Kenya Hotel Properties Limited v Attorney General & 5 others (Application 27 of 2020) [2020] KESC 6 (KLR) (20 November 2020) (Ruling)

Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR

Neutral citation: [2020] KESC 6 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 27 OF 2020

DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

NOVEMBER 20, 2020

BETWEEN

KENYA HOTEL PROPERTIES LIMITED ..... APPLICANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

JUDGES & MAGISTRATES VETTING BOARD ..... 3RD RESPONDENT

WILESDEN INVESTMENTS LIMITED ..... 4TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION ..... 5TH RESPONDENT

KENYA REVENUE AUTHORITY ..... 6TH RESPONDENT

(Being an application to stay the Execution of Civil Appeal No.149 of 2007 – Kenya Hotel Properties v. Willesden Investment Limited & 6 Others and/or calling up the bank guarantee No.DBK2007/030 issued by Development Bank of Kenya Limited for Kshs.70,902,400.00)

Supreme Court admits pleadings filed out of time as part of record

The appellant had breached timelines issued by court by filing submissions 25 days out of time without the leave of the court and without reference to the respondent/applicant. There was no explanation for the delay. The court considered whether prejudice had been suffered by the respondent/applicant due to the appellant's failure to file submissions within the stipulated time and whether the respondent/applicant could be facilitated to mitigate such prejudice. The court found that the appellants actions prejudice the respondent/applicant. However, the extent of prejudice was curable as the respondent/applicant could be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time. It was in the interest of justice and would aid in expeditious disposal of the litigation.

Reported by John Ribia

Civil Practice and Procedure *– pleadings – application to strike out pleadings – procedure to strike out pleadings – pleadings filed out of time – whether pleadings could be struck out for being filed out of time contrary to pre-trial directions – whether the court could admit pleadings filed out of time as part of the record – where the pleadings were filed out of time without reason for delay – whether admission of pleadings filed out of time prejudiced the other party to the proceedings – Constitution of Kenya, article 159 – Supreme Court Rules, rule 65 – Supreme Court Act, section 21*

Brief facts

The appellant had breached timelines issued by the deputy registrar of the court, to file and serve submissions within 21 days. The appellant instead filed the submissions 25 days out of time without the leave of the court and without reference to the respondent. There was no explanation for the delay was given by the appellant when the matter came up before the deputy registrar again. The respondents also alleged that the appellant's subsequent reasons for delay stated in their replying affidavit were unsupported by any evidence and were false.

Thus, the respondent filed the instant application to have those pleading struck out.

Issues

i. Whether pleadings could be struck out for being filed out of time contrary to pre-trial directions.
ii. Whether the court could admit pleadings filed out of time as part of the record.
iii. Whether admission of pleadings filed out of time prejudiced the other party to the proceedings.

Held

1. Section 21 of the Supreme Court Act granted the Supreme Court general powers to make any ancillary or interlocutory orders. Rule 65 of the Supreme Court Rules 2020 empowered the Supreme Court to issue directions that were appropriate where a provision of the rules or practice directions were not complied with. The bottom line in all cases was for parties to litigation to reasonably access justice.
2. Article 159 of the Constitution set out the guiding principles of the exercise of judicial authority which included that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.
3. Compliance with the Supreme Court's orders and directions on filing and service of documents was imperative. It went to the root of the rule of law as well as the dignity of the court. Rule 12(1) of the Supreme Court Rules provided that filing would be deemed complete when the document was submitted both electronically and physically.
4. The delay in compliance by the appellant was therefore prejudicial to the respondent who was deprived the opportunity to respond to the appellant's submissions.
5. Every party had an obligation to honour the court's directions. Late filing of submissions was not incurable and the court had discretion to allow such late filing. However, the appellant had not moved the court appropriately by way of an application for extension of time to file the said documents.
6. The consideration to bear in mind was what prejudice had been suffered by the respondent/applicant due to the appellant's failure to timeously file its submissions and whether the respondent/applicant could be facilitated to mitigate such prejudice.
7. At the hearing, the respondent/applicant could well argue their appeal orally. Furthermore, the respondent/applicant could always be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time all in the interest of justice and to an expeditious disposal of the litigation.
8. The late filed submissions were admitted and deemed as filed within time by dint of section 21 of the Supreme Court Act and rule 65 of the Supreme Court Rules. The respondent was granted fourteen (14) days to draw, file and serve supplementary submissions.

Application disallowed, appellant to bear costs of application.

Citations

Cases

Kenya

1. *Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof Tom Ojienda & Associates & 2 others; Law Society of Kenya (amicus curiae)* Civil Application 21 of 2019; [2020] KESC 56 (KLR) - (Followed)
2. *Kenya Hotel Properties Limited v Attorney General & 5 others* Civil Appeal No 404 of 2018; [2020] KECA 427 (KLR) - (Explained)
3. *Kenya Hotel Properties Limited v Willesden Investments Limited* Civil Appeal No 149 of 2007; [2009] eKLR - (Explained)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR ; [2012] 3 KLR 199 - (Explained)
5. *Munya v Githinji & 2 others* Application 5 of 2014 ; [2014] eKLR; [2014] 1 KLR 58 - (Explained)
6. *Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another* Petition No 3 of 2012; [2012] eKLR - (Applied)
7. *Rai v Rai* Petition 4 of 2012; [2013] eKLR; [2014] 2 KLR 253 - (Explained)
8. *Shikuku v Republic* Constitutional Reference 3 of 2011; [2012] eKLR; [2012] 1 KLR 160 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 20, 22, 23, 27, 163(4)(a); 165; 165(3)(b); 165 - (Interpreted)
2. Supreme Court Act (cap 9B) sections 14, 21, 24 - (Interpreted)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 31, 32

Advocates

None mentioned

RULING

A. Background

1. By a notice of motion dated September 23, 2020 and premised *inter alia* on sections 21 and 24 of the *Supreme Court Act* as well as rules 31 and 32 of the *Supreme Court Rules, 2020*, Kenya Hotel Properties Ltd, the Appellant/Applicant seeks a stay of execution of the Judgment and orders issued by the Court of Appeal in Civil Appeal No 149 of 2007, and/or the calling up of a Bank Guarantee No DBK2007/030 issued by Development Bank of Kenya Limited for Kshs 70, 902,400.00, pending the hearing and determination of the Petition of Appeal herein.

2. From the record, the dispute between the applicant and Willesden Investments Limited has been before the superior courts below for years and that is what led the Court of Appeal in *Civil Appeal No 404 of 2018* to state that the

> "... appeal and the totality of its antecedents is most disturbing, not least because the legal battle between its main protagonists has been within the corridors of justice in various forms and shapes through a multiplicity of suits and has engaged judicial minds and time for over two decades."

3. The original dispute that led to the filing of HCCC No 367 of 2000 at the High Court, Milimani related to Willesden's claim against the Applicant for damages for trespass to land and mesne profits arising from the Applicant's alleged use of LR No 209/12748 IR No 66986 as a parking lot. The

High Court in a Judgment delivered on 14th December 2006 awarded Willesden Kshs 54,102,400 as mesne profits, Kshs 10,000,000 as general damages for trespass and Kshs 6,000,000 for loss of business opportunity plus interest and costs.

4. In *Civil Appeal No 149 of 2007*, the Court of Appeal, in a Judgment delivered on 2nd April 2009, reduced the judgment sum to Kshs 22,729,800 plus interest at court rates from January 1994 to the date of full payment. An application for review of that Judgment was partially allowed with interest being applied from September 15, 1995 and not January 1994. The matter ought to have ended there because the Court of Appeal was then the apex court in Kenya but it did not because upon the promulgation of the *Constitution* in 2010 and the removal from office of Hon Emmanuel O'kubasu, JA. by the Judges and Magistrates Vetting Board on account of certain improprieties related to his handling of *Civil Appeal No 149 of 2007*, other proceedings were commenced at the High Court.

5. Riding on the fact of the said Judge's removal therefore, HC Constitutional Petition No 13 of 2011 was filed by the present applicant seeking a number of declarations, one of which was that "it would be against public policy and the Constitution for the 2nd respondent [Willesden] to derive any benefit from the decree in Milimani HCCC No 367 of 2000." That petition was dismissed on September 28, 2018 by Mwita J and Civil Appeal No 404 of 2018 was similarly dismissed by the Court of Appeal on August 7, 2020 hence the filing of an appeal before this court and the present motion for orders of stay of execution.

B. The Application

i) The applicant's case

6. It is the applicant's submission that its appeal is unique being the first of its kind to seek the setting aside of a judgment of the Court of Appeal following removal of a Judge from office. That such a plea is in line with this court's direction in *Rai v Rai* [2013] eKLR that the High Court has jurisdiction to set aside any Judgment whose rendering may have led to the removal of a Judge by the Vetting Board. The appeal is therefore arguable, according to the applicant.

7. Further, the applicant submitted that it has previously enjoyed orders of stay of execution issued by the Court of Appeal and denying Willesden access to the bank guarantee aforesaid. No prejudice would therefore be caused to the latter if the orders sought are granted.

8. Lastly, that it has satisfied the test for grant of stay orders as espoused in Civil Application No 21 of 2019, *Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof Tom Ojienda & Associates & 2 others; Law Society of Kenya (amicus curiae)*

ii. The 4th Respondent's case

9. On its part, the 4th respondent, in opposing the application, has argued that the applicant has consistently filed stay or injunction applications to frustrate Willesden's attempt at enjoying the fruits of its Judgment. The present one is therefore in the same mold, according to it.

10. Secondly, it has submitted that Petition No 16 of 2020 on which the present motion is anchored, is improperly before this court as no leave was sought before it was filed contrary to section 15 of the *Supreme Court Act.* And that, in any event, the appeal does not seek the interpretation or application of the Constitution as is required by article 163(4)(a) of the *Constitution*.

11. Thirdly, that the appeal is premised on a wrong interpretation of the Constitution as the hierarchy of courts demands that the High Court cannot overturn decisions of the Court of Appeal.

12. Fourthly, it has urged the point that Willesden has a pending application before the Court of Appeal seeking release of the bank guarantee aforesaid and so that is the correct forum to ventilate on the said issue. The present Motion should in the circumstances be dismissed.

13. We note that no other party save the 4th respondent participated in the present application.

C. Analysis and Determination

14. We have perused the petition of appeal in Petition No 16 of 2020 dated August 14, 2020 and taken note of the question of jurisdiction raised by the 4th respondent. in that regard, we have indicated above that the appeal arises from a constitutional petition filed in the High Court leading to the Judgment delivered on September 28, 2018 by Mwita J.In that Judgment, the learned Judge found, in a reasoned decision, that, by asking the High Court to overturn the decision in *Civil Appeal No 149 of 2007* through a petition alleging violation of constitutional rights, the petitioner was in effect asking him to overturn the decision of a court superior to the High Court which in itself would be an action in violation of the *Constitution*. He therefore declined the jurisdiction to do so and dismissed the petition.

15. The Court of Appeal on its part, and in agreeing with Mwita J, stated that it was strange that the present applicant had asked the High Court "to annul, strike out, reverse or rescind a judgment of this court, its elder sibling". Further, that Mwita J was right in not delving into the merits of the petition before him having found that he had no jurisdiction to determine it. And in any event, that the applicant, having reached the end of its litigational journey, was attempting, using unknown processes, to have a second bite at the cherry.

16. Specifically, on the alleged bias by Okubasu, JA., the learned Judges poured cold water on the applicant's approach, stating that, of the three judges who rendered the Judgment in *Civil Appeal No 149 of 2007*, only he was removed by the Vetting Board and in fact, no finding of bias was made by that Board as against him or the other Judges. And even if such a finding had been made, "it is a debatable point whether such a finding, not being a judicial pronouncement ... by a body inferior to this court, would have been binding on us in a judicial adjudicatory sense"

17. In concluding, the Court of Appeal stated thus:

> " We think, with respect, that it would be to set a pernicious precedent that would entirely unsettle the jurisprudence of this court and undermine the judgments of numerous of our courts and unleash untold juridical chaos were we to hold, as the applicant/appellant seeks to persuade us, that Judgments by Judges, and by extension Magistrates, who were removed by the vetting process are *ipso facto* null and void and should be set aside. We say no more".

18. We have set out in detail the findings of the two superior courts below to show that, indeed both courts considered the issue of the jurisdiction of the High Court to determine the allegations of violation of constitutional rights in the circumstances of the dispute between the parties and both courts agreed that the same did not meet constitutional muster for lack of jurisdiction. Is that a matter that would place the Petition of Appeal within the expectations of article 163(4)(a) and is there jurisdiction on the part of this court to interpret and apply any part of the *Constitution* in that regard? We need only state that, looking at article 163(4)(a), and previous judicial pronouncements of this court on jurisdiction, we are certain that we have the requisite jurisdiction to determine the petition of appeal – see *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* Sup Ct Petition No 3 of 2012; [2012] eKLR. We say so because the questions raised by the Applicant required the High Court to determine whether there were violations of constitutional rights and specifically that of fair hearing. While the High Court declined jurisdiction to do so and the Court of Appeal agreed with it, that fact alone vests this court

with jurisdiction to determine whether or not the decisions of both courts were made outside their constitutional mandates.

The merits of the applicant's case is a matter we shall determine in due course including the arguability or otherwise of its appeal at this stage but we find, without hesitation, that we have the requisite jurisdiction to determine the appeal.

19. What of the motion for orders of stay? The law on stay orders by this court was settled in *Gatirau Peter Munya v Dickson Mwenda & 2 others* SC Appl No 5 of 2014 [2017] eKLR. In that case, we stated that an applicant seeking such orders must meet the following expectations:

    i. Whether the appeal is arguable and is also not frivolous.

    ii. Would the appeal be rendered nugatory should the stay order not be granted? and;

    iii. Is it in the public interest that the order should be granted?

20. We have set out the history of the dispute in this matter in great detail and have shown that *Civil Appeal No 149 of 2007* was conclusively determined on April 2, 2009. That Judgment has never been overturned save for the slight order of review on the dates when interest on the principal sum would commence. This was on November 20, 2009. We are therefore not sitting on appeal over that decision per se but on related proceedings under the Constitution where the decision of the Vetting Board is the basis for the main plea for a decision that, notwithstanding the finality of the civil proceedings at the Court of Appeal, the High Court ought to have denied Willesden the fruits of a Judgment said to have been obtained (at the Court of Appeal) through alleged impropriety on the part of Okubasu, JA. The Judgment of the High Court leading to that decision has itself not been impugned on constitutional grounds neither has there been a complaint regarding the conduct of the other two Judges of the Court of Appeal who determined *Civil Appeal No 149 of 2007* (Onyango-Otieno and Aganyanya JJA).

21. The other main ground raised in the appeal is that in *Rai v Rai*, this court is said to have directed parties aggrieved by a decision of a judge removed through the vetting process to file a petition in the High Court seeking orders/declaration of breach of fundamental rights.

22. Are the above issues arguable and/or are they frivolous? Arguability of an appeal would entail this court looking at the record and the petition of appeal and determine, without finality but at a *prima facie* level, whether the appeal has substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quick sand. Is the present appeal one that is well founded and which, at the present stage, should persuade us to grant orders of stay before the appeal is heard and determined on its merits? We must reiterate that in answer to that question, we are not in any way pre-judging any issue raised in the petition of appeal.

23. The applicant has in that regard argued that it has raised a novel and never before adjudicated question – whether a decision rendered by a Judge removed for impropriety by the Vetting Board should be left to stand or should be overturned *ex debito justiciae*. What should we make of that submission?

24. A reading of our decisions in *SK Macharia & another v Kenya Commercial Bank Limited & 2 others* and *Rai* would show that reopening of cases concluded prior to 2010 and which raised issues of impropriety on the part of certain Judges who had handled those cases were at the centre of both decisions. Section 14 of the *Supreme Court Act* was interpreted and ultimately declared unconstitutional in that context. In *SK Macharia*, we specifically stated thus:

> "(65) In the instant case, we find that a final Judgment by the highest court in the land at the time vested certain property rights in, and imposed certain

obligations upon the parties to the dispute. We hold that article 163(4)(b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the *Constitution*".

25. While the above finding was made in relation to the Supreme Court, it applies even more emphatically to the High Court which we are certain has no jurisdiction to reopen cases finalized by the apex Court (the Court of Appeal at the time and this court, today). We say so well aware that the present applicant has relied on the concurring opinion of Mutunga, CJ In *Rai* to argue that it can indeed, by a petition under the Constitution, obtain appropriate relief from the High Court. Mutunga, CJ had this to say on that issue:

> " Article 10 of the *Constitution* requires Parliament to be non-discriminatory when it enacts laws. Parliament violated article 10 when it enacted section 14 of the Supreme Court Act because it limited the remedy of a new trial only to those who could prove that the judge in their case had been removed, retired or resigned on the basis of their complaints. The right to a fair trial, however, applies to everyone, not just those who were denied the right because of the misconduct of judges who then voluntarily or involuntarily left the bench. It also applies to those litigants whose rights were violated even though their respective judges had been found suitable by the judges and magistrates Vetting Board, or who did not have to be vetted under the Act. If the right to a fair trial belongs to everyone, the remedy must also belong to everyone. Therefore, based on the provisions of article 10 that promote and protect the principle on non-discrimination and the equal protection afforded by article 27, I find no basis for this discrimination and I would have declared section 14 unconstitutional."

26. The learned CJthen added as follows:

> " [110] As stated above, the Supreme Court of India has the power to redress all violations of fundamental rights. The High Court of Kenya has similar jurisdiction. This jurisdiction has been donated to the High Court under articles 23 and 165(3)(b) of the *Constitution*:
>
> "23.
>
> (1) The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights".
>
> [111] Therefore, while accepting senior counsel Nowrojee's contentions that there have been injustices in this case, the choice of forum is in question. The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental right (articles 23 as read with article 165 of the *Constitution*). The High Court, on this point, has correctly pronounced itself in a Judgment by Justices Nambuye and Aroni, in *Protus Buliba Shikuku v R*, Constitutional Reference No 3 of 2011, [2012] eKLR.
>
> [112] The *Shikuku* case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least

sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on articles 20, 22 23 and 165 of the Constitution rightly held that the High court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in *Marete v Attorney General* [1987] KLR 690:

> "The contravention by the state of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."

[113] Thus, in answer to Mr Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress."

27. In our view, Mutunga, CJ did not say that, by a constitutional Petition in the manner he had suggested, the High Court can purport to overturn final decisions of courts higher than itself. He did not even suggest that the *Constitution*, while not powerless, can subvert itself in the manner suggested by the applicant. More fundamentally, the Vetting Board's decisions cannot and should never be elevated to *supra*-judicial pronouncements that would have the effect of setting aside every decision made by a Judge who was removed for impropriety by it. To allow such a proposition would in effect turn our judicial system on its head. In any event, the applicant has not told us why a concurring opinion should bear more weight than the decision of the majority. Neither has it shown why such an opinion is binding precedent only because it is more attractive to certain parties than the majority decision.

28. Having so said, the only issue which we see as arising for our consideration in the present appeal and which in any event cannot be the basis for grant of stay orders is this; what remedies are available to a party alleging violations that may have arisen from operation of the law through the system of courts, even if the case had gone through the appellate level? This question, while not novel, having been partly addressed by the High Court in *Protus Buliba Shikuku v R* and Mutunga, CJ in his Concurring Opinion in Rai, ought to be settled by this court once and for all but not at the expense of a party that has been the beneficiary of what has now been rendered an impotent Judgment since 2009.

29. What of the nugatory principle? To the extent that the bank guarantee is the security to be secured, we have seen no evidence that Willesden is unable to repay the guaranteed amount should the bank guarantee be honoured in its favour. It has waited since 2009 to reap the fruits of its Judgment even as it has been engaged in judicial musical chairs long after the litigational journey had ended. The appeal can continue on that journey with or without the bank guarantee being in place.

30. On public policy, it is now obvious that we are disinclined to agree with the applicant in its quest not to realise that even if we were to agree with it on any part of its complaint, reopening Civil Appeal No 147 of 2007 is not an action that this court or indeed any other court can undertake. Once the Court of Appeal finalized the review of that Judgment, the matter came to an end, the Vetting Board proceedings notwithstanding. Remedies available to the applicant lie elsewhere than in such an action and we shall address such remedies, if any, at the hearing of the appeal.

31. We must, finally, state that it is indeed very strange that the stay orders sought are not in respect of the appeal before us but separate proceedings concluded in 2009 and for which a Judgment in favour of one party remains unenjoyed and has never been set aside. The applicant is also aware of proceedings

before the Court of Appeal in which the respondent has applied to have the bank guarantee honoured. Those orders, if not granted, would have the same effect as the orders sought in the present motion. Why did the applicant not pursue those proceedings and defend its bank guarantee?

D. Conclusion

32. We have gone into great detail to show that the motion before us is not one for granting. What of costs? They follow the event. Let the applicant bear the costs thereof.

E. Disposition

33. The final orders to be made are:

    i) The notice of motion dated September 23, 2020 is hereby dismissed.

    ii) The applicant shall pay the costs thereof.

34. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2020

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA