



**Member of Parliament, Balambala Constituency v Abdi & 7 others (Petition
21 (E023) of 2020) [2021] KESC 9 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KESC 9 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 21 (E023) OF 2020
MK KOOME, CJ, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 8, 2021**

BETWEEN

MEMBER OF PARLIAMENT, BALAMBALA CONSTITUENCY ... PETITIONER

AND

ABDI AHMED ABDI 1ST RESPONDENT

**CABINET SECRETARY FOR INTERIOR AND COORDINATION OF
NATIONAL GOVERNMENT 2ND RESPONDENT**

COUNTY COMMISSIONER, GARISSA COUNTY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

**MEMBER OF PARLIAMENT, GARISSA TOWNSHIP CONSTITUENCY 5TH
RESPONDENT**

MEMBER OF PARLIAMENT, DAADAB CONSTITUENCY .. 6TH RESPONDENT

GOVERNOR, GARISSA COUNTY 7TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 8TH
RESPONDENT**

*(Being an appeal to the Supreme Court against the Judgment and Orders
of the Court of Appeal of Kenya sitting in Nairobi (Makhandia, Kiage &
Murgor, JJ. A) in Civil Appeal No. 424 of 2017 delivered on 20th November, 2020)*

**Circumstances under which the Supreme Court would exercise jurisdiction over a matter as one
involving issues of constitutional interpretation and application.**

Reported by Beryl Ikamari



Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction - matters of constitutional interpretation or application – whether a matter concerning the creation of administrative units without public participation was a matter of constitutional interpretation or application which warranted the exercise of the Supreme Court's jurisdiction - Constitution of Kenya, 2010, article 163(4)(a).

Brief facts

The 1st respondent filed a petition at the High Court to challenge the creation of various administrative units in Garissa County on grounds that there had been no public participation. The trial court allowed the 1st respondent's petition and declared that the 2nd respondent (County Commissioner, Garissa) had violated constitutional provisions by purporting to create new administrative units and disregarding a court decision rendered in that regard. The trial court issued an order of *certiorari* against the 2nd respondent and an order of *mandamus* against the 2nd and 3rd respondents. The Court of Appeal upheld the trial court's decision prompting the petitioner to lodge a petition of appeal at the Supreme Court against the decision of the Court of Appeal.

The 1st and 8th respondents raised preliminary objections on grounds that the petition of appeal did not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution and that the petition of appeal had not been certified as one involving a matter of general public importance under article 163(4)(b) of the Constitution.

Issues

When would an appeal from the Court of Appeal lie as of right to the Supreme Court under article 163(4)(a) of the Constitution, as one involving matters of constitutional interpretation and application?

Held

1. Not all intended appeals lay from the Court of Appeal to the Supreme Court as of right. Under article 163(4)(a) of the Constitution, it was only those appeals arising from cases involving the interpretation or application of the Constitution that could be entertained by the Supreme Court without leave being granted.
2. The Supreme Court had laid down principles relating to appeals as follows:
 1. a court's jurisdiction was regulated by the Constitution, statute and by principles laid out in a judicial precedent;
 2. the chain of courts in the constitutional set-up had the professional competence to adjudicate upon disputes coming before them and only cardinal issue of jurisprudential moment deserved the further input of the Supreme Court;
 3. the lower court's determination of the issue on appeal had to have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
 4. an appeal within the ambit of article 163(4)(a) of the Constitution was one that had to be founded on cogent issues of constitutional controversy.

3. Section 4 of the National Government Coordination Act was the basis upon which the trial court adjudicated on whether the administrative actions of the 2nd respondent were done within the confines of the law. The provisions of section 4 were founded on articles 10, 189, 201(d) & 232 of the Constitution which the 2nd respondent was found to be in breach of. Therefore, the High Court as well as the Court of Appeal dealt with issues that involved the interpretation and application of the Constitution. The arguments of the 1st and 8th respondent that there were no constitutional issues determined by the other superior courts were untenable.

Preliminary objection dismissed.

Orders

- i. *The preliminary objection by the 1st respondent filed on January 25, 2021 was overruled.*
- ii. *The preliminary objection filed on March 3, 2021 by the 8th respondent was overruled.*
- iii. *Each party had to bear its costs of the objection.*



Citations

Cases

East Africa;

1. *Cordisons International (K) Limited v Chairman National Land Commission & 43 others* Petition 14 of 2019; [2020] eKLR— (Explained)
2. *Munya v Kithinji & 2 others* [2014] 1 KLR 58 — (Followed)
3. *Geoffrey M Asanyo & 3 others v Attorney General* Petition 7 of 2019; [2020]eKLR — (Explained)
4. *Joho & another v Shabbal & 2 others* [2014] 1 KLR 111— (Mentioned)
5. *Nduttu & 600 others v Kenya Breweries Ltd & another* [2012]2 KLR 804 — (Followed)
6. *Kiliswa, Peninah Nadako v Independent Electoral & Boundaries Commission (IEBC) & 2 others* Petition 28 of 2014;[2015]eKLR— (Followed)
7. *Omenda, Peter Ayodo & 6 others v Ethics & Anti-Corruption Commission & 2 others* Petition 40 of 2019; [2020]eKLR— (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 10(1)(2)(a)(c); 19; 47; 159; 162(4)(b); 163(4)(a); 189(1); 201(d); 232 — (Interpreted)
2. National Government Coordination Act, 2013 (Act No 1 of 2013) section 4 — (Interpreted)

Advocates:

None mentioned

RULING

A. Introduction

[1] Before the court is a Petition of Appeal dated 16th December 2020 and lodged on 21st December 2020. The appeal is against the decision of the Court of Appeal (Makhandia, Kiage, Murgor, JJ A) in Civil Appeal No 424 of 2017 delivered at Nairobi on the 20th November 2020 which upheld the decision of the High Court (Mativo, J), in Constitutional & Human Rights, Petition No 238 of 2015 delivered on 4th October 2017. The trial court had allowed the 1st respondent's Petition by declaring that the 2nd respondent had violated the provisions of the Constitution by purporting to create new administrative units within Garissa County and by disregarding a court decision rendered in that regard and issued an order of *certiorari* against the 2nd respondent and an order of *mandamus* against the 2nd and 3rd respondents.

[2] The petitioner in his appeal, seeks the following orders:

- a. That this petition be allowed.
- b. That the Judgment of the Court of Appeal dated 20/11/2020 in Civil Appeal Number 424 of 2017 and the Judgment of the High Court dated 4/10/2017 in Constitutional Petition Number 238 of 2015 be set aside.
- c. That High Court Constitutional Petition Number 328 of 2015 dated 8/06/2015 be dismissed.
- d. That the costs of this petition be provided for.

B. The Preliminary Objections



- [3] In response to the petition, the 1st respondent filed a notice of preliminary objection dated 20th January 2021 challenging this court's jurisdiction to hear and determine the Appeal on the grounds that; The Petition of Appeal does not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution and that the Petition of Appeal has not been certified as one involving a matter of general public importance under article 163(4)(b) of the Constitution.
- [4] The 8th respondent has also filed a notice of preliminary objection dated 25th February, 2021 also based on two grounds; that the appeal does not raise any matters of constitutional interpretation or application and that this court lacks the jurisdiction to determine the appeal in the manner presented.

C. Background

(i) Proceedings at the High Court

- [5] On 15th May 2015, the 2nd respondent issued two notices, Ref No DC/HR/1/30/105 and DC/HR/1/30/106 respectively advertising for two positions; Chiefs Grade II Job Group 'H' and Assistant Chief II, Job Group 'F' (the advertisements). In the advertisements, the position for Chiefs was for the area known as 'Abdisamit Location in Central Division' and the Assistant Chiefs position was for the area known as 'Auliya and Laago sub locations'. After the advertisement was issued, the 1st respondent filed a Petition before the Constitutional and Human Rights Division of the High Court at Nairobi claiming that the advertisements were erroneous because, for the Chief position, it purported to claim that Abdisamit Location is in Central Division of Garissa Sub-County yet it was in Dertu Division of Daadab Constituency and for the Assistant Chief position, it erroneously indicated that Auliya Sub-location was in Abdisamit Location of Sankuri Division yet it was in Laago Sub-location in Modika Location.
- [6] The 1st respondent thus challenged the creation of the administrative units claiming absence of public participation and that there had already been a determination on those elective/administrative boundaries by the High Court in *Republic v Independent Electoral and Boundaries Commission & another*, Judicial Review Misc Application No 120 of 2012 as consolidated with Petition No 94 of 2012 which case involved several consolidated Judicial Review applications among them Misc Application No 120 of 2012 in which the dispute involved the delimitation of boundaries of Balambala and Dujis Constituencies of Garissa County. The 1st respondent also claimed that the actions of the 2nd respondent were in violation of the provisions of articles 10, 47 and 159 of the Constitution as he usurped powers not conferred by the Constitution and sought a declaration to that effect. The 1st respondent also sought a *certiorari* order quashing the advertisements by the 2nd respondent, and *mandamus* order directing the petitioner and the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents to conform with the Judgment in Nairobi High Court Judicial Review Misc Application No 120 of 2012.
- [7] The trial court, (Mativo, J), while deciding on whether the 2nd respondent had acted within the confines of the law while creating the administrative units, found that the decision in Nairobi High Court Judicial Review Misc Application No 120 of 2012 as regards Balambala and Dujis Constituencies still stood since no appeal had being filed against it and that the actions of the 2nd respondent to create administrative units violates the provisions of article 10 and article 189 of the Constitution. The learned Judge further held that there was no proper public participation that superseded the actions of the 2nd respondent in creating the said administrative units. The learned Judge therefore went on to find that the 2nd respondent had contravened the provisions of section 4 of the *National Government Coordination Act* which offers guiding principles as to how creation of administrative units should be undertaken which section states that the national government shall act in accordance with the national values and principles of the Constitution as set out in articles 10, 19,



201(d) and 232 of the *Constitution*. Further, the trial court held that the decisions of the 2nd and 3rd respondents were illegal and *ultra vires* and proceeded to grant the orders of *certiorari* and *mandamus*.

(ii) **Proceedings at the Court of Appeal**

- [8] Aggrieved by the High Court’s decision, the petitioner preferred an appeal to the Court of Appeal, Civil Appeal No 424 of 2017. The Court of Appeal identified one main issue for determination which was whether the trial court had a basis or was justified in arriving at its conclusion. In its judgment rendered on 20th November, 2020, the appellate court upheld the trial court’s judgment and found that the learned Judge was right in finding that the 2nd respondent had no authority to interfere with the boundaries or create new administrative units outside legal notice No 14 of 2012, which was the legal notice that led to the filing of the cases before the High Court on the issue of administrative units, and doing so amounted to undermining the court orders and contravened the provisions of section 4 of the Act and articles 10, 189, 201(d) & 232 of the Constitution. The appeal was dismissed. The petitioner was aggrieved with that Judgment and filed the present appeal.

D. Parties’ Submissions on the Preliminary Objections

(i) **The 1st and 8th respondents**

- [9] While the 1st respondent filed no submissions in support of its preliminary objection, the 8th respondent relies on its submissions dated 25th February 2021 and filed on 3rd March 2021. In that regard, the 8th respondent submits that the petitioner’s appeal does not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution. The 8th respondent also argues that this court was not conceived as just another layer in the appellate court structure and therefore, not all decisions of the Court of Appeal are subject to appeal before it.
- [10] It is the 8th respondent’s further case that the Court of Appeal’s finding that “the trial court was therefore right in holding that the 2nd respondent had contravened the provisions of section 4 of the Act and articles 10, 189, 201(d) & 232” does not qualify in the context of the dispute between the parties to fall within the purview of article 163(4)(a) of the Constitution. It further submits that there was no question of interpretation or application of the Constitution before the High Court and the Court of Appeal submitting that the High Court’s decision was based on exercise of administrative powers and that similarly the decision of the Court of Appeal did not involve any determination of any constitutional question and accordingly, submits that constitutional issues arising from the decision of the Court of Appeal must be clear and apparent from which was not the case in the present appeal. To support its submissions, the 8th respondent cites this court’s decisions in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, *Lawrence Nduttu & 600 others v Kenya Breweries Ltd & another*, *Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others* and *Cordisons International (K) Limited v Chairman National Land Commission & 43 others*.

(ii) **The petitioner’s submissions**

- [11] The petitioner opposes the preliminary objection and filed written submissions dated 3rd March 2021 and filed in court on 22nd June 2021. He submits that the dispute before the High Court as well as the Court of Appeal involved the interpretation and application of the Constitution. In addition, he submits that in his grounds of appeal before this court, he seeks to have this court determine; the question of joinder of parties to constitutional petitions; the binding character of Court of Appeal decisions on the High Court; delimitation of boundaries both political and administrative and the question of retrospective application of the National Government Coordination Act, 2012, which issues all involve the application or interpretation of the Constitution.



[12] Further, in response to the preliminary objection raised by the 1st respondent, it is the petitioner's submission that the contention that 'the petition of appeal has not been certified as one involving a matter of general public importance under article 162(4)(b) of the Constitution does not arise. In support of this position, he reiterates that the appeal filed before the court lies as of right within the provisions of article 163(4)(a) of the Constitution and cites this court's decision in *Geoffrey M Asanyo & 3 others v Attorney General* in support of his submissions and prays that the Preliminary Objections be dismissed.

(iii) The 5th respondent's submissions

[13] The 5th respondent in its submissions also submits that this appeal is properly before this court and meets the jurisdictional threshold under article 163(4)(a) of the Constitution. The 5th respondent submits that the issue before the High Court and Court of Appeal involved the interpretation of the delimitation of electoral boundaries as provided for under article 89 of the Constitution and the powers of the Independent Electoral and Boundaries Commission (IEBC) *vis-a-vis* the extent of the jurisdiction of the High Court in disputes around delimitation of boundaries. He therefore argues that various constitutional issues were raised before the Court of Appeal and therefore submits that this court has jurisdiction to hear this appeal. The cases of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another (supra)* and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* were relied on in support of the above submissions.

E. Analysis and Determination

[14] The two preliminary objections before us raise one issue of determination by this court, that is, whether the appeal before us raises a question involving the interpretation or application of the Constitution.

[15] The basis of the preliminary objections is that the appeal does not raise any constitutional issues hence the same fails to qualify as an appeal filed as of right to invoke this court's jurisdiction.

[16] The petitioner and the 5th respondent on the contrary, argue that the appeal is premised upon article 163(4)(a) of the Constitution as it raises issues involving the application and interpretation of the Constitution. The 5th respondent further went on to argue that the appeal revolved around the jurisdiction of the High Court while exercising its power of review under article 89 of the Constitution.

[17] This court has previously set the guiding principles for bringing an appeal before it under article 163(4) (a) of the Constitution in *Gatirau Peter Munya v Dickson Mwenda Kithinji & others* where we stated *inter alia* as follows:

- i. a court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;
- ii. the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them, and only cardinal issues of law or jurisprudential moment, deserve the further input of the Supreme Court;
- iii. the lower court's determination of the issue on appeal must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
- iv. an appeal within the ambit of article 163(4)(a) is to be one founded on cogent issues of constitutional controversy.

[18] Further, in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, Supreme Court Petition No 3 of 2012; [2012] eKLR (*Lawrence Nduttu* case), this court held that the mere allegation



that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within the ambit of article 163(4)(a) of the Constitution. We specifically stated as follows:

“(27) This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation and/or application of the Constitution can be entertained by the Supreme Court.”

[19] Furthermore, in *Peninah Nadako Kiliswa v Independent Electoral & Boundaries Commission (IEBC) & 2 others*, this court found that even in matters originating as judicial review, the issues have to fall under the canopy of article 163 (4)(a). The court then proceeded to set guiding principles which a party must comply with in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review. We stated thus:

“(33) It follows that for an appeal to lie to this court, in a matter originated under judicial review, the issues have to fall under the canopy of article 163(4)(a). As judicial review is concerned with process, but for a case where the process is contested as being unlawful, irrational or procedurally unfair – elements falling within the purview of the rule of law (a constitutional principle)

– the matter cannot lie to the Supreme Court. Hence in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review, the party concerned should comply with certain principles, as follows:

- i. not all Judicial Review matters are appealable to the Supreme Court, as of right;
- ii. it is open to the party concerned to move the court on appeal under article 163(4)(b) of the Constitution, in which case, the normal certification process applies;
- iii. where such an appeal comes under article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;
- iv. the party concerned should 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.”

[20] It is clear from the court record that this petition of appeal arose from High Court Constitutional Petition No 238 of 2015 where the 1st respondent had sought a declaration that the actions of 2nd respondent were in breach of articles 10, 47 and 159 of the Constitution. The High Court (Matio, J) in deciding whether the 2nd respondent had acted within the confines of the law, then considered the provisions of section 4 of the National Government Coordination Act No 1 of 2013 which states that; ‘In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the Constitution in particular, those set out in articles 10, 189, 201(d) and 232.’



The trial judge then went on to analyze whether articles 10, 189, 201(d) and 232 of the Constitution (as the constitutional provisions) and section 4 of the National Government Coordination Act (as the statutory provision) were complied with and found in the negative. In so finding, he noted thus;

“Regarding the issue whether or not the first respondent acted within the confines of the law while creating the

administrative units, section 4 of the [National Government Co-ordination Act](#)^[14] offers the guiding principles. It provides in clear terms that:-“In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the Constitution in particular, those set out in articles 10, 189, 201(d) and 232.

Article 10 (1) of the Constitution provides that “The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.

Sub-article (2) (a) and (c) provides that “The national values and principles of governance include— (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (c) good governance, integrity, transparency and accountability.

Article 189 (1) provides *inter alia* that the Government at either level shall— (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.

From the averments and arguments rendered by the parties, I am not satisfied that the constitutional and statutory provisions outlined above were complied with. In particular, there appears not to have been proper public participation.

- [21] The Court of Appeal on its part, while determining the appeal, went on to analyze the application of section 4 of the National Government Coordination Act by the trial court and went on to find that the 2nd respondent had contravened the provisions of section 4 of the Act as well as articles 10, 189, 201(d) & 232 of the Constitution. It rendered itself as follows:

“Articles 1 and 2 of the Constitution states that all sovereign power belongs to the people of Kenya exercisable only in accordance with the Constitution through delegated authority donated to state organs such as the executive, the legislature and the judiciary. Being the Supreme Law, the Constitution binds all persons and all state organs at both levels of government. It follows therefore that if any state organ does or purports to do an act in a manner which does not fall within the constitutional prescription, then that action would be unlawful and or unconstitutional.

Whereas article 10 of the Constitution provides for national values and principles of governance such as devolution of power, the rule of law, participation of the people, good governance, integrity, transparency and accountability, article 47 provides for fair administrative action, in that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair...The learned Judge while



relying on the guiding principles in section 4 of the National Government Coordination Act and articles 10(1) & (2)(a)(c) and 189(1) of the Constitution was not satisfied that there was proper public participation and held that “there wasn’t any serious engagement with the public as the public had previously expressed their concerns in JR No 120 of 2012 and the court made a determination which was never reviewed, set aside or appealed against.” Consequently, the court found that the constitutional and statutory provisions were not complied with in the creation of the administrative units.”

[22] From the above, it is evidently clear that though section 4 of the National Government Coordination Act was the basis upon which the trial court adjudicated on whether the administrative actions of the 2nd respondent were done within the confines of the law, the provisions of section 4 were founded on the provisions of articles 10, 189, 201(d) & 232 of the Constitution, and it is these constitutional provisions that the 2nd respondent was found to be in breach of.

[23] We therefore find little difficulty in concluding that the issues before the High Court as well as the Court of Appeal involved the interpretation and application of the Constitution. The argument by the 1st and 8th respondents that there was no constitutional issue determined by the courts below is therefore untenable. Having so found, we have no option than to overrule the preliminary objections.

F. Orders

- (i) The preliminary objection by the 1st respondent filed on 25th January 2021 is hereby overruled.
- (ii) The preliminary objection filed on the 3rd March 2021 by the 8th respondent is hereby overruled.
- (iii) Each party shall bear its costs of the objection.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

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M K KOOME

CHIEF JUSTICE & PRESIDENT 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

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W OUKO



JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

