

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

Coram: Ibrahim,SCJ

PETITION NO. 27 OF 2014

YUSUF GITAU ABDALLAHTHE PETITIONER

AND

THE BUILDING CENTRE (K) LTD.....1ST RESPONDENT

UBM OVERSEAS LTD.....2ND RESPONDENT

ALIBHAI SHARIFF & CO. LTD3RD RESPONDENT

RAFFIQ SHARIFF.....4TH RESPONDENT

NOOR SHARIFF..... 5TH RESPONDENT

(Under the provisions of the Constitution of Kenya in the Bill of Rights, The Civil Procedure Act and The Supreme Court of Kenya Act and all its enabling provisions in the Laws of Kenya)

DIRECTIONS/RULING

1.0 INTRODUCTION

[1] The Petitioner in this matter, Yusuf Gitau Abdallah, considers himself as a victim of infringement of his constitutional rights. He depones to having been in court for the last fourteen (14) years seeking justice and claims that when he finally got it, the same court system through some of its judges and the respondents have conspired to deny him what he has sought for such a long time. Consequently, he has decided to approach the Supreme Court under a certificate of urgency by filing a petition seeking the indulgence of this Court for redress for the infringement of his rights under the Constitution.

[2] He filed his “petition” to this Court on the 23rd of July, 2013 under what he terms as a *petition under a certificate of urgency*. It is worth noting that from the onset this matter took a peculiar trajectory for despite invoking what can only be termed as a unique jurisdiction of the Court; the pleadings have a unique bearing. Ordinarily, one will file a petition and an application which application could then be accompanied by a certificate of urgency. I do not intend to dwell on this issue but parties at this stage who come to courts seeking justice should follow the legal channel provided for when accessing courts and should not by way innovation craft pleadings unknown in law.

[3] In **The Matter of the National Gender and Equality Commission, Reference No. 1 of 2013** this Court held thus [paragraphs 27 and 28]:

“[27] Though not forming part of the issues for determination, a matter arose in the course of filing the pleadings that caught our attention. Upon the institution of the reference, the Interested Party (IEBC) filed a notice of preliminary objection. Upon being served with the notice, the applicant proceeded to file what it termed as “*a notice of preliminary objection to the notice of preliminary objection*”. Ordinarily, a party files grounds of opposition in response to a preliminary objection. However, counsel for the applicant argued that he was justified in filing a parallel notice of preliminary objection: because the preliminary objection as filed by the IEBC was “bad in law”, as it did not seek to raise *a pure point of law*.

[28] It is our position that parties should not endeavour, in their pursuit of creativity, to introduce ‘new pleadings’ unknown to the law. The rules of procedure are a handmaid to the course of justice, and should be followed with fidelity.” (Emphasis provided)

2.0 BACKGROUND

[4] Being filed under a certificate of urgency, the matter was placed for hearing of the certificate on 5th August, 2014. During the *ex parte* hearing, I directed that the petitioner do file in Court all the rulings and Judgement(s) in this matter and any relevant documents so as to help the Court fully understand the matter in issue. Consequently, the petitioner filed a bundle containing: *Revival Letter, Notices, Affidavit & Document list; Proceedings; and Rulings and Judgement*. In an attempt to discern what this matter is about, I have taken time to study these documents.

[5] The history of this matter is traced to 25th June, 1998 when a plaint was filed in the High Court. The subject thereof being a contract of employment entered into between the petitioner and the 1st respondent dated 21st September, 1995, which contract was terminated by a letter dated 8th May, 1996. It is evident that this matter was handled by the various members of the Judiciary.

[6] The first ruling on record was delivered on 11th May, 2007 where the petitioner/plaintiff sought and was granted orders to amend his plaint and to enjoin the other 4 respondents who were then not on record. The second ruling was delivered by Nambuye, J (as she was then) on 6th June, 2008. Similar orders as previously granted on 11th May, 2007 were granted: the plaintiff was granted leave to amend his plaint and to enjoin the other defendants/respondents.

[7] It was not until 23rd July, 2009 when another ruling was made by Ali- Arone, J. This was a ruling dismissing the respondents' application that the petitioner/plaintiff deposit security for costs before the commencement of the hearing of this matter. From here the matter appears to have gone into limbo.

[8] Following that was the judgement of Khaminwa, J dated 23rd February, 2012. The record shows that this judgement was subject of an *ex parte* hearing. A reading of the judgement reveals that on the day set for hearing of the matter, the

respondents never appeared either in person or by counsel. The learned judge (as evident from her judgement) after being satisfied that indeed the respondents had been served and/or had notice of the matter, proceeded to hear the matter and rendered an *ex-parte* judgement. After analyzing the evidence on record she found that the petitioner/plaintiff had been irregularly dismissed from his employment and awarded him a total of Ksh. 2,005,000 and costs of the suit.

[9] Subsequently, from the record, the respondents filed an application in the High Court seeking to set aside the *ex-parte* judgement. The matter was heard and the respondents swore affidavits in which they deponed that the non-appearance was basically due to an inadvertent error on the part of a secretary in the office of counsel for the respondents who despite being served and receiving the hearing notice, forgot to enter it into the advocate's diary. The High Court, Odunga, J in a ruling delivered on 22nd January, 2013 was satisfied that the respondents had made their case and allowed the application and set aside the *ex parte* judgement. He directed that the matter be referred to the Industrial Court for hearing and determination and the respondents were also ordered to pay the petitioner/plaintiff 'thrown away' costs of Ksh. 15, 000.

3.0 PETITIONER'S CASE BEFORE THE COURT

[10] Suffices it to say that as the matter stands, this matter is still pending before the Industrial Court following the last orders of Odunga J. I have gone to a long extent to bring to the fore the procedural posture of events in this case so as to be clear what is before me. Before the Supreme Court is a litigant who, knowing very well that his matter is still pending before the Industrial Court, a Court with the status of the High Court, has decided to approach the Supreme Court directly. The big question is whether this Court has Jurisdiction to admit him or even hear him.

[11] The Petitioner has been acting in person in this matter from inception. Generally speaking, he alleges that his fundamental rights under the Bill of Rights in the Constitution have been infringed. He contends that having been a beneficiary of a Court judgement in this case, the ruling by Justice Odunga is erroneous and wrong. He alleges that Justice Odunga has perpetuated an injustice to him and that the Industrial Court is a lower court than the High Court which he cannot go to. Further it is his submission that this matter cannot be re-opened as it will be a violation of the *res judicata* principle.

[12] When asked whether this Court has the jurisdiction to hear a matter straight from the High Court without first going to the Court of Appeal, the petitioner answered in the affirmative. He submitted that the Supreme Court Act, No. 7 of 2011 has bestowed the Court with a special jurisdiction so as to do justice. Hence, it was his submission that this court can indeed take up such a matter. He referred the Court to sections 16 and 17 of the Supreme Court Act.

4.0 ANALYSIS AND DETERMINATION

[13] From the onset of the hearing of this matter, the question that bothered my mind was the question of jurisdiction. Can the Supreme Court admit and hear a matter direct from the High Court and what can be deemed as special circumstances? A jurisdictional question goes to the root of the Court and even as a single judge I have to inquire into whether a matter under certificate of urgency has *prima facie* met the jurisdictional threshold.

[14] The Supreme Court of Kenya is the apex court as provided by Article 162 of the Constitution. Until the promulgation of the Constitution 2010, the Court of Appeal was the final court of the land. This Court's jurisdiction is provided for by Article 163(3) of the Constitution. It has exclusive original jurisdiction to hear presidential petitions: Article 163(3) (a); and appellate jurisdiction to hear and determine cases from the Court of Appeal and any other court or tribunal as

prescribed by national legislation: Article 163(3) (b). However, even the appellate jurisdiction is not absolute; the same is qualified under Article 163(4) of the Constitution. It is of right if the matter involves the interpretation and/or application of the Constitution; or a matter where the Court of Appeal or this Court has certified that the matter is one of general public importance. The Court also has jurisdiction to give an advisory opinion as provided by Article 163(6) of the Constitution.

[15] A litigant who approaches the Court must be clear which jurisdiction, he/she intends to invoke. In *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR, this court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the

Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis provided).

[16] This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the ***S. K. Macharia*** case, 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.

[17] Recently, this Court refused to rule on a matter that was pending in the Court of Appeal even though it ruled that it had jurisdiction despite the applicant in that case urging this Court to do so. ***In Hassan Nyanje Charo v. Khatib Mwashetani and 3 others***, Application No. 14 of 2014 (*Mwashetani* case) this Court stated [paragraphs 32-33]:

“[32]Even though the Constitution grants this Court jurisdiction to entertain the present application for certification, as correctly argued by the Applicant, considering the pendency of the same application at the Court of Appeal, this Court for the sake of good order and good governance decline the call to entertain the Applicant’s Application.

[18] This Court refused to assume jurisdiction in the *Mwashetani* case above, for reasons of good order and good governance. What will compel it to do in this matter where there is apparently no iota of jurisdiction? As it stands, the matter is still pending before the Industrial court. The petitioner has come to this Court too early in the day and the Court cannot admit him. The matter is not ripe for the consumption of the Supreme Court. Commenting on the ripeness doctrine, **Jeffrey Tobin** in his book “**The Oath: The Obama White House and The Supreme Court**”, page 71-72 writes thus:

*“There are a (sic) number of procedural doctrines that can be used for this purpose. Other examples include **ripeness (is it too early for a court to decide the case?)**, mootness (is it too late for a court to decide a case?), venue (**is this court the right one?**), and the “political question” doctrine (is the subject matter appropriate for a court to decide at all?). **Everyone agrees that these doctrines are necessary, at some level; the courts cannot be allowed to weigh in on controversies simply because judges feel like deciding the merits.**”*

[19] In my view, this matter falls outside the jurisdiction of the Supreme Court on both the *ripeness doctrine* and the *venue doctrine*. Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy. It is also bound by the law and more so the Constitution which binds all. The Petitioner cannot be excused even on the pretext that he did not know this jurisdictional boundaries. A reading of the documents he has submitted to this Court shows that he describes himself *inter alia* as a printing consultant by profession with the ability to speak seven languages. Be it as it may, it is a legal principle that ignorance of the law is no defence. Hence the petitioner cannot with any iota of excuse claim he did not know this. Delivering her ruling in this matter on 6th June, 2008, Nambuye, J wrote thus;

“The court is also alive to a judicial practice, doctrine to the effect that a court of law is a court of justice and not a court of sympathy. Further that when a litigant chooses to litigate on his own human he should be taken to be competent to comprehend the court procedures and be able to conduct his/her proceedings smoothly and at no time should the standard required to be met by such litigants’ papers be less than that required of a litigant assisted by legal advice. That both stand on equal footing before the feet of justice.”

[20] I totally agree and endorse the sentiments by the learned Justice Nambuye (as she was then). The Petitioner herein cannot expect to circumvent the law and the laid down legal procedures. His conduct borders on abuse of court process and should be condemned in the strongest terms possible which I hereby do.

[21] Article 159 of the Constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. Hence all courts in the Republic have the legal authority to hear and determine matters within their respective jurisdictions. The allegations of the petitioner that his fundamental rights have been infringed are question which the High Court has the original jurisdiction to look into as Article 165 of the Constitution decrees. In *Peter Oduour Ngoge v Hon. Francis Ole Kaparo, SC Petition 2 of 2012*, [para. 29-30] the Court stated as follows:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised

and exhausted. 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." (Emphasis provided).

[22] Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework.

[23] It is worth noting that in this ruling, I have not commented on any of the Rulings and/or judgement so far rendered in this matter by the High Court. This is not an oversight but it is a deliberate act which to my mind is the right thing to do. This Court cannot at this time delve into an insight into the propriety of those rulings and/or judgement. To do so will be going against the spirit of our Constitution and the law that I have outlined above. It will amount to usurping jurisdiction not bestowed to this Honourable Court. Some aspersions have been cast upon the conduct of Justice Odunga for delivering a ruling setting aside the *ex parte* judgement. Without going into the merit of these allegations, I will hold that a litigant who has a complaint against a judge should lodge such a complaint with the appropriate authorities, if the same cannot be addressed within the framework of appeal or review. Such allegations cannot be ground for invoking or crowning a court with jurisdiction.

[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.

[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”. However, upon careful perusal, there is no petition before the Court to “commence” or “institute” any proceedings before the Court. What is before the Court is a purported “Notice of Motion” seeking the following orders:-

1. This application be certified urgent and be heard ex-parte in the first instance.
2. That the orders made by Judge Odunga on 22nd January 2013 be declared null and void as they were based on personal office practice failure in the affidavits presented.
3. That the judgment of Judge Khaminwa of 23rd February be reinstated and adjusted to reflect the correct position in line with the contract terms and parties to suit as reiterated in our amended plaint whose deliberations were heard by Judge Nambuye and judgment entered for which there had been no prayer for appeal.
4. The defence be admonished for insinuation on my character in their affidavits pertaining to my unprofessional association with their office staff members.
5. That all defence parties be considered as unprofessional, negligent and inhuman in the facts presented in our plaint.
6. Judge Macharia and Judge Odunga be reprimanded for turning a blind eye to this obvious anomaly pointed out by me in the proceedings.
7. That the defence parties be ordered to pay my dues immediately and firm orders of arrest if they fail to comply as too much time has passed.

This is an interlocutory application and not a Petition or Originating Motion which are the only pleadings through which proceedings can be commenced or instituted in the Supreme Court under the Supreme Court Rules, 2012, except for a Reference for an Advisory Opinion which is a special pleading.

These are under Rules 24 for grant of certification as a matter of general public importance (Originating Motion), Rule 33 for Appeals (Petition) and Rule 41 for Advisory Opinions (Reference).

I do hereby hold that the purported “Notice of Motion” herein dated 18th December 2013 cannot commence any proceedings and is not a “proceeding” before the Court.

As a result, I find that in the absence of any legislation or appropriate Rules, which I have recommended to be enacted, that a single judge has the discretion and power to strike out the offending so-called “Notice of Motion” and to cleanse the Court’s records. It should never have been accepted or admitted for lodgement or registration, if the appropriate laws/rules existed.

[27] Consequently, this matter is hereby struck out as it does not fall within the jurisdiction ambit of the Honourable Court. The Petitioner is directed to go and pursue his matter in the Industrial Court. I will humbly implore on the Industrial Court to consider fast tracking this matter given the long time it has taken in the judicial system. However, this will also need the full co-operation of the petitioner and the respondents to also earnestly prosecute this cause.

[28] As the petitioner has suffered the costs of filing this petition to this Court and there were no respondents who appeared, there will be no order as to costs. Copies of this Ruling be supplied to the Respondents for information only.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 13th day of August 2014.

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MOHAMMED K. IBRAHIM
JUDGE OF THE SUPREME COURT

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

**REGISTRAR
SUPREME COURT OF KENYA**