

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PETITION NO. 6 OF 2012

MENGINYA SALIM MURGANIAPPELLANT

VERSUS

KENYA REVENUE AUTHORITYRESPONDENT

AND

(Being a Petition for Review of the Judgment and Order of the Court of Appeal of Kenya (Omolo, Waki and Nyamu JJA) in the Civil Appeal No. 108 of 2009 delivered on 16th July 2010, arising from the judgment and decree of the High Court of Kenya at Nairobi, Ojwang J, delivered on 22nd September 2008)

KENYA REVENUE AUTHORITYAPPELLANT

VERSUS

MENGINYA SALIM MURGANIRESPONDENT

DIRECTION/RULING

In this Petition dated 18th June, 2012 the Petitioner seeks an order:-

“To set aside the decision of the Court of Appeal in Civil Appeal No. 108 of 2009 in its entirety and instead thereof reinstate the Judgment of the High Court in the HCCC NO. 1139 OF 2002 delivered on 22nd September 2008”

The Petition is brought under the provisions of Article 14 1(b).
Section 14 of the Supreme Court Act 2011 provides as follows:-

“(1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion

or on the application of any person, review the judgment and decisions of any judge-

- (a) Removed from office on account of a recommendation by a tribunal appointed by the President, whether before or after the commencement of this act; or

No.2 of 2011

- (b) Removed from office pursuant to the Vetting of Judges and Magistrates Act, 2011 or
- (c) Who resigns or opts to retire, whether before or after the commencement of the Act, in consequence of a complaint of misconduct or misbehavior.”

On the basis of Subsection (2) thereof, to qualify for review under subsection (1) the Judgment or decision shall have been the **basis** of the removal, resignation or retirement of, or complaint against, the judgment.

In this Petition, the Petitioner contends inter alia that:-

- “(15) On 15th December 2011, your petitioner herein lodged a complaint with the Judges and Magistrates Vetting Board against Hon. Justice Riaga Omolo, Hon. Justice Joseph Nyamu and Hon. Justice Philip Waki relating to their conduct in Civil Appeal No. 108 of 2009.
- (16) On 25th April 2012, the Judges and Magistrates Vetting Board handed down its report and determination in which it determined that Hon. Justice Riaga Omolo and Hon. Justice Joseph Nyamu were unsuitable to continue serving as Judges in the judiciary. Specifically at page 11 paragraph 4 of the report (page 112 of the Record) the Board said follows

“Another complaint alleged inconsistency in the manner in which the judge dealt with two separate cases involving employment rights, an inconsistency, it was said, that could be explained only by unprincipled pro-employer bias. The Board was not persuaded that the two cases could be reconciled in the manner argued for by the judge; and could appreciate why employees could feel that they could not rely on the courts for fair and consistent treatment. It was also disputed by the judge’s apparent lack of capacity for introspection and objective analysis in the matter.”

Your Petitioner asserts that this passage refers specifically to his complaint against Hon. Mr. Justice Riaga Omolo and Hon. Justice Nyamu and was one of the reasons for their removal from office.”

The Supreme Court in exercise of its powers under this special jurisdiction in Article 14 is required to:-

- “(3) (a) Conduct a preliminary enquiry to determine the admissibility of the matter; and**
- (b) Have all the necessary powers to determine the review under this section, including calling for evidence.”**

As a result, the court fixed this matter for directions on 3rd July, 2012. In the course of submissions, the court inquired as to the implications of the fact that the said Honourable Justices of Appeal, Hon. Justice Riaga Omolo and Hon. Justice Nyamu had applied for review of the decisions of the

Vetting Board under the provisions of Section 22 (1) of The Judges and Magistrates Vetting Board Act which provides as follows:-

“(1) A judge or magistrate who has undergone the vetting process and dissatisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under section 21(1)”

It was not in dispute that, indeed, the said Honourable Judges had filed applications for review and the Board is yet to make or pronounce its decisions.

The court heard brief submissions on the issue. This court is of the view that even before the conclusion of a preliminary enquiry to determine the admissibility of this petition for hearing, the question or implications of the pending applications for Review before the Vetting Board is a matter that must be resolved at the outset.

Under the provisions of Section 22 (3) of the Act, the decision of the Vetting Board on the review application is said to be final. It provides:-

“(3) The decision by the Board under this section shall be final”

As a result of it, it would appear at this stage that the Judges may have no recourse to the Courts if their applications are rejected. As stated, however, this is only a prima facie perception as that question may perhaps be contested in the future, we do not know.

In the circumstances therefore it is imperative that there is no pre-emption or prejudice of the fair and just consideration of the Review application by the Vetting Board. The Vetting Board is an Independent Tribunal and it should be allowed to conduct its functions/duties without being interfered with unless the matter is expressly or directly brought to the courts subject of course to the question of jurisdiction. Of greater importance is that and this in our view, that there should be no interference or fetter of the rights of the two Judges in respect of the pending review proceedings under the Vetting Act. Our view is underpinned by the provisions of the Constitution and principles of Natural Justice.

If the review of process is the only available appellate process, as suggested by the Act, then the more reason that the Vetting Board's deliberations are not interfered with or prejudiced by setting down this Petition for hearing or otherwise.

We hold that it is premature to give any directions towards the hearing of the Petition in the circumstances. We therefore order that any further proceedings in the Petition awaits the conclusion of Review process before the Vetting Board in respect of the two Honourable Judges. The matter is stood over generally. Costs shall be in the Petition. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2012

P.K. TUNOI
JUDGE OF SUPREME COURT

M.K. IBRAHIM
JUDGE OF SUPREME COURT

**I certify that this is
a true copy of the original**

Registrar Supreme Court