REPUBLIC OF KENYA

IN THE SUPREME COURT

(Coram: Mutunga CJ & P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ.)

CIVIL APPLICATION NO. 11 OF 2016

– BETWEEN –

THE HON. LADY JUSTICE KALPANA H. RAWAL……...…..APPLICANT

– AND –

1. JUDICIAL SERVICE COMMISSION .....RESPONDENT

2. THE SECRETARY, JUDICIAL SERVICE COMMISSION.....RESPONDENT

– AND –

OKIYA OMTATA OKOITI…….....INTERESTED PARTY

– WITH –

1. INTERNATIONAL COMMISSION OF JURISTS

2. KITUO CHA SHERIA

3. LAW SOCIETY OF KENYA ……..…AMICUS CURIAE

CIVIL APPLICATION NO. 12 OF 2016

(Coram: Mutunga CJ & P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ.)

– BETWEEN –

HON. JUSTICE PHILIP K. TUNOI …….....APPLICANT

JUSTICE DAVID A. ONYANCHA …….....APPLICANT

– AND –

JUDICIAL SERVICE COMMISSION.....……..RESPONDENT

THE JUDICIARY.....…….RESPONDENT

– AND –

OKIYA OMTATA OKOITI……..…….. INTERESTED PARTY

– WITH –

1. INTERNATIONAL COMMISSION OF JURISTS

2. KITUO CHA SHERIA

3. LAW SOCIETY OF KENYA .....AMICUS CURIAE

THE RULING BY THE HON. JUSTICE (PROF.) J.B. OJWANG

A. INTRODUCTION

[1] In the background to a multi-faceted set of claims, lies a cause emanating from both applicants, who are Justices of Kenya's apex Court. It is emerging distinctly at this preliminary stage, marked by threshold applications and objections, that *an ultimate interpretation of the Constitution of Kenya, 2010 is being sought:* regarding the lawful period of service of those Superior Court Judges who were already duly appointed and were in service under the earlier Constitution [the Constitution of Kenya 1969], and who then continued in service under the Constitution of Kenya, 2010. It is clear that the applicants have taken the position that the new Constitution had safeguarded their service and benefit rights derived from the earlier Constitution. And it is definitely the case, that both the High Court and the Court of Appeal have held in perfect unanimity, that the applicants have *no such rights*. Now apprehending forfeiture of rights, of safeguards, and of benefits, the nature and scope of which are the subject of *constitutional delineation,* the applicants are invoking *the final judicial competence, held by this Supreme Court.*

[2] However, the respondents have left nothing to chance, controverting and challenging the applicants' path towards the ultimate resolution of the *fundamental issues of constitutional interpretation and application*, before this Supreme Court. This explains the appearance of a plethora of participants in this matter, each coming to advance some preferred standpoint in policy, law or principle.

[3] The stage is set for a resolution through a mandate which, by the terms of the Constitution of Kenya, 2010 devolves to the plane of adjudication by the Judiciary. I have had occasion to articulate this principle in my work, ***Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*** (Nairobi: Strathmore University Press, 2013) (p.41), in the following terms:

> *"While the Constitution requires all State organs to perform their part in giving fulfilment to the Constitution, the ultimate arbiter is the Judiciary, which has unlimited powers of interpretation. Interpretation of the Constitution and of any law,* ***is far-removed from a condition of violence, tumult, or hurt to anyone, as the Judiciary's operations are minutely governed by known law and procedure; and this justifies the standing of the judicial function as the essential underpinning of the new constitutional dispensation"*** [emphasis supplied].

[4] Is this Supreme Court, in all the circumstances of the matter herein, the proper repository of the ultimate judicial competence to resolve the controversy which has arisen between two private citizens (the applicants), on the one hand, and the public, State agency, which is the Judicial Organization?

[5] As this matter centres upon the Judiciary itself, which I had typified (*op.cit.*, p.44) as "the core agency in the maintenance of constitutionalism…, armed with independence, as the foundation of its exercise of….competence…, part of the armoury of constitutionalism", the *matter now before this Supreme Court stands out as one of utmost gravity, with a fateful place in the evolution of a civilized constitutional*

order.

B. MOVING HE SUPREME COURT: PRELIMINARIES

[6] Following the delivery of the Court of Appeal's Judgment of 27th May, 2016 the applicants, in accordance with Rule 26 of the Supreme Court Rules, 2012, came before *Lady Justice Njoki* who, on that occasion, issued conservatory Orders pending the filing of appeals for an ultimate determination by this Court. But three days later, the Hon. The Chief Justice, allegedly by virtue of administrative competence, and moving *suo motu*, publicized a variation to the Order of the single Supreme Court Judge, which related to *inter partes* hearing of the earlier application for conservatory Orders – bringing forward that date to 2nd June, 2016. This forms the background to the various preliminary applications and objections that are the subject of the Ruling herein.

[7] Specifically, an applicant filed an objection to the Chief Justice's Orders aforesaid; an interested party filed a preliminary objection to those very Orders; a respondent filed an application seeking the setting aside of the single Judge's Orders of 27th May, 2016; an *amicus curiae* filed grounds of opposition to the first applicant's preliminary objection.

[8] Over a period of several days, the Supreme Court heard the various claims, even though some are still outstanding. With the preliminary claims thus running in parallel, and with a potential strife in the mode of disposal becoming real, the Court, upon hearing counsel on this issue, gave guidance by its Order of 10th June, 2016: the two preliminary objections in Application No. 11 of 2016, and the one in Application No. 12 of 2016, to be determined in today's Ruling – *this to settle the question whether and how the Supreme Court would entertain the real causes brought forth by the primary litigants: the Hon. Lady Justice Kalpana H. Rawal; the Hon. Justice Philip K. Tunoi; the Judicial Service Commission.*

B. RESOLVING THE PRELIMINARY QUESTIONS

(i) Civil Application No. 11 of 2016: Preliminary Objection to Chief Justice's Order of 30th May, 2016

[9] The applicant field a notice of preliminary objection to the expedited hearing scheduled by the Chief Justice in his Orders of 30th May, 2016.

[10] Canvassing the said objection, learned counsel, Mr. Kilukumi submitted that the Chief Justice's Order was null, insofar as the administrative authority which it invoked, could not permit the variation of the proper judicial Order already made by the single Judge, granting stay of the Orders of the Appellate Court, and setting a date for *inter partes* hearing. Counsel submitted that a party who was dissatisfied with the single-Judge decision under Section 24(1) of the Supreme Court Act, had just one opening: securing a hearing of the matter by a five-Judge Bench under s.24(2) of the said Act; and the Chief Justice as a single Judge, acting *suo motu*, had no capacity in law to effect a variation of the Orders in force. Learned counsel submitted that the administrative powers of the Chief Justice, while enabling him to take certain actions in general case management, conferred upon him no authority to intervene in the exercise of judicial discretion by Judges.

[11] Learned counsel relied on comparative case law, to buttress the argument that the constitutional concept of the independence of the Judiciary secured the independence of the Judge in the determination of a case, from those entrusted with administrative responsibilities, as well as from the influence of other Judges – and that this independence was secured by the individual Judge's oath of office.

[12] Counsel urged it to be not tenable, that there had been a special consideration of urgency such as would, in law, justify the variation of hearing date by virtue of the Chief Justice's administrative powers: for the parties themselves had not moved the Court seeking change of date, nor did a case come before a competent Bench, for a reconsideration of the earlier Orders.

[13] Among other cases, counsel relied on a decision from the United States of America, ***Calloway v.***

Ford Motor Company 189 S.E. 2d. 1972; 281 N.C. 496, in which, on the foregoing question, the Supreme Court of North Carolina thus held:

> ***"The question presented by this appeal is whether Judge Ervin, in his discretion, had authority to permit an amendment which Judge Hasty, in his discretion, had denied earlier.***
>
> ***"The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court Judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action."***

[14] The parity rule in the standing of decisions emanating from the different Judges serving on Superior Court Benches, learned counsel urged, is a meritorious one of principle, which assures that Judges honestly and dutifully perform their constitutional mandate of dispute resolution, without cowering to forces inclined to abuse their power, or to ingratiate their private predilections. He called in aid, for this principle, the Canadian case, ***Her Majesty The Queen v. Marc Beauregard*** [1986] 2 S.C.R. 56, in which the subject was thus elucidated:

> ***"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.'***

[15] Learned counsel, founding his argument on a line of judicial decisions, as well as the reflections of experts on modern judicialism, urged that this Court should countermand the administrative action of the learned Chief Justice, in the form of the Orders of 30th May, 2016 – with the effect that *inter partes* hearing of the conservatory-Orders question be reinstated to the date originally set, namely, 24th June , 2016. In that regard, learned counsel urged that this Court's view should be kept clear of unrelated, momentary situations, such as the impending retirement of the current Chief Justice.

(ii) The Preliminary Objection: Responses of Counsel

[16] Mr. Kilukumi's submissions found concurrence in those of learned counsel, Dr. Khaminwa, who recounted a long history in Kenya's judicial experience prior to the promulgation of the current Constitution – with Chief Justices arbitrarily recalling files already laid before Superior Court Judges, and issuing contrary directions. Dr. Khaminwa recalled certain recorded instances of such a kind, submitting that the affected Judges had been the subject of intimidation and blackmail, and that this undermined their independence, and impaired the cause of the rule of law, and of the principles of constitutionalism.

[17] In Dr. Khaminwa's perception, the incident which is the subject of this preliminary objection appeared to be emanating from certain active extra-judicial forces, endeavouring to pre-empt the progressive judicial-governance set-up of the new constitutional order, for private ends. Such a prospect, learned counsel submitted, would be grossly inimical to the rule of law, and to the recent achievements in constitutional governance.

[18] Learned counsel Mr. Anzala, for the Law Society of Kenya, was in support of the single-Judge Orders, urging that it takes a five-Judge Bench of the Supreme Court to reconsider the said Orders on merit. Counsel, however, shifted from the point of law and principle, urging that "clearly, the matter is extremely urgent," in light of the impending retirement of the learned Chief Justice. All the same, counsel urged that if the said Orders were to be varied, in relation to hearing-date for the conservatory Orders, then a decision to that effect is to emanate from a five-Judge Bench. Hence, learned counsel submitted, "the Chief Justice had no jurisdiction to interfere with the [single Judge's] directions and Orders"; "it may well be that it was expedient, but it was contrary to law"; "it was usurpation of the powers that vest in a five-Judge Bench"; "whatever the case, the manner of variation of these Orders was invalid"; "by Article 161, the Judiciary is subject only to the Constitution and the law"; "there is a clear dichotomy between

judicial and administrative powers"; "the Constitution donates no powers to the Chief Justice to take over the judicial powers of a Judge."

[19] Both the respondents, through their learned counsel, Mr. Ahmednasir and Mr. Kanjama, contested the preliminary objection. Senior Counsel, Mr. Ahmednasir was concerned to demonstrate that the applicant's initiative did not even amount to a "preliminary objection" in a proper sense: for it only raises a procedural question which falls short of a "pure point of law." He went on, however, to urge that the Chief Justice had broad powers beyond that of a mere figurehead and that, given his position under Article 161, he is empowered to "give directions to the Judiciary, and to all Judges." He said the Chief Justice could very well make the Orders in question, because, by the Judicial Service Act, s.5(2)(c), he exercises "general direction and control"; and so, when the Chief Justice made the Orders in question, he was giving "general direction."

[20] Mr. Ahmednasir did not limit his submissions to contesting the applicant's preliminary objection, he went further to contest the terms of the single-Judge Order of 27th May, 2016: contending that the learned Judge intruded into improper territory by bestowing upon the applicants herein "new tenure"; he maintained that stay of Orders in the Judgment should have come forth from the Appellate Court, but not from the Supreme Court; in counsel's own words: "the Order was a breach of the Constitution. This was a *coup,* in effect. It was a nullity. So a preliminary objection cannot be based on it." He contended that the preliminary objection was "being laid on something that does not exist." He asked this Court to set aside the single-Judge Orders of 27th May, 2016. Mr. Ahmednasir spurned outright the applicants' appeal cases before the Supreme Court, contending that the two Judges were already retired, as far back in time as six months ago; and so the preliminary objection was all for dismissing.

[21] And learned counsel, Mr. Kanjama urged that "the single Judge cannot determine proceedings," and that the Supreme Court is only validly constituted with a Bench of five Judges. It was his submission that the single Judge lacks authority, and can only sit "subject to directions of the Chief Justice and the Supreme Court Registrar." Mr. Kanjama urged that the Chief Justice was duly empowered to make the Orders he had made, by virtue of being head of the Judiciary, and as President of the Supreme Court in the terms of Article 163(1) (a) of the Constitution; and that he may properly exercise administrative powers in the discharge of essential tasks in the Judiciary. Counsel submitted that the Chief Justice in exercising administrative powers, duly acted in terms of Articles 10 and 259 of the Constitution; and that he had averted anarchy, by giving direction for the sitting of the Court. Counsel submitted that the instant matter, in which the Chief Justice only dealt with the "progress of hearings", was different from the position in the *Tunoi Case* in the High Court, where it had been held that the Chief Justice acted unlawfully, by purporting to consolidate cases in progress before that Court.

[22] The interested party, Mr. Okiya Omtata Okoiti, contested the applicant's preliminary objection, though on a large range of considerations that go beyond the proper basis for disposing of the objection.

[23] Mr. Omtata proceeded on his case by general argument, not limited to the defining format of a preliminary objection – especially the recognized template of the "pure point of law" (***Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd*** [1969] EA 696). He went on to incorporate evidentiary matters which should not occasion a decision, at this time: for instance, that there was urgency in stopping the single-Judge Orders; that the Chief Justice should not be reduced to a figurehead without powers; etc.

[24] Learned counsel, Mr. Kilukumi further illuminated the setting of the single-Judge Orders, by underlining their standing in law: it is the notice of appeal that paves the way for interlocutory Orders – which then have a foundation in law; there is no requirement that the appeal itself should have already been filed; the filing of the appeal itself is dependent on actions within the forum wherefrom the ultimate judicial contest proceeds; there is a proper legal setting for the invocation of the Court's discretion to grant conservatory orders – hence the single-Judge Orders rest on a proper foundation of law.

[25] Learned counsel had responses for a wide range of contentions advanced from the opposite side; for instance: the single-Judge Order granted no "new tenure" – for the workings of the Supreme Court have

continued, to-date, to include *Lady Justice Kalpana Rawal* as Justice, and Deputy Chief Justice, to-date; the rapid pace of moving the single-Judge Bench was the legal and constitutional entitlement of the applicant; this preliminary objection raises a "pure point of law," in the terms of the ***Mukisa Biscuits*** case.

[26] Mr. Kilukumi submitted that, as it was clear that the single-Judge Order was properly secured, and given by virtue of the recognized judicial competence of the single Judge, the Chief Justice's varying Orders had no basis in law, quite apart from standing out as an affront to the constitutional principle of the independence of Judges.

[27] Learned counsel submitted that the Chief Justice, as he exercises his administrative powers in that capacity, lacks competence to reverse to any extent, the judicial Orders already made by another Judge.

F. FINDINGS

[28] The essential issues, including the background, the legal issues, the assertions and arguments of the participants, emerge clearly from the foregoing paragraphs. The applicants object to the Chief Justice's Orders of 30th May, 2016 – because they contradict the single-Judge Orders of 27th May, 2016. The legal foundation of the single-Judge Orders is crystal-clear; and contests of them emerge only as general lines of persuasion, by no means anchored in succinct bases of law, or established authority. *The argument that the sustenance of single-Judge Orders is an integral outflow from the fundamental constitutional principle of judicial independence, is beyond question.*

[29] In contrast, the Orders of 30th May, 2016 can only claim an argued, and general rationale – one that cannot transcend the crisp points of law attendant upon the earlier Orders.

[30] *It follows, as a matter of judicial integrity, that it is the Orders of 30th May, 2016 that must be held to give way to those of 27th May, 2016.*

[31] *Accordingly, I hereby uphold the single-Judge Orders of 27th May, 2016. I allow the objection to the later Orders, strike them out, and direct, subject to the position of the Bench-majority, that there shall be a hearing of the applicants' interlocutory applications, as ordered by the single Judge on 27th May, 2016.*

[32] I would order that the costs herein shall abide the disposal of the said applications and/or subsequent proceedings.

DATED and DELIVERED at NAIROBI this 14th day of June, 2016.

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THE HON. JUSTICE (PROF.) J.B. OJWANG

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR, SUPREME COURT