



**Cordisons International (K) Limited v Chairman National Land Commission &
44 others (Petition 14 of 2019) [2020] KESC 50 (KLR) (30 April 2020) (Ruling)**

Cordisons International (K) Limited v Chairman National Land Commission & 43 others [2020] eKLR

Neutral citation: [2020] KESC 50 (KLR)

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

PETITION 14 OF 2019

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

APRIL 30, 2020

BETWEEN

CORDISONS INTERNATIONAL (K) LIMITED APPELLANT

AND

CHAIRMAN NATIONAL LAND COMMISSION 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

**DIRECTOR OF PHYSICAL PLANNING, MINISTRY OF PHYSICAL
PLANNING 3RD RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

KENWIND (K) LIMITED 5TH RESPONDENT

COUNTY GOVERNMENT OF LAMU 6TH RESPONDENT

LIMUS GACHOKI GITHI & 38 OTHERS 7TH RESPONDENT

*(Being an Appeal from the Judgment of the Court of Appeal at
Malindi dated 7th March 2019, Visram, Karanja and Musinga, JJA)*

Requirements for filing an appeal at the Supreme Court

The respondents filed preliminary objections on the court's jurisdiction to hear and determine the appeal. The preliminary objections were based on the grounds that the appeal did not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution and that the appeal had not been certified as one involving a matter of general public importance under article 163(4)(b) of the Constitution. The court highlighted requirements for filing an appeal at the Supreme Court.

Reported by Kakai Toili



Civil Practice and Procedure – appeals – appeals to the Supreme Court – requirements – specifying the appellate jurisdiction - where it was alleged a matter was of general public importance - where it was alleged that a court took a trajectory of constitutional interpretation or application in determining a case - what were the factors to consider in determining whether a court took a trajectory of constitutional interpretation or application - what was the purpose of specifying the appellate jurisdiction when filing an appeal - Constitution of Kenya, 2010, article 163.

Brief facts

The appellant contended that it had legitimate interest in the development of a wind power project on a parcel of land and having secured all necessary approvals, it was granted a leasehold interest over the subject land by the 6th respondent. The appellant further contended that it discovered that part development plans published in the Kenya Gazette as well as a letter of allotment had been issued to the 5th respondents in a bid to defeat the appellant's interest. The appellant thus filed a suit at the Environment and Land Court seeking orders, *inter alia*, to quash the decision contained in the letter of allotment among other orders. The Environment and Land Court dismissed the suit and thus aggrieved by the decision the appellant filed an appeal to the Court of Appeal. The Court of Appeal the appeal dismissed the appeal.

Aggrieved by the Court of Appeal's decision, the appellant filed the instant appeal. Before the appeal could be heard, the 5th, 6th and the 7th – 38th respondents filed preliminary objections on the court's jurisdiction to hear and determine the appeal. The preliminary objections were based on the grounds that the appeal did not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution of Kenya, 2010 (Constitution) and that the appeal had not been certified as one involving a matter of general public importance under article 163(4)(b) of the Constitution.

Issues

- i. What were the requirements for one to lodge an appeal to the Supreme Court as a matter of general public importance?
- ii. What was the purpose of specifying the appellate jurisdiction of the Supreme Court when filing an appeal?
- iii. What were the factors to consider in determining whether a court in determining a matter took a trajectory of constitutional interpretation or application?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163

4. Appeals shall lie from the Court of Appeal to the Supreme Court—

1. *as of right in any case involving the interpretation or application of this Constitution; and*
2. *in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).*

5. A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Held

1. For an appeal to lie to the court under article 163(4)(b) of the Constitution, articles 163(4) and (5) had to be complied with. From the record, there was no certification of the matter as being of general public importance as was required by the Constitution obtained by the appellant and so it could not be that the appeal was one filed under article 163(4)(b) even if the appellant had expressed that it had done so, and it had not.
2. The appellant had not indicated what jurisdiction it was invoking in approaching the court. It was not for the court to speculate on jurisdiction and assign to each appeal a jurisdiction not specifically invoked by a party appealing a Court of Appeal judgment. An appellant was expected to specify such



- jurisdiction with clarity to enable both the court and the opposing party to know what case was before them.
3. What was before the Environment and Land Court was a judicial review notice of motion in which orders of prohibition, *mandamus* and *certiorari* were being sought. The main issue in contention was the legality or otherwise of a letter of allotment dated February 7, 2017 issued by the 2nd respondent to the 5th respondent and whether conversely, the 2nd respondent ought instead to have issued land lease instruments to the appellant over the disputed parcel of land. Where specific constitutional provisions could not be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate was that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, could properly be said to have taken a trajectory of constitutional interpretation or application.
 4. The assumption of a task that transcended not just the reference to the rich generality of constitutional principle, it was a task that had to focus upon specific clauses of the Constitution, and called for the attribution of requisite meaning, tenor and effect.
 5. From both the judgments of the Environment and Land Court and the Court of Appeal, neither court was called upon to, specifically and directly put the meaning, tenor and effect of any article of the Constitution into their reasoning before resolving the issues placed before them. The fact that in doing so, reference was made to articles 47, 62 and 67 of the Constitution for example would not qualify in the context of the dispute between the parties to bring the instant appeal within the purview of article 163(4)(a) of the Constitution. The dispute was simple, whether the allotment letter issued to the 5th respondent was lawful or not and, whether the judicial review orders of prohibition, *mandamus* and *certiorari* were to issue. The administrative action in question never once took a proper constitutional trajectory.
 6. Whereas the preliminary objections would have been sustained for failure to state what specific provision of the Constitution the appellant was invoking, neither article 163(4)(a) and (b) of the Constitution could be properly invoked.

Preliminary objections by the 5th, 6th, 7th – 38th respondents allowed; appeal dismissed; appellant to pay the costs to the 5th, 6th and 7th – 38th respondents.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. The present appeal is premised on the contention by the Appellant that it had legitimate interest in the development of a wind power project on a parcel of land situate in Kiongwe, Lamu County. It further contends that, having secured all necessary approvals, it was granted a leasehold interest over the subject land by the 6th Respondent but it subsequently discovered that Part Development Plans PDP No.NBI/1281/2016/01 published in Gazette Notice Number 6554 as well as a letter of allotment had been issued to the 5th Respondents in a bid to defeat the Appellant's interest.
2. In order to protect its alleged interest over the subject land, the Appellant moved the Environment and Land Court (ELC) at Malindi by way of a Judicial Review Application ELC at Malindi J. R. Misc.



Application No.11 of 2017 seeking orders inter alia to quash the decision contained in the letter of allotment dated 7th February 2017 addressed to the 5th Respondent; compel the 2nd Respondent to issue lease instruments to the Appellant over 11,100 acres of land in Kiongwe and to prohibit the 1st Respondent from denying the validity of the Appellant's claim over that parcel of land.

3. In its Judgment, the ELC (Olola J) declined to issue the orders sought and instead, dismissed the Judicial Review Application. The Appellant, aggrieved by that decision filed C.A No.91 of 2018 at the Court of Appeal. In dismissing the appeal, the appellate Court determined that, since the Appellant had failed to adhere to the procedure for challenging the PDP, it would have been wrong for the trial Court to review the said decision.
4. Undeterred, the Appellant filed the present appeal contending inter alia that the learned Judges of appeal, as did the trial Court, erred in their interpretation and application of Articles 61, 62 and 67 of the Constitution.
5. Before the appeal could be heard however, the 5th, 6th and the 7th – 38th Respondents filed Preliminary Objections on this Court's jurisdiction to hear and determine the appeal. They are all now applying that the same be struck off or dismissed with costs for want of jurisdiction.

B. The Preliminary Objections

6. The three preliminary Objections raise the following two issues:
 - i) The Petition of Appeal does not raise any matters of constitutional interpretation or application under Article 163(4)(a) of the Constitution.
 - ii) 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.

C. Submissions by Parties

i) The 5th Respondent's Submissions

7. In submissions filed on 13th June 2019, the 5th Respondent has stated that, the Appellants have failed or neglected to specify the jurisdiction that they seek this Court to invoke in determining the appeal. Further, that a casual look at the judicial review proceedings before the ELC would show that no constitutional question was raised and that the gist of the dispute between the parties was the factual question as to who was entitled to set up the wind project on the disputed land. That neither the ELC nor the Court of Appeal was required to interpret or apply the Constitution in determining such a dispute which would then mean that Article 163(4)(a) of the Constitution cannot be properly invoked.

ii) The 3rd and 4th Respondents' Submissions

8. The 3rd and 4th Respondents support the Preliminary Objections and in their submissions filed on 30th July 2019, they state that following this Court's decision in *S. K. Macharia v KCB & 2 Others* Application No.2 of 2011 [2012] eKLR, a party coming to this Court must specify, with clarity, which jurisdiction it is invoking. And because the Appellant has failed to do so, then its Petition of Appeal is incompetent. It is further submitted that, even if it could be assumed that the Appellant is invoking Article 163(4)(a) and has approached this Court as a matter of right, the issues in contest cannot support such an approach as none of the superior Courts below nor this Court has been asked to interpret and apply any Article of the Constitution.



9. It is furthermore the 3rd and 4th Respondents' submission that, once the Court of Appeal had found that the Appellant had invoked the wrong procedure in challenging the letter of allotment issued to the 5th Respondent, then the next course of action would have been for it to appeal the initial and impugned decision regarding the allotment to the Liaison Committee in terms of Section 13 of the Physical Planning Act and not an appeal under an unknown procedure to this Court.
10. On its first objection, the 3rd and 4th Respondents have relied on this Court's decisions in *Erad Supplies and General Contractors Ltd v NCPB* [2012] eKLR; *Bia Tosha Distributors Ltd v Kenya Breweries Ltd and 6 Others* [2018] eKLR; *Lawrence Nduttu and 6,000 Others v Kenya Breweries Ltd and Anor* [2017] eKLR and *Hassan Ali Joho and Anor v Suleiman Said Shahbal and 2 Others* [2014] eKLR where this Court settled the law as regards its jurisdiction under Article 163(4)(a) of the Constitution.
11. On the second objection and on the assumption that the appeal is one filed under Article 163(4)(b) and that it is involving a matter of general public importance, it is submitted that, without certification as such, the present appeal is a non-starter and ought to be struck off. Reliance thereon is placed on our decisions in *Hermanus Phillipus Steyn v Giovanni* [2016] eKLR and *Peter Odiwuor Ngoge v Francis Ole Kaparo & 5 Others*, [2016] eKLR.

iii) The 6th Respondent's Submissions

12. We have not seen any submissions by this party but its preliminary objection is on record.

iv) The 7th – 38th Respondents' Submissions

13. On their part, the 7th – 38th Respondents submit that, neither in the trial Court nor at the Court of Appeal did the Appellant seek the interpretation or application of the Constitution neither can it do so now. And that although the Appellant has now cited certain provisions of the Constitution and purports to seek their application to the dispute between the parties, the Court of Appeal had no benefit of any arguments on those provisions and they cannot be introduced in this Court under Article 163(4)(a) of the Constitution. On this submission, the 7th – 38th Respondents have placed reliance on *S. K. Macharia v KCB*; *Erad Supplies and General Contractors Ltd v NCPB* [2012] eKLR; *Gatirau Peter Munya and Lawrence Nduttu and Joseph Ndungu Njau v Margaret Magiri Mbuki* [2017] eKLR.
14. On whether the appeal raises an issue of great public importance, relying on *Hermanus Phillipus Steyn* (supra), the Appellant has submitted that, without certification as such, the Appeal cannot be one founded on Article 163(4)(b) and should therefore be struck off.

D. Analysis and Determination

15. We deem it necessary to dispose of the second objection first i.e. whether the appeal concerns a matter of general public importance. Without belabouring the point, it is trite that for an appeal to lie to this Court under Article 163(4)(b), Sub-Articles 4 and 5 of that Article must be complied with. They read as follows:
 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; and
 - (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).



5. A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned”.
16. From the record, no such certification as is required by the Constitution was obtained by the Appellant and so it cannot be that the Appeal is one filed under Article 163(4)(b) even if the Appellant had expressed that it had done so, and it has not.
17. Before advertng to Article 163(4)(a), we have noted that the reason why the objections refer to both the constitutional interpretation and application jurisdiction of this Court as well as the general public importance jurisdiction, is because in its Memorandum of Appeal dated 17th April 2019, nowhere has the Appellant indicated what jurisdiction it was invoking in approaching this Court. We have in that regard often stated that, it is not for this Court to speculate on jurisdiction and assign to each appeal a jurisdiction not specifically invoked by a party appealing a Court of Appeal Judgment. An Appellant is expected to specify such jurisdiction with clarity to enable both the Court and the opposing party to know what case is before them. Without such specificity, such an appeal is one for striking out.
18. Having so said, for completeness of the record, is the appeal before us one in which Article 163(4)(a) could be invoked and the dispute determined as one necessitating the interpretation and application of the Constitution?
19. It must be recalled that what was before Olola J in ELRC J.R. Miscellaneous Application No.11 of 2017 was a judicial review Notice of Motion in which orders of prohibition, mandamus and certiorari were being sought. The main issue in contention was the legality or otherwise of a letter of allotment dated 7th February 2017 issued by the 2nd Respondent to the 5th Respondent and whether conversely, the 2nd Respondent ought instead to have issued land lease instruments to the Appellant over the disputed parcel of land in Kiongwe within Lamu County.
20. In his Judgment, the learned Judge partly stated as follows, in determining the dispute before him:
The contention by the Ex-parte applicant that the subsequent allocation was irregular and unlawful for encroaching on land already issued and allocated to the Ex-parte applicant does not lie as in law. The 2nd Interested Party had no power to allocate the public land to the Ex-Parte Applicant in the manner it did or at all”.
21. In determining as above, the Judge was concerned with the allocation of the disputed land as an administrative action and any references to the Constitution were as regards the powers of the 2nd Respondent to allocate public land to individuals and no more. Being dissatisfied with that determination, the Appellant, in its Petition of Appeal to this Court at paragraph 6 thereof has stated that the issues for determination by this Court are:
 - i) Whether there are fundamental errors of misidentification of errors on the face of the Judgment that fundamentally affected the decision of the appellate Court.
 - ii) Whether the dispute was framed and determined correctly.
 - iii) Whether the 6th Respondent’s consent was required and acquired by the 2nd Respondent to allocate the subject land to the 5th Respondent.
 - iv) Whether the 1st, 2nd and 3rd Respondents breached Article 47 of the Constitution as read with the Fair Administrative Action Act and the Rules of natural justice.
 - v) Whether the 5th Respondent had the necessary approvals and had followed the correct procedure to be able to be allocated the subject land and;



- vi) Whether the 1st, 2nd and 3rd Respondents were biased in favour of the 5th Respondent and against the Petitioner.
22. The question that must necessarily arise in the above context is this; what was before the Court of Appeal post Olola J's Judgment to trigger the issues now placed before this Court? In its Judgment, the Court of Appeal had inter alia stated as follows:
- (1) At the core of this appeal is a parcel of land situate in Kiongwe within Lamu County measuring approximately 11,100 acres or thereabout, hereinafter referred to as "the suit land". The Appellant's claim to the suit property is premised on the following facts: the suit property was allocated to Kenwind (K) Limited, the 5th Respondent herein, by the National Land Commission, the 2nd Respondent, vide a letter of allotment dated 7th February 2017."
23. The Court then went on to state thus:
- (27) The fundamental issue for determination in this appeal is: who, between the national Land Commission and the County Government, is lawfully mandated to allocate public land and what is the appropriate procedure thereof?"
24. In answering the above question, the Appellate Court addressed Article 67 of the Constitution which establishes the National Land Commission as well as Article 62(1)(a) which defines public land and concluded thus:
- (40) In view of the foregoing, it is obvious to us that the Appellant had not taken cognizance of the new land policy that had been ushered by the Constitution of Kenya, 2010 and the Land Act; and as a result backed the wrong horse. The Appellant ought to have engaged the National Land Commission as soon as it came into operation, given its constitutional and statutory role in allocation of public land."
25. In dismissing the Appeal, the Appellate Court rendered itself as follows:
- (44) Section 9(2) of the Fair Administrative Actions Act bars a Court from reviewing any administrative action or decisions unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. As there existed a statutory procedure for questioning the said PDP, which procedure was not adhered to by the appellant, it would have been procedurally wrong for the trial Court to review the said decision."
26. With the above facts in mind, and even if the Appellant had expressly invoked Article 163(4)(a) of the Constitution, and it has not, is the present appeal before us as a matter of right?
27. In *Gatirau Peter Munya*, (supra) we stated thus:
- (69) The import of the Court's statement in the *Ngoge Case* is that where 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."
28. We also stated as follows in *Aviation & Allied Workers Union* (supra) regarding what would amount to the interpretation and application of the Constitution in the context of Article 163(4)(a)—it is;
- (36) ... the assumption of a task that transcends not just the reference to the rich generality of constitutional principle, it is a task that [must] focus upon specific clauses of the Constitution, and calls for the attribution of requisite meaning, tenor and effect."



29. Having read both the Judgments of Olola J and the Court of Appeal, we are certain that neither Court was called upon to, specifically and directly put the meaning, tenor and effect of any Article of the Constitution into their reasoning before resolving the issues placed before them.
30. The fact that in doing so, reference was made to Articles 47, 62 and 67 of the Constitution for example would not qualify in the context of the dispute between the parties to bring the present appeal within the purview of Article 163(4)(a). The dispute was simple and as correctly framed by Olola J; whether the allotment letter issued to the 5th Respondent was lawful or not and, whether the judicial review orders of prohibition, mandamus and certiorari were to issue. The administrative action in question never once took a proper constitutional trajectory.
31. In the event, whereas the Preliminary Objections would have been sustained for failure to state what specific provision of the Constitution the Appellant was invoking, we have also shown that neither Article 163(4)(a) and (b) can be properly invoked and so the appeal is one for striking off as prayed.
32. As costs follow the event, the 5th, 6th as well as the 7th — 38th Respondents shall have the costs of the proceedings before us.

E. Disposition

33. For the above reasons, the final orders to make are that:
 - (i) The Preliminary Objections by the 5th, 6th as well as the 7th – 38th Respondents are hereby upheld.
 - (ii) The appeal herein is struck off for want of jurisdiction.
 - (iii) The Appellant shall pay the costs thereof to the 5th, 6th as well as the 7th – 38th Respondents.
34. It is so ordered.

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

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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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

.....

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

