



**Mwagiru & 2 others v Attorney General & 3 others (Application
20 of 2019) [2019] KESC 86 (KLR) (17 December 2019) (Ruling)**

Rosemary Wanja Mwagiru & 2 others v Attorney General & 3 others [2019] eKLR

Neutral citation: [2019] KESC 86 (KLR)

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

APPLICATION 20 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

DECEMBER 17, 2019

BETWEEN

ROSEMARY WANJA MWAGIRU 1ST APPLICANT

STEPHEN MBUGUA MWAGIRU 2ND APPLICANT

ROBERT GITHUI 3RD APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

TATU CITY LIMITED 2ND RESPONDENT

KOFINANCE COMPANY LIMITED 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 4TH RESPONDENT

*(Being an application for extension of time to file an appeal against the
Judgement and Orders of the Court of Appeal in Civil Appeal No 349
of 2013 (Karanja, Kiage & Sichale, JJ.A) delivered on 10th May, 2019)*

Jurisdiction to determine an appeal as of right where an applicant was not challenging the interpretation or application of the Constitution

Reported by Ribia John

***Jurisdiction** – jurisdiction of the Supreme Court - appellate jurisdiction - matters of constitutional interpretation and application - whether the Supreme Court had the jurisdiction to determine an appeal as of right where an applicant was not challenging the interpretation or application of the Constitution – Constitution of Kenya (2010), article 163(4)(a).*

***Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeals as of right over matters of constitutional interpretation and application - application for extension of time - whether the Supreme Court*



could determine an appeal as of right where an applicant failed to obtain certified copies from the Court of Appeal in good time.

Brief facts

The applicant sought for extension of time to file an appeal and record of appeal in the Supreme Court under article 163(4)(a) of the Constitution which provided that appeals would lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.

Issues

- i. Whether the Supreme Court could determine an appeal as of right where an applicant failed to obtain certified copies from the Court of Appeal in good time.
- ii. Whether the Supreme Court had the jurisdiction to determine an appeal as of right where an applicant was not challenging the interpretation or application of the Constitution.

Relevant provisions of the Law

Constitution of Kenya

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

Held

1. While the inability by an applicant to obtain certified copies from the Court of Appeal in good time, would in ordinary circumstances be reason enough for the extension of time by the Supreme Court, such reason, would not suffice in circumstances where, the intended appeal, was premised upon article 163(4)(a) of the Constitution. In such a scenario, the applicant had to satisfy the Court, that his intended appeal, was one involving the interpretation and/or application of the Constitution.
2. Neither the High Court nor the Court of Appeal, engaged in any exercise of interpretation or application of article 157(6) and (10) of the Constitution. There was no basis upon which the application for extension of time could be sustained. To successfully invoke the provisions of article 163(4)(a) of the Constitution, an appellant had to be challenging the interpretation or application of the Constitution, which the Court of Appeal used to dispose of the matter in that forum. Such a party, had to be faulting the Court of Appeal, on the basis of such interpretation.

Application dismissed

Orders

Application dismissed with costs.

Citations

East Africa

1. *Nduttu & 6000 others v Kenya Breweries Ltd & another* 2012] 2 KLR 804 –(Followed)
2. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 –(Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 157(6); 163 (4)(a) –(Interpreted)
2. Supreme Court Act, 2011 (Act No 7 of 2011) sections 21(2); 24(1) –(Interpreted)
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 21, 23, 26, 53 –(Interpreted)



RULING

1. Upon perusing the Notice of Motion Application dated July 9, 2019, and filed on even date, for extension of time to file an appeal and record of appeal out of time, against the Judgment and Orders of the Court of Appeal in Civil Appeal No. 349 of 2013 delivered on 10th May, 2019, brought under the Provisions of Article 163 4 of *the Constitution*, Sections 212, 241 of the *Supreme Court Act* and Rules 21, 23, 26 and 53 of the Supreme Court Rules, 2012; and
2. Upon reading the Applicants' grounds in support and the Supporting Affidavit, sworn by Rosemary Wanja Mwangi on 28th September 2018, wherein it is averred, that the delay in filing the appeal and record of appeal in time, was occasioned by the unavailability of certified proceeding from the Court of Appeal, and by the fact that, the applicant's advocate on record, Dr. Gibson Kamau Kuria, was unwell and admitted to Nairobi Hospital between 29th May 2019 and 25th June 2019; and
3. Upon reading the 2nd and 3rd Respondents' Notice of Preliminary Objection dated 16th July 2019, challenging this Court's jurisdiction to issue the orders sought, on grounds that, the intended appeal, is not one involving the interpretation and application of *the Constitution*, pursuant to Article 163 4 a of *the Constitution*, and that the Applicants have not sought Certification, under Article 163 4 b of *the Constitution*; and
4. Upon considering the Applicants' written submissions, in support of the Motion filed on 9th July 2019, and the written submissions in opposition to the Preliminary Objection, dated 22nd July 2019, wherein they restate the reasons for the delay, and contend that this court has jurisdiction, to hear and determine the Application; that the intended appeal challenges the Court of Appeal's interpretation and application of Article 157 6 and 10 of *the Constitution*; and
5. Upon considering the written submissions by the 2nd and 3rd Respondents dated 29th July 2019, in support of the Preliminary Objection, wherein it is contended that this Court lacks jurisdiction, under Article 163 4 a of *the Constitution* to hear and determine the intended appeal, as the same does not involve a question of constitutional interpretation and application; that the High Court and the Court of Appeal did not deal with the interpretation or application of Article 157 6 of *the Constitution* or any other constitutional provision; that Article 157 6 of *the Constitution* or any other constitutional provisions did not form the basis of the judgment of the Appellate Court; that the Applicants therefore, ought to have sought Certification from the Court of Appeal for this Court to assume jurisdiction; and
6. Upon considering the written submissions by the 4th Respondent, dated 12th September 2019, in support of the Preliminary Objection, in which it agrees in substance with the 2nd and 3rd Respondents that this Court lacks jurisdiction to entertain the application and the intended appeal; and
7. Having Considered the questions at the core of the Application viz: whether this Court has jurisdiction under Article 163 4 a, to entertain the intended appeal and whether the applicants herein, have made a compelling case for this Court to exercise discretion to grant the orders for enlargement of time. By a unanimous decision of this Bench, pursuant to the provisions of Article 163 4 a, Sections 212 of the *Supreme Court Act*, 2011 and Rules 21, 23 and 53 of the Supreme Court Rules, 2012, we find as follows:
 - a. While the inability by an applicant, to obtain certified copies from the Court of Appeal in good time, would in ordinary circumstances, be reason enough for the extension of time by this



Court, such reason, will not suffice in circumstances where, the intended appeal, is premised Upon Article 163 4 a of *the Constitution*. In such a scenario, the applicant must satisfy the Court, that his intended appeal, is one involving the interpretation and/or application of *the Constitution*.

- b. A perusal of the intended appeal, and record thereof, annexed by the Applicants, reveals that neither the High Court, nor Court of Appeal, engaged in any exercise of interpretation or application of Article 1576 and 10 of *the Constitution*. In keeping with this Court’s decision in Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another SC Petition No. 3 of 2012 [2012] eKLR, we find no basis Upon which the Application for extension of time can be sustained. As clearly enunciated in that case, to successfully invoke the provisions of Article 163 4 a of *the Constitution*, an appellant must be challenging the interpretation or application of *the Constitution*, which the Court of Appeal used to dispose of the matter in that forum. Such a party, must be faulting the Court of Appeal, on the basis of such interpretation.

In the circumstances, we hereby Order that:

Orders	Reasons	
1.	The 2 nd and 3 rd Respondents’ Notice of Preliminary Objection dated July 16, 2019 is hereby allowed	This Court lacks jurisdiction under Article 163 4 a of <i>the Constitution</i> . The intended appeal does not meet the threshold set out in Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another SC Petition No. 3 of 2012
2.	The Application dated July 9, 2019 is hereby dismissed.	Want of jurisdiction.
3.	The Applicants shall bear the costs of the Application	As per the holding in Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others Petition No. 4 of 2012 [2013] eKLR, costs follow the event.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2019.

D. K. MARAGA M. K. IBRAHIM

CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT

OF THE SUPREME COURT

J. B. OJWANG S. C. WANJALA

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU



JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

Supreme Court Of Kenya

