



Kenya Plantation & Agricultural Workers' Union v Omulama & 9 others (The Kenya Export Floriculture, Horticulture and Allied Workers' Union (KEFHAU); Represented by its Promoters) (Petition 4 of 2018) [2019] KESC 37 (KLR) (8 May 2019) (Ruling)

Kenya Plantation & Agricultural Workers' Union v Kenya Export Floriculture, Horticulture And Allied Workers' Union (Kefhau); Represented By Its Promoters; David Benedict Omulama & 9 others [2019] eKLR

Neutral citation: [2019] KESC 37 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 4 OF 2018**

**PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
MAY 8, 2019**

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS' UNION APPELLANT

AND

DAVID BENEDICT OMULAMA 1ST RESPONDENT
ANDREW MAKWAGA 2ND RESPONDENT
BENARD AMUCHIZI MUKAISI 3RD RESPONDENT
ADRIANO MUKALO 4TH RESPONDENT
WYCLIFF SORE 5TH RESPONDENT
SEVERIO MASIKA 6TH RESPONDENT
LILIAN INGUTIA 7TH RESPONDENT
EFELIA A NANDI 8TH RESPONDENT
JAMES AMATONYE 9TH RESPONDENT
REGISTRAR OF TRADE UNIONS 10TH RESPONDENT
**THE KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLIED
WORKERS' UNION (KEFHAU); REPRESENTED BY ITS PROMOTERS**

*(Being an application for stay of proceedings pending
at the Employment and Labour Relations Court)*



Supreme Court has no jurisdiction to stay orders of a lower court where the normal appellate mechanism has not been followed

The matter before the court was an application for stay of proceedings pending at the Employment and Labour Relations Court. The Supreme Court held that it had no jurisdiction to stay orders of a lower court where the normal appellate mechanism has not been followed.

Reported by Ian Kiptoo

Jurisdiction - jurisdiction of the Supreme Court – jurisdiction to stay orders – where the matter before the Supreme Court had not followed the normal appeal process – whether the Supreme Court had jurisdiction to stay orders of the Employment Labour and Relations Court where the normal appellate mechanism had not been followed – Constitution of Kenya, 2010, article 163 (4); Supreme Court Act, section 15 (1) and (2).

Brief facts

The matter before the Court was an application for stay of proceedings pending at the Employment and Labour Relations Court. The applicants argued that the interim orders granted to the respondent were un-procedural, unfair and an abuse of the court process and amounted to the violation of the applicants’ rights provided for in the Labour Relations Act; that due to the orders issued in Cause No 222 of 2018 their union was unable to collect dues and carry union activities; that the Employment and Labour Relations Court did not have jurisdiction to issue orders leading to Legal Notice No. 157, which stayed deduction of union dues in respect of the applicants’ union, thereby violating their right under article 36 of the Constitution of Kenya, 2010 (Constitution).

The respondents opposed the application stating that the orders sought were meant to scuttle the hearing of the present appeal as they emanated from rulings and judgments of separate causes of action as delivered in the Employment and Labour Relations Court in respect of which no appeal to the Court of Appeal had been preferred; that the applicants had wrongly approached the Court in respect to matters pending before the Employment and Labour Relations Court; and that the Court lacked jurisdiction to hear and determine the application.

Issues

- i. Whether the Supreme Court had jurisdiction to stay orders of a lower court where the normal appellate mechanism had not been followed.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163 (4)

“(4) 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 Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Held

1. The appellate jurisdiction of the Supreme Court was aptly captured in article 163(4) of the Constitution of Kenya, 2010 (Constitution). Section 15 (1) of the Supreme Court Act No. 7 of 2011 also provided that appeals to the Supreme Court would be heard only with the leave of the Court. Section 15 (2) on the other hand provided that sub-section (1) would not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.



- The Court had time and again stipulated the boundaries of its jurisdiction under article 163 (4) (a) of the Constitution in several decisions which were still applicable.
2. The applicants had not sought stay of proceedings before the Employment and Labour Relations Court (ELRC). The ELRC had had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties since the alleged causes were live before it. Accordingly, the ELRC should ideally be afforded the first opportunity to express an opinion as to whether the causes filed and being filed before it raised similar questions as to the ones being raised before the Supreme Court. Should the applicants be dissatisfied with the decision of the ELRC, they would be free to appeal that decision before the Court of Appeal and subsequently to the Court through the normal appellate mechanism. To allow the applicant to disregard the courts below and come directly to the Court in search of stay orders, would amount to an abuse of court process.
 3. The Supreme Court had in previous decisions emphasized the significance of respecting the hierarchy of the judicial system in several cases. The issues on collective bargaining agreement and remittance of union dues were neither raised nor determined at the lower Courts. Consequently, the Court lacked jurisdiction to entertain the same having been raised for the first time.

Application dismissed with costs to the respondent.

Orders

Kenya Plantation & Agricultural Workers' Union v The Kenya Export Floriculture, Horticulture and Allied Workers' Union (KEFHAU) and another [2019] eKLR

Petition No 4 of 2018

Supreme Court of Kenya

P M Mwilu CJ & VP; M K Ibrahim, S C Wanjala, N Ndungu, I Lenaola, SCJJ

May 8, 2019

Reported by Ian Kiptoo

***Jurisdiction** - jurisdiction of the Supreme Court – jurisdiction to stay orders – where the matter before the Supreme Court had not followed the normal appeal process - whether the Supreme Court had jurisdiction to stay orders of the Employment Labour and Relations Court where the normal appellate mechanism had not been followed – Constitution of Kenya, 2010, article 163 (4); Supreme Court Act, section 15 (1) and (2)*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. This is an application by way of Notice of Motion dated 9th August, 2018 brought under Articles 36, 41(2) (c) (4)(a), (b) & (5), 50(1), 163(3) (b), 163(4) (b), 163 (7) of the Constitution of Kenya and Rules 23, 26(1)(a), (b) (2)(3)(4) and (5) of the Supreme Court Rules, 2012 and the inherent jurisdiction/ powers of the Court. The applications seek the following substantive orders:
 1.;
 2. That pending inter-partes hearing and determination of this application and petition, the Petitioner be prohibited and/or restrained by itself, its servants, agents or any other person(s)



claiming through it from interfering in any way with the operations of the 1st to 9th Respondents' union by instituting legal proceedings in any other lower courts other than the Supreme Court on matters arising from the impugned Judgment of the Court of Appeal in Civil Appeal No. 141 of 2014;

3. That pending inter-partes hearing and determination of this application and the petition the proceedings in Cause No. 13 of 2018 and Cause No. 222 of 2018 in the Employment and Labour Relations Court in Nakuru on matters arising from the impugned judgment of Civil Appeal No. 141 of 2014 and any ex parte orders thereto be stayed;
 4. That pending inter-partes hearing and determination of this application and the petition the 1st to 9th Respondents' union be and is hereby allowed to engage in Collective Bargaining Agreement negotiations on behalf of its members with employers with whom it has a Recognition Agreement;
 5. That pending inter-partes hearing and determination of this application and the petition, employers who employ more than 5 members of the 1st to 9th Respondents' union be and are hereby directed to deduct and remit trade union dues in accordance with the Kenya Gazette Supplement No. 95, Legal Notice No. 157 of 3rd July, 2018;
 6. That after hearing of this application this Court be pleased to grant an order stopping the petitioners from interfering with operations of the 1st and 9th Respondents' Union by filing any suit in any other matters arising out of the judgment in Civil Appeal No. 141 of 2014 and which are under consideration in petition No. 4 of 2018; and
 7. That costs of and incidental to this application abide the result of the Petition No. 4 of 2018.
2. The application is premised upon nineteen (19) grounds in the body of the application and the supporting affidavit of David Benedict Omulama, the National Secretary of KEFHAU, sworn on 9th August, 2018.
 3. The application is opposed by Kenya Plantation & Workers' Union (the Respondent herein) who has filed a replying affidavit sworn by Francis L. Atwoli, the National Secretary, on 17th August, 2018.

B. Background

i. Proceedings at the Employment and Labour Relations Court

4. Before approaching the Employment and Labour Relations Court, the 1st and 2nd Applicants made an application to the Registrar of Trade Union on 17th July 2009 for the establishment of a trade union (KEFHAU). Upon receipt of the application, the Registrar issued a certificate. Afterwards, the 1st to 9th Applicants applied to the Registrar for the registration of the union. The Registrar acknowledged receipt of the application by a letter dated 25th March 2010 and notified the Applicants that the application was to be placed before the National Labour Board for consideration. Later, the Registrar notified the General Secretary of the Respondent and invited any objection. Thereafter, the Registrar sent a letter dated 30th August 2011 to KEFHAU's interim secretary enclosing a notification of refusal of registration.
5. Aggrieved by the Registrar's decision, the Applicants appealed to the Employment and Labour Relations Court raising several grounds. The learned Judge (Monicah Mbaru, J) considered the provisions of the Constitution of the Respondent relating to the sector the union represented and found that the Registrar's decision was largely based on the provisions of the repealed Constitution



and that the limitation under Article 24 of the Constitution did not apply to the Applicants. The Court also found that there was a fundamental difference between that which comprised plantations and agricultural industry in the Respondent's Constitution and floriculture and horticulture. Consequently, the learned Judge reversed the decision of the Registrar, stating that the union was registered as a trade union, and ordered the Registrar to immediately issue a registration certificate.

ii. Proceedings at the Court of Appeal

6. Aggrieved by the decision of the Industrial and Labour Relations Court, the Respondent preferred an appeal to the Court of Appeal, *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others*, Nairobi Civil Appeal No. 141 of 2014 based on six grounds. The Court of Appeal (Githinji, Waki & Kiage, JJA) dismissed the appeal on 12th May, 2017. On whether the learned Judge erred in fact and in law in holding that the decision of the Registrar was largely based on the repealed Constitution, the Learned Judges held that although the application for registration was made before the promulgation of the current Constitution, the decision of the Registrar refusing registration was made on 30th August 2011, slightly over one year after the current Constitution commenced. The applicable law at the time the decision was made was based on the Labour Relations Act and the current Constitution. As to whether the learned Judge failed to recognize the fact that the rights to form and join trade unions and associations are not absolute and are limited by Article 24 of 2010 Constitution, the Court of Appeal found that the condition imposed by Section 14(1)(d)(i) of the Labour Relations Act was not an unconstitutional limitation of the right to form and join a trade union and that the Employment and Labour Relations Court did not find otherwise. The 4th ground of appeal stated that the learned judge erred in fact and in law in holding that the refusal to register the trade union was unjustified and unreasonable without giving adequate reasons and on this, the Court of Appeal held that the learned Judge gave valid reasons why registration should not have been refused. The 1st and 5th grounds of appeal related to the form of order that the learned judge made. It was contended that the learned Judge erred in law in registering the union and in essence usurping the role of the Registrar. In that regard, the Court of Appeal held that a court should not assume any role in the registration of a trade union that being the statutory duty of the Registrar of Trade Unions. It concluded that the Court had jurisdiction to order registration and the registration of the proposed union by the Registrar cured any defect in the order.

iii. Proceedings at the Supreme Court

7. Aggrieved further by the decision of the Court of Appeal, the Respondent filed an appeal before this Court. The Respondent seeks to set aside the decision of the Court of Appeal. However, before the petition could be disposed, the Applicants filed a Notice of Motion under certificate of urgency hence, these proceedings.

The Parties' Respective Cases

a. The Applicants

8. Relying on their submissions dated 5th September, 2018, the Applicants submit that the Respondent has filed suits in the Employment and Labour Relations Court at Nakuru raising similar issues raised before the appeal herein. On this, they urge that the Respondent filed Cause no. 13 of 2018 seeking to stop the Applicants from accessing flower farms for the purposes of carrying out activities of a trade union. They submit that the Respondent seeks to dispense the appeal before this Court by a lower Court thereby abusing the Court process.



9. It is the Applicants' submissions that the issue of alleged infringement of the Respondent's right by the Court of Appeal is at the centre of the appeal before this Court and not before the Employment and Labour Relations Court. In that regard; the Applicants urge that the Respondent seeks to stop them from recruiting members in its areas and has filed Cause No. 222 of 2018, which in the Applicants' opinion seeks to preserve the substratum of its cause in the petition before this cause.
10. Further, the Applicants submit that they have invested in recruiting union members, engaged employers to sign two recognition agreements and need to conclude collective bargaining agreements. They urge that the interim orders granted to the Respondent are un-procedural, unfair and an abuse of the court process, and amount to the violation of the Applicants' rights provided for in the Labour Relations Act.
11. The Applicants urge that due to the orders issued in Cause No. 222 of 2018 their union is unable to collect dues and carry union activities. They urge that the Employment and Labour Relations Court did not have jurisdiction to issue orders leading to Legal Notice No. 157, which stayed deduction of union dues in respect of the Applicants' union, thereby violating their right under Article 36 of the Constitution.
12. On this Court's jurisdiction, the Applicants submit that this Court has the jurisdiction to hear and determine this application as the matters raised in Causes no. 13 of 2018 and 222 of 2018 raise similar issues as those pending before this Court. They urge that if the said causes are not stayed their right to be heard in this appeal would be prejudiced. To support this, they cite this Court's decision in Teachers Service Commission v Kenya National Union of Teachers and others, Appl. No. 16 of 2015.

b. The Respondent

13. The Respondent filed their written submissions on 21st September, 2018 opposing the Application. They submit that the orders sought by the Applicants are misplaced, unattainable and form part of the record from the Court of Appeal Judgment in respect of which the instant appeal is filed.
14. The Respondent urges that the orders sought are meant to scuffle the hearing of the present appeal as they emanate from rulings and judgments of separate causes of action as delivered in Employment and Labour Relations in respect of which no appeal to the Court of Appeal have been preferred. They also urge that the Applicants have wrongly approached this Court in respect to matters pending before the Employment and Labour Relations Court. They finally submit that this Court lacks jurisdiction to hear and determine this application.

C. Issues for Determination

15. The application raises the following issue for determination
 - a. Whether this Court has jurisdiction to determine this application? If the answer is in the affirmative, what remedy is available to the Applicants?

D. Analysis

16. The appellate jurisdiction of this Court is aptly captured in Article 163(4) of the Constitution of Kenya which state as follows:

- “(4) 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 Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
- (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.
17. Section 15 (1) of the Supreme Court Act No.7 of 2011 also provides that Appeals to the Supreme Court shall be heard only with the leave of the Court. Section (15) (2) on the other hand provides that Sub-Section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.
18. This Court has time and again stipulated the boundaries of its jurisdiction under Article 163(4)(a) of the Constitution in several decisions, which decisions are still applicable. In the case of Lawrence Nduutu case, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) the set guiding principles were affirmed as follows:
- (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 of Article 163 (4) (a).” [emphasis added]
19. Further, in the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others (Joho Case), Sup.Ct. Petition No. 10 of 2013, this Court observed as follows:
- (37): “In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution...” [emphasis added].
20. The same principle was also affirmed in this Court’s decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, S.C App. No. 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:
- (69): “The import of the Court’s statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.” [emphasis added]
21. In determining this application, we shall approach the question of jurisdiction from two angles, whether this Court can stay proceedings before a court below? And whether this Court can issue orders on matters that have not arisen through the normal appellate mechanism?

Jurisdiction to stay proceedings before a court below

22. On this, the Applicants seek this Court to prohibit the Respondent from instituting legal proceedings in any other lower Courts other than this Court on matters relating to Civil Appeal No. 141 of 2014.



They also want this Court to stay proceedings in Cause No. 13 of 2018 and 222 of 2018 before the Employment and Labour Relations Court pending the hearing and determination of the Petition before this Court.

23. We have had the opportunity to interrogate the Applicants' application, the supporting affidavit and written submissions, and note that they have not sought stay of proceedings before the Employment and Labour Relations Court. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties since the alleged causes are live before it. Accordingly, that court should ideally be afforded the first opportunity to express an opinion as to whether the causes filed and being filed before it raise similar questions as to the ones being raised before the Supreme Court. Should the Applicants be dissatisfied with the decision of that Court, they shall be free to appeal that decision before the Court of Appeal and subsequently to this Court through the normal appellate mechanism. To allow the applicant disregard the Courts below and come directly to this Court in search of stay orders, would amount to an abuse of the process of Court. This was the reasoning of this Court in the case of *Sum Model Industries Ltd v Industrial & Commercial Development Corporation*, SC Application No. 1 of 2011; [2011] eKLR.
24. We are therefore reluctant to grant prayer 2, 3 and 6 of this application for the above reasons.

Jurisdiction to issue orders on issues that have not arisen through the normal appellate mechanism.

25. It is the Applicants' case that pending the hearing and determination of this application and the petition, this Court issues them with orders to engage in Collective Bargaining Agreement negotiations on behalf of its members with employers with whom it has recognition agreement. They also seek orders from this Court directing employers who employ more than 5 members of their Union to deduct and remit trade union dues to the union.
26. This Court has in previous decision emphasized the significance of respecting the hierarchy of the judicial system in several cases. For instance, in the case of *Peter Oduor Ngoge v Francis Ole Kaparo & others* [2012] eKLR this Court stated as follows:
- “In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”
27. Also, in *Michael Mungai v Housing Finance Co. (K) Ltd & 5 other*, Appeal/Application 9 of 2015; [2017] eKLR, we specifically stated as follows:

- “(14) The powers of this Court have to be exercised within and in accordance with a specific jurisdiction as provided for in Article 163(3) of the Constitution. One cannot ask the Court to exercise its powers in a *carte blanche* manner. A litigant's plea must be precise and targeted. One cannot make omnibus prayers to the Court with the expectation that the Court will be merciful to him and decipher them and grant one or either of them. Each of the jurisdictions of the Court has a definite outcome that is predictable: an appeal may lead to an affirmation or overturning of the decision being appealed against; while a reference will definitely lead to an advisory opinion being rendered or declined. Consequently, any matter that comes before this Honourable Court has to be focused and targeted. One must have a cognizable cause of action and a



litigation trajectory that can be well traced within the judicial hierarchy in case of an appeal. A litigant cannot therefore, in a haphazard manner, request this Court to review or set aside the orders of the High Court directly. Such a request does not lie within the definite thread of a cause of action that has risen through the judicial hierarchy.” [emphasis added]

28. What we must decide is whether the issues raised in prayer 4 and 5 of the application were determined at the Employment and Labour Relations Court and subsequently at the Court of Appeal so as to this Court as an appeal. And if indeed they were issues for determination before the Courts below, whether issues of interpretation and application of the Constitution were at play?
29. We have perused the record and noted that the issues on collective bargaining agreement and remittance of union dues were neither raised nor determined at the Courts below. Consequently, this Court lacks jurisdiction to entertain the same having been raised here for the first time.
30. The upshot of the above is that we are inclined to disallow the entire application with costs to the Respondent.

A. Orders

31. Consequently, we make the following Orders
 - i. The Notice of Motion dated 9th August, 2018 be and is hereby dismissed.
 - ii. The Applicants shall bear the costs of the Respondent.
32. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2019.

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P. M. MWILU
DCJ & VP OF THE SUPREME COURT

.....
M.K. IBERAHIM
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

