



**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 296 OF 2006**

**HONOURABLE MR. JUSTICE MOIJO MATAIYA OLE KEIWUA.....**  
**APPELLANT**

**AND**

**THE HONOURABLE THE CHIEF JUSTICE OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**MR. JUSTICE (RTD) AKILANO MOLADE AKIWUMI ..... 2<sup>ND</sup> RESPONDENT**

**MR. JUSTICE BENJAMIN PATRICK KUBO ..... 3<sup>RD</sup> RESPONDENT**

**JOE OKWACH ..... 4<sup>TH</sup> RESPONDENT**

**PHILIP NZAMBA KITONGA ..... 5<sup>TH</sup> RESPONDENT**

**WILLIAM SHIRLEY DEVERELL ..... 6<sup>TH</sup> RESPONDENT**

**(THE 2<sup>ND</sup> TO 6<sup>TH</sup> RESPONDENTS BE PERSONS APPOINTED AS**

**CHAIRMAN MEMBERS RESPECTIVELY OF THE TRIBUNAL**

**TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL).....7<sup>TH</sup>**  
**RESPONDENT**

***(Appeal from the orders and directions and the ruling of the High Court of Kenya at***

***Nairobi (Lesiit, Wendo & Emukule, JJ.) dated 14<sup>th</sup> June, 2005***

***in***

***H.C.MISC.CIVIL APPLICATION NO. 1298 OF 2004)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

Although the record of appeal before us is voluminous as it runs into almost 1,000 pages together with a plethora of authorities cited by the learned counsel for the appellant, the cause of all that is before us is actually the introduction of two affidavits at the hearing of an application in the superior court pursuant to the provisions of sections 8 and 9 of the Law Reform Act (Cap. 26 Laws of Kenya) and Order LIII and

*Rule 3 of the Civil Procedure Rules.* We should also add that the *Memorandum of Appeal* comprises *fifty (50) grounds of appeal.*

In order to appreciate what is before this court a brief summary of the background will be necessary. The appellant herein, *Hon. Mr. Justice Moijo Mataiya Ole Keiwua*, a Court of Appeal Judge in the Republic of Kenya, is a respondent in proceedings before a Tribunal established under *section 62* of the Constitution of Kenya. The said Tribunal was established vide *Gazette Notice No. 8828 of 2003* by the President of the Republic of Kenya, with *Hon. Mr. Justice (Rtd.) Akilano Molade Akiwumi (2<sup>nd</sup> respondent herein) as Chairman*, and the *Hon. Mr. Justice Benjamin Patrick Kubo (3<sup>rd</sup> respondent)*, *Mr. Joe Okwach*, Senior Counsel (*4<sup>th</sup> respondent*), *Mr. Philip Nzamba Kitonga*, Senior Counsel (*5<sup>th</sup> respondent*) and the *Hon. Mr. Justice William Shirley Deverell (6<sup>th</sup> respondent)* as members. *Mr. Mbuthi Gathenji (7<sup>th</sup> respondent)* was appointed Assisting Counsel.

Several allegations were preferred against the appellant some relating to pending and also concluded judicial proceedings, among them *Nairobi High Court Civil Case No. 1565 of 2000* in which a company known as *Ol Kiombo Ltd.*, in which the appellant is Chairman, was *2<sup>nd</sup> defendant* with *Livingstone Kunini Ole Ntutu* as plaintiff and *Narok County Council* the *1<sup>st</sup> defendant*. While the appellant's matter was pending for hearing before the Tribunal the appellant filed an application dated *8<sup>th</sup> October, 2004* in the superior court expressed to be brought under *sections 8 and 9 of the Law Reform Act, Cap. 26 Laws of Kenya and Order LIII rules 2 and 3 of the Civil Procedure Rules*. In that application the appellant moved the superior court for orders of certiorari; prohibition and mandamus arguing that all the allegations made against him, which total ten were vexatious, unconstitutional and outside the mandate of a tribunal established under *section 62* of the Constitution of Kenya and did not flow from representations which were made to the President by the Hon. the Chief Justice of Kenya (*1<sup>st</sup> respondent herein*). He consequently applied for an order of certiorari to quash a decision by the Tribunal dated *6<sup>th</sup> September, 2004* directing the issuance of a hearing notice to him to appear before the said tribunal on a stated date, and a decision of the *7<sup>th</sup> respondent* to draw and lay before the tribunal the allegations of misconduct by the appellant, and an order of prohibition to stop the commencement of the investigations and inquiry into the conduct of the appellant, and if the inquiry has commenced then the Tribunal be prohibited from continuing with such inquiry or investigation and any further action in accordance with its terms of reference. Lastly, there was a prayer for mandamus directing the Hon. Chief Justice to observe the Constitution of Kenya in the letter and spirit and the common law embodied therein relating to rules of natural justice if there is a question as to the removal of the appellant as a Judge of Appeal.

It should be pointed out that leave to file judicial review proceedings had been granted by Ibrahim, J. on *30<sup>th</sup> September, 2004*. On *7<sup>th</sup> December, 2004*, *Stephen Kanyinke Ole Ntutu* and *Sylvester Katilai Ole Ntutu*, who are brothers (Ntutu brothers), filed what are described respectively as "*Replying Affidavit*". They had neither been served with the motion nor were they named as parties. On *15<sup>th</sup> December, 2004* *Margaret Nduku Nzioka*, the Chief Parliamentary Counsel in the Attorney-General's chambers filed an affidavit which she swore as Secretary to the Constitutional Tribunal.

The application of *8<sup>th</sup> October, 2004* was placed before the superior court (*Lesiit, Wendoh and Emukule, JJ.*) on *13<sup>th</sup> June, 2005* when Mr. Musalia Mwenesi learned counsel for the appellant sought an adjournment of the hearing of the motion on the principal ground that the appellant (the applicant in the motion) needed the court's direction on matters which had risen as regards the replying affidavit of the *7<sup>th</sup> respondent*, Mr. Mbuthi Gathenji, the locus standi of the Attorney-General in light of the Replying affidavit of Margaret Nduku Nzioka, the replying affidavits of the Ntutu brothers, whether Mr. Mwenesi who had been adversely mentioned and others should be joined as parties etc. He therefore sought leave to file replying affidavits.

Lest it escapes one's attention, it should be pointed out that what Mr. Mwenesi sought from the superior court was an adjournment of the application and certain directions from the superior court.

In a brief response to what Mr. Mwenesi had told the superior court, Mr. Ombwayo the learned counsel

for the 1<sup>st</sup> to 6<sup>th</sup> respondents opposed the application on all grounds advanced by Mr. Mwenesi. He submitted that the affidavits by the Ntutu brothers were not properly on record as they were not parties to the application and that the only affidavits that the court should consider were those of Mr. Mbuthi Gathenji (7<sup>th</sup> respondent), the Assisting Counsel to the Tribunal and Margaret Nduku Nzioka, the Secretary to the Tribunal.

Mr. Mbuthi Gathenji on his part associated himself with the submissions of Mr. Ombwayo except the submission that the affidavits by the Ntutu brothers were improperly on record. In addition he submitted that those affidavits were filed in support of his own affidavit. He also opposed Mr. Mwenesi's application for leave to file further affidavits.

The learned Judges of the superior court considered all that was urged before them and in a reserved ruling delivered on 14<sup>th</sup> June, 2005 came to certain conclusions. As regards the affidavits by the Ntutu brothers, the learned Judges said:-

*“We were asked by Mr. Obwayo, learned Counsel for the 1<sup>st</sup>-6<sup>th</sup> Respondents to strike out these Affidavits, as being improperly on the record, and having been drawn by M/s Katwa & Co., Advocates, Counsel who are not on record for any of the parties. We will however not strike them out. Firstly we think that these affidavits are in support of Mr. Mbuthi Gathenji's Affidavit, and ought to remain on record. Secondly, although they have been drawn by Counsel who is not on record in these proceedings, we think that this is a mere irregularity only which goes to form, and not to substance of this matter.”*

And what was the final decision of the superior court? We remind ourselves of the application by Mr. Mwenesi. It was an application for an adjournment of the motion and leave to file replying affidavits. The superior court concluded its ruling thus:-

*“For these same reasons we will allow the applicant to respond thereto, and do so within TEN (10) DAYS from the date of this Ruling. Although the applicant fails in all other grounds adduced by Mr. Mwenesi, we allow the application for adjournment to enable the applicant to respond if necessary, to any new grounds which may have been raised in the affidavits of Stephen Ole Ntutu and Sylvester Ole Ntutu respectively.”*

It is that order by the superior court that has provoked this appeal.

The gist of the ruling by the superior court was that the affidavits by the Ntutu brothers were to remain as part of the record and that Mr. Mwenesi was granted an adjournment and leave to file replying affidavits. Instead of utilizing the adjournment by filing the replying affidavits, Mr. Mwenesi and his client chose to file this appeal by way of a long Memorandum of Appeal comprising fifty (50) grounds of appeal! In the Memorandum of Appeal it is proposed to ask this Court for orders that:-

1) *The Appellant's appeal is allowed and the Ruling of the superior court (Lesiit, Wendoh, Emukule, JJJ.) dated and delivered on the 14<sup>th</sup> June, 2005 and the orders flowing from that Ruling are set aside and are quashed.*

2) *All processes flowing consequentially upon the Ruling of the superior court thus set aside and quashed is also set aside.*

3) *Taking all the circumstances of the matter into account and the lack of any affidavit by the 1<sup>st</sup> respondent on the making of any representations to His Excellency the President on any allegation or questions for investigation of the Appellant by a Tribunal under section 62 of the Constitution of Kenya, this Court in exercise of the jurisdiction and powers under rules 1(2) and 31 of the Court of Appeal Rules and section 3 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya, finds that the proceedings before the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents being the Tribunal to Investigate the Conduct of Judges of Appeal are without jurisdiction; are malicious, vexatious and bad in law being contrary to section 62 of the Constitution. Accordingly prayers “a”, “b”, “c”, “d” and “f” in the Notice of Motion dated 8<sup>th</sup>*

October, 2004 in the superior court are granted.

4. Consequently, this Honourable Court holds that there being no representation to His Excellency the President by the 1<sup>st</sup> Respondent as required of him under section 62 of the Constitution of Kenya the appointment of the Tribunal and the suspension of the Appellant under Gazette Notice No. 8828 of 2003 is contrary to that section, unconstitutional and is null and void.

5. In the ALTERNATIVE the affidavits of the non-parties Stephen Kanyinke ole Ntutu and Sylvester Kitilai ole Ntutu sworn on the 19<sup>th</sup> November, 2004 as well as the Appellant's replying affidavit sworn on the 24<sup>th</sup> June, 2005 are expunged from the record of the superior court.

6. The costs of the Appeal and the costs of the Civil Application no. NAI. 202 of 2005 (UR 119/2005) for stay pending appeal and the costs of the application for leave to apply for judicial review and for the application for judicial review are awarded to the Applicant in any event."

This is the appeal that came up for hearing before us as from 11<sup>th</sup> October, 2007, when Mr. S.M. Mwenesi appeared together with Mr. S.A. Wamwayi and Miss N. Thuku for the *appellant*, while Mr. A. Ombwayo (Principal Litigation Counsel) appeared for the 1<sup>st</sup> to 6<sup>th</sup> *respondents* and Mr. Mbuthi Gathenji appeared in person. Mr. Mwenesi addressed us at length. As regards the affidavits of the Ntutu brothers, he pointed out that when the matter came up before the superior court he sought to know the position of the Ntutu brothers since they were not parties in the application and yet they had sworn affidavits. Mr. Mwenesi pointed out that those affidavits were sworn two weeks before Mr. Gathenji's affidavit. It was further pointed out that the affidavits were drawn by an advocate (Mr. Katwa) who was not on record. It was therefore Mr. Mwenesi's submission that the two affidavits should have been struck out and as the superior court ordered that the affidavits should remain on record that was an error which ought to be corrected. He therefore asked us to allow this appeal by ordering that the affidavits by the Ntutu brothers be expunged from the record. That really concluded Mr. Mwenesi's submissions on the issue of the affidavits by the Ntutu brothers.

Before we come to the other part of this appeal we wish to consider what Mr. Ombwayo had to say about these affidavits. It should be observed that in the superior court, Mr. Ombwayo was of the view that these affidavits ought not to be on record. However, when the matter came before us Mr. Ombwayo changed his position and submitted that they ought to remain on record. He supported Mr. Gathenji's position on the issue relating to those affidavits.

Mr. Gathenji on his part submitted that the affidavits were properly on record and that this Court should confine itself to the ruling of the superior court on the issue of those affidavits.

The next part of this appeal relates to the other grounds which touch on the jurisdiction of this Court under the *section 3* of the *Appellate Jurisdiction Act (Cap 9 of Laws of Kenya)*. In his submission on this aspect of the appeal Mr. Mwenesi conceded that the matter was "*tricky and difficult*". We agree that the issues raised are indeed tricky. We say so because Mr. Mwenesi sought to persuade us that we have the power and that we should invoke that power and take over the notice of motion before the superior court and give a decision on that notice of motion. He pointed out that all the material before the superior court is before this Court. In this regard, Mr. Mwenesi placed before us a plethora of authorities in a bid to persuade us to take over the proceedings still pending before the superior court and deal conclusively with the issues raised in the notice of motion. Mr. Mwenesi asked us to affirm the independence of the Judiciary as in his view, the superior court misdirected itself in the manner it proceeded with the issue of affidavits.

On this aspect of the appeal Mr. Ombwayo was of the view that it was premature for this Court to deal with the notice of motion which is before the superior court.

Mr. Gathenji associated himself with the submissions of Mr. Ombwayo on this aspect of the appeal. He went on to emphasize that this Court should only look at the order appealed against which in his view

related to adjournment, affidavits and costs.

We have already set out the reliefs sought in this appeal by reproducing the portion of the Memorandum of Appeal which sets out the proposed orders that the appellant seeks from the Court. It is to be noted that *prayers 1 to 4* relate to the issue of this Court taking over the proceedings from the superior court and dealing with the notice of motion and giving final orders as would be given by the superior court. Then *prayers 5 and 6* are in the alternative and these relate to the issue of affidavits. We intend to deal with *prayers 1-4* before we deal with *prayers 5 and 6*. Mr. Mwenesi placed before us a list of authorities and although he did not specifically state which ones were relevant, we have endeavoured to go through this list and all we can say is that we commend Mr. Mwenesi for his industry but our perusal of the same revealed that most of them touch on the well known principles of natural justice. These authorities are relevant so far as the Notice of Motion before the superior court is concerned. But they were cited before us because Mr. Mwenesi was asking us to take over the notice of motion from the superior court and deal with it. He relied on the decision of the Court of Appeal in England in *R. V. INDUSTRIAL INJURIES COMMISSIONER EX PARTE AMALGAMATED ENGINEERING UNION* [1966] 1 ALL E.R. 97.

In dealing with the issue of jurisdiction of this Court to take over a matter which is before the superior court, we must be guided by the *Appellate Jurisdiction Act (Cap 9 Laws of Kenya)*. Section 3 of this Act provides:-

3. (1) *The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.*
- (2) *For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.*
- (3) *In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”*

As already pointed out the notice of motion dated 8<sup>th</sup> October, 2004 is the one which is pending before the superior court. The High Court has not determined that motion. It is this motion which had commenced before the High Court when Mr. Mwenesi applied for adjournment and directions. Hence the superior court has not given any determination on that motion. In absence of such determination this Court will have no jurisdiction to grant the prayers sought in *prayers 1 to 4*, in view of section 3(1) of the *Appellate Jurisdiction Act*. We are satisfied that there are no compelling reasons to warrant our taking over a matter which is still pending before the superior court.

As regards *prayers 5 and 6*, these relate to the affidavits of the Ntutu brothers. This in our view is the main issue arising from the ruling of the superior court which ruling the appellant is challenging on this appeal. What is the order to be appealed from? The formal order which appears at p. 904 of the Record of Appeal is as follows:-

*“IT IS HEREBY ORDERED:-*

1. *THAT* the affidavits of Stephen Ole Ntutu and Sylvester Ole Ntutu shall not be struck out on the following grounds:-
  - a. *The affidavits are in support of Mr. Mbuti Gathenji’s affidavit and ought to remain on record.*
  - b. *Although they have been drawn by Counsel who is not on record in these proceedings, we think that this is a mere irregularity only which goes to form and not to substance of this matter.*
2. *THAT* the applicant be and is hereby allowed adjournment of ten (10) days from the date of this ruling to enable him respond if necessary to any new grounds which have been raised in the Affidavits of

*Stephen Ole Ntutu and Sylvester Ole Ntutu respectively.*

3. THAT the costs of the adjournment for the 14<sup>th</sup> and 15<sup>th</sup> June 2005 be borne equally by the applicant and the 7<sup>th</sup> respondent.

*GIVEN under our hands and the seal of this Honourable Court at Nairobi this 14<sup>th</sup> day of June, 2005.”*

This simple order was almost submerged in the lengthy and at times passionate submissions by counsel appearing for the parties. From what is on record it cannot be denied that Ntutu brothers were not parties in the proceedings before the superior court or in the Constitutional Tribunal. It is significant to note that the two affidavits were prepared by an advocate who was not on record in the notice of motion. Again the affidavits were sworn before Mr. Gathenji had sworn his affidavit and yet they are being described as being in support of Mr. Gathenji's affidavit. How could they support a document which was not yet in existence? We also found it rather interesting that while Mr. Ombwayo objected to these affidavits when the matter was argued in the superior court he changed his stand when he reached this Court and was of the view that the affidavits should remain on record.

A question of expunging an affidavit of a non-party was raised and dealt with in the recent decision of this Court in JASBIR SINGH RAI & OTHERS V. TARLOCHAN SINGH RAI & OTHERS in *Civil Application No. NAI. 307 of 2003* (unreported) especially in the ruling of *Bosire, J.A.*

In that case as in this one, a person who was not a party in the litigation filed an affidavit to respond to certain allegations made against him. Objection was raised to that affidavit. This Court ruled, that while the Constitution and public policy demanded that a person should not be condemned unheard, there is another equally important issue of public policy that there be an orderly dispensation of justice. It is the duty of the Court to balance the conflicting issues. We think that it was highly irregular and improper for the *Ntutu brothers* to have filed these affidavits. We think that the Superior Court improperly took a lenient view of the matter by allowing those affidavits to remain on record.

Although this was an interlocutory appeal the vigour and anxiety with which all counsel appearing before us argued the matter made us feel that there was something the parties to this appeal are not willing to reveal. We say so because what provoked this appeal was a very simple order of the superior court. Indeed, the appellant was granted an adjournment as requested and was granted leave to file replying affidavits. Additionally, there would have been no basis for this appeal had the superior court not said that the affidavits were filed in support of Mr. Gathenji's affidavit, which as we said earlier had not been filed. Besides as we have stated above the *Ntutu brothers* were not parties and never sought leave of the Court to file the affidavits.

We have given the background to this matter as regards the affidavits of the Ntutu brothers. These affidavits were sworn by two people who were not parties to the proceedings in the superior court. Moreover, the two did not seek leave of the Court to be joined as parties and they purported to swear affidavits in support of yet to be sworn affidavit of Mr. Gathenji! In our view the Ntutu brothers would qualify as busy bodies who had no business in swearing and filing these affidavits. In doing so, they betrayed themselves as persons with some vendetta against the appellant and were ready to go to any length to crucify the appellant with or without any justification. For those reasons we would order that the affidavits of the two Ntutu brothers be and are hereby expunged from the record.

In view of the foregoing, this appeal is allowed to the extent that the affidavits of the non-parties *Stephen Kanyinke Ole Ntutu* and *Sylvester Kitilai ole Ntutu* sworn on the 19<sup>th</sup> November, 2004 as well as the appellant's replying affidavit sworn on the 24<sup>th</sup> June, 2005 are expunged from the record of the superior court. Costs of the appeal are awarded to the appellant. The Notice of Motion shall proceed to hearing in the superior court before any judges excluding *Lesiit, Wendoh & Emukule, JJ.* These shall be our orders.

*Dated and delivered at Nairobi this 11<sup>th</sup> day of July, 2008.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**