



Khan v International Commercial Company (K) Ltd (Petition E010 & E009 of 2023 (Consolidated)) [2023] KESC 107 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KESC 107 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION E010 & E009 OF 2023 (CONSOLIDATED)
MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
DECEMBER 21, 2023**

BETWEEN

KAYUM KHAN APPELLANT

AND

INTERNATIONAL COMMERCIAL COMPANY (K) LTD RESPONDENT

(Being Appeals from the Judgments and Orders of the Court of Appeal at Nairobi (M’Noti, Laibuta & Gachoka, JJA.) in Civil Appeals Nos 63 and 124 of 2018, both delivered on 17th February 2023)

An appeal to the Supreme Court under article 163(4)(a) of the Constitution must raise substantive questions of interpretation and application of the Constitution

Reported by John Ribia

***Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction to determine appeals on matters of constitutional interpretation/application – whether the appeal progressed through the appropriate mechanisms - whether the appeal raised questions of constitutional interpretation or application of the Constitution to warrant an appeal to the Supreme Court - whether the appeal before the Supreme Court had progressed through the appropriate appellate mechanisms so as to reach the Supreme Court by way of an appeal - Constitution of Kenya article 163(4)(a).*

Brief facts

The appellant invoked the Supreme Court’s jurisdiction under article 163(4)(a) of the Constitution alleging that the directions, actions, or omissions of the Employment and Labour Relations Court took a constitutional trajectory involving interpretation and application of the Constitution, particularly the Bill of Rights that the Court of Appeal failed to address.

The respondent contended that the appeal did not involve any issue of interpretation or application of the Constitution and as such the court did not have jurisdiction to entertain the same.



Issues

- i. Whether the appeal raised questions of constitutional interpretation or application of the Constitution to warrant an appeal to the Supreme Court.
- ii. Whether the appeal before the Supreme Court had progressed through the appropriate appellate mechanisms so as to reach the Supreme Court by way of an appeal.

Held

1. To evaluate the jurisdictional standing of the Supreme Court in handling the appeal, it was necessary for the court to consider whether the appeal raised a question of constitutional interpretation or application, and whether the same had been canvassed in the superior courts and had progressed through the normal appellate mechanism so as to reach the Supreme Court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution.
2. The directions that emanated from the Employment and Labour Relations Court (ELRC) were interlocutory matters. No substantive questions of interpretation and application of the Constitution arose at the ELRC during the proceedings leading to the directions issued by the court. What was before the ELRC concerned normal court processes during the conduct of the matter which were aimed at aiding the disposal of the matter and not cogent issues of constitutional controversy. The Court of Appeal only tangentially touched on the issue of the violation of the appellant's rights.
3. The Supreme Court lacked jurisdiction to adjudicate the appeal pursuant to article 163(4)(a) of the Constitution. The Supreme Court was unable to assess whether the trial court appropriately exercised its discretion and whether the rights of the appellant were violated.

Appeals dismissed.

Orders

Costs awarded to the respondent.

Citations

Cases

Kenya

1. *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya; Communications Commission of Kenya* Miscellaneous Application 1640 of 2003; [2005] KEHC 1767 (KLR) - (Explained)
2. *Gakure, John & 148 others v Dawa Pharmaceutical Co Ltd & 7 others* Civil Application 299 of 2007; [2010] KECA 89 (KLR) - (Explained)
3. *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* Civil Suit 97 of 2009; [2012] KEHC 1937 (KLR) - (Explained)
4. *Jobo & another v Shahbal & 2 others* SC Petition No 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
6. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition 11 of 2019; [2021] KESC 43 (KLR) - (Explained)
7. *Kiragu v Mugambi & 2 others* Civil Application No 10 of 2019; [2020] eKLR - (Explained)
8. *Krishen s/o Duragadass v Priska Wambui w/o David Karangi* Civ case 2047 of 1976; [1998] KEHC 233 (KLR) - (Explained)
9. *Munya v Kithinji & 2 others* Application No 5 of 2014; [2014] 1 KLR 58 - (Explained)
10. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition No 3 of 2012; [2013] 1 KLR 741 - (Explained)
11. *Ngoge v Ole Kaparo & 5 others* Petition No 2 of 2012; [2012] 3 KLR 436 - (Explained)



12. *Rai & 3 others v Rai Estate of & 4 others* SC Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
13. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2(2); 27; 48; 50; 73(1)(a)(i)(iv)(2)(b); 159(2)(a); 160; 163(4)(a); 165(2); 258; 259(1)(a)(c) - (Interpreted)
2. Employment and Labour Relations Court Act (cap 8E) section 5(4) - (Interpreted)
3. Industrial Court (Procedure) Rules, 2010 (cap 234 Sub Leg) rule 23 - (Interpreted)
4. Judicial Service Act, 2011 (Act No 1 of 2011) sections 2, 6 - (Interpreted)
5. Supreme Court Act (cap 9B) sections 3(a)(e); 3A; 15(2); 15A - (Interpreted)
6. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 38(1) - (Interpreted)

Advocates

Ms. Katile for the respondent

JUDGMENT

A. Introduction

1. Before the court are two appeals by the appellant both dated March 31, 2023 and filed on April 3, 2023, pursuant to articles 163(4)(a), and 258(1) of the *Constitution*, sections 3(a)(e), 3A, 15(2) and 15A of the *Supreme Court Act, 2011* and rule 38(1) (a) of the *Supreme Court Rules, 2020*. The appeals challenge the decisions of the Court of Appeal in Civil Appeals Nos 63 and 124 of 2018, both delivered on February 17, 2023 which dismissed the appellant's appeals challenging the Employment and Labour Relations Court's (ELRC) hearing directions issued on December 1, 2017 by Onyango J and February 14, 2018 by Makau J the appellate court reasoned that the learned Judges of the trial court had correctly exercised their discretion in issuing the impugned directions.
2. By a consent dated May 17, 2023 and adopted on May 26, 2023, the two appeals were consolidated with Petition No E010 of 2023 designated as the lead file.

B. Background

i. Proceedings at the Employment and Labour Relations Court

3. The appeal originates from an employment dispute. The appellant was employed by the respondent until the termination of his employment on May 2, 2012. Aggrieved, the appellant filed ELRC Case No 66 of 2013 where he *inter alia* alleged unfair constructive dismissal on grounds that he was required to manage a newly completed commercial development that had core construction defects, without any comparative salary increment. During the pendency of the suit, the parties filed several applications but of importance to this appeal are two applications highlighted below.
4. The appellant's first application sought the recusal of Mbaru J citing bias for *inter alia* permitting surprise oral evidence without a witness statement thus denying the appellant the right to further cross-examine the respondent's witness after re-examination and also for denial of leave to amend his pleadings. Vide a Ruling delivered on January 24, 2014, Mbaru J dismissed the application for recusal and denied the appellant leave to amend his pleadings. Aggrieved, the appellant appealed against the



ruling. The Court of Appeal allowed the amendment but made no orders as to the learned judge's recusal. That appeal is not subject of the present proceedings.

5. Upon resumption of hearing before the ELRC, the appellant wrote a complaint letter dated September 15, 2017 against Mbaru J, detailing his dissatisfaction with the manner in which the suit was handled. On September 29, 2017, the learned Judge recused herself to bolster the appellant's confidence that justice would be dispensed impartially. The learned Judge also referred the matter back to the Principal judge of the ELRC for re-allocation to another trial Judge.
6. Subsequently, the matter was listed for directions on December 1, 2017 before the Principal Judge, Onyango J, and after hearing the parties, she directed that; the matter be heard by court No 3; all the applications pending determination be consolidated and heard with the main claim; parties were precluded from filing any other applications pending the hearing of the substantive suit; and the matter was fixed for hearing on February 5, 2018. These directions of December 1, 2017 were to become the subject of appeal in Civil Appeal No 63 of 2018.
7. Pursuant to the directions issued on December 1, 2017, the appellant filed a second application for stay pending appeal, and the same was listed for hearing before Radido J on January 18, 2018 wherein the judge directed that the file be placed before the principal judge for further directions. On January 22, 2018, parties appeared before Onyango J who declined to hear the application and noted that the matter had been scheduled for hearing on February 5, 2018 before court No 3. On the date fixed for the hearing, the matter was mentioned before the Deputy Registrar who fixed it for hearing on February 14, 2018.
8. On February 14, 2018, the parties appeared before court No 3 presided over by Makau J and after hearing the parties' contesting arguments on which of the pending applications was to be heard first, the learned Judge directed that; the court do focus on finalizing the substantive suit; the applications that challenged the competency of pleadings be heard on priority basis to pave way for the hearing of the part-heard suit; notices of motion dated June 6, 2017 seeking to strike out the defence and the one dated June 27, 2016 seeking to strike out the amended claim be heard on a priority basis; parties to file submissions; and the matter be mentioned for highlighting of submissions on March 20, 2018. These directions further aggrieved the appellant and are the root of Civil Appeal No 124 of 2018.

ii. Proceedings at the Court of Appeal

9. The appellant filed two appeals at the Court of Appeal emanating from the decisions of Onyango J of December 1, 2017 and Makau J of February 14, 2018, as follows:
 - a. Civil Appeal No 63 of 2018
10. Aggrieved by the directions of December 1, 2017 by Onyango J, the appellant instituted Civil Appeal No 63 of 2018. The appeal was premised on 21 grounds as set out in the memorandum of appeal but was later condensed by the appellant into seven thematic grounds, *inter alia*; that the principal judge erred in law and fact by;
 - i. Violating the provisions of the Constitution, to wit, articles 2(2), 73(1)(a)(i) to (iv) & 2(b), 159(2)(a), 259(1)(a) to (c), and 160;
 - ii. Violating the appellant's rights under the Bill of Rights, that is articles 25(c), 27(1) (2) & (4), 48 and 50(1) of the Constitution;
 - iii. Assuming jurisdiction and purporting to assist the respondent's case, thereby weakening the appellant's case;



- iv. Displaying actual bias, partiality, and misuse of the court’s authority in granting the impugned directions;
 - v. Unlawfully interfering and intermeddling with the appellant’s case; and
 - vi. Failing to recuse herself or disclose that she had had contact with the respondent or its representatives.
11. The Court of Appeal delineated a single issue for determination; whether the presiding judge exercised her discretion properly. In a judgment delivered on February 17, 2023, the appellate court (M’Inoti, Laibuta & Gachoka, JJA) dismissed the appeal. In doing so, it determined that the directions by Onyango J were in accordance with the law and her supervisory capacity as directed by article 165(2) of the *Constitution*, sections 2 of the *Judicial Service Act*, and 5(4) of the *Employment and Labour Relations Act*. It was further noted that the impugned directions were intended to facilitate the quick determination of the appellant’s case and therefore could not have been issued in misuse of the court’s discretion. As regards the alleged violation of the Constitution and the Bill of Rights, bias, and partiality on the part of the Judge, the appellate court found that the same was unsubstantiated and had failed. The Court of Appeal also observed that the trial Judge cannot be faulted because she did not deal with any issues raised in the interlocutory applications or the main suit but only issued directions to aid in the disposal of the suit in a timely manner.
- b. Civil Appeal No 124 of 2018
12. Similarly, aggrieved by the Directions of February 14, 2018, by Makau J, the appellant lodged Civil Appeal No 124 of 2018. The appeal was premised on eighteen (18) grounds later condensed into five (5) grounds. It was argued in that regard that the learned Judge erred in law and fact by;
- i. Failing to consider or record that any proceedings further to the orders of the Presiding Judge, were merely academic and a waste of judicial time;
 - ii. Declining to hear the appellant’s application for stay of proceedings thereby denying him equality and equal benefits of law;
 - iii. Failing to guard the appellant’s rights, causing an injustice;
 - iv. Failing to give priority to the application predicated on violations of the appellant’s fundamental rights and freedoms; and
 - v. Conducting the proceedings in a biased manner.
13. The Court of Appeal delineated one issue for determination; whether the trial Judge exercised discretion properly in [issuing] his directions of February 14, 2018. By a judgment delivered on February 17, 2023, the Court of Appeal (M’Inoti, Laibuta & Gachoka, JJA) dismissed the appeal on the ground that the learned Judge exercised his discretion correctly. The court further cautioned that, a Judge is the master of proceedings and cannot act at the whim of the parties. It also emphasized that to allow parties to determine how proceedings are to be conducted would amount to promoting anarchy in the court process and would contravene articles 159 and 160 of the Constitution which vests judicial authority in the judiciary and protects judicial independence.



ii. Proceedings at the Supreme Court

14. Aggrieved by the said judgments of the Court of Appeal, two appeals were filed before the court namely: Petition No E009 of 2023 and Petition No E010 of 2023 both dated March 31, 2023 and filed on April 3, 2023.
15. By a consent adopted by this court on May 26, 2023, the two appeals were consolidated, with Petition No E010 of 2023 designated as the lead file. The appellant seeks the following reliefs in the consolidated appeal:
 - i. The appeals be allowed;
 - ii. Orders setting aside the Court of Appeal's judgements and orders delivered February 17, 2023 in Civil Appeal No 63 of 2018 and Civil Appeal No 124 of 2018;
 - iii. A declaration that all proceedings imposed and impressed upon the appellant by the trial court from February 14, 2018 to June 8, 2018 were null and void;
 - iv. Orders setting aside the decision of December 1, 2017 of the Employment and Labour Relations Court;
 - v. A declaration that the Directions of December 1, 2017 by the Employment and Labour Relations Court are null and void;
 - vi. A declaration that all proceedings imposed and impressed upon the appellant after the decision of December 1, 2017 are null and void;
 - vii. An order remitting the application dated August 29, 2017 to the High Court (Human Rights and Constitutional Division) for hearing and determination, prior to the determination of the employment claim;
 - viii. Order for costs to the appellant; and
 - ix. Any other reliefs the court deems fit to grant.
16. In response, the respondent has filed two grounds of objection both dated May 16, 2023, challenging this court's jurisdiction to hear the instant appeal as of right under article 163(4)(a) of the *Constitution*. The appellant equally filed a rejoinder dated May 24, 2023 urging that the court's jurisdiction had been properly invoked. The rival arguments by the parties are set out in detail below.

C. Parties' Submissions

i. Appellant's submissions

17. The appellant's submissions are dated June 9, 2023 and filed on June 29, 2023. On the issue of the jurisdiction of the court, the appellant submitted that contrary to the respondent's assertions, the requirements under article 163(4)(a) of the *Constitution* had been satisfied. He urged that the directions, actions, or omissions of the trial court took a constitutional trajectory involving the interpretation and application of the Constitution, especially the Bill of Rights. Moreover, it was the appellant's case that the Court of Appeal was called upon to analyze the enumerated breaches but instead wrongly upheld the violations, occasioning a gross miscarriage of justice thus necessitating this court's intervention under article 163(4)(a) of the *Constitution*. Therefore, he urged that it is the duty of this court to interrogate and right the wrongs committed by the superior courts in this matter.



18. On the issue of breach of fundamental rights, the appellant contended that the impugned directions contravened his constitutional rights of access to justice and to a fair and free trial for reasons that the directions were issued *suo motu*, without hearing the parties, and prevented him from moving the trial court for leave to adduce additional evidence in support of his amended claim or reliefs necessary to prosecute his employment claim.
19. The appellant also argued that the trial court breached the following provisions of the Constitution: article 2(2) & (4) by issuing orders violating the Constitution and granting the respondent an unfair advantage; article 73(1)(a) (i) to (iv) and 2(b), by exercising authority inconsistent with the purpose and objective of the Constitution and failing to exercise objectivity and impartiality in the exercise of judicial authority; articles 27, 48 and 50 by displaying bias and partiality in the decision-making process; articles 159(1)(2)(a) and (e), 259(1)(a) to (c), by omitting to implement the Constitution in a manner that promotes its purpose, values, principles and advance the Bill of Rights; and article 160(1) of the Constitution, by interfering with the independence of the court. Lastly, he faulted the appellate court for upholding the trial court's interpretation or application of the cited constitutional provisions.
20. On the issue of bias, it was the appellant's case that the Court of Appeal Judges failed to interrogate the evidence presented or apply the *dictum* of a reasonable mind to ascertain whether indeed the trial Judges were biased. He further argued that the trial court was biased in the conduct of its proceedings for reasons that: the respondent forum shopped for favorable orders from the Principal Judge; the Principal Judge omitted to record proceedings pertaining to the appellant's oral submissions; the learned Judges denied the appellant a right of audience; issued *suo motu* orders to the detriment of the appellant; omitted to weigh the prejudice occasioned to the appellant; issued orders devoid of reasons; and the proceedings were fundamentally defective and failed to comply with constitutional standards.
21. On the issue of whether the trial court correctly exercised its discretion, the appellant contended that, as regards the directions of December 1, 2017, the Principal Judge acted in excess of her supervisory powers and usurped the trial court's jurisdiction by proceeding to issue pre-hearing conditions after assigning the matter to Makau J. He further urged that the impugned directions were biased and prohibitive and improperly went into the merits of the substantive matter. Consequently, he urged this court to find that the superior courts incorrectly interpreted and applied article 165 (2) of the Constitution}}, sections 2 and 6 of the Judicial Service Act, and 5(4) of the Employment and Labour Relations Act.
22. As regards the directions of February 14, 2018, the appellant postulates that the trial court failed to give reasons for its directions. In the same breath, he posits that the advanced reasons-that the impugned directions were issued to prioritize the expeditious determination of the substantive dispute- were misconceived and invalid in law. Furthermore, the appellant faults the Court of Appeal for failing to analyze and give directions on the order of priority in determining the applications pending before the trial court as well as the finalization of the substantive suit. He thus urged this court to declare the impugned directions void and a nullity in law.

ii. Respondent's submissions

23. The respondent's submissions are dated July 6, 2023 and filed on July 10, 2023. On the issue of jurisdiction, the respondent challenged this court's jurisdiction to entertain the appeal on the grounds that; the substratum of the appeal relates to the ELRC's exercise of discretion; the appeal does not arise from a judgment or ruling of the trial court but from pre-hearing directions; the exercise of discretion did not raise any questions of the interpretation and application of the Constitution; the appeal is



premature as the substantive case is still pending before the ELRC; and the appeal is misconceived, vexatious and an abuse of the court process.

24. On violation of the appellant's fundamental rights, the respondent argued that the directions did not in any way contravene the appellant's right to a fair trial or deter access to justice. It emphasized that the appellant was given enough opportunities to prosecute his employment claim and the delay was occasioned by his multiple applications and appeals. Citing *Krisben s/o Duragadass v Mrs Priska Wambui w/o David Karangi* [1998] eKLR, the respondent contended that the impugned orders were necessary to ensure that the main suit was heard and determined and that litigation came to an end.
25. Without prejudice to the foregoing, the respondent submitted that a right can be limited under article 24 of the Constitution, and therefore the directions were issued in furtherance of the overriding objective to ensure the just and expeditious determination of the substantive suit. In that regard, it relied on the High Court decisions in *Hangzhou Agrochemical Industries Limited v Panda Flowers Limited* [2012] eKLR and *John Gakure & 148 others v Dawa Pharmaceuticals Co Limited & others* Civil Application No 299 of 2007 to make the point that, the trial court had the jurisdiction to drive the court process and firmly steer the wheel of the process in order to attain the overriding objective including obviating hardship, reducing delay or expenses and ensuring expeditious and fair determination of all disputes before it.
26. On the issue of whether the court exercised its discretion properly, it was submitted that the trial court did so as the orders of December 1, 2017 were issued by the principal judge in the exercise of administrative and supervisory powers granted by article 162(2)(a) of the Constitution, section 5 (4) of the *Employment and Labour Relations Act* and rule 23 of the *Industrial Court (Procedure) Rules, 2010*. It was the respondent's further submission that the trial court observed the rules of natural justice and it is not sufficient to merely allege denial of an opportunity to be heard.
27. As pertains the directions of February 14, 2018 by Makau J, the respondent submitted that the court rightfully exercised its judicial authority and inherent jurisdiction to ensure just, expeditious, and timely determination of the claim and ensure that real and substantial justice is served on the disputants. It relied on the case of *Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya* [2005] 1KLR 828 to further buttress this argument.
28. As regards the issue of bias, the respondent submitted that the appellant had failed to substantiate these allegations or show any unprofessional contact between the trial judges and the respondent or its representatives, and consequently, the claim of bias must fail. In conclusion, it urged that such accusations are serious, concerning, uncalled for, and must be discouraged by this court. In support of these assertions, it relied on the High Court decision in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

D. Analysis and Determination

29. Having considered the respective parties' pleadings and submissions in the appeal before us, we are of the considered view that the following issues emerge for determination:
 - i. Whether the jurisdiction of this court has been properly invoked under article 163(4)(a) of the Constitution; and
 - ii. If the answer to (i) is in the affirmative,
 - a. whether the trial court properly exercised its discretion;
 - b. whether the appellant's fundamental rights had been infringed; and



- c. What reliefs are available to the appellant?

i. Whether the jurisdiction of this court has been properly invoked under article 163 (4) (a) of the Constitution

30. The appellant invoked this court’s jurisdiction under article 163(4)(a) of the *Constitution* alleging that the directions, actions, or omissions of the learned judges of the ELRC took a constitutional trajectory involving interpretation and application of the Constitution, particularly the Bill of Rights and therefore he is properly before us. Moreover, that the Court of Appeal was called upon to pronounce itself on the breaches of the Constitution but it ignored the breaches occasioning gross miscarriage of justice.
31. At the core of the respondent’s response to the above contentions is that the appeal does not involve any issue of interpretation or application of the Constitution and as such the court does not have jurisdiction to entertain the same. Furthermore, that the appeal arose from interlocutory applications and the exercise of discretionary powers by the ELRC, and the superior courts did not therefore interpret or apply any constitutional provisions with finality.
32. From the foregoing, this court is called upon to evaluate its jurisdictional standing to entertain this appeal, that is, whether the appeal raises questions of constitutional interpretation or application of the Constitution and whether the same has progressed through the appropriate appellate mechanisms so as to reach this court by way of an appeal as contemplated under article 163(4)(a) of the *Constitution*.
33. This court has in many instances addressed the question of its jurisdiction under article 163(4)(a) of the Constitution. The court in that regard specifically laid down the guiding principles in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012; [2012] eKLR, *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* SC Petition No 2 of 2012 [2012] eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 other* SC Application No 5 of 2014 [2014] eKLR. The court was also categorical on this issue when it stated thus in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR: “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*.”
34. This position was furthermore reaffirmed by the court in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR where we emphasized that;
- “...in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior courts leading to the present appeal. In order to establish that fact, the court needs to ask itself the following questions:
- i. What was the question in issue at the High Court and the Court of Appeal?
 - ii. Did the superior Courts 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?”
35. In applying the above holdings to the present issue, we note that the first set of directions, subject of the appeal herein, were issued by Onyango J on December 1, 2017 where she directed as follows:
- “The matter will be heard by court 3; All the applications will be consolidated with the claim and heard together; parties will not be allowed to file further applications pending the hearing of the case; the case is fixed for hearing on February 5, 2018.”
36. The second set of directions which are the subject of the appeal before us were given by Makau J as follows:
- “The court will focus on finalizing the suit i.e. the dispute between the employer and employee. I will fix the hearing date from the applications, which challenge the pleadings so that after the issue of the pleadings is settled, we can focus on the trial which is already part-heard. The notice of motion dated June 5, 2017 by the claimant seeking to strike out defence and the notice of motion dated June 27, 2017 seeking to strike out the amended claim will be heard on a priority basis. The submissions have been filed for the claimant’s motion. Respondent is given 14 days to file and serve the motion dated 27.6.2017 and thereafter to file submission and serve within 14 days after service. Mention for highlighting on March 20, 2018.”
37. A plain reading of the above directions reveals that the directions emanated from interlocutory matters before the trial court. No substantive questions of interpretation and application of the Constitution therefore arose at the ELRC during the proceedings leading to the directions issued by the two learned judges. What was before the ELRC concerned normal court processes during the conduct of the matter which was aimed at aiding the disposal of the matter and not cogent issues of constitutional controversy.
38. Similarly, the determination of the Court of Appeal in both appeals before it revolved around the single issue of the exercise of discretion by the learned judges of the ELRC. Even though the Court of Appeal tangentially touched on the issue of violation of the appellant’s fundamental rights, it found that there was no evidence to support the assertions and that was the end of that matter.
39. In *Ananias N Kiragu v Eric Mugambi & 2 others* SC Civil Application No 10 of 2019; [2020] eKLR we stated thus:
- “8. As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question but also on an issue that had been canvassed right through from the High Court to the Court of Appeal even though the substantive matter is still pending before the High Court...”



40. This position was reiterated and reaffirmed by this court in *Paul Mungai Kimani & 2 others v Kenya Airports Authority & 3 others* SC Petition No 11 of 2019; [2021] eKLR where we observed:

“(44) We have severally held that this court has no jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question is a substantive determination of a constitutional issue that has been canvassed through the superior courts below.”

41. Having found that the trial court did not determine any constitutional issue in its directions issued on December 1, 2017 and February 14, 2018 and that the Court of Appeal only tangentially touched on the issue of the violation of the appellant’s rights, we are of the considered view that the same has not progressed though the appropriate appellate mechanisms to properly reach this Court under article 163(4)(a) of the *Constitution*. Moreover, bearing in mind that the appeal herein originated as a result of interlocutory directions or orders from the ELRC and that the substantive matter is still pending determination before the ELRC, we find that this court does not have jurisdiction to entertain it.

42. Having concluded that this court lacks jurisdiction to adjudicate the appeal pursuant to article 163(4) (a) of the *Constitution*, it consequently follows that the court is unable to assess whether the trial court appropriately exercised its discretion and whether the rights of the appellant were violated.

43. It is well established that costs follow the event but the court may in appropriate cases exercise discretion and order otherwise as was our holding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. The appellant, acting in person, impressed us with his clear submissions, misguided as they were for the reasons above, and he ought to have anticipated the consequences of his pursuit of a lost cause. Consequently, we shall exercise discretion and award costs to the respondent.

E. Orders

44. Consequently, we issue orders as follows:

1. Petition No E010 of 2023 dated March 31, 2023 is hereby dismissed.
2. Petition No E009 of 2023 dated March 31, 2023 is hereby dismissed.
3. Costs of the two appeals are hereby awarded to the respondent.
4. We hereby direct that the sum of Kshs 6,000/- deposited as security for costs in each of the appeals herein be refunded to the appellant.

45. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2023.

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

