



Kiamba & 3 others v Ethics & Anti-Corruption Commission & another (Petition (Application) E004 of 2024) [2024] KESC 19 (KLR) (Crim) (10 May 2024) (Ruling)

Neutral citation: [2024] KESC 19 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CRIMINAL
PETITION (APPLICATION) E004 OF 2024
SC WANJALA, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
MAY 10, 2024**

BETWEEN

**JIMMY MUTUKU KIAMBA 1ST APPLICANT
TRACY MBINYA MUSAU 2ND APPLICANT
JIMBISE LIMITED 3RD APPLICANT
MUTHAIGA GREEN ACRES LIMITED 4TH APPLICANT**

AND

**ETHICS & ANTI-CORRUPTION COMMISSION 1ST RESPONDENT
EQUITY BANK LIMITED 2ND RESPONDENT**

(Being an application for conservatory orders and/or interim stay of execution of the Judgment delivered on 9th February, 2024 in Civil Appeal No. 464 of 2019 (Laibuta, Ali-Aroni & Mativo JJ.A))

Mere reference of constitutional principles is not sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution
The application sought for among other orders; conservatory and/or interim orders staying the execution of the judgment of the Court of Appeal pending the hearing and determination of the application. The court highlighted the guiding principles in granting an order of stay of execution and the requirements to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution. The court further held that the mere reference to the rich generality of constitutional principles was not a sufficient ground to invoke article 163(4)(a) of the Constitution.

Reported by Kakai Toili



Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals as of right in any matter relating to the interpretation or application of the Constitution - requirements to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution - whether mere reference of constitutional principles by the Court of Appeal was sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4)(a).

Jurisdiction - jurisdiction of the supreme court - jurisdiction of the supreme court to hear appeals as of right in any matter relating to the interpretation or application of the Constitution - whether mere reference of constitutional principles by the Court of Appeal was sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4)(a).

Civil Practice and Procedures – orders - orders of stay of execution - what were the guiding principles in granting an order of stay of execution.

Brief facts

The instant application sought for among other orders; conservatory and/or interim orders staying the execution of the judgment of the Court of Appeal pending the hearing and determination of the application. The applicants claimed that their appeal was arguable with a high probability of success as it raised complex issues of constitutional interpretation that could not be properly determined at an interlocutory stage.

The applicants further claimed that their appeal was premised on several grounds including that their constitutional rights to property, fair hearing, fair administrative action and freedom from discrimination were infringed upon by the 1st respondent when it instituted proceedings at the High Court for forfeiture of unexplained assets under section 55(5) and (6) of the Anti-Corruption and Economic Crimes Act despite the High Court having made a finding that the assets were not acquired as a result of corrupt conduct.

The applicants contended that, unless the application was allowed, the appeal would be rendered nugatory and an academic exercise; and that the applicants would suffer prejudice. The 1st respondent on the other hand argued that the appeal did not involve the interpretation or application of the Constitution nor did it relate to any recurrent issue of cogent constitutional controversy and therefore no right of appeal under article 163(4) (a) of the Constitution lay to the court.

Issues

- i. What were the requirements to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution.
 1. Whether mere reference of constitutional principles by the Court of Appeal was sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in any matter relating to the interpretation or application of the Constitution.
- ii. What were the guiding principles in granting an order of stay of execution?

Held

1. Before the court granted an order for stay of execution, an appellant, or intending appellant, must satisfy the court that;
 1. the appeal or intended appeal was arguable and not frivolous;
 2. unless the order of stay sought was granted, the appeal or intended appeal were it to eventually succeed, would be rendered nugatory; and,
 3. that it was in the public interest that the order of stay be granted.
2. An appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. Where the interpretation or application of the Constitution had only but a limited bearing on the merits of the main cause, then the jurisdiction of the court could not be properly invoked. The mere reference to the rich generality of constitutional



- principle as the Court of Appeal did in the instant case, was therefore not a sufficient ground to invoke article 163(4)(a) of the Constitution.
3. The application of section 26 of the Anti-Corruption and Economic Crimes Act to the effect that the provision was permissive rather than mandatory in informing persons of interest of the intention to investigate bank accounts or search premises and it was left to the discretion of the 1st respondent to do so, such a matter could not attract any interpretation or application of the Constitution and to attract the court's attention under article 163(4)(a) of the Constitution.
 4. The gist of the applicants' appeal involved a determination of the proper interpretation or application of the provisions of sections 55 and 56 of the Anti-Corruption and Economic Crimes Act and whether or not the threshold of forfeiture had been met to warrant the orders of forfeiture of assets granted, neither the High Court nor the Court of Appeal attempted to interpret or apply sections 26, 55 or 56 of the Anti-Corruption and Economic Crimes Act in the context of their constitutionality or otherwise.
 5. The issues raised by the applicants were not sufficient to trigger the court's jurisdiction under article 163(4)(a) of the Constitution and neither the petition of appeal nor the instant motion were properly before the court. Consequently, the court had no jurisdiction to hear and determine Petition No. E004 of 2024 or the instant application for conservatory or stay orders.

Petition of appeal and application struck out.

Orders

Kshs. 6,000 to be deposited as security for costs in the appeal be refunded to the appellant; no order as to costs.

Citations

Cases

Kenya

1. *Amuti, Stanley Mombo v Kenya Anti-Corruption Commission* Petition 21 of 2019; [2020] KESC 45 (KLR) - (Followed)
2. *Board of Governors, Moi High School, Kabarak & Daniel Toroitich Arap Moi v Malcolm Bell* Civil Application 12 & 13 of 2012; [2013] KECA 13 (KLR) - (Followed)
3. *Ethics & Anti Corruption Commission v Joseph Chege Gikonyo, Lucy Kangai Stephen & Giche Limited; Francis Irungu Thuita (Interested Party)* Anti-Corruption and Economic Crimes Case 14 of 2018; [2018] KEHC 1757 (KLR) - (Followed)
4. *Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others* Petition 30 & 31 of 2019 (Consolidated); [2022] KESC 59 (KLR) - (Followed)
5. *Jobo & another v Shabbal & 2 others* Civil Appeal 12 of 2013; [2013] KECA 435 (KLR) - (Followed)
6. *Munya v Kithinji & 2 others* Petition 2 of 2014; [2014] KESC 49 (KLR); [2014] 1 KLR 58 - (Followed)
7. *Nduttu and 6000 Others v Kenya Breweries Ltd & another* Petition No 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 25(c); 27; 40; 47; 50(2)(o) — (Interpreted)
2. Anti-Corruption and Economic Crimes Act (cap 65) sections 26, 55(5); 55(6) — (Interpreted)
3. Supreme Court Act (cap 9B) sections 21, 25 — (Interpreted)
4. Supreme Court Rules (cap 9B Sub Leg) rules 31, 32 — (Interpreted)

Advocates

Mr Makokha for the applicants.

Ms Faith Ng'ethe for the 1st respondent.

Ms Nazi for the 2nd respondent.



RULING

1. Upon reading the notice of motion dated February 22, 2024 and filed on March 4, 2024 expressed to be brought under sections 21 and 25 of the Supreme Court Act, 2011 and Rules 31 and 32 of the Supreme Court Rules, 2020 seeking orders;
 1. Spent
 2. That the honourable court be pleased to issue conservatory and/or interim orders staying the execution of the judgment dated February 9, 2024 in Nairobi Court of Appeal Civil Appeal No 464 of 2019 pending the hearing and determination of this Application;
 3. That this honourable court be pleased to issue conservatory and/or interim orders staying the execution of the judgment dated February 9, 2024 in Nairobi Court of Appeal Civil Appeal No 464 of 2019 pending the hearing and determination of this Appeal;
 4. That the costs of this Application be provided for.
2. Upon perusing the grounds on the face of the application, the supporting affidavit of Jimmy Mutuku Kiamba, the 1st applicant, and the submissions dated on February 22, 2024 filed on behalf of the applicants to the effect that their appeal is arguable with a high probability of success as it raises complex issues of constitutional interpretation that cannot be properly determined at an interlocutory stage; that their appeal is premised on several grounds including the applicants' claim that their constitutional rights to property, fair hearing, fair administrative action and freedom from discrimination were infringed Upon by the 1st respondent when it instituted proceedings in Nairobi High Court ACEC No 1 of 2016 for forfeiture of unexplained assets under section 55(5) and (6) of the Anti-Corruption and Economic Crimes Act (ACECA) despite the High Court in Misc Civil Application No 804 of 2014 having made a finding that the assets were not acquired as a result of corrupt conduct. Further, the applicants fault the court of Appeal for having erred; in failing to hold that there was no finding of corrupt conduct on acquisition of the subject assets on the part of the applicants hence the order of forfeiture was unlawful and infringed on their right to property guaranteed under article 40 of the Constitution; in failing to consider the applicants' contention that the conduct of the 1st respondent, in commencing investigations against the 2nd and 3rd applicants and continuing with Further investigations against the 1st applicant, was tantamount to trial for an offence that they had been previously tried and acquitted of and this was in violation of article 50(2)(o) and article 25(c) of the Constitution; in failing to find that the High Court Judge was biased and discriminated against the applicants by arriving at a different conclusion from a similar one in a past ruling, in violating the applicants' freedom from discrimination guaranteed under article 27 of the Constitution; failing to independently and impartially consider the evidence before it and instead relying solely on the misrepresentation by the 1st respondent thereby infringing on the applicants' right to fair hearing; and relying on the presumption by the 1st respondent that the 2nd applicant was incapable of owning property by herself, other than through her husband, which was discriminatory of the latter on the basis of gender and in violation of article 27 of the Constitution.
3. Further, the applicants contend that, unless the application is allowed, the appeal will be rendered nugatory and an academic exercise for several reasons including that; there is a real danger that the applicants will be evicted from their matrimonial home which forms part of the properties to be forfeited to the government and their children rendered destitute; the applicants will suffer prejudice, denied rights to fair administrative action and fair hearing under articles 47 and 50 of the Constitution



- as well as lose their right to property under article 40 of the Constitution as the substratum of the appeal would have been defeated with the 1st respondent taking possession of the properties subject of these proceedings. Finally, it is contended that the 1st respondent will not suffer any prejudice if the applicants were granted the opportunity to exhaust their remedies of appeal and the public interest tilts towards staying execution of the judgment of the court of Appeal delivered on 9th February, 2024; and
4. Upon considering the 1st respondent's Notice of Grounds Affirming the Decision dated March 12, 2024, the Replying Affidavit sworn on March 12, 2024 by Catherine Ngari, the 1st respondent's Forensic Investigator, and submissions dated March 12, 2024 in opposition to the application, to the effect that the application has been filed for the sole purpose of delaying the inevitable forfeiture of assets to the State which the court found to be unexplained; there is no arguable appeal and the appeal is frivolous; citing this court's decision in Lawrence Nduttu & 6000 v Kenya Breweries Ltd & another; SC Petition No 3 of 2012 [2012] e KLR, it is argued that the appeal does not involve the interpretation or application of the Constitution nor does it relate to any recurrent issue of cogent constitutional controversy and therefore no right of appeal under article 163(4)(a) of the Constitution lies to this court; the 1st respondent had conducted investigations and the applicants were afforded a reasonable opportunity to explain the disproportion between the assets concerned and their legitimate sources of income which explanation was deemed unsatisfactory; that in Stanley Mombo Amuti v Kenya Anti-Corruption Commission; SC Petition No 21 of 2019 [2020] eKLR this court found that in cases of unexplained wealth proceedings, no appeal would lie to this court as of right as such cases are concerned with the application of sections 26 and 55 of the ACECA and not the interpretation of the Constitution, therefore any application or interpretation of the Constitution would be peripheral or have a very limited bearing on the main case; the intended appeal would not be rendered nugatory as the State has the means to make restitution to the applicants in the event that they are successful; and public interest does not lie in favour of permitting the applicants to retain that which has lawfully been found to be unexplained and acquired through corruption; and
 5. Upon considering the applicants' supplementary submissions addressing the question of jurisdiction of the court to determine the appeal and instant application wherein it is contended that section 55 of ACECA is a normative derivative of the principles embodied in article 40(6) of the Constitution and therefore the superior courts, in determining forfeiture of unexplained assets, were applying the provisions of article 40 of the Constitution; in seeking to distinguish their case from Stanley Mombo Amuti v Kenya Anti-Corruption Commission(*supra*), they argue that forfeiture of unexplained assets proceedings is a substantive issue touching on article 40 depending on the circumstances of the case but not every case may necessitate the need for application and interpretation of the Constitution; they therefore urge that, their case is different as there was already a determination by a competent court in a Ruling in Miscellaneous Civil Application No 804 of 2014 delivered on June 25, 2015 that the subject properties were not acquired as a result of corrupt conduct; this aforesaid Ruling should have rested the matter unless the 1st respondent had appealed against it, which it did not, but instead instituted High Court ACEC No. 1 of 2016; that despite raising this issue before the High Court, the court found that the proceedings in Miscellaneous Civil Application No 804 of 2014 were in regard to preservation orders under section 56 of ACECA; that in arriving at this finding, the High Court departed from its previous position in EACC v Joseph Chege Gikonyo & 2 others; Francis Irungu Thuita (Interested Party) [2018] eKLR; that because of this departure, the applicants have properly imputed inconsistency, bias and discrimination against them on the part of the High Court Judge.
 6. Further, the applicants have submitted that, despite raising the aforesaid issue for determination before the court of Appeal, the court only acknowledged but failed to determine the same leaving the issue unsettled and uncertain and therefore this court ought to determine the question whether the



High Court was biased and discriminated against them and Further, whether the court of Appeal, by failing to determine the issue, violated their constitutional right to fair hearing guaranteed in article 25(c) of the Constitution; relying on the decision in Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others; SC Petition No 10 of 2013 [2014] eKLR, it is urged that a question of interpretation and application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law; Further relying on the decision in Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others it is argued that, where specific constitutional provisions cannot be identified as having formed the gist of the case at the court of Appeal, the very least an applicant should demonstrate is that the court's reasoning and conclusions leading to the determination of the issues, put in context, can be properly said to have taken the trajectory of constitutional interpretation and application; that in addition to the question of violation of the applicants' right to property enshrined in article 40 of the Constitution, the applicants have also raised fundamental questions of their constitutional rights and freedoms under articles 25(c), 47 and 50 of the Constitution, whose violation rendered the hearing unfair; that these substantive questions were in issue in all the superior courts below unlike in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission(*supra*); and

Having considered the application, affidavits, rival arguments by the parties,

We Now Opine as follows:

7. Guided by the provisions of section 23A of the Supreme Court Act, this court has jurisdiction to issue an order for stay of execution, an injunction, a stay of Further proceedings or any other conservatory or interim orders, on such terms as the court may deem fit; and
8. Considering this court's finding on its jurisdiction to grant orders of stay of execution of decrees issued by superior courts in the case of Board of Governors, Moi High School, Kabarak & another v Malcolm Bell, Petition Nos 6 & 7 of 2013; [2013] eKLR and restating this court's guiding principles on grant of stay of execution orders in Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others, SC Application No. 5 of 2014 [2014] eKLR, to the effect that before this court grants an order for stay of execution, an appellant, or intending appellant, must satisfy the court that;
 - i. the appeal or intended appeal is arguable and not frivolous;
 - ii. unless the order of stay sought is granted, the appeal or intended appeal were it to eventually succeed, would be rendered nugatory; and,
 - iii. that it is in the public interest that the order of stay be granted.
9. Taking note of this court's jurisdiction as delineated in article 163(4)(a) of the Constitution and our decision in Lawrence Nduttu and 6000 others v Kenya Breweries Ltd & another; SC Petition No 3 of 2012 [2012] eKLR where we stated that an appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution and added as follows:

“In other words, an appellant must be challenging the interpretation or application of the Constitution which the court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a Further appeal to the Supreme Court under the provisions of article 163(4)(a) of the Constitution”.
10. Appreciating that in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission, SC Petition No 21 of 2019 [2020] eKLR we found that, where the interpretation or application of the



Constitution had only but a limited bearing on the merits of the main cause, then the jurisdiction of the court could not be properly invoked. In the same case we added that the mere reference to the rich generality of constitutional principle as the court of Appeal did in the instant case, was therefore not a sufficient ground to invoke article 163(4)(a) of the Constitution. More specifically, and relevant to the application before this court, we Further held that proceedings regarding unexplained wealth and its forfeiture concern the application of sections 26 and 55 of ACECA and the threshold of forfeiture of property rather than the specific constitutional questions revolving around interpretation or application of articles 40 and 50;

11. Further, Appreciating that in the case of Ethics and Anti- Corruption Commission & another v Tom Ojienda, SC T/a Prof Tom Ojienda & Associates Advocates & 2 others (Petition 30 & 31 of [2019] (Consolidated)) [2022] KESC 59 (KLR) this court determined the application of section 26 of ACECA to the effect that the provision was permissive rather than mandatory in informing persons of interest of the intention to investigate bank accounts or search premises and it was left to the discretion of the 1st respondent to do so and we now add that, such a matter cannot attract any interpretation or application of the Constitution and to attract our attention under article 163(4)(a).
12. And Noting that the gist of the applicants' appeal involves a determination of the proper interpretation or application of the provisions of sections 55 and 56 of ACECA and whether or not the threshold of forfeiture had been met to warrant the orders of forfeiture of assets granted, we find no difficulty in concluding that neither the High Court nor the court of Appeal attempted to interpret or apply sections 26, 55 or 56 of ACECA in the context of their constitutionality or otherwise;
13. Applying the principles in Lawrence Nduttu and 6000 others v Kenya Breweries Ltd & another (supra), it is our considered view that the issues raised by the applicants are not sufficient to trigger this court's jurisdiction under article 163(4)(a) of the Constitution and neither the Petition of Appeal nor the present Motion are properly before us and we uphold the 1st respondent's submissions on the issue of jurisdiction. To sustain the Petition of Appeal having made that firm finding would not be a useful venture on the part of the court or parties and it would be in the interest of justice and expeditious disposal of cases that we do not extend the life of such a petition.
14. Consequently, we find that this court has no jurisdiction to hear and determine Petition No E004 of 2024 or the instant application for conservatory or stay orders.
15. On costs, having found that we have no jurisdiction to address any of the issues raised in both the Petition of Appeal and the motion before us, we shall exercise discretion and order that there shall be no order as to costs.
16. Accordingly, and for the reasons aforesaid we make the following orders:
 - i. The Petition of Appeal No. E004 of 2024 dated February 19, 2024 and filed on March 4, 2024, be and is hereby struck out for want of jurisdiction;
 - ii. The notice of motion dated February 22, 2024 and filed on March 4, 2024, be and is hereby struck out;
 - iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs in the appeal herein be refunded to the appellant; and
 - iv. There shall be no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2024.



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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

