

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
APPLICATION NO. 11 OF 2016

(Coram: Mutunga CJ-P, Ibrahim SCJ, Ojwang SCJ, Wanjala SCJ, Njoki SCJ)

HON. LADY JUSTICE KALPANA RAWALAPPLICANT

—AND—

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE SECRETARY JUDICIAL SERVICE

COMMISSION.....2ND RESPONDENT

OKIYA OMTATA OKOITI.....INTERESTED PARTY

INTERNATIONAL COMMISSION

OF JURISTS.....1ST AMICUS CURIAE

KITUO CHA SHERIA.....2ND AMICUS CURIAE

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

(Being an application for issuance of conservatory orders in respect of the judgement and Order of the Court of Appeal delivered on the 27th May, 2016 by the Court of Appeal (Hon. Justice GBM Kariuki, Hon. Justice Milton Asike Makhandia, Hon Justice William Ouko, Hon Justice Patrick O. Kiage, Hon. Justice Kathurima M'inoti, Lady Justice Jamilla Mohammed, Hon Justice Prof. Otieno-odek) in Civil Appeal No. 1 of 2016.

RULING

A. INTRODUCTION

[1] The Applicant in this matter is raising a preliminary objection challenging the legal basis of directions in this matter, issued by the Chief Justice on 30th May, 2016.

B. BACKGROUND

[2] The Applicant's appeal to the Court of Appeal challenging the retirement age of Judges was dismissed. The Court of Appeal's judgement delivered on 27th May, 2016 upheld the High Court's judgment in declaring that the retirement age of all judges serving on the effective date of the *Constitution of Kenya 2010*, is 70 years. Aggrieved, the Applicant sought *ex parte* conservatory orders in this Court. Njoki SCJ on 27th May, 2016 granted the conservatory reliefs. Thereafter, the Chief Justice gave the following directions:

“CORAM:

MUTUNGA CJ & PRESIDENT

DIRECTIONS

[1] I have perused the Orders in this application granted Ex-parte by Njoki SCJ on May 27, 2016.

[2] The said Orders were granted under an application that sought to be certified urgent and be admitted for hearing on a priority basis.

[3] Njoki SCJ made the certification of urgency, granted interim orders, and fixed hearing inter-partes on Friday June 24, 2016.

[4] Granted the urgency under which the hearing of the application was sought and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and President of the Supreme Court to fast track the hearing of the application.

[5] My directions are therefore as follows: (1) The registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-partes before a 5 judge bench of the Supreme Court on Thursday, June 02, 2016 at 10.00am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow,

***May 31, 2016 at 10am before Wanjala and Njoki
SCJJ.***

[3] These directions prompted the applicant to file the instant preliminary objection.

C. PARTIES' RESPECTIVE CASES.

(i) The Applicant's case

[4] Mr. Kioko Kilukumi for the Applicant disputed the lawfulness of these directions. He gave a brief background to this matter. He pointed out that on 27th May, 2016 the Court of Appeal delivered its Judgement in the Applicant's matter. He submitted that he promptly filed an application under a *certificate of urgency* before this Court seeking stay of execution pending appeal. He submitted that the matter was placed before the duty Judge, Njoki SCJ. He urged that he sought for the Court to grant an order of temporary stay, *ex-parte* pending an *interpartes* hearing within 28 days. The Court in allowing the *ex-parte* application declined the period requested for, which was 28 days, and ordered for the application to be heard on 24th June, 2016.

[5] He urged that on 30th May, 2016 the Chief Justice issued the aforestated directions, which were unconstitutional, outrightly, illegal and unlawful. He contended that the directions were derived from a nebulous source described as 'administrative powers of the Chief Justice and President of the Supreme Court.' He urged this Court to determine the issue as to whether an administrative direction – even by the Chief Justice himself – can override a judicial decision. Counsel submitted that the Chief Justice had neither legal power nor authority to act *suo motu* so as to vary an order issued by any Judge of the Supreme Court under section 24 (1) of the Supreme Court Act.

[6] Mr. Kilukumi urged that in accordance with Section 24(1) and (2) of the Supreme Court Act, 2011 a person aggrieved by the decision of the single-judge bench ought to have applied for review of the decision by a five-judge bench. He submitted that none of the parties sought for the Chief Justice to exercise his administrative powers and bring forward the hearing date. This act of moving *suo motu*, he urged, was improper considering that: firstly, it had the effect of interfering, altering and/or varying a single Judge's orders, and secondly, that the Chief Justice is a member of the 1st Respondent in this matter.

[7] Counsel urged that the directions violated and eroded the independence of Judges enshrined in Article 160(1) of the Constitution. He contended that neither the Constitution nor the Supreme Court Act confers powers on the Chief Justice to alter or vary the decisions of a single Judge of the Court. Counsel urged that judicial independence is sacrosanct; that in a collegiate bench, other judges must not be made to feel subservient and that there is a distinction between discharge of administrative functions and of judicial functions. Counsel reinforced these arguments with numerous local and foreign authorities namely; *The administrative Authority of Chief Judicial Officers in Australia-Kathy Mack and Sharyn Roach Anleu*; *Judicial independence and the Role of the Chief Justice, Powers, Limitation and Challenges, Hon. Z Vertes-President of the commonwealth Magistrates and judges Association (2012-2015)*; *the Role of the Chief Justice-Professor the Honourable David K Malcolm AC KCSJ*; *the Culture of Judicial Independence; Conceptual foundation and Practical Challenges-Simon Shetreet and Christopher Forsyth*; ***Re Colina; Ex Parte Torney*** [1999] HCA 5721 October 1999 m85/1998; ***Phillip K Tunoi & 2 Others v Judicial Service Commission & another*** [2015] eKLR para 70 of the Ruling; ***Justice Alliance of South Africa (JASA) v President of the Republic of South Africa and others*** [2011] ZACC 23. Para 82; ***In Re: the Marriage of Donna and Mark Oliverez***, H040955; ***Calloway v Ford Motor Company***, 281

N.C. 496, 189 S.E 2d 484 (1972); the Queen v Beauregard, [1986] 2 S.C. R. 56; R v Lippe [1991] 2 S.C. R 114; Canada (Minister of Citizenship and Immigration) v Tobiass, [1997] 3 SCR 391; The Bangalore Principles of Judicial Conduct and United Nations Basic Principles on the Independence of the Judiciary.

(ii) Kituo cha Sheria's case (2nd Amicus Curiae)

[8] Counsel for the 2nd *Amicus Curiae* Dr. Khaminwa submitted that Mr. Kilukumi raised issues of paramount importance that go beyond Kenya and take an international dimension. He urged the Court to take into account the history of the Judiciary. He reminded the Court of former Chief Justice James Wicks who once took a file from a Judge in Kisumu while the matter was part heard. He urged that this was contrary to judicial ethics. He also made reference to a matter in which he was involved which was fixed for hearing before Justice Cotran but the Chief Justice ordered the file to be transferred to Justice Hancox. He submitted that this was contrary to judicial independence which must be protected at all costs.

[9] Dr. Khaminwa contended that blackmail trends were creeping into the Judiciary reminiscent of the times of Chief Justice Wicks. He urged

that the Court must not allow this to happen and submitted that the Rule of Law must be maintained. Counsel urged that the Chief Justice might have made the directives in good faith but it was wrong and contrary to law. He urged this Court to quash the directives issued by the Chief Justice to serve as a lesson to all other Chief Justices in the future.

[10] Dr. Khaminwa's co-counsel Ms. Jennifer Shamalla adopted both Mr. Kilukumi's and Dr. Khaminwa's submissions. She urged that the people of Kenya did not give the Chief Justice powers to make or issue directives to vary a Court Order. She urged that a Court can only vary a Court Order *suo motu* pursuant to Section 14 of the Supreme Court Act, 2011. Kituo cha Sheria, however, withdrew from the suit before judgment was delivered.

(iii) LSK's Case (3rd Amicus Curiae)

[11] Counsel for the Law Society of Kenya Mr Masika urged that Njoki SCJ had jurisdiction to sit pursuant to Section 24 (1) of the Supreme Court Act, 2011 particularly if it was established that there was a Notice of Appeal on record. He contended that the directions by the Chief Justice may have been the right thing to do, given the urgency of the matter, but that nonetheless they were unlawful. He urged that the Chief Justice usurped

the powers of a five-judge bench as set out in Section 24 (2) of the Supreme Court. He submitted that pursuant to Article 161(1) the Judiciary is subject only to the Constitution and the law.

(iv) 1st and 2nd Respondents' case

[12] Senior Counsel Ahmed Nassir for the 1st and 2nd Respondent opposed the application. He urged that the preliminary objection raised by the applicant was not strictly speaking a preliminary objection since it did not raise a point of law pleaded. He submitted that the preliminary objection raised a procedural issue as to whether the matter should be heard or not. He urged that that there was no proper appeal before Njoki SCJ since the applicants had not filed a petition of appeal before the Court. Further, he urged that the order of the single judge gave the applicant a new tenure as Deputy Chief Justice since there was no stay by the Court of Appeal. He contended that it was a constitutional transgression that the application was premised on Article 163(4)(a) of the Constitution which relates to an appeal but not a notice of motion such as the one in this matter. Therefore, he urged, the orders made by the single Judge were granted outside the law.

[13] Counsel urged that the Chief Justice is empowered by the Constitution, the Supreme Court Act and the Judicial Service Act to direct that a matter be heard on a priority basis. He contended that the stipulation by Article 161 of the Constitution that the Chief Justice is the head of the Judiciary, he is the “*real head*” and not merely an executive head. Counsel cited Section 5(1) of the Judicial Service Act, which echoes the contents of Article 161 (2) (a) of the Constitution that the Chief Justice is the head of the Judiciary. He urged that pursuant to Section 5(2)(c) of the Judicial Service Act the Chief Justice exercises general direction and control over the Judiciary.

[14] Ahmed Nassir’s co-counsel, Mr. Kanjama submitted that Article 172 mandates the 1st and 2nd respondents to promote independence and accountability. He urged that accountability is a demand under Article 159(2) while independence is under Article 160 of the Constitution. He submitted that judicial officers must be accountable and judicial independence is never absolute. He urged that the same is constrained by demands of good judicial governance. He contended that the directions of the Chief Justice created the right balance between independence and accountability.

[15] Counsel submitted that that the Chief Justice's administrative powers are derived from Articles 161 (2), 163 (1) (a) of the Constitution and section 6 of the Supreme Court Act and Rules 4 of the Supreme Court (Amendment) Rules 2016.

[16] He contended that disallowing the Chief Justice to exercise these powers would put the Judiciary in a state of anarchy. Counsel also contended that all the authorities cited by the applicant could be distinguished from the present case and were not *pari materia*. Counsel urged that the applicant has not shown that any reasonable prejudice has been suffered as a result of the direction by the Chief Justice. It was Mr. Kanjama's submission that the Chief Justice has administrative powers over all levels of courts and that under Section 10 of the Supreme Court Act, 2011, the Registrar is answerable to the Chief Justice.

(v) Interested party's case

[17] The interested party associated himself with the views of the 1st and 2nd Respondent. He also submitted that in light of mandatory provisions of Article 163(8) of the Constitution, this Court is empowered to make its own rules and therefore the Supreme Court Rules outrank the Supreme Court

Act. He also submitted that Njoki SCJ exceeded her mandate by fixing an *inter partes* hearing date as she should have left the matter for the registrar to fix.

(vi) ICJ (1st Amicus Curiae)

[18] ICJ Kenya who was the 1st *amicus curiae* in this matter curiously chose not to address the Court on this matter, despite ICJs international reputation, publications and works on the independence and accountability of judges' world-wide.

(vii) Rejoinder

[19] In response, Mr. Kilukumi submitted that he filed all the requisite pleadings, which were on record, and once that was done, the jurisdiction of this Court was triggered. He submitted that this is preliminary objection as it raises a pure point of law which when determined will effectively determine these proceedings. He submitted that it was not in contention that the Chief Justice has administrative powers. Rather, what was being challenged was whether he could singularly vary a judicial order in force.

D. ISSUES FOR DETERMINATION

[20] Having read the pleadings, the written submissions and the authorities presented to this Court, and having listened to the oral submissions of all the parties in this matter, the following issues for determination crystallise:

- 1) Whether a single-judge bench of this Court had jurisdiction to grant the orders issued on 27th May, 2016.***
- 2) Whether the Chief Justice could exercise his administrative powers to vary a decision of a single-judge bench of the Court and, if so, whether he could do so suo motu?***

E. ANALYSIS

- 1) Whether a single-judge bench of this Court had jurisdiction to grant the orders issued on 27th May, 2016?***

[21] To effectively dispose of this issue, other sub-issues and questions must be determined:

(a) Whether there existed pleadings upon which the conservatory orders could be granted;

(b) Whether this Court has jurisdiction to grant interlocutory orders and, if yes, whether a single-judge bench can issue such interlocutory orders;

(c) What constitutes an order of the Court?

(d) Whether Rules of procedure take precedence over statutory provisions?

(e) What are the powers of a single judge?

(a) The Pleadings before Njoki SCJ.

[22] From the onset, it is imperative to state that this issue must be considered as Counsel Ahmed Nassir for the respondents vehemently urged that there were no proceedings known to law upon which Njoki SCJ could grant the conservatory reliefs. He was categorical that the orders could only have been made if the Court was seized of an appeal but this was

not the case. A careful perusal of the pleadings before the Court reveals a Notice of Appeal dated 27th May, 2016.

[23] It is important to point out that the Applicant moved this Court on the same date that the judgement of the Court of Appeal was delivered. The Applicant, being apprehensive that her position could be declared vacant at any time, hence rendering the appeal nugatory, rushed to this Court with speed. In so doing, she filed a Notice of Appeal in compliance with Rule 31(1) of the Supreme Court Rules, 2012. This Court (Wanjala and Njoki SCJJ) determined in ***Law Society of Kenya v Centre for Human Rights and Democracy & 12 Others***, Sup. Ct. Petition No. 14 of 2013, [2014] eKLR that:

“[t]he Notice [of Appeal] as its title indicates, is a signification of intent by the potential appellant, to challenge by way of appeal the decision of a lower Court.”

[24] The logical conclusion therefore is that the Notice of Appeal brought the applicant into the realm of 'intending appellant' who could now seek to

persuade the Court that her matter warranted grant of Conservatory orders and if so persuaded, the Court could grant the reliefs.

[25] The pleadings also reveal a Notice of Motion application under certificate of urgency together with an affidavit showing the urgency dated 27th May 2016. It is therefore pertinent to point out that the applicant complied with Rule 26 of the Supreme Court Rules, which provides:

“Urgent applications.

26.(1) a Party who seeks to have an application heard on priority basis shall file an application which shall be-

(a) accompanied by a certificate of urgency; and

(b) Supported by an affidavit setting out the urgency.

(2) a single judge of the Court may grant or decline to certify the application as urgent.

(3) Where the single judge declines to certify an application as urgent, the applicant may apply informally at the time the decision is made or formally within seven days, for the matter to be

placed before the single judge for the hearing inter partes.

(4) At the hearing of an application previously decided by a single judge, no additional evidence shall be adduced.

(5) The provisions of these rules shall apply to the hearing of urgent applications during the term of the Court or during vacation.” [Emphasis added]

[26] It is therefore improper and incorrect to assert that there were no pleadings known to law upon which the orders were granted.

(b) Can this Court grant interlocutory orders?

[27] Section 24 (1) of the Supreme Court Act is instructive in this regard. It provides:

24. (1) In any proceedings before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge may think fit, other than an order or direction that

determines the proceedings or disposes of a question or issue before the Court in the proceeding.

(2) Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.

[28] Thus, not only does the Supreme Court Act grant any Judge of this Court power to grant interlocutory relief but it also allows an aggrieved party to seek review of the single judge's grant or denial of interlocutory orders. Further, this Court has, in a number of decisions queried whether it has jurisdiction to grant interlocutory relief and has answered in the affirmative.

[29] In ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell***, SC Applications Nos. 12 and 13 of 2012, the Court (Ibrahim and Ojwang SCJJ) at paragraph 33 and 39 delivered itself as follows:

33. "It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of an appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case..."

39. "Apart from considering several questions of law and principle bearing on the matter before us, it is clear that the core question was, whether the Supreme Court has the jurisdiction to grant interlocutory orders, and more particularly, orders of stay of execution of decrees issued by other superior Courts. This question is, by this Ruling, now set to rest: where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues."

[30] In *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others*, Sup. Pet. No. 27 of 2014; [2014] eKLR, Ibrahim SCJ sitting as a single Judge determined that the matter fell outside the jurisdiction of the Supreme Court. He observed:

[25] As I make the determination herein, I am conscious of the provisions of Section 24, (1) of the Supreme Court Act, 2011 which provides as follows:-

24. (1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.

The meaning and effect of the said provision is that a single judge in a proceedings or proceedings may give any interlocutory order and give any interlocutory directions as he/she think fit other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceedings.

[26] I touched on the propriety of the pleadings of the Applicant herein at the outset. The question to be

asked is whether there is any “proceedings” before this Court in the first place and whether there is any interlocutory application/matter before the Court. I think that the question of deciding whether to certify the matter as urgent could be deemed to be an “Interlocutory matter”.

[31] In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* Sup.Ct Application No. 5 of 2014 [2014] eKLR one of the issues for the Court's determination was whether that case was a proper case where the interlocutory reliefs sought by the applicant could be granted. The Court (Ojwang and Wanjala SCJJ) observed:

[85]The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

[32] In *T.S.C v K.N.U.T and 3 others*, Sup. Ct. Application 16 of 2015, the Court (Mutunga, CJ& P; Rawal, DCJ& V-P; Ibrahim, Ojwang, Wanjala, SCJJ) stated as follows:

[30] "The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction. We affirm the statement of legal principle as stated in Malcolm Bell, regarding the inherent jurisdiction of this Court to grant stay of execution, or injunction, so as to preserve the substratum of an appeal, or intended appeal."

[33] The emerging principle is therefore that the powers granted to this Court under section 24(1) are of fundamental importance so as to allow the Court to do justice by either granting or denying interlocutory orders in an appeal or an intended appeal.

[34] Of importance too is the composition of the Court as set out in Article 163 (2) of the Constitution. There have been arguments that a single Judge had no jurisdiction to issue the interlocutory orders in this matter, as one Judge cannot conduct proceedings of this court as the constitutional quorum is five Judges. Article 163(2) of the Constitution is clear that the Supreme Court is properly constituted for purposes of its proceedings if it is composed of five Judges. This is reiterated by Section 23(1) of the Supreme Court Act, 2011 (the Act) which states as follows:

“For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise of five Judges.”

[35] This Court, however, (Ojwang and Njoki SCJJ) in ***Erad Suppliers & General Contractors Limited v National Cereals & Produce Board***, Sup. Ct. Petition No. 5 of 2012,[2012] eKLR,(***Erad***) determined

the meaning of the word “**proceedings**” in the Supreme Court in the following terms:

“[5A] We are conscious of the fact that both the Constitution and the accompanying statutes and rules, which are new instruments, will for some time be the subject of basic interpretations and, essentially, unless initiatives are taken within other institutions than the Judiciary, it will be the responsibility of the Court to fix the operative meanings of the relevant provisions.

[6] The Court, in giving meaning and effect to the drafts-person’s language, cannot be purely technical or literal. The Court must take into account the reality and the context as a whole – so as to give meaning to the provisions: in particular the definition of the word “proceedings” under Art.163(2) of the Constitution. We find that the steps of this Court run in a series of events – and it is the last event, namely, the hearing and determination of the substantive cause, that must come before the full Bench of five Judges; and this is what amounts to hearing-proceedings before this Court.

[7] In the run-up to the hearing before the five-Judge Bench, there are preparatory steps – beginning with proceedings on record before the Supreme Court

Registrar, to any settling of deserving legal-procedural issues before a more limited Bench of the Court, and ending up with the substantive hearing before a Bench of five Judges. Without this mode of case-management, the task of the Court under the Constitution would be incapacitated. This would be contrary to the provisions of Art.159(2)(d) of the Constitution. It is, therefore, our duty to give full meaning to the terms of the Constitution as regards the determination of contested questions – i.e., the questions of merit.

[8] In that context, we find that this [two judge] Bench as constituted today, is a valid and lawful framework for clearing initial and preliminary questions preceding the hearing and determination of the substantive cause, before arriving at the stage of a Bench of five Judges. We also rule that, while the category of preliminary issues preparatory to a hearing before five Judges is by no means closed, this Bench is a lawful forum for determining and directing on issues of jurisdiction – as a basis for intended hearings before the full Bench.”

(c) What constitutes an order of the Court?

[36] *Black's Law Dictionary*, 8th edition, at pages 1129 and 1130 defines Order to mean:

2. A written direction or command delivered by a Court or a judge. The word generally embraces final decrees as well as interlocutory directions or commands. Also termed court order; judicial order. "An order is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudication a preliminary point or directing some step in the proceedings".¹ Henry Campbell Black, A Treatise on the law of judgments.¹ at 5 (2d ed. 1902).

While an order may amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of the enforcement and appeal but in other respects, as for instance the time within which proceedings to annul orders rather than judgments. The class of judgments and of decrees formally called

interlocutory is included in the definition given in (modern codes) of the word 'order'. 1. AC. Freeman, a Treatise of the Law of judgments 19 at 28 (Edward W. Tuttle ed., 5th ed. 1925.(emphasis added)

[37] Flowing from the foregoing, it is without doubt that the Conservatory orders constitute valid Court Orders which could only be varied or altered in the manner prescribed under section 24(2) of the Supreme Court Act.

(d) Whether Rules of procedure take precedence over statutory provisions.

[38] It was the interested party's submission that the Rules of procedure outranked the statutory provisions. Article 163(8) of the Constitution provides that ***'the Supreme Court shall make rules for the exercise of its jurisdiction.'*** Article 163 (9) provides ***that 'an Act of Parliament shall make further provision for the operation of the Supreme Court.'*** Section 31 of the Supreme court Act refers to Article 163 (8) and without limiting it makes a potential list of Rules that may be made by the Supreme Court. The Supreme Court Rules 2012 as

amended in 2016 are made pursuant to Article 163 (8) and section 31 of the Supreme Court Act.

[39] Article 2 of the Constitution asserts the Supremacy of the Constitution. The ***Judicature Act, cap 8 Laws of Kenya***, in Section 3(1) thereof embodies the time-hallowed principle of the hierarchy of norms. The section creates a deliberate and hierarchical sequence of laws, starting with the Constitution, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. ***Section 31 (c) of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya)*** provides that no subsidiary legislation shall be inconsistent with the provisions of an Act. Taking all the forgoing into account, I am of the view that the Rules cannot be said to be superior to the Supreme Court Act. The Supreme Court Rules must be taken to complement and not substitute or outrank the Supreme Court Act. Consequently, both the Act and the Rules must be read in conformity with the Constitution and not contradict or detract from it.

[40] Further, the Supreme Court Rules, being subsidiary legislation must be read in a manner consistent with the Supreme Court Act. Similarly,

powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of Parliament and if the relevant provisions are irreconcilable the statutory provisions trump the provisions of the subsidiary legislation.

(e) Powers of a single judge.

[41] A single judge of the Supreme Court can, as outlined above, pursuant to Section 24 (1) of the Supreme Court Act, (a) make any interlocutory orders and give any interlocutory directions as long as such orders or directions do not determine the proceeding or dispose of an issue before the Court and; (b) grant or decline to certify applications as urgent pursuant to Rule 26 of the Supreme Court Rules 2012. Further, a single judge can, in accordance to section 11 of the Supreme Court Act confirm, modify or reverse a decision of the Registrar.

[42] Rule 3 of the Supreme Court Amendment (Rules) 2016 also allows a single judge to hear applications and make orders with regard to change of representation; admission of consent; consolidation of matters; dismissal of a matter for want of prosecution; correction of errors on the face of the record; withdrawal of documents; review of decisions of the Registrar; leave to file additional documents; admission of documents for filing in the

Registry; or substitution of service. Rule 4(4) is also instructive as it discloses that a single judge can indeed make decisions. Rule 4(4) provides:

(4) A party aggrieved by the decision of a single judge may file an application for review of the decision to the Court.

[43] The consequence of all of the above is the inescapable conclusion that Njoki SCJ had jurisdiction to issue the Conservatory orders dated 27th May, 2016 pursuant to Section 24 (1) of the Supreme Court Act. She considered the relevant circumstances surrounding the case, found the pleadings proper and conscientiously ascertained the best course. She also took into account the principles set out in ***Erad*** that this Court runs in a series of events which culminate in the hearing and determination of the substantive cause to come before five judges. As such, once seized of the matter, she was obligated to render justice.

2.) Whether the Chief Justice could exercise his administrative powers to vary a decision of a single-judge bench of the Court and, if yes, whether he could do so suo motu?

[44] Counsel for the Applicant urged that the Chief Justice invoked a nebulous source described as 'administrative powers of the Chief justice and President of the Supreme Court to grant him powers to give the directions. Counsels for the Respondents contended that the Chief Justice had power to issue the directions pursuant to Articles 161(2) (a) and 163 (1) (a) of the Constitution, Section 6(1) of the Supreme Court Act, sections 5(1) and 5(2) (c) of the Judicial Service Act and Rules 4 of the Supreme Court (Amendment) Rules 2016. These provisions of law are examined next. Dr. Khaminwa for the 2nd *amicus curiae* urged that to allow the Chief Justice to make such directives fell short of upholding the Rule of Law and infringed on Article 160 (1) of the Constitution. His co-counsel Shamalla submitted that the Chief Justice exercised, on his own motion, powers that he did not have.

[45] The Chief Justice is the Head of the Judiciary and President of the Supreme Court, as stipulated by Articles 161(2)(a) and 163(1)(a) of the Constitution, respectively. He has precedence over other Supreme Court Judges in terms of seniority. Section 5(1) provides thus:

“As the head of the Judiciary, the Chief Justice shall have precedence over the other judges of the Supreme Court.”

[46] The Chief Justice is to preside over the matter before the Supreme Court and in his absence the Deputy Chief Justice presides. Section 6(1) of the Act provides as follows:

“The Chief Justice shall preside over the Supreme Court and in the absence of the Chief Justice, the Deputy Chief Justice shall preside.”

[47] And importantly in the absence of the Chief Justice and Deputy Chief Justice, then the other Judges of the Court take precedence on administrative and judicial matters based on seniority.

[48] Under the Rules, the role of the Chief Justice is provided as follows. Rule 4(1) provides that:

*(1) The Chief Justice shall **co-ordinate** the activities of the Court, including—*
*(a) **constituting a Bench** to hear and determine any matter filed before the Court;*

- (b) determining the sittings of the Court and the matters to be disposed of at such sittings; and*
- (c) . . .*

[49] It is not in dispute that the Chief Justice is the head of the Judiciary and President of the Supreme Court and that he is vested with administrative powers. The issue is whether he can invoke his administrative powers and his rank in the Supreme Court to vary a Court Order in force. As illustrated in paragraph 30 above, the conservatory orders granted amount to a valid Court Order. In Shimon Shetreet article; *"The limits of Judicial Accountability: A hard look at Judicial Officers Act 1986"* (1987) 10 UNSW Law Journal 4, 11 he states that:

"a significant aspect of judicial independence is the internal independence of a judge which refers to his independence vis-a-vis his judicial superiors and his colleagues."

[50] In *The Queen v Beauregard*, [1986] 2 S.C.R. 56, the matter related to Financial security of federally appointed judges. This decision is however of persuasive relevance as it considered the principle of

judicial independence. Then Chief Justice Dickson of the Supreme Court of Canada held:

21. 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.

[51] The independence of the Judiciary is jealously guarded by the Constitution. Article 160(1) provides that:

“In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject

to the control or direction of any person or authority.”

[52] Professor W.R. Leberman [Professor Emeritus of the Faculty of Law, Queen’s University, Kingston, Ontario, Canada] in his learned article, *“Judicial Independence and Court Reforms in Canada for the 1990’s”*, in Queen’s Law Journal Vol 12 (187) 385 [at p. 389] observed as follows:

“Judges are not civil servants. They are, so to speak, servants only of the law itself. They are judges and judges only, with no other career employment or interest. They have guaranteed tenure in office with assured public salaries and pensions. They cannot be instructed how to decide cases that come before them.”

[53] Dr. Khaminwa urged that decisional independence of Judges must be protected at all costs. He was of the opinion that the Chief Justice's directives, although in good faith, took us to the dark days of Chief Justice Wicks where he could call for files which were part heard and assign them to another Judge or even interfere and interrupt ongoing proceedings in Court and call for the file.

[54] Dr. Khaminwa referred us to the ***Muriithi case*** in a bid to show the excesses of a former Chief Justice. In ***Mwangi Stephen Muriithi v Attorney General*** Civil Case No. 1170 of 1981 [1981] eKLR, Dr. Khaminwa was acting for the Plaintiff. The judgment by Hancox J, states in part:

"On the same day Mr Khaminwa, who has acted throughout for the plaintiff, as he has said in his submissions on the present objection, personally approached Cotran J in the court building, and, as the record shows, said he had an urgent application which had to be heard that day....."

This application was heard by me and dismissed after full argument on Mr Shield's preliminary objection on behalf of the Attorney-General, and it is this which now gives rise to Mr Khaminwa's present preliminary objection. The objection is that I should not hear the case; that it was fixed before Cotran J

and the file wrongly transferred from him as a result of a telephone conversation said to have taken place with the Chief Justice from the Judge's chambers. Cotran J's accord does indeed show that he was directed that the case should not come before him but before me, but it is equally clear from it that the file itself was not before him on what was erroneously stated to be in April 30. In fact all the proceedings took place on April 29, both before Cotran J and myself, and the Ruling on the application delivered on the 30th.

In the course of his argument before me at that time Mr Khaminwa did take the point that once Cotran J was properly seized of the case the Chief Justice did not have power to take away his jurisdiction and give the case to another Judge. Mr Khaminwa did not, however, at that stage, pursue the matter to the point of objecting to my hearing the interlocutory application, but he did, as he says lodge an appeal upon this ground. That appeal has been abandoned."

[55] This excerpt shows some veracity to Dr. Khaminwa's claim that Chief Justice Wicks could not only instruct a Judge not to hear a particular matter but also pass it over to another Judge. I note that Dr. Khaminwa who is a friend of the Court as well as an officer of the Court pointed out that the Judgments such as the aforestated one, would never really reveal the 'behind the scenes' story that culminated in it. It is my considered opinion that Dr. Khaminwa's concerns about decline of decisional independence of judges, are valid.

[56] With respect, *the Chief Justice in calling for a file that was part heard before another Judge and varying the Court Orders therein, without being moved by a party, and without reference to the Judge already seized of the matter acted contrary to Article 160 (1) of the Constitution.* This action was also in violation of section 3 of the Supreme Court Act wherein he is mandated to assert the Supremacy of the Constitution and develop rich jurisprudence that respects Kenya's history. Taking into account Kenya's judicial history and the rife external interference by the Executive at the time, we must jealously guard and protect the independence of Judges enshrined in Article 160(1) of the Constitution. To open the door to allow again for a Chief Justice that lords over judicial officers and interferes with judicial decisions would be taking

us back to the dark days of our oppressive judicial history in the 1970's and 1980's.

[57] Although Counsel Ms. Shamalla referred to Section 14 of the Supreme Court Act, I must point out that this section was declared unconstitutional in this Court's (*W.M. Mutunga, P.K. Tunoi J.B. Ojwang, S.C. Wanjala & N.S. Ndungu*) decision in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** Civil Application No. 2 of 2012[2012] eKLR. However, I am persuaded by her argument that the Kenyan people did not intend to give the Chief Justice *suo motu* powers to vary Court Orders given by any Judge and that nothing would have been simpler than to make provision for this under the Constitution if that was the intention of the people.

[58] To my mind therefore, the Chief Justice's directions did amount to a conflict between Court administration and judicial independence. The effect of the directions was to encroach on the internal independence of another Judge.

[59] The directions issued by the Chief Justice on 30th May, 2016 – which are stated to be in exercise of his administrative powers as the Chief Justice

and President of the Supreme Court – are not *in tandem*- with Section 24 of the Supreme Court Act which provides for the review of a single-Judge decision by five Judges. The Chief Justice's powers are restricted to co-ordination of the activities of the Court such as constituting a Bench, determining the date and time of the sittings of the Court and the matters to be disposed of during those sittings. It is without a doubt, that these powers cannot be exercised so as to alter or in any way interfere with the decisions of the Court (whether by one or more Judges).

[60] It is noteworthy that the power of the Chief Justice to determine the date and time of the sittings of the Court are stipulated in the Supreme Court Rules, *while* the provision that an order of a single Judge is to be reviewed by a five-Judge Bench is stipulated in an Act of Parliament. As already observed, powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of Parliament and if the relevant provisions are irreconcilable, the statutory provisions trump the provisions of the subsidiary legislation.

[61] It is important at this stage to make a few remarks on the duty roster of the Supreme Court. There is a duty roster that is an administrative mechanism which details which Supreme Court Judge is on duty each day. The approval of, and any changes to this roster, are made by the Chief

Justice or in his absence by the Deputy Chief Justice. In her absence the most senior Judge present will make such a decision. In this way the 'bench' that sits on a daily basis and which normally hears urgent matters is constituted properly under the rules. It is pursuant to the duty roster that Njoki SCJ could hear the urgent application.

[62] Before I conclude, I wish to make some observations on the workings of a collegial court like the Supreme Court: The Court operates in such fashion that the Chief Justice is first amongst equals amongst the seven Judges. Each Judge has an equal vote in judicial matters. The Court uses the mode of conferencing to discuss matters both administrative and judicial in a manner that gives the court rhythm; where each Judge has his or her own step that matches that of the other, either through persuasion, negotiation or through respect for each other's independent decision making. This is why the President of the Supreme Court *coordinates* the activities of the Court.

[63] The meaning of the word *coordinate* is to be found in the **Oxford English Dictionary** in the following terms:

“[as a verb]

- 1. bring the different elements of a complex activity or organization) into a harmonious or effecting relationship ... Negotiate with others in order to work together effectively.***

[as an adjective]

- 2. Equal in rank of importance...***

Equal in rank and fulfilling identical functions”

[64] It is to be noted that the word “Coordinate” is not used to describe the workings of the administration of any other court in our judicial System. The President of the Court of Appeal, under *the Court of Appeal (Organization and Administration) Act 2016*, “**oversees** proper management and administration of the Court”. The Presiding Judge of the High Court under the *High Court Organization and Administration Act* “is **responsible** to the Chief Justice for the **overall** administration and management of the court”.

[65] Further, the wording of the Supreme Court Act deliberately recognizes the special nature of a small and operationally intimate institution, where the Court works in harmony and through mutual

respect. An Act by one Judge that undermines another Judge is a situation best avoided as it may upset the collegiate foundation of the Court.

Conclusion

[66] As I return to the specific issue at hand, it has been said that the CJ's directions were issued in view of the public interest nature of the matter. Nevertheless the fact that the matter belongs to the litigants cannot be overlooked. It cannot be emphasized enough that it was incumbent upon the aggrieved party to seek the review of a decision of a single Judge. Only then could a five-judge Bench review the orders made by Njoki SCJ. There is no provision for the Court or the Chief Justice to do so *suo motu*.

[67] It cannot be overstated that it is vital in a democracy such as ours that individual judges and the Judiciary as a whole are impartial and independent of all external and internal pressures and of each other, so that persons who appear before Court and the wider public can have confidence that their cases will be decided fairly and in accordance with the law.

[68] I find the preliminary objection has merit and that the directions of the Chief Justice changing the date of return for the *interpartes* hearing from the 24th to the 2nd June 2016 - more so, where none of the parties has

raised an application challenging the said orders and where no reference was made to the Judge who was already seized of the matter - are in contravention of Section 24 of the Supreme Court Act and are tantamount to interference with the independence of a judge safeguarded in Article 160 of the Constitution.

ORDERS:

[69] I am inclined to make the following orders:

- (a) The application dated 30th May, 2016 is hereby allowed.***
- (b) The date for interpartes hearing is confirmed as the 24th of June 2016.***
- (c) Parties to bear their own costs.***

DATED and DELIVERED at NAIROBI this Day of June, 2016.

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR
SUPREME COURT OF KENYA**