



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Criminal Application 2 of 2012

BETWEEN

ISAAC KAMAU IRUNGUAPPELLANT

AND

REPUBLICRESPONDENT

(Being an application for grant of leave from the Court of Appeal Mombasa (Lakha, Bosire, Owuor JJ.A) dated 27th July 2001

In

C.R.A NO. 112/2001

RULING OF THE COURT

The application before us is the motion dated 20th March 2012.

It is styled thus;

“Being an application for grant of leave from the Court of Appeal to the Supreme Court under Articles 163 (4) (A), 22 (1), 22(3) (d); 22 (4), 25 (a) 262 & clause 6 of the 6th schedule of the Constitution 2010, Section 15 (2) of the Supreme Court Act, Rules 53 and 53 of the Supreme Court Rules, Section 3 (2), 3A & 3B of the Appellate Jurisdiction Act; Rule 4 of the Court of Appeal Rules, 2010)”

That styling notwithstanding, the motion itself has two brief prayers, namely;

“1. THAT the application be certified as urgent.

2. THAT the applicant be granted an extension of time for fourteen days from the date of this order to file his Notice of Appeal to the Supreme Court.”

The application is premised on a raft of grounds on its face all of which basically mount constitutional challenges to the sentence of death imposed on the applicant after a trial before a subordinate court for robbery with violence for which he was convicted. His appeals, first to the High Court, and then to this Court, were dismissed. The appeal to this Court was *Criminal Appeal No. 112 of 2001* and judgment

therein was rendered on 27th July 2001.

We did on our own motion enquire of Mr. Bryrant, learned counsel for the applicant, whether we were possessed of jurisdiction to entertain this application. The applicant styles his application one for certification but he only prays for extension of time to file a Notice of Appeal to the Supreme Court. Even assuming we could treat the application as one seeking certification under **Article 163 (4) (b)** of the Constitution, which he has not cited, we do not see that the applicant has attempted to place himself within what is contemplated by that provision of law.

Article 163 (4) (b) provides from an appeal for this Court to the Supreme Court;

“In any other case in which the Supreme Court, or the Court of Appeal certifies that a matter of general public importance is involved.”

We would have the jurisdiction, and in a proper case grant certification, if it were shown that the issue being raised is one involving a *matter of general public importance*. Neither in the application and its supporting affidavit nor in the submissions before us by counsel was any attempt made to show that there is an issue of general public importance. On that score, we cannot grant certification.

As to the constitutional issues that are raised by the applicant, they are governed by **Article 163 (4) (a)** of the Constitution under which an appeal from this Court to the Supreme lies;

“as of right in any case involving the interpretation or application of this Constitution.”

That provision is clear beyond peradventure. A party wishing to rely on it does not require leave, permission, certification, green light or any input whatsoever from this Court.

The self-evident position that an appeal from this Court to the Supreme Court based on interpretation or application of the Constitution does not require leave was restated by the Supreme Court in **LAWRENCE NDUTTU & 6000 OTHERS Vs. KENYA BREWERIES LTD AND J. HARRISON KINYANJUI & CO. ADVOCATES** SC Petition No. 3 of 2012 as follows;

“At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is a case involving the interpretation or application of the constitution. In such a case no prior leave is required from this Court or the Court of Appeal. The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court ... then such intending appellant must convince the court that the case is one involving a matter of general public importance.”

(Emphasis ours)

The same holding was adopted and affirmed by the same court in **SAMUEL K. MACHARIA Vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS** Sup. Ct. Appl. 2 of 2011, [2012] eKLR. It is the law.

As regards the fact that the application before us is seeking extension of time to file a Notice of Appeal, we hold that on that score, too, the applicant has come before the wrong forum. He cites **Rule 4** of this Court’s Rules which provides thus;

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

(Emphasis ours)

This Rule clearly can be of no assistance to the applicant for the simple reason that the filing of a Notice of Appeal before the Supreme Court and the timelines for it is not a matter provided for by the Court of Appeal Rules. As such, even were we inclined to extend time, it is not within our province. We agree with Mr. Kamula, learned counsel for the respondent that the Supreme Court Act and the Rules made thereunder provide the proper legal framework for extension of time for filing a notice of appeal to that court. It is to the same Act and Rules that the applicant should have resorted to in order to challenge what he told us was a refusal by the court’s registry to accept his application. The correspondence Mr. Bryant showed us moreover indicate that he last engaged that registry long before that court became fully operational and we have no reason to doubt that correspondence thereto would now be acknowledged and appropriately dealt with.

It is apparent from what we have said so far that this application is doomed. Before we dismiss it, however, we wish to observe that the judgment of this Court appealed from was passed more than ten years prior to the promulgation of the Constitution. Our preliminary view is that the jurisdiction the appellants wish to invoke is not retrospective in character as it relates to matters involving ‘this constitution’. Finality and closure are necessary to litigation. Moreover, both the Supreme Court and this Court have categorically declared that position in a number of cases including **S.K. MACHARIA** (supra) where the Supreme Court stated;

“Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the commencement of the Constitution of 2010, it would trigger turbulence of pernicious proportions in the private legal relations of the citizens. We hold that the Article 163(4) is forward looking, and does not confer jurisdiction upon the Supreme Court before the commencement of the Constitution.”

We ourselves recently followed that decision in **GREENFIELD INVESTMENT LTD Vs. BABER ALIBHAI MAWJI** Civ. Appl 5 of 2005, where we concluded as follows, which we reaffirm;

“Where, as here, the judgment predated the Constitution, this Court must decline certification. It did so in BAIBA DHIDHA MJIDHO Vs. VANLEER (EA) LTD (GRIEF (K) LTD) Vs. THE BUSINESS OF BRIEF BROS CORPORATION, Civ. Appl. 8 of 2008. We likewise decline.”

The upshot is that this application is devoid of merit and is accordingly dismissed.

Dated and delivered at Nairobi this 24th day of May 2013.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mwn