



REPUBLIC OF KENYA



Dhanjal Investments Limited v Shabaha Investments Limited (Petition 3 (E004) of 2022) [2022] KESC 41 (KLR) (Civ) (8 July 2022) (Judgment)

Neutral citation: [2022] KESC 41 (KLR)

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

CIVIL

PETITION 3 (E004) OF 2022

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

JULY 8, 2022

BETWEEN

DHANJAL INVESTMENTS LIMITED PETITIONER

AND

SHABAHA INVESTMENTS LIMITED RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal at Mombasa delivered on 18th February, 2022 (Gatembu, Mbogholi & Nyamweya, JJ.A.) in Civil Appeal No. 80 of 2019)

JUDGMENT

1. **UPON** perusing the Respondent's Notice of Preliminary Objection dated 23rd March, 2022 and lodged on 24th March, 2022 challenging this Court's jurisdiction to entertain the petition on the grounds that:
 - i. The appeal is in violation of the Supreme Court's mandate;
 - ii. The appeal does not raise any issues relating to the interpretation or application of *the Constitution*;
 - iii. That the appeal does not involve any matter of general public importance; and
 - iv. The appeal has been brought without certification as required by law;and
2. **UPON** considering the respondent's submissions dated 5th May, 2022 and filed on 9th May, 2022 in furtherance of these grounds, to the effect that the appeal herein does not involve constitutional interpretation or application; that the pleadings filed in both superior courts below only show that the central issue for determination was whether or not interest on balance of purchase price of the



suit property was payable to the respondent; that at no point in the proceedings was any matter of a constitutional nature raised; and that the issue of fair hearing raised by the appellant in its submissions at the Court of Appeal was an afterthought well calculated to give this Court jurisdiction; and

3. **UPON** considering the appellant's response to the preliminary objection dated 5th April, 2022 and submissions dated 16th May, 2022 to the effect that the matters being raised in the appeal relate to the right to fair trial under Articles 25(c) and 50(1) of *the Constitution* and the question of impediment to access to justice contrary to Article 48 of *the Constitution*; that in ground no 1 of its memorandum of appeal before the Court of Appeal, the appellant raised the issue of fair trial which the Court of Appeal proceeded to make a determination on; that the Court of Appeal also dealt with the question whether the fact that the loss of the original court file was prejudicial to the appellant's right to access to justice; and that this appeal has been brought as of right pursuant to Article 163(4)(a) and therefore does not require certification; and

In view of the foregoing, We Now Pronounce As Follows:

4. **ACKNOWLEDGING** the fact that jurisdiction is everything and that without it a court has no power to make one more step, but to dismiss such a case. Further, cognizant of the decision of this Court in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR, where it was emphasized that a court's jurisdiction flows from either *the Constitution* or legislation or both. We must, in limine, therefore be satisfied that the appellant has properly invoked the jurisdiction of this Court; and
5. **GUIDED** by the principles set out by this Court in the case of *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*, SC Petition 3 of 2012; [2012] eKLR, that to bring an appeal under the ambit of Article 163(4)(a) of *the Constitution*, an appellant must be challenging the interpretation or application of *the Constitution* upon which the Court of Appeal disposed of the matter in that forum; that as a bare minimum, an appellant should demonstrate that the Court of Appeal's reasoning and conclusions which led to the determination of the issue before it related to application or interpretation of *the Constitution*. See also *Gatirau Peter Munya v. Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR; and
6. **UPON** examination of the record, we note that the appeal is brought, "under Article 163(4)(a) of *the Constitution* of Kenya 2010, Sections 15(2), 21(1)(3) of the *Supreme Court Act* and Rules 12, 38 and 39 of the *Supreme Court Rules*, 2020". It is, in that sense anchored on the interpretation and application of Articles 25(c), Article 50(1) and Article 47 of *the Constitution*; and
7. **NOTING** that the cause of action before the High Court arose from the performance of a sale agreement between the parties in which the respondent's claim against the appellant was for;
 - a. a declaration that the Agreement for sale between the plaintiff and the defendant in respect of the suit property is valid.
 - b. payment of Kshs.38, 700,000/= being the balance of the purchase price owed to the plaintiff by the defendant.
 - c. interest on (b) at 30% per annum as agreed payable from the date the Defendant took possession of the suit property being the 27th January 1996 until payment in full.
 - d. General damages.



- e. Mesne profit from the 27th January 1996 being damage for breach of contract at Kshs. 407,891,537.56 as at 30th April 2008, until payment in full of the balance of the purchase price inclusive of all interest due and payable herein.
 - f. Costs of this suit.
 - g. interest at court rates”; and
8. **NOTING FURTHER** that the parties compromised the suit by recording a consent whereby the appellant agreed to pay the aforesaid balance, leaving only a single issue for determination being the interest payable to the respondent. This fact notwithstanding, before the Court of Appeal, the appellant claimed that due to a delay of nearly 24 years in the conclusion of both the main suit and the appeal, it had been denied the right to a fair trial. It further alleged that, although this issue was urged in the High Court, no determination was made of it; and
9. **NOTING ALSO**, that the Court of Appeal in its determination of this question observed that the appellant blamed both the courts and the respondent for the delay but failed to provide evidence of how the respondent, who was only a party to the appeal breached its right to fair trial; and that the appellant did not raise the constitutionality or otherwise of the trial in his counterclaim or as a preliminary issue for determination. For the reason that the claim was raised for the first time in the Court of Appeal, and only in the submissions, the Court of Appeal expressed the view that there was no basis for it to make any findings on the alleged violations of the right to fair trial. With that, the Court of Appeal proceeded to determine four substantive and pleaded issues; and
10. **UPON** evaluating the present preliminary objection and the grounds raised in opposition, and after perusing the record as a whole, it is evident to us that the solitary question, following the recording of a consent on 7th September 2012 in the High Court, was one of the interest payable on the Kshs 38,700,000.00 and the costs which were to be mutually agreed upon by the parties, or assessed by the High Court if the parties failed to agree. There was no question of the interpretation and application of *the Constitution* whatsoever. Yet this Court, in *Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board*, SC Petition 5 of 2012; [2012] eKLR, firmly established that, for an appeal to be admissible under Article 163(4)(a), a petitioner must demonstrate that the matter coming on appeal was the subject of litigation before the High Court, involving the interpretation and application of *the Constitution*, which has risen through the judicial hierarchy on appeal to the Court of Appeal and ending in this Court; and
11. **SATISFIED** that the question of violation of the appellant’s right to a fair hearing has never been the issue in controversy but was strategically introduced in the Court of Appeal so as to prepare a basis to approach this Court. It was not one of the four questions framed by the Court of Appeal for its determination, namely;

“... whether there was any breach of the sale agreement by the Appellant or Respondent, and if so the effect thereof, including on the validity of the sale agreement. Secondly, whether the doctrine of lis pendens applied to the sale agreement, and if so, the effect thereof. Thirdly, whether the Respondent was entitled to payment of interest and if so at what rate and for what period. Lastly, whether the Appellant was entitled to payment of damages, and if so, the quantum.”

The question of violation of the appellant’s constitutional rights not having been argued and determined by the High Court, was not central to the determination by the Court of Appeal. In any



case, if the delay amounted to a violation of the appellant’s right to a fair hearing, the respondent was equally affected as it was also denied the fruits of the agreement for the said period of 24 years.

12. **WE NOW** reiterate what we said in Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others [supra], that the Court’s jurisdiction cannot be expanded through judicial craft or innovation. From the totality of the material before us, it cannot be said that the reasoning which led to the determination of the issues before the Court of Appeal and by extension the High Court, involved the interpretation or application of *the Constitution*. We conclude here as we did in Lawrence Nduttu [supra], that where the case to be appealed from has had nothing or little to do with the interpretation or application of *the Constitution*, as is the case in this appeal, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4)(a).
13. In the end we are satisfied that this appeal does not meet the jurisdictional threshold of Article 163(4) (a), with the result that we decline the invitation to assume jurisdiction to entertain it.
14. **ACCORDINGLY**, we make the following Orders:
 - i. The Preliminary Objection dated 23rd March, 2022 is hereby sustained.
 - ii. The Petition of Appeal dated 7th March, 2022 is hereby struck out.
 - iii. As costs follow the event and are in the discretion of the Court we order that the Appellant shall bear the costs of the appeal

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

