



Zubeidi v Active Partners Group Limited & 4 others (Petition 44 of 2019) [2020] KESC 73 (KLR) (4 August 2020) (Ruling)

Hassan Zubeidi v Active Partners Group Limited & 4 others [2020] eKLR

Neutral citation: [2020] KESC 73 (KLR)

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

PETITION 44 OF 2019

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

AUGUST 4, 2020

BETWEEN

HASSAN ZUBEIDI PETITIONER

AND

ACTIVE PARTNERS GROUP LIMITED 1ST RESPONDENT

MOHAMED ABDULRAHMAN MOHAMED FAG 2ND RESPONDENT

DUBAI BANK KENYA LIMITED 3RD RESPONDENT

MUNGU & COMPANY ADVOCATES 4TH RESPONDENT

CHIEF MAGISTRATES COURT MILLIMANI 5TH RESPONDENT

(Being an appeal against the Judgement and Orders of the Court of Appeal in Civil Appeal No 395 & 414 of 2018 (Koome, Sichale & J.Mohammed, JJ.A) delivered on 8th November, 2019)

Factors to consider in determining whether a judgment can be appealed against to the Supreme Court as a matter involving constitutional interpretation and application

Reported by Kakai Toili

***Jurisdiction** – jurisdiction of the Supreme Court – appellate jurisdiction – matters of constitutional interpretation and application - what were the factors to consider in determining whether a judgment could be appealed against to the Supreme Court as a matter involving the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4)(a).*

Brief facts

The 1st, 2nd and 4th respondents filed the instant preliminary objection challenging the court’s jurisdiction on grounds that the appeal before the court did not raise any issues concerning the interpretation or application



of the Constitution as envisaged under article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution). The respondents claimed that there were two issues for determination before the two superior courts namely, whether, under the terms of the contract between the 1st and 2nd respondents and the petitioner, Kenyan courts had jurisdiction to determine a dispute arising therefrom; and whether, a default judgment entered against the 1st and 2nd respondents could be set aside.

It was further claimed that in answering to the first issue, the High Court held that it had jurisdiction to determine the dispute. While in overturning the decision, the Court of Appeal held that the jurisdiction of Kenyan courts had been unequivocally excluded by the contract in question. Concerning the second question, it was alleged that both superior courts were in agreement that the default judgment should be set aside. The respondents' therefore argued that the resolution of the two issues did not involve the interpretation or application of the Constitution, nor could it be said that in disposing of them, the superior courts took a trajectory of constitutional interpretation or application.

Issues

What were the factors to consider in determining whether a judgment could be appealed against to the Supreme Court as a matter involving the interpretation or application of the Constitution?

Held

1. The court had to consider whether the appeal raised a question of constitutional interpretation or application, and whether it had been canvassed in the superior courts, progressing through the normal appellate mechanism so as to reach the Supreme Court by way of an appeal. The court also had to determine, in the alternative, whether a trajectory of constitutional interpretation or application was evident in the superior courts' reasoning leading to the determination of the question.
2. The petitioner's appeal emanated from two rulings of the trial court, the ruling setting aside a default judgment and the ruling on the effect of contractual clauses, ousting the jurisdiction of courts in Kenya. A perusal of the pleadings before the courts and the decisions of both the High Court and the Court of Appeal left no doubt that in arriving at the decisions they did, the two superior courts did not advert to the Constitution by way of interpretation or application. On the contrary, all that the courts did was to determine whether the default judgment ought to be set aside and to interpret the effect of a contractual clause.
3. The petitioner had raised the issues of breach of articles 27, 48 and 50 of the Constitution for the first time before the court. The interpretation and application of those articles was not in issue before either the High Court or the Court of Appeal. The petitioner had not properly invoked the jurisdiction of the court under article 163(4)(a) of the Constitution.

Application allowed.

Orders

- i. *Preliminary objection allowed.*
- ii. *Petition of appeal dated November 15, 2019, struck out.*
- iii. *Costs of the proceedings in the court to be borne by the petitioner.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

Advocates

None mentioned



RULING

1. Before the Court is a Petition of Appeal dated 15th November 2019, and filed on 18th November 2019, under Articles 163(4)(a) of the Constitution of Kenya, Section 15(2) of the Supreme Court Act and Rules 9 & 33 of the Supreme Court Rules 2012; against the Court of Appeal's decision (Koome, Sichale & J.Mohammed, JJ.A) in Civil Appeals Nos. 395 and 414 of 2018 (consolidated) delivered at Nairobi on the 8th November 2019. The Appellate Court upheld the High Court's Ruling (Tuiyott J) in Civil Suit No 475 of 2016 delivered on 1st November 2017, setting aside a default Judgment but overturned a further Ruling delivered by the same Court on 29th May 2018, in effect finding that the trial Court lacked jurisdiction to entertain the suit before it.

B. The Preliminary Objection

2. The 1st, 2nd and 4th Respondents have filed a Preliminary Objection dated 3rd February 2020, challenging this Court's jurisdiction on grounds that the appeal before the Court does not raise any issues concerning the interpretation or application of the Constitution as envisaged under Article 163 (4) (a) of the Constitution.
3. In their written submissions dated 24th February 2020, and filed on even date, the Respondents contend that in disposing of the case before them, neither the High Court nor the Court of Appeal, interpreted or applied any provision of the Constitution as to support a further appeal to this Court under Article 163 (4) (a) of the Constitution. They submit that there were two issues for determination before the two Superior Courts namely, whether, under the terms of the Contract between the 1st and 2nd respondents and the petitioner, Kenyan Courts had jurisdiction to determine a dispute arising therefrom; and whether, a default Judgment entered against the 1st and 2nd respondents herein could be set aside.
4. In answer to the first question, the High Court held that it had jurisdiction to determine the dispute arising under the Contract. In overturning this decision, the Court of Appeal held that the jurisdiction of Kenyan courts had been unequivocally excluded by the Contract in question. Concerning the second question, both Superior Courts were in agreement that the default Judgment should be set aside. It is the Respondents' argument that the resolution of these two issues did not involve the interpretation or application of the Constitution, nor can it be said that in disposing of them, the Superior Courts took a trajectory of Constitutional interpretation or application. They therefore urge that the petition of appeal should be struck out as the same is incompetent for want of jurisdiction.

C. The Petitioner's Response to the Preliminary Objection

5. The Petitioner on the other hand is categorical that this Court has jurisdiction to determine the appeal. In his written submissions dated 20th February 2020, and filed on even date, he contends that the issues giving rise to this appeal involved the interpretation and application of the Constitution. The Petitioner submits that the Court of appeal decision infringed on his right of access to justice under Article 48 of the Constitution, right to protection of the law under Article 27 of the Constitution as well as his right to fair trial under Article 50 of the Constitution.
6. He further submits that the appeal raises a constitutional question, namely, whether parties to a suit are at liberty to oust the jurisdiction of the Court as they please. He contends that on this further issue, the Appellate Court misapprehended the principles of law regarding the effect of Exclusive Jurisdiction



Clauses as formulated in the Eleftheria [1969]2 All ER 641. He submits that the Notice of preliminary Objection should be dismissed with costs.

D. Determination

7. As already settled in a long line of authorities by this Court, (see Lawrence Nduttu & 6000 Others vs Kenya Breweries Limited & Another S.C Petition No.3 of 2012; and Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, [2014] eKLR (Munya 1) the Court has to consider whether the appeal raises a question of Constitutional interpretation or application, and whether the same 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. We have also to determine, in the alternative, whether a trajectory of Constitutional interpretation or application is evident in the Superior Courts' reasoning leading to the determination of the question.
8. In the present appeal, the Petitioner's appeal emanates from two Rulings of the trial Court, the Ruling setting aside a default Judgment and the Ruling on the effect of contractual clauses, ousting the jurisdiction of courts in Kenya. A perusal of the pleadings before the courts and the decisions of both the High Court and the Court of Appeal leaves no doubt that in arriving at the decisions they did, the two Superior Courts did not advert to the Constitution by way of interpretation or application. On the contrary, all that the courts did was first, to determine whether the default Judgment ought to be set aside and secondly, to interpret the effect of a contractual clause. The petitioner has raised the issues of breach of Articles 27, 48 and 50 of the Constitution for the first time before this Court. The interpretation and application of these Articles was not in issue before either the High Court or the Court of Appeal.
9. It follows from the foregoing, that the Petitioner has not properly invoked the jurisdiction of this Court under Article 163 (4) (a) of the Constitution. The Preliminary Objection is therefore well founded. Consequently, we make the following orders under Section 23(2)(b) of the Supreme Court Act, 2011 and Rules 21 and 23 of the Supreme Court Rules, 2012;

E. Orders

- (i) The Preliminary Objection dated 3rd February, 2020 is hereby allowed.
 - (ii) The Petition of Appeal dated 15th November 2019, is hereby struck out.
 - (iii) The costs of the proceedings in this Court shall be borne by the Petitioner herein.
- Orders accordingly.

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

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

