



REPUBLIC OF KENYA



Wamae & 97 others v Barclays Bank of Kenya Limited (Petition 19 (E022) of 2020) [2021] KESC 5 (KLR) (8 October 2021) (Ruling)

Neutral citation: [2021] KESC 5 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 19 (E022) OF 2020
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 8, 2021**

BETWEEN

AGNES WACHU WAMAE & 97 OTHERS APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

(Being a preliminary objection to the Petition of Appeal from the Judgment of the Court of Appeal at Nairobi (Koome (as she then was), Makhandia & Kantai JJ.A.) in Civil Appeal No. 440 of 2018)

Requirements to be met for one to appeal to the Supreme Court as of right in a matter involving the interpretation or application of the Constitution.

Reported by Kakai Toili

Civil Practice and Procedures – appeals – appeals to the Supreme Court – appeals as of right in matters involving the interpretation or application of the Constitution vis-a-vis appeals involving matters of general public importance - what was the distinction between appeals to the Supreme Court as of right in matters involving the interpretation of the Constitution and appeals involving matters of general public importance - what were the requirements to be met for one to appeal to the Supreme Court as of right in a matter involving the interpretation or application of the Constitution - whether the mere invocation of articles of the Constitution entitled one to appeal to the Supreme Court as of right – Constitution of Kenya, 2010, article 163(4)(a) and (b).

Civil Practice and Procedure- preliminary objections – nature of preliminary objections - what was the nature of preliminary objections - whether a jurisdictional question about whether an intended appeal to the Supreme Court involved matters of constitutional interpretation and application could be raised in a preliminary objection - Constitution of Kenya, 2010, article 163(4)(a).

Brief facts

The 1st appellant and 104 other former employees of the respondent filed a claim seeking the re-evaluation and award of their exit packages following a declaration of redundancy. In their claim, the appellants' main contention was that, upon subsequent and proper calculation of their expected exit packages, it was found



that the respondent had not computed and paid to them their correct dues. In interpreting the provisions of section 40(g) of the 2007, the Employment and Labour Relations Court entered judgment in favour of the claimants in the action. That court also found discrimination in terms of section 5(3) of the 2007, in the manner in which the employees were treated. In overturning that decision, the Court of Appeal's judgment turned on the question whether the Employment and Labour Relations Court properly read and construed the provisions of section 40(1)(g) of the Employment Act.

Aggrieved, the appellants filed the instant petition of appeal. The respondents subsequently filed a notice of preliminary objection urging the Supreme Court to dismiss the appeal on among other grounds that: the decision of the Court of Appeal did not involve an issue of interpretation or application of the Constitution of Kenya, 2010 (Constitution) and as a result, an appeal to the Supreme Court as of right did not lie; and in so far as the petition of appeal was based on grounds that the intended appeal raised an issue of general public importance, it was improperly before the Supreme Court, no leave to appeal had been sought or granted by the Court of Appeal and no certification that a matter of general importance was involved had been made in accordance with the law.

Issues

- i. What were the requirements to be met for one to appeal to the Supreme Court as of right in a matter involving the interpretation or application of the Constitution?
- ii. What was the nature of preliminary objections?
- iii. What was the distinction between appeals to the Supreme Court as of right in matters involving the interpretation of the Constitution and appeals involving matters of general public importance?
- iv. Whether the mere invocation of articles of the Constitution entitled one to appeal to the Supreme Court as of right in a matter involving interpretation and application of the Constitution.

Held

1. A preliminary objection consisted of a point of law that had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a *demurrer*. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The point raised in the objection raised a jurisdictional question which, if argued successfully, was capable of disposing of the appeal. Indeed, the other ingredients were also present.
2. It was incompatible to rely on article 163(4)(a) of the Constitution as the basis of the appeal and in the same breath claim that the appeal raised a matter of general public importance on account of conflicting decisions because for the latter, there had to be a certificate granting leave to appeal under article 163(4)(b), while in the former, an appeal was as of right. No certificate was sought or obtained, and indeed the appeal was premised on article 163(4)(a).
3. The appeal had to 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 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 or application of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.
4. The appeal did not meet the conditions required for one to appeal to the Supreme Court as of right in a matter involving the interpretation or application of the Constitution. From the Employment and Labour Relations Court to the Court of Appeal, not a single question on the Constitution was pleaded, canvassed and determined. Indeed, no specific constitutional provisions were presented for interpretation or application.



5. The mere invocation of articles of the Constitution in the pleadings did not in itself avail those provisions for consideration by the court. There was no issue of constitutional controversy before both courts below for either interpretation or application. The appeal did not meet the jurisdictional threshold under article 163(4)(a) of the Constitution.

Preliminary objection allowed; petition of appeal dismissed.

Orders

Petitioner to bear the costs of the respondent.

Citations

Cases

1. *Aviation & allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Civil Appeal 46 of 2013|2014 [eKLR— Cited
2. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* Petition 18 & 20 of 2014 [2014] eKLR— Cited
3. *Gatirau, Peter Munya v Dickson Mwenda & 2 others* Application 5 of 2014 [2014] eKLR— Cited
4. *Joho & another v Shabbal & 2 others* [2014] 1 KLR 111— Cited
5. *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* Civil Appeal 60 of 2013 [2014] eKLR— Explained
6. *Ngoge v Kaparo & 6 others* [2012] 2 KLR 419 — Cited
7. *Nduttu & 6000 others v Kenya Breweries Ltd & another*[2012] 2 KLR 804 — Explained
8. *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* EA [1969] 696 — Explained
9. *Owners of Motor Vessel 'Lillian S'v Caltex Oil (Kenya) Limited* [1989] KLR 1— Explained

Statutes

1. Constitution of Kenya, 2010 articles 163(4)(a)(b)— Interpreted
2. Employment Act, 2011 (Act No 11 of 2011) sections 5(3); 40(1)(g) — Interpreted
3. Supreme Court Act, 2011(Act No 7 of 2011) section 15 — Interpreted
4. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 9 (1) — Interpreted

Advocates

None mentioned

RULING

A. Introduction

- 1 Before the court is a petition of appeal dated 2nd December, 2020 pursuant to article 163(4) of the Constitution of Kenya, section 15 of the [Supreme Court Act](#), and rules 9(1) of the Supreme Court Rules 2012. It challenges the determination of the Court of Appeal (Koombe (as she then was), Makhandia & Kantai, JJA) in Civil Appeal No 440 of 2018, in which the decision of the Employment and Labour Relations Court (Nduma, J) in ELC Cause No 806 of 2011 was overturned.

B. Background

- 2 The first appellant, Agnes Wachu Wamae, and 104 other former employees of the respondent filed a claim seeking the re-evaluation and award of their exit packages following a declaration of redundancy pursuant to a circular of 24th December, 2010. In the circular, the respondent's Managing Director informed those affected alongside all other Bank employees that, "due to pressure on margins, the Bank had embarked on a cost review exercise reviewing all key cost items in the Bank, including staff costs."



3 In their claim, the appellants' main contention was that, upon subsequent and proper calculation of their expected exit packages, it was found that the respondent had not computed and paid to them their correct dues. According to them, the erroneous payments were made as a result of –

“Fraudulent misrepresentation, concealment and/or non-disclosure of material facts, thereby resulting in them being paid reduced amounts, contrary to the *Employment Act* and the Law, which action was illegal, null and void.”

4 The trial court (Nduma, J) isolated three issues, as follows, for determination;

- “(i) Are the claimants entitled to severance pay calculated at every completed year of service at whatever rate it is computed at?
- ii. Are the claimants entitled to payment of the full annual leave entitlement in respect of the year 2011.
- ii. From what time should interest be calculated in the event of an award in this matter”.

5 In interpreting the provisions of section 40(g) of the *Employment Act* 2007, which, in his opinion, was the relevant applicable law, the learned Judge entered judgment in favour of the 105 claimants in the action. He declared that all the claimants had worked for more than 16 years and were deprived of large amounts of their dues, to which they were entitled. He also found discrimination in terms of section 5(3) of the *Employment Act* 2007, in the manner in which the employees were treated.

6 In overturning that decision, the Court of Appeal's judgment turned on the question whether the learned Judge properly read and construed the provisions of section 40(1)(g) of the Act. The court found fault in the decision, observing that, having declared redundancies, the learned judge ought to have found that each of the claimants were only entitled to payment of 15 days' salary for each year of service; that in finding that they were entitled to be paid 1 ½ months' salary for each year served, capped at 16 years, the Judge erred as his decision exceeded what the law allowed.

7 The appellate court also found that there was no discrimination in the way the respondent undertook the restructuring exercise; and that no provision of the law, not even section 5 of the *Employment Act*, was breached by respondent in the process.

8 It was that decision that triggered the filing of the present petition of appeal in this court.

C. Preliminary Objection

9. As the hearing of the appeal was pending, the respondents filed a notice of preliminary objection dated 21st January, 2021, urging the court to dismiss the appeal on the following grounds:

- “(i) The decision of the Court of Appeal from which the petition is brought does not involve an issue of interpretation or application of the Constitution of Kenya, 2010. As a result, an appeal to the Supreme Court as of right does not lie.
- (ii) In so far as the petition of appeal is based on grounds that the intended appeal raises an issue of general public importance, it is improperly before the Supreme Court, no leave to Appeal having been sought or granted by the Court of Appeal in accordance with article 163(4)(b) of the Constitution of



Kenya 2010, and no certification that a matter of general importance (sic) is involved having made in accordance with the law.

- (ii) In so far as the petition of appeal seeks a review of the integrity, fairness and legitimacy of the proceedings of the Court of Appeal, it is bad in law as the Court of Appeal is not a tribunal over which this Honourable Court has powers of Judicial Review”.

D. Parties’ Respective Submissions

i. The respondent

10. In support of the objection, the respondent argues that the appellants have no right to appeal to this court as the dispute did not involve issues of interpretation or application of the Constitutions; that the citing of numerous articles of the Constitution in the appeal, without demonstrating how they were interpreted or applied by the two superior courts below is in vain; that the decisions of the courts below did not at all deal with the interpretation or application of any of the provisions of the Constitution; that without jurisdiction, as decreed in the *locus classicus* *Owners of Motor Vessel ‘Lillian S’v Caltex Oil (Kenya) Limited*, Civil Appeal No 50 of 1989, [1989] KLR 1, we down our tools, and declare that the Appeal is an abuse of the process of the court.
11. The respondent has asked us to be guided, in determining whether article 163(4)(a) is available to the appellant, by our decisions in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another*, Sup Ct Petition No 3 of 2012; [2012] eKLR and *Aviation & allied Workers Union of Kenya v Kenya Airways Limited & 3 Others*, Petition 4 of 2015 [2017] eKLR.
12. On the appellant’s contention that there are conflicting decisions of the Court of Appeal on similar issues which require this court’s final settlement, as a matter of general public importance, the respondent has responded that the court’s jurisdiction has not been properly invoked as required by article 163(4)(b) of the Constitution of Kenya, there being no certificate either by the appellate court or this court.
13. Consequently, the respondent pleads that the objection be upheld and the petition of appeal be dismissed with costs.

ii. The petitioners

14. The appellant, on the other hand, has submitted that, contrary to the objection, the petition of appeal is not premised on article 163(4)(b), but on the interpretation and application of the Constitution by virtue of article 163(4)(a), and specifically raising the question of application and interpretation of the rights guaranteed by articles 25, 27, 48 and 50 of the Constitution. That being the case, the Appellant submits that no leave or certificate was necessary to bring the appeal.
15. It is further contended that the issues in contest revolved around the interpretation and application of the “law”, meeting the criteria in article 163(4)(a); and therefore the notice of preliminary objection is misconceived and is for rejection, as in any case, the objection is not on pure question of law but on contested fact, hence not meeting the requirements laid down by the Court in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others*, [2014] eKLR. In support of the submissions, and to persuade us, the following decisions were cited: Lawrence Nduttu Case (*supra*), *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, Petition No 18 of 2014 as consolidated 20 of 2014, [2014] eKLR, and Hassan Ali Joho (*supra*), among other authorities.



16 In the end, the appellant has prayed that the court finds that the appeal is properly brought in accordance with article 163(4)(a) and to dismiss the preliminary objection with costs.

E. Analysis and Determination

17 The objection has been taken on the jurisdiction of the court to entertain the appeal, on the ground that it does not meet any or the two limbs of article 163(4)(a) and (b) of the Constitution.

18 The principles established by the time-honoured, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696, cited with approval by this court in *Hassan Ali Jobo* case (*supra*) are settled that;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

19 We have no doubt at all that the point raised in the objection satisfies the above strictures. But of significance, it raises a jurisdictional question which, if argued successfully, is capable of disposing the appeal. Indeed, the other ingredients are also present.

20 The petition of appeal lodged in the registry on 2nd December, 2020, is expressed to be brought under article 163(4)(a) of the Constitution and identifies two points as the basis; that it raises questions of constitutional interpretation and application and secondly, that there are conflicting decisions of the Court of Appeal on a point of law which would require this court to settle. The case cited to contradict the decision of the Court of Appeal in the matter giving rise to this appeal is *Telkom Kenya Limited v John Ochanda* [2013] eKLR, where it was held that payment of severance pay must cover each year of an employee's service. It is incompatible to rely on article 163(4)(a) as the basis of the appeal and in the same breath claim that the appeal raises a matter of general public importance on account of conflicting decisions, because for the latter there has to be a certificate granting leave to appeal under article 163(4)(b), while in the former, an appeal is as of right. It is conceded that no certificate was sought or obtained, and that indeed the appeal is premised on article 163(4)(a).

21 Having reached that conclusion, we must now consider the principles that guide the court on the delineation of its jurisdiction under that provision, which are now settled by a long line of authorities, such as *Hassan Ali Jobo*, *Peter Oduor Ngoge v Hon Francis Ole Kaparo*, [2012] eKLR, [Gatirau Peter Munya v Dickson Mwenda & 2 Others](#), [2014] eKLR and *Lawrence Nduttu* (*supra*). Those principles were summarized in the latter case as follows;

“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 or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a).”



22. Applying this test to the matter under our review, we entertain no doubt that the appeal does not meet the conditions articulated in these authorities. From ELRC to the appellate court, not a single question on the Constitution was pleaded, canvassed and determined. Indeed, no specific constitutional provisions were presented for interpretation or application.
23. The case brought before the ELRC, as summarized by the learned judge was simply whether the appellants were entitled to severance pay calculated at every completed year of service following the respondent's declaration of their redundancy. The only provision of the law whose interpretation was called forth was section 40(1)(g) of the *Employment Act* . Judgment in their favour was entered pursuant to the interpretation of that provision.
24. The appellate court, likewise, in setting aside the judgment of the ELRC, based its decision purely under section 40(1)(g) of the *Employment Act* . We have gone through the entire judgment of the appellate court and confirm that, not once, has the word constitution been mentioned.
25. Before this court, in the petition of appeal, the appellants have now introduced several provisions of the Constitution, which they argue, fell for interpretation by the two superior courts below. We must remind them that, the mere invocation of articles of the Constitution in the pleading, does not in itself avail those provisions for consideration by this court. We arrive at the inevitable conclusion that there was no issue of constitutional controversy before both courts below for either interpretation or application. The appeal does not meet the jurisdictional threshold under article 163(4)(a) of the Constitution.

F. Final Orders

26. Consequently, we make the following orders:
 - i. The preliminary objection dated 2nd December, 2020 is hereby sustained.
 - ii. The Petition of Appeal No 19 (E022) of 2020 is hereby dismissed.
 - iii. The petitioner shall bear the costs of the respondent.

It is so Ordered.

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

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P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT



.....
I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....
W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

