



REPUBLIC OF KENYA



KENYA LAW
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**Macharia & another v Director of Public Prosecutions & 11 others (Petition
9 (E011) of 2022) [2022] KESC 61 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KESC 61 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 9 (E011) OF 2022

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

OCTOBER 7, 2022

BETWEEN

SAMUEL KAMAU MACHARIA 1ST PETITIONER

ROYAL CREDIT LIMITED 2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

ANNE MUTAHI (MRS) 3RD RESPONDENT

KAUSHIK SHAH 4TH RESPONDENT

LES BAILIE 5TH RESPONDENT

PATRICK OBATH 6TH RESPONDENT

LAMIN MANJAN 7TH RESPONDENT

KARIUKI NGARI 8TH RESPONDENT

CHEMUTAI MURGOR (MRS) 9TH RESPONDENT

ROBIN BAIRSTOW 10TH RESPONDENT

NANCY OGINDE (MRS) 11TH RESPONDENT

OFFICIAL RECEIVER 12TH RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal at Nairobi (Warsame, Sichale & Omondi, JJ.A.) delivered on 4th March, 2022 in Civil Appeal No. 206 of 2016)



RULING

1. Upon perusing the 3rd to 11th Respondents' Notice of Motion dated 6th May, 2022 and lodged on 12th May, 2022 seeking to strike out the Petition of Appeal dated 14th April, 2022 on the grounds that:
 - i. The appeal is filed without jurisdiction;
 - ii. The appeal does not raise any issues relating to the interpretation or application of Constitution;
 - iii. The Petition is fatally defective for the reason that the Petitioners were joined as interested parties before the High Court and therefore their participation was merely ancillary; and
 - iv. The Petitioners lack the requisite locus standi to institute the present appeal; and
2. Upon reading the affidavit by Dr. David Mwaisaka, the Head of Legal Kenya and East Africa Standard Chartered Bank, sworn on 6th May, 2022 in support of the Motion; and
3. Upon considering the 3rd to 11th respondents' submissions dated 6th May, 2022 and filed on 12th May, 2022 in furtherance of these grounds, to the effect that: First, the appeal herein does not involve constitutional interpretation or application pursuant to Article 163(4)(a) of the *Constitution*; that the proceedings before both superior courts below were mainly between the DPP (1st Respondent) on one part and the 3rd to 11th respondents on the other part; that the dispute centred around the DPP's decision dated 7th April, 2014, by which the DPP re-opened criminal investigations against the Standard Chartered Bank (SCB) into allegations of stealing by directors, thereby reversing an earlier decision made by the Attorney-General on 26th November, 2005, before the establishment of the independent Office of the DPP, not to prosecute SCB and the directors; that upon that decision being challenged, the High Court issued, among other reliefs, an order of prohibition stopping the Kenya Police and the DPP from investigating or prosecuting the 3rd to 11th respondents; and that at no point in the said proceedings was any matter of a constitutional nature raised; and
4. Further, that the petitioners lack the requisite *locus standi* to institute the present proceedings for the reason that their participation has at all times been peripheral to the dispute between the principal parties as they were joined as interested parties in the judicial proceedings before the High Court. As such, they cannot institute the instant appeal and seek substantive orders to set aside the judgments of the two superior courts below. Lastly, that the petitioners have proceeded to frame new constitutional issues for determination by this Court which were not the subject of determination before the two superior courts below, contrary to the finding by this Court in the case of *Teachers Service Commission v. Simon Makau & 19 Others*, SC Application 38 of 2014; [2015] eKLR; and
5. Upon considering the petitioners' grounds of opposition to the Motion and submissions dated 24th May, 2022 to the effect that they have approached this Court for the reason that the Court of Appeal misconstrued and misapplied Article 157(4) of the *Constitution*; that one of the issues framed by the Court of Appeal was "whether the DPP legitimately exercised his power in reviewing the decision not to prosecute Standard Chartered Bank" and; that the Court of Appeal proceeded to make a determination on the powers conferred upon the DPP under Article 157 of the *Constitution*; and
6. Furthermore, relying on the dicta by this Court in the case of *Joseph Lendrix Waswa v. Republic*, SC Petition No. 23 of 2019; [2020] eKLR, the petitioners contend that as victims in the criminal investigations in question, they have the right to be heard throughout the trial process up to the



appellate stage; that their capacity to participate in this appeal has been enhanced during the pendency of the suit; and that the 3rd to 11th respondents are the potential suspects who obtained orders of certiorari to quash requisitions issued to them and an order of prohibition to stop investigations which had been set in motion by the DPP. Therefore, in their view, Lendrix Waswa [supra] illustrates the scope of the petitioners' participation in criminal proceedings and also proceedings which take place before persons are charged; and Considering the foregoing arguments, we now opine as follows:

7. We acknowledge the fact that jurisdiction is everything and that without it, a court has no power to make one more step; and that a court's jurisdiction flows from either Constitution}} or legislation or both. It follows that we must, in limine, be satisfied that the petitioners have properly invoked the jurisdiction of this Court. See [*Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others*](#), SC Application No. 2 of 2011; [2012] eKLR; and
8. Guided by the principles set out by this Court in numerous cases, we restate, first, that an appeal within the ambit of Article 163(4)(a) of the [*Constitution*](#) is to be one founded on cogent issues of constitutional controversy; that the mere allegation that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within Article 163(4) (a); that for an appellant to bring an appeal under this Article, it must be shown that the issues determined by the Court of Appeal arose from the High Court or any court below it and involved the interpretation or application of Constitution; that where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a); that where, before the superior courts below, 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; and finally that, even in matters originating as judicial review in the High Court, like is the case here, the issues have to fall under the canopy of Article 163 (4)(a); that in such a case, the party concerned must remember that not all Judicial Review matters are appealable to the Supreme Court, as of right and the option open to the party is to invoke Article 163(4)(b) of the [*Constitution*](#), in which case, the normal certification process applies; that, however, where such an appeal comes under Article 163(4)(a), the petitioner has to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal and demonstrate that the superior courts had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional. For these pronouncements, see [*Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*](#), SC Petition No. 3 of 2012; [2012] eKLR; [*Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*](#) SC Petition No. 5 of 2012; [2012] eKLR; and [*Peninah Nadako Kiliswa v. Independent Electoral & Boundaries Commission \(IEBC\) & 2 others*](#), SC Petition No. 28 of 2014; [2015] eKLR.
9. Upon evaluating the present Motion and the grounds raised in opposition, perusing the record as a whole and applying the above principles, it is evident to us that both the High Court and Court of Appeal dealt with the issue of whether the DPP legitimately exercised his power in reviewing the decision not to investigate SCB. This issue revolved around the interpretation and application of Article 157 of the [*Constitution*](#) on the exercise by the DPP of the prosecutorial mandate. To that extent the petitioners have illustrated that the appeal raises constitutional questions which were subject of litigation before the High Court and the Court of Appeal.
10. Acknowledging therefore that the Court can entertain the appeal for the reasons explained, the next critical question is whether the petitioners have the *locus standi* to institute the instant proceedings before this Court?



11. Guided further by the following passage in our decision in *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, SC Petition 15 & 16 of 2015 (consolidated); [2016] eKLR, that;

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties.” [our emphasis]

12. Inevitably it must follow that the dispute has always revolved around the re-opening of criminal investigations into SCB and its directors by the DPP, being the primary parties. The requisitions were issued by the latter against the former. Essentially, before both superior courts below, the contest has been the prosecutorial mandate of the DPP vis-à-vis the rights of the 3rd to 11th respondents. The petitioners now want to advance their rights which have never been the subject of judicial determination before this stage. Equally, the rights of the petitioners do not speak to the core issue which has been the exercise of the prosecutorial powers of the DPP. The petitioners’ stake in the proceedings has throughout remained peripheral and cannot override the stake of the primary parties, who appear not to have been aggrieved.

13. Restating the words in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012; [2013] eKLR that:

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

14. Ultimately, we respectfully agree that the petitioners, though interested parties before the superior courts below, cannot, at this juncture, have overriding interests above and beyond the primary parties or mutate from having a peripheral stake into central core parties complete with freshly and new formulated constitutional grounds that were not the issues determined by the court appealed from. Just like we stated in *Methodist Church in Kenya v. Mohamed Fugicha & 3 others*, SC Petition 16 of 2016; [2019] eKLR, this appeal is not properly before us.

In view of all these, we find that the petitioners lacked the locus standi to institute this appeal.

15. Accordingly, we make the following Orders:

- i. The Notice of Motion application dated 6th May, 2022 is hereby allowed.
- ii. The Petition of Appeal dated 14th April, 2022 is hereby struck out.



iii. The Petitioners shall bear costs of this application.

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th Day of October, 2022.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT 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

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

Petition No. 9 (E011) of 2022

