



Okoiti v Sicpa Securities Sol. Sa & 2 others (Application 15 of 2018) [2019] KESC 28 (KLR) (23 July 2019) (Ruling)

Okiya Omtatah Okoiti v Sicpa Securities Sol Sa & 2 others [2019] eKLR

Neutral citation: [2019] KESC 28 (KLR)

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

APPLICATION 15 OF 2018

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

JULY 23, 2019

BETWEEN

OKIYA OMTATAH OKOITI APPLICANT

AND

SICPA SECURITIES SOL. SA 1ST RESPONDENT

THE CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY 3RD RESPONDENT

(Being an application for stay of orders granted by the Court of Appeal on 11th May 2018 (A. Makhandia, K. M’noti, and F. Sichale, JJA); an application to strike out the applicant’s Notice of Appeal and Notice of Motion dated 16th May, 2018 and 8th June, 2018 respectively; and notice of Preliminary Objection dated 17th July 2018)

The Supreme Court does not have the jurisdiction to interfere with exercise of discretion by the Court of Appeal to stay a High Court judgment pending determination of its appeal where there was no appeal pending before it

The main issue for determination was whether the Supreme Court had the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal to stay a judgment of the High Court pending determination of its appeal where there was no appeal pending before it. The Supreme Court held that there would be a pending or an intended appeal, as a basis to entertain an application for stay of execution and the Supreme Court lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) of the Rules where there was neither an appeal, nor an intended appeal pending before the Court.

Reported by Kakai Toili



Jurisdiction – *jurisdiction of the Supreme Court – jurisdiction over exercise of discretion by the Court of Appeal – where the Court of Appeal stayed a judgment of the High Court pending determination of its appeal - where there was neither an appeal nor an intended appeal pending before the Supreme Court - whether the Supreme Court had the jurisdiction to entertain applications challenging the exercise of discretion by the Court of Appeal to stay a judgment of the High Court pending determination of its appeal - what were the circumstances in which the Supreme Court could entertain an application challenging the exercise of discretion by the Court of Appeal to stay a judgment of the High Court pending determination of its appeal – Constitution of Kenya, 2010, article 164(3); Court of Appeal Rules, 2010, rule 5(2)(b)*

Brief facts

The 2nd respondent through a public notice announced that with effect from November, 2017, bottled water, juices, soda and other non-alcoholic beverages and cosmetics manufactured or imported into Kenya had to be affixed with excise stamps. Aggrieved by the 2nd respondent's action the applicant filed a constitutional petition at the High Court challenging the legal instrument whose contents were part of the public notice. The High Court decided that the Legal Notice in question was enacted in a manner inconsistent with the Constitution and the Statutory Instruments Act on account of want of adequate public participation prior to its enactment. Aggrieved by that decision, the 2nd and 3rd respondent filed an appeal at the Court of Appeal and also applications seeking to stay the execution of the judgment of the High Court pending the hearing and determination of their appeals. The Court of Appeal allowed their application for stay.

Aggrieved by the Court of Appeal's decision, the applicant filed an application seeking among other orders for stay of the orders granted by the Court of Appeal in Civil Application No. 76 of 2018 (UR 67/2018) consolidated with Civil Application No. 78 of 2018 (UR 68/2018). The 3rd respondent subsequently filed an application seeking among others orders that the applicant's application be struck out. The 1st respondent filed a notice of preliminary objection seeking to strike out the applicant's application on grounds that the Court lacked jurisdiction to hear and determine an application challenging the exercise of discretion by the Court of Appeal under rules 5(2) (b) of the Court of Appeal Rules among other grounds.

Issues

- i. Whether the Supreme Court had the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal to stay a judgment of the High Court pending determination of its appeal where there was no appeal pending before it.
- ii. What were the circumstances in which the Supreme Court could entertain an application challenging the exercise of discretion by the Court of Appeal to stay a judgment of the High Court pending determination of its appeal?

Relevant provisions of the Law

Court of Appeal Rules, 2010

Rule 5 - Suspension of sentence, injunction and stay of execution and stay of further proceedings

1. *Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—*
 1. *in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.*

Held

1. The jurisdiction of the Court was limited, jurisdiction flowed from the Constitution and legislation. Rule 5(2)(b) of the Court of Appeal Rules(Rules) was derived from article 164(3) of the Constitution and it illuminated the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal. There would be a pending or an intended appeal, as a basis to entertain an application for stay of execution and the Supreme Court lacked jurisdiction to entertain an application challenging the



- exercise of discretion by the Court of Appeal under rule 5(2)(b) of the Rules where there was neither an appeal, nor an intended appeal pending before the Court.
2. The issues raised in the application by the applicant had not been adjudicated upon by the Court of Appeal. The appeals were indeed still pending in the Court of Appeal, there was no judgment by the Court of Appeal in which constitutional issues or matters of general public importance had been canvassed. Interlocutory applications filed under rule 5(2) (b) of the Rules were not appeals as envisaged by article 164(3) of the Constitution.
 3. The applicant made an application dated July 23, 2018 seeking the Court of Appeal to vary or rescind its order granted on May 11, 2018, such conduct amounted to an abuse of court process. An applicant should have first pursued the application in the Court of Appeal to avoid conflicting decisions from the Court and the Court of Appeal.
 4. If the Court were to follow the decision in *Deynes Muriithi & 4 others v. Law Society of Kenya & another* [2016] eKLR, which it did not, the applicant had not demonstrated that the decision of the Court of Appeal had the effect of disposing of the substratum of the substantive matter before the High Court. He had not demonstrated that the order of the Court of Appeal had a pre-emptive effect on the appeals pending in the Court of Appeal.
 5. The notice of preliminary objection was mainly challenging the jurisdiction of the Supreme Court to entertain the application by the applicant which was a pure point of law. There were no contested facts that needed to be ascertained in determining the issue of jurisdiction.
 6. There was no application in the instant matter for two reasons;
 - a. the Court was unable to categorize the application as constitutional litigation;
 - b. all the respondents had expended their resources in defending the applicant's application.
 7. It was important for an applicant to be mindful of the cost implication in litigation before embarking on that journey.

Applicant's application dismissed, notice of preliminary objection upheld and 3rd respondent's application allowed; applicant was to bear the costs of all the respondents in all the applications.

Citations

East Africa

1. *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others* Petition No 22 of 2014; [2015]- (Followed)
2. *Charo, Hassan Nyaje v Khatib Mwashetani & 3 others* Civil Application No 23 of 2014; [2014] eKLR- (Mentioned)
3. *Equity Bank Limited v West Link MBO Limited* Civil Application No 78 of 2011 (UR 53 of 2011; [2013] eKLR- (Cited)
4. *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* Application 4 of 2012; [2013] eKLR- (Explained)
5. *Kangethe Kinyanjui v Tony Keter & 5 others* Civil Application 97 of 2016; [2013] eKLR- (Explained)
6. *Mukisa Biscuit Co v West End Distributors* (1969) EA 696 - (Explained)
7. *Muriithi, Deynes & 4 others v Law Society of Kenya & another* Civil Appeal 12 of 2015; [2016] eKLR- (Explained)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Mentioned)
9. *Njibia, Daniel Kimani v Francis Mwangi Kimani & another*, Sup Ct Civil Application No 13 of 2014; [2015] eKLR - (Explained)
10. *Owners of Motor Vessel Lilian "s" v Caltex Oil Kenya Ltd* [1989] KLR 1 - (Mentioned)
11. *Seven Sea Technologies Limited v Eric Chege* Miscellaneous Application No 29 of 2013; [2014] eKLR - (Mentioned)



12. *Sum Model Industries Ltd v Industrial & Commercial Development Corporation* [2011] 2 KLR 122– (Mentioned)
13. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Petition No 23 of 2013; [2013] eKLR –(Followed)
14. *Transcend Media Group Limited v Independent Electoral & Boundaries Commission* Civil Suit No 304 of 2014; [2015] eKLR –(Explained)
15. *Twaha, Fabim Yasim v Timamy Issa Abdalla & 2 others* Civil Application No 35 of 2014 [2015] eKLR– (Mentioned)
16. *Wandambusi, Geoffrey Wambanda & another v Attorney General for and on Behalf of the Commissioner for Lands & 3 others* Civil Appeal No 13 of 2016; [2017] eKLR–(Explained)

South Africa

1. *Biowatch Trust v. Registrar Genetic Resources and others* [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) –(Explained)

Nigeria

1. *Chief (Dr) Pere Ajuwa v The Shell Petroleum Development Company of Nigeria Limited* SC 290 of 2007; [2011] NGSC 7 (16 December 2011) (SC.290/2007) [1960] NGSC 1 (15 December 2011)–(Cited)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 3(1); 22(1)(2)(c); 48; 163(4) (a); 258(1)(2)(c)–(Interpreted)
2. Appellate Court Rules, 2010 (cap 9 Sub Leg) rules 5(2) (b) –(Interpreted)
3. Supreme Court Act, 2011 (Act No 7 of 2011) section 15 (1) (2)

RULING

A. Introduction

1. Before this Court are two Notice of Motion applications and a Notice of Preliminary Objection. The first Notice of Motion is by the Applicant in the main Okiya Omtatah Okoiti (Okoiti). The Second Notice of Motion is by the 3rd Respondent, Commissioner General, Kenya Revenue Authority (KRA). A Notice of Preliminary Objection has also been raised by the 1st Respondent, SICPA Securities SOL SA (SICPA). The Cabinet Secretary, National Treasury (CS) is the 2nd Respondent. For purposes of this Ruling, we shall adopt the order of the parties as set out in the first Notice of Motion Application by Okoiti dated 8th June 2018.
2. In the first Notice of Motion, supported by an affidavit dated 8th June 2018 and sworn by Okoiti, the Applicant is seeking the following orders:
 - (i) That this Honourable Court be pleased to certify this matter as urgent and the same be heard as a matter of priority;
 - (ii) That this Honourable Court be pleased to order a stay to the orders granted on 11th May, 2018 by the Court of Appeal in Civil Application No. 76 of 2018 (UR 67/2018) consolidated with Civil Application No. 78 of 2018 (UR 68/2018);
 - (iii) That the substance of this application be certified as involving matters of general public importance;
 - (iv) That this application for leave be granted;



- (v) That the costs of the application be provided.
3. In the second Notice of Motion dated 31st July, 2018, KRA is praying for the following orders:
- (i) This Honourable Court be pleased to strike out Okiya's Notice of Appeal dated 16th May, 2018 and filed in Court on 17th May, 2018;
- (ii) This Honourable Court be pleased to strike out Okiya's Notice of Motion dated 8th June, 2018 and filed in Court on 14th June, 2018 as Civil Application No. 15 of 2018;
- (iii) This Court be pleased to make such other order as may be deemed fit and just in the interest of justice;
- (iv) The cost of the application be provided.
4. In its Preliminary objection, SICPA is urging this Court to strike out Okiya's Notice of Motion on grounds that this Court lacks jurisdiction. First, to hear and determine an application challenging the exercise of discretion by the Court of Appeal under Rules 5(2) (b) of the Appellate Court Rules. Second, the application offends Article 163(4) (a) of the Constitution. Third, that the application lacks merit, is incompetent and unlawful.

B. Background

5. The genesis of the dispute is a public notice given in the local media in October, 2017 to announce that with effect from 1st November 2017 "Bottled water, juices, soda and other Non-Alcoholic Beverages and Cosmetics" manufactured or imported into Kenya shall be affixed with excise stamps in accordance with Legal Notice No. 110 of 18 June 2013.
6. The regulations contained in the legal notice had been issued by the CS and had the effect of expanding the scope of the items to be covered by EGMS to include certain listed goods. According to Okiya, the Kenya branch of SICPA (having its headquarters in Switzerland) had been awarded the tender, worth between Ksh.15-17 billion to ensure the traceability of products, secure exercise duty and ultimately increase revenue to KRA.
7. The system was also meant to seal loopholes leading to loss of revenue that had been suffered under a manual system as well as curb illicit trade in counterfeit goods. The previous manual method of affixing Excise and Revenue Stamps on excisable goods was only limited to tobacco, wines, spirit and beer but suffered alleged rampant counterfeiting of stamps resulting in manufacturers under declaring the volumes of their products, leading to under collection of exercise tax.
8. Okiya filed constitutional Petition No.532 of 2017 in the High Court of Kenya at Nairobi challenging the legal instrument. The main grounds being that there had been no public participation or consultation before the introduction of the EGMS and that the legal instruments for the introduction of EGMS were enacted in a manner inconsistent with the Constitution. Further, that the award of Tender Number KRA/HQS/DP-423/2014-2015 by the KRA through direct procurement violated applicable laws thus necessitating its quashing.
9. In a Judgment dated 12th March, 2018, the High Court (Matiyo J) decided that Legal Notice No. 53 of 30th March 2017 was enacted in a manner inconsistent with the Constitution and the Statutory Instruments Act on account of want of adequate public participation prior to its enactment.
10. The High Court proceeded to issue the following declarations:



- (i) A declaration be and is hereby issued that public participation must apply to enactment of all subsidiary legislation and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case;
 - (ii) A declaration be and is hereby issued that subsidiary legislation must conform to the Constitution, the Parent Act and the Statutory Instruments Act in terms of both its content and the manner in which it is adopted and failure to comply renders the legislation invalid;
 - (iii) A declaration be and is hereby issued decreeing that the Repealed Legal Notice 110 of 18th June 2013 and Gazette Notice No. 12856 of 5th September 2013 were enacted in a manner inconsistent with the provisions of the Constitution and the Statutory Instruments Act, hence they were null and void for all purposes.
 - (iv) A declaration be and is hereby issued decreeing that the Legal Notice No. 53 of 30th March 2017 was enacted in a manner inconsistent with the Constitution and the Statutory Instruments Act in that there was no adequate public participation prior to its enactment, hence the same is null and void for all purposes;
 - (v) A declaration be and is hereby issued that KRA was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of the tendering of tenders and or to ensure that [any] direct procurement meets the strict statutory requirements of Section 103(2) (a) to (e).
11. The High Court further issued an order of certiorari (an order for review) in the following terms:
- (i) An order of certiorari be and is hereby issued quashing Legal Notice Number 53 of 30th March 2017 to the extent that it seeks to impose or introduce excise duty on bottled water, juices, soda and other non-alcoholic beverages and cosmetics;
 - (ii) An order of certiorari be and is hereby issued quashing the award of Tender Number KRA/HQS/DP-432-2014-2015 for the Excisable Goods Management System, awarded by the KRA to SICPA.
12. Aggrieved by the findings of the High Court, KRA filed Civil Appeal No. 100 of 2018 while SICPA filed Civil Application No. 125 of 2018. The CS and SICPA also appealed to the Court of Appeal. Further, SICPA and KRA filed Civil Application No. 76 of 2018 and Civil Application No. 78 of 2018 respectively, both dated 21st March 2018 and principally brought under Rule 5 (2) (b) of the Court of Appeal Rules. They sought to stay the execution of the Judgment and decree of the High Court pending the hearing and determination of their appeals. The parties consented to the consolidation of the two applications for ease of hearing and determination.
13. In a Ruling dated 11th May 2018, the Court of Appeal stayed the Judgment and decree of the High Court in its entirety pending the hearing and determination of the appeals. The Court of Appeal in doing so stated that the Appellants stood to lose substantial, if not colossal, amounts of money in the event it refused to grant the stay and the appeals ultimately succeeded. The Court also stated that it had approached the exercise of power or discretion under Rule 5(2) (b) with a sense of balance or proportionality.
14. It is this Ruling by the Court of Appeal that has provoked the three applications before the Supreme Court.



(i) Applicant's submissions

- 15 Okiya has filed two sets of submissions dated 3rd August 2018 and 17th September 2018. The submissions are in support of his Motion and in opposition to the Preliminary Objection by SICPA and Notice of Motion by KRA. He has addressed the following issues in his submissions:
- (i) Whether the preliminary objection is partly incompetent;
 - (ii) Whether the Supreme Court has jurisdiction to entertain the application;
 - (iii) Whether there is a dichotomy between interlocutory and final decisions of the Court of Appeal;
 - (iv) Whether there was need to first make application for leave to appeal in the Court of Appeal;
 - (v) Whether the intended appeal involves matters of general public importance;
 - (vi) Whether the Court of Appeal decision was proper, just and equitable;
 - (vii) Whether the application raises a reasonable cause of action and whether the intended appeal is necessary and in the interest of justice;
 - (viii) Whether the applicant's application is sub-judice proceedings pending before the Court of Appeal;
 - (ix) Whether the costs are payable.
16. On the first issue, Okiya dismisses the Preliminary Objection by SICPA as incompetent on the basis that the Preliminary Objection is not based on pure matters of law. He is of the view that the Preliminary Objection is based on issues of facts that need to be ascertained by hearing the matter on merit. He submits that the grounds could only be raised in support of a notice of motion application seeking to dismiss his application. He has cited the case of *Mukisa Biscuit Co v. West End Distributors* (1969) EA 696 at 701 to support his assertion that a Preliminary Objection cannot be raised if any fact has to be ascertained.
17. The second issue is whether this Court has jurisdiction to entertain the application of stay by Okiya. Highlighting the summary of the High Court's findings, Okiya submits that the High Court made out a case in the public interest and that the dispute relates to interpretation and application of the Constitution. He further argues that the Court of Appeal in its ruling, determined that the matter before it was of great public importance.
18. According to Okiya, this Court, in *Deynes Muriithi & 4 others v. Law Society of Kenya & another* [2016] eKLR determined that it has residual jurisdiction to hear and determine applications challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of the Appellate Court's Rules. He thus argues that the decision of the Court of Appeal under Rule 5(2) (b) has the effect of allowing the appeal without any hearing leaving nothing to determine in a pending appeal.
19. The third issue is whether there is a dichotomy between interlocutory and final decisions of the Court of Appeal. He submits that neither the Constitution nor the Supreme Court Act, No. 7 of 2011 creates such a dichotomy between a final and/or interlocutory decision of the Court of Appeal. To support his assertion, he has cited the decision of the Supreme Court of Nigeria in *Chief (Dr.) Pere Ajuwa v. The Shell Petroleum Development Company of Nigeria*, SC 290 of 2007.
20. The fourth issue is whether there was need to first make an application for leave to appeal in the Court of Appeal. He is of the view that his application is unique in the sense that it encompasses both limbs



of the jurisdiction vested on this Court by Article 163(4) of the Constitution. On one hand, he argues, it involved the interpretation and application of the Constitution and therefore no leave was required. He has listed Articles 3(1), 22(1) & (2) (c), 50(1), 48 and 258(1) & (2) (c) of the Constitution. On the other hand, he argues, there was need to make application for leave so that those issues that involved matters of general public importance could be taken on board in the intended appeal. He thus submits that given the hybrid nature of the application, it was not practical to split it into two parts.

21. The fifth issue is whether the intended appeal, of the Court of Appeal's decision under Rule 5(2) (b) to allow unheard appeals pending before it, involves a matter of general importance. It is his argument that a matter of general public importance that transcends the circumstances of this particular case arises in the decision by the Court of Appeal to be minded to exercising their discretion on a new ground of the pauperism. He has made reference to the Court of Appeal decision in Geoffrey Wambanda Wandambusi & Another v. Attorney General for and on Behalf of the Commissioner for Lands & 3 Others [2017] eKLR where the Court of Appeal cited the decision of this Court in Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscione [2013] eKLR that set the principles governing what constitutes matters of general public importance.
22. The sixth issue is whether the Court of Appeal decision was proper, just and equitable. Okiya submits that the Court of Appeal ignored the fact that he was acting in the public interest against a state organ and premised its decision on the fact that he was a pauper not in a position to refund KRA and SICPA whatever money they claimed they would lose if the appeal was successful. He further argues that the Court of Appeal was wrong in making interlocutory orders which were determinative of the appeals before it without considering its impact on his right to be heard.
23. Okiya is thus urging this Court to allow the issue to be heard on merit and grant the order sought to preserve the subject matter in the proceedings in the Court of Appeal.
24. The seventh issue is whether his application raises a reasonable cause of action and whether the intended appeal is necessary and in the interest of justice. He submits that the Court of Appeal's orders were determinative of appeals before it effectively denying him right to be heard. He accuses the Court of granting a stay order on the ground that he was a pauper yet he was acting in the public interest and that the dispute was not a money claim but the protection of rights and the Constitution. It is thus his submission that the application raises a reasonable cause of action and ought to be heard on merit.
25. He has also cited a High Court decision in Transcend Media Group Limited v. Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR where the court summarized the principles of striking pleadings. It said that the Court should not strike out suit if there is a cause of action with some chance of success; should be used in plain and obvious cases and with extreme caution; the power should only be used in cases which are clear and beyond all doubt; court should not engage in a minute and protracted examination of documents and facts; and if a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward. He thus submits that his Motion raises triable issues and should not be struck out.
26. Concerning the substantive appeal, Okiya submits that his intended appeal is necessary and in the interest of justice. He argues that it seeks to cure a substantial miscarriage of justice by the Court of Appeal, involves matters of general public importance, and falls within the exceptional circumstances that justify the intervention of the Supreme Court.
27. The eighth issue is whether Okiya's application is sub-judice proceedings pending before the Court of Appeal. It is his submission that his application dated 23rd July 2018 pending in the Court of Appeal is not seeking similar prayers to the instant application but seeking to fast track the hearing of the pending appeals. He has also submitted that the said application appeared to have been overtaken by events



since the Court of Appeal notified the parties that the pending appeals were to be mentioned on 29th August 2018 for purposes of fixing a hearing date.

28. Okiya has prayed for costs. However, he submits, this being a suit between a private citizen and the State, the respondents should not be allowed costs in the event his application is not successful. He has cited a ratio decidendi in the South African case of *Biowatch Trust v. Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) at paragraph 21 where Sachs J held that as general rule, in constitution litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs unless there exist other consideration to justify the departure such as an instance where the litigation is frivolous or vexatious. He thus urges this Court to allow his application and dismiss the Notice of Motion by KRA as well as the Preliminary Objection by SICPA.

(ii) Submissions by KRA/3rd Respondent

29. KRA has filed two sets of submissions. The first is dated 13th September 2018 in support of its Notice of Motion dated 31st July 2018 which is seeking to strike out Okiya's Notice of Appeal dated 16th May 2018 and Notice of Motion dated 16th May 2018. The second set of submissions is dated 24th August 2018 in opposition to Okiya's Notice of Motion.
30. KRA submits that there are three issues in determining whether the Notice of Appeal and Notice of Motion by Okiya should be struck out, namely:
- (i) Whether this Court is seized of jurisdiction to entertain Okiya's application;
 - (ii) Whether Okiya's application is incompetent; and
 - (iii) Whether the notice of Appeal is an abuse of this Court's process.
31. On jurisdiction, it is KRA's contention that any cause that does not directly engage this Court's jurisdiction under Article 163(4) (a) of the Constitution, where the Court is imbued with the power to hear matters of an appellate nature, falls outside the jurisdiction of this Court. It is therefore its submission that interlocutory applications raised under Rule 5(2) (b) of the Court of Appeal rules are not appeals as envisaged by Article 164(3) of the Constitution. In support of this contention, it has cited the case of *Equity Bank Limited v. West Link MBO Limited Civil Application No. 78 of 2011 (UR 53/2011)*.
32. It has also made reference to the case of *Stanley Kangethe Kinyanjui v. Tony Keter & 5 others* [2013] eKLR where the Court of Appeal was of the mind that when dealing with applicants under Rule 5(2) (b), the Court of Appeal exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to the Court. Asserting that a decision made by the Court of Appeal under Rule 5(2) (b) is discretionary in nature, it has cited a decision of this Court in *Teachers Service Commission v. Kenya National Union of Teachers & 3 others (Supra)* where we said that this "...illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal."
33. Similarly, KRA has referred to another decision of this Court in *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another, Sup.Ct.Civil Application No. 13 of 2014* where this Court stated that one category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate" [Emphasis supplied].
34. It is the further submission by KRA that this Court has made it clear that it lack jurisdiction to disturb any decision of the Court of Appeal made in an application under Rule 5(2)(b) of the Appellate Rules.



It has made reference to the case of Deynes Muriithi & 4 Others v. Law Society of Kenya and Another (Supra) where this Court stated as follow:

“Against this background, we note that the Court of Appeal exercised its original and discretionary powers in issuing Orders under Rule 5(2) (b) of the Court of Appeal Rules, and is yet to determine the main appeal where it will ordinarily hear the submissions of the parties, and arrive at a reasoning on the relevant issues on appeal. This would then prompt a party aggrieved with the Appellate Court’s decision to appeal against it to this Court. Until then, this Court lacks the jurisdiction to interfere with the Court of Appeal’s inherent and supervisory jurisdiction.”

35. On whether the application by Okiya is incompetent, KRA submits that Okiya has invited this Court to adjudicate the merits of an appeal, which still lies before the Court of Appeal, and is yet to be determined. This, according to KRA, amounts to an abuse of the Court process.

36. KRA has furthermore contended that hearing the application and the intended appeal by Okiya will amount to this Court sitting in appeal on the merits of the appeal before the Court of Appeal which is yet to be determined. He thus submits that there is no Judgment by the Court of Appeal and there is no framework within which to have this Court adjudicate on the issues raised. To support this contention, it has cited the case of Basil Criticos v. Independent Electoral and Boundaries Commission & 2 Others, Sup Ct. Petition No. 22 of 2014, where this Court rendered itself thus:

“In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over?”

37. The last issue is whether the Notice of Appeal filed by Okiya is an abuse of the Court process. It submits in that regard that there is no appeal on which this Court would be invited to sit. It has cited the case Deynes Muriithi (Supra) to argue that a decision of the Court that emanates from an application made under Rule 5(2) (b) of the Court of Appeal does not constitute an appeal.

38. It is therefore submitted that Okiya’s decision to lodge an appeal through the Notice of Appeal dated 16th May 2018 is an abuse of the Court process and it urges this Court to strike out the Notice of Motion as well as the Notice of Appeal by Okiya.

39. We now turn to the submissions by KRA in opposition to the Notice of Motion by Okiya. It has raised two issues for determination, namely:

- (i) Whether this Court is seized of jurisdiction to entertain Okiya’s application; and
- (ii) Whether the application is competent.

40. The submissions reiterate the submissions by KRA seeking to strike out the Notice of Appeal and Notice of Motion by Okiya. In that context it urges the Court to dismiss the application for lack of jurisdiction and for being incompetent.

(iii) Submissions by SICPA (1st respondent)

41. SICPA has filed submissions dated 17th August 2018 in support of its Notice of Preliminary Objection dated 17th July 2018 and in opposition to Okiya’s Notice of Motion dated 8th June, 2018. SICPA is urging this Court to dismiss the Notice of Motion by Okiya for being bad in law, an abuse of the Court process and for lack of jurisdiction. To emphasize on the importance of jurisdiction, it has relied on the



authority of *The Owners of Motor Vessel Lilian “s” v. Caltex Oil Kenya Ltd* [1989] KLR 1 as quoted in *Seven Sea Technologies Limited v. Eric Chege* [2014] eKLR.

42. It is also submitted by SICPA that an application for leave to appeal to this Court in cases relating to matters of general public importance, must first be made before the Court of appeal and that, it is only upon refusal of such an application by the Court of Appeal that an aggrieved party may seek review in this Court. It has in that regard cited Section 15 (1) of the Supreme Court Act which provides that “Appeals to the Supreme Court shall be heard only with the leave of the Court.”
43. SICPA has further contended that the Supreme Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules. It has cited the case of *Equity Bank Limited v. West Link MBO Limited*, Civil Application 78 of 2011 as quoted in the case of *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others* [2015] eKLR in making that submission. It has also cited *Deynes Murithi & 4 others v. Law Society of Kenya & Another* (Supra).
44. SICPA, therefore, submits that this Court lacks jurisdiction to entertain Okiya’s Notice of Motion in so far as it seeks to interfere with the discretionary powers of the Court of Appeal. Okiya having not sought leave in the Court of Appeal to file his application, it is submitted that his application should be struck out and the preliminary objection be upheld.

(iv) Submissions by the Cabinet Secretary, National Treasury (CS)/2nd respondent

45. The Attorney General (AG) has on behalf of the CS filed submissions dated 6th September 2018 in support of its Grounds of Opposition dated 6th September 2018.
46. It is submitted that an appeal that is envisaged under Article 163(4) (a) and (b) of the Constitution and Sections 15(1) and (2) and 16 of the Supreme Court Act, 2011, refers to a substantive appeal and not an interlocutory appeal against a decision of the Court of Appeal. According to the AG therefore, the exercise of the Court of Appeal’s jurisdiction and discretion under Rule 5(2) (b) of its rules does not in itself constitute an appeal capable of being disturbed by this Court. He therefore submits that application by Okiya is fatally defective and incompetent. In support of that position he has cited the decision of the Court of Appeal in *Equity Bank Limited v. West Link MBO Limited* (supra).
47. The AG further argues that in the event and should this Court be minded to agree with the Applicant that it has jurisdiction to entertain an appeal on an interlocutory matter such as the intended one, appeals to this Court under Article 163 (4) (b) of the Constitution must only be upon certification either by this Court or the Court of Appeal. It makes reference to the case of *Hermanus Phillipus Steyn v. Gnechchi – Ruscone* (supra) in support of that proposition where we said:

“...And in *Koinange Investment & Development Ltd v Robert Nelson Ngethe*, the Court of Appeal, again, quite properly stated the governing principle in respect of appeals to the Supreme Court.”

48. The AG thus agrees with KRA that the jurisdiction of this Court has been prematurely invoked because the main appeals arising out of the impugned High Court decision are still live and pending before the Court of Appeal.
49. Finally, the AG submits that the application by Okiya does not raise any issue of general public importance. Relying on principles set in *Hermanus Phillipus Steyn* (supra), on what constitute matters of general public importance, it submits that there is no issue(s) by Okiya that transcends the circumstance of this particular case which has a significant bearing on the public interest. That Okiya



has not demonstrated the nature of the substantial point of law that has arisen from the decision of the Court of Appeal in the exercise of its discretionary powers under Rule 5 (2) (b) and for which a substantive decision was made; the nature of any uncertainty in law that has arisen from the impugned decision of the Court of Appeal that needs certification by this Court has not been demonstrated; and that Okiya has thus failed to identify and concisely set out the specific elements of “general public importance” which he attributes to the subject matter at hand for which he seeks certification. It concludes that the application by Okiya has failed to meet the judicially settled criteria for the grant of the orders sought and ought to be struck out.

(v) Analysis and determination

50. The main issue for determination, cutting across the three applications is whether this Court has jurisdiction to hear appeals arising from interlocutory orders of the Court of Appeal under Rule 5(2) (b) Of the Court of Appeal rules. If answered in the affirmative, what are appropriate reliefs for this Court to grant? We have deliberately set out the rival submissions on this point to enable us firmly restate the law on that issue.
51. Okiya is asking this Court to depart from its decision in *Teachers Service Commission v. Kenya National Union of Teachers & 3 others* (supra) where we made a determination that we have no jurisdiction to interfere with the exercise of discretion by the Court of Appeal on an application made under Rule 5(2) (b). He is instead urging this Court to be persuaded by the dicta in *Deynes Muriithi* (supra), where this Court found that:

“...whenever it becomes plain that the Orders made by other Courts are destined to occasion grave injustice, and this is apparent on the fact of the decision in question, this Court, as ultimate custodian of the constitutional integrity, may not turn a blind eye to such decision, where it stands in conflict with express provisions of the Constitution.”
52. Okiya thus believes that the Court of Appeal acted in manner that takes away fundamental rights of the citizens of Kenya; the decision has determined the pending appeals in the Court of Appeal denying him the right to be heard; and therefore it is important for this Court to interfere with the exercise of discretionary powers by the Court of Appeal.
53. KRA, SICPA and CS on the other hand have argued that this Court lacks jurisdiction to entertain appeals in relation to Rule 5(2) (b) applications in the Court of Appeal and have urged this Court to be persuaded by the cases of *Equity Bank Limited v. West Link MBO Limited*; *Stanley Kangethe Kinyanjui v. Tony Keter & others*; *Daniel Njihia v. Francis Mwangi Kimani & another*; *Fahim Yasim Twaha v. Timamy Issa Abdalla & 2 others*; *Hassan Nyaje Charo v. Khatib Mwashetani & 3 others*; *Sum Model Industries Ltd v. Industrial & Commercial Development Corporation*; *Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*; and *Hermanus Phillipus Steyn v. Gneccchi-Ruscone*.
54. From the onset, we must reiterate that the jurisdiction of this Court is limited. That jurisdiction flows from the Constitution and legislation. In *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others* (supra) this Court held that Rule 5(2)(b) of the Court of Appeal Rules are derived from Article 164(3) of the Constitution and that it illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal. Generally thereafter, we added there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution; and that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules where there is neither an appeal, nor and intended appeal pending before the Supreme Court. We are not ready to



depart from these principles because no sound argument has been made in this application to demand such departure.

55. In that regard, the issues raised in the application by Okiya have not been adjudicated upon by the Court of Appeal. The appeals are indeed still pending in the Court of Appeal. There is no Judgment by the Court of Appeal in which constitutional issues or matters of general public importance have been canvassed. This was also our finding in *Basil Criticos v. Independent Electoral and Boundaries & 2 Others*. We thus agree with the Respondents that interlocutory applications filed under Rule 5(2) (b) are not appeals as envisaged by Article 164(3) of the Constitution. The jurisdiction of this Court in that context is not as wide as submitted by Okiya.
56. Okiya has also submitted that the pending appeals in the Court of Appeal were mentioned on 29th August 2018 for purposes of fixing a hearing date. We also note that Okiya made an application dated 23rd July 2018 seeking the Court of Appeal to vary or rescind its order granted on 11th May 2018. Although he is denying the contents of the application, we have perused the annexure marked “CNM-4” by KRA and we are in agreement with KRA that such conduct amounts to an abuse of Court process. An Applicant should have first pursued the application in the Court of Appeal to avoid conflicting decisions from this and that Court.
57. If we were to follow the decision in *Deynes Muriithi*, which we are not, we would find that Okiya has not demonstrated that the decision of the Court of Appeal has the effect of disposing of the substratum of the substantive matter before the High Court. He has not demonstrated that the Order of the Court of Appeal has a pre-emptive effect on the appeals pending in the Court of Appeal.
58. Okiya has further argued that the Preliminary Objection by SICPA is incompetent on the basis that it is not based on pure issues of law but raises issues of fact that need to be ascertained. We do not agree with him because the notice is mainly challenging the jurisdiction of this Court to entertain the application by Okiya which is a pure point of law. We find no contested facts that need to be ascertained in determining the issue of jurisdiction.
59. The last issue to address is costs of the application. Okiya has urged this Court not to condemn him to pay costs, relying on the *Biowatch* decision cited above, in the event his application is not successful. We agree with the principle set out in that Judgment but find that it finds no application in this matter for two reasons. First, based on our finding above, we are unable to categorize this application as constitutional litigation. Secondly, all the Respondents have expended their resources in defending Okiya’s application. He should therefore pay their costs. In making that order, it is important for an applicant to be mindful of the cost implication in litigation before embarking on that journey.

C. ORDERS

- (i) The Notice of Appeal dated 8th June 2018 is hereby struck off;
 - (ii) The Notice of Motion dated 31st July 2018 is hereby allowed;
 - (iii) The Notice of Preliminary Objection dated 17th July 2018 is hereby upheld;
 - (iv) The Applicant shall bear the costs of all the Respondents in all the applications.
60. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2019.

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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. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is the true copy of the original

The Registrar

Supreme Court of Kenya

