



Megvel Cartons Limited v Diesel Care Limited & 2 others (Application E008 of 2023) [2023] KESC 24 (KLR) (Civ) (21 April 2023) (Ruling)

Neutral citation: [2023] KESC 24 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL**

APPLICATION E008 OF 2023

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

MEGVEL CARTONS LIMITED APPLICANT

AND

DIESEL CARE LIMITED 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

(Being an application for stay of execution of the Judgment and Decree of the ELC Court (Angote, J.) in ELC Case No. 166 of 2011 and affirmed by the Judgment and Orders of the Court of Appeal (H. Okwengu, H. A. Omondi & M. Gachoka, JJ.A) delivered on 17th February, 2023 in Civil Appeal No. 70 of 2018)

The Supreme Court’s jurisdiction to determine appeals on grounds of constitutional interpretation limited to cases which raised the constitutional questions at the trial court and at the Court of Appeal
For the Supreme Court to have the jurisdiction to determine an appeal based on the interpretation of the Constitution, the questions of constitutional interpretation needed to have been raised or determined both at the High Court and at the Court of Appeal.

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals involving Constitutional interpretation or matters of general public importance - whether the instant appeal involved constitutional interpretation or exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance to warrant an appeal to the Supreme Court – Constitution of Kenya, 2010, article 163(4)(a).



Brief facts

At the Environment and Land Court and the Court of Appeal, the gravamen of the appellant's case was the validity of the two titles held by the applicant and the 1st respondent; and the issue before court was which one of the two was the genuine and legitimate one. Both superior courts held that the appellant's title was a forgery. Aggrieved the appellant filed a petition of appeal in which the instant motion was founded. The applicant faulted the Court of Appeal for violating the right to property among other constitutional provisions.

Issues

Whether the appeal involved constitutional interpretation or exceptional circumstances or a distinctive opportunity for the Supreme Court to provide guidance to warrant an appeal to the Supreme Court.

Held

1. For an applicant to be granted stay of execution orders in an appeal before the Supreme Court, the applicant had to satisfy the court that the appeal was arguable and was not frivolous; that unless the orders of stay were granted, the appeal would be rendered nugatory; and thirdly that, it was in the public interest that the order of stay be granted.
2. Arguability of an appeal would entail the Supreme Court looking at the record and the petition of appeal and determine, without finality but at a *prima facie* level, whether the appeal had substance or was not made of straw. It also entailed interrogating its foundation and confirming that it was not built on quicksand.
3. An appeal within the ambit of article 163(4)(a) of the was to be founded on cogent issues of constitutional controversy. The mere allegation that a question of constitutional interpretation or application was involved, without more, did not automatically bring an appeal within article 163(4) (a). For an appellant to bring an appeal under article 163(4)(a), it had to be shown that the issues determined by the Court of Appeal arose from the High Court or any court below it and involved the interpretation or application of the ; and lastly, that where the case to be appealed from had nothing or little to do with the interpretation or application of the , it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
4. The applicant's case before the two superior courts below did not involve the interpretation and application of the Constitution. The gravamen of the case before those courts was the validity of the two titles held by the applicant and the 1st respondent; and the question to be answered was which one of the two was the genuine legitimate title. At no point did the Court of Appeal venture to address any constitutional question, neither did the judgment of the Environment and Land Court.
5. Even though the applicant alluded to infringement of constitutional rights, no such claim was made before both superior courts below. The issue of the validity of the titles, which involved a factual examination of the origin of the two titles, could not mutate into a constitutional question, without the benefit of arguments by the parties and determination before the courts below.
6. The first limb for the grant of the relief of stay of execution had not been satisfied. The Supreme Court's jurisdiction under article 163 (4) (a) of the had improperly been invoked. The Supreme Court had no jurisdiction to determine the appeal.

Application dismissed, appeal struck out for want of jurisdiction.

Orders

Costs to be borne by the applicant.

Citations

Cases

1. Attorney General & 5 others (SC Application No 27 of 2020; [2020] eKLR) — Explained
2. Erad Suppliers & General Contractors Limited v National Cereals & Produce Board (Civil Suit 639 of 2009; [2012] KEHC 4372 (KLR)) — Mentioned



3. Macharia, Samuel Kamau & Another v Kenya Commercial Bank & 2 Others (SC Application No 2 of 2011; [2012] eKLR) — Mentioned
4. Munya, Gatirau Peter v Dickson Mwenda & 2 others (SC Application No 5 of 2014; [2017] eKLR) — Mentioned
5. Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another (SC Petition No 3 of 2012; [2012] eKLR) — Mentioned
6. Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] eKLR) — Mentioned
7. Republic v Prasul Jayantilal Shah (Criminal Case No 238 of 2019) — Mentioned
8. Trattoria Limited v Joaninah Wanjiku Maina & 3 others (SC Petition (Application) No E029 of 2022) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — Article 25(c); 40; 50(1); 163(4)(a); 163(7) — Interpreted
2. Supreme Court Act (Act No 7 of 2011) — Rule 18, 21(1)(a); 24 — Interpreted
3. Supreme Court Rules, 2020 — Rule 15(2); 3(5); 31; 32 — Interpreted

Advocates

Mr. Kibera Maina (Kibera & Associates Advocates) for 1st respondent

Mr. Eredi for 2nd and 3rd respondent

Mr. Ochieng Oduol appearing together with Mr. Justus Obuya for Appellant

RULING

Representation:

Mr Ochieng Oduol appearing together with Mr Justus Obuya for the appellant (Triple OK Law LLP Advocates)

Mr Kibera Maina for the 1st respondent

(Kibera & Associates Advocates)

Mr Eredi for the 2nd and 3rd respondent (Office of the Attorney General)

1. Upon reading the notice of motion by the applicant dated February 28, 2023 and filed on March 2, 2023, brought pursuant to article 163(4)(a) of the *Constitution*, sections 21 (1)(a) and 24 of the *Supreme Court Act, 2011* as well as rules 3(5), 31 and 32 of the *Supreme Court Rules, 2020* for orders that;

1. Spent...
2. Spent...
3. Spent...

4. Pending the hearing and determination of Petition No E003 of 2023 (the Appeal) this court be pleased to issue an order of injunction restraining the 1st respondent herein whether by themselves, their agents, servants, employees, invitees and/or otherwise whomsoever from entering upon or trespassing, disposing of, dealing, alienating, occupying or in any way whatsoever interfering with the applicant’s proprietary rights including the right to quiet possession and enjoyment over all that piece of land known as LR 25064 (IR 85088) (Formerly



known as LR No 1504/11 (IR 85400)) situate in Mavoko Township, Machakos County (the suit property), before its surrender for change of user;

5. Pending the hearing and determination of the appeal this court be pleased to stay execution of the judgment and decree of the ELC (Angote, J) delivered on January 26, 2018 in Machakos ELC No 166 of 2011 as affirmed by the Court of Appeal decision on February 17, 2023 in Civil Appeal No 70 of 2018; and
6. Costs of and incidental to this application do abide the outcome of the main appeal.
2. Upon considering the grounds in support of the application and the averments contained in the supporting affidavit sworn on February 28, 2023
3. Upon considering the applicant's submissions dated February 28, 2023 and filed on March 2, 2023, to the effect that, this court has jurisdiction to determine the appeal under article 163(4)(a) of the Constitution as it raises important arguable constitutional issues on account of breach of the applicant's property rights under article 40; that the Court of Appeal breached the applicant's right to fair hearing under article 50(1) as read with article 25(c) of the Constitution; that the Court of Appeal's findings were in contravention of the principle of stare decisis under article 163(7); and that the Court of Appeal abdicated its duty under article 164(3) to re-evaluate the evidence on record and arrive at its own independent conclusions; and
4. Further, noting the applicant's submission that it is faced with two significant immediate threats of eviction from the suit property being, the application by the 1st respondent to forcefully evict the applicant and criminal charges proffered against the applicant's director for the offences of forgery and forcible detainer in Criminal Case No 238 of 2019 *Republic v Prasul Jayantilal Shab*; that the applicant has been in occupation of the suit property where it has been operating a factory for the past 12 years and it has made significant investment therein to the tune of Kshs 1.2 billion and presently employs over 700 Kenya citizens; that should it be evicted from the suit property, it stands to suffer irreparable loss as well as the loss of livelihood of its employees; and that it is in the interest of justice and in public interest to grant the orders sought; and
5. Also noting the 1st respondent's grounds of opposition and submissions dated March 10, 2023 and filed on even date wherein it contends that;
 - i. The single core issue before the ELC and Court of Appeal was which of the two titles of the suit property was the genuine one, whether that held by the applicant or that of the 1st respondent. Both superior courts below held that the applicant's title was a forgery. For this reason, the applicant did not plead and/or argue any constitutional issues for interpretation and/or application in the ELC or in the Court of Appeal.
 - ii. This court lacks jurisdiction to hear and determine both the application and the appeal for the reason that the appeal does not meet the jurisdictional threshold of the Constitution under article 163(4)(a) as read with section 15(2) of the Supreme Court Act as it is not an appeal involving the interpretation and/or application of the Constitution.
 - iii. The application and appeal are, in the result improperly before this court and incurably defective as there is no automatic right of appeal and leave to appeal has not been sought therefore the petition ought to be struck out.
 - iv. Since the petition upon which the application is premised is fatally flawed, according to the 1st respondent, the application lacks merit and the applicant has failed to satisfy the principles for the grant of the relief of interlocutory injunctive orders and stay of execution.



6. Bearing in mind that the 2nd and 3rd respondents have not filed any responses to both the application and the petition; and
7. Having considered the application, grounds of opposition, and submissions before us, we now opine as follows:
 - i. This being an application for stay of execution, it is well established that an applicant must satisfy the court that the appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory; and thirdly that, it is in the public interest that the order of stay be granted. See *Gatirau Peter Munya v Dickson Mwenda & 2 others*, SC Application No 5 of 2014, [2017] eKLR.
 - ii. The instant motion was filed in a separate file being No E008 of 2023 from the petition of appeal which is in No E003 of 2023 and which we have taken the liberty to peruse, to satisfy ourselves as to its arguability.
 - iii. We emphasized the need to do this in *Kenya Hotel Properties Limited v Attorney General & 5 others*, SC Application No 27 of 2020; [2020] eKLR, as follows:

“Arguability of an appeal would entail this court looking at the record and the petition of appeal and determine, without finality but at a *prima facie* level, whether the appeal has substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quicksand.” [our emphasis]
 - iv. We reiterate the well-known line, that jurisdiction is everything and that without it, a court has no power to make one more step; that a court’s jurisdiction flows from either the *Constitution* or legislation or both; and that jurisdiction cannot be expanded through judicial craft or innovation. See *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others*, SC Application No 2 of 2011; [2012] eKLR.
 - v. It follows that we must, in limine, be satisfied that the applicant has properly invoked the jurisdiction of this court; and
 - vi. Guided by the principles set out by this court in numerous cases, we restate, first, that an appeal within the ambit of article 163(4)(a) of the *Constitution* is to be one founded on cogent issues of constitutional controversy; second, that the mere allegation that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within article 163(4)(a); third, that for an appellant to bring an appeal under this article, it must be shown that the issues determined by the Court of Appeal arose from the High Court or any court below it and involved the interpretation or application of the *Constitution*; and lastly, that 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 this court under the provisions of article 163(4)(a). See *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR; and *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board*, SC Petition No 5 of 2012; [2012] eKLR.
 - vii. We note in the above context that, the applicant’s case before the two superior courts below did not involve the interpretation and application of the Constitution. The gravamen of the case before those courts was the validity of the two titles held by the applicant and the 1st respondent; and the question to be answered was which one of the two was the genuine



legitimate title. A perusal of the judgment of the Court of Appeal would indeed show that save for the introductory statement that “The right to property is a right enshrined in the Constitution under article 40.”, at no point did the court venture to address any constitutional question, because there was none. Likewise, the Judgment of the ELC, did not address any constitutional issues.

- viii. In the petition before this court, the applicant now faults the Court of Appeal for allegedly violating articles 25(c), 50(1), 163(7) and 164(3) of the Constitution. Among the issues the applicant proposes to be determined in the petition is whether a surrender for purposes of a change of user transmutes private land into public land under article 62(c) of the Constitution making it available for allocation by the government to third parties.
 - ix. Even though the applicant now alludes to infringement of constitutional rights, no such claim was made before both superior courts below. The issue of the validity of the titles, which involved a factual examination of the origin of the two titles, cannot mutate at this stage into a constitutional question, without the benefit of arguments by the parties and determination before the courts below.
 - x. In the circumstances, we come to the conclusion that the first limb for the grant of the relief of stay of execution has not been satisfied and further that the court’s jurisdiction under article 163(4)(a) of the Constitution has improperly been invoked.
 - xi. For the foregoing reasons, we must find that we have no jurisdiction to determine the appeal and must down tools as the three conditions precedent laid in Gatirau Peter Munya v Dickson Mwenda & 2 others have not been met.
 - xii. In view of the circumstances of this case, we follow the course we adopted in Trattoria Limited v Joaninah Wanjiku Maina & 3 others, SC Petition (Application) No E029 of 2022, where the court’s power under section 18 of the Supreme Court Act to summarily dismiss a petition, reference or an application, which are wholly defective was restated. Like in that application, we have found here that the court lacks jurisdiction to entertain both the application and the appeal.
 - xiii. We take this course fully alive to the well-known principle that the question of jurisdiction can be raised at any point in the proceedings, on appeal and even *suo moto*. The foundation of the petition of appeal is indeed built on quicksand. Its fate, no matter how long it is delayed, is inevitable. Consequently, we find that the notice of motion dated February 28, 2023 lacks merit and is hereby dismissed for want of jurisdiction. Likewise, and for that very reason, the petition of appeal is incompetent and is also struck out.
 - xiv. As costs follow the event and are awardable as a matter of discretion, we direct that costs in this application shall be paid by the applicant to the 1st respondent.
8. Accordingly, we make the following orders:
- a. The notice of motion dated February 28, 2023 is hereby dismissed.
 - b. The petition of appeal No E003 of 2023 dated February 27, 2023 is hereby struck out for want of jurisdiction.
 - c. The applicant shall bear the costs of this application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2023



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P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

SUPREME COURT OF KENYA

I certify that this is a true copy of the original.

REGISTRAR

SUPREME COURT OF KENYA

