



**Coast Professional Freighters Limited v Oganda & 2 others (Petition
4 of 2017) [2020] KESC 48 (KLR) (30 April 2020) (Ruling)**

Coast Professional Freighters Limited v Welsa Bange Oganda & 2 others [2020] eKLR

Neutral citation: [2020] KESC 48 (KLR)

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

PETITION 4 OF 2017

**DK MARAGA, CJ, PM MWILU, DCJ & V-P, MK
IBRAHIM, NS NDUNGU & I LENAOLA, SCJJ**

APRIL 30, 2020

BETWEEN

COAST PROFESSIONAL FREIGHTERS LIMITED APPELLANT

AND

WELSA BANGE OGANDA 1ST RESPONDENT

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION 2ND
RESPONDENT**

NADHIA LIMITED 3RD RESPONDENT

*(Being an appeal from the Judgment of Court of Appeal at Mombasa dated 17th
February 2017 in Civil Appeal No.18 of 2016, Makhandia, Ouko and M’Inoti, JJA)*

Parties should specify the jurisdiction they are invoking in approaching the Supreme Court

In appeals before the Supreme Court parties should specify the jurisdiction they are invoking in approaching the Supreme Court. Where an appeal did not require the interpretation and application of the Constitution and where the superior courts below had also not done so, then no appeal lied as a matter of right under article 163(4) (a) of the Constitution. The instant appeal was one such appeal and it was deemed frivolous and vexatious as the appellant, well represented by counsel, ought to have known that it had no right to approach the Supreme Court if it had looked at its dispute from the prism of the Constitution and not mere displeasure and dissatisfaction with the decisions of both the High Court and the Court of Appeal.

Reported by Chelimo Eunice

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution, being an appeal as a matter of right and under article 163(4)(b) of the Constitution, being an appeal involving a matter of general public importance – where a party failed to address the jurisdictional question *ab initio* - whether a dispute on protection of the right to property necessary involved the interpretation



and application of the Constitution – whether the Supreme Court would assume jurisdiction where an appeal did not require the interpretation and application of the Constitution and where the superior courts below had also not done so – Constitution of Kenya, 2010, article 163 (4) (a) and (b).

Brief facts

The respondents raised objections to the hearing of the appellant’s petition of appeal on the ground that the court had no jurisdiction to hear and determine the appeal and instead, the same ought to be struck off with costs. In response to the preliminary objections, the appellant submitted that the appeal was properly before the court because the dispute revolved around the right to property and involved the interpretation and application of the Constitution.

Issues

- i. What was the fate of an appeal where a party failed to address the jurisdictional question *ab initio*?
- ii. Whether the Supreme Court would assume jurisdiction where an appeal did not require the interpretation and application of the Constitution and where the superior courts below had also not done so.

Held

1. The Supreme Court’s jurisdiction was circumscribed by the Constitution so that not every matter qualified as an appeal to the Supreme Court. It behoved every party to state, with a measure of specificity and precision, what jurisdiction it was invoking in approaching the Supreme Court. It was not for the court to peruse an appeal, speculate on what jurisdiction it had to assume, then proceed to determine such an appeal on that assumption. Where a party failed to address the jurisdictional question *ab initio* and which gave it standing before the court, the appeal was one for striking out without further ado. That position was true of the instant appeal.
2. Nowhere did the High Court make any attempt at interpreting or applying the Constitution since no such issue arose for its determination. The Court of Appeal also did not address any constitutional issue as was the expectation of article 163(4)(a) of the Constitution.
3. Where an appeal did not require the interpretation and application of the Constitution and where the superior courts below had also not done so, then no appeal lied as a matter of right under article 163(4)(a) of the Constitution. The instant appeal was one such appeal and it was deemed frivolous and vexatious as the appellant, well represented by counsel, ought to have known that it had no right to approach the Supreme Court if it had looked at its dispute from the prism of the Constitution and not mere displeasure and dissatisfaction with the decisions of both the High Court and the Court of Appeal.

Preliminary objections by the 1st, 2nd and 3rd respondents upheld, appellant’s petition of appeal struck off, with the appellant paying costs of the proceedings before the Supreme Court.

Citations

Statutes

None referred to

Advocates

The Appellant shall pay costs of the proceedings be



RULING

A. Introduction

1. Sometime in 1998, the 1st Respondent, Welsa Bange Oganda, filed a suit at the High Court in Mombasa (HCCC No.58 of 1998). After what was described by the trial Judge, Kasango J, as “a long journey”, Judgment was eventually delivered on 21st August 2015 with the following orders being issued:
 - a) The alleged auction of 17th September 1997 of property Mombasa/Block X/219 is hereby declared null and void.
 - b) The title Mombasa/Block X/219 shall hereof be rectified to revert back to the Plaintiff, Welsa Bange Oganda. In that regard, Coast Professional Freighters Limited shall vacate Mombasa Block X/219 within 30 days from today’s date failing which, eviction orders shall issue.
 - c) There shall be Judgment jointly and severally against Industrial and Commercial Development Corporation and Coast Professional Freighters Limited for the Plaintiff for Kshs.8 Million.
 - d) 1st to the 3rd Defendants shall pay the Plaintiff’s costs of this suit.
2. On appeal, the Court of Appeal, having re-evaluated the evidence and applying the applicable law to the same, dismissed the appeal with costs to the 1st Respondent. That decision triggered the present appeal.

B. Preliminary Objections

3. We are now confronted with preliminary objections as follows:
 - i) The first by the 1st Respondent dated 13th March 2017; and
 - ii) The second by the 2nd and 3rd Respondents dated 2nd March 2018.
4. All the three parties have raised objections to the hearing of the Petition of Appeal on the ground that, whereas the Appellant has not indicated what jurisdiction of this Court it is invoking, the appeal is not a proper one as a matter of right under Article 163(4)(a) of the Constitution nor does it raise a matter of general public importance as is the expectation of Article 163(4)(b) of the Constitution. Consequently, it is urged, this Court has no jurisdiction to hear and determine the appeal and instead, the same should be struck off with costs.
5. In response to the Preliminary Objections, the Appellant has submitted that the dispute revolves around Article 40 of the Constitution which protects the right to property and whereas the Petition of Appeal is not grounded on Article 163(4)(b) on matters of general public importance, the same is properly before this Court as one involving the interpretation and application of the Constitution under Article 163(4)(a). To that extent therefore, it is urged that the Appeal is properly before this Court as a matter of right and should be determined on the merits.

C. Analysis And Determination

6. Since the Appellant has admitted that Article 163(4)(b) is inapplicable to its appeal, it not being one involving a matter of general public importance, we shall only interrogate the applicability of Article 163(4)(a) i.e. whether the appeal is one filed as a matter of right under the said Article and requiring the interpretation and application of the Constitution by this Court.



7. In doing so, we must from the onset state that, we shall not tire in reminding parties that this Court's jurisdiction is circumscribed by the Constitution itself so that not every matter qualifies as an appeal to us. It therefore behoves every party to state, with a measure of specificity and precision, what jurisdiction it is invoking in approaching this Court. It is not for the Court to peruse an appeal, speculate on what jurisdiction it should assume, then proceed to determine such an appeal on that assumption. Where a party therefore fails to address the jurisdictional question ab initio and which therefore gives it standing before this Court, the appeal is one for striking out without further ado. That position is true of the present appeal.
8. The above finding notwithstanding, we deem it fit to state with clarity whether indeed the appeal is properly before us under Article 163(4)(a) of the Constitution. Does it require the application and/or interpretation of the Constitution?
9. Our perusal of the record at the High Court and Court of Appeal would show that as shown above, Kasango J was dealing with the question whether, the 2nd Respondent, having decided to exercise its rights as chargee over L.R. No. Mombasa/Block X/219 registered in the name of the 1st Respondent and who had allegedly failed to repay a loan he had taken from it, breached its agreement with the latter.
10. As a corollary, the learned Judge determined the question whether, in the sale (at a public auction) and transfer of the 1st Respondent's property aforesaid to the Appellant, fraud was committed by the Appellant and the 2nd Respondent.
11. It is our view in that context that, nowhere in her Judgment did Kasango J make any attempt at interpreting or applying the Constitution because as can be seen by the final orders she issued (para 1 of this Ruling), no such issue arose for her determination. What of the Court of appeal?
12. In their Judgment, the learned Judges of Appeal distilled the following issues for determination:
 - i) Whether or not the High Court (Commercial Division) had jurisdiction to hear and determine the dispute;
 - ii) Whether the exercise of statutory power of sale by the 2nd and 3rd Respondents was proper and or lawful;
 - iii) Whether the Appellant participated in the public auction held on 17th September 1997;
 - iv) If the answer to (iii) is in the affirmative, whether the Appellant emerged or was declared the successful bidder in the auction; and,
 - v) Whether the award of Kshs.8 Million to the 1st Respondent, jointly and severally, against the Appellant and the 2nd Respondent was sustainable.
13. In addressing all the above questions, the Court of Appeal did not once address any constitutional issue as is the expectation of Article 163(4)(a) i.e. the requirement for the interpretation and application of the Constitution to trigger our jurisdiction thereof.
14. Without belabouring the point, this Court's decisions on the issue confronting us and as enunciated in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, *Hassan Ali Joho and Anor v Suleiman Said Shalabal & 2 Others* [2014] eKLR; *Aviation and Allied Workers Union of Kenya v Kenya Airway Ltd & 3 Others* [2017] eKLR; are succinct in making the point that, where an appeal does not require the interpretation and application of the Constitution; and where the superior Courts below have also not done so, then no appeal lies as a matter of right under Article 163(4)(a) of the Constitution. The present appeal is one such appeal and we deem it frivolous and vexatious as it is



obvious to us that the Appellant, well represented by Counsel, ought to have known that it has no right to approach this Court if it had looked at its dispute from the prism of the Constitution and not mere displeasure and dissatisfaction with the decisions of both the High Court and the Court of Appeal.

15. What of costs? Having found that the appeal is so frivolous that it ought not to have been filed in the first place, it follows that the Appellant shall pay costs to all the Respondents.

D. Disposition

16. Consequent upon our findings above, the following are our final Orders:
- i) The Preliminary Objections by the 1st, 2nd and 3rd Respondents are hereby upheld.
 - ii) The Petition of Appeal herein is struck off.
 - iii) The Appellant shall pay costs of the proceedings before this Court to all the Respondents.
17. It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2020.

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

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

