



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina & another (As Administrators of the Estate of Margaret Wanjiru Kinyara - Deceased)
v Kinyanjui & Njenga (As Administrators of the Estate of Elizabeth Wanjiru Njenga -Deceased)
& 3 others (Petition 19 of 2019) [2020] KESC 28 (KLR) (Civ) (4 September 2020) (Ruling)**

Margaret Wanjiru Wainaina & another v James Njenga Kinyanjui & 4 others [2020] eKLR

Neutral citation: [2020] KESC 28 (KLR)

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

PETITION 19 OF 2019

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

SEPTEMBER 4, 2020

BETWEEN

**MARGARET WANJIRU WAINAINA 1ST PETITIONER
EUNICE WANGARI MWANGI 2ND PETITIONER
AS ADMINISTRATORS OF THE ESTATE OF MARGARET WANJIRU
KINYARA - DECEASED**

AND

**JAMES NJENGA KINYANJUI & DAVID KARANJA NJENGA (AS
ADMINISTRATORS OF THE ESTATE OF ELIZABETH WANJIRU NJENGA -
DECEASED) 1ST RESPONDENT
DAVID KARANJA NJENGA 2ND RESPONDENT
KEZIAH MUTHONI WANAINA 3RD RESPONDENT
PETER NJENGA WANAINA 4TH RESPONDENT**

*(Being an application to strike out an Appeal from the judgement of the Court of
Appeal at Nairobi (Ouko (P), Musinga, Kantai JJ) in Civil Appeal No. 30 of 2005)*



Failure to state the constitutional provision which a party was invoking the Supreme Court's appellate jurisdiction is not a mere procedural technicality curable under article 159 of the Constitution

The petitioner filed the instant petition appealing against the decision of the Court of Appeal which overturned the High Court's decision that had awarded the deceased a portion of her deceased's father property. The court held that failure to state the constitutional provision which a party was invoking the Supreme Court's appellate jurisdiction was not a mere procedural technicality curable under article 159 of the Constitution.

Reported by Sharon Sang & Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – requirements for filing an appeal – stating the constitutional provision a party was invoking the Supreme Court's appellate jurisdiction – failure to state the constitutional provision – effect of - whether failure to state the constitutional provision a party was invoking the Supreme Court's appellate jurisdiction was a mere procedural technicality curable under article 159 of the Constitution – Constitution of Kenya, 2010, articles 159 and 163.

Brief facts

The petitioner filed the instant petition appealing against the decision of the Court of Appeal which overturned the High Court's decision that had awarded the deceased a portion of her deceased's father property. The 1st respondent filed a preliminary objection alleging that the petitioners did not obtain leave to appeal; further, that they did not seek or obtain certification from the Court of Appeal that the matter was one of general public importance. Additionally, they claimed that the petitioner filed the notice of appeal after the expiry of the 14 days required to file an appeal without seeking for extension of time.

It was the 1st respondent's case that jurisdiction of the Supreme Court to entertain an appeal from the Court of Appeal was premised on two limbs provided under article 164 of the Constitution of Kenya, 2010, (Constitution). The respondents argued that the instant matter failed the requisite test as it was a private succession cause involving relatives. Further that none of the issues before both the High Court and the Court of Appeal involved interpretation or application of the Constitution and that the two superior courts only delved into succession issues.

Issues

Whether failure to state the constitutional provision a party was invoking the Supreme Court's appellate jurisdiction was a mere procedural technicality curable under article 159 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*
- 2. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)*

Held

1. A party ought to indicate which constitutional provision he or she relied on when moving the court. It was absurd that a party could seek audience before the court without doing so, as it could not be left to the court to speculate which provision was best suited for the petitioner's appeal.
2. In preferring an appeal, a litigant should invoke the correct constitutional or statutory provision; an omission in that regard was not a mere procedural technicality to be cured under article 159 of the Constitution.

Petition dismissed; preliminary objection allowed; petitioners to bear the costs of the application.



Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. The Petition before the court is dated and filed on the 17th of May 2019, appealing against the decision of the Court of Appeal at Nairobi dated 5th of April 2019, in Civil Appeal No 30 of 2005. The Appellate Courts decision overturned a High Court decision that had awarded Mary Wanjiru Kinyara (deceased) a portion of her deceased's father property.
2. On the 30th of May 2019, the 1st Respondent filed a Preliminary objection alleging that the Petitioners did not obtain leave to appeal contrary to Section 15(1) of the Supreme Court Act, further, that they did not seek or obtain certification from the Court of Appeal that the matter is one of general public importance contrary to Section 24(1) of the Supreme Court Rules 2012. Additionally, they claim that the Petitioner filed the Notice of Appeal after the expiry of the 14 days without seeking extension of time.
3. In submissions dated and filed on the 11th of March 2010, it is the 1st Respondents case that Jurisdiction of this Court to entertain an appeal from the Court of Appeal is premised on two limbs provided under Article 164 of the Constitution. That is;
 - 3) Appeals shall lie from the Court of Appeal to the Supreme Court—
 - (a) as of right in any case involving the interpretation or application of this Constitution; and
 - (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
4. They submit that for a matter to meet the threshold of a case that involves the interpretation and application of the Constitution, one has to be apply a test set by this court in *Lawrence Nduttu & 6000 Others v Kenya Breweries LTD & Another S.C Petition No 3 of 2012*. It is their submission that the case emphasizes that it is not the mere allegation in pleadings by party that clothes an appeal with the attributes of Constitutional Interpretation or application, but that the case must originate from a Court of Appeal case where issues revolved around the interpretation or application of the Constitution.
5. They argue that this present matter fails the requisite test as it remains a private succession cause involving relatives. Further that none of the issues before both the High Court and the Court of Appeal involved interpretation or application of the Constitution and that the two superior courts only delved into succession issues.
6. This Appeal, they argue therefore falls squarely within the ambit of Article 163(4) (b) and rule 24(1) of the supreme court rules. As this limb directs parties to seek certification from the Court of Appeal as a matter of general public importance which the Petitioners have failed to do, it is their submission that this Court is not clothed with the requisite jurisdiction to entertain this application and must lay



down its tools. They support this assertion by citing *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 other*, [2018] eKLR.

7. In response to these submissions, we note that despite several mentions before the Deputy Registrar of this Court, the Petitioners in this matters have not filed submissions in this application.
8. We note that the objection before us refers to the questions of jurisdiction of this Court both on matters of constitutional interpretation and application as well as on matters of general public importance. It is also noted that Petitioner’s Memorandum of Appeal dated 17th May 2019 failed to indicate under which constitutional provision they are invoking the court’s jurisdiction in seeking redress from this court.
9. We have on several occasions stated that a party ought to indicate which constitutional provision he or she relies on when they move this Court. It is absurd that a party can seek audience before the court without doing so, as it cannot be left to the court to speculate which provision is best suited for the Petitioner’s appeal.
10. This was our position in *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* [2015] eKLR where this Court was categorical that in preferring an appeal, “a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.”
11. Similarly, in *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* [2018] eKLR we stated that:

“(53) In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court’s jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter...”

12. In our view, the principles in the above cases still prevail and we dismiss the petition for want of jurisdiction.

ORDERS

1. The Preliminary Objection dated 30th of May 2020 is allowed.
2. The Petitioner’s shall bear the costs of this application.

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

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....
P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT OF THE SUPREME COURT



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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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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

