REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim & Ojwang, SCJJ)

PETITION NOs. 6 AND 7 OF 2013 (CONSOLIDATED)

IN THE MATTER OF COURT OF APPEAL CIVIL APPLICATIONS NOs. 12 & 13 OF 2012 (CONSOLIDATED)

-BETWEEN-

THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK.....PETITIONER

-AND-

1. MALCOLM BELL.....
2. HON. DANIEL TOROITICH ARAP MOI } .....RESPONDENTS

-AND BETWEEN-

HON. DANIEL TOROITICH ARAP MOI.....PETITIONER

-AND-

1. MALCOLM BELL
2. THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK } .....RESPONDENTS

RULING

I. INTRODUCTION

[1] The High Court decision in Nakuru HCCC No. 14 of 2004 was overturned by the Court of Appeal in Civil Appeal No. 1229 of 2006, on 9th August, 2012; but

the Court of Appeal then granted the applicants leave to appeal further to the Supreme Court. An applicant, the Board of Governors of Moi High School, Kabarak thereafter came before this Court under certificate of urgency, in prayer for stay of execution of the Court of Appeal decision, pending hearing of their appeal.

[2] However, rather than proceed to the merits of the prayer for stay of execution, the Court, by its two-Judge Bench, had to consider a preliminary objection.

II THE INTERLOCUTORY APPLICATION IN THE SUPREME COURT

[3] The applicant moved the Court on the basis of Articles 50(1), 163(3)(b) and 163(4)(b) of the Constitution, as well as sections 15(1) and 16(2)(a), (b) of the Supreme Court Act, 2011 (Act No. 7 of 2011) and Rule 30(2) of the Supreme Court Rules, 2012 and the inherent powers of the Court.

[4] However, the respondent contended that such an application did not lie, and consequently, ought to be struck out. The objection is founded as follows:

(1) The Supreme Court lacks jurisdiction to hear and determine an application for stay of execution of a decree arising from a judgment of the Court of Appeal.

(2) Articles 163(3)(b) and 163(4)(b) of the Constitution, and sections 15(1) and 16(2) of the Supreme Court Act, 2011 do not confer upon the Supreme Court the jurisdiction to entertain an application for stay of execution of a decree arising from a judgment of the Court of Appeal.

(3) In effect, the application for stay of execution was legally defective, not being within the Supreme Court's scope of jurisdiction.

III. INTERLOCUTORY APPLICATION, SUPREME COURT, AND THE QUESTION OF JURISDICTION

[5] Learned Senior Counsel, Mr. Muite urged that jurisdiction in all cases must emanate from the Constitution, or from statute, or from Rules and Regulations founded on the terms of statute – and must not be assumed otherwise. He relied on a passage in this Courts earlier ruling, in ***Samuel Kamau Macharia v. Kenya Commercial Bank and Two others,*** Civ. Appl. No. 2 of 2011:

> *"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), Const. Appl. No. 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 statue law."*

[6] Mr. Muite urged that the initial burden rested with the applicant to show that the Court being moved has jurisdiction, in the first place. Learned counsel

contended that the applicant had not discharged this burden, and that, for certain, the Supreme Court lacked jurisdiction.

[7] Counsel recalled the terms of Article 163(3) of the Constitution, which thus provides:

> *"The Supreme Court shall have –*
>
> *(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140; and*
>
> *(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from –*
>
> *(i) the Court of Appeal; and*
>
> *(ii) any other court or tribunal as prescribed by national legislation."*

Against this background, Mr. Muite invoked a passage in this Court's ruling in the ***Samuel Kamau Macharia Case*** (supra) [at para. 69]:

> *"Article 163 of the Constitution provides for the jurisdiction of the Supreme Court in exhaustive terms, though leaving room for Parliament to prescribe further appellate jurisdiction in terms of Article 163(3)(b)(ii), which stipulates that the Supreme Court shall have appellate jurisdiction to hear and determine appeals 'from any other court or tribunal as prescribed by national legislation'. The Constitution also confers jurisdiction upon the Supreme Court to hear and determine an appeal from a judge who has been recommended for removal under Article 168(8). As far as we are aware, Parliament has yet to confer any further*

appellate jurisdiction upon the Supreme Court in terms of Article 163(3) (b) (ii) above."

[8] By the foregoing statement, Mr. Muite submitted, the Supreme Court had pronounced on its appellate jurisdiction *in exhaustive terms*.

[9] Counsel contended that the Supreme Court, unlike the Court of Appeal, had no jurisdiction to order stay of execution of a decree, contrary to the applicant's claim; for the Court of Appeal's jurisdiction in this regard has expressly been conferred by statute law. So if the Supreme Court were to have such a jurisdiction, this would have to come only by way of *statute law*. For the Court of Appeal, this stay-of-execution jurisdiction was given by the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya); and also by Rule 5 (2)(b) of the Rules of the Court of Appeal.

IV. JURISDICTION TO GRANT STAY ORDERS: ANALOGY WITH OTHER SUPERIOR COURTS

[10] Apparently responding to the applicant's invocation of the *inherent powers* of the Supreme Court, Mr. Muite submitted that the public interest if it would be appended to such powers, does not give jurisdiction. And learned counsel, for effect, gave the example of Rule 5 (2)(b) of the Rules of the Court of Appeal which granted the jurisdiction to grant stay of execution, in the same way as did the Civil Procedure Act (Cap. 21, Laws of Kenya) and the Civil Procedure Rules, in respect of the High Court: he would find no similar provision in respect of the Supreme Court.

[11] Mr. Muite urged that the draftsperson, for the Supreme Court Act, and in view of both the Civil Procedure Act and the Appellate Jurisdiction Act, was deliberate in making no express provision in respect of the stay-of-execution

jurisdiction. Counsel urged that there was, indeed, a rationale, to such a position: since the Benches of the High Court and Court of Appeal are in more substantial sizes, they were being entrusted with a wider range of matters, including both the substantive cause and the interlocutory matter; but as for the Supreme Court with its seven-Judge Bench, it was intended that only *filtered and certified matters* of general public importance should be taken up, on final appeal. Counsel urged that the Supreme Court should decline to open its doors to applications for stay-of-execution orders, as such applications would have a flood-gate effect on matters being brought before the Court, contrary to the original intention.

[12] Learned counsel submitted that a distinction should be drawn between the High Court's wider jurisdiction based on Article 165(3)(a) of the Constitution, and that of the Supreme Court as founded on the terms of Article 163. He urged that the status of jurisdiction in the Supreme Court was short of that intended in Article 165(3)(e), which confers on the High Court *"any other jurisdiction, original or appellate, conferred on it by legislation"* – this being the foundation for the Civil Procedure Act and the Civil Procedure Rules, as these provide for jurisdiction.

V. APPLICATION LIES WITHIN THE SUBSTANTIVE APPEAL: ISSUE OF JURISDICTION

[13] Learned counsel Mr. A.B. Shah invoked **section 21(1)(b) of the Supreme Court Act, 2011,** as a basis for the argument that the application formed an *integral part of the main cause,* and so, inherently, fell *within* the Supreme Court's jurisdiction. The provision is as follows:

> *"(1) On appeal in proceedings heard in any court or tribunal, the Supreme Court –*

(a) may make any order, or grant any relief, that could have been made or granted by the court or tribunal;

(b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163(4)(b) of the Constitution.

"(2) In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.

"(3) The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal."

[14] Learned counsel submitted that his client's notice of appeal, as well as the petition of appeal had been duly filed as required by law, and that the application by Notice of Motion had also been properly filed, within the framework of the pending appeal. He urged that the appeal was founded on a certificate of leave duly granted by the Court of Appeal; and he submitted that the Supreme Court was duly empowered to exercise appellate powers in the matter, by virtue of Article 163(4)(b) of the Constitution.

[15] Mr. Shah demonstrated his case also by citing the Supreme Court Rules, Rule 51, which thus provides:

"(1) The Chief Justice may issue practice directions for the better carrying out of the provisions of these Rules.

"(2) Where these Rules contain no provision for exercising a right or procedure, the Court may adopt any procedure that is not inconsistent with the Act, these Rules or the practice directions."

Learned counsel urged that, as the application was within the ambit of the appeal, if the Court had the jurisdiction to hear the appeal, then it must also have the jurisdiction *to hear such an application*.

[16] Mr. Shah also invoked the terms of Rule 3 of the Supreme Court Rules, 2012, which thus provides:

"(1) These Rules apply to proceedings under the Court's jurisdiction and include petitions, references and applications.

"(2) The overriding objective of these Rules is to ensure that the Court is accessible, fair and efficient.

.....

"(4) The Court shall interpret and apply these Rules without undue regard to technicalities of procedure.

"(5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

[17] Mr. Shah submitted that the orders sought were requisite in the context of the appeal, as *the appeal itself would be rendered nugatory*, if the objector were to proceed to execute on the basis of the judgment being appealed against.

[18] It was relevant in this regard, learned counsel urged, that the Court of Appeal had issued a certificate favouring appeal, on the basis of the *general public importance of the question,* and also on the basis that there could have been a "substantial miscarriage of justice" if the appeal was not heard.

VI. APPEAL TO THE SUPREME COURT: MAIN CAUSE AND INTERLOCUTORY MATTERS

[19] The term "appeal" is thus defined in ***Black's Law Dictionary***, 8th ed. (2004) [at p.105]:

> *"A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal...."*

[20] "Review" and "possible reversal" are the constant objects in view, as a Court entertains an appeal from a lower Court; and so, in the instant case, the applicants' pending appeal is seeking these ends, upon the Supreme Court acting on the Court of Appeal's certification of the matter as proper for appeal. Does the Court have the capacity to achieve those ends, without the power to preserve the subject-matter?

[21] We have considered the standing of an interlocutory application such as the one before us, in the context of comparative judicial experience; and in this regard we considered a decision of the Supreme Court of Appeal of South Africa, ***New Clicks South Africa (Pty) Ltd v. Minister of Health and Another*** 2005 (3) SA 238 (SCA), which also came up before the Constitutional Court of South Africa. Various issues were being raised within an appeal, in a piecemeal fashion, and a question was raised as to the standing of the several orders made.

The following passage in the decision sheds some light on the question before us in the instant matter:

> ***"The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application."***

[22] On that principle, this Court needs to evaluate the convenience of granting interlocutory reliefs *within an appeal*. On the basic question of jurisdiction, learned counsel, Mr. Shah has invoked all the governing provisions: Article 163(4)(b) of the Constitution; sections 21(1), (2) and (3) of the Supreme Court Act, 2011; and Rules 3 and 51 of the Supreme Court Rules, 2012. But in addition to this foundation, it now emerges that the Court, in its exercise of discretion, may consider the *convenience* of interlocutory orders within the context of the appeal itself. Interlocutory reliefs, in this respect, may be apposite by ensuring that the appeal is not rendered nugatory: and this not only serves the cause of *fairness* in dispute settlement, but also ensures that the ultimate decision of the Court bears the intended constitutional authority.

[23] It is not apparent to us, in the light of section 21(2) of the Supreme Court Act, 2011 that this Court, in exercise of its jurisdiction, is limited to adjudicating exclusively on the main dispute on appeal, and precluded from exercising all the attendant powers which, alone, will ensure the execution of the judgment and decree of this Court. The empowerment of the Court to make any ancillary or interlocutory orders is, in our opinion, entirely consistent with the draftsperson's

intention to consolidate and safeguard the Supreme Court's mandate to dispense justice in all matters coming up before it.

[24] Such an interpretation is in every respect consistent with section 24(1) of the Supreme Court Act, 2011 which thus provides:

> ***"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."***

[25] Although learned counsel, Mr. Muite gave the impression that by law, only the High Court and the Court of Appeal may grant orders of stay of execution of a decree, we would not agree. This Court, by granting such orders, is not at all in departure from the principle we enunciated in ***Peter Oduor Ngoge v. Francis Ole Kaparo***, S.C. Pet. No. 2 of 2012:

> ***"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."***

Does the grant of interlocutory relief in the instant matter encroach on the jurisdiction of the Court of Appeal? We do not think so. For interlocutory applications in the nature of injunctions and stay of execution are made *within the substantive matter of the appeal*; and that is the case, in this instance. The Court has jurisdiction to hear and determine such interlocutory applications

with special regard to the circumstances of each case. Where necessary, this Court may also exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the Court – to render justice in accordance with the Constitution and the ordinary law.

VII. THE SUPREME COURT, INHERENT POWERS, AND THE QUESTION OF JURISDICTION

[26] It is apparent from the submissions of learned counsel, Mr. Muite that the theme "inherent powers" was a factor behind the contention that the Supreme Court lacks jurisdiction to make an interlocutory order such as that regarding stay of execution of the decree of a lower Court.

[27] The reference to "inherent powers" is found in Rule 3(5) of the Supreme Court Rules, 2012 which thus provides:

> ***"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

Such powers, it is our apprehension, are not substantive powers such as will open up foundations to new lines of litigation – as in the case of *jurisdiction*, or some source of a *cause of action*. Rather, inherent powers are endowments to the Court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional; it includes such powers as enable the Court to regulate its internal conduct, to safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that its mode of discharge of duty is conscionable, fair and just.

[28] Are such powers capable of *donating jurisdiction*? It is not possible. For jurisdiction is a critical threshold in the tenability of a cause of action, and must emerge from the Constitution or the statute law, or from a rule created on the basis of statute law.

[29] This perception is consistent with the comparative jurisprudence coming to our attention. The South African Court of Appeal decision in ***Oosthuiven v. Road Accident Fund*** (258/10) [2011] ZASCA 118 has the following passage:

> ***"[A] Court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have."***

The Court in that case, relied on a work of scholarship, Jerold Taitz's book, ***The Inherent Jurisdiction of the Supreme Court*** (Cape Town: Juta Publishers, 1985), in which the following passage appears:

> ***"The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the Court is unable to function with justice and good reason... [S]uch powers are enjoyed by the Court by virtue of its very nature as a superior court modelled on the lines of an English superior court. All English superior courts, English colonial superior courts and the superior courts which succeeded them are deemed to possess such inherent jurisdiction save where it has been repealed or otherwise amended by legislation."***

[30] We have noted, however, that because such inherent powers are of an unbounded character, they have been perceived, in certain jurisdictions abroad,

as lending themselves to some enlargement, especially, to allow for the prescription of *new procedural rules*. Thus Professor Samuel P. Jordan in his article, "Situating Inherent Power within a Rules Regime," in ***Denver University Law Review*** (Vol. 87:2) thus remarks:

> ***"[By] virtue of being constituted as a court and invested with judicial power, courts have long found that they have authority to impose procedural requirements in the context of deciding cases. As far back as 1812, the U.S. Supreme Court concluded that certain implied powers must necessarily result to our courts of justice from the nature of their institution. Thus, even when a formalized and prospective set of procedural rules does not exist, courts may fulfil their judicial function by developing and enforcing case-specific procedural requirements. It requires only a modest extension of that logic to conclude that these powers also permit courts to use their inherent power to fill gaps left by an existing but incomplete procedural framework."***

[31] Such an approach, quite clearly, would become apt for consideration only in the context of a deficient framework of legislation or rule-making; and such has not been perceived to be the position in Kenya, so far. It thus remains the case that this Supreme Court's inherent powers are limited as already indicated.

[32] In our opinion, the Supreme Court's jurisdiction in respect of interlocutory orders, such as stay-of-execution orders, firstly emanates directly from the statute law and the rules; and secondly, rests on the rational principle that the appellate power of "review and possible reversal" of the substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was

made. This principle is well recognized in comparative judicial experience. In ***Bremer Vulkan Schiffbau and Maschinenfabrick v. South India Shipping Corporation Ltd***. [1981] AC 909, Lord Diplock, in relation to the inherent powers of the High Court, typified such powers as enabling the Court to take necessary action to maintain its character as a court of justice. According to Lord Diplock, it would stultify the constitutional role of the court if as a court of justice it were not armed with power to prevent its process being misused, in such a way as to diminish its capability to arrive at a just decision of the dispute.

[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 the 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.

VIII. OTHER POINTS OF PRELIMINARY OBJECTION

[34] Learned counsel, Mr. Muite also contested the application, if only fleetingly, on the ground of abuse of Court process. The essence of this allegation was that the applicant had moved two Courts concurrently with the same prayer – first in the Court of Appeal, which declined to grant the orders on 19th April, 2013, and then now in the Supreme Court.

[35] In ***The Kenya Section of the International Commission of Jurists v. The Attorney-General and Two Others***, Sup. Ct. Crim. App. No. 1 of 2012, this Court considered "abuse of process," and thus held [para. 36]:

> ***"The concept of 'abuse of the process of the Court' bears no fixed meaning, but has to do with the motives behind the guilty***

party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice."

[36] On the basis of our earlier decision, we do not, in the present instance, perceive a tell-tale case of abuse of Court process; for it is by no means evident that the applicant is attempting to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.

[37] Is it plausible that this Court would at any time have jurisdiction to entertain the kind of interlocutory application raised by the applicant? Learned counsel, Mr. Muite submitted that the answer could be in the affirmative, provided only that, in response to a substantive objection by his client, this Court would already have endorsed the Court of Appeal's certification of the final appeal as being one on a matter of general public importance.

[38] We are, on this point, guided by the terms of Article 159(2)(d) of the Constitution which provides that:

"justice shall be administered without undue regard to procedural technicalities...."

A breach of the foregoing provision would, in our view, result if we were to hold that we will only have jurisdiction to grant stay of orders of execution, after disposing of the first respondent's application calling for a finding that the appeal does not raise a matter of general public importance. The interpretation proposed by learned counsel seeks not to solve a real question in the litigation process, but merely invites the Court to adopt an artificial view of the meaning of words used in the provisions of the law.

IX. DISPOSAL

[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.*

[40] ***Accordingly, we disallow the preliminary objection***.

[41] **Costs in the cause.**

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 8th day of May, 2013.

.....	**.....**
M.K. IBRAHIM	**J.B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true
Copy of the original

DEPUTY REGISTRAR
SUPREME COURT OF KENYA