



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njenga v Republic & 3 others (Petition 10 of 2018)**  
**[2020] KESC 35 (KLR) (4 August 2020) (Judgment)**

*Leah Waithira Njenga v Republic & 3 others [2020] eKLR*

Neutral citation: [2020] KESC 35 (KLR)

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

**PETITION 10 OF 2018**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**AUGUST 4, 2020**

**BETWEEN**

**LEAH WAITHIRA NJENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**MINISTER OF LANDS & SETTLEMENT ..... 2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**A.S. WAWERU ..... 4<sup>TH</sup> RESPONDENT**

*((Being an appeal from the Judgment and Order of the Court of Appeal at Nairobi (Musinga, Ouko & Gatembu, JJA) dated 4th May, 2018 in Nairobi Civil Appeal No.269 of 2013))*

**The Supreme Court does not have jurisdiction to hear an appeal involving constitutional claims raised for the first time at the Supreme Court.**

*The Supreme Court held that its jurisdiction in appeals that raised issues involving constitutional interpretation and application was not properly invoked. The court held that issues that involved allegations on the violation of the rights to property as recognized under article 40 of the Constitution, were raised for the first time at the Supreme Court and were not the subject of determinations at the High Court or the Court of Appeal.*

Reported by John Ribia

***Jurisdiction*** – jurisdiction of the Supreme Court – jurisdiction to determine an appeal regarding the interpretation of the Constitution - whether the Supreme Court had jurisdiction under article 163(4)(a) of the Constitution to hear an appeal involving constitutional claims raised for the first time at the Supreme Court – Constitution of Kenya, 2010 article 163(4)(a).



## **Brief facts**

The appellant filed for judicial review (*mandamus*) to compel the Minister and Commissioner of Lands to issue her title for land she claimed to have purchased from the Jacob Njenga Muiruri. The land had been transferred to the 4<sup>th</sup> respondent through what she claimed was unlawful means. Both the High Court and the Court of Appeal dismissed her claims. Dissatisfied, she appealed to the Supreme Court, asserting violations of her constitutional rights under article 40 of the Constitution. During the appeal, Njenga passed away, and her legal representatives took over the case.

## **Issues**

Whether the Supreme Court had jurisdiction under article 163(4)(a) of the Constitution to hear an appeal involving constitutional claims raised for the first time at the Supreme Court.

## **Held**

1. Whereas judicial review orders were one of the remedies available to a party claiming violation of the Bill of Rights under article 23(3)(f) of the Constitution, the instant dispute was not one in which allegations of violation of fundamental rights were at the centre of the dispute. The judicial review application was filed under order LIII rules 1, 2 and 3 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Rules. Nowhere in pleadings or submissions was the court called upon to interpret any part of the Constitution.
2. The substantive prayers for *mandamus*, general and exemplary damages did not require the trial court, the Court of Appeal nor the Supreme Court to interpret or apply the Constitution as the question whether the title issued to A. S Waweru was unlawful did not require that action on the part of the Superior Courts below nor the Supreme Court.
3. The Supreme Court's jurisdiction under article 163(4)(a) of the Constitution had not been met.

*Appeal struck out; the appellant was to pay costs to the 4<sup>th</sup> respondent.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Bwana, Bwana Mohamed v Silvano Buko Bonaya & 2 others* Election Petition 15 of 2014; [2015] KESC 8 (KLR) - (Explained)
2. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Applied)

#### **United Kingdom**

1. *Gordon v Metropolitan* [1910] 2 KB 1080 - (Mentioned)
2. *Scott v Brown* [1892] 2 QB 724 - (Explained)

### **Statutes**

#### **Kenya**

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rules 1, 2, 3 - (Interpreted)
2. Civil Procedure Act (cap 21) section 3A - (Interpreted)
3. Constitution of Kenya articles 23(3)(f); 40; 163(4)(a) - (Interpreted)

### **Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 14
2. Pretoria Declaration on Economic, Social and Cultural Rights, 2004  
In general

### **Advocates**

*Mr. Ngoge* for the appellant



## JUDGMENT

### A. Background

1. By High Court Miscellaneous Application No 940 of 2005 (Nairobi), Leah Waithira Njenga applied for orders of *mandamus* directed at the Minister for Lands and Settlement as well as the Commissioner of Lands compelling them to issue her with title documents for Land Reference Number Nyandarua/OI Kalou Salient/271. She further prayed for general and exemplary damages as well as costs.
2. Her suit was predicated on her claim that she had purchased the said parcel of land from one, Jacob Njenga Muiruri, and had obtained all necessary authorizations and consents in that regard but instead, the land was unlawfully transferred to one, A. S. Waweru, the 4th respondent.
3. Having heard the parties, Sitati J, on May 13, 2011, dismissed the Judicial Review Application with costs. In doing so, she stated *inter alia* that Leah Waithira Njenga had not proved that she was lawfully entitled to the suit land, had come to Court with unclean hands by failing to disclose that her husband had previously litigated on the same parcel of land, unsuccessfully so, and that without the title deed issued to A. S. Waweru being nullified in separate proceedings, the orders sought were unavailable to her.
4. Dissatisfied, Leah Waithira Njenga filed an appeal to the Court of Appeal, being Civil Appeal No 269 of 2013 which appeal was determined on May 4, 2018. In dismissing the said appeal, the learned Judges of Appeal found that the same was without merit and specifically that, an order of *mandamus* was not efficacious in the circumstances of the case. Further, that there was no basis in law for an award of general and exemplary damages as had been sought by Leah Waithira Njenga. In addition, that the claim for Kshs. 10 Billion being quantum of damages thereof was, as it were, plucked from the air.
5. Leah Waithira Njenga, after the dismissal of her appeal aforesaid, filed the present appeal claiming in 20 grounds of appeal that the learned Judges of Appeal erred in law and fact in failing to grant the order of *mandamus* thereby sanitizing arbitrary deprivation and unlawful acquisition of matrimonial property by a third party.

### B. Submissions by the Parties

#### i) appellant's submissions

6. We should note at this point that Leah Waithira Njenga died during the pendency of this appeal and by an order of this court dated April 29, 2019, Jacob Njenga Muiruri and Mark Kamau Njenga were substituted in her place.
7. In submissions filed on September 11, 2019 the appellants have argued that the decisions of the Superior Courts had the net effect of depriving Leah Waithira Njenga of her matrimonial home and property contrary to the rules of natural justice, article 40 of the *Constitution*, article 14 of the *African Charter on Human and Peoples' Rights* as well as the *Pretoria Declaration on Economic, Social and Cultural Rights, 2004*.
8. In addition, the appellants have urged that both the High Court and the Court of Appeal misunderstood and failed to apply all the evidence tendered by Leah Waithira Njenga showing that she was entitled to the suit land and also erred in declaring that the Land Control Board Consent tendered in evidence was irregular, null and void.



9. Regarding Leah’s eviction from the suit land, the appellants argued that the said action contravened the United Nations Sub-Commission Resolution 2003/17 on forced eviction as well as the African Commission Resolution 262 on women’s Right to Land and Productive Resources. Reliance was also placed on *Gordon v Metropolitan* [1910] 2 KB 1080 as well as *Scott v Brown* [1892] 2 QB 724 where it was held that unlawful contracts should not be enforced by any Court.
10. Regarding this court’s jurisdiction under article 163(4)(a) of the *Constitution*, while no written submissions were filed on the issue, Mr Ngoge for the appellant, at the hearing of the Appeal stated that the same was properly before the court as article 40 thereof was cited in the Memorandum and Supplementary Record of Appeal to support the appellants’ case and therefore this Court was properly seized of the Appeal as a matter of right.

## ii) 4th respondent’s Submissions

11. In submission filed on November 21, 2019, the 4th respondent raised only one issue; that the original dispute and appeal, as framed, do not raise any matter involving the interpretation or application of the Constitution and therefore the appeal was erroneously filed as a matter of right under article 163(4)(a) of the *Constitution*. Reliance thereon was placed on our decisions in Petition No 3 of 2010 *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* as well as Petition No 15 of 2014 *Bwana Mohamed Bwana v Silavano Buko Bonaya* where we addressed appeals as a matter of right under the said article.
12. The 4th respondent thus prays that the appeal be dismissed with costs and as neither the 1st, 2nd nor 3rd respondents participated in the appeal, that is the only response to it.

## C. Analysis and Determination

13. As the issue of the jurisdiction of this court to hear the appeal as a matter of right under article 163(4)(a) of the *Constitution* has been raised, we must dispose of that issue first. If we find that we have no jurisdiction, the appeal will obviously be struck out and its merits or otherwise will not attract our attention.
14. In the above context and we note that Mr Ngoge, the present advocate for the appellant, also appeared in that matter, in *Lawrence Nduttu*, we stated thus:

“26) Mr Ngoge has urged that whenever a citizen alleges in his pleading before the Supreme Court that the High Court and Court of Appeal were complicit in facilitating violations of his fundamental human rights, the Supreme Court automatically assumes jurisdiction without the necessity of leave in order to uphold the Constitution, human rights and the rule of law. Anything to the contrary would be unconstitutional and retrogressive. We understand Mr. Ngoge to be arguing that a mere allegation of a violation of human rights automatically brings an intended appeal within the ambit of article 163(4)(a) of the *Constitution* hence dispensing with the need for leave under article 163(4)(a) of the *Constitution*.

27) With respect, but firm conviction, we disagree with this contention. Such as approach as is urged by Counsel if adopted, would completely defeat the true intent of article 163(4)(a) of the *Constitution*. This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from



cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under article 163(4)(a) of the *Constitution*. [Emphasis ours] Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the *Constitution*, it cannot support a further appeal to the Supreme Court under the provisions article 163(4)(a) of the *Constitution* [Emphasis ours]. If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4)(a) of the *Constitution*, the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a) of the *Constitution*. It is the court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold".

15. In the present appeal, despite the very clear guidance to counsel and litigants in *Nduttu*, Mr Ngoge still argued that, the fact that in the appeal, article 40 on the right to property was raised for the first time in the Supplementary Record of Appeal filed on this court on June 21, 2018, the appeal was still properly before us as a matter of right under article 163(4)(a) of the *Constitution*. With respect, we must once again disagree with such a submission.
16. Whereas it is indeed true, as argued by Mr Ngoge, that judicial review orders are now one of the remedies available to a party claiming violation of the Bill of Rights under article 23(3)(f) of the *Constitution*, the present dispute was never and is not now one in which allegations of violation of fundamental rights are at the centre of the dispute between the appellant and the 4th respondent. Indeed, the Judicial Review Application before Sitati J was one filed under order LIII rules 1, 2 and 3 of the *Civil Procedure Rules* as well as section 3A of the *Civil Procedure Rules*. Nowhere in pleadings or submissions was the learned judge called upon to interpret any part of the Constitution. And she did not.
17. It is also not in doubt that the substantive prayers for *mandamus*, general and exemplary damages did not require Sitati J, the learned Judges of Appeal nor ourselves to interpret or apply the Constitution as the question whether the title issued to AS Waweru was unlawful would not have required nor does it now require that action on the part of the superior courts below nor ourselves. The test that we set in *Lawrence Nduttu* and subsequent decisions on our jurisdiction under article 163(4)(a) of the *Constitution* has therefore not been met and we must accede to the 4th respondent's prayer that the present Appeal is one that ought to be struck off for want of jurisdiction.

What of costs? Costs follow the event and therefore the appellants shall pay costs of the Appeal to the 4th respondent.



**D. Disposition**

18. The final orders to be made, for the above reasons, are that;
- i) The Appeal herein is struck off.
  - ii) Costs thereof shall be paid by the appellant to the 4th respondent only.
19. Orders accordingly.

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

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**M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**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**

