REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

APPLICATION NO. 12 OF 2016

JUSTICE PHILIP TUNOI ..... APPLICANT

JUSTICE DAVID O. ONYANCHA.....2ND APPLICANT

¾AND¾

JUDICIAL SERVICE COMMISSION..... .....1ST RESPONDENT

THE JUDICIARY..... .....2nd RESPONDENT

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 jurisdiction to make any other orders following the directions given on 27th 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 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 which for purposes of clarity and reference are reproduced below.

> ***"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 are what the Applicant is challenging.

C. PARTIES' RESPECTIVE CASES.

(i) The Applicant's case

[4] Senior Counsel Pheroze Nowrojee for the Applicant disputed the Chief Justice's jurisdiction to issue the directions. He contended that administrative directions cannot set aside a judicial order. It was his submission that the invocation of the administrative powers violated Article 160 (1) of the Constitution which stipulates that judges are only subject to the Constitution in the exercise of judicial authority.

[5] Further, he urged, the Chief Justice while making the directions was not seized of the matter as the single-judge was. He urged that for that reason, the Chief Justice acted illegally, *suo motu*. Counsel urged that the directions were contrary to Statute; specifically Section 3 (c) and (d) of the Supreme Court Act. He submitted that this case touched on the history of this Country particularly on the age of retirement of judges.

[6] Counsel contended that calling for the file, or giving directions on the file while another judge was seized of the matter was synonymous with interference with judicial independence which implied that the file did not reach the office of the judge who called for it in the normal course of business. He cited various incidences embedded in the history of this country relating to interference with judicial independence.

[7] One of the instances counsel cited was an incident in which Chief Justice Miller (as he then was) called for a file in a criminal matter that Justice Schofield was seized of. In that regard, he urged that the Constitution sought to address such issues of interference with judicial independence and such actions cannot be allowed to happen in this day and age in light of Section 3 of the Supreme Court Act.

[8] Counsel urged that the directions of the Chief Justice amount to use of absolute discretion which is a hallmark of tyranny and dictatorship. In addition, he contended that no public officer should grant themselves such power. He submitted that subordinate legislation should never be imprecise, and he underscored that the power exercised by the Chief Justice was imprecise, vague and its source ought to have been stated in the directions given. Counsel urged that it was a cardinal rule of law that, the exercise of powers affecting rights have to be anchored on a provision of law, otherwise misinterpretation of law would result. He concluded by urging this Court to delineate the precincts for exercise of the Chief Justice's administrative powers.

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

[9] Counsel Dennis Muriuki held brief for Mr Masika for the Law Society of Kenya. He submitted that the Chief Justice may have meant well in a bid to expedite the matter. However, he urged that the Chief Justice did not have power to vary orders in view of the prescriptions in Section 24 of the Supreme Court Act, 2011. He contended therefore, that the directions did not lie in law.

(iii) 1st and 2nd Respondents' case

[10] Senior Counsel Paul Muite 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 and did not comply with the principles set out in ***Mukisa Biscuit Manufacturing co. Ltd. v West End Distributors ltd*** (1969) EA 696. He submitted that the Chief Justice is empowered by Article 161 (2) (a) of the Constitution as the head of the Judiciary and Section 5(2)(c) of the Judicial Service Act to exercises general direction and control over the Judiciary. He urged that the Chief Justice Could issue the directions in a bid to expedite the case in light of Article 159 of the Constitution. Counsel urged that all the historical examples cited were of executive interference and hence not on all fours with the instant case.

[11] Senior Counsel's co-counsel, Mr. Mansur submitted that Article 163 (8) of the Constitution mandates the Supreme Court to make Rules in exercise of its power. He submitted that Article 163 (8) of the Constitution as read with Rule 4 of the Supreme Court Rules, 2012 grant the Chief Justice power to make directions. He urged that as soon as the matter was certified urgent, the Chief Justice had power to determine the sittings and the Bench pursuant to Rule 4. He buttressed this assertion with the decision in ***Samuel Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** Application 2 of 2011; [2012] eKLR.

(v) Rejoinder

[12] In response, Kiragu Kimani submitted Rules cannot trump an Act of Parliament. He urged that no person could interfere with a judicial order and that the right recourse was to seek review before a five-judge bench in accordance with the Supreme Court Act. Counsel urged that although Section 5(2)(c) of the Judicial Service Act allowed the Chief justice to exercise general direction and control over the Judiciary, Section 6 of the same Act allowed the president of the Court of Appeal, the Principal Judge of the High Court and the County Judge and Division heads to supervise and administer their respective stations.

[13] Senior Counsel Pheroze Nowrojee in reply submitted that what was in issue was whether the Chief Justice could vary a judicial Order. He contended that the Chief Justice could not. He urged that 'sittings' of the Court are not 'hearings' of the Court as allege by Mr. Mansur and concluded by urging that by varying an Order of the court, the Chief Justice exercised absolute jurisdiction which cannot be countenanced in law.

D. ISSUES FOR DETERMINATION

[14] 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 issue for determination crystallizes: Whether the Chief Justice had jurisdiction to make other orders following the orders issued on 27th May, 2016?

E. ANALYSIS

Did the Chief Justice have jurisdiction to make other orders following the orders issued on 27th May, 2016?

[15] To effectively dispose of this issue three questions must be answered.

(a) Did the Chief Justice exercise absolute discretion, if yes, is this permissible under the Constitution?

(b) What constitutes an order of the Court?

(c) Do Rules of procedure take precedent over statutory provisions?

(a) Did the Chief Justice exercise absolute discretion?

[16] Counsel for the Applicant contended that the Chief Justice exercised absolute discretion in issuing the directions and in so doing disregarded Section 3 (c) and (d) of the Supreme Court Act. Counsel for the Respondent urged that the Chief Justice properly issued the directions in accordance with Article 161 (2) (a) of the Constitution as the head of the Judiciary and Section 5(2)(c) of the Judicial Service Act. These assertions are examined below.

[17] The Chief Justice is the Head of the Judiciary as stipulated by Article 161(2)(a) of the Constitution and section 5 (2) (c) of the Judicial Service Act. Under the Supreme Court Rules, the role of the Chief Justice is stipulated in the following terms under Rule 4(1):

> *"(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) . . ."*

[18] It is not in dispute that the Chief Justice is the head of the Judiciary and that he is vested with administrative powers. In exercise of this powers, the Chief Justice can therefore exercise administrative and judicial discretion. Administrative discretion is defined in ***Black's Law Dictionary***, 8th edition, at page 499 to mean:

> ***"A public official's or agency's power to exercise judgment in the discharge of duties."***

[19] Judicial discretion is also defined on the same page as:

> ***"The exercise of judgment by a judge or court based on what is fair under the circumstances guided by the rules and principles of law; a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right."***

[20] Given that the directions of the Chief Justice invoked his administrative powers, by parity of reason, he was exercising administrative discretion as there is no specific provision in law that gives the Chief Justice power to 'fast track' the hearing of an application. Use of absolute administrative discretion is at odds with the Constitution. Absolute as used here refers to the total and final action of acting on your own judgment of which action is subject to none. This cannot be countenanced under Articles 10 and 73 of the Constitution which espouse National values and principles of governance and responsibilities of leadership respectively. Our prescriptive and progressive Constitution demands that all State Officers, of whom the Chief Justice is one, to exercise their administrative discretion within the confines of the Constitution.

[21] This situation is aggravated by the fact that the Chief Justice's directions were not in keeping with the Supreme Court's obligations as set out in Section 3 of the Supreme Court Act, 2011. This Court elaborated on the significance of this Section in ***Speaker of the Senate & another v Attorney-General & 4*** others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR in the following terms:

> ***[162] It is in recognition of this duty to nurture Kenya's new order, that the Supreme Court Act, in Section 3(d), has extended an open invitation to the Supreme Court to pronounce itself in constitutional and legal 'matters relating to the transition from the former to the present constitutional dispensation…having due regard to the circumstances, history and cultures of the people of Kenya'. The creation of the Supreme Court as the apex Court in the new Constitution was itself informed by a desire and a need to have a fresh Court oversee the constitutional birth of a new order, and also respond to the risks that our judicial history posed to this new Constitution.***
>
> ***[163] In executing its mandate the Court must, therefore, be appreciative of its unique constitutional mission as a substantive rather than a decorative device, deliberately created to oversee Kenya's successful constitutional and institutional transition.*** (emphasis added)

[22] It is a matter of history and public knowledge that Sir James Wicks who served between 1971- 1982 worked at the behest of the Executive as pointed out by Counsel for the Applicant. Counsel's fear is that if these directions are allowed to stand, this precedent will bind all Courts in accordance to Article 163 (7) of the Constitution. In my view, it would also create some hazy source of power for a Chief Justice in the future, to fall upon and which cannot be questioned. This would inevitably take us back to the dark days of the imperial CJ like Sir James Wicks. This is not permissible under our Constitution and such an act if allowed to stand would form precedent that may begin to extinguish the gains of a reformed Judiciary, under the new Constitutional order.

B. What constitutes an order of the Court?

[23] ***Black's Law Dictionary***, 8th edition, at pages 1129 and 1130 defines the term "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. <u>The class of judgments and of decrees formally called interlocutory is included in the definition given in (modern codes) of the word 'order'</u>. 1. AC. Freeman, a Treatise of the Law of judgments 19 at 28 (Edward W. Tuttle ed., 5th ed. 1925."*** *[Emphasis supplied]*

[24] 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. The directions by the Chief Justice varying the date of the *inter partes* hearing set by Njoki SCJ are a nullity and amounts to a contravention of the Constitution and the Supreme Court Act. Administrative directions cannot, in law, vary a Court Order. To hold otherwise would be to pave way for arbitrariness and exercise of absolute discretion.

[25] It is inaccurate therefore to argue, as the respondents have, that the Court Order was not varied. Once the single Judge of this Court was seized of the matter, she was obligated to render justice and issue any orders she deemed fit in line with Section 24 of the Supreme Court Act. The only recourse available to the aggrieved party was to seek review of the order by a five-judge bench. Any other avenue for recourse would be in direct contravention of Section 24(2) of the Supreme Court Act.

[26] It was argued that Section 5 (2)(c) of the Judicial Service Act empowers the Chief Justice to "exercise general direction and control over the Judiciary". Judiciary in this case, means Judges, Magistrates, Kadhis, etc. In my view Article 160(1) is uncompromising that in the exercise of judicial authority Judges are subject to the Constitution, *only*. That means that any statutory provision that purports to take away that judicial independence is unconstitutional to the extent of that inconsistency, as dictated by Article 2(4) of the Constitution.

[27] It is also expected that provisions of law are to be interpreted in a manner that conforms to the Constitution. Therefore, Section 5 (2)(c) of the Judicial Service Act must be construed in a manner that is in conformity with Article 160(1) of the Constitution so as to safeguard the independence of the judiciary.

Consequently, Section 5 (2)(c) cannot be construed as empowering the Chief Justice to interfere with the judicial independence reposed on the Judges by Article 160(1).

[28] In the same token, statutory provisions that make specific prescription on a subject trump general provisions on the same subject. In this instance, Section 24(2) of the Supreme Court Act is very specific as to how to vary an order issued by a single Judge whereas, Section 5 (2)(c) of the Judicial Service Act is in very general terms. Therefore, Section 24(2) of the Supreme Court Act overrides Section 5(2)(c) of the Judicial Service Act.

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

[29] It was the Respondent's submission that Article 163 (8) of the Constitution as read with Rule 4 of the Supreme Court Rules granted the Chief Justice power to make the directions. 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.

[30] Article 2 of the Constitution asserts the Supreme 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, subsidiary legislation 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.

[31] Taking all the foregoing into account, I am of the view that the Rules cannot be said to be superior to the Supreme Court Act. Seeing that there was provision for review of the orders of the single Judge in the Supreme Court Act, the respondents cannot claim that the Chief Justice's directions were pursuant to the Rules ignoring the fact that the Act provides the mechanism for review. The Supreme Court Rules must be construed to complement but not substitute or outrank the Supreme Court Act. In addition, both the Act and the Rules must be read in conformity with the Constitution and not contradict or detract from it.

[32] Further, the Supreme Court Rules, being subsidiary legislation must be read in a manner consistent with the Supreme Court Act which are ranked higher in the sources of law in Kenya. 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, as I had alluded earlier.

[33] I am convinced that the Chief Justice's directions amount to a conflict between Court administration and judicial independence. The effect of the directions was to encroach on the internal independence of the Judge. 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."***

[34] 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 judgeshould 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."***

[35] 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."***

[36] 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."***

[37] Although it is said that the directions were issued in view of the public interest nature of the matter, the fact that the matter belongs to the litigants should never be overlooked. As Counsel Nowrojee stated - the actions of the Chief Justice may to an independent observer create the impression that he either had a personal interest in the matter or that he was an aggrieved party - even though this may not have been his intention. It did not help matters that he is a member of the 1st Respondent. It cannot be emphasised 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 the single Judge. There is no provision for the Court or the Chief Justice to do so *suo motu*.

[38] It cannot be overstated that it is vital in a democracy that individual judges and the judiciary as a whole are impartial and independent from all external pressures and from 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.

F. ORDERS

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

(a) The application dated 31st May 2016 is hereby allowed.

(b) Costs in the cause.

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