WMM v EWG (Petition 33 (E037) of 2022) [2023] KESC 36 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KESC 36 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 33 (E037) OF 2022

MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

JUNE 16, 2023

BETWEEN

WMM ..... APPELLANT

AND

EWG ..... RESPONDENT

(Being an appeal from the Ruling and Orders of the Court of Appeal at Nairobi (M'inoti, Omondi & Laibuta, JJ.A.) delivered at Nairobi on 4th November, 2022 in Civil Application No. E416 of 2021)

Circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right to determine appeals arising from the Court of Appeal's interlocutory applications

Reported by John Ribia

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to determine appeals as of right in matters involving constitutional interpretation – where an appeal arose from an interlocutory application from the Court of Appeal - whether Supreme Court's jurisdiction to determine appeals as of right in matters involving constitutional interpretation extended to appeals that challenged the exercise of discretion of the Court of Appeal in interlocutory applications - what were the circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right in matters involving constitutional interpretation to determine appeals arising from the Court of Appeal's interlocutory applications – Constitution of Kenya, 2010, article 163(4)(a); Matrimonial Property Act, (cap 152), section 7; Marriage Act, (cap 150), section 66(2); Court of Appeal Rules, 2010, (cap 9 Sub Leg), rule 5(2)(b).*

Brief facts

The petition emanated from a divorce cause that was filed at the High Court where it was held that the practice obtaining was that parties who sought to divorce filed a petition before the subordinate court and if they sought a declaration of their interest in any matrimonial property acquired during the marriage and subject to the value of the property, they would file the cause at the High Court. Nevertheless since the respondent was seeking the distribution of matrimonial property as part of her prayers, the High Court held that the selling of the matrimonial property and the equal sharing of the proceeds of the sale therefore bringing herself under the

provisions of section 7 of the Matrimonial Property Act, then it would be effective and in the interest of justice for all the matters to be dealt with at the High Court.

Aggrieved the appellant moved to the Court of Appeal and filed an application under rule 5(2)(b) of the Court of Appeal Rules in which the appellant sought to have the proceedings before the High Court stayed pending hearing and determination of the appeal. The appeal was on grounds that the High Court erred in law and fact in usurping the Resident Magistrate's Court jurisdiction. The Court of Appeal, in agreeing with the trial court, held that the High Court had unlimited original jurisdiction under article 165(3)(a) of the Constitution in all matters and that section 66 (2) of the Marriage Act did not override or oust the unlimited jurisdiction of the High court to hear and determine matters related to the dissolution of marriages. The appellate court noted that in effect the provisions of article 165(3) of the Constitution superseded the provisions of section 66(2) of the Marriage Act. The Court of Appeal exercised its discretion and declined to issue the stay orders on the grounds that the appellant had failed to show that he had an arguable appeal.

Further aggrieved the appellant filed the instant appeal before the Supreme Court on grounds that the High Court and Court of Appeal erred in finding that the High Court's unlimited and original jurisdiction in civil and criminal matters was only subject to 165(3)(a) of the Constitution and that article 165(3)(a) superseded the express limits on jurisdiction on dissolution of marriage in the Marriage Act.

Issues

i. Whether Supreme Court's jurisdiction to determine appeals as of right in matters involving constitutional interpretation extended to appeals that challenged the exercise of discretion of the Court of Appeal in interlocutory applications.

ii. What were the circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right and determine appeals arising from the Court of Appeal's interlocutory applications?

Relevant provisions of the Law

Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5(2)(b)

5. Suspension of sentence, injunction, stay of execution and stay of proceedings

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

Held

1. For an appeal to be properly before the Supreme Court under article 163(4)(a) of the Constitution, the appellant had to show how the Court of Appeal disposed of the matter by way of interpreting or applying particular provision[s] of the Constitution.
2. The Court of Appeal exercised discretionary powers in issuing orders under rule 5(2)(b) of the Court of Appeal Rules. The appeal arose from an interlocutory decision of the Court of Appeal challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) meaning that there was no substantive appeal before the Supreme Court. There was also no judgment from the Court of Appeal in which constitutional issues had been analyzed and a determination issued.
3. Appeals from rulings of the Court of Appeal under rule 5(2)(b) of the Court of Appeal Rules could not be disguised as appeals under article 163(4)(a) of the Constitution. Appeals were anchored on intended appeals that were yet to be heard and determined. The Supreme Court had no jurisdiction to determine the instant appeal.
4. It was necessary to distinguish between two situations regarding the Supreme Court's jurisdiction. First, when the Supreme Court found it lacked jurisdiction to handle appeals from interlocutory decisions of the Court of Appeal without substantive appeal pending. Second, when the Supreme

Court did assume jurisdiction over appeals arising from interlocutory applications that originated in the High Court moved to the Court of Appeal and the Supreme Court.

5. There was need to distinguish the Supreme Court's finding on lack of jurisdiction to handle appeals arising from interlocutory decisions of the Court of Appeal where there was no substantive appeal pending before the Supreme Court to that where the Supreme Court had assumed jurisdiction in appeals that arose from interlocutory applications originating from the High court, through to the Court of Appeal and finally to the Supreme Court.
6. In the Joho, Hassan Ali & another v Suleiman Said Shahbal & 2 others (Petition10 of 2013; [2014] eKLR) (Joho Case), the issue for determination before the High Court that was presented by way of an application was on the constitutionality of section 76(1)(a) of the Elections Act in line with article 87(2) of the Constitution where the parties invited the High court to exercise its jurisdiction as conferred by article 165(3)(d)(i) to interpret Constitution and determine the validity of this provision of the the Elections Act. The High Court exercised its jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to the Supreme Court. The Supreme Court therefore made a determination that it had jurisdiction as the appeal emanated from a substantive determination of a constitutional question by the Court of Appeal. The Supreme Court's jurisdiction was triggered because the issue in dispute had been canvased right through from the High Court to the Court of Appeal, even though the substantive appeal on the outcome of the election petition was still pending before the Court of Appeal.
7. In the Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Application 10 of 2017; [2018] eKLR) decision, the Supreme Court considered the question of whether a determination in an interlocutory application legitimately lay on appeal before the Supreme Court as of right. The Supreme Court affirmed that the question was answered in the Joho Case hence its holding that an interlocutory application which was determined by the Court of Appeal could properly lay a foundation for an appeal before the Supreme Court. However, it was noted that just like in Joho, the resolution must be of a constitutional issue canvassed before the High Court where a determination was rendered, with the decision being appealed to the Court of Appeal and then finally rising to the Supreme Court.
8. As long as the twin issues of the monetary value of the properties in dispute and the nature of the relationship between the appellant and respondent were not determined by the High Court and Court of Appeal, the appellant had not properly invoked article 163(4)(a) of the Constitution by purporting to challenge the jurisdiction of the High Court. No appeal lay before the Supreme Court as of right. As long as the aforesaid issues were not determined by the two Superior Courts, the submissions by the appellant that there were constitutional determinations by the Superior Courts were merely preemptive.

Petition struck out.

Orders

i. *The Petition of Appeal dated November 23, 2022 and filed on November 24, 2022 was struck out for want of jurisdiction.*
ii. *The amount of Kshs 6000 that was deposited in Court as security for costs be and was released to the appellant.*
iii. *Each party was to bear their costs of the appeal.*

Citations

Cases

Kenya

1. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2017; [2018] eKLR - (Explained)

2. *Criticos, Basil v Independent Electoral and Boundaries Commission & 2 others* Petition 22 of 2014; [2015] eKLR - (Explained)
3. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* Petition 5 of 2012; [2012] eKLR; [2012] 2 KLR 454 - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Muriithi, Deynes & 4 others v Law Society of Kenya & another* Petition 507 of 2014; [2015] KEHC 6945 (KLR) - (Explained)
6. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR; [2014] 2 KLR 253 - (Explained)
8. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] eKLR - (Explained)
9. *Waibara, Clement Kungu v Annie Wanjiku Kibeh & another* Civil Application 31 of 2020; [2020] KESC 5 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 28, 29(c)(f); 40(1)(2); 45(3); 50(1); 87(2); 163(4)(a); 165(2)(a)(3)(5) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5 (2) (b) - (Interpreted)
3. Elections Act (cap 7) section 76(1) (a) - (Interpreted)
4. Marriage Act (cap 150) sections 2, 66(2) - (Interpreted)
5. Matrimonial Property Act (cap 152) sections 4, 6, 7, 8, 9, 12(2)(3); 17(2)(b) - (Interpreted)
6. Supreme Court Act (cap 9B) sections 3, 15A- (Interpreted)
7. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 39 - (Interpreted)

Advocates

Mr. Manyara for the appellant

JUDGMENT

A. Introduction

1. The petition before this court is dated November 23, 2022 and filed on November 24, 2022. The appeal is filed pursuant to the provisions of article 163(4)(a) of the *Constitution*; section 15A of the *Supreme Court Act* and rule 39 of the *Supreme Court Rules 2020*. The appeal challenges the decision of the Court of Appeal (M'inoti, Omondi & Laibuta, JJ A) in Civil Application No E416 of 2021 delivered on November 4, 2022 declining to grant the appellant orders staying execution under rule 5(2)(b) of the *Court of Appeal Rules*.

B. Background

i. Proceedings at the High Court

2. The appellant and respondent had cohabited and lived as husband and wife since 2008. The respondent claimed that from the time she started living with the respondent as her husband, she helped the appellant either directly or indirectly to acquire various assets during their cohabitation despite the assets being registered in the respondent's name. The assets included parcels of land, motor vehicles and developments made on their matrimonial home in Thome (hereinafter referred to as 'matrimonial properties'). The respondent further claims that she and the appellant were unable

to bear a child despite spirited attempts on their part and for that reason, her relationship with the appellant turned sour resulting in the respondent being kicked out of their matrimonial home, eventually resulting in their separation.

3. Subsequently, the respondent instituted by way of originating summons, proceedings for enforcement of the right to matrimonial home and property in High Court Civil Suit No 1 of 2019 under the provisions of article 28, 29(c) & (f), 40 (1) & (2) and 45(3) of the *Constitution*; sections 4,6,8,9, 12(2) & (3) and 17 of the *Matrimonial Property Act 2013* and other enabling laws seeking various orders *inter alia*; a temporary injunction restraining the appellant from alienating or interfering with the matrimonial properties pending determination and hearing of the originating summons; a declaration that the matrimonial properties are such properties within the meaning of the *Matrimonial Property Act* of 2013 and were acquired by the joint funds and efforts of the appellant and respondent; and an order that the said matrimonial properties be valued and sold and the net proceeds be divided equally between the appellant and the respondent.

4. The respondent then proceeded to file a notice of motion dated October 4, 2019 seeking to amend her originating summons where she sought to include particulars of other immovable properties not listed in her originating summons as well as amendments to the effect that her marriage to the appellant was based on long cohabitation and that she wanted to rely on presumption of marriage in the division of the matrimonial property. The respondent also sought two further declarations; that the appellant and respondent be presumed married between the year 2008 and 2018 and that the marriage between the appellant and respondent be dissolved.

5. The appellant opposed the application by claiming that the proposed amendments sought to introduce a new cause of action and also ousted the jurisdiction of the High Court to hear and determine the originating summons.

6. In a ruling dated and delivered on April 30, 2020, the High Court (Muchelule, J (as he then was) exercised his discretion and allowed the notice of motion and in effect, admitted the amended originating summons. The trial judge noted that the practice obtaining is that parties who seek to divorce file a petition before the subordinate court and if they seek a declaration of their interest in any matrimonial property acquired during the marriage and subject to the value of the property, they would file the cause at the High court. He however noted that for purposes of the application for amendment before the court, though it would be desirable for parties seeking the dissolution of marriage to initially file their cause in the subordinate courts, the High Court is nonetheless clothed with unlimited original jurisdiction in criminal and civil cases under article 165(2)(a) of the *Constitution* and that under section 17(2)(b) of the *Matrimonial Property Act*, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause.

7. The trial judge was also of the view that since the respondent was seeking as part of her prayers, the selling of the matrimonial property and the equal sharing of the proceeds of the sale therefore bringing herself under the provisions of section 7 of the *Matrimonial Property Act*, then it would be effective and in the interest of justice for all the matters to be dealt with at the High court.

ii. Proceedings in the Court of Appeal

8. Aggrieved, the appellant moved to the Court of Appeal and filed a notice of appeal expressing their intention to appeal the decision of Muchelule J (as he then was) dated April 30, 2020. It is on the basis of that notice of appeal that the appellant also filed an application under rule 5(2)(b) of the *Court of Appeal Rules* in Nairobi Civil Application No E416 of 2021 seeking orders to have the proceedings

before the High Court in the ruling delivered in Family Suit No 1 0f 2019 (OS) on April 30, 2020 stayed pending the hearing and determination of the intended appeal. The appellant's intended appeal before the Court of Appeal was anchored on the grounds that the learned judge erred in law and fact by; allowing the respondent's application and by doing so, usurped the jurisdiction of the Resident Magistrate's Court in dissolving marriages as expressly conferred by section 2 of the *Marriage Act*; entertaining the originating summons pursuant to the *Matrimonial Property Act* despite the fact that no divorce proceedings have been initiated or concluded; and by declaring that the court is clothed with jurisdiction under article 165(2)(a) of the *Constitution* to determine divorce proceedings notwithstanding that a statute has plainly ousted that jurisdiction and granted it to the Resident Magistrate's Courts.

9. In its determination, the Court of Appeal (M'Inoti, Omondi & Laibuta JJA), after considering the grounds of appeal as set out in the appellant's intended appeal noted that in determining whether the appellant's application was meritorious, the appellant had to prove that he has an arguable appeal. The appellate court was of the view that the question as to whether the applicant has an arguable appeal turns on the court's finding on the question of whether the High Court has jurisdiction to hear and determine the respondent's summons relating to their marital dispute and matrimonial property.

10. The Court of Appeal, in agreeing with the trial court, held that the High Court has unlimited original jurisdiction under article 165(3)(a) of the *Constitution* in all matters and that section 66 (2) of the *Marriage Act* does not override or oust the unlimited jurisdiction of the High Court to hear and determine matters related to the dissolution of marriages. The appellate court therefore noted that in effect, the provisions of article 165(3) of the *Constitution* supersede the provisions of section 66(2) of the *Marriage Act*.

11. It was therefore the appellate court's finding that since the value of the matrimonial property in issue is claimed to have exceeded the pecuniary jurisdiction of the Magistrate's Court which is set at Kshs 20 Million for the Chief Magistrate's Courts and coupled with the unlimited jurisdiction of the High Court, the appellant had failed to prove that he had an arguable appeal with a probability of success.

12. The Court of Appeal exercised its discretion and declined to issue the orders sought under rule 5(2)(b) of the *Court of Appeal Rules* on the grounds that the appellant had failed to show that he had an arguable appeal. Having found that there was no arguable appeal, the court found no reason to address the nugatory aspect. The appellant's notice of motion was therefore dismissed.

iii. Proceedings in the Supreme Court

13. Aggrieved by the Court of Appeal's decision, the appellant has filed an appeal before this court laying out two grounds of appeal being:

    i) That the learned judges erred in finding that pursuant to article 165(3) of the *Constitution*, the High Court's unlimited and original jurisdiction in civil and criminal matters is only subject to article 165(5) and that article 165(3)(a) supersedes the express limits on jurisdiction on dissolution of marriage in the *Marriage Act*;

    ii) That the learned judges erred by making conclusive, definitive and/or final findings/pronouncements on the law as regards the jurisdiction of the High Court to hear and determine divorce matters vis a vis the express provisions of the *Marriage Act* at the interlocutory stage thus preempting the determination of the intended appeal and hence prejudicing the appellant's right to appeal.

14. The appellant now seeks the following reliefs:

i) The ruling and orders of the Court of Appeal delivered on November 4, 2022 be set aside and there be substituted thereof an order allowing Nairobi Civil Application No E416 of 2021 in terms of prayer 2;

ii) Costs of this appeal be borne by the respondent

iii) Such consequential or further orders as this honorable court may deem just.

15. In response to the petition, the respondent filed a replying affidavit dated February 2, 2023 and filed on February 3, 2023. Therein, she opposes the appeal and depones that the notice of appeal is incurably defective for targeting a non-existent decision by quoting the wrong date for the respondent's application for amendment of her originating summons.

16. The respondent also depones that the Court of Appeal's ruling is unassailable, in that the High Court is vested with unlimited jurisdiction under article 165(3)(a) of the *Constitution* to handle civil and criminal matters; that under section 17(2)(b) of the *Matrimonial Property Act*, an application for a declaration of rights to any property between spouses may be made as part of a petition in a matrimonial cause and that; considering the value of the properties contested between the appellant and the respondent exceeded Kshs 20 Million, then the High Court is by dint of article 165(3)(a) and section 17(2)(b) of the *Matrimonial Property Act*, clothed with the jurisdiction to determine the dispute.

17. In conclusion, the respondent claims that the appellant is asking this court to make a determination on the merits of his intended appeal before the Court of Appeal which would be pre-emptive and embarrass the hearing of the pending appeal by the court. The respondent therefore claims that the appeal lacks merit, is an abuse of the court process, is intended to waste the court's time and that the same should be dismissed.

C. Parties' Respective Cases

i. Appellant's

18. The appellant's submissions are dated and filed on January 24, 2023. In them, he begins by addressing the question of the court's jurisdiction to handle appeals arising out of a determination of an interlocutory application. The appellant submits that appeals arising from interlocutory applications can be determined before this court as of right and relies on the court's decisions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR where in both cases, this court held that it had limited jurisdiction to handle appeals arising out of an interlocutory determination by the High court

19. The appellant in that context argues that the High Court determined the question of jurisdiction in its ruling dated April 30, 2020, when it held that though it was desirable that a party seeking the dissolution of a marriage ought to commence proceedings at the subordinate court, the High court is still clothed with unlimited jurisdiction under article 165 (3)(a) of the *Constitution* in criminal and civil cases.

20. The appellant challenges the Court of Appeal's decision by submitting that the court erred by also affirming the finding by the High Court and further holding that the provisions of section 66(2) of the *Marriage Act* do not override or oust the unlimited jurisdiction of the High Court to hear and determine matters relating to dissolution of marriages. The appellant further faults the Court of Appeal for deciding such an issue in an application filed under rule 5(2)(b) of the *Court of Appeal*

Rules. The appellant argues that though this was not a final determination, the finding is precedent and binding on the lower courts and that such a finding will bring confusion to the lower courts and therefore urges the Supreme Court to determine it with finality and offer guidance on the issue of jurisdiction as an issue of law.

21. Further expounding on his grounds of appeal, the appellant submits that the High Court cannot proceed to usurp the jurisdiction accorded to other courts, which in this case is the Resident Magistrate's Court that has jurisdiction to handle matters that involve the dissolution of marriages as provided for under the *Marriage Act 2014*. The appellant argues that it was not in error or accident that Parliament conferred the jurisdiction of dissolution of marriage to subordinate courts, but that it was a deliberate attempt to cure an existing lacuna or improve the existing one. The appellant also submits that it can be argued that as a matter of fact, Parliament purposefully and knowingly ousted the jurisdiction of the High Court in divorce matters.

22. In that regard, the appellant submits that the superior courts erred by arrogating the High court's jurisdiction through craft and innovation notwithstanding the plain limitation provided in the *Marriage Act* on account that the respondent, in her originating summons, wanted to have the issues of dissolution of marriage and division of matrimonial property handled concurrently and that since the value of the matrimonial property was above Kshs 20 Million, then the High Court could handle the filed summons. The appellant submits that such an interpretation defeats the intention of the Legislature in enacting the *Marriage Act 2014* and *Matrimonial Property Act 2013*. He argues that an application for the division of matrimonial property is filed under the provisions of section 17 of the *Matrimonial Property Act* and that the same should be filed after the dissolution of marriage.

23. The appellant therefore submits that if the interpretation by the High Court and subsequently by the Court of Appeal is followed, then nothing prevents a party from consciously and deliberately filing matters in the High Court which are reserved for tribunals by quoting the provisions of article 165(3)(a) of the *Constitution*. The appellant further contends that the Court of Appeal made such firm and categorical findings on grounds that were pending determination in the intended appeal and that such pronouncements were made in an application filed under rule 5(2)(b) of the *Court of Appeal Rules*. It is his submission therefore, that such a determination not only embarrasses the fair and proper adjudication of a dispute but also infringes on the appellant's right to a fair hearing before an independent and impartial court as guaranteed under article 50(1) of the *Constitution*.

24. The appellant concludes by urging the court to exercise its jurisdiction under section 3 of the *Supreme Court Act* and provide an authoritative and impartial interpretation of the *Constitution*.

ii. Respondent

25. The respondent filed no submissions and did not appear nor was she represented at the hearing although due notice was given to her.

D. Issues for Determination

26. Flowing from the foregoing, two issues arise for our consideration:

    i) Whether there is a substantive determination of a constitutional question by the Court of Appeal to warrant the invocation of this court's jurisdiction under article 163(4)(a) of the *Constitution* and;

    ii) Whether this court has jurisdiction to hear appeals arising from interlocutory orders of the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules*.

We shall proceed to address the two issues concurrently.

E. Analysis

27. The appellant has approached this court under article 163(4)(a) of the *Constitution* which allows appeals as of right to the Supreme Court in all cases involving interpretation and application of the *Constitution*. While this court has on numerous occasions made determinations on the extent of its powers under article 163(4)(a) of the *Constitution*, the question of the extent of this court's jurisdiction is one we need to address before engaging our minds on the determination of appeals.

28. The question as to when this court assumes appellate jurisdiction over appeals filed under article 163(4)(a) has been addressed in a number of cases with the court coming up with guiding principles. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012; 2012] eKLR we held that

> " The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. 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)."

29. This position was further entrenched in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR, where we emphasized that:

> " In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*."

30. Further, in *Erad Suppliers & General Contractors Ltd vs National Cereals & Produce Board*, SC Petition No 5 of 2012 [2012] eKLR this Court held that:

> " [13A] In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court."

31. From the above decisions, we reiterate that for an appeal to be properly before this court under article 163(4)(a) of the *Constitution*, the appellant must show how the Court of Appeal disposed of the matter by way of interpreting or applying particular provision[s] of the *Constitution*. Therefore, the question before us that remains to be decided is whether article 163(4)(a) of the *Constitution* grants this court jurisdiction to entertain appeals challenging the exercise of discretion by the Court of Appeal

under rule 5(2)(b) of the *Court of Appeal Rules*. The appellant admits that though this appeal arises from a determination of an interlocutory application, he argues that the High Court and Court of Appeal made a determination on a constitutional matter and we should therefore seize jurisdiction and determine the merits of his appeal.

32. In that regard, the appellant argues that the Court of Appeal erred by determining an issue of jurisdiction through an interlocutory application brought under rule 5(2)(b) of the *Court of Appeal Rules*. The appellant also contends that the appeal lies as of right as the issue for determination is the interpretation of article 165(3)(a) of the *Constitution* vis-a-vis the application of sections 2 and 66 of the *Marriage Act*.

33. The respondent however contests the jurisdiction of this court to determine this appellant's appeal by urging that the appellant having confirmed that he still has an intended appeal before the Court of Appeal, is still inviting this court to make pronunciations on the merits of that intended appeal which would in effect, be pre- emptive and embarrass the hearing of the intended appeal before the Court of Appeal.

34. The appellant now seeks this court's determination on whether the Court of Appeal erred by finding that the High Court had jurisdiction to determine the originating summons filed by the respondent relating to both their marital dispute and matrimonial property and; whether such a finding defeats the intention of the provisions of the *Marriage Act* on the dissolution of marriages and *Matrimonial Property Act* on the division of matrimonial property, as both statutes provide for the relevant procedures as well as the courts to adjudicate on such disputes.

35. We note that the Court of Appeal, in arriving at its decision, considered whether the High Court has jurisdiction to determine the originating summons filed before it by the respondent. The appellate court held;

> "To our mind, the High Court's unlimited original jurisdiction in civil and criminal matters as conferred by article 165(3) (a) is only subject to clause (5). To that extent, section 66(2) of the *Marriage Act, 2014* does not override or oust the unlimited original jurisdiction of the High Court to hear and determine matters relating to dissolution of marriages. In effect, the provision of article 165(3) of the *Constitution* supersedes section 66(2) of the *Marriage Act*.
>
> To the extent that the value of the matrimonial property in issue is claimed as exceeding the pecuniary jurisdiction of the magistrates' courts, which is set at Kshs 20,000,000 in the case of Chief Magistrate's Courts, and coupled with the unlimited jurisdiction of the High Court, we reach the inescapable conclusion that the applicant has no arguable appeal with a probability of success."

36. The decision by the Court of Appeal flows from the High Court decision where the trial court, while determining whether it had jurisdiction to determine the filed originating summons held:

> " For the purposes of this application, I consider that, although it is desirable that a party seeking the dissolution of a marriage goes to the subordinate court, this court is under article 165(2)(a) of the Constitution clothed with unlimited original jurisdiction in criminal and civil cases. Under section 17(2) (b) of the Matrimonial Property Act, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause. And now that the applicant seeks, as part of her prayers, the selling of the property and the equal sharing of the proceeds of such sale, and therefore

bringing herself under section 7 of the Matrimonial Property Act, I consider it appropriate and effectual that all these matters be dealt with in this court."

37. Flowing from the above, it is not in dispute that the superior courts made determinations on the question of jurisdiction preliminarily. It is this determination that the appellant seeks to convince us to decide on by claiming that such pronouncements shall have a compounding effect that will lead to the High Court determining matters reserved for tribunals and subordinate courts by arrogating itself jurisdiction whereas there are statutes that specifically provide for such jurisdiction.

38. We note that in its decision, the Court of Appeal considered whether the appellant had an arguable appeal, and in doing so, considered the question of jurisdiction, which was essentially, the appellant's main ground of appeal in his intended appeal to the Court of Appeal. The learned judges of appeal aptly captured this issue when they stated:

> "On our reading of the grounds on which the applicant's motion is founded, the draft memorandum of appeal, the affidavit in support thereof, and the written and oral submissions made to us, we are of the considered view that the question as to whether the applicant has an arguable appeal turns on our finding on a single question: whether the High Court has jurisdiction to hear and determine the respondent's summons relating to their marital dispute and matrimonial property."

39. In interpreting whether the appellant's application had merit, the Court of Appeal was guided by the provisions of rule 5(2)(b) of the *Court of Appeal Rules* which provides for stay of execution of proceedings pending the determination of a pending appeal or in the appellant's case, an intended appeal. The Court of Appeal considered that to be successful, an applicant must first show that the intended appeal is arguable and not merely frivolous and that secondly, the intended appeal, if successful, will be rendered nugatory if there is impending execution of/or further proceedings from the impugned judgment. For the court to determine the first limb it must be satisfied, prima facie, that the appeal or intended appeal is arguable. That is precisely the question the court was answering here, without expressing a definitive conclusion. That can only be done in the appeal.

40. Having so said, it is not in dispute that the appeal before us is an appeal arising from the interlocutory orders of the Court of Appeal issued under rule 5(2)(b) of the *Court of Appeal Rules*. The nature of appeals arising from orders issued under rule 5(2)(b) applications filed under the *Court of Appeal Rules* has previously been determined by this court in a number of cases. In *Deynes Muriithi v the Law Society of Kenya & another*, Civil Application No 12 of 2015, this court held:

> "...the main purpose of rule 5(2)(b) applications, is that the orders issued therein are for preserving the substratum of the appeal. This means that the Court of Appeal, at that stage, has not yet determined and disposed of the appeal; it is yet to set out its reasoning, in interpretation and application of the Constitution. The Appellate Court has yet to determine the main appeal which must have been heard at the High Court, moving on to the Court of Appeal, and then to this court."

41. Also in *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, Sup Ct Civil Application No 16 of 2015, the question before the court was whether article 163(4)(a) of the *Constitution* grants this court jurisdiction to entertain appeals arising from interlocutory orders of the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules* where the exercise of discretion by

the Court of Appeal is contested. In finding that we lacked jurisdiction to handle such appeals, we held that:

> "(35) The application before us contests the exercise of discretion by the appellate court, when there is neither an appeal, nor an intended appeal pending before this court.
>
> Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163 (4) (a) of the Constitution. Any square involvement of this court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged..., Such an early involvement of this court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.
>
> (36) In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that court's rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court." Emphasis ours]

42. In reiterating the above position, we affirm that the Court of Appeal exercises discretionary powers in issuing orders under rule 5(2)(b) of its rules. In the circumstances, we note that the appeal before us arose from an interlocutory decision of the Court of Appeal challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that court's rules meaning that there is no substantive appeal before us. There is also no judgment from the Court of Appeal in which constitutional issues have been analyzed and a determination issued. Indeed, in *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 22 of 2014 [2015] eKLR while interrogating an appeal against orders by the Court of Appeal denying the extension of time where there was no judgment by the Court of Appeal, we found that:

> "[50] It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of article 163(4) (a) of the Constitution. In the absence of a judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this court be sitting on appeal over? We have no doubt that, had this fact been openly ventilated in Court in the initial application by the applicant, the ex parte order for stay would not have issued from the single-judge bench of this court." [Emphasis ours]

43. We reiterated this finding in *Clement Kungu Waibara v Annie Wanjiku Kibeh & another*, SC Civil Application No 31 of 2020 [2020] eKLR where while answering the question posed on what this court would be sitting on appeal over in the absence of a judgment by the Court of Appeal, we went on to find:

> "(12) Without a judgment of the Court of Appeal which would then create a finality to contested issues and then point parties to the specific limb in article 163(4) to which our intervention would be required, we cannot see how our jurisdiction under that article can be properly invoked."

44. We have restated the law on our jurisdiction elsewhere in this judgment as well as our findings in our decisions on the issue of interlocutory appeals to demonstrate that appeals from rulings of the Court

of Appeal under rule 5(2)(b) cannot be disguised as appeals under article 163(4)(a) as such appeals are anchored on intended appeals that are yet to be heard and determined. On this basis, we decline the invitation by the appellant to find that we have jurisdiction to determine this appeal.

45. Before we conclude, and for clarity, we would like to distinguish this court's finding on lack of jurisdiction to handle appeals arising from interlocutory decisions of the Court of Appeal where there is no substantive appeal pending before us to that where we have assumed jurisdiction in appeals arising from interlocutory applications originating from the High court, through to the Court of Appeal and finally to this court. Of relevance are our decisions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others*, SC Application No 10 of 2017; [2018] eKLR.

46. In the *Joho* case, the issue for determination before the High Court that was presented by way of an application was on the constitutionality of section 76(1)(a) of the *Elections Act* in line with article 87(2) of the *Constitution* where the parties invited the High court to exercise its jurisdiction as conferred by article 165(3)(d)(i) to interpret *Constitution* and determine the validity of this provision of the the *Elections Act*. The High Court exercised its jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to the Supreme Court. This court therefore made a determination that it had jurisdiction as the appeal emanated from a substantive determination of a constitutional question by the Court of Appeal. This court's jurisdiction was triggered because the issue in dispute had been canvased right through from the High Court to the Court of Appeal, even though the substantive appeal on the outcome of the election petition was still pending before the Court of Appeal.

47. In the *Bia Tosha* decision, we considered the question of whether a determination in an interlocutory application legitimately lies on appeal before this court as of right. The court affirmed that this question was answered in the *Joho* case hence its holding that an interlocutory application which is determined by the Court of Appeal could properly lay a foundation for an appeal before this court. However, we noted that just like in *Joho*, the resolution must be of a constitutional issue canvassed before the High Court where a determination is rendered, with the decision being appealed to the Court of Appeal and then finally rising to the Supreme Court.

48. In conclusion, we find that as long as the twin issues of the monetary value of the properties in dispute and the nature of the relationship between the appellant and respondent were not determined by the two superior courts, the appellant has not properly invoked article 163(4)(a) of the *Constitution* by purporting to challenge the jurisdiction of the High Court. In the circumstances, no appeal lies before us as of right. Further, as long as the aforesaid issues were not determined by the two superior courts, the submissions by the appellant that there were constitutional determinations by the superior courts are merely preemptive.

Costs

49. On costs, the principle that costs follow the event is the general rule in this court as we so held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012 [2014] eKLR. However, noting the nature of the appeal before us; the fact that the respondent did not appear and noting that the main suit is still pending before the High Court, we deem it fit that each party should bear its costs hereof.

F. Orders

50. From the foregoing analysis, we make the following orders:

i. The petition of appeal dated November 23, 2022 and filed on November 24, 2022 is hereby struck out for want of jurisdiction.

ii. The amount of Kshs 6000/= deposited in court as security for costs be and is hereby released to the appellant.

iii. Each party shall bear their costs of the appeal.

51. It is accordingly ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

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 as a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA