



**Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others  
(Petition 41 of 2019) [2020] KESC 75 (KLR) (4 August 2020) (Ruling)**

*Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others [2020] eKLR*

Neutral citation: [2020] KESC 75 (KLR)

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

**PETITION 41 OF 2019**

**DK MARAGA, CJ, PM MWILU, DCJ & VP, MK  
IBRAHIM, SC WANJALA & N NDUNGU, SCJJ**

**AUGUST 4, 2020**

**BETWEEN**

**THE KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> PETITIONER**

**THE COMMISSIONER GENERAL OF KENYA REVENUE  
AUTHORITY ..... 2<sup>ND</sup> PETITIONER**

**THE COMMISSIONER OF CUSTOMS & EXISE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**MOUNT KENYA BOTTLERS ..... 1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY BOTTLERS ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI BOTTLERS ..... 3<sup>RD</sup> RESPONDENT**

**KISII BOTTLERS ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal  
(Karanja, Odek & Kantai, JJ.A) in Civil Appeal No 164 of 2013 delivered on 19th July, 2019)*

**Factors to consider in determining the Supreme Court’s appellate jurisdiction involving the  
interpretation or application of the Constitution**

Reported by Sharon Sang & Kakai Toili

***Jurisdiction** – jurisdiction of the Supreme Court – appellate jurisdiction – appellate jurisdiction in matters  
involving the interpretation or application of the Constitution – what were the factors to consider in determining*



*the Supreme Court's appellate jurisdiction involving the interpretation or application of the Constitution - Constitution of Kenya, 2010, article 163(4)(a).*

### **Brief facts**

The instant appeal was against the decision of the Court of Appeal that overturned the judgment and orders of the High Court. At the High Court, the 1<sup>st</sup> to 4<sup>th</sup> respondents sought a declaration that the assessment of excise duty and VAT together with the interest and penalties was unconstitutional. The High Court found; that the respondents had properly invoked the court's jurisdiction; that the respondents had acted within the law and that there was no breach of any constitutional right against the respondents. Aggrieved by that decision, the 1<sup>st</sup> to 4<sup>th</sup> respondents lodged an appeal at the Court of Appeal on the grounds that; the High Court erred in law when it failed to fully appreciate and apply the provisions of article 210(1) of the Constitution and that it also erred in fact and law by not appreciating the entire legislative history of section 127C of the Customs and Excise Act which they claimed was at variance with article 210(1).

The respondents filed the instant preliminary objection challenging the court's jurisdiction to hear and determine the appeal. The respondents sought the striking out of the appeal on grounds that the court lacked jurisdiction. The respondents alleged that the appeal did not involve the interpretation or application of the Constitution. They averred that the Court of Appeal only considered the principles of interpreting tax statutes.

### **Issues**

What were the factors to consider in determining the Supreme Court's appellate jurisdiction involving the interpretation or application of the Constitution?

### **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 –*

1. *as of right in any case involving the interpretation or application of this Constitution; and*

### **Held**

1. In determining whether the court's jurisdiction had been properly invoked under article 163(4) (a) of the Constitution of Kenya, 2010, (Constitution), the court had to consider whether the appeal before it raised a question of constitutional interpretation or application, and whether the question had been canvassed in the superior courts, progressing through the normal appellate mechanism so as to reach the court by way of an appeal. The court also had to determine whether in the alternative, a trajectory of constitutional interpretation or application was evident in the court's reasoning leading to the determination of the question.
2. The issues before the High Court as well as the Court of Appeal involved the interpretation and application of the Constitution. The High Court interpreted and applied the provisions of articles 22 and 47 of the Constitution and section 127C of the Customs and Excise Act as read with article 210(1) of the Constitution, while the Court of Appeal interpreted and applied the provisions of section 127C of the Customs and Excise Act as read together with article 210(1) of the Constitution. The argument that the Court of Appeal only interpreted and applied the provisions of section 127C of the Customs and Excise Act and not any constitutional provisions was untenable. The court had jurisdiction in respect of the appeal.

*Application dismissed.*

### **Orders**

*Preliminary objection dismissed.*

### **Citations**

#### **East Africa**

1. *Jobo & another v Shabbal & 2 others* [2014] 1 KLR 111 –(Cited)



2. *Munya v Mwenda & 2 others* [2014] 3 KLR 36 –(Mentioned)
3. *Nduttu & 6000 others v Kenya Breweries Ltd & Another* [2012] 2 KLR 804 –(Mentioned)

## Statutes

### East Africa

1. Constitution of Kenya, 2010 articles 22,47,163(4)(a); 165(3)(d)(6); 210(1) –(Interpreted)
2. Customs and Excise Act (cap 472) section 127 C –(Interpreted)

## RULING

### A. Introduction

1. Before the Court is a Petition of Appeal dated 30th October 2019, and lodged on 1st November 2019. The Appeal is against the decision of the Court of Appeal (Karanja, Odek & Kantai, JJ.A) in Civil Appeals No. 164 of 2013, delivered at Nairobi on the 19th July, 2019. The Appellate Court overturned the Judgment and Orders of the High Court (Lenaola J. as he then was), in Constitutional & Human Rights, Petition No 72 of 2011 delivered on 26th October 2012. The trial Court had dismissed the Respondents’ petition with costs and found that the Petitioners herein had acted within the law in demanding payment of excise duty on returnable containers, and that there was no breach of any Constitutional right against the 1st to 4th Respondents.

### B. The Preliminary Objection

2. The 1st to 4th Respondents (the Applicants herein) vide a Motion dated 17th December 2019, have lodged a Preliminary Objection challenging this Court’s jurisdiction to hear and determine the Appeal. The Application is based on the supporting Affidavit by Xavier Alcoverro Selga, sworn on 17th December 2019. The Applicants urge that the Petition be struck out with costs, on grounds that this Court lacks jurisdiction as the appeal does not involve the interpretation or application of *the Constitution*. It is their contention that in arriving at their decision, the learned Judges of appeal only considered the principles of interpreting tax statutes, more specifically Section 127 C of the *Customs and Excise Act*, and the amendments thereto.
3. The Application is opposed by the Petitioners herein, who through the 1st Petitioner’s Replying Affidavit sworn by Justus Kiuvu on 16th January 2020, aver that this Court has jurisdiction as the appeal originated from the Constitutional and Review Division of the High Court. They state that a similar application challenging the jurisdiction of the High Court was dismissed as that Court held that it had jurisdiction to hear and make a determination on a claim of violation of rights and freedoms guaranteed under Articles 47 and 210 of *the Constitution*. The Petitioners therefore aver that having filed a Constitutional petition before the High Court, the Respondents cannot now contend that the determination by the Court of Appeal did not involve the interpretation and application of *the Constitution*.

### C. The Applicant’s/respondents’ Case

4. In their written submissions dated 10th January 2020 and filed on 16th January 2020, the Respondents argue that this Court lacks jurisdiction as the impugned decision did not involve the interpretation and application of *the Constitution* within the meaning of Article 163(4)(a) of *the Constitution*. They submit that the jurisdiction to hear any question regarding the interpretation of *the Constitution* is vested in the High Court in the first instance, under Article 165(3)(d) of *the Constitution*. It is their view that they did not seek the interpretation of *the Constitution* under Article 165(3)(d) in their original



Petition to the High Court. They further submit that even though they appealed against the High Court's decision on the ground that the trial Judge had failed to appreciate and apply the provisions of Article 210(1) of *the Constitution*, the Appellate Court in its decision did not make any determination on the interpretation and application of the provisions of that Article.

5. It is the Applicants' case that the determination of their appeal at the Appellate Court centered only on the interpretation and application of Section 127C of the *Customs and Excise Act*. They submit that the Petitioners have not challenged the impugned decision on grounds that the Court of Appeal erred in any way, in the interpretation and application of *the Constitution*. It is their contention that the Petitioners are only seeking this Court's interpretation of Articles 201 (1) and 210 of *the Constitution*; which cause of action in their view should have been pursued through a Reference for an Advisory Opinion under Article 163(6) of *the Constitution* and not an appeal under Article 163(4)(a).

#### **D. The Petitioner's Case**

6. The Petitioners on the other hand submit that the dispute before the High Court as well as the Court of Appeal involved the interpretation and application of *the Constitution*. They rely on this Court's decision in *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others* [2014] eKLR. It is their case that the appeal emanates from Constitutional Petition No 72 of 2011, in which the Respondents were seeking a declaration that the assessment of excise duty and VAT together with the interest and penalties by the Petitioners was unconstitutional and illegal. They submit that the Respondents herein, had further claimed before the High Court that the tax demands made against them were not only inconsistent with *the Constitution*, but also a violation of their fundamental rights and freedoms.
7. The Petitioners further submit that, in holding that it had jurisdiction, the Constitutional and Human Rights Division of the High Court concluded that the matter before it entailed the interpretation and application of *the Constitution*. It was pursuant to that holding that the High Court considered the provisions of Article 210 (1) of *the Constitution* in interpreting Section 127 C of the *Customs and Excise Act*. The Petitioners contend that dissatisfied with the High Court decision, the 1st to 4th Respondents moved to the Court of Appeal seeking the interpretation and application of *the Constitution*. They urge that grounds 1 and 2 of the Memorandum of Appeal raised Constitutional issues to wit, that the High Court's interpretation of Section 127C of the *Customs and Excise Act* had failed to appreciate the provisions of Article 210(1) of *the Constitution* and that the actions by the Petitioners were at variance with Article 210(1) of *the Constitution*. They submit that the Court of Appeal, in interpreting the provisions of Section 127C of the *Customs and Excise Act*, had to be guided by the provisions of Article 210(1) of *the Constitution*.

#### **E. Determination**

8. The jurisdiction of this Court under Article 163(4)(a) of *the Constitution* is clearly laid out in a long line of this Court's decisions (see inter alia *Lawrence Nduttu & 6000 Others vs Kenya Breweries Limited & Another* SC Petition No. 3 of 2012 and *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, [2014] eKLR (Munya 1). In determining whether its jurisdiction has been properly invoked under Article 163 (4) (a), the Court has to consider whether the appeal before it raises a question of Constitutional interpretation or application, and whether the question has been canvassed in the Superior Courts, progressing through the normal appellate mechanism so as to reach the Supreme Court by way of an appeal. It also has to determine whether in the alternative, a trajectory of Constitutional interpretation or application is evident in the court's reasoning leading to the determination of the question.



9. It is undoubtedly clear from the Court Record that this Petition of Appeal emanates from Constitutional Petition No. 72 of 2011, wherein the 1st to 4th Respondents were seeking a declaration that the assessment of excise duty and VAT together with the interest and penalties was unconstitutional and illegal. The Respondents also claimed their fundamental rights and freedoms under *the Constitution* had been violated.
10. After hearing the parties, Lenaola J (as he then was) identified the main issues for determination namely: whether the matter was properly before the court; whether the respondent acted within the law and; and whether there was a breach of fundamental rights of fair administrative action and legitimate expectation. In a nutshell the learned Judge found that on the first issue, the Petitioners (Respondents herein) had properly invoked the Court's jurisdiction. On the second issue, the learned Judge found that the respondents had acted within the law in demanding payment of excise duty on returnable containers. On the third issue, the trial Judge found that there was no breach of any Constitutional right against the 1st to 4th Respondents.
11. Aggrieved by the Decision of the High Court, the 1st to 4th Respondents lodged an appeal in the Court of Appeal. Two grounds in the Memorandum of Appeal are relevant at this point, firstly; that the learned Judge erred in law when he failed to fully appreciate and apply the provisions of Article 210(1) of *the Constitution* and secondly, that the learned Judge erred in fact and law when he failed to appreciate the entire legislative history of Section 127C of the *Customs and Excise Act* which was at variance and disharmony with (sic) Article 210(1) of *the Constitution*.
12. From the above summary, we find little difficulty in concluding that the issues before the High Court as well as the Court of Appeal involved the interpretation and application of *the Constitution*. Towards this end, the High Court interpreted and applied the provisions of Articles 22, 47 of *the Constitution* and Section 127C of the *Customs and Excise Act* as read with Article 210(1) of *the Constitution*, while the Court of Appeal interpreted and applied the provisions of Section 127C of the *Customs and Excise Act* as read together with Article 210(1) of *the Constitution*. The Respondents argument that the Court of Appeal only interpreted and applied the provisions of Section 127C of the *Customs and Excise Act* and not any Constitutional provisions is clearly untenable. In view of the reasons tendered, we find that this Court has jurisdiction in respect of this Appeal. Having so found, we have no option but to dismiss the Preliminary Objection.
13. F. Orders
  - i. The Notice of Motion Application dated 17th December 2019, is hereby dismissed.
  - ii. The Costs of this Application shall be borne by the Applicants/Respondents.Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2020**

**D. K. MARAGAP. M. MWILU**

**CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE**

**OF THE SUPREME COURT PRESIDENT OF THE SUPREME COURT**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**



**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya

