



**Executive Committee, Kisii County & 2 others v Masosa Construction Limited
& another (Petition 5 of 2020) [2021] KESC 47 (KLR) (16 July 2021) (Ruling)**

Executive Committee Kisii County & 2 others v Masosa Construction Limited & another [2021] eKLR

Neutral citation: [2021] KESC 47 (KLR)

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

PETITION 5 OF 2020

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, SCJJ, NS NDUNGU & I LENAOLA, JJ

JULY 16, 2021

BETWEEN

THE EXECUTIVE COMMITTEE, KISII COUNTY 1ST APPELLANT

THE GOVERNOR, KISII COUNTY 2ND APPELLANT

THE COUNTY GOVERNMENT OF KISII 3RD APPELLANT

AND

MASOSA CONSTRUCTION LIMITED 1ST RESPONDENT

THE TRANSITION AUTHORITY 2ND RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Kisumu (Makhandia, Kiage & Otieno-Odek, JJA) delivered on 3rd April 2020 in Civil Appeal No. 39 of 2016)

Circumstances where Supreme Court has the jurisdiction to determine an appeal from the Court of Appeal as of right.

The main issue for determination was whether grounds that the National Government was liable to pay all liabilities of defunct local authorities were sufficient to meet the jurisdictional requirements for appeals as of right to the Supreme Court under article 163(4)(a) of the Constitution. The Supreme Court held that even if raised before the superior courts, the issue raised did not form the substratum of the contempt proceedings and did not at all require determination by the Superior Court in the manner suggested by the appellants. Like the superior courts below, litigation ingenuity could not be used to craft an issue outside the framework of the real dispute between the parties and then expect the Supreme Court to seize it and proceed to determine it.

Reported by John Ribia

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeal to the Supreme Court as of right in cases involving the interpretation of the Constitution - under what circumstances would the Supreme Court have the jurisdiction to determine an appeal from the Court of Appeal as of right in cases involving the



interpretation and application of the Constitution - whether grounds that the National Government was liable to pay all liabilities of defunct local authorities were sufficient to meet the jurisdictional requirements for appeals of right to the Supreme Court - Constitution of Kenya, 2010 article 163(4)(a); Supreme Court Rules, 2012 rules 9 and 33(1)(a) and (2) (repealed).

Brief facts

On August 8, 2000, the Municipal Council of Kisii (defunct) and the 1st respondent entered into a contractual works agreement, the terms of which the 1st respondent was contracted to widen and gravel specific roads within Kisii Municipality. Upon execution of the contract, the 1st respondent commenced the contractual works and performed its obligations until completion. Subsequently, the Municipal Council of Kisii prepared and issued a final certificate, denoting the total sums payable to the 1st respondent. A dispute thereafter arose when the Municipal Council of Kisii blatantly failed and/or neglected to pay the amount owing to the 1st respondent.

The 1st respondent filed a successful suit at the High Court, where it was awarded a decretal sum of Kshs 15,556,986.70. That Judgment notwithstanding, the Municipal Council of Kisii failed and/or refused to pay the decretal sum. As a result, the 1st respondent was constrained to file Miscellaneous Application No. 10 of 2011, to compel the Municipal Council of Kisii to settle the debt. The High Court ruled in favour of the 1st respondent. Pursuant to that Judgment, the Municipal Council of Kisii paid part of the decretal sum leaving an outstanding balance of Kshs 8,464,699.05. Following the promulgation of the Constitution of Kenya in 2010, the Municipal Council of Kisii and all other local authorities were rendered defunct.

The 1st respondent moved the Court seeking orders for *mandamus* to compel the appellants to settle the outstanding amount of Kshs 8,464,699.05. The High Court issued an order of *mandamus* against the appellants compelling them to pay to the 1st respondent the amount claimed. As a result of the appellants' failure to comply with the orders, the 1st respondent obtained leave to file contempt proceedings. The High Court cited the appellants for contempt. Aggrieved the appellants appealed the decision at the Court of Appeal, but was dismissed prompting the instant appeal, where they sought to appeal the matter as of right as they argued that it was a case that involved the interpretation of the Constitution.

Issues

- i. Under what circumstances would the Supreme Court have the jurisdiction to determine an appeal from the Court of Appeal as of right in cases involving the interpretation and application of the Constitution (under article 163(4)(a) of the Constitution).
- ii. Whether grounds that the National Government was liable to pay all liabilities of defunct local authorities were sufficient to meet the jurisdictional requirements for appeals as of right to the Supreme Court under article 163(4)(a) of the Constitution.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163(4)(a)

163. Supreme Court

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution;

Held

1. An appellant had to 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 had to 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 of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163 (4)(a) of the Constitution.



2. An appeal would lie as of right to the Supreme Court under article 163(4)(a) if the issues it raised revolved around the interpretation and application of the Constitution, and their interpretation or application of the Constitution had formed the basis for the determinations at the superior courts below the Supreme Court and the same issues had therefore progressed through the normal appellate mechanism to reach the Supreme Court.
3. At no point were the superior courts called on to determine any issue involving the interpretation or application of any provision of the Constitution. The dispute, quite plainly, involved the question, whether or not the appellants were in contempt of court orders and the Superior Courts determined that the appellants had indeed, disobeyed court orders.
4. The appellants argued that by virtue of section 6 of the Sixth Schedule to the Constitution, the National Government was the one mandated to pay for liabilities incurred by the defunct local authorities. They pointed out that at the time the High Court issued the order of *mandamus*, there had been no transfer of liabilities from the defunct Municipal Council of Kisii to the County Government of Kisii. By that argument alone, the appellants urged the misguided point that the Supreme Court was clothed with jurisdiction to determine their appeal. That issue, even if raised before the superior courts, did not form the substratum of the contempt proceedings and did not at all require determination by the Superior Court in the manner suggested by the appellants. Like the superior courts below, litigation ingenuity could not be used to craft an issue outside the framework of the real dispute between the parties and then expect the Supreme Court to seize it and proceed to determine it.
5. No question of constitutional interpretation or application was canvassed before the instant court or the superior courts. The appellants had not properly invoked the jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution. The Supreme Court was not vested with the jurisdiction to hear and determine the instant appeal.

The appeal was struck out for want of jurisdiction. Costs of the appeal were to be borne by the 1st respondent.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. The Petition of Appeal dated 28th April 2020 and filed on 30th April 2020 arises from a Judgment of the Court of Appeal at Kisumu (Makhandia, Kiage & Otieno-Odek, JJA) which upheld the decision of the High Court at Kisii (Karanja J.) delivered on 5th April 2016 in Misc. Application No. 72 of 2015(JR). The High Court had cited the Appellants herein for contempt of Court for failure to comply with an order of mandamus issued by the Court on 10th December 2014 in Misc. Application No. 14 of 2013(JR).

B. Background

2. On 8th August 2000, the Municipal Council of Kisii (now defunct) and the 1st Respondent herein (Masosa Construction Limited) entered into a contractual works agreement, the terms of which the 1st Respondent was contracted to widen and gravel specific roads within Kisii Municipality. Upon execution of the contract, the 1st Respondent commenced the contractual works and performed its obligations until completion. Subsequently, the Municipal Council of Kisii prepared and issued a final



- certificate, denoting the total sums payable to the 1st Respondent. A dispute thereafter arose when the Municipal Council of Kisii blatantly failed and/or neglected to pay the amount owing to the 1st Respondent.
3. In pursuit of its monies, the 1st Respondent decided to file a civil suit — Kisii HCC No. 67 of 2007 — for recovery of the payment for the works done. On 23rd March 2010, Judgment was entered in favour of the 1st Respondent and the High Court (Muchelule J.) ordered the Municipal Council of Kisii to pay a decretal sum of Kshs 15, 556, 986.70. That Judgment notwithstanding, the Municipal Council of Kisii still failed and/or refused to pay the decretal sum.
 4. As a result, the 1st Respondent was constrained to file Miscellaneous Application No. 10 of 2011, to compel the Municipal Council of Kisii to settle the debt. On 12th September 2012, the High Court (Sitati J.) ruled in favour of the 1st Respondent. Pursuant to that Judgment, the Municipal Council of Kisii paid part of the decretal sum leaving an outstanding balance of Kshs 8,464,699.05. Following the promulgation of the Constitution of Kenya in 2010, the Municipal Council of Kisii and all other local authorities were rendered defunct.
 5. In the interim, Kisii County Government, aggrieved by Muchelule J.’s decision, instituted an appeal – Civil Appeal No. 283 of 2011 – which was dismissed on 25th November 2015. The 1st Respondent had also moved the Court vide Miscellaneous Application No. 14 of 2013 (JR) seeking orders for mandamus to compel the Appellants to settle the outstanding amount of Kshs 8,464,699.05. On 10th December 2014, the High Court (Wakiaga J.) issued an order of mandamus against the Appellants compelling them to pay to the 1st Respondent the amount claimed. As a result of the Appellants’ failure to comply with the said orders, the 1st Respondent obtained leave of the High Court at Kisii to institute Miscellaneous Application No. 72 of 2015 (JR) seeking an order that the Appellants herein be cited and punished for contempt of Court for breaching, disregarding and/or ignoring the terms of the court order issued on 10th December 2014.
 6. In the contempt proceedings, the learned Judge (Karanja J.) outlined two issues for determination; first, whether the Appellants were aware of the material order from the time of its issue on 10th December 2014; and secondly, whether they acted in disobedience of the order without justifiable cause. Upon analysis of the evidence, the learned Judge found that the Appellants “were duly served with the necessary order, which was a command they were expected to heed in promoting constitutional values and principles of governance such as rule of law beside upholding the dignity and authority of the Court.” The Court also observed that the Appellants’ inaction, lethargy and neglect in that regard was a deliberate disregard of a valid court order which grossly undermined the dignity of the Court.
 7. In a Ruling delivered on 5th April 2016, the High Court then proceeded to cite the Appellants for contempt and further issued a seven-day period to allow the Appellants time to expunge the contempt, in default thereof a warrant of arrest of the 2nd Appellant was to be issued. It is this order that forms the basis of the subsequent appeals.
 8. Dissatisfied by the Ruling of the High Court, the Appellants thereafter filed Civil Appeal No. 39 of 2016 on 26th May 2016 to the Court of Appeal raising several grounds which the learned Judges of Appeal crystallized into two as follows; whether the learned Judge erred in citing the Appellants for contempt and whether the learned Judge erred in finding that the Appellants were liable to pay the outstanding decretal sum. In a Judgment delivered on 3rd April 2020, the learned Judges of Appeal unanimously found that the Appellants had been in contempt of Court and dismissed the appeal in its entirety.
 9. The Appellate Court, on the issue of contempt, expressed the view that the Appellants, having conceded that they were duly served with the court order, then the issue of personal service could not



suffice as a ground of appeal. It was also the learned Judges' considered view that knowledge of the Judgment or order by a contemnor suffices for contempt proceedings. On the issue of liability, the learned Judges of Appeal held that the obligation of the Appellants to satisfy the decretal sum had already been determined in the previous suits; that is, HCCC. No. 67 of 2007, Misc. Application No. 14 of 2013(JR) as well as Civil Appeal No. 283 of 2011 and as such the issue of liability was not a matter that was relevant in the contempt proceedings.

10. Aggrieved by the findings of the Court of Appeal, the Appellants filed the instant appeal pursuant to Rules 9 and 33(1)(a) and 2 of the Supreme Court Rules, 2012 (repealed). The Appellants in that regard seek the following reliefs from this Court:
 - (a) The Petition of Appeal herein be allowed.
 - (b) The Judgment of the Court of Appeal delivered on 3rd April 2020 be set aside and substituted with an Order allowing this Petition of Appeal.
 - (c) Costs of this Appeal be granted to the Petitioners and be borne by the Respondent.
11. In advancing their claim, the Appellants have raised 18 grounds of appeal which can be summarised as follows;
 - (a) That the Appellate Court failed to consider that no evidence was adduced to prove that the Appellants willingly, negligently or deliberately refused to comply with a court order;
 - (b) That the learned Judges of Appeal failed to appreciate that under Section 6 of the Sixth Schedule of the Constitution, the debt in issue was to be settled by the National Government and not the County Government;
 - (c) That the learned Judges erred in confining themselves to only adjudication of whether the court orders were obeyed or not, while failing to consider the compelling circumstances surrounding the case, touching on inability and illegality;
 - (d) That the learned Judges erred by failing to grant the Appellants a fair hearing;
 - (e) That the learned Judges erred in adopting a constitutional interpretation that occasioned absurdity to constitutional interpretation, enforcement of court orders and functions mandated on the two levels of Government.
12. The 1st Respondent lodged its Grounds of Objection and a Replying Affidavit to the appeal, both dated 23rd July 2020, on 3rd August 2020 pursuant to Rule 42 of the Supreme Court Rules, 2020. In the aforementioned pleadings, the 1st Respondent is challenging this Court's jurisdiction to adjudicate upon the instant appeal. The 1st Respondent is also of the view in that regard, that an appeal to this Court in the present circumstances could only lie pursuant to Certification under Article 163(4)(b) as opposed to an appeal as of right under Article 163(4)(a) of the Constitution.
13. Accordingly, it is the 1st Respondent's argument that the issues of the constitutional obstacles being alluded to by the Appellants, including the import of Section 6 of the Sixth Schedule of the Constitution, ought to have been ventilated before the Superior Court which dealt with the order of mandamus; thus, it was not the prerogative of the High Court dealing with contempt proceedings to re-visit the legality, propriety and/or validity of the order of mandamus.
14. The 1st Respondent adds that if the Appellants were keen on lodging an appeal in this Court to interrogate the import of Section 6 of the Sixth Schedule, then certification ought to have been sought from the Court of Appeal. It is also their view that, since no certification was sought or obtained, then



the appeal herein is premature, misconceived and as such is devoid of merit. It is therefore urged that the same be struck out or otherwise dismissed.

C. Parties' Submissions

(a) The Appellants'

15. The Appellants' written submissions are dated 11th August 2020 and filed on 12th August 2020 through their Advocate, Mr. Peter Wanyama. In the submissions, the Appellants have condensed the issues for determination as follows:
 - (a) Whether this Court has jurisdiction to determine the appeal.
 - (b) Whether it is the mandate of the National or County Government to take over liabilities of the defunct local authorities.
 - (c) Whether the Judgment delivered by the Court of Appeal should be set aside.
16. In their rebuttal to the 1st Respondent's Grounds of Objection and Replying Affidavit, the Appellants refute the claim that their appeal was filed under non-existent provisions of law which were long repealed. They instead submit that their appeal was filed on 30th April 2020, while the Supreme Court Rules, 2020 were gazetted on 4th June 2020. As such, as at the time of filing this appeal, the 2020 Rules were yet to come into operation.
17. On jurisdiction, the Appellants submit that this Court has jurisdiction to hear all appeals from the Court of Appeal as conferred by Article 163(4) (a) in questions that involve interpretation of the Constitution. Relying on the authority of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others* [2014] eKLR, they contend that the appeal at hand involves a question of interpretation of the Constitution and hence does not require certification from the Court of Appeal. In the aforementioned case, this Court emphasized that a matter that directly involves an interpretation and/or application of a particular provision of the Constitution will constitute an appeal as of right under Article 163(4)(a). They also rely on the ELRC decision of *Dr. Moses Kiprotich Langat v The Kericho County Assembly Committee on Appointment & 3 others* [2020] eKLR for that submission.
18. In addition, the Appellants fault the Appellate Court for failing to recognize that the Appellants were public officials assigned to safeguard public funds. In the premises, they were not permitted to incur expenses in contravention of the provisions of the Public Finance Management Act nor the authority of the Kisii County Assembly in budgeting and appropriation of County funds. They maintain therefore that they were not permitted by law to comply with the aforementioned court order as this would amount to clothing themselves with a mandate that is constitutionally assigned to the National Government.
19. On the issue of liability, the Appellants reiterate that they are not automatic legal successors of defunct local authorities. They argue, in that context, that, by virtue of Section 6 of the Sixth Schedule of the Constitution, it is the sole mandate of the National Government to pay for liabilities incurred by the defunct Local Authorities through issuance of conditional grants to the relevant County Governments.
20. It is further argued that Section 33(1) of the Sixth Schedule of the Constitution provides that; "An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name." As such, for County Governments to take up liabilities of the defunct Local Authorities, they first have to be declared



the legal successors of the authorities. In this instance, it is urged that, the County Governments are neither an office nor an institution as stipulated under Section 33 of the Sixth Schedule. This position, they emphasize, was well expressed in the case of (Interim) County Secretary, County Government of Kakamega v Republic Ex Parte Ali Adam & Another [2017] eKLR.

21. The Appellants also contend that the Transition to Devolved Governments Act, 2012, established a Transition Authority whose functions were inter alia "...to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities." It is their further contention that subject to Section 35(1) of the Transition to Devolved Governments Act, there was to be no transfer of any assets or liabilities by a state organ, public entity or local authority during the transition period.
22. The Appellants furthermore submit that the 1st Respondent did not tender any evidence to the effect that there was a transfer of the liabilities to the Appellants during the transition period with the approval of the cited authorities. To support this submission, they rely on the case of (Interim) County Secretary, County Government of Kakamega v Republic Ex Parte Ali Adam & Another (Supra) where the Court of Appeal expressed the view that the transition aforesaid was to be carried out within a pre-determined statutory period and strict adherence to the stated pre-requisites was mandatory.
23. The Appellants also assert that, by the time the application for the order of mandamus as well as contempt proceedings were filed, the transition period was yet to expire. The Appellants, in that regard, conceded that they acknowledged receipt of the order of mandamus and one question that is then posed is, did the Appellants willfully disobey the court order? In answer, the Appellants submit that they did not. That the Transition Authority at the time was still in the process of auditing all its assets and liabilities, and as such, no mechanisms had been put in place to legally authorize the Appellants to settle the debts. Based on the foregoing, the Appellants urge that the Judgment of the Court of Appeal delivered on 3rd April 2020 ought to be set aside.

(b) The Respondents'

i. The 1st Respondent

24. In opposing the appeal, Mr. Oguttu Mboya, Advocate for the 1st Respondent relied on the written submissions dated 4th September and filed on 10th September 2020 wherein the 1st Respondent had made their submissions on three limbs; that is; whether this Court is seized of jurisdiction to entertain this appeal; whether the suit debt is payable by the Appellants and if so, whether they have refused to comply with the terms of the court order; and whether the decision by the Court of Appeal is legally sound and ought to be sustained.
25. On jurisdiction, the 1st Respondent submits that for the Appellants to invoke and rely on Article 163(4)(a), it is paramount for them to show that the proceedings, and in particular the issues before the High Court and the Court of Appeal, involved the interpretation and application of relevant constitutional provisions. In this regard, they rely on this Court's decisions in Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others (supra) and Peter Oduor Ngoge v Hon. Francis Ole Kaparo, SC Petition No. 2 of 2012 [2012] eKLR to buttress the position that before invoking this Court' jurisdiction under Article 163(4)(a), an Appellant must show that the issue in dispute was canvassed and/or dealt with in the Superior Courts in the first instance. They also rely on Erad Suppliers & General Contractors Limited v National Cereals & Produce Board [2012] eKLR for this submission.
26. Still on jurisdiction, the 1st Respondent is of the view that both the High Court and the Court of Appeal did not make any finding or determination touching on the interpretation or application of the



- Constitution. As such, no appeal lies to this Court under Article 163(4)(a). They contend that the two Courts below only addressed the import and tenure of the provisions of Section 5 of the Judicature Act and the relevant provisions of the Civil Procedure Act (of England) as regards the pre-requisite ingredients leading to contempt of court proceedings.
27. It is the 1st Respondent's other position that if the Appellants were desirous of appealing to this Court, then they ought to have sought Certification from the Court of Appeal under Article 163(4) (b). They thus consider the Appellants' appeal as an "attempt to smuggle an appeal against the order of mandamus" disguised as an appeal against the Ruling on contempt proceedings.
 28. On the issue of liability and the non-compliance of the court order, the argument advanced is that the 3rd Appellant, by dint of Articles 179(2) and 183 of the Constitution, was bound by the Judgment of the Court of Appeal. Accordingly, it was obliged to satisfy, liquidate or settle the debt. In that regard, they rely on the case of *Interim County Secretary, County Government of Kakamega v Republic Ex Parte Ali Adam & Another* (supra) where the Court of Appeal concluded that the legal rights and liabilities of defunct Local Authorities are to accrue in favour of and be sustained against their successors which in this case, are the respective County Governments and not the National Government.
 29. Furthermore, the 1st Respondent submits that subject to the Court of Appeal's decision in Civil Appeal No. 283 of 2011, it was incumbent upon the Appellants to invoke the provisions of Regulation 10(1) (a) of the Regulations for Transfer of Assets and Liabilities during the Transition Period, 2012, which provides that "The Authority may approve a request for transfer of an asset or liability where; (a) there is an existing court order." The 1st Respondent thus refutes the complaint by the Appellants that the orders of the Court of Appeal were intent on pushing the Appellants to commit an illegality by paying the said debt, an argument, they state, is misconceived and otherwise legally untenable.
 30. The 1st Respondent, in that context, invites this Court to take cognizance of the import and tenor of Article 207 of the Constitution for the proposition that it was incumbent upon the Appellants to move the County Assembly to generate the relevant legislation that will realize compliance of court orders of this nature.
 31. Lastly, on the issue of whether the Judgment of the Court of Appeal should be set aside, it is submitted that the Appellate Court, having found that the order of mandamus was not challenged and further, that the pre-requisite conditions of contempt were established, then the learned Judges of Appeal were right in upholding the impugned ruling of the High Court. Thus, they cite the case of *Hadkison v Hadkison* (1952) ALL ER, pages 567-575 where the Court expressed that; "It was the unqualified obligation of every person against, or in respect of whom an order has been made by a Court of competent jurisdiction, to obey it unless and until that order was discharged...". In that context, they maintain that the Appellants willfully and deliberately failed to comply with the court order of mandamus. In conclusion, the 1st Respondent urges that the appeal be struck out for want of jurisdiction. On the issue of costs, they urge that costs follow the event and should be awarded to them.
 32. As for the 2nd Respondent, it is evident from the record that they did not file any response in this appeal. During the plenary hearing, it was also pointed out that the 2nd Respondent did not participate in the proceedings at the Court of Appeal. Nonetheless, Mr. Munene Advocate, who appeared on their behalf, at the hearing, urged that this Court lacks jurisdiction to entertain this dispute.



D. Issue For Determination

33. At the hearing, we directed parties to address us on the single issue of jurisdiction and therefore the only issue arising for determination is: Whether the appeal before this Court meets the constitutional threshold under Article 163(4)(a) of the Constitution.

E. Analysis And Determination

34. This Court, has in many instances addressed the question of whether this Court's jurisdiction has been properly invoked under Article 163(4)(a) of the Constitution. And as was rightly pointed on by the 1st Respondent, in the cases of Peter Oduor Ngong'e (Supra), Hassan Ali Joho (Supra) and also in the cases of Gatirau Peter Munya v Dickson Mwenda & 2 Others SC Application No. 5 of 2014 [2014] eKLR and Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another SC Petition No. 3 of 2012; [2012], eKLR, this Court has settled that question.
35. In Lawrence Nduttu (Supra) we were thus categorical that for us to be seized of jurisdiction under that Article;
- “... 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 of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)” [Emphasis supplied].
36. Also, in Hassan Ali Joho (supra) and Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board SC Petition No.5 of 2012; [2012] eKLR, this Court stated that an appeal lies to this Court under Article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the Constitution, and that the interpretation or application of the Constitution had formed the basis for the determinations at the superior Courts below this Court and the same issue had therefore progressed through the normal appellate mechanism to reach this Court. This was also the position of the Court in the cases of Gatirau Peter Munya (supra) and Hassan Ali Joho (supra) where it was stated that the lower Court's determination of an issue appealed must have taken a trajectory of constitutional application or interpretation and an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy.
37. Furthermore, this Court, in the case of Rutongot Farm Ltd v Kenya Forest Service & 3 Others SC Petition No. 2 of 2016 [2018] eKLR deduced the questions the Court needs to ask itself in ascertaining whether an appeal raises a question of constitutional interpretation or application and whether the constitutional issue arising has been considered by the Superior Courts resulting in the filing of an appeal before the Supreme Court. It was thus noted that 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?"



38. In answering the above questions, on the issue that was before the High Court and the Court of Appeal, it is prudent to examine the history leading to the institution of the case before the High Court. From the pleadings, the 1st Respondent filed before that Court, an application to have the Appellants cited for contempt of Court for failure to satisfy a court order. The court order that the Appellants had failed to comply with was an order of mandamus issued when the 1st Respondent commenced judicial review proceedings against the Appellants, compelling the Appellants to satisfy a decretal sum due to the 1st Respondent for the sum of Kshs. 8,464,699.05/-. The High Court noted in that regard:
- “It is apparent to this Court that no substantial dispute arises with regard to the issuance of the material court order on the 10th December 2014 vide Judicial Review Case No. 14 of 2013 or Kisii High Court Misc. Application No. 14 of 2013 (J.R), where the applicant had sought judicial review orders of mandamus to compel the Respondents to satisfy and/or settle a decree issued in Kisii High Court Civil Case No. 67 of 2007 on the 23rd March 2010 for the sum of Kshs. 8,464,699.05/- in favor of the applicant.”
39. The High Court further noted that the proceedings leading to the filing of the judicial review application were not of concern in the contempt proceedings by holding as follows;
- “It must be stated herein for purposes of clarity or avoidance of doubt that we are not herein concerned with the previous proceedings between the Applicant and the Respondent or any other party which eventually led to the application for an order of mandamus by the Applicant.”
40. The High Court therefore went on to only make a determination that the Appellants failed to obey a court order to perform a public duty bestowed upon them. The High Court ultimately cited the Appellants for contempt of Court in failing to offer a reasonable explanation for their disobedience thus triggering the present appeal proceedings.
41. On its part, the Court of Appeal agreed with the High Court that the appeal filed by the Appellants arose from the alleged contempt of Court and not liability to pay the decretal sum. Makhandia, JA thus pronounced himself as follows;
- “The issue before the learned Judge that gave rise to the instant appeal related to citation for contempt and not liability of the Appellants to satisfy the Judgment or decretal sum.”
42. As such, the Court of Appeal found that the only issue for determination in the contempt proceedings was whether a court order had been obeyed or not and went on to dismiss the Appellants’ appeal.
43. It is therefore clear from the record that at no point were the Superior Courts called on to determine any issue involving the interpretation or application of any provision of the Constitution. The dispute, quite plainly, involved the question, whether or not the Appellants were in contempt of court orders and the Superior Courts determined that the Appellants had indeed, disobeyed court orders.
44. The Appellants, in the face of the above clear position, nonetheless argue that by virtue of Section 6 of the Sixth Schedule of the Constitution, the National Government is the one mandated to pay for liabilities incurred by the defunct local authorities. They point out that at the time the High Court issued the order of mandamus, there had been no transfer of liabilities from the defunct Municipal Council of Kisii to the County Government of Kisii.
45. By that argument alone, the Appellants urge the misguided point that this Court is now clothed with jurisdiction to determine their appeal. Misguided they are, with respect, because that issue, even if



raised before the Superior Courts, did not form the substratum of the contempt proceedings and did not at all require determination by the Superior Court in the manner suggested by the Appellants. Like the Superior Courts below, we are of the view that, litigational ingenuity cannot be used to craft an issue outside the framework of the real dispute between the parties and then expect this Court to seize it and proceed to determine it – See *Methodist Church in Kenya v Mohamed Fugicha & 3 Others*, SC Petition No.16 of 2016 [2019] eKLR

46. In conclusion, it is clear to us that no question of constitutional interpretation or application was canvassed before this Court or the Superior Courts. The Appellants have not thus properly invoked the jurisdiction of this Court under Article 163(4)(a) of the Constitution and this Court is therefore not vested with the jurisdiction to hear and determine this appeal.

F. Disposition

47. Flowing from our findings above, the final orders to be made are as follows:

- (i) The Appeal herein is struck out for want of jurisdiction.
- (ii) As costs follow the event, only the 1st Respondent shall have the costs of the appeal since the 2nd Respondent did not participate in the proceedings, in any meaningful way.

48) It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021.

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

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

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

