REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mutunga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki, SCJJ)

CIVIL APPLICATION NO. 12 OF 2016

– BETWEEN –

HON. JUSTICE PHILIP K. TUNOI.....1ST APPLICANT

JUSTICE DAVID A. ONYANCHA.....2ND APPLICANT

– AND –

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE JUDICIARY.....2ND RESPONDENT

THE RULING BY THE HON. JUSTICE (PROF.) J.B. OJWANG

A. THE PRELIMINARY OBJECTION, AND THE SUBMISSIONS

[1] The applicants raised a preliminary objection, contesting the legal basis of the Orders made in this matter by the Chief Justice on 30th May, 2016. The said Orders, learned Senior Counsel, Mr. Nowrojee submitted, purported to vary pre-existing Orders of 27th May, 2016 but were made without jurisdiction.

[2] Learned counsel highlighted the Chief Justice's words, *"Granted the urgency under which Orders are sought, I invoke my administrative power*s," urging that the making of the later Orders had seriously "*compromised the reputation of the Supreme Court, and the future of the Judiciary."*

[3] Mr. Nowrojee submitted that administrative powers cannot validate an interference with *judicial Orders*. He submitted that the Judiciary, as constituted under Article 160(1) of the Constitution, is only subject to the Constitution, and not to courses of action taken in exercise of administrative powers.

[4] In learned counsel's words:

> *"When a Chief Justice acts in an administrative capacity, he is not acting in a judicial capacity. He invokes administrative powers and becomes someone other than the Court."*

[5] Counsel submitted that a person issuing administrative directions is not seized of the matter in question, which has already been the subject of pertinent Orders by another Judge.

[6] Learned counsel referred to a relevant decision of the High Court, ***Justice Philip K. Tunoi & Another v. The Judicial Service Commission & Another,*** Petition No. 244 of 2014, in which it was thus held (para.70):

> *"...it is explicit, and we so determine, that substantive directions are to be issued by the court actually seized of the matter, and not any other 'person' or 'authority'. Directions when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. In our view,* ***the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the Court ought to render Judgement, because this ceases to be an***

administrative function and can be construed as bordering on interfering in the judicial conduct, or road map, of a matter. *In any case, the Court seized of the matter is obliged in law to dispose of all matters in an expeditious manner"* [emphasis supplied].

[7] Learned counsel submitted that any directions regarding the conduct of a case already laid before the Bench, ought to issue forth from the Judge or Judges seized of the matter. He urged that on that principle, the Orders made in the instant matter by *Njoki, SCJ* on 27th May, 2016, formed an integral part of the *judicial* exercise, in the overall conduct of the matter – and was not amenable to administrative variation. On that principle, it was not tenable in law, that the Chief Justice may subject the case to administrative powers, be it in relation to hearing dates, or Judgment dates. The process of hearing cases is a judicial function – especially where a certain Judge has, or certain Judges have already taken action.

[8] Learned counsel further submitted that the foregoing High Court decision had been taken between the same parties who have now come before the Supreme Court; and so, over and above the binding rule that judicial Orders are not for administrative variation, as between the parties herein, that position is binding, on the basis of the doctrine of *res judicata;* none of the parties had appealed against the High Court's prescription of the rule of law in question. Moreover, none of the parties has moved this Supreme Court seeking a departure from that rule of law as defined by the Judges of the High Court. It can no longer be reopened: for there must be an end to litigation.

[9] That the High Court prescribed the rule in a case between these very parties; that the rule related to the Chief Justice's administrative acts; and that the Chief Justice in the instant case, has overlooked that same rule of law – counsel urged – now raised the further question as to whether the litigant has been accorded the protection of the Court as required under the law.

[10] Learned counsel submitted that the Judicial Service Commission, a public agency under the Constitution, has a duty of fairness towards persons falling within its mandate, and consequently, it has a duty of fairness towards the Judges involved in this matter. In this instance, failure of due performance of that remit has become evident, making this case one of the most important constitutional matters coming up before the Supreme Court. The matter has come up when, yet-untested issues of transition from the former to the current Constitution are live: and a fair and judicious resolution of these will have impacts upon citizen-rights in future times.

[11] A just and fair disposition is now called for in the functioning of the Judicial Service Commission, Mr. Nowrojee urged, as a group of some 40 senior Judges are transiting between the former and the current Constitution.

[12] Learned counsel submitted that this Court should bear in mind the special questions of constitutional transition; the rights of those to whom the Judicial Service Commission has to render service; and the disturbing historical past, when raw power claimed by personalities in the judicial service, would validate the "calling up of files", to the intent that duly-made Orders be varied, to serve private interests. Learned counsel cautioned, as a matter of prudence in the discharge of Court work, that signals such as, "the Chief Justice has left

directions", or "has left instructions", to be acted upon by officials, when the referent is a judicial matter, are for avoiding – especially since they open up the scope for judicial review Orders such as *certiorari, mandamus, prohibition*, which would predictably, occasion contretemps in the conduct of the operations of the Judiciary. He cited a past case, ***Muriithi v. Attorney-General*** [1986] KLR 767, which superbly exemplifies the grave impropriety of a Chief Justice departing from the orderly and collegial conduct of affairs, to bluffing administrative techniques that compromise order and civility in the discharge of Court work. Learned counsel submitted that such a roughshod scheme of judicial administration, under the Constitution of Kenya, 2010 has fallen into redundancy; it is "a retrogressive mechanism never to be brought back in this transformed judiciary."

[13] Learned counsel asked the Court to annul the file-demand notice attributed to the office of the Chief Justice, as it "*will create a pernicious precedent for the next Chief Justice.*"

[14] Learned counsel submitted that the Chief Justice's administrative action, insofar as it purported to vary properly-taken judicial orders, was unconstitutional, and contrary to the relevant statute law; more particularly so, as the notion such act purveyed, was that of absolute discretionary powers, which are alien to the Constitution of Kenya, 2010.

[15] Counsel submitted that it was untenable for the Chief Justice's said exercise of power to be justified on the basis of subsidiary legislation. For all such legislation must not be so imprecise as to create unregulated openings, by virtue of which unconstitutional exercises of power might be exercised. The Chief

Justice had cited no valid source of the power he purported to exercise; and so such exercise of power was a nullity.

[16] Mr. Nowrojee made the prayers that:

> *(i) the preliminary objection be upheld;*
>
> *(ii) the Judicial Service Commission's Notice of Motion in Application No. 12 of 2016 be dismissed;*
>
> *(iii) the Court do set the boundaries of administrative powers, as distinct from judicial powers.*

[17] In response, learned Senior Counsel, Mr. Muite adopted the Judicial Service Commission submissions made by learned Senior Counsel, Mr. Ahmednasir and learned counsel, Mr. Kanjama, in a related application, Civil Application No. 11 of 2016. He considered that the notice of preliminary objection had extended beyond objection, becoming an answer to the application by the Judicial Service Commission: insofar as the objector was contending that the learned Chief Justice lacked the jurisdiction to make the Orders of 30th May, 2016 by which he purported to vary judicial Orders already in place. Mr. Muite contended that it was improper to raise the point as a preliminary objection, and that this was a matter for submissions within the framework of an application.

[18] Mr. Muite submitted that a distinction was to be drawn between a Judge's decisional independence, on the one hand, and the issuance of administrative

directions, on the other hand: and he maintained that the Chief Justice had left intact the decision taken by the single Judge in a judicial capacity. He contended, however, that by virtue of Article 161(2)(a) of the Constitution which made the Chief Justice "head of the Judiciary", he was the custodian of powers of general control, and quite rightly exercised the same in varying the single Judge's Orders of 27th May, 2016. He contended that no person in the Judiciary can have precedence over the Chief Justice as regards the setting of hearing date; in his words: "*The Chief Justice had the mandate and the jurisdiction; if he was to constitute the Bench, he would have authority to give the date; so he can also give dates for other matters….He could not close his eyes to the fact that on 16th June, 206 he would not be in office.*"

[19] Such a position was adopted by learned counsel, Mr. Issa for the Judicial Service Commission, who contended that whereas the single Judge had a clear mandate to certify a matter as urgent, the law was silent on the setting of hearing arrangements – and so the Chief Justice could very well vary the prior Orders and prescribe a new hearing date.

[20] Learned counsel, Mr. Kiragu submitted that, by Section 24(1) of the Supreme Court Act, any Judge of the Supreme Court may make interlocutory Orders, and issue attendant directions. He then posed the question as to whether anyone, outside the framework of Section 24(2) of the said Act, may interfere with such an Order. Making interlocutory Orders, and assigning hearing date therefor: can these be separated?

[21] Mr. Kiragu's answer was that the correct position is that, one is not concerned with the particular office-holder who assigns that date; the matter is

about observance of the rule of law. Can the Chief Justice's administrative powers be used to review the judicial Orders of a Judge? Counsel submitted that there is a proper procedure for moving a Judge who has issued Orders, to vary the same.

[22] Learned Senior Counsel, Mr. Nowrojee in his reply, submitted that the single-Judge Orders had been made in judicial proceedings, whereas those of the Chief Justice had been made in the course of administration. He submitted that if the Chief Justice's Orders were contrary to the Constitution, it meant that there was no basis for a sitting of the Court to consider matter that was covered by his Orders.

[23] Learned counsel submitted that even though it was right for the Chief Justice, in a proper case, to set hearing dates, once a Judge has been seized of the matter, the Chief Justice had no further role. He urged that the Chief Justice cannot reverse a hearing date specifically assigned by a Judge in judicial proceedings; for otherwise, there would be a wide scope for abuse of power. Thus, the Chief Justice's Orders of 30th May, 2016 fell outside the granted powers – as a Judge had already taken the appropriate action. In the circumstances, the fixing of hearing date was contrary to law, and the Court should down tools, as regards the date assigned by the Chief Justice.

B. OVERVIEW: EXTRACTING THE FUNDAMENTAL PRICNPLE

[24] It is a fact that closely-related, highly significant events came to pass in Kenya's Law Courts on *27th May, 2016*. Firstly, a case of the greatest interest to the Judicial Branch, to Judges and judicial staff, to the totality of the national

governance structures, and to the Kenyan people in general, was decided upon by the Court of Appeal. That Court took a unanimous stand in favour of the Judicial Service Commission, and against the two Supreme Court Judges whose retirement-age contest had come up for determination – with far-reaching implications touching on a good number of other Judges in service. The fact that it was this vital organ, the Judiciary, that was at the centre of the Appellate Court's Orders, was significant furthermore, insofar as those Orders intimately affected those *relationships that are the subject of declared constitutional values and principles, as well as specific constitutional rights*. Quite clearly, *the complex set of constitutional-interpretation and application issues involved, directly called for the most serious, and most enlightened interpretations*. Naturally, the affected Justices of the Supreme Court promptly invoked the ultimate appellate jurisdiction of that Court.

[25] Notwithstanding the logistical obstacles beleaguering their efforts, such as the non-availability of essential process-documents of the Appellate Court, the applicants lawfully moved the Supreme Court, at the preliminary stage of applications, and *secured requisite conservatory Orders*.

[26] *While it is to be assumed from the foregoing account, that the Kenyan public now awaits the most effective, and juridically resourceful resolution of the emerging questions by this apex Court, the Judicial Service Commission contests any prospect of the adjudicatory process moving one more step.*

[27] This is the context in which the applicants have come by the instant preliminary objection, seeking to annul the Chief Justice's administrative Orders of 30th May, 2016 which sought to vary the specifics of the single-Judge Orders of

27th May, 2016 which had duly fixed a convenient date for the *inter partes* hearing of the interlocutory applications, ahead of the main appeal cause.

[28] *It is for certain, that the Supreme Court, as the ultimate seat of justice, ought to entertain this matter, not only for the purpose of upholding the rights of the litigants, but also for that of giving fulfilment to a rights-responsive, a progressive, and a democratic Constitution of Kenya, 2010.*

[29] *Guided by the foregoing principles, and taking the stand that the meritorious Constitution thus perceived, has no space for authoritarian inclinations – least of all in relation to the functioning of the judicial process – I have to uphold the substance of the applicants' preliminary objection.*

C. ORDERS

[30] From my assessment of the merits of the submissions of learned counsel in this matter; and arising from my insights set out in the last six paragraphs of this Ruling, I have to make the following Orders:

(a) The substance of the applicants' objection is upheld; and consequently, the Chief Justice's administrative Orders and directions of 30th May, 2016 are declared null.

(b) The Judicial Service Commission's application by Notice of Motion in Civil Application No. 12 of 2016, dated 30th May, 2016 is, consequently, dismissed.

(c) Costs shall abide the** inter partes **hearing and determination of the pending applications and/or causes.

DATED and DELIVERED at NAIROBI this 14th day of June, 2016.

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THE HON. JUSTICE (PROF.) J.B. OJWANG
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT