



Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another (Joint receivers and managers of Karuturi Limited) (Petition 8 of 2019) [2021] KESC 51 (KLR) (16 July 2021) (Judgment)

Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & 2 others [2021] eKLR

Neutral citation: [2021] KESC 51 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 8 OF 2019

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

JULY 16, 2021

BETWEEN

SURYA HOLDINGS LIMITED 1ST PETITIONER

THEA HOLDINGS LIMITED 2ND PETITIONER

KARUTURI LIMITED 3RD PETITIONER

AND

CFC STANBIC BANK LIMITED 1ST RESPONDENT

MUNIU THOITI AND KURIA MUCHERU 2ND RESPONDENT

JOINT RECEIVERS AND MANAGERS OF KARUTURI LIMITED

(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting in Nairobi (Ouko, Musinga & Gatembu, JJA) dated 25th January 2019, in Nairobi Civil Appeal No. 114 of 2018)

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

Reported by Ribia John

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals 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 - Constitution of Kenya, 2010 article 163(4)(a).

Brief facts

The 1st and 2nd appellants were guarantors to a facility agreement between the 3rd appellant and the 1st respondent. The 3rd appellant defaulted in its repayment obligations to the 1st respondent. That led to the



appointment of receivers in accordance with the power annexed to the debenture, as issued by the 3rd appellant. That appointment was challenged by the appellants at the High Court. The High Court confirmed the appointment of the receivers, but restrained them from selling the charged properties, and ordered the 3rd appellant to continue operating as a going concern in the interest of all the parties. Later on, the High Court issued winding up orders against the 3rd appellant.

The High Court in its ruling found that the appellants had made an admission that the 3rd appellant owed the 1st respondent a pre-receivership sum of US\$ 4,028,194.30 and Kshs. 2,706,966.13 together with interest thereon. The High Court further directed the parties to agree on a forensic audit. The parties agreed on the auditor. The audit report was duly filed in court, and the parties addressed the court extensively on it. The High Court found that the 3rd appellant owed the 1st respondent a sum of USD 4,028,194.30 and Kshs. 2,706,994.13, together with contractual interest as contained in the facility agreement executed between the 3rd appellant and the 1st respondent, being the pre-receivership debt.

Aggrieved the appellants filed an appeal before the Court of Appeal. The Court of Appeal found that the orders granted by the High Court did not constitute a wrong exercise of judicial discretion. As such, the Court of Appeal did not interfere with the orders made by the High Court and dismissed the appeal with costs to the respondents. Aggrieved, the appellants filed the instant appeal.

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)?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 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. Under article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution) the Supreme Court had jurisdiction to entertain appeals from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution. An appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. An appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
2. The pleadings before the High Court confirmed that the constitutional issues raised before the Supreme Court were never pleaded and also that the High Court did not interpret or apply the same. The Court of Appeal, just like the High Court did not interrogate or apply any of the articles of the Constitution alleged to have been violated, that was, articles 25 and 50 of the Constitution.
3. Several issues were pending determination before the High Court. There was no substantive determination by the superior courts below of a constitutional nature, to warrant the Supreme Court to exercise its jurisdiction under article 163(4)(a) of the Constitution. Non-determination of the constitutional issues raised before the Court of Appeal, that was, violation of their right to be heard pursuant to articles 25 and 50 of the Constitution, did not form a basis for the instant court to entertain the appeal under article 163(4)(a) of the Constitution. It would have been pre-mature for the Court of Appeal to make a finding on the constitutional issue raised since the High Court had not fully



determined the rights of the parties before it. The Supreme Court lacked the jurisdiction to entertain the instant appeal.

Appeal dismissed; appellants to bear the respondents' costs.

Citations

Cases

Kenya

1. *Ananias N Kiragu v Eric Mugambi, Franklin Mwirigi & Martin Njeru* Civil Application 10 of 2020; [2020] KESC 77 (KLR); [2020] eKLR - (Explained)
2. *Asanyo & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 15 (KLR); [2018] eKLR - (Explained)
3. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR); [2017] eKLR - (Explained)
4. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2017; [2018] KESC 70 (KLR); [2018] eKLR - (Explained)
5. *Daniel Kimani Njibia v Francis Mwangi Kimani & another* Civil Application 3 of 2014; [2015] KESC 19 (KLR); [2015] eKLR - (Explained)
6. *Deynes Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] KESC 13 (KLR); [2016] eKLR - (Explained)
7. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
8. *Gitonga v Republic* Petition 11 of 2017; [2020] KESC 61 (KLR); [2020] eKLR - (Explained)
9. *Habib Bank A. G. Zurich v Pop-In (Kenya) LTD. & 3 others* Civil Appeal 147 of 1989; [1995] KECA 15 (KLR) - (Explained)
10. *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR - (Explained)
11. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
12. *Kiai Mbaki & 2 others v Gichuhi Macharia & another* Civil Appeal 178 of 2002; [2005] KECA 143 (KLR); [2005] eKLR - (Explained)
13. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Explained)
14. *Lavuna & others v Civil Servants Housing Co. Ltd & another* Civil Miscellaneous application 14 of 1995; [1995] KECA 111 (KLR); [1995] eKLR - (Explained)
15. *Lawrence Nduttu & 6000 others v Kenya Breweries Limited & another* Petition No 3 of 2012; [2012] eKLR - (Explained)
16. *Milligan Heritage Ltd & another v Anthony M.Mwaura* Civil Appeal 91 of 2013; [2014] KEHC 2730 (KLR); [2014] eKLR - (Explained)
17. *Nguruman Limited v. Jan Bonde Nielsen & others* Civil Appeal 77 of 2012; [2014] eKLR - (Explained)
18. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR); [2017] eKLR - (Explained)
19. *Parliamentary Service Commission v Martin Nyaga Wambora & others* Application 8 of 2017; [2018] KESC 74 (KLR); [2018] eKLR - (Explained)
20. *Patriotic Guards Ltd v James Kipchirchir Sambu* Civil Appeal 20 of 2016; [2018] KECA 799 (KLR); [2018] eKLR - (Explained)
21. *Royal Media Services Limited & 2 others v Attorney General & 8 others* Civil Application 341 of 2013; [2014] KECA 777 (KLR); [2014] eKLR - (Explained)
22. *SAJ v AOG & another; ZOG (Interested Party)* Petition 1 of 2013; [2013] KESC 19 (KLR); [2013] eKLR - (Explained)



23. *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited* Civil Suit 78 of 2014; [2018] KEHC 304 (KLR); [2018] eKLR - (Mentioned)
24. *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another* Civil Appeal No 114 of 2018 - (Mentioned)
25. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] KESC 29 (KLR); [2015] eKLR - (Explained)

India

Bareilly Electricity Supply Co. Ltd v. The Workmen & others 1972 AIR 330, 1972 SCR (1) 241, AIR 1972 SC 330, 1972 LAB. I. C. 188, 1972 (1) SCR 241, 1971 2 LBLJ 407, 1972 23 FACLR 273, 1973 2 SCJ 499, 40 FJR 360, 23 FAC LR 273 - (Explained)

Regional Court

Shah v Devji [1969] EA 91 - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) - (Interpreted) order 13 rule 1; order 2 rule 15(1)(a); 15(9)(d)
2. Companies Act (cap 486) - (Interpreted) section 319
3. Constitution of Kenya - (Interpreted) articles 25(c); 50; 159(2)(e); 163(4)(a)
4. Supreme Court Act (cap 9B) - (Interpreted) sections 15(1); 15(2)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. The petition of appeal before us is dated February 14, 2019 and filed on even date, and it challenges the Judgment of the Court of Appeal sitting in Nairobi (Ouko, Musinga & Gatembu, JJA) dated January 25, 2019, in Nairobi Civil Appeal No 114 of 2018. The Court of Appeal in its Judgment upheld the High Court's decision and found that the orders granted on January 19, 2018 did not constitute wrongful exercise of jurisdiction. The Appeal is filed as of right under article 163(4)(a) of [Constitution](#).

B. Background

a. Proceedings at the High Court

2. The brief background to this matter is that the 1st and 2nd appellants are guarantors to a facility agreement between the 3rd appellant and the 1st respondent. The 3rd appellant defaulted in its repayment obligations to the 1st respondent. This led to the appointment of receivers on February 10, 2014, in accordance with the power annexed to the debenture, as issued by the 3rd appellant. This appointment was challenged by the appellants at the High Court. By a Ruling dated June 11, 2014, the High Court (F Gikonyo, J) confirmed the appointment of the receivers, but restrained them from selling the charged properties, and ordered the 3rd appellant to continue operating as a going concern in the interest of all the parties. Later, on March 30, 2016, the High Court in Winding up Cause 12/2013 issued Winding up Orders against the 3rd appellant.
3. Subsequently, the appellants filed HCC No 78 of 2014 seeking the following orders against the 1st respondent: a declaration that the 1st respondent was in breach of its contractual obligations; a



declaration that the appointment of receivers by the 1st respondent over it was unlawful; a permanent injunction to restrain the 1st respondent from selling the charged properties; a permanent injunction restraining the 1st respondent from appointing a receiver-manager; a permanent injunction restraining the 1st respondent from advertising or offering the charged properties for sale; and a mandatory injunction to compel the 1st respondent and its appointed receiver managers to lift the receivership and to vacate the premises of the 3rd appellant.

4. On June 22, 2016, the 1st respondent filed an application to the court dated June 21, 2016 seeking several substantive orders namely: grant of leave to make an application against the 3rd appellant which was in liquidation; the claim be marked as adjusted and compromised on the terms that: the 1st and 2nd appellants were to, within a period of 30 days' pay to the 1st respondent a sum of USD 4, 028, 194.30 and KES 2, 706, 994.13 together with contractual interest as was contained in the Facility Agreements that were executed between the 3rd appellant and the 1st respondent; the 1st and 2nd appellants were to, at their own cost appoint a forensic auditor within 30 days from the date thereof in conjunction with the interested parties, review all the business and operational transactions undertaken by the 3rd appellant from the time it was placed under receivership to determine the amount owed, the same was to be settled by a third audit firm being KPMG, Delloite or Earnest Young who were to be appointed by either party within 7 days of a disagreement and their determination will be final. The appointed firm was to determine the issue in dispute within 14 days of appointment; the 1st and 2nd appellants was to thereafter, within 60 days make payment to settle all the sum certified in the aforesaid audit after which the 1st respondent was to discharge any security held in respect of advances made to the 3rd appellant; and if the 1st and 2nd appellants defaulted in making the payment referred above on its due date, the 1st respondent was to thereupon be at liberty to exercise all or any of its rights in respect of advances made to the 3rd appellant including but not limited to the right to sell all assets covered or contained in the securities given by the appellants to the 1st respondent. Finally, the 1st respondent sought that upon making of orders (2) above, all interim orders were to be discharged forthwith.
5. By a Ruling dated 13 October 2016, the court (F Tuiyot, J) found that the appellants had made an admission that the 3rd appellant owed the 1st respondent a pre-receivership sum of US\$4,028,194.30 and Ksh 2,706,966.13 together with interest thereon. The court further directed the parties to agree on a forensic audit to review all the Business and Operational Transactions undertaken during the receivership period and to determine the amount, if any, owed by the 3rd appellant to the 1st respondent. In the event of a disagreement on the appointment of a forensic auditor, the court was to appoint one. The Forensic auditor was to, within 30 days of appointment, file his/her findings with the court and provide copies thereof to the parties. The court was then to make further orders upon receipt of that report.
6. Subsequently, the parties agreed on the auditor, Deloitte Consulting Group. The audit report was duly filed in court, and the parties addressed the court extensively on it. On January 19, 2018, the High Court (Tuiyot J) found that the 3rd appellant owed the 1st respondent a sum of USD 4,028,194.30 and Kshs. 2,706,994.13, together with contractual interest as contained in the facility agreement executed between the 3rd appellant and the 1st respondent, being the pre-receivership debt. He ordered the 1st and 2nd appellants to pay the pre-receivership debt within sixty (60) days. The 1st and 2nd respondents were also ordered to pay the 1st respondent within 90 days: USD (US dollars) 6,337,120.48 being the sums outstanding to the Creditors other than the 1st respondent during the receivership period; USD (US dollars) 6,734,083.25 being monies advanced by the 1st respondent, post the receivership period up to 31st December 2016; and USD (US Dollars) 978,849.36 being expenses incurred by the 1st respondent in preserving the assets of the 3rd appellant from 1st January 2017 to 31st July 2017.



7. The court directed that the firm of Deloitte Consulting Limited undertake an immediate audit to establish further expenses that may have been incurred in the preservation of the assets of the 3rd appellant from 1st August 2017 to the date of the ruling and file a report within 30 days for further Orders. In default of payment of the monies as set out in the said ruling, the Orders of injunction granted on June 11, 2014 in favour of the appellants were to stand discharged and the 1st respondent was at liberty to exercise all or any of its rights, in respect of the advances made to the 3rd appellant, including but not limited to the right to sell assets covered or contained in the securities given to it.
8. Aggrieved by the said Ruling, the appellants filed Civil Appeal No 114 of 2018, *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & another*. In the memorandum of appeal, the appellants faulted the Learned Judge for: failing to appreciate that the alleged post-receivership debt was in essence post receivership losses attributable to the 1st respondent and the receivers; failing to appreciate that the alleged post-receivership sum was not pleaded; failing to appreciate that the audit report by Deloitte Consulting Ltd on which the Judge based his decision was disputed; entering judgment on unproven debt and that the 1st and 2nd appellants as guarantors were not liable for post-receivership debt; making a final determination without conducting a trial thereby violating article 50 of *Constitution*; holding that the 3rd appellants owed the 1st respondent a sum of USD 4, 028, 194.30 and KES 2, 706, 994.13; failing to appreciate the difference between what was referred to as a contractual rate of interest and interest lawfully due; and failing to appreciate that the composite proposal that the appellants had made as contained in the Affidavit sworn on March 24, 2016 was not severable or susceptible to cherry picking by the 1st respondent and that the proposal was not in any event an admission of debt in law.
9. While determining the Appeal, the learned Judges of Appeal listed one issue for determination namely, whether the impugned orders made by the High Court on January 19, 2018 directing the appellants to make payments to the 1st respondent and in default for the 1st respondent to be at liberty to exercise its powers of sale constituted a wrong exercise of discretion. In its judgment dated 25 January 2019, the appellate court was not convinced that the orders granted by the learned Judge on 19 January 2018, constituted a wrong exercise of judicial discretion. As such, the court did not interfere with the orders made by the High Court and dismissed the appeal with costs to the respondents.
10. The appellants, aggrieved by the decision of the Court of Appeal, have now moved to the Supreme Court.

C. Parties' Respective Submissions

i. The appellants' case

11. The appellants' appeal is premised on four grounds framed as follows: whether the failure by the Court of Appeal to adjudicate on Constitutional issue of fair hearing amounts to a violation of the appellants' right to fair hearing enshrined in articles 25(c) and 50(1) of *Constitution*; whether the Court of Appeal's dismissal of the issues raised by the appellants as "merely muddying the waters" is a dereliction of the court's duty under article 164(3) as read with articles 25(c), 50 and 159(2)(e) of *Constitution*; whether the Court can determine a dispute with finality without giving effect to a party's non-derogable right to a fair hearing guaranteed under articles 25(c) and 50(1) of *Constitution*; and whether it is constitutional for judicial discretion to be exercised in a manner that violates a litigant's right to fair trial as enshrined in article 50 as read together with article 25 of *Constitution*.
12. The appellants filed their written submissions on March 12, 2020. The appellants commence their submissions by faulting the Court of Appeal for failing to adjudicate the allegation that their right to a fair hearing under article 50(1) of *Constitution* was violated by the High Court. While citing articles



25(c), 50(1) and 159(e) of *Constitution*, the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, the appellants urge that the High Court failed to conduct proceedings before it in a judicious manner. They submit that they were denied the opportunity to challenge the contents of the audit report as provided for in *Constitution*. They fault the Court of Appeal for upholding the High Court’s decision which, in their view, was wrong and evaded a determination of the real issues in the appeal before it.

13. The appellants also submit that the Court of Appeal missed the vital point that the alleged acknowledged debt was about the alleged pre-receivership debt, and not the alleged receivership debt which was the subject of an appeal before it. The appellants argue that by denying them a right to a fair hearing, the Court of Appeal negated its constitutional mandate under article 164(3)(a) and 159(2)(e) of *Constitution*. To support their argument, they cite a decision from the Supreme Court of India, *Bareilly Electricity Supply Co. Ltd v. The Workmen & others* [1972] AIR 330, 1972 SCR (1) 241, this Court’s decisions in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu* SC Petition No 18 as consolidated with Petition No 20 of 2014 and *Kia Mbaki & 2 others v Gichui Macharia & another* [2005] eKLR.
14. The second limb of the appellant’s submissions is that the Court of Appeal’s dismissal of the issues raised as merely “muddying the waters” is a disregard of the Court’s duty under article 50 and 159(2) (e) of *Constitution*. On this, the appellants submit that the Court of Appeal erroneously proceeded to dispose of the appeal on the wrong basis that they were exclusively challenging the trial Court’s exercise of judicial discretion thereby ignoring the main issue in dispute.

The appellants cite the cases of *Miligan Heritage Ltd & another v Anthony M Mwaura* [2014] eKLR and *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR to anchor their submissions.

15. On the third and last issue, that is, whether it is constitutional for a court to exercise judicial discretion in a manner that violates a litigant’s right to a fair trial as enshrined under article 50 as read with article 25 of *Constitution*, the appellants submit that the alleged Notice of Motion dated June 21, 2016, was based on pre-receivership debt and not otherwise as was submitted in the audit report. Therefore, they urge that the High Court’s contemplation that any amount found to be undue to the 1st respondent would be refunded to the appellants is an admission that a decision was yet to be made as regards the post-receivership debt if any, and the party liable to pay. They maintain that the Court of Appeal’s decision contravened order 13 rule 1 of the *Civil Procedure Rules*, and articles 25(c) and 50(1) of *Constitution*. To support their argument on this issue, they cite the case of *Parliamentary Service Commission v. Martin Nyaga Wambora & others* [2018] eKLR. Ultimately, they urge this court to uphold the appeal as prayed.

ii. The 1st respondent’s case

16. On the first two issues that is, whether the Court of Appeal failed to adjudicate Constitutional issue of fair hearing and whether the petitioners’ right to fair hearing as enshrined in article 50(1) of *Constitution* were violated, it is submitted that contrary to the appellants’ argument that the matter was decided based on affidavits filed in court on March 24, 2016, the Application was based on letters from the 1st respondent’s Advocates acknowledged by the appellants’ advocates. Further, that the High Court’s decision was based on the existence of an admission arising from correspondence between the advocates on record.
17. The 1st respondent also submits that the Court of Appeal considered and determined the appellants’ contention that their right to a fair trial under articles 25(c) and 50(1) were violated but found that



it did not arise in this case as the matter in issue was an application for judgment on admission. The respondent supports the Court of Appeal's decision not to fault the learned Judge for making his findings on a *prima facie* basis. To support its argument, the 1st respondent relies on the cases of *Lavuna & others v Civil Servants Housing Co. Ltd & another*, Civil Appeal No 14 of 1995, *Habib Bank AG Zurich v Popin (Kenya) Ltd, & 3 others* [1997] eKLR, *Shah v Devji* [1969] EA 91 and *Nguruman Limited v Jan Bonde Nielsen & others* Civil Appeal No. 77 of 2012 [2014] eKLR.

18. Furthermore, the 1st respondent submits that Constitutional issue of fair hearing does not arise in the circumstances of this case as the same involved the High Court's exercise of discretion, that is, conditions for the extension of an interlocutory injunction pending the hearing to determine the rights of the parties. It is the 1st respondent's case that the orders made by the High Court did not determine the suit in finality as alleged by the appellants but preserved the suit by granting conditional orders.
19. The 1st respondent argues that the Court of Appeal rightly found that the belated introduction of a constitutional claim of lack of access to justice or fair hearing had no basis in law since the issue they were dealing with was of an interlocutory nature under order 13 rule 2 of the *Civil Procedure Rules*, 2010.

They state that the court's decision was a pure exercise of discretion and that the case is still at the interlocutory stage of a suit and that parties are yet to proceed to a full hearing.
20. In response to the appellants' claim that the Court of Appeal failed to adjudicate the appellants' claim of failure by the High Court to grant them a fair hearing, the 1st respondent submits that the Court of Appeal dealt with and determined the issue of the claim of denial to Constitutional right to a fair hearing. Furthermore, the 1st respondent submits that the Court of Appeal could not have faulted the High Court for the course it took because the High Court would have erred in law and fact if the learned Judge had converted the application for judgment on admission to a mini trial. The 1st respondent cites the case of *Deynes Muriithi & 4 others v Law Society of Kenya & another*, Supreme Court Appl No 12 of 2015 [2016] eKLR to anchor its argument.
21. On the question of this court's jurisdiction to entertain the appeal, the 1st respondent submits that there was no issue involving the right to a fair hearing before the High Court and there is a clear material that this was not the thrust of the arguments by the appellants in the Court of Appeal. The 1st respondent relies on the case of *Charles Maina Gitonga v. Republic*, SC petition No 11 of 2017; [2020] eKLR, *Lawrence Nduttu & 6000 others v. Kenya Breweries Limited & another*, SC Petition No 3 of 2012; [2012] eKLR and *Aviation & Allied Workers Union v Kenya Airways & 2 others* SC Petition No 4 of 2015 [2017] eKLR to support its argument. The respondent also argues that this court, in dismissing its application and preliminary objection, departed from its set principle that issues of constitutional application and interpretation must rise through the superior courts in the clearest of cases as was held in the case of *Geoffrey Asanyo & 3 others v Attorney General* [2018] eKLR. They urge the court to review its decision on jurisdiction in this case. They also cite the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR to support their case.
22. Disagreeing with the appellants' contention that the need for the audit review arose as a result of the erroneous finding by the learned Judge that the appellants' statement in their affidavit was an admission, the 1st respondent submits that the audit firm of Deloitte & Touch was agreed upon by the parties. Additionally, they contend that the pre-receivership debt was admitted by the appellants hence the learned Judge's findings on the audit report whose terms of reference were crafted consensually by the parties. They maintain that the appellants were accorded a fair hearing.
23. The 1st respondent argues that the Court of Appeal rightly found that the belated introduction of a constitutional claim of lack of access to justice or fair hearing had no basis in law since the issue they



were dealing with was of an interlocutory nature under order 13 rule 2 of the Civil Procedure Rules, 2010. They state that the court's decision was a pure exercise of discretion and that the case is still at the interlocutory stage of a suit and that parties are yet to proceed to a full hearing.

24. It is also contended that despite the introduction of additional grounds of appeal by the appellants, that is, relating to the admission of the amount of USD 4, 028, 194.30, the court addressed all the issues before it thereby according to the appellants the right to be heard, and that finally that the main suit is yet to be heard.

iii. 2nd respondent's case

25. Through its submissions filed on June 16, 2020, the 2nd respondent submits that the Court of Appeal correctly determined that the imposition of terms on the injunction, that the appellants were enjoying, was a matter of discretion which the High Court judge had exercised correctly. Further, that the question of whether the appellants' right to be heard had been infringed did not arise, as the issues they had complained about had been reserved for determination at a full hearing of the suit.
26. The 2nd respondent submits that the Court of Appeal considered all arguments made by parties, including the allegation that the petitioners had not been heard by the High Court on the issues of post-receivership debt. It is also submitted that the court correctly determined the interlocutory appeal before it concerning the High Court's exercise of jurisdiction in imposing conditions for the continued enjoyment by the appellants of the injunction that had restrained the sale of the charged assets. The 2nd respondent's maintains that the appellants made extensive submissions on the audit report before the order appealed against was made.
27. The 2nd respondent furthermore submits that the order made by the High Court on January 19, 2018, did not involve the interpretation and application of Constitution but merely imposed the condition that the appellants must deposit the sums that were admitted and agreed upon, and pays the further amount determined via a process they had chosen. This respondent urges that the mere fact that the appellants were disputing some amounts claimed by the 1st respondent is not and cannot be a basis for the appellants to assert a right to an injunction.
28. It is additionally submitted that the contest between the parties could only be resolved by the Court of Appeal applying the principles that govern the exercise of discretion by the High Court in granting or refusing to grant or extend an injunction. That the resolution of that issue did not require the interpretation or application of Constitution and the issue does not arise before this court.
29. They conclude that the appeal herein is based on a misrepresentation of the true dispute between the parties and the issues in contest before the Court of Appeal, and that the same should be dismissed with costs.
30. We are cognizant of the fact that on March 22, 2019, this court issued a conservatory order restraining the respondents, by themselves, their servants, agents, employees or whomsoever, from offering for sale, alienating, or in any manner disposing of the 1st and 2nd appellants' parcels of land, namely LR Nos 12248/19; 12248/20; 12248/21; 12248/38; 25261 and 25262 and LR No 10854/60 (Title No LR 87312) — pending the hearing and determination of the appeal. The court also stayed the execution and/or enforcement of the Orders issued on 19 January 2018, in High Court Civil Suit No 78 of 2014, Surya Holdings Limited & 2 others v CFC Stanbic & another, pending the hearing and determination of the appeal.



D. Issues for Determination

31. From the filed pleadings, written and oral submissions by parties, the following issues emerge for determination:
 - a. Whether the appeal before this court meets Constitutional threshold under article 163(4)(a) of *Constitution*.
 - b. If the answer to issue (i) is in the affirmative, what remedies are available in the circumstances?

E. Analysis

32. It is the 1st and 2nd respondents' argument that there was no issue involving the right to a fair hearing before the superior courts below. In other words, it is the respondents' case that the subject matter of this appeal did not involve issues interpretation and application of *Constitution* to warrant this Court's exercise of jurisdiction under article 163(4) (a) of *Constitution*.
33. Under article 163(4)(a) of *Constitution*, this court has jurisdiction to entertain appeals from the Court of Appeal as of right in any case involving the interpretation or application of *Constitution*.
34. Section 15(1) of the *Supreme Court Act* makes provision for this Court's appellate jurisdiction with regards to appeals under article 163(4)(b) of *Constitution*. Section (15)(2) of the same *Act* on the other hand provides that Sub-section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of *Constitution*. We note that this appeal is premised on article 163(4)(a) of *Constitution* and section 15(2) of the *Act*.
35. This Court set guiding principles in the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR, with regard to its appellate jurisdiction under article 163(4)(a) of *Constitution*, where it stated that an appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *Constitution*. In other words, an appellant must be challenging the interpretation or application of *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
36. In the case of the *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR, this Court emphasized that the appeal should have raised questions of constitutional interpretation or application, and 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 *Constitution*.
37. The same principle was affirmed in this Court's decision in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated that specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.
38. We have perused the record of appeal and taken note that the ruling of the trial court issued on 19th January 2018, was a follow up on the ruling of the same court issued on 13 October 2016 flowing from a Notice of Motion application dated June 21, 2016, premised under order 2 rule 15(1)(a) and 9d),



- order 13 rule 2 of the Civil Procedure Rules, section 319 of the Companies Act, and the pleadings before the trial court confirm that Constitutional issues raised before us were never pleaded and also that the trial court did not interpret or apply the same.
39. Furthermore, we have looked at the issue before the Court of Appeal, that is, whether the impugned orders made by the High Court on January 19, 2018 directing the appellants to make payments to the 1st respondent and in default, for the 1st respondent to be at liberty to exercise its powers of sale constituted a wrong exercise of discretion, and have come to the conclusion that the Court of Appeal, just like the High Court did not interrogate or apply any of the articles of Constitution alleged to have been violated that is, articles 25 and 50 of Constitution.
40. This court has previously found that it lacks 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 in the cases of Daniel Kimani Njibia v Francis Mwangi Kimani & Another, SC. Civil Application No 3 of 2014; [2015] eKLR; Teachers Service Commission v. Kenya National Union of Teachers & 3 others Sc Application No 16 of 2015; [2015] eKLR; and Bia Tosba Distributors Limited v Kenya Breweries Limited & 6 others [2018] eKLR. In the Ananias N Kiragu v Eric Mugambi & 2 others [2020] eKLR. In SAJ v AOG & 2 others [2013] eKLR, this court found that its jurisdiction can only be invoked when substantive matters in the appellant's petition have been answered.
41. Having perused the record, more so, the amended plaint and the decision of the trial Court and that of the Court of Appeal, it is obvious to us that several issues are still pending determination before the trial court. Consequently, it is our finding that there is no substantive determination by the superior courts below of a Constitutional nature, to warrant this Court to exercise its jurisdiction under article 163(4) (a) of Constitution. Although the appellants have urged us that non-determination of Constitutional issue raised before the Court of Appeal, that is, violation of their right to be heard pursuant to articles 25 and 50 of Constitution, should form a basis for us to entertain this appeal under article 163(4)(a) of Constitution, we unanimously disagree with them. It is our finding that it would have been pre-mature for the Court of Appeal to make a finding on Constitutional issue raised since the trial court had not fully determined the rights of the parties before it.
42. We are cognizant of a ruling of this court issued on March 22, 2019, dismissing a preliminary objection dated February 22, 2019 and a Notice of Motion dated February 25, 2019, which preliminary objection and Application contested this court's jurisdiction in this matter. However, having listened to all the parties in the matter and re-evaluated the pleadings before us, and the record of appeal, and considering our findings herein, we are satisfied that we lack the jurisdiction to entertain the matter before us. Further, under article 163(7) of Constitution, this court is not bound by its decisions.
43. Since costs follow the event as previously decided this court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC Petition No 4 of 2012; [2014] eKLR, the appellant shall bear the costs of appeal in this Court.
44. Consequently, the appeal is dismissed.

F. Orders

45. Flowing from above, the final orders are:
- i. The Petition of appeal dated February 14, 2019 and filed on even date is hereby dismissed.
 - ii. The appellants shall bear the respondents' costs.



Orders accordingly.

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

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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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

