REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civ Appli 202 of 2005

HONOURABLE MR. JUSTICE MATAYIA OLE KEIWUA ..... APPLICANT

AND

THE HON. THE CHIEF JUSTICE OF KENYA ….....1ST RESPONDENT

MR. JUSTICE (RTD) AKILANO MOLADE AKIWUMI.....2ND RESPONDENT

MR. JUSTICE BENJAMIN PATRICK KUBO .....….....…3RD RESPONDENT

JOE OKWACH ……....…….....……4TH RESPONDENT

PHILIP NZAMBA KITONGA ……....…….....…….... 5TH RESPONDENT

WILLIAM SHIRLEY DEVERELL .....…….....…… 6TH RESPONDENT

(THE 2ND TO 6TH RESPONDENTS BEING THE PERSONS APPOINTED

AS CHAIRMAN AND MEMBERS RESPECTIVELY OF THE TRIBUNAL TO INVESTIGATE THE CONDUCT

OF JUDGES OF APPEAL) MBUTHI GATHENJI ….. 7TH RESPONDENT

(Intended appeal from the Orders and directions and the ruling of the High Court of Kenya

at Nairobi (Lesiit, Wendo & Emukule, JJ) dated 14th June, 2005

In

H.C. Misc. C. No. 1298 of 2004)

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RULING OF THE COURT

The applicant, Hon. Mr. Justice Moijo Matayia 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 T tribunal was established under Gazette Notice ***No. 8828 of 2003***, by the President of the Republic of Kenya, with Hon. Mr. Justice (Rtd) Akilano Molade Akiwumi, (2nd respondent), as

Chairman, and the Hon. Mr. Justice Benjamin Patrick Kubo (3rd respondent), Mr. Joe Okwach, Senior Counsel (4th respondent), Mr. Philip Nzamba Kitonga, Senior Counsel (5th respondent) , and the Hon. Mr. Justice William Shirley Deverell (6th respondent) as members. Mr. Mbuthi Gathenji, (7th respondent) was appointed assisting counsel.

Several allegations were preferred against the applicant, 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 he is Chairman, was 2nd defendant with Livingstone Kunini Ole Ntutu as plaintiff and Narok County Council, the 2nd defendant. It was alleged that he unlawfully influenced Rimita, J who had conduct of the case to decide it favourably to his company. We have picked only this particular case because in general terms, it is the only one specifically relevant to the application before us. The plaintiff in that case is lined up as one of the witnesses to testify before the Constitutional Tribunal. The applicant however, contends that Livingstone Kunini Ntutu, and his brother Hon. Stephen Kanyinke Ole Ntutu, M.P, maliciously raised fictitious complaints against him "to teach him a lesson" as they perceive the applicant as having influenced the decision in the aforesaid civil case. He believes that the proceedings before the Constitutional Tribunal are malicious, in bad faith and bad in law.

By an application dated 8th October, 2004, 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, the applicant moved the superior court, for orders of certiorari, prohibition and mandamus, arguing that all 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 (1st respondent). He consequently applied for an order of certiorari to quash a decision by the tribunal dated 6th 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 7th respondent to draw and lay before the tribunal, the allegations of misconduct by the applicant; and an order of prohibition to stop the commencement of investigations or inquiry into the conduct of the applicant, 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. the Chef 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 applicant as a Judge of Appeal.

That motion was filed in Court on 30th September, 2004, pursuant to leave to file the same which was granted by Ibrahim, J., and was assigned Misc. Civil Application No. 1298 of 2004. On 7th 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. We, however, note from the provisions of ***Order 53 rule 3 (4)*** and ***6*** of the Civil Procedure Rules, that in proceedings for Judicial Review, it is permissible for non-parties to take part in such proceedings and may file an affidavit or affidavits, apparently, with leave of Court. The rule uses the words "if on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served …"

Be that as it may, both affidavits were sworn on 19th November, 2004, and were filed, as we stated earlier, on 7th December, 2004, together with another affidavit sworn by the 7th respondent on 6th December, 2004. This latter affidavit is lengthy and attempts to answer the averments in the applicant's affidavit in support of the judicial review application.

On 15th December, 2004, Margaret Nduku Nzioka, the Chief Parliamentary Counsel in the Attorney General's Chambers, filed an affidavit which was sworn by her on the same day. She swore and filed the affidavit as Secretary to the Constitutional Tribunal.

The application was listed for hearing before Lesiit, Wendo and Emukule, JJ on designated dates. When it came for hearing Mr. Mwenesi for the applicant orally applied, first for leave to file a replying affidavit to those filed, particularly by the Ntutu brothers, and secondly, for directions as to service of the motion on the two brothers who, according to the applicant's counsel, needed to be made parties to the motion. In addition counsel requested that Ol Kiombo Ltd, a company in which the applicant is a shareholder and at one point its chairman, be too made a party, arguing that since the issues raised by the Ntutu brothers concerned Nairobi High Court Civil Case No. 1565 of 2000, the subject matter of one of the allegations against the applicant before the Constitutional Tribunal, then it was necessary for all parties in that suit to be made parties.

The third ground counsel raised was that as the 7th respondent had raised an issue in his affidavit in reply to the motion, regarding the role of the Attorney General in the Constitutional Tribunal, the applicant needed the leave of the court to deal with that issue in a replying affidavit. Mr. Ombwayo for the 1st to 6th respondents, in answer, submitted, inter alia, that affidavits filed by Kunini Ole Ntutu and Kitilai Ole Ntutu were improperly on record, the leave of the court having not been sought to file them, and also, because the two were not parties to the application. In his view, however, he did not think there was a need to make the Ntutu brothers parties. Besides he said, the application for leave to file an affidavit in answer to those filed by the two brothers had come too late and that an adjournment to file such an affidavit was unmerited.

On his part Mr. Mbuthi Gathenji the 7th respondent, an advocate, submitted from the bar that affidavits by Stephen and Sylvester Ntutu were filed in "support of my affidavit and are independent." They were made to rebut specific allegations against them and that is an insufficient reason to make them parties, the duty was on the applicant to decide who to make a party to the motion, and that being a Judge the applicant was well placed to know the requirements of the law. In his view the applications for leave to file a replying affidavit and for adjournment were intended to delay the hearing of the motion and the commencement of the hearing of the inquiry against the applicant by the tribunal.

After Mr. Mwenesi replied to those submissions, the court reserved its ruling which it delivered on 14th June, 2005. It is against that ruling that an appeal is intended. In the ruling the superior court held, inter alia, that the right to reply to or file a further affidavit by an applicant must be exercised within a reasonable time after service of the replying affidavit; that where an applicant so intends and wishes to amend his statement prior notice in writing has to be given detailing the action intended and supplying details thereof; that it was the duty of the applicant and not the court, to identity persons who are or may be directly affected and duly serve them with his motion under ***Order 53*** of the Civil Procedural Rules, and if the applicant does not do so the court is not obliged to assist him in that regard; that while ***rule 8*** of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 (L.N. 133 of 2001), does provide for stay of proceedings, the rule does not cover "Sundry Proceedings which may remotely refer to the matters in issue." And consequently what the applicant was trying to do was "to gag any proceedings covering other matters which he may indirectly be concerned with."; that the affidavit of Margaret Nduku Nzioka, did not in any way give the Attorney-General any status in the Tribunal which he does not already have, as she swore the affidavit in her capacity as an officer of the Tribunal; that most of the issues raised by Mr. Gathenji in paragraphs 55 and 56 of his affidavit and which the applicant wanted to respond to, were matters of law, not fact, and which the Tribunal was fully competent to determine; and that although the affidavits of the Ntutu brothers were inappropriately expressed to be "*Replying Affidavit*" when appropriately they should have been titled "*Affidavit in support of the Replying Affidavit of Mbuthi Gathenji …*", they would not be struck out as they were filed in support of Mr. Gathenji's affidavit, and also, because whatever error that was committed by titling them as replying affidavits was of a minor nature – and not on substance. The court then allowed the applicant a right to respond only to new matters raised in the affidavits of Stephen and Sylvester Ntutu and was granted an adjournment to do so. He was given a limited period of 10 days within which to respond.

It is against that ruling, as we stated before, that an appeal is intended. The applicant now applies under ***rule 5 (2) (b)*** of the Court of Appeal Rules (the Rules) for inter alia an order, that there be a stay of

further proceedings in High Court Miscellaneous Civil Application No. 1298 of 2004, pending the hearing and final determination of the intended appeal.

In an application under ***rule 5 (2) (b)*** of the Rules, an applicant has the duty of showing, firstly, that his appeal or intended appeal raises arguable points, or put differently, that it is not frivolous. Secondly, that unless he is granted a stay or injunction, as the case may be, his appeal or intended appeal if successful, will be rendered nugatory. (see **Bob Morgan Systems Ltd. & Another vs. Jones [2004] KLR 194**.)

We have already set out the background facts, in resume form. The main issue raised by this application concerns the interpretation of the provisions of ***Order 53 rules 3, 4, 5*** and ***6***, of the Civil Procedure Rules Stephen and Sylvester Ntutu were not parties in the matter before the superior court. Under ***Order 53 rule 6*** of the Civil ***Procedure Rules***, on the hearing of any motion "*any person who desires to be heard in opposition and appears to the High Court to be a proper person to be heard shall be heard notwithstanding that he has not been served ….*" The two were not served with the applicant's motion. It is arguable whether without the leave of the court they would file affidavits whether on their own, or through counsel, in response to the motion, as happened in this matter.

In **Jasbir Singh Rai and three others vs. Tarclochan Singh Rai and Four others Civil Application No. NAI. 307 of 2003 (154\ 2003 UR)** a person who thought he was directly affected filed an affidavit in response to an application before this Court for review of its judgment. He also engaged legal counsel to represent him during the hearing which counsel filed a notice of appointment. The issue which arose in limine was whether the affidavit and notice of appointment were properly on record, the leave of the court not having been sought before they were filed. The Court, comprising of five Judges, held thus: -

> "***We have come to the conclusion that it is not desirable to retain those documents on record and we order that they be and are hereby expunged from the record. We shall give our full reasons for this order in the court's final ruling."***

The final ruling of the Court has not been delivered as the application is still pending. Of course, the application was not under ***Order 53***. But that decision raises the question whether a party considering himself affected can simply file or cause to be filed documents in response to matters raised in any judicial proceedings.

As the applicant is only required to show at least one arguable point we are satisfied that the applicant has satisfied the first duty.

On the nugatory aspect, the applicant, a Judge of Appeal, is facing a disciplinary Tribunal, and as we stated earlier he alleged that those proceedings are unconstitutional, vexatious and outside the mandate of a Tribunal established under ***Section 62*** of the Constitution of Kenya. A finding against him will lead to his removal as a Judge of Appeal. The extent to which the ruling of the superior court, against which an appeal is intended, will adversely affect the outcome of his application before that court cannot be fathomed at this stage. In the result we think that unless we grant him the stay he seeks his intended appeal will be rendered nugatory. We note in passing that there has been a long lapse in time since the aforesaid ruling was delivered, and yet to date no appeal has been filed. Bearing that in mind, we will grant **prayers (2), (3)** and **(4)** of the motion dated 14th July, 2005. The applicant to lodge his appeal within **30 days** of this ruling failing which this order will automatically lapse. However, if he lodges his appeal within the time allowed, the orders of stay to remain in force until determination of that appeal. Costs of this application shall be in the intended appeal.

Dated and delivered at Nairobi this 17th day of November, 2006.

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.