



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MARAGA & GATEMBU, JJ.A)**

**CIVIL APPEAL NO. 236 OF 2013**

**BETWEEN**

**ALI ISMAIL BARAKI ..... 1<sup>ST</sup> APPELLANT**

**MOHAMMED ADAN KARBAT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE CHAIRMAN, GARISSA COUNTY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, GARISSA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE CLERK, GARISSA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY IN-CHARGE OF DEVOLUTION ..... 4<sup>TH</sup>  
RESPONDENT**

**THE TRANSITION AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal from the Ruling of the High Court of Kenya at Nairobi before (Majanja, J dated 21<sup>st</sup> August, 2013 in NAIROBI HIGH COURT J. R. MISCELLANEOUS CIVIL APPLICATION NO. 301 OF 2013)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. On 21<sup>st</sup> August 2013 the High Court (D. S. Majanja J) struck out with costs the appellants' action seeking to quash the decision of the County Assembly of Garissa made on 18<sup>th</sup> July 2013 approving the names of the County Public Service Board on grounds that it was an abuse of the court process. Aggrieved by that decision, the appellants have appealed to this Court.

**Background**

2. One Abdiwahab Abdullahi Ali petitioned the High Court of Kenya at Garissa in Constitutional

Petition Number 8 of 2013 to declare the nominations of officials of the office of the County Public Service Board “*whose names were rejected by the County Assembly of Garissa on the 9<sup>th</sup> July 2013 ... unconstitutional and therefore invalid and a nullity.*” He also sought “*an order of invalidation of the list of the nominees to the County Service Board*” and a repeat of the exercise of nomination of County Service Board officials among other reliefs.

3. On 18<sup>th</sup> July 2013, the said Abdiwahab Abdullahi Ali moved the court under certificate of urgency and obtained a temporary order “*staying the forwarding of the list of nominees of the County Public Service Board to the County Assembly of Garissa for approval*” pending the hearing of his application inter partes.
4. By an application dated 25<sup>th</sup> July 2013 presented to the High Court, Garissa in Constitutional Petition Number 8 of 2013 the appellants, Ali Ismael and Mohammed Aden Karbat, applied to be joined in that action as first and second interested parties on the grounds that they were directly affected by the relief sought therein and that should the matter proceed without them, justice would not be served as they would be condemned unheard. In his affidavit in support of that application the 1<sup>st</sup> appellant deposed that he was dismayed by the process taken by the County Government of Garissa in its recruitment, selection, vetting, approval, swearing in and the impending gazettement of the County Public Service Board members; that the Governor, County Government of Garissa, the Hon. Attorney General and the Clerk, County Assembly of Garissa are in contempt of court having proceeded to swear in the members of the Garissa County Public Service Board despite a court order restraining that exercise.
5. On 25<sup>th</sup> July 2013 the court at Garissa directed that “*the application for (the joinder of) the intended interested parties will be held in abeyance*” pending the hearing and determination of a preliminary objection taken by the respondents in the petition before the court.
6. On 16<sup>th</sup> August 2013 the appellants’ commenced Judicial Review proceedings under certificate of urgency in Nairobi in Miscellaneous Civil Application No. 301 of 2013 at the High Court in Nairobi by which they sought and obtained leave of the court (G. V. Odunga J) “*to apply for an Order of Certiorari to quash the decisions of the County Assembly of Garissa on the 18<sup>th</sup> day of July 2013 purportedly approving the names of the county public service board when there was a valid court order by the Honourable Justice S. N. Mutuku staying the forwarding of the list of nominees which order was duly served but contemptuously ignored...*”

That application was based on the grounds, among others, that the Constitution, the County Government Act, the Public Appointments Act and the court order issued by the High Court at Garissa on 18<sup>th</sup> July 2013 were violated.

7. By an application dated 19<sup>th</sup> August 2014 made under Article 6(2),165(6) and 189 of the Constitution, section 57 of the County Governments Act, section 6(9) and 12 of the Public Appointments (Parliamentary) Approvals Act amongst other provisions, the respondents applied to the High Court in Nairobi to review, vacate or vary the orders of leave granted

on 16<sup>th</sup> August 2013 or for the action to be struck out or transferred to the High Court Garissa on the grounds that the same was an abuse of the court process as a similar matter involving the applicants was pending in the High Court, Garissa.

8. After hearing the parties, the learned judge of the High Court at Nairobi determined that:

***“First, the parties to this matter are those in the Garissa case. It is true that the ex-parte applicants in this matter are proposed interested parties in the Garissa petition as their application to join the petition has not been granted and has been held in abeyance. But as the learned Judge has already heard them and made an order on their application, they are effectively part of those proceedings pending a final determination. They cannot invoke***

*parallel proceedings to deal or litigate the same issue which they would raise in those proceedings...”*

9. The learned judge further determined that the subject matter of the litigation in both cases concerned the constitution of the Garissa County Public Service Board and that the proceedings in the Constitutional court were a “collateral attack on the orders of Mutuku J issued on 25<sup>th</sup> July 2013 directing that the ex-parte applicants’ joinder application in Garissa High Court be held in abeyance” and further that the matter was in the nature of contempt proceedings. With that the learned judge struck out the appellants’ action with costs.

#### **The appeal and submissions by counsel**

10. Aggrieved by that decision, the appellants appealed to this Court complaining that the judge was wrong to find that the parties and the subject matter in the actions in the High Court in Nairobi and in Garissa are the same; that the judge violated Articles 27, 48 and 50 of the Constitution; that when the High Court at Nairobi granted leave to the appellants on 16<sup>th</sup> August 2013, the proceedings in the High Court Garissa were overtaken; that the judge struck out a non-existent suit; and that the judge in effect sat on appeal over the decision granting leave.

11. At the hearing of the appeal before us, the parties were represented by learned counsel who relied on written and oral submissions.

12. For the appellants, Mr. Kibe Mungai submitted that the learned judge erred in striking out the suit in a judicial review application after leave to commence judicial review had been granted; that leave to commence the proceedings having been granted, there was nothing to be struck out and it is not clear what was struck out; that the judge erred in finding that the subject matter of the judicial review was the same as the matter in the High Court in Garissa; that the appellants are not parties in the proceedings in the High Court in Garissa; that a judicial review application can only be resisted on the established grounds for judicial review; that the judge was also wrong in treating the matter as one of contempt proceedings when the complaint was that the action by the respondents was null and void; that the judge acted in excess of jurisdiction in purporting to sit on appeal over the decision of Odunga J granting the appellants leave to apply for the judicial review and that the appellants were denied the right to be heard.

13. Counsel for the appellants further submitted that the learned judge erred in condemning the appellants to pay costs and that the appropriate order would have been for each party to bear its own costs as the matter was one of public interest intended to promote good governance. In that regard counsel referred us to **Trusted Society of Human Rights Alliance vs. AG and others [2012] eKLR.**

14. Opposing the appeal, Mr. Mogaka learned counsel for the 1<sup>st</sup> to 3<sup>rd</sup> respondents submitted that the appellants are participants in the proceedings in the High Court in Garissa and in Nairobi and that the learned judge was right to hold that the subject matter in both courts is the same; that allowing this appeal will result in parallel proceedings in different courts over the same subject matter; that the appellants applied to be joined in the proceedings in Garissa and were heard and their application deferred pending disposal of a preliminary matter in those proceedings; that the appellants commenced proceedings for judicial review in Nairobi without withdrawing the application in Garissa and that the learned judge had inherent power which he properly exercised under Section 3A of the Civil Procedure Act to stop abuse of court process.

15. Mr. Adan Mohammed, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents agreed with Mr. Mogaka that the subject matter of the proceedings in the constitutional petition filed in Garissa and the judicial review proceedings in Nairobi is the same and that allowing the appeal could result in the two courts giving conflicting decisions over the same subject matter as the matter the subject of the judicial review is the same as the subject matter of the constitutional petition in Garissa and that considering that the appellants participated in the Garissa case, it was mischievous of them to commence judicial review proceedings in Nairobi over the same subject matter.

## **Determination**

16. We have considered the appeal and submissions by learned counsel. Although the appellants set out ten grounds of appeal in their memorandum of appeal, the main issue for our determination is whether the learned judge erred in striking out the judicial review proceedings commenced by the appellants on the basis that the same amounted to an abuse of the process of the court.

17. As we have already noted, the petitioner in Constitutional Petition Number 8 of 2013 petitioned the High Court in Garissa to declare the nominations of the County Public Service Board unconstitutional, invalid and a nullity and for an order for the exercise of nomination of members of the County Public Service Board to be repeated. The appellants then applied to be joined in that petition on the grounds that they were “personally and directly affected by the proceedings.”

18. In the affidavit in support of the application to be joined in that petition, the 1<sup>st</sup> appellant, Ali Ismael deposed that:

***“I am a resident of Garissa, I was dismayed by the process taken by the County Government of Garissa, in its recruitment process of advertisement, selection, short listing, vetting, approval, swearing in and the impeding gazettement of members of the County Public Service Board members.”***

He went on to set out in that affidavit how the recruitment process was undertaken and how some of the nominees did not qualify for the positions or how some nominees are unfit and ineligible for office to which they were purportedly nominated.

19. The record shows that counsel for the appellants Mr. Nzaku appeared before the judge at the High Court in Garissa on 25th July 2013 to prosecute the application seeking to have the appellants joined in those proceedings whereupon the learned judge gave directions for the application to be held in abeyance pending disposal of a preliminary objection taken in respect of another application presented in that petition.

20. In what would appear to have been a change of strategy, the appellants without withdrawing their pending application for joinder before the High Court at Garissa commenced judicial review proceedings at the High Court in Nairobi in August 2013 where they applied and obtained leave of the court to apply for an order of certiorari to quash the decision of the County Assembly of Garissa purportedly approving the names of members of County Public Service Board and appointing and gazetting them as such. In essence, the basis for commencing the judicial review proceedings in the High Court in Nairobi, as is discernible from the verifying affidavit of Ali Ismail Baraki, was that “*the manner of recruitment and appointment of the Public Service Board was in clear violation of the law.*” The object of those proceedings was, as deposed by appellant to “*nullify the purported appointment of the County Public Service Board.*”

21. Based on the foregoing there is no doubt in our minds that the subject matter of the petition in the High Court at Garissa and the judicial review proceedings in the High Court at Nairobi is the same. Having applied to be joined in the suit in the High Court in Garissa, and directions having been given with respect to the disposal of that application, it was not open, in our view, for the appellants to commence parallel proceedings as they did, whether by way of judicial review proceedings or otherwise. To have done so without first withdrawing the pending application in Garissa was, in our view, an abuse of the process of the court. The learned judge of the High Court at Nairobi cannot therefore be faulted for taking the same view. The matters in issue in the judicial review proceedings initiated by the appellants in the High Court at Nairobi are directly and substantially in issue in the Constitutional Petition in the High Court Garissa with respect to which the appellant’s application for joinder is pending.

22. The principle that a court should not proceed with the trial of a matter in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties is

well founded. It finds expression for instance in section 6 of the Civil Procedure Act. That principle aids in the efficient use of available judicial resources and efficient disposal of the business of the court as well as avoiding harassment of parties from multiplicity of actions. To pursue, what is substantially the same matter in different courts is in our view an abuse of the process of the court.

23. Undoubtedly Courts have inherent powers to make orders necessary for the ends of justice and to prevent abuse of the process of the court. This Court re-affirmed that position recently in the context of election petitions in the case of

**Richard N. Leiyagu v IEBC and two others Civil Appeal No. 18 of 2013** where the Court stated:

*“In our own appreciation of this appeal, the Judge held that the court had no jurisdiction and in the same breath accepted and rightly so, that the inherent jurisdiction vested in the court was meant to ensure the ends of justice are achieved. Circumstances vary and although the courts are governed by the statutory underpinnings, statutes cannot cover every perceivable situation and make provisions. That is what is described in the Taylor case (supra) as implied jurisdiction. For example the Elections Act or the regulations made thereunder do not make any express provisions that, once a petition is fixed for hearing and the petitioner fails to attend court on the day of hearing, the petition will be dismissed for non-attendance. This is a general power given to a court to control its own procedure so as to prevent its being used to achieve injustice and also it is a power given to the court in order to maintain its character as a court of justice.”*

24. In the circumstances of the present case the learned judge properly exercised his power. There is also no reason to interfere with the exercise of judge’s discretion in condemning the appellants in costs.

25. For those reasons we find no merit in the appeal and we accordingly dismiss it with costs.

**Dated and delivered at Nairobi this 3rd day of October, 2014.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**D. K. MARAGA**

..... **JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**