



Okoiti v Central Bank of Kenya & 7 others (Application 32 of 2018) [2019] KESC 29 (KLR) (23 July 2019) (Ruling)

Okiya Omtatah Okoiti v Central Bank of Kenya & 7 others [2019] eKLR

Neutral citation: [2019] KESC 29 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 32 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

CENTRAL BANK OF KENYA 1ST RESPONDENT

DE LA RUE INTERNATIONAL LIMITED 2ND RESPONDENT

DE LA RUE CURRENCY & SECURITY PRINT LIMITED ... 3RD RESPONDENT

DE LA RUE KENYA EPZ LIMITED 4TH RESPONDENT

PUBLIC PROCUREMENT REVIEW AUTHORITY 5TH RESPONDENT

HON ATTORNEY GENERA 6TH RESPONDENT

DIRETOR OF PUBLIC PROSECUTIONS 7TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 8TH RESPONDENT

(Being an application for extension of time to file a Petition of Appeal out of time from the Judgment and decree of the Court of Appeal in Civil Appeal No.116 of 2018 as consolidated with Civil Appeal No.119 of 2018)

The Supreme Court declines to allow an appeal for failure to comply with article 163(4)(a) of the Constitution requiring appeals to the Supreme Court to involve matters of constitutional application and interpretation

The application sought for an extension of time to file a petition of appeal out of time. The court declined to allow the appeal for failure to comply with article 163(4)(a) of the Constitution requiring appeals to the Supreme Court to involve matters of constitutional application and interpretation.



Reported by Moses Rotich

Constitutional Law-*Supreme Court-appellate jurisdiction of the Supreme Court-appeals involving application and interpretation of the Constitution-what was the threshold to be met for an appeal alleging involvement of constitutional application and interpretation-whether the applicant had demonstrated that the intended appeal involved a matter of constitutional application and interpretation-Constitution of Kenya, 2010, article 163(4)(a).*

Brief facts

The instant application sought for an extension of time to file a petition of appeal out of time from the judgment and decree of the Court of Appeal in Civil Appeal No 116 of 2018 as was consolidated with Civil Appeal No 119 of 2018.

The 2nd respondent and other three firms had been prequalified by the 1st respondent, the Central Bank of Kenya, as suppliers for production of bank notes, originating material and currency printing services. In October 24, 2017, the 1st respondent issued the tender for printing and supply of new design currency and restricted it to candidates who had prequalified. Following the award of the tender to the 2nd respondent on November 30, 2017, the appellant successfully petitioned the High Court to declare, *inter alia*, that the award of the tender made on November 30, 2017 by the 1st respondent to the 2nd respondent was both unconstitutional and unlawful. The High Court quashed the said tender award and issued an order compelling the 1st respondent to transparently re-evaluate the bids of all compliant bidders and award the tender strictly in accordance with law. The 1st and 2nd respondents successfully appealed to the Court of Appeal to set aside the High Court decision.

The Court of Appeal rendered its judgment on October 12, 2018, setting aside the High Court decision, prompting the appellant to move to the instant Court. The appellant urged the Court to find, *inter alia*, that the intended appeal required no certification under article 163(4)(b) of the Constitution.

Issues

- i. Whether the applicant had demonstrated that the intended appeal met the constitutional requirement under article 163(4)(a) of the Constitution that appeals to Supreme Court ought to involve application and interpretation of the Constitution.
- ii. Whether a private citizen who brings a matter of public interest should be condemned to pay costs.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163(4)(a)

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

Held

1. The jurisdiction of the Supreme Court was limited. The instant application was brought under article 163(4)(a) of the Constitution. For the application to succeed, the intended appeal had to involve application and interpretation of the Constitution. If the applicant were to bring his appeal as a matter of great public importance, then he ought to have sought certification thereof.
2. For the Court to assume jurisdiction under article 163(4)(a) of the Constitution, the applicant had to demonstrate how certain articles of the Constitution were applied or interpreted in the trial court as well as the appellate court. In the instant matter, the applicant had to demonstrate how article 227 of the Constitution, on procurement of public goods and services, was misapplied.
3. At paragraph 16 of the applicant's replying affidavit dated March 11, 2019, the applicant had listed a number of constitutional provisions that he invoked for determination. It included article 22(1) and 2(c) and 258(1) and 2(c) of the Constitution. However, he failed to explain how the articles were



- applied or interpreted. There was no explanation proffered by the applicant as to how the Court of Appeal misinterpreted or misapplied the constitutional provision he had listed.
4. The instant dispute did not relate to any express question of the interpretation and application of the Constitution. The dispute between the parties related to the tender for printing of new currency and the issue of the 15% preferential margin. No articles of the Constitution required any interpretation or application in that regard. Any reference to the Constitution, as was the case at the Court of Appeal, was peripheral in addressing those two central issues. Accordingly, the instant Court had no jurisdiction to entertain the intended appeal. Having arrived at that finding, there was no need to proceed to determine the issue on whether the time should be extended to allow the applicant to file his intended appeal.
 5. Where a private citizen sued a government entity in a matter of great constitutional moment or of great public importance, the applicant should, as a general rule, not be condemned to pay costs. However, in the instant matter, all the respondents had expended their finances in defending the application. The application was in any event never certified as one of public interest to attract the sympathy of the Court as a matter of general public importance. The applicant, by instituting proceedings in a process which was basically about the tender for printing of new currencies, ought to have anticipated the consequences of his actions including costs. Accordingly, the applicant should bear the costs of all the respondents.

Application dismissed.

Orders

- i. *Prayer No 2 of the applicant's notice of motion dated November 15, 2018, seeking to extend time to file a petition of appeal was dismissed.*
- ii. *Preliminary objection dated December 11, 2018 by the respondent was upheld.*
- iii. *Costs of all respondents should be borne by the applicant.*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

- [1] Before this Court is a Notice of Motion Application dated 15th November, 2018 supported by an affidavit of Okiya Omtatah Okoiti, the Applicant. The Motion is seeking the following orders:
- i. ...
 - ii. That this Court be pleased to extend time for filing both the petition of appeal, record of appeal, and a supplementary record of appeal so that they can be considered as having been filed within the stipulated time;
 - iii. That the costs of the application be provided.
- [2] The Application was triggered by a Judgment of the Court of Appeal dated 12th October, 2018 that set aside the Judgment of the High Court. The Applicant, who was the Petitioner in the High Court, failed to file his appeal to this Court, on time, hence the instant application.



B. Background

- [3] The 1st Respondent (Central Bank of Kenya), pursuant to Article 232 of the Constitution, commenced the procurement of design of currency banknotes in 2014 by advertising the prequalification of suppliers for production of Bank notes, originating material and currency printing services. This was done locally and internationally by Tender No. CBK/043/2013/2014, published in two local dailies, regional weekly papers and its website.
- [4] Following the pre-qualification, four firms that included the 2nd Respondent (De La Rue International Limited), were prequalified by the 1st Respondent. After prequalification, the 1st Respondent in the year 2016 floated Tender No. CBK/064/2016/2017 for origination of material and data set files for the new Kenya currency and bank notes.
- [5] On 24th October, 2017, the 1st Respondent issued the tender for printing and supply of the new design currency. The tender was restricted to candidates who had prequalified under the earlier prequalification process due to the specialized and complex nature of the goods, works and/or services required. On 8th November, 2017, the 1st Respondent issued an addendum to the tender wherein it informed the candidates of its preferences and reservations which were to be fulfilled by bidders in the performance of the proposed contract. The addendum provided inter alia that the bidders who sought to sub-contract part or whole of the contract were to obtain the express authority of the 1st Respondent. The addendums were as a result of the clarifications sought by the 2nd Respondent.
- [6] Before the award of the tender, the 4th and 6th Respondents moved to the High Court by way of Nairobi HC Petition No. 568 of 2017 against the 1st Respondent challenging the tendering process for allegedly contravening Articles 227 and 231 of the Constitution. The Petition was however withdrawn by consent of the 1st, 3rd and 4th Respondents. Following the withdrawal, the tender was evaluated and awarded to the 2nd Respondent. In awarding the tender, the 1st Respondent applied 15% margin of preference provided for under Section 28 of the Public Procurement and Disposal Regulations, 2006. The Restricted Tender for Printing & Supply of New Design Kenya Currency Banknotes, being Tender Reference No. CBK/37/2017-2018 was made on 30th November, 2017.
- [7] Aggrieved with the award, M/s Crane AB successfully petitioned the 5th Respondent (The Public Procurement Review Authority) for review of the decision on the basis that the 2nd Respondent was unlawfully awarded the tender after irregular application of the 15% preference margin inter alia. The preferential margin had been introduced to promote the participation of local industries or marginalized groups in the tendering process. The 5th Respondent thereafter annulled the award. The 1st and 2nd Respondents then moved to the High Court through Judicial Review Applications Nos. 6 and 7 of 2018 to challenge that nullification. The High Court quashed the decision of the 5th Respondent on the ground that the 5th Respondent exceeded its jurisdiction in allowing a party who was not a bidder, to wit M/s Crane AB, to initiate the review proceedings before it.
- [8] Following the above decision of the High Court, Okiya Omtatah Okoiti, the Applicant herein, petitioned the High Court challenging the entire procurement process as a nullity for allegedly failing to comply with the law on the basis misapplication of the law and regulations thus petitioned the High Court for various declarations against the Central Bank Of Kenya, “the 1st Respondent”, De La Rue International Limited, “the 2nd Respondent”, De La Rue Currency & Security Print Ltd, “the 3rd Respondent”, De La Rue Kenya EPZ, “the 4th Respondent, and Public Procurement Review Authority, “5th Respondent.



- [9] The Petition aforesaid alleged contravention of Articles 27, 35 and 47 of the Constitution and the national values and principles of governance set out in Articles 1,2,3,10,231(3), 232, and 259 (1) of the Constitution by the 1st Respondent. The Petition also alleged that the 1st Respondent, in awarding the tender, contravened not just the aforesaid provisions of the Constitution but also the Public Asset Disposal Act, 2015; the Public Procurement & Procurement & Disposal ACT, 2005; the Fair Administrative Action Act, 2015; the Central Bank of Kenya Act and the Statutory Instrument Act, 2015. The Applicant further alleged that the 1st Respondent, as the procuring entity, rigged the tender in favour of the 2nd Respondent with the collusion of the 3rd and 4th Respondents.
- [10] The High Court (Odunga J) in a Judgment delivered on 9th April, 2018 inter alia issued a declaration that the award of the tender made on 30th November, 2017 by the 1st Respondent to the 2nd Respondent was both unconstitutional and unlawful. The High Court then proceeded to quash the said award and issued an order compelling the 1st Respondent to transparently re-evaluate the bids of all compliant bidders and award the tender strictly in accordance with law.
- [11] Aggrieved by the decision of the High Court, the 1st and 2nd Respondents filed Civil Appeals Nos. 116 and 119 of 2018, respectively. The appeals were consolidated and heard together. The Court of Appeal (Githinji, Asike-Makhandia, and Sankale ole Kantai) in a judgment delivered on 12th October, 2018 set aside the Judgment and Decree of the High Court. The Applicant's failure to file his appeal to this Court within the required period has triggered the instant application.

(i) The Application at the Supreme Court

- [12] The application before us is brought under Articles 1,2,3(1), 4(2), 10, 22,27, 47, 50(1), 73, 75, 159, 163(4)(a), 201(a)&(d), 227(1) & (2), and 259 (1) of the Constitution of Kenya, 2010; Section 19 of the Supreme Court Act, 2011; Rule 53 of the Supreme Court Rules, 2012; and all enabling provisions of the law.

(ii) Notice of Preliminary Objection

- [13] The 2nd Respondent has filed a notice of Preliminary Objection dated 15th December, 2018 alleging that the Orders sought by the Applicant are not available in law in the absence of the certification process stipulated in Article 163(4)(b) of the Constitution. We shall deal with the objection as we determine the merits of the Application.

C. Submissions

(i) The Applicant's

- [14] The Applicant filed written submissions dated 11th March 2019 in support of his Application. The Applicant has also listed the issues for determination as follows:
- i. Whether the subject matter of the intended appeal is still live and justiciable;
 - ii. Whether the intended appeal required certification under Article 163(4)(b) of the Constitution;
 - iii. Whether the computation of time under Rule 33(1) of the Supreme Court Rules violates the Constitution and the principles of natural justice;
 - iv. Whether there was inordinate delay in making this Application;
 - v. Whether the time to file the appeal should be expanded;



- vi. Whether costs are payable.
- [15] On the first issue, the Applicant submits that since the dispute is about banknotes and not coins, the Respondents' claim that the subject matter is moot is not backed by any material evidence. He has produced as exhibit "000-2" Legal Notice No. 235 of 7th December, 2018, for supply of coins. It is thus his submission that the subject matter is still live and justiciable.
- [16] On the second issue, the Applicant has submitted that he wishes to appeal under Article 163(4) (a) of the Constitution, as the intended appeal raises issues of the interpretation and application of the Constitution as well as statute. He thus contends that his intended appeal revolves around the application and interpretation of Article 227 of the Constitution as read with the Public Procurement and Asset Act, 2015 and the repealed Public Procurement and Disposal Act, 2005 which he believes the Court of Appeal misapplied. He has further alleged misapplication of Article 50(4) of the Constitution by the Appellate Court. He thus submits that certification is not required in the circumstances.
- [17] On whether the computation of time under Rule 33(1) of the Supreme Court Rules violates the Constitution and the principles of natural justice, the Applicant submits that Rule 33(1) violates Articles 25(c), 47,48, 50(1), 73, 159(2) (d), and 163(4)(a) & (b) of the Constitution. He is of the view that the 30 – day period under Rule 33(1) to file an appeal should start running at the expiry of the 14 days period under Rule 31(1) allowed to file the Notice of Appeal, irrespective of whether or not a notice of appeal is filed on the first or the last day of the 14 – day period allowed under Rule 31(1). He thus argues that the Rule should never be offensive to file an appeal at the earliest opportunity.
- [18] The Applicant has further submitted that the Rule does not exclude such time as may be certified by the Registrar of the Court of Appeal as having been required to prepare certified record of proceedings, and does not provide a cure where delay is occasioned by inaction on the part of the Registrar of the Court of Appeal. He is of the view therefore that time should start running only after the provision of record of proceedings to a litigant by the Court of Appeal registry.
- [19] On the fourth issue, it is submitted that there was no delay in making this Application. He argues instead that, having missed the deadline for filing the appeal by four days, he filed and served his notice of appeal on 27th November 2018 which he submits was only 10 days after the expiry of the time stipulated in the Rules.
- [20] The Applicant has furthermore urged this Court not to lose sight of the fact that, had he delayed to file his notice of appeal until the 26th October 2018, the 14th day of the time stipulated under Rule 31(1), then he would have been allowed to file his petition of appeal and the incomplete Record of Appeal when he presented it on 19th November 2018, since the 30-day deadline would have been some 10 days away – on 25th November 2019. He thus argues that having filed his Notice of Appeal on 16th November, 2018, he was unreasonably punished by having 10 days taken away from the time allowed for him to comply with other processes.
- [21] On whether the time to file the appeal should be extended, the Applicant acknowledges that the 30 days' period within which to file his intended appeal had lapsed but submits that the delay was occasioned by factors outside his control. He claims in that regard that he applied for copies of proceedings on 19th October 2018 which proceedings are yet to be supplied to him. He thus urges this Court to exercise its discretion under Rule 53 of the Supreme Court Rules and extend the time to file his appeal. He also argues that no prejudice will be occasioned to the Respondents if extension of time is granted and that he has satisfied all requirements for extension of time as set out by this Court in *Nicholas Kiptoo Arap Korir v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.



[22] Concerning costs, he is urging the Court to allow the application with costs. However, he submits that in the event that his Application is disallowed, then the Court should not award costs to the Respondents since this is public interest litigation between a private citizen and the State. He cites the Biowatch case cited as CCT 80/2008 or 2009 ZA CC 14 at paragraph 21 in support of that submission.

(ii) The 1st Respondent's

[23] The 1st Respondent has filed its written submissions dated 6th March, 2019 opposing the application for leave to file a Petition of Appeal out of time as well as Application No. 33 of 2018 by the Applicant seeking to stay the Judgment of the Court of Appeal. The two Applications are based on same facts. It has also relying on the Replying Affidavit of Kennedy K. Abuga dated 19th December 2018 and has in addition listed the following two issues for determination:

- a. Whether the Applicant's prayer for extension of time to file his appeal should be allowed by this Court;
- b. Whether this Court can properly order for stay of the judgment of the Court of Appeal.

[24] We will only deal with the first issue which concerns this Application. The second issue will be dealt with independently in Application No. 33 of 2018. It is submitted in that context that a party intending to appeal to this Court must not only file a notice of appeal within 14 days of the decision they wish to appeal from being made, but must also file a substantive petition of appeal, record of appeal and pay the prescribed fees within 30 days of the filing of a notice of appeal as prescribed under Rule 33(1). According to the 1st Respondent, the Applicant, having filed his Notice of Appeal on 16th October, 2018, could not file his appeal later than 17th November 2018 which he had not done.

[25] The 1st Respondent further submits that the word "shall" as used in Rule 33(1) is in mandatory terms and has cited the decision of this Court in *Law Society of Kenya v. Centre for Human Rights and Democracy & Others*, Sup. Ct. Pet. 14 of 2013 where this Court rendered itself as follows:

26. The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the petition of appeal, record of appeal, and the prescribed fee."

[26] Citing Rule 37(1) of the Supreme Court Rules 2012, the 1st Respondent also submits that by fact of the failure of the Applicant to lodge an appeal within the prescribed timeframe, then the Notice of Appeal was deemed as withdrawn. Cognizant of Rule 53 of the Supreme Court Rules that allow this Court to extend time, the 1st Respondent has further cited Rule 55 of the Rules arguing that the gravity of the non-compliance by the Applicant and the circumstances of this case calls upon this Court to disallow the Applicant's prayer to file his appeal out of time.

[27] The 1st Respondent has furthermore submitted that due to the non-compliance by the Applicant, the subject of the Petition has already been overtaken by events and an appeal would serve no purpose. It also submits that the 1st Respondent has already gone ahead post the Judgment of the Court of Appeal dismissing the Applicant's Petition of appeal, to undertake its mandate under the law by concluding the tendering process and signing a legally binding contract as per the terms of Tender No. cbk/37/2017-2018 with the 2nd Respondent and even committed funds to the same. In addition, it is submitted that the printing of the new currency has commenced and some of the currencies are in circulation. According to the 1st Respondent, these are after-events occasioned by the delay of the Applicant in filing the appeal within the prescribed time. They are of the view therefore that even if



this Court were to allow the lodging of the appeal out of time, there would be no subject matter to be determined in the appeal and any such determination would be academic.

- [28] Citing the decision of this Court in *Raila Odinga v. Independent Elections and Boundaries Commission & others*, Petition No. 5 of 2013, it is submitted also that each case must be considered within the context of its peculiar circumstances and the exercise of discretion must be made sparingly. They have also relied on similar decisions in *Paul Wanjohi Mathenge v. Duncan Gichane Mathenge* [2013]eKLR, and *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR in that context.
- [29] Citing further the decision of this Court in *Nicholas Kiptoo Arap Korir Salat* case, it is submitted that extension of time should not occasion prejudice to the Respondents and all the circumstances of the case should be considered. They thus submit that having entered into a binding contract with the 2nd Respondent, circulation of currency having begun, the 1st Respondent and the general public would be highly prejudiced if the extension is allowed. This being not the first appeal on the matter, the 1st Respondent submits that the Appellant has had an opportunity to be heard before competent Courts below and litigation must come to an end.
- [30] The 1st Respondent concludes on this issue by submitting that concluded constitutional causes of action or processes cannot be reopened or re-litigated before the Supreme Court. In support, they have cited *Chris Munga N Bichage v. Richard Nyagaka Tongi & 2 others* [2017] eKLR and *Mary Wambui Munene v. Peter Gichuki Kingara & 2 others* [2014] eKLR. The tender having been awarded, gazettelement being concluded, and the processing of printing undertaken already, it urges this Court not to be used to re-open such concluded processes.

(iii) The 2nd Respondent's

- [31] The 2nd Respondent has filed written submissions dated 26th February 2019 in support of the Preliminary Objection. It has also filed written submissions dated 19th March 2019 in opposition to the Application to file a petition of appeal out of time. The two sets of submissions are laying emphasis on the jurisdiction of this Court to entertain the Application by the Applicant.
- [32] The 2nd Respondent in that regard submits that the decisions at both the High Court and the Court of Appeal turned on which statute between the PPAD (now repealed) and the PPADA was applicable to the restricted tender process; and upon what basis the 2nd Respondent was accorded a preferential margin. The 2nd Respondent thus submits that once the applicable law was established, there was never a dispute as to its interpretation or application. It is therefore argued that no questions involving the interpretation or application of the Constitution were canvassed in the superior courts. It is further argued that the Applications do not disclose the constitutional questions to be adjudicated upon by this Court, but mere allegations are made incapable of clothing the intended appeal with attributes of constitutional interpretation or application required under Article 163 (4) (a) of the constitution. In support, it has cited the case of *Gatirau Peter Munya (Supra), Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another* [2012] eKLR, and *Teachers Service Commission v. Simon P. Kamau & 19 others* [2015]eKLR.
- [33] The 2nd Respondent in addition submits that the intended appeal having failed to meet the threshold for admission under Article 163(4) (a) of the Constitution, then the only other way to invoke this Court's jurisdiction is under Article 163(4) (b). As such, it is submitted, the Applicant ought to have first obtained certification to the effect that the intended appeal raises matters of general importance. In the absence of such certification, it is argued, there is no basis for this Court to find that the intended appeal raises cardinal issues of law deserving its further input. Furthermore, it is argued that



the intended appeal would be incurably defective for want of a mandatory ingredient of the record of appeal under Rule 33(4) of this Court's Rules, namely "the certificate, if any, certifying that the matter is of general public importance".

[34] The 2nd Respondent thus prays that this ought to Court disallow the Application to extend time and find that it has no jurisdiction to do anything more regarding the dispute between the parties.

(iv) The 3rd and 4th Respondents'

[35] The 3rd and 4th Respondents have filed joint submissions dated 7th March 2019 in opposition to the Applicant's Notice of Motion in Application No. 32 of 2018 dated 15th November 2018 and in support of the 2nd Respondent's Notice of Preliminary Objection dated 11th December 2018. The submissions have raised the following issues for determination:

- a. Whether extension of time should be granted where leave to this Court and /or certification of the intended appeal as a matter of public interest has not been sought; and
- b. Whether the applicant has met the threshold for granting of extension of time as sought in the Application;

[36] The submissions on the first issue reiterates the argument by the 2nd Respondent that certification of the intended appeal as a matter of public importance is necessary because the same does not involve application or interpretation of the Constitution. They have made in that context reference to paragraph 2 of the Judgment of the Court of Appeal where the Court summarized the issues for determination none of which related to the interpretation of the Constitution.

[37] On whether the Applicant has met the threshold for grant of extension of time, they have made reference to the case of Nicholas Salat (*supra*) where this Court set out the principles for consideration when determining whether or not to extend time for filing a petition of appeal. They are of the view that failure to meet even one of the seven principles set out in that case entitles the Application to be dismissed. It is in that context argued that the Applicant, having failed to address the specific instances of constitutionality and public importance that he intends to canvass in its intended petition of appeal, the Application ought to be dismissed.

[38] The 3rd and 4th Respondents have in addition taken issue with the proof of the cause of delay and argue that the Applicant has failed to provide evidence of follow ups made with the registry for the copies of the proceedings. They have cited the case of Mombasa County Government v. Kenya Ferry Services & another [2019] eKLR in support of that argument.

[39] The 3rd and 4th Respondent also submit that they have mobilized their financial and human resources to carry out their mandate pursuant to the tender and the contract signed. As such, they argue that the extension of time will greatly prejudice them. Citing the principles laid down in *Hermanus Phillipus Styn v. Giovanni Gnechi-Ruscone* [2013] eKLR, it is argued that the extension of time would occasion a great burden on the public taking into account the fact that measures have already been put in place including disbursement of funds for the execution of the services under the tender.

[40] They thus urge the Court to disallow the application for leave to file a petition of appeal out of time, the jurisdiction having been improperly invoked, and the Application having failed to meet the threshold of leave for extension of time.

[41] There are no submissions on record for the 5th, 6th, 7th and 8th Respondents. They have not also responded to the Application in any way.



D. Analysis and Determination

- [42] We have set out the rival submissions by parties and in our view, there are only two issues for determination by this Court. The first issue is whether this Court has jurisdiction to entertain the Application. The second issue is, if we have jurisdiction to determine it, has the Applicant laid enough grounds to enable us extend time within which to file his appeal?
- [43] It is important to settle the issue of jurisdiction ab initio bearing in mind that the jurisdiction of this Court is limited. It would also be an exercise in futility if we were to allow the Applicant to file his appeal out of time only to find later that we are without jurisdiction. In that context, the Application is stated to have been brought under Article 163(4) (a) of the Constitution. Put differently, the intended appeal must have involved application and interpretation of the Constitution. We would thus agree with the Respondents to the extent only, that if the Applicant were to bring his appeal as a matter of great public importance, then he ought to have sought certification thereof. The Applicant has however insisted that his appeal involves interpretation and application of the Constitution and so no certification is required.
- [44] The above being the case, we shall address the Application as framed and so the issue of certification would not arise in our consideration thereof. In that regard, the 3rd and 4th Respondents have made reference to paragraph 2 of the Judgment of the Court of Appeal where the court summarized the issues for determination. In the said paragraph, the Court of Appeal listed the twin issues for determination to be: “whether the appeals ought to be struck out for want of joinder of essential or necessary parties; the applicable law to the tender; and whether the 15% preference margin was lawfully granted to the 2nd appellant and finally, costs”.
- [45] For this Court to assume jurisdiction under Article 163(4) (a) of the Constitution, the Applicant must demonstrate how certain Articles of the Constitution were applied or interpreted in the Trial Court as well as the Appellate Court. In *Zebedeo John Opure v. Independent Electoral and Boundaries Commission and 2 Others*, Sup. Ct. Election Petition No. 32 of 2018 (para. 57) we held that for a dispute to fall under Article 163(4) (a) of the Constitution, the conclusion reached by the trial Court must clearly emerge as one requiring constitutional interpretation or application. Although the Opure case related to an electoral dispute, we find it applicable here. We further stated in that case that a party seeking this Court’s intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Has the Applicant demonstrated how Article 227 of the Constitution was misapplied?
- [46] We have elsewhere above made reference to the Applicant’s Replying Affidavit dated 11th March 2019. At paragraph 16, he has listed a number of Articles in the Constitution that he invoked for determination. He has included Articles 22 (1) & (2) (c) and 258 (1) & (2) (c) of the Constitution. He then, at paragraph 17, stated that “there is no way an appeal to this Court resulting from the Court of Appeal’s decision in the first appeal thereof, can be said not to be a case involving the interpretation or application of this Constitution”. At paragraph 21, he concludes that his intended appeal revolves around the interpretation and application of Article 227(a) of the Constitution. However, rather than explain how the Articles were applied or interpreted, the Applicant has only made assumptions and we are at pains to find, how the conclusion reached by the Trial Court as well as the Appellate Court emerge as one requiring interpretation and Application of the Constitution. We are also unable to find any explanation by the Applicant as to how the Court of Appeal misinterpreted or misapplied the constitutional provision he has listed. We thus agree with the Respondents that the dispute did not relate to any express question of the interpretation and application of the Constitution. In our view, like the Court of Appeal, we are clear in our minds that the dispute between the parties relates



to the tender for printing of new currency and the issue of the 15% preferential margin. No Articles of the Constitution require any interpretation or application in that regard. Any reference to the Constitution, as was the case at the Court of Appeal, was peripheral in addressing those two central issues.

[47] Having made the above observations, we find that this Court has no jurisdiction to entertain the intended appeal and we cannot also cannot proceed to determine the second issue on whether the time should be extended to allow the Applicant file his intended appeal.

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

E. Orders

49.

- a. Prayer No. (2) of the Applicant's Notice of Motion dated 15th November 2018 seeking to extend time to file a petition of appeal is hereby dismissed.
- b. The Preliminary Objection by the 2nd Respondent, dated 11th December 2018 is upheld.
- c. The costs of all Respondents shall be borne by the Applicant.

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

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT



I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

