



REPUBLIC OF KENYA



KENYA LAW
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**Sonko v Clerk County Assembly of Nairobi City & 11 others (Application
14 (E022) of 2021) [2021] KESC 14 (KLR) (8 November 2021) (Ruling)**

Neutral citation: [2021] KESC 14 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 14 (E022) OF 2021
SC WANJALA, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 8, 2021**

BETWEEN

MIKE MBUVI SONKO APPLICANT

AND

CLERK COUNTY ASSEMBLY OF NAIROBI CITY 1ST RESPONDENT

SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

CLERK OF THE SENATE 4TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA 5TH RESPONDENT

SENATE OF KENYA 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

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

ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNOR

COMMITTEE 9TH RESPONDENT

**BENSON MUTURA THE ACTING GOVERNOR NAIROBI 10TH
RESPONDENT**

ANNE KANANU THE DEPUTY GOVERNOR 11TH RESPONDENT

OKIYA OKOITI OMTATAH 12TH RESPONDENT

(Being an application for an order of injunction pending the hearing and determination of an appeal against the Ruling and Order of the Court of Appeal at Nairobi (W. Karanja, J. Mohammed & Lesit, JJ.A) dated 22nd October, 2021 in Civil Application No. E228 of 2021)



The Supreme Court does not have jurisdiction to determine a matter that is yet to be determined by the Court of Appeal.

Reported by Ribia John

***Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction to determine appeals as of right – where a matter had not been determined by the Court of the Appeal - whether the Supreme Court had the jurisdiction to determine a matter that was yet to be heard and determined by the Court of Appeal – Constitution of Kenya, 2010, article 163(4)(a).*

Brief facts

The applicant filed the instant appeal and contended that the application was squarely within the Supreme Court’s jurisdiction in terms of article 163(4)(a) of the Constitution and sections 3(a) and 3(b) of the Supreme Court Act. Further, that the intended appeal would be rendered nugatory unless a temporary order of injunction was granted as he stood to be unfairly, unlawfully, unprocedurally and oppressively deprived of his position as Governor of Nairobi City County. The 1st and 3rd respondents filed preliminary objections on grounds that the instant application was incompetent and ought to be struck out for the reasons that, neither the petition nor the application raised any question of constitutional interpretation or application as the main dispute was yet to be determined by the Court of Appeal.

Issues

Whether the Supreme Court had the jurisdiction to determine a matter that was yet to be heard and determined by the Court of Appeal.

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. The appeal before the Court of Appeal was yet to be heard and determined and was scheduled for arguments. There was no substantive determination of a constitutional question by the Court of Appeal to warrant the invocation of the Supreme Court’s jurisdiction under article 163(4)(a) or of its inherent powers under rule 31 of the Supreme Court Rules, 2020.
2. The appeal before the Court of Appeal was yet to be heard and determined. An application so tangential, could not be predicated upon the terms of article 163(4)(a) of the Constitution. Any square involvement of the Supreme Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal.
3. Without substantive determination of, and in the absence of a judgment of the Court of Appeal in the appeal pending before it, the application was premature and did not meet the threshold of article 163(4)(a) of the Constitution. The court lacked jurisdiction to entertain the application.

Application dismissed.

Orders

- i. *The objections by the 1st and 3rd respondents in respect of the notice of motion were sustained.*
- ii. *The notice of motion dated October 23, 2021 was incompetent and was struck out.*
- iii. *Costs awarded to the 1st, 3rd, 7th and 11th respondents, the only parties who had participated in the application.*

Citations

Cases



1. *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others* Petition No 22 of 2014; [2015] eKLR — (Followed)
2. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Application 10 of 2018; [2018] eKLR — Followed
3. *Clement Kungu Waibara v Annie Wanjiku Kibeh & another* (Sup Ct. Application 31 of 2020 [2020] eKLR) — Followed
4. *Teachers Service Commission v Kenya National Union of Teachers & 3 Others* ([2015] eKLR) — Followed

Statutes

1. Constitution of Kenya, 2010 — article 163(4)(a)(b) — Interpreted
2. Court of Appeal rules (2010 cap 9 Sub Leg) — Rule 5(2)(b) — Interpreted
3. Supreme Court Act (No. 7 of 2011) — section 3(a), 3(b), 21(2), 24(1) — Interpreted
4. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3(a), 3(b) — Interpreted
5. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 23, 31, 33(5) — Interpreted

Advocates

None mentioned

RULING

- [1] We have perused and carefully examined the notice of motion taken out by the applicant on 23rd October, 2021 and filed on 25th October, 2021, which is expressed to be brought under the provisions of article 163(4)(a) of the *Constitution*, sections 3(a), 3(b), 21(2) and 24(1) of the *Supreme Court Act* (No 7 of 2011) and the repealed rules 23 and 33(5) of the *Supreme Court Rules, 2012*, as well as the inherent power of the Supreme Court. The applicant seeks that an order of temporary injunction be issued to restrain the 9th respondent from swearing in the 11th respondent as the Governor of Nairobi City County and to prohibit her from occupying the office of the Governor, pending the hearing and final determination of the applicant's intended appeal; and
- [2] Upon reading the affidavit by the applicant, Hon. Mike Mbuvi Sonko, sworn on 22nd October 2021 in support of the motion; and
- [3] Upon considering the written submissions by the applicant dated and filed on 25th October, 2021 wherein the applicant contends that the application is squarely within this court's jurisdiction in terms of article 163(4)(a) of the Constitution and sections 3(a) and 3(b) of the *Supreme Court Act*. Further, that the intended appeal will be rendered nugatory unless a temporary order of injunction is granted as he stands to be unfairly, unlawfully, unprocedurally and oppressively deprived of his position as Governor of Nairobi City County; and
- [4] Upon considering the written submissions by the 3rd respondent dated 3rd November, 2021 and filed on 4th November, 2021 to the effect that both the Petition and the instant application are incompetent and ought to be struck out for the reasons that, neither the Petition nor the application raises any question of constitutional interpretation or application as the main dispute is yet to be determined by the Court of Appeal; that the matter has not been certified as one of general public importance; that this court lacks jurisdiction to entertain or issue orders in relation to Rulings arising from applications under rule 5(2)(b) of the *Court of Appeal Rules*; and that the Petition and this application are, for those reasons, fatally defective, incompetent and lack merit as they establish no grounds warranting this court to interfere with the exercise of discretionary jurisdiction of the Court of Appeal under rule 5(2)(b); and



- [5] Upon considering the replying affidavit sworn on 4th November 2021 by the 11th respondent in opposition to the application; and
- [6] Upon considering the written submissions by the 11th respondent dated 4th November 2021 and filed on even date, wherein she contends that the applicant has no *prima facie* case to warrant the grant of conservatory orders; and that the applicant has not demonstrated how the intended appeal will be rendered nugatory if an injunction is not granted, and in the event the appeal succeeds; that as a matter of fact, should the appeal succeed after the swearing in of the 11th Respondent, no prejudice will be occasioned to the applicant as he will simply be reinstated as the Governor after the revocation of the 11th respondent's appointment as the Governor; and
- [7] Upon considering the notice of preliminary objection filed by the 1st respondent on 3rd November, 2021 challenging the jurisdiction of the court to entertain the present application and the Appeal, as well as the 3rd respondent's similar objection contained in the written submissions; and
- [8] Noting that the Court of Appeal declined to grant the orders for the reason that there was no nexus between the orders sought in the application under rule 5(2)(b) of its rules and the Petition before the High Court, as the issue of the swearing in of the 11th respondent was neither before the High Court nor was it considered and determined by the High Court in its judgment.
- [9] And bearing in mind that on 25th October, 2021, the single judge on behalf of the Court certified this application as urgent and granted a temporary order of injunction for a period of 14 days, restraining the 9th respondent from swearing in the 11th respondent as the Governor of Nairobi City County and also prohibiting her from assuming the office or otherwise occupying the office of Governor, Nairobi City County, pending *inter partes* hearing of the application.
- [10] Aware that those temporary orders have lapsed today, 8th November 2021, and parties having filed and exchanged written submissions upon which we now consider and determine this Application pursuant to rule 31 of the [Supreme Court Rules, 2020](#); and
- [11] Further noting that the 7th respondent has lodged a notice of preliminary objection dated 27th October 2021 and filed on 28th October 2021 in opposition to the main Petition of Appeal on the grounds that this court lacks jurisdiction to hear and determine the petition as it arises from a decision of the Court of Appeal made in exercise of its discretionary powers under rule 5(2)(b) of the [Court of Appeal Rules](#); that the Appeal does not involve any issues of constitutional interpretation and application contrary to the provisions of article 163(4)(a) of the [Constitution](#) and; and that, in any event the appeal has not been certified as one involving a matter of general public importance as required by article 163(4)(b) of the Constitution; and
- [12] Aware that parties have been invited to appear before the Deputy Registrar of the court on 15th November, 2021 for directions on the hearing of the main Appeal and the notice of preliminary objection; and
- [13] Furthermore, noting that, as the substantive appeal before Court of Appeal is yet to be heard and decided on merits, there is no determination of any constitutional question by the Court of Appeal so far; and recalling that this appeal emanates from an interlocutory ruling, and having carefully considered the application, submissions and the relevant authorities;

We now therefore opine as follows:

14. From the objections raised by the 1st and 3rd respondent contesting this court's jurisdiction to entertain this application, the replying affidavit and written submissions of the 11th respondent, the single issue in the motion for determination is whether it meets the threshold of article 163(4)(a) of



the Constitution. Put differently, in form of a question, does the court have jurisdiction to determine this application?

- [15] We note that the appeal before the Court of Appeal is yet to be heard and determined and is indeed scheduled for arguments on 22nd November 2021. That being so, there is no substantive determination of a constitutional question by the Court of Appeal to warrant the invocation of the court's jurisdiction under article 163(4)(a) or of its inherent powers under rule 31 of the rules of the court at this stage.
- [16] In the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 Others*, [2015] eKLR, the court has, with finality settled the question of its jurisdiction to hear appeals arising from interlocutory orders of the Court of Appeal made pursuant to rule 5(2)(b) of the *Court of Appeal Rules* when it rendered itself as follows in this passage:

[35] The application before us contests the exercise of discretion by the appellate court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date of 22nd September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

[36] In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court. We in this regard, again embrace the perception of Chief Justice Marshall (1755–1835) at the U.S Supreme Court, in *Cohens v Virginia*, 19 US 264 (1821):

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should...We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution...” (Our Emphasis)

This dictum has been followed in subsequent decisions such as *Basil Criticos v Independent Electoral and Boundaries Commission & 2 Others*, *Sup Ct Petition No 22 of 2014 [2015] eKLR*; *Clement Kungu Waibara v Annie Wanjiku Kibeh & another Sup Ct Application 31 of 2020 [2020] eKLR*; and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others Sup Ct Application 10 of 2018 [2018] eKLR*.

- [17] The upshot of our consideration of the notice of motion dated 23rd October 2021, guided by these decisions, is that, without substantive determination of, and in the absence of a judgment of the Court of Appeal in the appeal pending before it, this application is premature and does not meet the threshold of article 163 (4)(a) of the Constitution.

The court, we conclude, for that specific reason, lacks jurisdiction to entertain the application.

- [18] Accordingly, we make the following Orders:

i. The objections by the 1st and 3rd respondents in respect of the notice of motion are sustained.



- ii. The notice of motion dated 23rd October 2021 is, for the reasons given, incompetent and is hereby struck out.
- iii. We award costs to the 1st, 3rd, 7th and 11th respondents, the only parties who have participated in this application.

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

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

**I certify that this is a
true copy of the original**

REGISTRAR

SUPREME COURT OF KENYA

