Mungai v Housing Finance Company (K) Limited & 5 others (Civil Appeal (Application) 9 of 2015) [2017] KESC 47 (KLR) (26 January 2017) (Ruling)

Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR

Neutral citation: [2017] KESC 47 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPEAL (APPLICATION) 9 OF 2015

MK IBRAHIM & SC WANJALA, SCJJ

JANUARY 26, 2017

IN A MATTER OF A REVIEW AND/OR AN APPEAL INVOLVING THE IDENTIFICATION, INTERPRETATION, APPLICATION, EXECUTION AND ENFORCEMENT OF THE CONSTITUTION, LAWS OF KENYA AND RULES OF KENYA COURT OF APPEAL CIVIL APPLICATION NOS. NAI 55 OF 2012 & NAI 288 OF 2008, HCCA 335/97, HCCC 17 & 3 OF 2001, HCCC 1026 OF 2001 AND HCCC 779 OF 2009

BETWEEN

MICHAEL MUNGAI .... APPELLANT

AND

HOUSING FINANCE COMPANY (K) LIMITED .... 1ST RESPONDENT

KENYA BUILDING SOCIETY LIMITED .... 2ND RESPONDENT

TAIFA AUCTIONEERS .... 3RD RESPONDENT

CHRISTOPER AVISA .... 4TH RESPONDENT

KENYA COMMERCIAL BANK LIMITED/KPCU .... 5TH RESPONDENT

CLEOPHAS OGUTU AND OTHERS .... 6TH RESPONDENT

RULING

1. Mr. Michael Mungai, who describes himself as the appellant/applicant/decree holder, filed this matter in this Court on 26th June 2015 under a certificate of urgency. The file was placed before Ojwang, SCJ who certified it urgent on 2nd July, 2015. The learned Judge ordered that the file be mentioned before the Deputy Registrar for allocation of a hearing date.

2. The applicant sought the following orders which we produce verbatim:

(a) That the Supreme Court do certify this matter as extremely urgent and grant leave for instant disposal of the application and or appeal in accordance with the rules without the proceedings.

(b) The Supreme Court uses its constitutional, special and general powers to extend the time and allow the appellant/applicant (decree holder) to appeal directly to the Supreme Court in this matter, out of the stipulated time. That the annexed appeal be deemed to have been filed out of time with the permission of this Court.

(c) That the Supreme Court strike out, review, set aside and/or vary the determinations, rulings judgement and orders of Justice Mbaluto, Justice Osiemo, Justice Ringera, Justice Kamau, Justice Mabeya and Justice Ogolla (in HCCC 1026 of 2001) Justice Mutungi, Justice Okwengu (HCCA 335 of 1997) Justice Musyoka (HCCC 17 of 3 of 2001) Justice Odunga & Justice Kimondo (HCCC 779 of 2009) Justice Riaga and the others (*CA 288 of 2008*) & Justice Waki and the other (*CA 55 of 2012*).

(d) That the Supreme Court consolidate the applications, reviews and/or appeals of the rulings judgments and orders of Justice Mbaluto, Justice Kamau, Justice Mabeya and Justice Ogolla (in HCCC 1026 of 2001) Justice Mutungi, Justice Okwengu (in HCCA 335 of1997) Justice Musyoka (HCCC 17 of 3 of 2001) Justice Odunga & Justice Kimondo (HCCC 779 of 2009) Justice Riaga and the others (*CA 288 of 2008*) & Justice Waki and the other (in *CA 55 of 2012*) into one file and/or alternatively allow the appellant applicant to file and serve one appeal for all the said appeals.

(e) That the Hon. Supreme Court order the respondents and their agents to deposit money, accounts, documents and or security for all the bills (intrusion, reinstatement, restitution, losses, damages and costs) as billed by the appellant applicant), for the suit home, ten accounts and all the listed other one thousand and fifty properties (1050) in an international Bank in the joint names of the Court, respondents and the appellant applicant, pending the full hearing and determination of this application and or an appeal.

(f) That the Hon. Supreme Court, dismiss the respondents four applications and order the High Court of Kenya to issue the appellant/applicant (Decree Holder) with decrees and certificates of stated costs (for the restitutions, reinstatement, intrusion, costs, losses & damages) against the respondents as billed and or alternatively the Hon. Court allow the appellant/applicant (Decree Holder) to proceeded with the annexed Notices of Motion and applications/Appeal dated 19/10/2001 and 27/10/2008 directly, in this Court, against the respondents and their agents.

(g) That the Supreme Court grant (a) the appellant/applicant (decree Holder) his execution prayers as pleaded in the annexed executions Applications (12), (b) the contempt Notice of Motion dated 08/07/2008 and 27/10/2008 and the other pending applications against the respondents and their CEOs as prayed (c) and or give specific orders as to how the annexed execution, reinstatement, compensation, costs, reinstitution prayers in the appellants further amended plaint dated 19/10/2001, & reply to defense and counter claim (in HCCC 1026 of 2001) & amended defense and counter claim dated 10/10/2005 and in Hccc 17 & 3 of 2001 and the other two applications in HCCC 779 of 2009 *CA 55 of 2012* and *CA 288 of 2008*. Against the respondents and their agents. (d) That the Hon. Supreme Court order the High Court and the Court of Appeal to allow the appellant/applicant to appear and participate as an interested party, in all the suits affecting the listed properties which are the subject of these suits.

(h) That the Supreme Court grant the appellant/applicant (Decree Holder) the cost of this application and or appeal, the relative applications/suits in the High Court and Court of Appeal, against the respondents and any other relief the Hon. Court deems fit, fair and just to grant the appellant applicant against the respondents, to facilitate the enforcement and execution of the listed court orders and decrees.

3. The application was supported by an affidavit sworn by the applicant on 23rd June, 2015. The matter was canvassed before the Court on 22nd November 2016 with the applicant appearing in person. The crux of his case was that he is a victim of injustice and was seeking the intervention of this Court as he has been denied justice by the superior courts. He submitted that where the lower courts have been unable to execute a decree, the Supreme Court should be able to come in and resolve the issue. The applicant's case is well captured in the prayers sought in his application re-produced verbatim above. His oral submissions buttressed the prayers he had stated in the application.

4. Learned Counsel Mr. Mugambi appeared for the 1st respondent, HFCK Ltd, and submitted that the application, for whatever it is, was pre-mature, misplaced and a waste of the Court's time. He urged that the Court has no jurisdiction. Counsel submitted that the application was not clear on the prayers being sought by the applicant. It was his submission that there was no appeal whatsoever pending before the Court of Appeal and there was no specific decision of the court(s) being appealed against. He urged that the applicant should not be let to take advantage of this Court and jump the courts hierarchy. He prayed that the application be dismissed with costs.

5. The 4th and 5th respondents filed what they described as a 'summary report on the suit'. It is in this summary that this Court is able to decipher the background of the cause of action. The litigation journey herein sprung from divorce proceedings between the applicant, Michael Mungai and his estranged former wife Nancy Wanjeri in Chief Magistrate Court Divorce case No. 122 of 1997. During the subsistence of their marriage they took out a facility with Housing Finance Company (K) Limited to purchase a home: LR. No. Nairobi Block 111/530. This transaction must have been frustrated with the consequence that Taifa Auctioneers, 3rd respondent, were instructed by the 1st respondent, in exercise of its chargee's power of sale, to sell the property with the consequence that the property was sold to 4th respondent through a public auction financed by the 5th respondent, Kenya Commercial Bank.

6. This sale aggrieved the applicant herein who filed a suit (a plaint) dated 5th July, 2001. It appears that since then, the matter has been heard severally by both the High Court and the Court of Appeal where several rulings and judgements have been delivered. It is also apparent that in most cases, if not all, the applicant, Michael Mungai has been on the losing side of these courts' pronouncements. Where he has felt so aggrieved, he has moved to the next court on appeal or filed another motion or matter. His grievance and long journey has now brought him before this Court where he filed this application.

7. It is the 4th and 5th respondents' submission that this is a vexatious suit and a mockery of justice. The respondents submitted particularly that: this Honourable Court my lord has the power and authority to put an end to this mockery of alleged justice and save its time by dealing with other justiciable cases that are brought before it. This Honourable Court can further order that future applications as prepared by the plaintiff should not be served on parties who are not parties to the suit as the same is tantamount to harassment in its very least.

8. In an attempt to determine the matter before this Court, we have asked ourselves severally: what is before us? What cause of action is being pursed herein by the applicant? While the Supreme Court was created by *the Constitution* 2010 as the epitome of justice in our judiciary hierarchy, its jurisdiction

is particularly provided for by Article 163 of *the Constitution*. The Court is given a specific mandate and its creation was not meant to open a pandora's box for all manner of applications, even where the cause of action is not discernable.

9. Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books. In Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others, Sup. Ct. Petition No. 27 of 2014; [2014] eKLR, this Court observed that it can only do justice within the legal framework:

    (16) This Court can only assume jurisdiction bestowed to it by *the Constitution* and/or Statute. Just as in the S. K. Machariacase, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant's pestering. The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court."

10. It is on this background that as a Court we have tried to dissect the cause of action by the applicant that warranted him moving this Court, and whether he indeed properly moved this Court. The 'suit' as presented before this Court is one that is quite cumbersome to decipher. Outrightly no proper pleading(s) has been presented before this Court. We say so as the document before us has Mr. Michael Mungai describing himself as 'an appellant, an applicant and a decree holder' all at the same time. The 'respondents' are described as 'respondents, intruders, and transferee lite pendent'. With such a description of the parties, the Court is at a loss as to what cause of action is before it. What is the nature of the application before this Court? This application is neither an interlocutory application as provided for under section 24 of the *Supreme Court Act* and Part IV, on applications, of the Supreme Court Rules, 2012; nor is it an application under Rule 53 of the Court Rules, for extension of time. Finally, it is not an application for review of certification under Article 163(5) of *the Constitution*, as read together with section 15 of the Act. Prima facie this is the regime that governs applications that come before this Court. Applications falling outside these parameters cannot rightfully lie before this Court.

11. We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of *the Constitution*, as mere technicalities. Before a Court of law can invoke Article 159 of *the Constitution* and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of Raila Odinga v I.E.B.C & Others (2013) eKLR, this Court said that Article 159(2)(d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of *the Constitution* for the question, what is it that is before us? remains unanswered.

12. A perusal of the orders sought reveals that most of these orders, if not all, cannot be granted by this Court. The applicant prays that this Court invokes its constitutional, special and general powers to

extend time and allow him to come directly to the Supreme Court. We reiterate that extension of time as an equitable remedy is well founded in law as the maxim goes: equity follows the law. The power of this Honourable Court to extend time as enshrined in Rule 53 of the Court Rules can only be exercised within a precise legal framework. The principles for consideration by the Court in exercise of this power were settled in Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & OthersSupreme Court Application No. 16 of 2014(The Nick Salat case). The Court acknowledged that extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. It should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised.

13. Hence there is no any other special or general power that this Court has to extend time and allow a litigant to subvert the judicial hierarchy of the courts in our legal system at the pretext of doing justice. Justice is sought and delivered within the set down legal parameters. This Court will not contravene the judicial hierarchy which is at the core of our judicial independence and competence in decision making as expounded in the Peter Oduor Ngoge v Francis Ole Kaparo & others [2012] eKLR case thus:

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

14. The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in Article 163(3) of *the Constitution*. One cannot ask the Court to exercise its powers in a carte blanche manner. A litigant's plea must be precise and targeted. One cannot make omnibus prayers to the Court with the expectation that the Court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the Court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy.

15. Equally, it is very preposterous to ask the Supreme Court to consolidate matters not before it. The applicant prays that this Court consolidates several matters in the High Court and Court of Appeal and proceeds to make/give some orders. Consolidation is a legal process done by a court of competent jurisdiction when it is seized of more than one matter, which matters spring from the same cause of action but filed by different parties or involves other parties too. The matters are consolidated and heard together so as to save judicial time and also avoid the courts giving conflicting judgements in similar matters. A party cannot ask a court of law to consolidate matters not before it. The applicant before us asks this Court to consolidate matters and yet, before this Court is only this single application. This prayer is prima facie a total abuse of the process of this Court not withstanding it being frivolous. What else is before this Court that it can consider consolidating?

16. The applicant also seeks that this Supreme Court directs the High Court to make some orders. We would like to state that the Supreme Court is not a court bestowed with supervisory jurisdiction like the High Court under Article 165(6) of *the Constitution*. It is only the High Court that in exercise of its supervisory jurisdiction can be requested, and where meritorious, order a subordinate court or

a tribunal one way or the other, but within the law. The applicant prays that this Court orders the High Court to issue him with decrees and certificates of filed costs. Unless and until those issues come through the appellate judicial hierarchy, the Supreme Court cannot compel the High Court to issue and make such orders. This Court is not a taxing master for the High Court.

17. In a nutshell, the applicant must be told in firm terms that we find no legitimate, cognizable and sound prayer in the prayers sought that this Court can consider and grant. Access to justice as a principle enshrined in *the Constitution* is not a blank cheque for all and sundry to bring all manner of 'applications' and 'matters' before the Court. Courts are constitutional creatures and exercise that jurisdiction only bestowed to them by the law (See Samuel Kamau Macharia & another V Kenya Commercial Bank Limited & 2 others [2012] eKLR). While the applicant comes at the disguise of seeking access to justice, the truth is that this application, because of being vexatious and frivolous, impedes the access to justice of others by clogging the judicial system and taking up this Court's precious judicial time that it would have used to hear other litigants with legitimate causes of action.

18. This Supreme Court was not established as a Court where all manner of grievances and disgruntlements are to be entertained. To allow such a window to be open will itself defeat the purpose for the creation of the Court as provided for in *the Constitution* and particularly in section 3 of the *Supreme Court Act*, which outlines the objectives of the Court.

19. In the Yusuf Abdalla case, this Court expressed its desire to have the Rules of the Court amended so as to empower the Registrar of the Court to refuse to admit matter for filing in this Court which matters are prima facie frivolous, defective and an abuse of the Court process. The Court stated thus, [paragraph 24]:

> "Finally, this matter has brought to the fore the glaring lacuna in the *Supreme Court Act* and Rules. Judicial time is very precious and should not be wasted by a judge or judges of the Court sitting at the preliminary stage to determine whether a matter has met the prima facie jurisdiction threshold to be admitted to the Supreme Court. Time is now ripe for an amendment to the Act and Rules of this Court to cure this malady. The Registrar of the Court should be empowered to be able to assess cases before filing or even after filing and dismiss matters that do not fall within the four corners of the Supreme Court jurisdiction. I recommend that the Parliament and/or Rules Committee move with speed to implement such an amendment if not for good order then for the preservation of judicial time and for the dignity of this Court. The wheels of justice at the Supreme Court should not be clogged by matters that should not have been admitted in the first place."

20. The amendments could not have come timely. On 29th January, 2016, the Chief Justice gazetted the Supreme Court (Amendment) Rules, 2016. The amendments introduced Rule 4A thus;

Role of the Registrar

4A. (1) The role of the Registrar shall be to-

(a) schedule matters filed before the Court for a scheduling conference in accordance with rule 15;

(b) decline to admit pleadings that are not in accordance with *the Constitution*, the Act, the relevant rule or the Court's Practice directions for filings;

(c) where the Registrar considers it fit and just to do so, impose sanctions or order costs against a party who does not comply with the directions of the Court and causes unnecessary delay by way of adjournments; and

(d) fix matters for hearing in consultation with the Chief Justice.

21. It is now crystal clear that under the Rules of the Court, the Registrar has the power to refuse to admit matters such as this one before us. This application as presented and filed before this Court offends *the Constitution*, the Act, and the Rules and Practice Directions of this Court. It should not have been accepted by this Court. It smacks of abuse of court process and waste of judicial time. And it should be referred to for what it is: a frivolous and vexatious application.

22. The vexatious and frivolous nature of this 'application' is also evident in the law under which it is brought. The applicant states that the application is brought under Articles 10, 21, 22, 23, 27, 3, 31, 35, 40, 46, 47, 48, 50, 158, 159, 163, 164, 165 & 259 of *the Constitution* of Kenya, as read with the Chief Justice Constitutional *Legal Notice No. 117 of 2013* rules 3, 5, 7 & others, sections 17, 21, 23 and others of the Supreme Court of Kenya rules, sections 3, 3s & 3b, 41 & 74, 103 and others of the *Appellate jurisdiction Act*, Cap, sections 60, 74, 77, 104 (2) of the TPA, sections (7, 34, 43, 61 & 78) of the repealed LTA Act Cap 282, repealed RLA Cap. 300 (sections 30, 108, 109, 138, 143 and others and RTA CAP 281, sections (2, 23, 24, 34, 38, 48, 53, 61, 75, 78, 83 & 84 and others together with sections (1a & 1b, #, 3a & 3b, 80, 91 & 92 and Orders 22, 42, 43, 45 and others of the Civil Procedures Act, Cap. 21 and other enabling powers of the Statute and law. How frivolous can this be?

23. In the case of Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone, Supreme Court, Application No. 4 of2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is *the Constitution*, the *Supreme Court Act* and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the *Supreme Court Act*. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none.

24. Seven years after the promulgation of *the Constitution* in which the Supreme Court was created, we believe that the parameters within which this Court exercises its various jurisdictions have now been de-alienated and are now known to all litigants. While previously this Court has admitted for filing matters and applications, with the notion that it is to find the 'proper footing' and setting the boundaries for the Court's jurisdictional operations, we believe that time has come when this Court has to assert its authority and be taken serious. We take note of the amendments that have been made to the Court Rules in which the Registrar has been given powers to reject frivolous documents coming to this Court. It is our hope that that power will be exercised not whimsically, but judiciously, assertively and authoritatively. An application such as this one should not be allowed for filing in this Honourable Court. No justice can be said to be denied by the Registrar of the Court acting within the law to shield and protect the sanctity and dignity of this Court from being clogged with frivolous applications.

25. We believe we have said enough to demonstrate that the application before us is for striking out, which we hereby do with costs to the respondents.

Orders accordingly

DATED AND DELIVERED THIS 26TH DAY OF JANUARY, 2017 AT NAIROBI

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this a true copy of the original

Registrar, Supreme Court of Kenya