University of Eldoret & another v Sitienei & 3 others (Petition 33 of 2019) [2020] KESC 72 (KLR) (30 April 2020) (Ruling)

University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR

Neutral citation: [2020] KESC 72 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 33 OF 2019

DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ

APRIL 30, 2020

BETWEEN

UNIVERSITY OF ELDORET .... 1ST PETITIONER

THE VICE CHANCELLOR, UNIVERSITY OF ELDORET .... 2ND PETITIONER

AND

HOSEA SITIENEI .... 1ST RESPONDENT

PROFESSOR EZEKIEL KIPROP .... 2ND RESPONDENT

THE CABINET SECRETARY FOR EDUCATION SCIENCE AND TECHNOLOGY .... 3RD RESPONDENT

ATTORNEY GENERAL .... 4TH RESPONDENT

(Being applications in the appeal from the Ruling and Orders of Court of Appeal at Nakuru (Lady Justice Nambuye, Mr. Justice M'Inoti, Lady Justice Sichale JJA) delivered on the 9th July 2019 in Civil Appeal No.55 of 2017 (as consolidated with Civil Appeal No.58 of 2017)

RULING

1. We have two applications in this appeal. The first one dated 20th August 2019 and filed on 23rd August 2019 is by the Petitioners. It seeks a stay of execution of the judgment and decree of the Court of Appeal at Nakuru delivered on 18th October 2018. The second one is by the 1st and 2nd Respondents (the Respondents). It seeks the striking out of both the Notice and Record of this Appeal. We wish to start with the second application.

2. This appeal is brought as of right under article 163(4)(a) of *the Constitution*. The Respondents' said application to strike it out is premised on the ground that this Court lacks jurisdiction to entertain it. In the alternative, the Respondents seek an order that the Petitioners deposit security in the sum of Shs.29,886,063/= within such time as circumscribed by the court. The Respondents also seek that the costs of the appeal be borne by the Petitioners. The application is supported by an annexed affidavit of the 1st Respondent, Hosea Sitienei on his own behalf and with the authority of the 2nd Respondent.

3. The background of the matter is that the 1st and 2nd Respondents were the Finance Officer and Deputy Vice Chancellor, Finance and Administration respectively of the 1st Petitioner. In July 2015, they were suspended from duty pending investigations on allegations of involvement in the unrests at the University at the time. They filed suit before Employment and Labour Relations Court (ELRC) at Nakuru (No.8 of 2015) seeking an order to stop the intended investigation. On 6th November 2015, Radido J, declined to halt the investigations directing the University to serve them with the investigation results before undertaking any disciplinary action against them. The University did not comply. Instead, it commenced disciplinary proceedings prompting the Respondents to separately file petitions (Nos. 1 and 2 of 2016) seeking similar reliefs. Though Radido J. held that he had jurisdiction, he did not interfere with the disciplinary proceedings since, in his view, there were adequate Constitutional and statutory safeguards to remedy any unfair administrative action or unlawful termination of employment. The Respondents were subsequently terminated from employment.

4. Aggrieved, the duo filed petitions numbers 10 and 11 of 2016 challenging their termination for being unlawful, irregular and illegal, contending that it violated Constitutional and statutory provisions and the orders of 6th November 2015 for violating their right to fair trial. They also contended that as constituted, the University Council did not have the mandate to undertake disciplinary process. They accordingly sought declaratory reliefs or in the alternative, compensation.

5. The Petitioners opposed the petitions contending that they were res judicata; that they were misconceived for merely raising personal and private law issues disguised as Constitutional issues; that the disciplinary process was fair and lawful; and that members of the University Council were legally in office.

6. Marete J. heard the two petitions separately and by judgments dated 24th November 2016, dismissed them as res judicata. That prompted the Respondents to file separate appeals that were consolidated by the Court of Appeal. In its judgment dated 18th October 2018, the Court of Appeal allowed them. In their application dated 31st December 2018 and filed on 8th January 2019, the Petitioners sought a review of that decision. The Court of Appeal dismissed that review application provoking this appeal which, by this application, the Respondents want struck out.

7. The main ground in support of the present application is that the Petitioners cannot appeal as of right as there was nothing touching on the interpretation or application of *the Constitution* and the same having not been certified under Article 163(4)(b) of *the Constitution* as raising a matter of general public importance, this Court lacks jurisdiction to entertain it. Citing the cases of Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another SC Petition No.3 of 2012 [2012] eKLR, Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others SC Petition No.10 of 2013 [2014]eKLR, Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others SC Application No.5 of 2014 [2014]eKLR, Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 Others SC Petition No.4 of 2015 [2017]eKLR and Musa Cherutich Sirma v. Independent Electoral and Boundaries Commission & 2 Others [2019] eKLR the Respondents submit that the Petitioners must show how the appellate court disposed of the matter by way of interpreting or applying a particular

provision of *the Constitution*. They submit that the issues before the Court of Appeal were whether the matter was res judicata and the composition of the 1st Petitioner's Council under Section 36(1)(d) of the *Universities Act* 2012 and not any Constitutional provision as alleged.

8. The Respondents further submit that the Petitioners have not demonstrated in their petition how the Court of Appeal failed to take into consideration the criteria set out in Musa Cherutich Sirma case (supra) to warrant interference with the appellate court's exercise of discretion. In the premises, the Supreme Court lacks jurisdiction to entertain a petition of appeal challenging the orders of the Court of Appeal made in exercise of discretionary powers to review its judgment.

9. In response, the Petitioners submit that the petition before the Court meets the threshold for admission as of right. The petitions before the ELRC were founded on the premise that the termination of their employment violated Articles 41, 47 and 50 of *the Constitution*. The Court of Appeal ignored their submissions on that ground thus violating their right to a fair trial under Article 50 of *the Constitution*. The Petitioners also urge us to adopt the principle that the Court of Appeal's reasoning and conclusions which led to the determination of the issue did take a trajectory of Constitutional interpretation or application as affirmed in Peter Oduor Ngoge v Hon. Ole Kaparo & 4 others and Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited & Anor Sup Ct Appl. No.8 of 2019.

10. The main ground in this application is whether we have jurisdiction to entertain this appeal. The Respondents, as already pointed out, argued that there having been no issue of Constitutional interpretation or application, this appeal founded on Article 163(4)(a) is untenable. The Petitioners maintain that this appeal is well founded on Article 163(4)(a).

11. There is common ground and all the parties appreciated it, that for us to exercise our jurisdiction, certain cardinal considerations must be met. In the case of an appeal founded on Article 163(4)(a), there must have been the issues of Constitutional contestation that transcended the court hierarchy and formed the basis of the determination by the courts resting with the Court of Appeal. Similarly, our jurisdiction under Article 163(4)(a) can be exercised as of right if it be demonstrated that the court's determination of the issue took a trajectory of the Constitutional application or interpretation. To determine whether or not an appeal meets that threshold, as we stated in Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others [2015] eKLR, this Court has to ascertain the character of the issues in the subject matter of litigation.

12. The main question that we interrogate is whether the appeal fits within either of the above principles. A consideration of the petition of appeal reveals that it is an appeal as of right against the ruling on review delivered on 9th July 2019 in which the Court of Appeal rendered as follows:

> "The crux of this application is whether there are exceptional circumstances that would justify the review of the Court's judgment. Having carefully considered the application, the exceptional ground that the University and the Vice Chancellor are relying upon for review of the judgment is the interpretation of Section 36(1)(d) of the *Universities Act*, under which they contend it is the duty of the Cabinet Secretary rather than the University to appoint the Council" (emphasis ours).

13. Despite the above position, the Petitioners made no spirited attempt to subject this exceptional ground to the confines of our jurisdiction under Article 163(4)(a) in terms of the principles elucidated above. Instead, they couched their appeal on the basis of the Court of Appeal judgment delivered on 18th October 2018. There is no evidence before us to demonstrate that the judgment of 18th October 2018 was being appealed. Indeed, the Notice of Appeal filed by the Petitioners is instructive that the appeal is against the entire ruling of 9th July 2019.

14. Had the appeal been against the judgment, we could perhaps have been persuaded differently. Any attempt by the petitioners to merge the two decisions in their appeal in our view is ingenious but must nevertheless be stifled at the outset. The issues of res judicata, fair hearing and Order 21 Rule 4 and Rule 28 and ELRC Rules 2016 were never canvassed in support of the application for review subject of the present appeal. The fact that the initial proceedings were couched as Constitutional petitions before ELRC does not of itself confer jurisdiction. This was the import of our decision in Rutongot Farm Ltd v Kenya Forest Service & 3 Others [2018] eKLR where we stated:

> "Even though the Appellant thus alludes to infringement of its Constitutional rights, the issue for the Superior Court's determination was, who is the rightful owner of the suit land? This would entail examination of the facts on record and based on the governing laws, deciding on who between the 1st Respondent and the Appellant was entitled to the suit land. No question of Constitutional interpretation or application was therefore before those Courts or this Court. And as already stated, neither was such an issue canvassed at the superior Courts."

15. The contention before the courts was therefore not the Constitutionality or application of the said Section 36(1)(d) of the *Universities Act* but rather, the evidence to support compliance with the provision, which the University and the Cabinet Secretary failed to do to the Court of Appeal's satisfaction. We are unable to fathom any Constitutional issue arising from this context to warrant our assumption of jurisdiction as sought.

16. Having reached this conclusion, we do not find it necessary to consider the other issues raised in the application.

17. Having struck out this appeal, the Petitioners' application for stay of execution dated 20th August 2019 and filed on 23rd August 2019, has no legs to stand on. It is accordingly dismissed.

18. Considering the chequered history of the parties and their litigation, we find that to promote the finality of the dispute, each party should bear its own costs before us. The substantive dispute already having been determined by the Court of Appeal, we see no need to escalate the dispute to the limited extent of costs only before the Supreme Court, the appeal not having been heard on merit. This is a unique type of dispute involving a public institution from which we believe the applicants have already obtained sufficient legal redress under the circumstances.

19. In the end we find that we do not have jurisdiction over the appeal under Article 163(4)(a) of *the Constitution* and make the following Orders:

    a) The Petitioners' application for stay of execution dated 20th August 2019 and filed on 23rd August 2019, is hereby dismissed.

    b) The 1st and 2nd respondents' application dated 4th September 2019 is hereby upheld to the extent that this Honourable Court lacks jurisdiction to entertain the appeal;

    c) The petition of appeal dated 9th August 2019 is struck out.

    d) Each party shall bear the costs of the application.

    It is so ordered.

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

....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT 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

....

S. C. WANJALA

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