



REPUBLIC OF KENYA



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**Njuguna & 46 others v Spire Properties (K) Limited & 12 others (Petition
28 (E030) of 2022) [2023] KESC 37 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 37 (KLR)

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

PETITION 28 (E030) OF 2022

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

JUNE 16, 2023

BETWEEN

ESPIE NJUGUNA & 46 OTHERS APPELLANT

AND

SPIRE PROPERTIES (K) LIMITED 1ST RESPONDENT

TRANSNATIONAL BANK LIMITED 2ND RESPONDENT

HOTEL SPAN LIMITED 3RD RESPONDENT

R.T. DUNNET 4TH RESPONDENT

MARIAM SAIDI MWABORA 5TH RESPONDENT

BENSON KITETO 6TH RESPONDENT

KOON CHOO & CHRISTINE LYN JOGSCHAT 7TH RESPONDENT

ANTHONY BWIRE AKUKHA 8TH RESPONDENT

JOSEPH ONGUTI 9TH RESPONDENT

STEPHEN K. NDEGWA 10TH RESPONDENT

SAMUEL G. MOMANYI 11TH RESPONDENT

DANIEL O. OMUYA 12TH RESPONDENT

OBADIAH G. MBUGUA 13TH RESPONDENT

*(Being an appeal from the Judgment and Orders of the Court of Appeal at
Mombasa (Gatembu, Mbogholi & Nyamweya JJ.A) delivered on 29th July, 2022
in Civil Appeal No. 135 of 2018 Consolidated with Civil Appeal No. 139 of 2018)*



Guiding principles for invoking the Supreme Court’s appellate jurisdiction.

In a case where appellants lodged an appeal at the Supreme Court with the grievance that the judgement by the Court of Appeal allegedly lacked clarity and was self-contradicting, the Supreme Court held that it did not have the jurisdiction to clarify the Court of Appeal’s judgment. The court held that the Court of Appeal could be moved to clarify its judgment or to amend apparent errors under rule 34(2)(d) and (e), and 35 of the Court of Appeal Rules.

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals emanating from the Court of Appeal as of right in any matter involving the interpretation of the Constitution - what were the guiding principles for invoking the Supreme Court’s appellate jurisdiction to determine appeals as of right in any case involving interpretation of the Constitution - whether the Supreme Court had jurisdiction to hear and determine an appeal that sought to clarify the Court of Appeal’s judgment - articles 10, 162 (2) and 163 (4)(a); rule 34(2); 35; 37(1);

Section 12

Brief facts

Aggrieved by an adverse Court of Appeal judgement, the appellants filed the instant appeal where they contended that the judgment of the Court of Appeal breached article 10 of the in that the judgment lacked clarity, was impractical and self-contradicting. The appellants’ grievance was that the Court of Appeal awarded the claimants six months’ gross salary due and payable by the 1st respondent, whereas the 1st respondent was one of the claimants and the Court of Appeal did not determine who a deserving claimant was.

The 2nd respondent filed a preliminary objection contending that the instant matter did not meet the jurisdictional threshold for it to be determined as an appeal as of right by the Supreme Court.

Issues

- i. What were the guiding principles for invoking the Supreme Court’s appellate jurisdiction to determine appeals as of right in any case involving interpretation of the Constitution article 163(4)(a) of the ?
- ii. Whether the Supreme Court had jurisdiction to hear and determine an appeal that sought to clarify the Court of Appeal’s judgment.

Held

1. A court could only exercise jurisdiction as conferred by the or written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The Supreme Court’s appellate jurisdiction was set out in article 163(4) of the .
2. In order to address the issue whether the Supreme Court had jurisdiction or not, the questions that needed to be answered were:
 1. what was the question in issue at the High Court and the Court of Appeal?
 2. Did the superior courts below dispose of the matter after interpreting or applying the ?
 3. Did the appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?
3. Each case must be evaluated on its own facts. To determine whether a matter concerned the interpretation and application of the , the court must establish whether the issues raised in the petition fell within the ambit of the court’s jurisdiction, cognisant of the fact that the appeal would be examined not on its merits but under the lens of the requirements of article 163(4)(a) of the .
4. The appellants sought their terminal benefits against the 1st to 4th respondents jointly and severally; judgment for the sum of Kshs 32,457,007/=; general damages; and costs and interest. The appellants were seeking their dues from the 1st to 4th respondents upon termination of their employment. It was on that basis that the High Court transferred the matter to the Employment and Labour Relations Court (ELRC) as the matter related to employment and labour relations. It was also the Court of



- Appeal's finding that the transfer of the matter to the ELRC could not be construed as having extended the court's jurisdiction. The issue concerning the receivership had a limited bearing to the main claim by the appellants.
5. The Supreme Court did not have jurisdiction to entertain the consideration and determination of the issue whether the ELRC had jurisdiction to entertain the issue of validity and/or legality of the receivership in the instant appeal.
 6. Calling on the Supreme Court to determine the issue would be seeking to have the court address itself to the extent of the application of the provisions of section 12 of the , which statutory provision was not under constitutional challenge before any of the superior courts below. The Supreme Court was not clothed with jurisdiction to consider the instant matter under the issue touching on receivership.
 7. In determining whether the matter took a constitutional trajectory, it required a look at a court's reasoning and even the processes and procedures adopted by a court in its proceedings, noting the court's discretionary mandate.
 8. The appellants were unable to comprehend the import of the judgment by the Court of Appeal. The appellants were asking the court to interpret and clarify the said judgment. The Supreme Court had no jurisdiction to interpret its decisions or those of other courts. The court could not heed the appellants' call to assist them in understanding the judgment, more so, through the instant appeal.
 9. It was an issue that could be addressed by the Court of Appeal. The appellants ought to have moved the Court of Appeal appropriately to either confirm or clarify the import of its decision via applications under rule 34(2)(d) and (e), and 35 of the .
 10. The issue of clarification of the Court of Appeal's judgment did not fall under the ambit of article 163(4)(a) of the . The issues raised largely revolved around factual contestations as among the parties, which the superior courts below were engaged in, to enable them determine the extent of culpability, if any, as among the different parties.

Preliminary objection upheld, petition of appeal dismissed.

Orders

Each party was to bear their own costs.

Citations

Cases

1. Adeg, Benson Ambuti & 2 others v Kibos Distillers Limited & 5 others (Petition 3 of 2020; [2020] KESC 36 (KLR)) — Explained
2. Amuti, Stanley Mombo v Kenya Anti-Corruption Commission (Petition 21 of 2019; [2020] KESC 45 (KLR)) — Explained
3. Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others (Petition 4 of 2015; [2017] KESC 11 (KLR)) — Mentioned
4. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014; [2014] eKLR) — Mentioned
5. Cordisons International (K) Limited v Chairman National Land Commission & 43 others (Petition 14 of 2019; [2020] KESC 50 (KLR)) — Mentioned
6. Erad Suppliers & General Contractors Limited v National Cereals & Produce Board (Petition 5 of 2012; [2012] eKLR) — Explained
7. Gichuru, Simon Gitau v Package Insurance Brokers Ltd (Petition 36 of 2019; [2020] KESC 19 (KLR)) — Mentioned
8. Ibrén, Nasra Ibrahim v Independent Electoral and Boundaries Commission & 2 others (Election Appeal 9 of 2018; [2018] KECA 500 (KLR)) — Mentioned
9. John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Petition 17 of 2015; [2019] KESC 20 (KLR)) — Explained



10. Joho & another v Suleiman Said Shahbal & 2 others (Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 11) — Mentioned
11. Kimani, Paul Mungai & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others (Petition 45 of 2018; [2020] KESC 9 (KLR)) — Explained
12. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] eKLR; [2012] 2 KLR 199) — Explained
13. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Application 5 of 2014; [2014] eKLR) — Mentioned
14. Mutua, Eric Kyalo v Wiper Democratic Movement-Kenya & Gideon Mutemi Mulyungi (Civil Appeal 173 of 2017; [2017] KECA 363 (KLR)) — Explained
15. Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012; [2012] eKLR) — Mentioned
16. Njihia, Daniel Kimani v Francis Mwangi Kimani & another (Civil Application 3 of 2014; [2015] eKLR) — Explained
17. Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR)) — Explained
18. Rai, & Jasbir Singh 3 others v Tarlochan Singh Rai & 4 others (Petition 4 of 2012; [2014] eKLR) — Explained
19. Rutongot Farm Ltd v Kenya Forest Service, Attorney General, Permanent Secretary Ministry of Forest and Wildlife & Commissioner of Lands (Petition 2 of 2016; [2018] KESC 27 (KLR)) — Explained
20. Steyn, Hermanus Phillipus v Giovanni Gnecci-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — Article 10; 162 (2); 163 (4)(a) — Interpreted
2. Court of Appeal Rules, 2022 (cap 9 Sub Leg) — Rule 34(2); 35; 37(1) — Interpreted
3. Employment Act, 2007 (Act No 11 of 2007) — Section — Interpreted
4. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — Section 12 — Interpreted

Advocates

Gikandi Ngibuini for appellants

Irene Kashindi & Faith Wangongu for 1st respondent

Gabriel Gakuo for 2nd respondent

Billy Kongere for 5th – 13th respondents

RULING

A. Introduction

1. The appellants filed the petition of appeal dated September 12, 2022 pursuant to article 163(4)(a) of the [Constitution](#). They challenge the decision of the Court of Appeal in Civil Appeal No 135 of 2018, consolidated with Civil Appeal No 139 of 2018 which was delivered on July 29, 2022.
2. The 2nd respondent, Transnational Bank Limited, filed a preliminary objection dated November 3, 2022 challenging this court's jurisdiction to hear and determine the appeal under article 163(4)(a) of the [Constitution](#). The preliminary objection is supported by the 1st respondent, Spire Properties (K) Limited and is opposed by the appellants and the 5th -13th respondents.



At the oral hearing, we directed and limited the parties to the preliminary objection. Before addressing the preliminary objection, we briefly highlight the background and litigation history of the matter before the superior courts below.

B. Background & Litigation History

3. The appellants and the 5th-13th respondents were employed by the 3rd respondent on diverse dates between 1981 and 1997 in various capacities and departments at Diani Reef Grand Hotel (the hotel). The 2nd respondent appointed the 4th respondent, RT Dunnet, as the receiver manager *vide* a deed of appointment dated September 2, 1998, under terms of a debenture, following the failure by the 3rd respondent to meet its obligations therein.
4. At the point of taking over as receiver manager, the 4th respondent was presented with a list of existing staff and computation of their terminal dues owed to them as at September 2, 1998. The appellants opted to continue working at the hotel and receiving their monthly dues, even after it was placed under receivership. However, unlike those who left employment, the appellants were not paid their terminal dues. The computation of their terminal dues, which was not disputed by any party was Kshs 32,457,007.00.

i. High Court

5. The appellants and the 5th-13th respondents instituted Mombasa High Court Civil Case No 62 of 2007 against the 1st-4th respondents *vide* a plaint dated March 27, 2007. They sought a declaration that they are entitled to be paid their terminal benefits by the 1st – 4th respondents jointly and severally; judgment for the sum of Kshs 32,457,007/=; general damages; and costs and interests.
6. In a ruling dated March 25, 2013 the High Court (Mwongo J) transferred the suit to the Industrial Court (as it then was) having found that the dispute relates to employment and labour relations. Consequently, the matter was issued a new case number, being Industrial Court Cause No 79 of 2013 and disposed of by that court.

ii. Employment and Labour Relations Court (ELRC)

7. The appellants urged that; they were employed on permanent and pensionable terms, and were entitled to leave and/or leave allowance and gratuities calculated according to their period of service, upon termination of their employment services; the 3rd respondent did not take any loan facility and therefore the receivership was unlawfully set in motion and without justification; the purported sale of the Hotel was to defeat the payment of the appellant's terminal benefits; that even assuming that there was a loan, the Receiver Manager was obliged in law to call for a creditor's meeting setting out a schedule of the secured and unsecured debts indicating, what proportions of such debt would be paid out of the proceeds of sale; it had an obligation to advertise the sale in both local and international dailies so as to receive the best bid which ought to pay all the creditors; no auction sale took place; the sale of the 1st respondent to the 4th respondent was shrouded with mystery and that termination of their employment was irregular, unlawful and improper.
8. In its defence, the 1st respondent maintained that it never entered into any contracts of employment with the appellants, and it was separate and distinct from the 2nd, 3rd and 4th respondents and therefore, it could not be held liable jointly or severally for their acts and/or omissions. The 2nd and 4th respondents on the other hand averred that the 3rd respondent obtained a loan facility from the 2nd respondent secured by all the necessary security documents prepared and perfected in connection with the loan. That the Receiver Manager was therefore appointed pursuant to the security documents, specifically



the debenture, after the 1st respondent defaulted on the loan repayment. They denied the allegations of fraud and maintained that they did not terminate the appellants' employment as they did not have capacity to do so.

9. In its judgment dated September 8, 2017 the trial court determined that; there was an intricate web of relationships between the Parties; the appellants were employed by the 3rd respondent and remained as such up to the date the 4th respondent took over running of the business; the appointment of the Receiver Manager did not of itself terminate the contracts of employment; the 3rd respondent was not the appellants' employer but was the principal wrongdoer who set in motion the receivership and denial of their terminal dues; and that the 2nd respondent was vicariously accountable for the actions of the 4th respondent.
10. The trial court further determined that; the 2nd respondent did not have a justification for appointing the Receiver/Manager as it was not shown that the 1st respondent had defaulted in its obligations to the Bank of Scotland nor a demand made by the 3rd respondent to the 1st respondent; the 4th respondent had an obligation to advertise the Hotel properly highlighting actual and potential value, including to the international hotel industry; the sale of the hotel was not lawfully carried out, the appointment of the Receiver/Manager having been substantively invalid; and it made a finding that in creditors meetings held, the employees' concerns were aired and undertakings made by the Receiver/Manager to retain them in employment.
11. Consequently, the trial court found that; the 2nd, 3rd and 4th respondents were liable to pay the appellants terminal dues of Kshs 29,603,973; the termination of the appellants' contracts was irregular, unlawful and improper and, granted each of them Kshs 500,000.00 to be paid by all the respondents jointly and severally; including costs and interest on terminal dues at 14% per annum from the date of filing the claim.

ii. Court of Appeal

12. Aggrieved by the decision of the Employment and Labour Relations Court, the 1st respondent filed Civil Appeal No 135 of 2018. It urged that the trial court erred in finding that the sale of the Hotel was flawed; that there was an employment relationship between the appellant and the 1st respondent; that it made a promise to re-employ the appellants creating a legitimate expectation; that it breached obligations to the appellants; and that it erred in awarding general damages against it.
13. The 2nd respondent filed Civil Appeal No 139 of 2018 on the grounds that the trial court erred in failing to appreciate that there was no contractual relationship of employment between it and the appellants; that it had all the rights to appoint a receiver under the debenture and that the appellants did not challenge the receivership in a Commercial Court, therefore it had no *locus standi* to challenge the commercial transaction between the 3rd respondent and the 2nd respondent; interfering and interpreting all contractual documents between the 2nd and 3rd respondents in favour of the appellants who were not parties to those contractual documents; that the allegations of fraud were not proved; general damages were awarded in contravention of the [Employment Act](#); and failure by the trial court to consider their evidence, submissions and authorities.
14. In a judgment delivered on July 29, 2022, the appellate court allowed the two appeals. It held that the ruling of Mwongo, J could not be construed as having extended the jurisdiction of the ELRC beyond the jurisdiction conferred on that court by the [Constitution](#) and by statute, and that article 162(2) of the [Constitution](#) as read with section 12 of the [ELRC Act](#) limit the jurisdiction of the court to hearing and determination of disputes relating to employment and labour relations. The appellate court's view was that the pronouncement by the court effectively invalidating and nullifying a receivership was a matter



beyond the court's jurisdiction. Concerning liability, it held that the receiver terminated the claimants' employment by reason of redundancy and therefore, the 1st respondent was liable. It determined that in the circumstances, a fair compensation for the claimants was an award of 6 months gross salary to each deserving claimant. On the issue of general damages, it held that since the ELRC had no jurisdiction to entertain the issue of the validity and /or legality of the appointment of the receiver, it could not award general damages on that basis. The appellate court's order read as follows:

“The only order that remains in favour of the claimants is the six months' gross salary due and payable by the 1st respondent and they were entitled to costs and interests payable by the 1st respondent. The appellants herein shall bear their own costs but the claimants shall be entitled to costs and interests, payable by the 1st respondent.”

ii. Supreme Court

15. The appellants have filed the instant appeal, being aggrieved by the decision of the Court of Appeal. It is premised on the grounds that the learned judge erred in law and fact in;
 - a. Finding that article 162(2) of the *Constitution* as read with section 12(1) of the Employment and Labour Relations Court Act, 2011, 2011 which provides for jurisdiction of the ELRC to hear and determine disputes relating to employment and labour relations preclude the ELRC from making pronouncements invalidating and nullifying a receivership as such was a matter beyond the court's jurisdiction;
 - b. Concluding that the challenge to validity/legality of the receivership process before the ELRC was a matter beyond the court's jurisdiction by dint of article 162(2) of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act, 2011*;
 - c. Failing to interpret and determine that article 162(2) of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act, 2011*, extends to determination of the validity/legality of processes leading to determination of employment regardless of whether the process is of a commercial nature or any other nature for that matter; and
 - d. Holding at paragraph 84 that it had awarded 6 months gross salary to each deserving claimant and paragraph 87 that, “the only order that remains in favour of the claimants is the six months gross salary due and payable by the 1st respondent” whereas this does not pass the dictates of article 10 of the *Constitution* as it is an impractical order that is self-contradicting since they cannot pay themselves.
16. As earlier intimated, when the petition came up for hearing on April 26, 2023, we noted that the 2nd respondent had filed the notice of preliminary objection dated November 3, 2022 which we directed that it be argued first. The said preliminary objection is the subject of this determination.



C. Submissions of the Parties

a. 2nd respondent

17. In support of its preliminary objection, the 2nd respondent filed submissions dated November 16, 2022 and orally highlighted them through counsel in court. The 2nd appellant urges that the petition does not raise any dispute that requires constitutional interpretation. It submitted that none of the superior courts below was called upon to specifically or directly interpret and/or put meaning, tenor and effect on any article of the Constitution.
18. It argues that the crux of the dispute between the parties was an employment dispute, which dispute is governed by the Employment Act, 2007 and not a matter that required constitutional interpretation. In support of its averment, it relies on this court's decisions in Cordisons International (K) Limited v Chairman National Land Commission & 43 others Sup Ct Petition No 14 of 2019; [2020] eKLR and Erad Suppliers & General Contractors Limited v National Cereals & Produce Board Sup Ct Petition No 5 of 2012 [2012] eKLR.
19. The 2nd respondent further urges that the matter was not certified as a matter of general public importance first at the Court of Appeal, and relies on this court's decision in Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione Sup Ct Application No 4 of 2012 [2013] eKLR to buttress this argument.

b. 1st respondent

20. The 1st respondent supported the 2nd respondent's preliminary objection. It similarly filed grounds of objection dated October 18, 2022 and submissions dated January 17, 2023.
21. The 1st respondent submits that this court lacks jurisdiction as there is no question of constitutional interpretation or application that was integrally linked to the main cause in the Court of Appeal as to allow the appellants to invoke this court's jurisdiction. It further urges that the reference by the appellate court to article 162 of the Constitution was peripheral and did not have a substantial bearing on the merits of the main case. It urges that the jurisdiction of this court cannot be invoked based merely on that reference to the Constitution in the Court of Appeal.
22. It further submits that the holding of the Court of Appeal was not made on the basis of the constitutional conferment of jurisdiction but on the basis that the ELRC did not have the authority to determine those particular issues that are the preserve of another forum, being the High Court, and therefore the determination by the Court of Appeal cannot be said to have taken a constitutional trajectory. It urges that section 12 of the Employment and Labour Relations Court Act is not a normative derivative of article 162(2) of the Constitution. To buttress its arguments, it relies on this court's decisions in Lawrence Nduttu & 6,000 others v Kenya Breweries Ltd & another Sup Ct Petition No 3 of 2012 [2012]eKLR, Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others Sup Ct Petition No 3 of 2020 [2020]eKLR, Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others Sup Ct Petition No 4 of 2015 [2017] eKLR, Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others Sup Ct Petition No 19 of 2018 [2018]eKLR, Stanley Mombo Amuti v Ethics and Anti-Corruption Commission Sup Ct Petition No 21 of 2019 [2020]eKLR and Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Sup Ct Petition Nos 14, 14 A, 14 B & 14 C of 2014 (Consolidated) [2014] eKLR.
23. On the violation of article 10 of the Constitution by the Court of Appeal, the 1st respondent submits that the alleged errors made by the Court of Appeal are capable of being corrected under the slip rule



in rule 37(1) of the Court of Appeal Rules or through the settlement of terms of the decree under rule 34(2) of the Court of Appeal Rules.

c. Appellants' Submissions

24. The appellants opposed the preliminary objection vide their submissions dated December 21, 2022 and oral arguments before court. They invoke this court's jurisdiction under article 163(4)(a) of the Constitution as they fault the Court of Appeal's interpretation of article 162(2) of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. Their case is that section 12 of the Employment and Labour Relations Court Act, 2011 is a normative derivative of article 162(2) of the Constitution. They rely on this court's decisions in Simon Gitau Gichuru v Package Insurance Brokers Ltd Sup Ct Petition No 36 of 2019 [2020] eKLR and Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others Sup Ct Application No 5 of 2014; [2014] eKLR to support this argument.
25. The appellants further urge that the Court of Appeal violated article 10 of the Constitution which requires all state organs and state officers to uphold the national values and principles of governance including transparency and accountability. They contend that the relief granted by the Court of Appeal lacked clarity, was impractical and self-contradicting as the Court of Appeal awarded the relief of "six (6) months gross salary to each deserving claimant" as compensation without giving a legal basis of why each claimant was awarded compensation of six months, and further, in not determining who among them was a "deserving claimant." They posit that the appellate court held that liability was to be borne by the "1st respondent" whereas the 1st respondent was one of the appellants herein, thus making the judgment impractical. The appellants submit that the matter therefore took a constitutional trajectory as the Court of Appeal decision is in contravention of article 10 of the Constitution for lacking transparency and accountability.

d. 5th -13th respondents' submissions

26. The 5th -13th respondents opposed the 2nd respondent's preliminary objection and filed the submissions dated December 2, 2022. They reiterate the appellants' submissions and urge that the superior courts below interpreted and applied article 162(2) of the Constitution in resolving the dispute, and that section 12 of the ELRC Act is a normative derivative of article 162(2) of the Constitution.
27. They further submit that the Court of Appeal's resolution of the dispute took a constitutional trajectory and is in violation of article 10 of the Constitution which demands transparency and accountability. To support their arguments, reliance was placed on this court's decisions in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others Sup Ct Petition No 17 of 2015 [2019] eKLR and Simon Gitau Gichuru case (supra). They also rely on the decision in Eric Kyalo Mutua v Wiper Democratic Movement, Kenya & another [2017] eKLR where the court held that a judicial order ought and must be a precise and unequivocal positive or negative command.

D. Analysis and Determination

28. Upon considering the preliminary objection filed by the 2nd respondent, the submissions filed thereto in support and in opposition, and upon hearing the oral arguments by the parties in court, the only issue for determination is whether this court has jurisdiction to hear and determine the appeal as a matter of right under article 163(4)(a) of the Constitution.
29. This court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others, Civil Application No 2 of 2011 [2012] eKLR held that a court's jurisdiction flows from either the Constitution or legislation or both. A court can therefore only exercise jurisdiction as conferred



by the Constitution or written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law. The Supreme Court’s appellate jurisdiction is set out in article 163(4) of the Constitution of Kenya which states:

- “(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
- a. as of right in any case involving the interpretation or application of this Constitution; and
 - b. in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

30. This court has set out the guiding principles for invoking its jurisdiction under article 163(4)(a) in several of its decisions including in Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another (*supra*) and Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others, Sup Ct Petition No 10 of 2013 [2014] eKLR. In Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others Sup Ct Petition No 45 of 2018; [2020] eKLR we stated as follows:

- “(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.
- ii. The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/ issues of his matter which in his opinion fall for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and application.
- iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).
- iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).
- v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a).”

31. It therefore follows, as we determined in Rutongot Farm Ltd v Kenya Forest Service & 3 others SC Petition No 2 of 2016 [2018] eKLR, that in order to address the issue whether this court has jurisdiction or not, the questions that need to be answered are:

- (i) What was the question in issue at the High Court and the Court of Appeal?
- (ii) Did the superior courts below dispose of the matter after interpreting or applying the Constitution?



- (iii) Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?
32. Each case must however be evaluated on its own facts. To enable us resolve the question whether a matter concerns the interpretation and application of the Constitution, we must establish whether the issues raised in the petition fall within the ambit of this court's jurisdiction, cognisant of the fact that we examine the appeal, not on its merits, but under the lens of the requirements of article 163(4)(a) of the Constitution.
33. The appellants have set out four grounds of appeal, compressed in their submissions into two issues for determination: whether the ELRC had jurisdiction to entertain the issue of validity and/or legality of the receivership; and whether the Court of Appeal's judgment violated article 10 of the Constitution.
34. Having perused the record before us, we note that the matter was first filed at the High Court, and subsequently transferred to the Industrial Court vide a ruling dated March 25, 2013. In the said ruling, Mwongo J stated as follows:
- “[8]. ... Section 12 of the Industrial Court Act provides: The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:- (a). disputes relating to or arising out of employment between an employer and an employee.
- [9]. Given the provisions of article 162 (2) and the Industrial Court Act 2011 cited above, the primary constitutional concern in this matter is whether on a proper reading of the pleadings, the dispute herein relates to employment and labour relations. I have no doubt in my mind that the dispute herein relates to employment and labour relations. The monetary prayer is for payment of terminal benefits from employment of the plaintiffs who were allegedly employees of the 1st defendant, subsequently put under receivership of the 2nd defendant allegedly with the involvement of the 3rd defendant.
- [10]. The secondary question that arises is whether, given the nature of the pleadings the dispute relates to or arises out of employment between an employer and employee in terms of section 12 of the Industrial Court Act. Again by the same argument, I have no doubt that the disputes in the plaint arise out of an employment scenario.”
35. We note that the learned judge further stated that:
- “ 12 ...Their jurisdiction is narrowed down to all matters relating to employment and labour relations. Whatever legal or factual scope of such matters, whether involving fraud or receivership or company law, the learned judges of the Industrial Court are entitled to address them fully and substantively. That is how wide the scope of their jurisdiction is.
13. Thus the argument of the 3rd and 4th defendant that that court cannot deal with matters of fraud is hollow and unpersuasive so is that, that court cannot deal with employment in cases or issues of receivership or arraignment of contract or novation or any other legal issues affecting employment. Such arguments



wholly misunderstand the object of article 162(2) which is to create a court similar to the High Court, but where focus is indeed all matters related to employment and labour relations.”

36. The reliefs sought by the appellants as set out in their Pleint were: a declaration that they were entitled to be paid their terminal benefits by the 1st – 4th respondents jointly and severally; judgment for the sum of Kshs 32,457,007/=; general damages; and costs and interests.
37. We note that in the ruling transferring the matter to the ELRC, the High Court analysed the pleadings before it and determined that it was an employment and labour relations matter. The court noted the provision of article 162(2) and (3) of the Constitution which empowers Parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and to enact legislation to determine the jurisdiction of the said courts and section 12 of the Industrial Court Act. The High Court specifically addressed itself to section 12 of the Industrial Court Act and the pleadings before it. We note that there was no question of interpretation or the application of article 162(2) of Constitution.
38. We note that in making its determination, the trial court framed the issues for determination as: what relationship if any, parties had with each other; whether the appointment of the receiver manager was lawful; whether the 1st, 2nd and 3rd respondents acted lawfully in selling the hotel to the 4th respondent; and whether the appellants suffered as a result of the receivership and sale of the Hotel, whether they are entitled to terminal benefits, damages, costs and interest, and if so, from which respondent, and to what extent. The trial court made findings concerning the receivership and held that there was no justification for appointing the receiver/manager, and the sale of the hotel was not lawfully carried out.
39. The issue before the Court of Appeal on the other hand, was whether the trial court went beyond its jurisdiction, taking note of the ruling of Mwongo, J. It was the appellate court’s view that the said ruling could not be construed as having extended the jurisdiction of the ELRC beyond the jurisdiction conferred to it under the Constitution or statute. The Court of Appeal in its judgment noted that the jurisdiction of the ELRC was resolved in the ruling delivered by Mwongo J on March 25, 2013 where he held that the matter was a dispute relating to employment and labour relations. It further held that the trial court’s pronouncements, by effectively invalidating and nullifying the receivership was beyond the court’s jurisdiction under the Constitution and Statute.
40. This court in Aviation & Allied Workers Union of Kenya case (*supra*) stated that it is for the appellant to demonstrate the manner in which the superior courts interpreted or applied the provisions of the Constitution and the impact on its case. We stated:
- “[36] .. In an appeal such as this, the appellant ought to show how the other superior courts incorrectly interpreted, or applied the relevant provision of the Constitution, and how the right interpretation when applied, would impact upon its case. And “interpretation” or “application”, in this regard, resides in the assumption of a task that transcends just the reference to the rich generality of constitutional principle; it is a task that focusses upon specific clauses of the Constitution, and calls for the attribution of requisite meaning, tenor and effect.”
41. Further, in Hassan Ali Jobo cases, (*supra*) we held that an appeal is admissible if it raises cogent issues of constitutional controversy. We stated:



“[52] ..However, it is to be affirmed that any appeal admissible within the terms of article 163(4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this court, in furtherance of the objects laid out under section 3 of the Supreme Court Act, 2011 (Act No 7 of 2011).”

42. Additionally, in *Benson Ambuti Adega* case (*supra*) this court held:

“[45] ...It is manifestly evident from the foregoing that, where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this court may not be properly invoked. (See *Erad Supplies and General Contractors Ltd v National Cereals & Produce Board* (*supra*)).”

43. We establish from the primary pleading filed at the High Court that the appellants sought their terminal benefits against the 1st – 4th respondents jointly and severally; judgment for the sum of Kshs 32,457,007/=; general damages; and costs and interest. The appellants were seeking their dues from the 1st – 4th respondents upon termination of their employment. It was on this basis that the High Court transferred the matter to the ELRC as the matter related to employment and labour relations. It was also the Court of Appeal’s finding that the transfer of the matter to the ELRC could not be construed as having extended the court’s jurisdiction. The issue concerning the receivership therefore had a limited bearing to the main claim by the appellants. In *Stanley Mombo Amuti* case (*supra*) we noted that in *Erad Supplies and General Contractors Ltd* case (*supra*) we specifically stated that:

“Where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this court may not be properly invoked. Indeed, in *Aviation and Allied Workers Union* (*supra*) we added that the mere reference to the rich generality of constitutional principle as the Court of Appeal did in the present case, is not a sufficient ground to invoke article 163(4)(a). The same must be said of the present cause.”

44. To this end therefore, we find that this court does not have jurisdiction to entertain the consideration and determination of the issue whether the ELRC had jurisdiction to entertain the issue of validity and/or legality of the receivership in the instant appeal. Further, calling on this court to determine the issue would be seeking to have the court address itself to the extent of the application of the provisions of section 12 of the *ELRC Act*, which statutory provision was not under constitutional challenge before any of the superior courts below. Consequently, we declare that this court is not clothed with jurisdiction to consider this matter under this issue touching on receivership.

45. The twin issue that the appellants seek a determination of is whether the Court of Appeal’s judgment violated article 10 of the *Constitution*. The appellants seek a determination on

“whether the Learned Judges of Appeal erred by holding at paragraph 84 of the judgment that it had awarded 6 months gross salary to each deserving claimant and paragraph 87 of the judgment where it held that,

“The only order that remains in favour of the claimants is the six months gross salary due and payable by the 1st respondent.”

The appellants contend that this holding does not pass the constitutional dictates under article 10 of the *Constitution* as, whereas the court made the said findings, it did not determine who among the



appellants was a deserving claimant entitled to the six months gross salary. They further aver that the order for payment of the six months' salary was to be effected by the 1st respondent, who happened to be one of the claimants. It is therefore their submission that the matter took a Constitutional trajectory as the Court of Appeal decision is in contravention of article 10 of the Constitution for lacking transparency and accountability.

46. In this court's decision in *John Florence Maritime Services Limited* case (*supra*) we noted that in determining whether the matter took a constitutional trajectory, it requires a look at a court's reasoning and even the processes and procedures adopted by a court in its proceedings, noting the court's discretionary mandate. We stated:

(39) It again follows that a determination of whether a matter has met the appellate jurisdictional threshold embodied in article 163(4)(a) of the Constitution is not based on principles cast in stone. This is a discretionary mandate and power that the Supreme Court exercises judiciously on a case to case basis. Therefore, where a litigant before this court alleges that in exercise of their constitutional mandates the superior courts contravened the Constitution in the conduct of their proceedings, in protecting the Constitution that is the embodiment of the aspirations of the people of Kenya, this court may assume jurisdiction to correct such an anomaly."

47. The appellants aver that the judgment lacked clarity, was impractical and self-contradicting. The appellants' grievance is that the Court of Appeal awarded the claimants six months gross salary due and payable by the 1st respondent, whereas the 1st respondent was one of the claimants and not determining who was a "deserving claimant." The question for determination under this issue is therefore whether the matters raised by the appellants are anomalies about which this court ought to assume jurisdiction, noting that the Supreme Court is not only charged with the interpretation and application of the *Constitution*, but the protection of the *Constitution* as well.

48. The appellants aver that "upon disposal of the matter by the Court of Appeal it remained unclear to the petitioners as to whether they actually got any relief from the court since the only relief granted by the court lacked clarity, was impractical and self-contradicting. The relief granted ended up to be of no assistance in resolving the dispute." In response to this issue, the 1st respondent submitted that the alleged errors made by the Court of Appeal are capable of being corrected under the slip rule provided under rule 37(1) of the *Court of Appeal Rules* or through the settlement of terms under rule 34(2) of the *Court of Appeal Rules*.

49. Our understanding of this averment is that the appellants are unable to comprehend the import of the judgment by the Court of Appeal. The appellants are therefore, in essence, asking us to interpret and clarify the said judgment. In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Sup Ct Presidential Election Petition No 1 of 2017 [2017] eKLR in our ruling delivered on October 17, 2017 we held (paragraph 56) that this court has no jurisdiction to interpret its decisions or those of other courts. We therefore cannot heed the appellants' call to assist them in understanding the judgment, more so, through the present appeal.

50. It is our considered view that this is an issue that can be addressed by the Court of Appeal. The appellants ought to have moved the Court of Appeal appropriately to either confirm or clarify the import of its decision. Rule 34(2)(d) and (e) of that court's rules provides that-

"(2) Where a decision of the court was given in a civil application or appeal



- d. if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules (a) and (b), the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct, after giving all the parties an opportunity of being heard;
- d. if the parties are unable to agree which party was substantially successful, the Registrar, on the application of either party, which application may be made informally, and after giving all parties an opportunity of being heard, shall direct by which party the draft is to be prepared, and such direction shall be final.”

51. Rule 35 of the *Court of Appeal Rules* on its part, makes provision for correction of errors. It states-

- “(1) A clerical or arithmetical mistake in any judgment of the court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or the application of any interested person so as to give effect to what the intention of the court was when judgment was given.
- (2) An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected.”

52. We therefore find, taking into account the cited provisions, that this issue does not fall under the ambit of article 163(4)(a) of the *Constitution*. We state so because the issues raised largely revolve around factual contestations as among the parties, which the superior courts below were engaged in, to enable them determine the extent of culpability, if any, as among the different parties.

53. For the reasons set out above, we decline the invitation to assume jurisdiction in respect of this appeal. As stated in *Daniel Kimani Njibia v Francis Mwangi Kimani & another* SC Application No 3 of 2014 [2015] eKLR, this court had not been conceived as just another layer in the appellate -court structure. Much less an explainer to litigants and counsel of judgments of superior courts below.

54. Considering this court’s decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012; [2014] eKLR which set out the legal principles that guide the grant of costs and enunciated that generally, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit, and noting that this matter did not proceed to hearing of the appeal on the merits, and to bring closure to the litigants before the court, we exercise our judicial discretion in ordering that each party shall bear its costs.

Orders

55. Consequently, we make the following orders:

- i. The preliminary objection dated November 3, 2022 be and is hereby upheld; with the result that;
- ii. The petition of appeal dated September 12, 2022 be and is hereby struck out; and



iii. Each party shall bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 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

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S. C. WANJALA

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

