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LEGAL ALERT

THOUGHTS ON THE SUB JUDICE RULE

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On 17th August 2022, in Omwanza Ombati v. The Hon. Chief Justice, The President of the Supreme Court & 4 Others (2022) eKLR, the High Court (Thande, J) quashed the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 ("the Rules") on the basis that the Rules were unconstitutional for firstly, usurping the legislative power, a prerogative of Parliament and secondly, for want of public participation. The Rules, which were published on 20th May 2022, in Legal Notice Number 79 of 2022 of the Kenya Gazette introduced sub-rules 4 and 5 to Rule 18 on the following terms:

- *4. Upon the commencement of the hearing of the petition by the Court, litigants, their advocates, and advocates' agents shall refrain from expressing their opinion on merit, demerit, or predict the outcome of the petition in any manner that would prejudice or impede court proceedings, until judgment is delivered.*
- *5. A breach of sub-rule (4) shall amount to contempt of Court under the Act and the Rules made thereunder.*

The intention of the Supreme Court was to curb the rampant diatribes often witnessed especially on social media whereby advocates invariably trade insults, launch scurrilous attacks and spew vitriol, all in the name of exercise of the freedom of expression. Indeed, it was recently quipped that "advocates were a rarity some years back, but now, they are everywhere, and so social media knows no peace". Such conduct has the resultant effect of eroding the dignity and public confidence in the Courts and undermines the administration of justice. The Court thus sought to codify the longstanding sub-judice rule in order to protect the integrity of judicial proceedings by holding advocates in contempt of Court for non-compliance with the said rule.

Origin of the Sub Judice Rule

The sub judice rule can be traced back to 1742, when Lord Chancellor Hardwicke in holding the St. James Evening Post in contempt of Court stated that, "it was not only libellous to publish that a witness who testified in active proceedings committed perjury, but a case for contempt of Court by publications". Essentially, the sub judice rule was meant to punish those who misrepresent facts relating to active proceedings for contempt of Court given that such conduct would unfairly prejudice ongoing legal proceedings.

As far as the Lord Chancellor Hardwicke was concerned, any act done or writing published, calculated to bring a Court or a judge of the Court into ridicule, or to lower his or her authority, amounts to contempt of Court. However, that class of contempt is qualified such that fair comments on judicial proceedings or reasonable expostulation against judicial acts contrary to law or public good is not treated as contempt of Court. This therefore gives some leeway to the freedom of expression and freedom of the media within the aforesaid confines.

Application of the Sub Judice Rule in Kenya

Kenya imported the sub judice rule through the Judicature Act, (Cap. 8) Laws of Kenya under section 5(1) which provides that the High Court of Kenya and

the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court Justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts. Ever since the enactment of the Judicature Act in 1967, the practice has been legally adopted and applied in the circumstances of Kenya to protect active judicial proceedings and the sanctity of Court.

For instance, in Republic v. Tony Gachoka & Another (1999) eKLR, the Court of Appeal, which was the apex Court at the time, found the Respondents in breach of sub judice rule hence guilty for contempt of Court and sentenced the 1st Respondent, to imprisonment for six (6) months and fined the 2nd Respondent Ksh. 1,000,000 and to cease any further publication until the full amount was paid.

In the present case, the issues that were before Justice Thande centred on legality of the Supreme Court (Presidential Election Petition) (Amendment) Rules, 2022 and not the legality of the sub judice rule as a judicial principle to protect active judicial proceedings. In quashing the Rules, Justice Thande stated that the Supreme Court does not have the power to make rules having the force of law under Kenyan Constitutional dispensation notwithstanding the provisions of Article 163 (8) of the Constitution which empowers the Supreme Court to make rules for the exercise of its jurisdiction.

The Court, further, stated that the Supreme Court in making of such Rules must ensure it conducts adequate public participation pursuant to Article 10 (2) of the Constitution and the failure to do so rendered the Rules improper.

The justification offered for the holding is that the Constitution divides powers among various organs of government and only Parliament is exclusively mandated to make laws or rules that have the force of law. On the second issue, it was determined that no public institution or organ of government was beyond the reach of National values and principles of good governance, hence the Supreme Court was bound to conduct public participation before promulgating the Rules.

Conclusion

The decision does not do away with the sub judice rule in Kenya. Whereas the Supreme Court might have exceeded its limits by attempting to augment the law on sub judice, the annulment of the Rules does not derogate the subsisting provisions of the law as regards the Court's power to punish a party for contempt of Court.As such, any commentary or publication relating to active judicial proceedings that would bring the Court into disrepute or substantively prejudice or undermine the administration of justice would still be in breach of the sub judice rule and punishable for contempt of Court.

Disclaimer

This alert is for informational purposes only and should not be taken or be construed as a legal opinion. If you have any queries or need any clarifications as to how any aspect of the judgment might affect you, please do not hesitate to contact John Mbaluto, Partner, FCIArb (john@oraro.co.ke) or Ajak Jok Ajak, Associate (ajak@oraro.co.ke) or your usual contact at our firm.

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