Tunoi & another v Judicial Service Commission & another; Njagi & another (Interested Parties) (Civil Application 122 of 2015) [2015] KECA 664 (KLR) (9 June 2015) (Reasons)

Philip K. Tunoi & another v Judicial Service Commission & 3 others [2015] eKLR

Neutral citation: [2015] KECA 664 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 122 OF 2015

F SICHALE, J MOHAMMED & S OLE KANTAI, JJA

JUNE 9, 2015

BETWEEN

PHILIP K TUNOI ..... 1ST APPLICANT

DAVID A ONYANCHA ..... 2ND APPLICANT

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

JUDICIARY ..... 2ND RESPONDENT

AND

LEONARD NJAGI ..... INTERESTED PARTY

ATTORNEY GENERAL ..... INTERESTED PARTY

(An application to stay proceedings pending the lodging, hearing and determination of the Intended Appeal from the ruling, directions and orders of the High Court of Kenya at Nairobi (Mwongo, Korir, Meoli, Ong'undi & Kariuki, JJ.) delivered on 8th May, 2015 in HCCC No. 244 of 2014 Consolidated with Petition No. 495 of 2014)

REASONS

Reasons for the Decision Made on 19th May, 2015

1. We made the following order after hearing counsel for the parties on 19th May, 2015:

> Pursuant to Rule 32 (5) of this Court's Rules and pending the issuance of our reasoned ruling to be delivered on 9th June, 2015 and in view of the urgency of the motion wherein it is sought to stay Nairobi High Court Constitutional Petition No. 244 of 2014 scheduled

for hearing on 21st and 22nd May, 2015, prayer 3 of the motion dated 12th May, 2015 is hereby granted."

These, then, are our reasons.

2. The said Motion on Notice was brought by the applicants, Justice Philip K. Tunoi and Justice David A. Onyancha, under Article 159(2) (d) of the *Constitution*, Section 3A and 3B of The *Appellate Jurisdiction Act* and Rule 5(2) (b) of this Courts Rules. Prayer 3 of that Motion asks that:

> That this Honourable Court be pleased to stay further proceedings in Nairobi High Court Constitutional Petition No. 244 of 2014 Justice Philip K. Tunoi & Justice David A. Onyancha –vs- The Judicial Service Commission and The Judiciary pending the hearing and determination of the Intended Appeal by the Applicants against the ruling and orders of the High Court in Petition No. 244/2014 given on 8th May, 2015."

3. In the grounds set out in support of the Motion it is stated that the applicants have an arguable appeal against the ruling and orders of the High Court in Nairobi High Court Constitutional Petition No. 244 of 2014 given on 8th May, 2015 and that the applicants seek a stay of further proceedings in the High Court pending the hearing and determination of the intended appeal; that the appeal from the ruling and orders of the High Court would be rendered nugatory unless a stay of further proceedings in the High Court is granted pending the hearing and final determination of the appeal. It is also stated that the High Court had directed that hearing of the said petition as consolidated with another petition No. 495 of 2014 do proceed to hearing on 21st and 22nd May, 2015 and that unless an order of stay of further proceedings in the High Court was granted, the applicants stood to suffer irreparable loss and infringement of their constitutional rights and freedoms since the implication of the order appealed against was to unlawfully and unconstitutionally constitute the bench which was about to hear the petition on the said date and to unlawfully consolidate the two petitions. It was also stated that the application had been brought without delay.

4. Justice Tunoi swore an affidavit on 12th May, 2015 in support of the motion to which there are various annextures.

5. Wilfrida Mokaya, an advocate of the High Court of Kenya and Registrar of the Judicial Service Commission swore a replying affidavit on 19th May, 2015 to which various annextures were attached.

6. What is the background of the matter giving rise to the application before the Court?

7. In Petition No. 244 of 2014 dated 26th May, 2014 and filed at the Constitutional and Human Rights Division of the High Court the applicants, Justice Tunoi and Justice Onyancha petitioned that court for various orders against the Judicial Service Commission and The Judiciary. More orders sought were declarations, orders of certiorari and orders of prohibition relating to a determination on the question whether the retirement age of judges who were in office at the promulgation of the Constitution of Kenya, 2010 was 70 or 74 years. That petition was referred to the Honourable the Chief Justice who in Directions issued on 24th February, 2015 ordered, *inter alia*, that the petition be heard by a bench of 5 named judges; that the petition be heard on priority basis on two consecutive dates not later than 26th March, 2015 and that judgment thereof be delivered on or before 30th April 2015.

8. Apparently, unknown to the applicants, Justice Leonard Njagi, a judge of the High Court, had filed Petition No. 495 of 2014. That petition was also referred to the Chief Justice who on 25th February, 2015 ordered in Directions given that day that the petition be consolidated with the applicants petition and that directions issued in the applicants petition would apply to the second petition. Those orders

amongst others became the subject of protracted argument before the 5- judge bench appointed by the Chief Justice and in a ruling delivered on 8th May, 2015 it was ordered that:

1. The Notice of Motion dated 5.3.2015 whereby the Attorney General seeks to be enjoined as *Amicus Curiae* is hereby dismissed.

2. In respect of the application for setting aside of the Chief Justice's directions:

   a. the said directions on timelines have been overtaken by effluxion of time and we need say no more thereon; and

   b. the order of consolidation made on 24th February, 2015, has no binding effect on this court.

3. The Court, in exercise of its power under Rule 17 of the Mutunga Rules does, on its own motion consolidate Petition No. 244 of 2014 and Petiton No. 495 of 2014 for hearing and determination.

4. The leading file is Petition No. 244 of 2014 and the parties shall appear in the following order:

   Justice Philip K. Tunoi ..... First Petitioner

   Justice David A Onyancha ..... Second Petitioner

   Justice Leonard Njagi ..... Third Petitioner

   Judicial Service Commission ..... First Respondent

   The Judiciary ..... The Second Respondent

   The Attorney General ..... The Third Respondent

5. In terms of proceeding with the petitions, we deem all pleadings and submissions filed by the parties as properly filed in the consolidated petition.

6. There shall be no orders as to costs."

9. The applicants filed a Notice of Appeal against that ruling and now come to us on the application for stay of the proceedings in the High Court pending appeal.

10. The principles to be applied by this Court on consideration of applications under Rule 5(2) (b) of this Courts Rules are now fairly well settled by many decisions that have been pronounced by this Court. The court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of the judge. The court has to be satisfied that the intended appeal, or appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must, in addition, be satisfied that should the appeal, or intended appeal, as the case may be, succeed, the success would be rendered nugatory should the court refuse to grant the application. See, for enunciation of these principles Republic v Kenya Anti-Corruption Commission and 2 Others [2009] KLR 31 where it was stated by this Court that:

11. The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he

failed to demonstrate the other limb. [See also this Court's decisions in the cases of Reliance Bank Ltd V Norlake Investments Ltd (2002) 1 Ea 227 & Githunguri V Jimba Credit Corporation Ltd & Others (no. 2) 1988; Klr 828; Wardpa Holdings Ltd & Others V Emmanuel Waweru Mathai & Hfck (civil Appeal No. 72 Of 2011 [unreported]."

12. In Equity Bank Limited v West Link Mbo Limited[2013] eKLR this Court stated:

13. It is trite law in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance.... It is clear that rule 5 (2) (b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

14. In Peter Chepkochoi Mitei v Esther Jelegat Ngech & 3 Others[2013] eKLR this Court stated that the innovation of the law on rule 5(2) (b) principles had received additional expansion in enactment of Section 3A and 3B of The Appellate Jurisdiction Act. Section 3A (1) of that Act provides that:

    (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act."

15. Sub-section 2 provides that in the interpretation of the provisions of the Act the court shall give effect to the overriding objections of the Act.

16. Section 3B (1) of the Act provides that:

> For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-
>
> a. the just determination of the proceedings;
>
> b. the efficient use of the available judicial and administrative resources;
>
> d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective partes; and
>
> e. the use of suitable technology."

17. This Court considered the effect of that expanded jurisdiction in City Chemist (Nbi) & Anor v Oriental Commercial Bank Limited (Civil Application No. NAI 302 of 2008 (UR):

> The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attribute's of the overriding objective."

18. We also stated that the said sections 3A and 3B of the Act derive their legitimacy from Article 159 of the Constitution which deals with judicial authority.

19. Those are the principles that will guide us as we determine whether the applicants have satisfied the said principles to be entitled to a grant of the orders sought.

20. Senior counsel Pheroze Nowrojee, appearing for the applicants submitted that it was against the principles of natural justice for the High Court to order suo moto consolidation of the two petitions without hearing the parties. Counsel cited the High Court case of Political Parties Dispute Tribunal & Anor v Musalia Mudavadi & 6 Others [2014] eKLR where Odunga, J. quoted extensively from a

passage by learned authors Adam M. Milani and Michael R. Smith, Tenessee Law Review (Vol. 69 XXX 2002) dealing with suo moto procedure as follows:

> The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process...It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision...Even when a court raises a point sou motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties...If it does so, it will be in breach of the parties right to fair hearing."

21. Learned counsel questioned the Honourable the Chief Justice's authority to rely on matters outside the remit of Article 165 of the Constitution in giving directions and believed that this was an arguable point.

22. On the nugatory aspect of the intended appeal Mr. Nowrojee submitted that there was a real danger of the intended appeal being overtaken by events because the consolidated petitions were scheduled for hearing on 21st and 22nd

23. May, 2015 and the intended appeal could not be heard or determined before those dates. This, to learned counsel, would mean that if the intended appeal was successful it would be rendered nugatory as the proceedings it was meant to prevent would have taken place. For this he relied on the case of Okiya Omtata Okoiti & Anor v Anne Waiguru & 3 Others, Civil Application No. NAI 3 of 2015 (UR) where this Court stayed proceedings in the High Court after finding that:

> Mr. Omtatah did not particularize the damage he perceives would occur but we agree that should the order staying the proceedings not be granted, there is a real possibility that the appeal herein, if successful, would be rendered nugatory as it is possible that hearing of the main petition would go on as directed, and as such his appeal on this issue would be overtaken by events. For this reason, we find that the applicants have demonstrated the nugatory aspect of this appeal."

24. Learned counsel submitted further that if the proceedings at the High Court continued it would not be possible to reverse them as the intended appeal was not against the judgment that would follow the said proceedings. For all these learned counsel prayed that the orders sought should be granted.

25. Senior counsel Paul Muite who appeared with Mr. M.M. Issa, for the 1st and 2nd respondents, thought otherwise. According to senior counsel the intended appeal was not arguable because the applicants had succeeded in the High Court in setting aside the Chief Justice directions they complained of including the order for consolidation of the two petitions. Senior counsel submitted that the High Court was entitled to hold, as it did, suo moto, that the two petitions related to the same issue – retirement age of judges – and consolidation of the two petitions was in order as it would in any event save judicial time and expedite the resolution of an issue that was of a public nature. The High Court in ordering consolidation had in any event exercised a discretion donated by the Mutunga Rules and this Court should not ordinarily interfere where such a discretion had been exercised, submitted counsel. Reliance was laid on the case of Joseph N.K. Arap Ngok & Another v EABSBanu Limited [2015] eKLR to support the proposition that this Court should not interfere with exercise of discretion by the High Court. Mr. Muite was also of the view that if the hearing at the High Court did not proceed as scheduled it would create difficulty to the parties as constituting a bench of five judges was difficult

because some of the judges were from stations outside Nairobi and disruption of court process was likely to occur. Mr. Muite's final submission was that even if the hearing at the High Court proceeded it would not have an irreversible effect as the petition could be heard afresh if the intended appeal succeeded.

26. The third respondent did not appear at the hearing and we proceeded because we were satisfied that service of a hearing notice had been effected.

27. Mr. Mwangi Njoroge, learned state counsel appeared for the 4th respondent. In associating himself with the submissions by Mr. Muite, learned counsel submitted that the nugatory aspect of the application had not been satisfied because, in his view, judgment of the High Court could be set aside and the petitions heard separately if the intended appeal succeeded. In any event, wondered counsel, why should judicial time be exerted in two benches being empanelled to deal with what he thought was the same issue?

28. Mr. Nowrojee, in reply, submitted that if this Court finally finds that the directions by the Chief Justice were invalid the whole of those directions including the bench constituted thereof would be set aside.

29. We have carefully considered the Motion, the affidavits, annextures and the arguments rendered in support or in opposition to the matter before us.

30. Onyango Otieno, J.A. in the lead Ruling in Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others [2013] eKLR had this to say on the arguability principle in a Rule 5 (2) (b) application as the one before us:

> I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one arguable point suffices for that finding."

31. And in Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR this Court had this to say on the same issue:

> "This Court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed, but one that is not frivolous, and one that raises issues that merit the consideration of this Court."

32. The same point is made, again by this Court, in Transjuba International Limited v ZEP-RE (PTA Reinsurance & 2 Others [2015] eKLR where this Court said:

> He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision."

33. In the Motion before us whether or not the High Court was right to order consolidation of the petitions without affording the parties an opportunity to be heard in an arguable point. We do not agree with counsel for the respondents that the High Court considered the positions of the parties before exercising its discretion on the issue. The relevant part of the order of that court which is reproduced elsewhere in this Ruling states that the High Court exercised its power under Rule 17 of the Mutunga Rules and ordered consolidation of the two petitions. As properly submitted by Mr. Nowrojee, for the applicants, Petition No. 495 of 2014 raised issues unrelated to issues raised in Petition No. 244 of 2014 because Mr. Justice Leonard Njagi, the 3rd respondent, also questioned authority of the Judges and Magistrates Vetting Board to declare him unfit to hold the office of a judge.

34. We also find as arguable in the intended appeal the point as relates the status of the Attorney-General who appears as a party in the consolidated petition when the High Court had dismissed the Attorney-General's application to appear as amicus curiae in Petition No. 244 of 2014.

35. The orders of the High Court intended to be appealed from were made on 8th May, 2015. The hearing of the consolidated petition was then scheduled for 21st and 22nd May, 2015. There is no doubt that the intended appeal which we find not to be frivolous would be rendered nugatory as the same could not be filed, heard and determined before the hearing of that petition. It would not be proper use of judicial time for the consolidated petition to be heard and determined when the intended appeal could very well succeed. We find that the nugatory aspect of the principles upon which we exercise our discretion in an application such as this one is satisfied.

36. These, then, are the reasons why we made the orders on 19th May, 2015.

37. In view of the importance of the issue raised in the petition at the High Court where it is sought to determine the applicable retirement age of judges after promulgation of The Constitution of Kenya, 2010, we order that the applicants file appeal within 30 days of today. The President of this Court may very well consider fast-trucking that appeal so that the issue is determined without delay.

38. The costs of the Motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI 9TH DAY OF JUNE, 2015.

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR