



**Kihoro v Attorney General (Application 6 of 2020)
[2020] KESC 78 (KLR) (23 September 2020) (Ruling)**

Wanyiri Kihoro v Attorney General [2020] eKLR

Neutral citation: [2020] KESC 78 (KLR)

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

APPLICATION 6 OF 2020

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

SEPTEMBER 23, 2020

BETWEEN

HON WANYIRI KIHORO APPLICANT

AND

THE ATTORNEY GENERAL RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal (Waki, Nambuye & Kiage JJA), denying grant of certification to appeal to the Supreme, delivered at Nairobi on 29th September 2017 in Civil Application No. SUP 2 of 2016)

The Supreme Court has no jurisdiction to determine appeals from final judgements of the Court of Appeal before the promulgation of the Constitution

The main issue before the Supreme Court was whether the Supreme Court had jurisdiction to entertain appeals from cases that were determined and finalized by the Court of Appeal before the promulgation of the Constitution of Kenya 2010. The Supreme Court held that it had no jurisdiction.

Reported by Chelimo Eunice

Jurisdiction – appellate jurisdiction of the Supreme Court – appeals from the Court of Appeal - whether the Supreme Court had jurisdiction to entertain appeals from cases that were determined and finalized by the Court of Appeal before the promulgation of the Constitution of Kenya 2010 – where the final judgment by the Court of Appeal was delivered on March 17, 1993 – whether the Supreme Court could entertain the appeal - Constitution of Kenya, 2010, article 163(4)(b).

Brief facts

The applicant sought to review the ruling of the Court of Appeal denying him certification to file an appeal to the Supreme Court. The intended appeal was against the judgment of the Court of Appeal in Civil Appeal No. 151 of 1988 delivered on March 17, 1993. The applicant argued that although Civil Appeal No. 151 of 1988



was heard and determined on March 17, 1993, the cause of action was not satisfied or finalized until November 2011, when the applicant's application before the High Court seeking enforcement of the judgment in Civil Appeal No. 151 of 1988 was determined and the decretal amount recovered from the State; that there was continuity of the dispute between the parties up to November 2011, which was after the promulgation of the 2010 Constitution, hence the Supreme Court had jurisdiction to entertain the intended appeal.

Issues

Whether the Supreme Court had jurisdiction to entertain appeals from cases that were determined and finalized by the Court of Appeal before the promulgation of the Constitution of Kenya 2010.

Held

1. The Supreme Court had no jurisdiction to entertain appeals from final judgements of the Court of Appeal before the promulgation of the Constitution of Kenya 2010. Article 163(4)(b) of the Constitution was forward-looking, and did not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.
2. The final judgment by the Court of Appeal was delivered on March 17, 1993, long before the promulgation of the Constitution. There could never have been any other appeal from that judgment due to the fact that the Court of Appeal was then, the highest court in the land. When the applicant moved to the High Court in *Miscellaneous Application No.52 of 2009*, he was simply but importantly seeking to enforce the final judgment and orders of the Court of Appeal. He was seeking to reap the fruits of that judgment. Such an application could not be said to have sustained the cause of action until November 2011, so as to confer jurisdiction on the Supreme Court. The applicant was not appealing anything from such an enforcement action that he commenced before the High Court. Even if such an appeal were possible, which it was not, the Supreme Court would not have appellate jurisdiction over a decision from the High Court.
3. Since the Supreme Court had no jurisdiction to entertain the application, it could not determine the other two issues raised.

Application dismissed with no orders as to costs.

RULING

A. Introduction

1. Before the Court is a Notice of Motion Application dated 4th March, 2020 and lodged on 11th March, 2020. The motion seeks review of refusal to grant certification to appeal to the Supreme Court by the Court of Appeal (Waki, Nambuye & Kiage JJA) in Civil Application No. SUP 2 of 2016. It is brought under Articles 163 (4)(b), (5) & (7), 2(5), 2(6), 22(3)(d) & 159(2)(d) of the Kenya Constitution 2010; Sections 3, 15, 16, 23, & 24 Supreme Court Act 2011 (now revoked), Rules 3, 24, 31 & 53 of the Supreme Court Rules 2012 (now revoked), Rule 4a (2) Supreme Court (Amendment) Rules 2016 (now revoked), Section 4 of the Fair Administrative Action Act 2015 and all the other enabling provisions of law.

B. The Application

2. The Applicant seeks to review the Ruling of the Court of Appeal denying him certification to file an appeal to this Court. The Intended appeal is against the Judgment of the Court of Appeal in Civil Appeal No. 151 of 198 delivered on 17th March, 1993. The Application is based on the averments in the supporting Affidavit by Hon Wanyiri Kihoro, sworn on 4th March, 2020. The Applicant faults the Appellate Court's finding denying him certification and relies on the following grounds



to persuade this Court to grant review Orders; that although Civil Appeal No. 151 of 1988, was heard and determined on 17th March 1993, the cause of action was not satisfied or finalized until November 2011, when the Applicant's High Court Miscellaneous Application. No. 52 of 2009, seeking enforcement of the Judgment in Civil Appeal No. 151 of 1988 was determined and the decretal amount recovered from the State; that there was continuity of the dispute between the parties up to November 2011, which was after the promulgation of the Constitution 2010, hence this Court has jurisdiction to entertain the intended appeal.

3. On the reasons for delay, he urges that the State was responsible for the delay in terminating the cause of action between the parties, from 17th March, 1993 to 25th November 2011, a period of 18½ years; that the Deputy Registrar of the Court of Appeal took four (4) years to avail him the Judges' notes; that once the proceedings were availed, the Applicant prepared his intended appeal to this Court but was informed by the Court's registry that he could not lodge it without the Chief Justice's Approval; that subsequently, by an Order of the Deputy Registrar of this Court, he was informed that his intended appeal could not be received by the registry as it was out of time; that he moved the Court for review of this decision and on 5th May 2016, was ordered to seek leave from the Court of Appeal, leading to Civil Application No. SUP 2 of 2016; that the Ruling of the Appellate Court was delivered on 29th September, 2017 and that he made an application for typed proceedings on 11th October 2017, followed by four reminders; and that he was furnished with the proceedings of two Judges' notes on 26th February 2020. Consequently, the Applicant was forced to compile the intended appeal without one Judge's notes as the same were inaccessible or irretrievable.
4. The Respondent has not filed its response or submissions to the instant Application, despite the Deputy Registrar's compliance directions issued on 5th BJune 2020, 9th June 2020, and 12th June 2020.

C. The Applicant's Case

5. In his written submissions dated 24th March 2020, and filed 2nd June 2020, the Applicant submits to the Court on three limbs. On the issue whether this Court has jurisdiction to hear an intended appeal against the Judgment of the Court of Appeal delivered on 17th March 1993, he urges that a cause of action can only be concluded by accord and satisfaction which arise from agreement of the parties or a Court Order. He submits that even if the Judgment he seeks to appeal against was delivered in 1993, the cause of action was not satisfied or finalized until 25th November 2011, when Miscellaneous Application. No. 52 of 2009 seeking enforcement of the said Judgment was concluded, and the decretal amount recovered from the State. He adds that there was continuity of the dispute between the parties up to November 2011, which was after the promulgation of the Constitution 2010. He concludes that this Court has jurisdiction to entertain the intended appeal and that he has met the test set in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others PARA 2012. eKLR.
6. On the reasons for delay in filing the appeal, the Applicants restates the grounds set out in his supporting affidavit as highlighted above. He attributes the delay of 18½ years between 17/3/1993 and 12/11/2011 to the Respondent for failing to pay the compensation ordered by the Court of Appeal. He also attributes part of the delay to the Court of Appeal for failing to furnish him with typed proceeding in both Civil Appeal No. 151 of 1988 and Civil Application No. SUP 2 of 2016; and to the proceedings before the Supreme Court, prior to the filing of the application for certification before the Court of Appeal.
7. Relying on this Court's decision in Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscone PARA 2013. eKLR, the Applicant urges that the substance of his intended appeal is for this Court to address the following issues of general public importance; whether a trial in secrecy accorded the Applicant a



fair trial under sec. 77(1) of the former Constitution, (whose provisions are now contained in Article 50 of the Constitution, 2010); whether the detention of the Applicant incommunicado at Nyayo House Basement for 70 days by the Special Branch Police without arraignment was in breach of section 72(3) of the former Constitution; whether it is justified for the court to award general compensation but refuse to award the Applicant exemplary damages; whether the Court of Appeal could apply the provisions of the amended section 72(3) of the former Constitution, when the amendment was passed after the cause of action had arisen; whether the appellate court would ignore the circumstances under which the Applicant was detained which amounted to inhuman, torturous, degrading treatment and punishment; and whether the Judgment of the Court Appeal was self-contradictory on torture, cruel, inhuman degrading treatment and punishments, as it declared that torture had been committed but afterwards reduced it to just mental torture thereby rejecting physical torture.

D. Issues for Determination

8. Three issues fall for our consideration in this Application. Firstly, whether this Court has jurisdiction to hear this matter; secondly, whether the Application is tenable in view of the delay in filing it; and lastly, whether the matters raised by the Applicant are of general public importance under Article 163(4)(b) of the Constitution.
9. On the first issue, the Applicant herein contends that even if the Judgment in Civil Appeal No. 151 of 1988 that he seeks to appeal against was heard and determined on 17th March 1993, the cause of action was not satisfied or finalized until 25th November, 2011, when Miscellaneous Application. No. 52 of 2009 seeking enforcement of the said Judgment was concluded, and the decretal amount ordered by the Court recovered from the State. He adds that there was continuity of the dispute between the parties from 1986 to November 2011, which was after the promulgation of the Constitution 2010, hence this Court has jurisdiction to entertain the intended appeal. We note that there are no submissions from the Respondent.

E. On Jurisdiction

10. In *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* PARA 2012. eKLR and *Tom Martins Kibisu v. Republic* PARA 2014. eKLR this Court laid down the distinct principle that, it had no jurisdiction to entertain appeals from final Judgements of the Court of Appeal, before the promulgation of the 2010 Constitution. Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.
11. In the matter before us, it is not in doubt that the final Judgment by the Court of Appeal was delivered on 17th March 1993, long before the promulgation of the current Constitution. There could never have been any other appeal from that Judgment, due to the fact that the Court of Appeal was then, the highest court in the land. When the Applicant herein moved to the High Court in Miscellaneous Application No.52 of 2009, he was simply but importantly seeking to enforce the final Judgment and Orders of the Court of Appeal. He was seeking to reap the fruits of that Judgment. Such an application cannot be said to have sustained the cause of action until November 2011, so as to confer jurisdiction on this Court. The Applicant is not appealing anything from such an enforcement action that he commenced before the High Court. How can he, when indeed the High Court granted his prayer for enforcement of the Court of Appeal Judgment? At any rate, even if such an appeal were possible, which it isn't, this Court would not have appellate jurisdiction over a decision from the High Court.



12. The intended appeal therefore offends the pronouncement of this Court in Samuel Macharia [Supra]. As such, it is clear that we have no jurisdiction to entertain this Application. This finding of necessity disposes of the other two issues. Consequently, we make the following Orders:

F. Orders

(i) The Notice of Motion Application dated 4th March 2020, is hereby dismissed.

(ii) No Orders as to Costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 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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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

ISAAC LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

