



**Tunoi & another v Judicial Service Commission & 3 others (Civil Appeal
163 of 2015) [2015] KECA 311 (KLR) (26 October 2015) (Judgment)**

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

Neutral citation: [2015] KECA 311 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 163 OF 2015
F SICHALE, J MOHAMMED & S OLE KANTAI, JJA
OCTOBER 26, 2015**

BETWEEN

**PHILIP K. TUNOI 1ST APPELLANT
DAVID A. ONYANCHA 2ND APPELLANT**

AND

**JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
JUDICIARY 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
LEONARD NJAGI 4TH RESPONDENT**

(Being an appeal from the ruling and orders of the High Court of Kenya at Nairobi (Mwongo PJ, Korir, Meoli, Ong'undi and C. Kariuki, JJ.) given on 8th May, 2015 in Petition No. 244 of 2014)

JUDGMENT

1. When this appeal came up for hearing before us on 8th October, 2015 Paul Muite, SC, who led Mr. Mansur Issa advocate for the 1st and 2nd respondents took the view that the only issue that remained for determination in the appeal involved the order of the High Court that consolidated High Court of Kenya Constitutional and Human Rights Division Petition No. 244 of 2014 and Petition No. 495 of 2014. In his view to move the process forward and to enable the petition in the High Court to be heard, the said respondents were conceding to the appeal the consequence being that the two petitions which had been ordered consolidated be separated and be heard separately.
2. Pheroze Nowrojee, SC, who led Mr. Fred Ngatia for the appellants took a different view and submitted that there were other matters in the appeal other than the issue of consolidation, to be determined.



3. As the said counsel were not agreed we ordered that the appeal be heard on all other issues save on the issue of consolidation that had been conceded to by the 1st and 2nd respondents.
4. As the petitions in the High Court have not been heard the less said here the better as the merits of the petitions are not known. A brief background will assist to determine this appeal.
5. Justice Philip K. Tunoi, a judge of the Supreme Court of Kenya, and Justice David A. Onyancha, a judge of the High Court of Kenya, by the said **Petition No. 244 of 2014** on 27th May, 2014 filed at the Judicial Review and Constitutional and Human Rights Division of the High Court where various prayers were made and which for purposes of this appeal we summarise to be the question on a determination whether judges of the superior courts who were appointed to office prior to the Constitution of Kenya, 2010, would retire at the age of 70 years or 74 years. In Petition No. 495 of 2014 Justice Leonard Njagi, a judge of the High Court, petitioned the court for apparently similar determination. Various applications were made in the petitions but we make reference only to those that are relevant to this appeal.
6. The 1st and 2nd respondents (respectively the Judicial Service Commission and the Judiciary) moved the High Court pursuant to Article 165(4) of the Constitution asking that the petition be certified as raising substantial questions of law warranting the empanelling by the Hon. the Chief Justice of a bench consisting of uneven number of judges not less than 3. That application was heard by G.V. Odunga, J., who despite objection by the appellants, in a ruling delivered on 12th February, 2015 certified the petition accordingly and ordered that the petition be transmitted to the Chief Justice for purposes of empanelling a relevant bench.
7. Because of the central role the directions that followed has taken in this appeal we set out in full directions that the Hon. The Chief Justice gave:

February 24, 2015

Before Mutunga, CJ

Directions Under Article 165(4) of the Constitution

Pursuant to the Order of Odunga J dated February 12, 2015 and the Bench Memo by Hon. Ongeru of the same date, I give directions as follows:

The petition will be heard by a 5 judge bench comprising Mwongo PJ (Presiding), Kimaru J, Meoli J, Ong'undi J and C. Kariuki J. The petition will be heard on priority basis and on two consecutive dates not later than March 26, 2015. Judgment on the petition should be delivered on or before April 30, 2015. The petition will be mentioned before Mwongo J on March 4, 2015."

8. Similar application was made in Petition No. 495 of 2014 and the following direction was given by the Chief Justice:

February 25, 2015

Before Mutunga, CJ

Directions Under Article 165(4) of the Constitution

Pursuant to the Order of Odunga J dated February 12, 2015 and the Bench Memo by Hon. Ongeru dated February 24, 2015, I give directions as follows:



The petition will be consolidated with Petition 244 of 2014 and heard by the 5 judge bench already constituted to hear Petition 244 of 2014. Directions given under Petition 244 of 2014 will also apply to this petition.”

9. By a letter dated 4th March, 2015 addressed to the High Court the firm of Ngatia and Associates, advocates acting for the appellants inter alia stated that they were not aware of the order made by the Chief Justice in Petition No. 495 of 2014 in respect to the consolidation of that petition with Petition No. 244 of 2014. They therefore requested a copy of the order to enable them apply for vacation of the same.
10. By a Notice of Motion filed at the High Court on the 17th March, 2015 the appellants moved the court under various provisions of the Constitution and other laws praying in the main that the directions given on 24th
11. February, 2015 in Petition No. 244 of 2014 be vacated and expunged from the court record and that directions given on 25th February, 2015 in Petition No. 495 of 2014 be declared as not binding in Petition No. 244 of 2014 and be expunged from the record. The motion was based on the various grounds set out in the body of the same and by an affidavit of the 1st appellant. That motion was heard by the 5 judge bench empanelled by the Chief Justice (Mwongo, PJ, Korir J, Meoli J, Ong’udi J and Kariuki J.). The judges considered the objection taken by the appellants and found merit in the same and allowed the application. The following orders were made in the ruling delivered on 20th May, 2015:

In conclusion, we thus issue the following orders in respect of the two applications before us:

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 Petition 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 order as to costs.”

Those are the orders that provoked this appeal.

12. In the memorandum of appeal, seven grounds are set out but in view of the concession of the appeal by the 1st and 2nd respondents on the issue of consolidation of the two petitions which then become separated we shall only concern ourselves with the grounds relating to other matters raised in the said memorandum of appeal. Indeed this position was confirmed during argument before us by Mr. Nowrojee who wanted us to allow grounds 1 to 4 by consent. The remaining grounds 5, 6 and 7 are to the effect that:

5. The learned Judges erred in law and in fact in the manner they exercised any discretion vested in them, exercised the same wrongly and thereby arrived at the wrong conclusions and made erroneous orders.
6. The learned Judges erred in law and in fact in failing to appreciate, sufficiently or at all, that the Directions made by the Hon. the Chief Justice were made pursuant to, inter alia, the Bench Memo of Hon. Ongeru, a fact which vitiated the Directions and rendered the same to be struck off.
7. The learned Judges erred in law and in fact in failing to apply the long established principles in *Rex-Vs- Sussex Justices Ex-Parte McCarthy* and the line of cases thereafter to the effect that justice should be seen to be done.”

The reliefs sought in the memorandum of appeal are:

- (a) This appeal be allowed.
 - (b) The ruling and orders of the High Court made on 8th May 2015 be set aside and substituted with orders that the Directions given on 24th February 2015 by the Chief Justice in High Court Petition No. 244/2014 be vacated and expunged from the Court record and the Directions given on 25th February 2014 by the Chief Justice in High Court Petition No. 495/2014 be declared not binding in High Court Petition No. 244/2014.
 - (c) Such other and/or further orders and/or directions be issued as appropriate in the circumstances.
 - (d) Costs of and incidental to this appeal be borne by the Respondents.”
13. During the plenary hearing before us Mr. Fred Ngatia on behalf of the appellants was the first to go. He set out the history of the petitions and submitted that the Chief Justice erred in considering a 'Bench Memo' in his exercise of power donated to him by Article 165(4) of the Constitution. Learned counsel was of the view that the directions given by the Chief Justice as related to appointment of a bench of 5 judges to hear the petition; the order that the hearing of the petition proceed on priority basis on two consecutive days and judgment be delivered by a given date was a major complaint by the appellants. Counsel also referred to the ruling appealed from where the learned judges found that the Hon. the Attorney General would be partisan and the application to be enjoined as *amicus curiae* was refused while in the order consolidating the two petitions the Attorney General became a party as the 3rd respondent was contradictory. Counsel also complained that the learned judges decided not to rule on issues which the court found to be overtaken by events. Counsel thought that whether matters have been overtaken by events or whether such matters had abated was a live legal issue.
14. Mr. Pheroze Nowrojee then took over for the appellants. Counsel faulted the learned judges for failing to appreciate that the directions given by the Chief Justice pursuant inter alia to a Bench Memo were



unconstitutional. Counsel submitted that the Bench Memo was not made pursuant to proceedings to which the appellants were parties; that Bench Memo did not confer power or authority; that the Bench Memo was ultravires the law and that the Chief Justice's reliance on a Bench Memo without hearing the appellants was unfair administrative action that violated the appellants' rights. Counsel continued that the Chief Justice in taking account of the Bench Memo took input of a party unauthorised by Article 165(4) of the Constitution. According to counsel the Chief Justice in taking account of Bench Memo did not act on his own direction as required in law. Reliance was laid on the words of Hewart, CJ in *R v Sussex Justices Ex parte McCarthy* [1924] 1KB 256, All ER Rep 233) for the proposition that:

"It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

15. Mr. Nowrojee submitted that if a document was taken into account which should not be taken into account the decision arrived at is void and should be set aside. Counsel was of the view that the Bench Memo affected all directions given by the Chief Justice and the directions should therefore be set aside.
16. Mr. Steve Mwenesi learned counsel for Justice Leonard Njagi was opposed to the position taken by the 1st and 2nd respondents in conceding to the appeal on the order for consolidation issued by the High Court. According to him the High Court had power and discretion to determine either suo moto or on an application of a party whether petitions should be consolidated. According to counsel separating the petitions at the High Court would not be in consonance with the law and we should refer the issue of consolidation to the High Court for determination. Counsel was also of the view that the Bench Memo complained of by the appellants was not an issue before the High Court and could not be agitated here. Learned counsel thought that the principle in *R v Sussex Justices* (supra) was distinguishable as the Bench Memo was not placed before the High Court. For all that he urged us to dismiss the appeal.
17. Mr. Paul Muite submitted that when the judge of the High Court certified that a bench of not less than 3 be empaneled he further ordered that the petition file be transmitted to the Chief Justice for empaneling the bench. According to counsel Article 165(4) imposed a constitutional obligation on the Chief Justice where a certification as already been referred to had been made. Counsel wondered whether the appeal had merit when even if it succeeded it was still the Chief Justice who would empanel a bench. Counsel was of the view that the appellants had an evidentiary burden to obtain and place before the petition court the Bench Memo so that it would be shown that contents thereof violated the Constitution. In any event, continued learned counsel, Article 35 of the Constitution expressly provided for access to information by which provision the appellant should have asked for the Bench Memo. Counsel further submitted that when judges make decisions there is an administrative process that accrues and is carried out by a Registrar or Deputy Registrar of the court. That role, according to counsel, is what the Hon. Ongeru Bench Memo was all about. In conclusion counsel cited Article 159 of the Constitution which forbids undue regard to procedural technicalities but promotes hearing of disputes on substance.
18. Mr. Mansur Issa in further submissions for the 1st and 2nd respondents noted that the appellants' counsel had written to the High Court after learning of the directions on consolidation of the two petitions. Why, wondered counsel, was a similar letter not written by the said lawyers to call for the Bench Memo. Mr. Issa submitted that the judges of the High Court were right not to make any determination in relation to the Bench Memo because such memo was not placed before them. Counsel was also of the view that the Bench Memo not having been placed before the judges of the High Court could not be subject to an appeal.



19. Mr. Waigi Kamau learned State Counsel in associating himself with submissions of the 1st and 2nd respondents reminded us that the issue of the retirement age of judges had caused considerable public interest and should be determined without delay.
20. We have considered the record of appeal, Memorandum of Appeal, the grounds thereof, submissions of counsel and the law. Having done so we take the following view of the matter.
21. It is common ground that Odunga, J, on application, certified that matters set out in the petition then before him, raised substantial issues of law that required constitution of a bench of not less than 3 judges- to hear and determine the petition. He therefore ordered in (Petition No. 244 of 2014):
 37. Accordingly, I direct that this petition be transmitted to the Hon. the Chief Justice for the purposes of empanelling of that bench
22. It is not shown how the court file then reached the Hon. the Chief Justice. What is clear from the record is that the court file in Petition No. 244 of 2014 was before the Chief Justice on 24th February, 2015 and the court file in Petition No. 495 of 2014 was before the Chief Justice the next day on 25th February, 2015. In both files the Chief Justice gave the directions which we have set out in full in this Judgment.
23. The appellants complain that the Chief Justice acted outside the powers donated to him by Article 165(4) of the Constitution the main issue according to the appellants being that the Chief Justice considered a

"Bench Memo by Hon. Ongeru"
24. We have carefully perused the proceedings and submissions that were made by learned counsel before the 5-judge bench that heard the motions subject of this appeal. Nowhere in those proceedings or the submissions do the appellants raise any issue or complaint regarding a Bench Memo" which is now said to have influenced the Chief Justice in making the direction he made on the two consecutive days we have set out.
25. The "Bench Memo" of Hon. Ongeru was not placed before the High Court judges and is not before us.
26. Section 59 of the Evidence Act provides that:

No fact of which the court shall take judicial notice need be proved."
27. And Section 60 of the same Act provides in so far as is relevant here:

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- (1) The courts shall take judicial notice of the following facts -
 - (a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya:
 - (b)
 - (c)
 - (e)
 - (f)
 - (g)



- (h)
- (i)
- (j)
- (k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it.”

“Judicial Notice” is defined in the 9th Edition of Black’s Law Dictionary as:

“A court’s acceptance, for the purposes of convenience and without requiring a party’s proof, of a well known and indisputable fact; the court’s power to accept such a fact.”

28. We are prepared to, and we do hereby take judicial notice of the fact that judicial officers including judges do not ordinarily carry out administrative duties. We do take judicial notice, also, that Hon. Ongeru was at the material time a Deputy Registrar of the High Court.
29. Order 49 of the Civil Procedure Rules on “Special Powers of Registrars” provides in Rule 1 that:

Wherever in these Rules it is provided that any ministerial act or thing may be done by the court, that act or thing may be done by the registrar or by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand.”
30. So the law allows Registrars to carry out ministerial acts or things on behalf of the court. What is a ministerial act? Black’s Law Dictionary (9th Edition) defines it as:
31. An act performed without the independent exercise of discretion or judgment, if it is mandatory, it is also termed a ministerial duty.”
32. It is the practice of the Superior Courts that, once appointed, Registrars perform administrative or ministerial duties on behalf of the courts where they serve.
33. The appellants contend that the directions issued by the Hon. the Chief Justice on 24th and 25th February, 2015 were unconstitutionally influenced by the Bench Memo of Hon. Ongeru. No attempt was made by the appellants to obtain the said Bench Memo which is complained of. Learned counsel for the appellants submit that because Kenya’s litigation is adversarial it was not the duty of the appellants to get that piece of evidence. In our considered opinion that cannot be the position in law at all especially in a situation as here where the 1st and 2nd respondent’s position was always that the Bench Memo was an innocent letter by the Deputy Registrar of the High Court transmitting the order of Odunga, J, to the Hon. the Chief Justice to empanel a bench to hear petitions. Nothing was easier than writing a simple letter to the High Court requesting for a copy of the memo so that contents could be examined to establish whether the Chief Justice had been influenced in giving directions by a document not allowed in law.
34. In any event, and as properly submitted by the 1st and 2nd respondents, what interest would a Deputy Registrar have in matters such as were before the High Court and would a person in the position of a Chief Justice allow himself to be directed by such a Registrar?
35. Sections 3A and 3B of the Appellate Jurisdiction Act provide for the overriding objective of the said Act and its Rules being to facilitate the just, expeditious, proportionate and affordable resolution of



appeals filed to this Court. We are enjoined to handle all matters presented before us for purposes of attaining the just determination of proceedings; the efficient use of available judicial and administrative resources and the timely disposal of proceedings.

36. And as learned counsel for the 1st and 2nd respondents reminded us, Article 159 of the Constitution commands us to ensure that justice is not delayed and is administered without undue regard to procedural technicalities. That will, in the end, ensure that the purpose and principles of the Constitution find their prime place where they are protected and promoted.
37. We agree with learned counsel Mr. Muite and Mr. Issa that after the 1st and 2nd respondents conceded the appeal on the High Court order for consolidation of the petition Nos. 244 of 2014 and 495 of 2014 there was nothing left to be agitated in this appeal.
38. Justice Leonard Njagi did not file a cross-appeal and Mr. Mwenesi's objection to the concession of the appeal by the 1st and 2nd respondents would in the event have no basis and is dismissed.
39. That being the view we have taken the appeal is dismissed. That opens the petitions in the High Court for hearing which should be expedited because as we were again reminded by Mr. Muite and Mr. Issa on the one hand and by Mr. Waigi Kamau, learned State Counsel, the question on whether judges who were in office pre- the Constitution of Kenya, 2010 should retire at the age of 70 or 74 years is a matter that the public has an interest and should be determined without delay. Costs would ordinarily follow the event but we take the view that in view of the public nature of the issues raised before us each party shall meet their costs of this appeal.
40. It is therefore so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF OCTOBER, 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

