



Tullow Oil PLC & 3 others v Permanent Secretary, Min of Energy, Republic of Kenya & 15 others (Application 4 of 2018) [2019] KESC 36 (KLR) (Civ) (8 May 2019) (Ruling)

Tullow Oil PLC & 2 others v Permanent Secretary, Min of Energy, Republic of Kenya & 15 others [2019] eKLR

Neutral citation: [2019] KESC 36 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

APPLICATION 4 OF 2018

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

MAY 8, 2019

BETWEEN

TULLOW OIL PLC 1ST APPLICANT
AFRICA OIL TURKANA LIMITED 2ND APPLICANT
AFRICA OIL KENYA LIMITED 3RD APPLICANT
ANGUS MCCOSS 4TH APPLICANT

AND

THE PERMANENT SECRETARY, MIN OF ENERGY, REPUBLIC OF KENYA 1ST RESPONDENT
MINISTER OF ENERGY, REPUBLIC OF KENYA 2ND RESPONDENT
MINISTER OF PLANNING & DEVELOPMENT, REPUBLIC OF KENYA 3RD RESPONDENT
NATIONAL OIL CORPORATION OF KENYA 4TH RESPONDENT
ENVIRONMENT MANAGEMENT AUTHORITY 5TH RESPONDENT
GEOHERMAL DEVELOPMENT COMPANY 6TH RESPONDENT
CENTRIC ENERGY CORPORATION 7TH RESPONDENT
PLATFORM RESOURCES INC 8TH RESPONDENT
0903658B.C LTD 9TH RESPONDENT
ALEC EDWARD ROBINSON 10TH RESPONDENT



SUMAYYA ATHMANU (MD NOCK)	11 TH RESPONDENT
PATRICK MWAURA NYOIKE	12 TH RESPONDENT
CHINA NATIONAL OFFSHORE OIL CORP	13 TH RESPONDENT
INTERSTATE PETROLEUM COMPANY LIMITED	14 TH RESPONDENT
MONENA M. KENGARA	15 TH RESPONDENT
EDWARD KINGS ONYANCHA MAINA	16 TH RESPONDENT

(An application to strike out the Notice of Appeal in the intended appeal from the judgment of the Court of Appeal (Azangalla, Gatembu & Murgor JJA) sitting at Eldoret and delivered at Kisumu on the 29th day of July, 2016 in Eldoret Civil Appeal No. 18 of 2015)

A party should provide sufficient grounds for a failure to file an appeal within the prescribed time.
The main issue for determination was what was the effect of failing to lodge the requisite documents necessary to institute an appeal at the Supreme Court within the stipulated timelines. The Supreme Court held that time for filing an appeal under article 163(4)(b) of the Constitution lapsed 30 days after the grant of certification. There was nothing on record to confirm that the 16th respondent sought certification, and if the same was allowed, and when it was allowed. The 16th respondent failed to provide sufficient grounds for his failure to file his appeal within the prescribed time.

Reported by Beryl Ikamari and Mathenge Mukundi

Civil Practice and Procedure - appeals - appeal to the Supreme Court - timelines for filing an appeal to the Supreme Court - where a party filed the notice of appeal and failed to lodge other accompanying documents within the stipulated timeframe - effect of failing to lodge the requisite documents necessary to institute an appeal at the Supreme Court - Supreme Court Act, 2011, section 19 & Supreme Court Rules, rule 33 & 37.

Civil Practice and Procedure - preliminary objection - nature of a preliminary objection - circumstances under which a preliminary objection could be raised - whether a preliminary objection was competent where points of law forming the basis of a preliminary objection were not discernible.

Brief facts

The application originated from a decision of the High Court. The court rejected the applicants' applications to dismiss or strike out a judicial review application by the 16th to the 18th respondents. The main issue for determination in the applications was whether the issues raised in the subsequent judicial review application had previously been dealt with and finalized by the court in a previous concluded judicial review application. The applications were dismissed and the trial court stated that the doctrine of *res judicata* was inapplicable in judicial review proceedings.

Aggrieved by the High Court decision, the applicants filed appeals 376 of 2014, 18 of 2015 and 45 of 2015, which were subsequently consolidated under Civil Appeal 376 of 2014 as the lead file. The Court of Appeal raised one question for determination, namely, whether the High Court was right in taking the view that the doctrine of *res judicata* was not applicable to judicial review proceedings. The appeal was allowed and consequently the ruling of the High Court was set aside. The *ex parte* leave granted to the 16th and 18th respondents to apply for judicial review orders including prohibition was discharged. The application for judicial review 1 of 2012 was also dismissed. The appellate court faulted the trial court's reasoning that the doctrine of *res judicata* did not apply to judicial review proceedings.

The 16th respondent lodged a notice of appeal intending to appeal against the decision of the Court of Appeal. It was that notice of appeal that the applicants wanted withdrawn or struck out.



Issues

- i. What was the effect of failing to lodge the requisite documents necessary to institute an appeal at the Supreme Court within the stipulated timelines?
- ii. Whether a preliminary objection was competent where points of law forming the basis of a preliminary objection were not discernible.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 33(1)

An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-

- a) a petition of appeal;
- b) a record of appeal; and
- c) the prescribed fee.

Rule 37(1)

Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of appeal shall be deemed to have been withdrawn, and the court may on its own motion or on application by any party make such orders as may be necessary.

Held

1. A preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point would dispose of the suit. Examples were an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties were bound by the contract giving rise to the suit, to have the dispute to be referred to arbitration. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
2. A preliminary objection would only be raised on a pure question of law. To distinguish such a point of law, the court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were *prima facie* presented in the pleadings on record. The point of law that was being raised by the 16th respondent was not discernible. Hence, the preliminary objection failed as it did not meet the threshold set in the *Mukisa Biscuit* case.
3. The notice of appeal was filed August 8, 2016 and the time for filing an appeal as of right lapsed on September 7, 2016. Up to date there was no appeal filed. The time for filing an appeal under article 163(4)(b) of the Constitution lapsed 30 days after the grant of certification. There was nothing on record to confirm that the 16th respondent sought certification, and if the same was allowed, and when it was allowed. The 16th respondent failed to provide sufficient grounds for his failure to file his appeal within the prescribed timeframe.

Application allowed. The 16th respondent would bear the costs of the applicants.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

A. Introduction

- 1 This is an application by way of a Notice of Motion dated 28th February, 2018 brought under Rules 3(1), (2) and (5) and 37 of the Supreme Court Rules. The application seeks the following substantive orders:
 1. The Notice of Appeal dated 8/8/2016 lodged by Edward Kings Onyancha Maina, the 16th Respondent herein be and is hereby deemed as withdrawn;
 2. In the alternative, Notice of Appeal dated 8/8/2016 lodged by Edward Kings Onyancha Maina, the 16th Respondent be and is hereby struck out.
 3. The costs of this application be borne by the 16th Respondent.
2. The application is based on eight (8) grounds in the body of the application and the supporting affidavit of Martin Ombogo, the Country Manager of Tullow Kenya B.V, a subsidiary of Tullow Oil Plc, sworn on 28th February, 2018.
3. The 16th Respondent has filed a Notice of Preliminary Objection on Points of Law dated 4th April, 2018.

B. Background

I. Proceedings at the High Court

- 4 This cause originates from a decision of the High Court sitting at Kitale (Karanja J.R, J) delivered on 5th March, 2013. In that ruling, the Court rejected the Applicants' applications to dismiss or strike out a judicial review application by the 16th to the 18th Respondents. The main issue for determination on the applications was, whether the subject matter or matters and indeed the issues in the subsequent judicial review application had "previously been dealt with and finalized by the court" in the previous judicial review application. While dismissing the applications dated 20th February, 2012, 18th April, 2012 and the application dated 8th May, 2012 the learned Judge held himself thus:

"Judicial review proceedings, being sui-generis, do not fall under the Civil Procedure Act and Rules save order 53 of the Civil Procedure Rules. The main ground in the applications to set aside leave is founded on the doctrine of "res-judicata" which is provided for under Section 7 of the Civil Procedure Act in that: -

"No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The doctrine is based on the maxims that no man should be vexed twice over the same cause, that it is in the interest of the state that there should be an end to litigation and that a judicial decision must be accepted as correct. However, the doctrine is applicable under the Civil Procedure Act which does not apply to judicial review proceedings (see, Republic vs. Judicial Service Commission ex parte Pareno (2004) KLR 203, Republic vs



Communication Comm. Of Kenya (2001) 1 EA 1999 and Welamondi vs The Electoral Commission of Kenya (2002) KLR 486).

It may as well follow that “res-judicata” does not apply in judicial review proceedings. Therefore, the application dated 20th February, 2012 and the two applications dated 18th April, 2012 would be devoid of merit in so far as they relate to the setting aside of the leave granted on 30th January, 2012.” [emphasis added]

PARA ii. Proceedings at the Court of Appeal

5. Aggrieved by the order dismissing their respective applications, the Applicants filed appeals no 376 of 2014, 18 of 2015 and 45 of 2015, which were subsequently consolidated under Civil Appeal No. 376 of 2014 as the lead file. The Court of Appeal raised one question for determination, namely, whether the learned Judge of the High Court was right in taking the view that the doctrine of res judicata was not applicable to judicial review proceedings.
6. The Learned Judges of Appeal allowed the Applicants’ appeal, consequently setting aside the ruling of the High Court delivered on 5th March, 2013. The ex parte leave granted to the 16th and 18th Respondents to apply for judicial review orders and prohibition was discharged. The application for judicial review Number 1 of 2012 was also dismissed. The learned Judges faulted the trial Court’s reasoning that the doctrine of res judicata does not apply to judicial review proceedings.

iii. Proceedings at the Supreme Court

7. Aggrieved by the decision of the Court of Appeal, the 16th Respondent lodged a Notice of Appeal intending to appeal against the decision of the Court of Appeal. It is this Notice of Appeal that the Applicants wants withdrawn or struck out.

Parties’ Submissions

a. The Applicants

8. The Applicants filed their written submissions dated 16th August, 2018. They urge that the 16th Respondent does not have a right of appeal as of right before this Court against the judgment of the Court of Appeal. While citing *Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone*, SC Application No 4 of 2012 (the Hermanus Case), the Applicants submits that the 16th Respondent’s intended appeal does not fall under Article 163(4)(a) of the Constitution of Kenya on the ground that the leave he was granted by the High Court to apply for judicial review had nothing involving interpretation and application of the Constitution.
9. The Applicants in their submissions, rely on Section 19(a) of the Supreme Court Act No. 7 of 2011, Rule 24 of the Supreme Court Rules, and urge that the 16th Respondent has not demonstrated the law under which he approaches this Court. The Applicants also submit that the 16th Respondent has not had his intended appeal certified as a matter of general public importance pursuant to Article 163(4) (b) and as per the decision of this Court in the case of *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others*; SC Pet. No 2 of 2012; [2012] eKLR.
10. Moreover, the Applicants submit that the 16th Respondent’s intended appeal contravenes Rule 33(1) of the Supreme Court Rules which require an Appellant to lodge an appeal within thirty (30) days of filing a notice of Appeal where the appeal is as of right, and within 30 days after the grant of certification where such certification is required. Consequently, they urge that the 16th Respondent’s Notice of Appeal dated 7th September, 2016, be deemed to have been withdrawn, and or struck out.



In that regard, the Applicants cite the Court of Appeal's decision in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR.

- 11 Finally, the Applicants submit that the 16th Respondent has not filed any of the mandatory pleadings listed in Rule 33(1) of the Supreme Court Rules. They urge this Court to have the 16th Respondent's Notice of Appeal withdrawn in view of his intention not to proceed with the appeal with costs.

b. The 16th Respondent

12. The 16th Respondent vehemently opposes the Applicants' application. In that context, he has filed a Notice of Preliminary Objection dated 4th April, 2018. The 16th Respondent raises several points of law, namely, that: this Court lacks jurisdiction; the application dated 28/2/2018 lacks locus standi, is bad in law, incurable, premature, defective, frivolous and vexatious; counsel lacks audience; the application and notice of address of service are defective for not disclosing the name and signature of the author, having an incompetent supporting affidavit, and is a forgery.
- 13 The 16th Respondent raises a point of law that the Counsel prosecuting the application suffers from conflict of interest and professionally unethical. The Respondent urges this Court to dismiss the application with costs to him.

C. Issues for Determination

- 14 Having perused the filed pleadings we have identified two issues for determination as follows:
1. Whether the 16th Respondent has put forward a competent preliminary objection?
 2. Whether this Court should withdraw and or strike out the 16th Respondent's Notice of Appeal dated 8th August, 2016.
15. Rule 37(1) of the Supreme Court Rules, 2012 grants this Court jurisdiction to determine this application. It provides that:

“Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of appeal shall be deemed to have been withdrawn, and the Court may on its own motion or on application by any party make such orders as may be necessary.”

D. Analysis

i. The preliminary Objection

- 15 The core of the preliminary objection is that the application before this Court the supporting affidavit and notice of address of service are defective, frivolous, the applicant's counsel is conflicted, and that this Court lacks jurisdiction.
16. This Court has had occasion in the past, to consider the nature of a preliminary objection and endorsed the long-standing jurisprudence set in the *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 (the Mukisa Biscuit Case), on the nature of a preliminary objection. In *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Sup. Ct. Application No. 23 of 2014, the Court cited its earlier decision in the *Joho* case thus:

[paragraph 51]



“The principles in the Mukisa Biscuit case were restated by this Court in the Joho case [as follows...]

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

17 In the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others*; SC, Appl No. 50 of 2014 [2015] eKLR, we held as follows:

“(18) ... a preliminary objection may only be raised on a “pure question of law”. To distinguish such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record...” [emphasis added]

18. In the present case, we are not able to discern the point of law that is being raised by the 16th Respondent. It is our considered opinion that the same has not met the threshold set in the Mukisa Biscuit case. Therefore, the preliminary objection fails.

ii. The case for withdrawal or striking out the Notice of Appeal

19. We now consider the question whether this Court should withdraw or strike out the 16th Respondent’s Notice of Appeal dated 8th August, 2016. It is the Applicants’ submissions that the timelines for filing an appeal either as of right or one involving matters of general public interest has lapsed and that the 16th Respondent’s Notice of Appeal dated 8th August, 2016 should be withdrawn or struck out.

20 Rule 33(1) of the Supreme Court Rules 2012 thus provides as follows:

“An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-

- a) a petition of appeal;
- b) a record of appeal; and
- c) the prescribed fee”

21 Rule 33(4) of the Supreme Court Rules thus provides:

“For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court—

- a. the certificate, if any, certifying that the matter is of general public importance;
- b. the memorandum of appeal;
- c. the record of proceedings; and
- d. the certified decree or order” [emphasis supplied].



22 Further, Rule 33(6) of the Supreme Court Rules, provides as follows:

“Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal.”

29. In the present application, we note the Notice of Appeal was filed 8th August, 2016 and the time for filing an appeal as of right lapsed on 7th September, 2016. Up to date there is no appeal filed. The time for filing an appeal under Article 163(4)(b) lapses 30 days after the grant of certification. There is nothing on record to confirm that the 16th Respondent sought certification, and if the same was allowed, and when it was allowed. In a nutshell, it is our finding that the 16th Respondent has failed to provide sufficient grounds for his failure to file his appeal within the prescribed time. We are inclined to allow the application with costs to the applicants.

E. Orders

23. Consequently, we make the following Orders:

- i. The Notice of Motion application dated 28th February, 2018 be and is hereby allowed.
- ii. The Notice of Preliminary Objection dated 4th April, 2018 is hereby disallowed.
- iii. The 16th Respondent shall bear the costs of the Applicants.

Orders accordingly.

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

.....
P.M. MWILU M.K. IBRAHIM

DCJ &VP

SUPREME COURT JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA NJOKI NDUNGU

**JUSTICE OF THE SUPREME JUSTICE OF THE SUPREME COURT
COURT**

.....
I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

SUPREME COURT OF KENYA

