



**Ngaya v Judicial Service Commission & 3 others (Cause 398 of 2014)  
[2015] KEELRC 218 (KLR) (6 November 2015) (Ruling)**

*George Ngaya v Judicial Service Commission & 3 others [2015] eKLR*

Neutral citation: [2015] KEELRC 218 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 398 OF 2014  
MN NDUMA, J  
NOVEMBER 6, 2015  
(FORMERLY NRB H.C.C.C. NO. 348 OF 2008)**

**BETWEEN**

**GEORGE NGAYA ..... CLAIMANT**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF THE JUDICIARY ..... 2<sup>ND</sup> RESPONDENT**

**HON. MR MAXWEL GICHERU ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. In this Application dated 31<sup>st</sup> March 2015, the 3<sup>rd</sup> Respondent seeks the following orders:-
  - i. That it be declared by this Honourable Court that the claimant is non-suited against the 3<sup>rd</sup> Respondent for the reason that the 3<sup>rd</sup> Respondent handled the Claimant's case in his official and not personal capacity;
  - ii. That it be declared that the 3<sup>rd</sup> Respondent was one of the many judicial officers representing or acting as an agent of the Judicial Service Commission who cannot be isolated from the other officers who cannot be sued as done in this claim;
  - iii. That the 3<sup>rd</sup> Respondent's name be struck out from this claim
  - iv. That the costs of this application and of the entire suit be paid by the Claimant.



2. The application is based on grounds stated on the face of the application and on a further ground that the claim is statute barred as against the 3<sup>rd</sup> Respondent. Further grounds are set out in the supporting affidavit of the 3<sup>rd</sup> Respondent dated 31<sup>st</sup> March 2015.
3. The 3<sup>rd</sup> Respondent states that as an agent of the 1<sup>st</sup> Respondent, he acted in his official capacity by participating in the disciplinary process against the Claimant. That the 3<sup>rd</sup> Respondent's recommendation to the Claimant's employer, the 1<sup>st</sup> Respondent was merely procedural and not binding on the 1<sup>st</sup> Respondent.
4. The claimant is therefore not suited as against the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent relies on Article 160(5) of the Constitution of Kenya 2010 in recognition of the sacrosanct principles of independence of the Judiciary which bestows judicial offices with immunity from liability for actions/omissions done in the cause of their judicial duties. The same is echoed by dint of section 6 of the Judicature Act (Cap 8 Laws of Kenya) as follows:-

“No Judge or Magistrate shall be liable to be sued in a Civil court for an act done or ordered by him in the discharge of judicial duty”,

5. The principle was articulated in the case of Moses Wamalwa Mukambi Vs John O. Makali & 2 Others [2012] eKLR as follows:

“even when there arises any liability from the exercise of judicial function, the liability is the liability of the state. Hence it is unconstitutional to join a judicial officer in a suit challenging what he did in the lawful exercise of judicial function. On this basis, the correct party to sue is the Attorney General and does not suffer any deficiency or impairment in law as to require the judicial officer be cited as a party”

### **Submissions by the Claimant**

6. The claimant submits that the 3<sup>rd</sup> Respondent acted *malafides, ultravires* and in vengeance against the Claimant in that the 3<sup>rd</sup> Respondent unilaterally and arbitrarily instigated and instituted allegations of corruption simply to settle personal scores he had with the Claimant.
7. That in collusion with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the 3<sup>rd</sup> Respondent maliciously caused the unlawful dismissal of the Claimant. Claimant relies on the proviso to Section 6 of the Judicature Act which reads:

“provided at the time in good faith believed himself to have jurisdiction to do or order the act complained of”,

and

Article 160(5) of the Constitution which provides;

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function”,

8. Therefore, the claimant submits that the immunity accorded to judicial officers for actions performed in the execution of their judicial functions is not absolute. That the immunity to apply, the officer must have been involved in judicial work and secondly the officer must demonstrate that he acted in good faith and had jurisdiction to do or order the act complained of.



9. The act complained of in this suit is disciplinary action conducted by the Judicial Service Commission, the 1<sup>st</sup> Respondent, and the 2<sup>nd</sup> Respondent Chief Registrar Judiciary as the employer of the claimant. The 3<sup>rd</sup> Respondent was the immediate supervisor of the claimant and therefore originated the complaint that culminated in the dismissal of the Claimant as a clerical officer on 27<sup>th</sup> October, 2006.
10. The Claimant challenges substantive and procedural lawfulness of the dismissal and had initially sued the Judicial Service Commission, Chief Registrar Judiciary and the Attorney General in his capacity as the legal representative of Government in all litigation.
11. The Claimant seeks reinstatement and the payment of lost earnings stipulated in the plaint dated 18<sup>th</sup> January 2012. The Claimant alleges the 3<sup>rd</sup> Respondent was the complainant, prosecutor and judge which allegations are challenged by the Respondents.

### **Issues for Determination**

- i. Did the 3<sup>rd</sup> Respondent act in his judicial capacity in the disciplinary proceedings of the Claimant?
- ii. Is the 3<sup>rd</sup> Respondent a necessary party to these proceedings?

### **Issue i**

12. The 3<sup>rd</sup> Respondent being a Chief Magistrate at Kakamega wore a judicial and administrative hat. He exercised his judicial and administrative authority as a judicial officer. It is the Court's finding that the 3<sup>rd</sup> Respondent acted as a Magistrate in both roles and the immunity accorded to judicial officers under section 6 of the Judicature Act Cap 8 of Laws of Kenya is applicable to him in the conduct of his judicial and administrative functions.
13. Whether or not the 3<sup>rd</sup> Respondent acted in good faith believing himself to have jurisdiction to do or order the act complained of by the Claimant is a matter that the Judicial Service Commission as the employer of the Claimant is fully answerable. This can only be determined however after the hearing of the case on merits as was stated by Justice G. V. Odunga in Nairobi HCCC 356 of 2011 *Douglas Kipchumba Ruto Versus Kenya Anti Corruption Commission & Others* thus;
 

“in my considered view, for a court to be satisfied as to the existence of good faith, it must act on evidence and that evidence must be tested by cross examination before being acted upon or at least persons against whom it is given must be given an opportunity to challenge it if only to demonstrate that justice has been done. No person should be made to feel that his interests have not been safeguarded or at least not been borne in mind by the court in arriving at a decision which affects him”
14. There has to be a balance between private and public interest in this kind of matter. The interest of the Claimant is to have justice done and to be seen to have been done. It suffices that his employer, the 1<sup>st</sup> Respondent is made to explain to the satisfaction of the court the lawfulness of the decision it took against the Claimant. Any party is at liberty to call the 3<sup>rd</sup> Respondent as the immediate supervisor of the Claimant to testify in the matter.
15. On the other hand it is in the public interest that judicial officers are not dragged to court every time they make an adverse decision against persons, be they employees of the Judiciary or members of the public. The independence of the Judicial officer is protected by the partial immunity granted to them so as to discharge their duties without fear or favour.



16. The justice of the present case, demands that the 3<sup>rd</sup> Respondent be not dragged as a defendant in this case. This would detract from his duties and is against public interest.
17. It suffices that the employer of the Claimant and the authorized legal representative of Government answer to the case brought by the Claimant. The relief sought by the Claimant if successful would be fully catered for by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents.
18. For these reasons, the 3<sup>rd</sup> Respondent is not suited in this matter and is struck off from the case.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER 2015**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**

