



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njenga v Cabinet Secretary, Ministry of Information Communication and Technology  
& 8 others (Petition 15 of 2019) [2020] KESC 25 (KLR) (4 September 2020) (Ruling)**

*Adrian Kamotho Njenga v Cabinet Secretary, Ministry of  
Information Communication and Technology & 8 others [2020] eKLR*

Neutral citation: [2020] KESC 25 (KLR)

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

**PETITION 15 OF 2019**

**DK MARAGA, CJ, PM MWILU, DCJ & V-P, MK  
IBRAHIM, SC WANJALA & NS NDUNGU, SCJJ**

**SEPTEMBER 4, 2020**

**BETWEEN**

**ADRIAN KAMOTHO NJENGA ..... APPELLANT**

**AND**

**CABINET SECRETARY, MINISTRY OF INFORMATION COMMUNICATION  
AND TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**PAUL KUKUBO ..... 3<sup>RD</sup> RESPONDENT**

**MUGAMBI NANDI ..... 4<sup>TH</sup> RESPONDENT**

**DAVID CHERUIYOT KITUR ..... 5<sup>TH</sup> RESPONDENT**

**LEVI OBONYO OWINO ..... 6<sup>TH</sup> RESPONDENT**

**CHRISTOPHER GUOY HUKA ..... 7<sup>TH</sup> RESPONDENT**

**PATRICIAL W KIMAMA ..... 8<sup>TH</sup> RESPONDENT**

**KENTICE L TIKOLO ..... 9<sup>TH</sup> RESPONDENT**

*(Being a preliminary objection to the Petition of Appeal from the Judgment of the Court  
of Appeal at Nairobi (Ouko, P; Koome, Kantai JJA) in Civil Appeal No.385 of 2017)*



**An appeal against a decision declining to review a High Court decision does not meet the threshold to warrant an appeal as of right to the Supreme Court.**

*The main issue for determination was whether an appeal against a decision declining to review a High Court decision met threshold set under article 163(4)(a) of the Constitution to warrant an appeal as of right to the Supreme Court. The Supreme Court held that while the case had its genesis at the High Court constitutional division, the appellant did not seek to appeal against the pronouncement of the court on the issues raised but instead sought review of the decision of that court. To allow the appellant to ignore the normal hierarchy of courts in the determination of issues would amount to abuse of the process of court.*

Reported by John Ribia

**Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeal as of right – appeal on decision declining to review a High Court decision - whether an appeal against a decision declining to review a High Court decision met threshold to warrant an appeal as of right to the Supreme Court – Constitution of Kenya, 2010, article 163(4)(a).

**Brief facts**

The appellant had filed a constitutional petition in the High Court. Aggrieved with the High Court’s decision, the appellant sought review in the Court of Appeal, which was declined. Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal before the Supreme Court.

The instant appeal was premised on article 163(4)(a) of the Constitution of Kenya, 2010 (Constitution) (that granted the Supreme Court the jurisdiction to determine matters as of right when they raised constitutional questions) and raised issues that revolved around constitutional interpretation and application. Particularly, he urged that the instant court should adopt the South African Constitutional Court’s jurisprudence that constitutional matters had to include disputes as to whether any law or conduct was inconsistent with the Constitution as well as issues concerning the status, powers and functions of an organ state. The respondent filed a preliminary objection challenging the jurisdiction of the court to determine the instant matter.

**Issues**

Whether an appeal against a decision declining to review a High Court decision met threshold set under article 163(4)(a) of the Constitution to warrant an appeal as of right to the Supreme Court.

**Held**

1. A jurisdictional challenge whenever raised had to be determined *in limine* as it went to the core of the case for where a court found that it had no jurisdiction, it could not make a further step.
2. For an appeal to be fit for determination by the Supreme Court under the jurisdiction of the court provided in article 163(4)(a) of the Constitution, the court had to confirm that the issues of constitutional interpretation and application being raised before the court had risen through the normal appellate mechanism so as to reach the court.
3. Under article 163(4)(a) of the Constitution, a matter was not sustainable unless it was demonstrated that it raised cogent issues of constitutional controversy. The appellant had to be faulting the Court of Appeal’s interpretation or application of the Constitution that informed the impugned Judgment. General references to constitutional provisions were not enough to bring an appeal within the ambit of article 164 (3) (a), if such provisions were not a basis of contestation at the appellate court.
4. In the instant appeal it was difficult to see how the matter met the threshold for admission under article 163(4)(a) of the Constitution. While the case had its genesis at the High Court constitutional division, the appellant did not seek appeal against the pronouncement of the court on the issues raised but instead sought review of the decision of that court. It was the decision to decline the application for review that was subject matter before the two subsequent superior courts, which decision aggrieved the appellant who then sought further redress at the instant court. At no point did the appellant invoke



the two superior courts' appellate jurisdiction. Further, in coming to their decisions, the two courts did not defer to the interpretation and application of the Constitution.

5. To allow the appellant ignore the normal hierarchy of courts in the determination of issues would amount to abuse of the process of court. The Supreme Court lacked jurisdiction to entertain the instant appeal.

*Preliminary objection allowed; appeal dismissed; costs awarded to the respondents.*

**Citations**

**Statutes**

None referred to

**Advocates**

None mentioned

## **RULING**

1. Before the Court is a Preliminary Objection raised by the 2nd to 9th Respondents dated 19th June 2019, urging this Court to dismiss the Petition of Appeal on the following grounds:
  - (i) That the appeal before the Court is defective as the same has been brought in a manner contrary to Article 163 (4) of the Constitution, neither does it meet the threshold set by the same Article.
  - (ii) That the appeal does not concern the interpretation and/ or application of the Construction
  - (iii) That the Petitioner has not obtained certification of the present Appeal from either the Court of Appeal or this Honourable Court as raising any matter of general public importance to warrant consideration of the Appeal by this Court.

### **1. Background**

2. The genesis of this matter is a Petition No. 203 of 2016 filed by Appellant at the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi, where he sought several declarations that; actions of the respondent were in violation of Articles 10 and 27 of the Constitution of Kenya; the actions of the respondents to be in violation of Section 6B(10)(c) of the Kenya Information and Communication Act; Gazette Notice No. 1267 dated 27th February and published on 26th February, 2016 to be invalid and an order of certiorari be issued to quash the said notice; Gazette Notice No. 3152 dated 29th April, and published on 4th May 2016 to be invalid and an order of certiorari to be issued to quash it; an order of mandamus be issued directing the respondents to comply with the gender requirements and ensure that at least 4 out of the 12 appointees to the Board of the Communications Authority of Kenya were of opposite gender; that costs be granted and the court be at liberty to grant any orders or relief as may be just and expedient.
3. On the 24th of February 2017, Lenaola, J. (as he then was) considered the matter dismissing it, and found as a fact that the respondents had not breached any article of the constitution or any provision of the Kenya Information and Communications Act Cap 411A Laws of Kenya.
4. Dissatisfied, the Appellant via a Notice of Motion Application dated 17th May 2017, sought review of the judgement of the Court on grounds; THAT the orders made did not take into account fundamental matters of law raised during the proceedings; THAT the decision did not make determination with regard to the mandatory provisions of Section 1(2) of the First Schedule to the



Kenya Information and Communication Act (KICA); THAT Section 1(2) of the First Schedule to KICA dictates that the members of the 1st Interested Party's Board be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times; THAT the Respondent blatantly violated the law by gazetting all the seven members of the Board on the same effective date notably 29th April, 2016; and THAT, the appointments having been gazetted on the same effective date, the terms of the members will lapse on the same date contrary to Section 1(2) of the First Schedule to the Kenya Information and Communications Act.

5. Mativo J considered the application, case laws and the provisions of Section 80 of the Civil Procedure Act, order 45 of the Civil Procedure Rules and found that the motion before him did not fall within the province of review, as matters challenged in the judgment should have been taken on appeal.
6. Further aggrieved the Appellant filed at the Appellate Court, Civil appeal no 385 of 2017. In a decision dated 8th of March 2019 Ouko, P Koome, Kantai JJA dismissed the appeal, finding that the issues raised were not issues that could be taken in an application for review by a Judge of equal jurisdiction, and that these were matters that belonged to the province of an appeal.
7. It is that determination that triggered the filing of the present appeal.

### **3. Supreme Court**

#### **a. 2nd to 9th Respondents Case.**

8. In submissions dated 19th June 2010 and filed on the 20th of June 2020, the 2nd to 9th Respondent urge that the Appellant has not demonstrated nor claimed that the matters raised in the Appeal are subject to certification in terms of Article 163(4)(b) of the Constitution, nor have they sought certification of the matter as being of general public importance at the Court of Appeal or the Supreme Court.
9. In that light, it is their submission that the impugned appeal must be on account of the Appellants belief that the case involves the interpretation and application of the Constitution.
10. It is therefore their submission that the Appeal is incompetent as the it does not arise from the manner in which the Court of Appeal interpreted or applied the provisions of the Constitution as required by Article 163(4) (a) of the Constitution.
11. It is their submission that to evaluate the jurisdictional standing of the Court to handle an appeal, one looks at whether it raises a question of constitutional interpretation or application and whether the same has been canvassed in the Superior Courts. To support this assertion, they cite the decisions in Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others, Supreme Court Petition No 10 of 2013 [2014] eKLR (Joho Case) and Erad Suppliers & General Contractors Limited vs National Cereals & Produce Board, Supreme Court Petition No 5 of 2012 (Erad Case)
12. It is their case that in this present matter, the consideration of the Appellant's Application for review at the High Court and the subsequent appeal to the Appellant Court did not require any of the two superior Courts to defer to the Constitution for the resolution of the merits of the main issue. Further that interpretation and application of the Constitution if any, was only a peripheral consideration to the main issue as demonstrated by the consideration in the Ruling of Mativo J of whether Article 159(2)(d) of the Constitution would allow an otherwise incompetent Application for Review to be allowed.
13. The 2nd to 9th Respondents further urge that the Appellant has merely stated provisions of the Constitution that were allegedly violated without demonstrating how those provisions were subject of



the Appeal before the Court. This they argue, goes against this Court's decision in Peter Oduor Ngoge v Hon Ole Kaparo, Supreme Court Petition No. 2 of 2012. (Ngoge Case)

14. They further submit that the Appellant seems to challenge the judgement of the High Court which was not subject of Appeal in the Court of Appeal and for that reason cannot be subject of an appeal before this Court.
15. They urge that the 3rd to 9th Respondents are no longer members of the Board of the 2nd Respondent as their terms expired on the 29th of April 2019, therefore the reliefs sought by the Petitioner in his Appeal will be inconsequential, where granted. Thus the consideration of the present Appeal by this Honourable Court would be at best an academic exercise.
16. They urge the Court to decline jurisdiction and dismiss the present Appeal in limine with costs to the 2nd to 9th Respondents.

#### **b. Appellant's Case**

17. By written submissions dated 15th August 2019 the Appellant opposes the preliminary objection. It is his submission that Petition of appeal is premised upon Article 163(4) (a) of the Constitution.
18. He urges that it is imperative that the court discerns what relates to the appropriate legal construction of the phrase "matters involving the interpretation or application of the Constitution".
19. He cites the South African case of M Fredricks & 47 others vs MEC for Education and Training, Eastern Cape & Others [2001] where the Constitutional Court stated:
10. As this Court observed in S v Boesak 2001(1) SA 912 (CC); 2001(1) BCLR 36 (CC) at para 13, the Constitution provides no definition of "constitutional matter". What is a Constitutional matter must be gleaned from a reading of the Constitution itself:

If regard is had to the provision of s 172 (1)(a) and s 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and function of an organ of state. Under s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too under s 39 (2) is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of all the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction. (Emphasis supplied) He urges the Court to adopt this South African jurisprudence.

20. The Appellant urges the court to dismiss the preliminary objection as it is without merit, hence proper for dismissal without costs.

#### **4. Analysis.**

21. It is trite law that a jurisdiction challenge whenever raised has to be determined in limine as it goes to the core of the case for where a court finds that it has no jurisdiction, it cannot make a further step.
22. In the present matter, the Appellant urges that this appeal is premised on Article 163(4) (a) of the Constitution and raises issues that revolve around its interpretation and application. Particularly,



he urges that this Court should be persuaded and adopt the South African Constitutional Court jurisprudence cited above that constitutional matters must include disputes as to whether any law or conduct is inconsistent with the constitution as well as issues concerning the status, powers and functions of an organ state.

23. Conversely, the 2nd to 9th Respondents argue that the present case does not meet the jurisdiction threshold of this court, and cannot be entertained.

24. This Court has had the occasion to define the delineations of its jurisdiction under Article 163(4) (a) of the Constitution in a number of its decisions which decisions are still applicable. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others, [2012] eKLR; Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another [2012] eKLR; Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others [2012] eKLR; Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR;

Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndung'u Waititu & 4 Others [2014] eKLR; Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others [2013] eKLR (Joho) among others it has been our position that in order to determine whether this Appeal is proper before us therefore, we must confirm that the issues of Constitutional interpretation and application being raised before us have risen through the normal appellate mechanism so as to reach us.

25. Further that, under Article 163(4)(a), a matter is not sustainable unless it is demonstrated that it raises cogent issues of constitutional controversy. The Appellant must be faulting the Court of Appeal's interpretation or application of the Constitution that informed the impugned Judgment. General references to Constitutional Provisions are not enough to bring an appeal within the ambit of Article 164 (3) (a), if such provisions were not a basis of contestation at the Appellate Court.

26. In the present appeal, it is difficult to see how the matter meets the threshold for admission under Article 163(4)(a) of the Constitution. While the case had its genesis at the High Court constitutional division, the Appellant did not seek appeal against the pronouncement of the court on the issues raised but instead sought review of the decision of that court. It was the decision to decline the application for review that was subject matter before the two subsequent superior courts, which decision aggrieved the appellant who then sought further redress at this Court. At no point did the Appellant invoke the two superior courts appellate jurisdiction. Further, in coming to their decisions, the two courts did not defer to the interpretation and application of the Constitution.

27. In that light, to allow the Appellant ignore the normal hierarchy of courts in the determination of issues would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal.

28. As to costs, this Court has previously settled the law on award of costs, that costs follow the event, and that, a Judge has the discretion in awarding costs. This was the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No. 4 of 2012; [2014] eKLR. We note that in this matter, both the trial court, and appellant court accepted that the Appellant was motivated by public interest in moving the courts. In that light, they ordered that parties ought to bear their own costs.



We are however disinclined to do the same. In the matter of Okiya Omtatah Okoiti v Central Bank of Kenya & 7 others, SC Application No. 32 of 2018; [2019] eKLR

“ [Paragraph 48], this Court stated as follows:

“We find it necessary to address issue of costs. While we agree with the Applicant that where a private citizen sues a government entity in a matter of great constitutional moment or of great public importance, the Applicant should, as a general rule, not be condemned to pay costs, we note however that all Respondents have expended their finances in defending this Application. The Application was in any event never certified as one of public interest to attract the sympathy of the Court as a matter of general public importance. The Applicant, by instituting proceedings in a process which is basically about the tender for printing of new currencies, ought to have anticipated the consequences of his actions including costs. We, in the event, order that the Applicant should bear the costs of all Respondents.”

29. We make a similar finding in this matter regarding costs, in view of the fact that this matter was not certified as being one of public interest, sufficient to attract the sympathy of the Court as a matter of general public importance, and reiterate that the Applicant, when instituting proceedings, ought to have anticipated the consequences of his actions including costs.

#### **5.Orders**

30. Consequent upon our findings above, the final orders are that:

Preliminary Objection by the Respondents dated 19th June, 2019 be and is hereby upheld.

1. The Petition of Appeal dated 18th of April, 2019 be and is hereby dismissed.
2. The costs of all Respondents shall be borne by the Applicant.

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

.....

**D. K. MARAGA**

**CHIEF JUSTICE & 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**

.....



**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR,**

**SUPREME COURT OF KENYA**

