



C M A W-M v P A W-M (Petition 7 of 2015) [2018] KESC 45 (KLR) (11 May 2018) (Ruling)

C M A W-M v P A W-M [2018] eKLR

Neutral citation: [2018] KESC 45 (KLR)

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

PETITION 7 OF 2015

DK MARAGA, CJ & P, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

MAY 11, 2018

BETWEEN

C M A W-M PETITIONER

AND

P A W-M RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (Asike- Makhandia, W. Ouko, and K. M’Inoti, JJA) at Malindi dated 29th May, 2015 in Civil Appeal No. 2 of 2014)

The appeals that lie as of right from the Court of Appeal to the Supreme Court are those concerning questions of interpretation and application of the Constitution

The appeal was about a family dispute revolving around the question of alimony. The court held that issue did not transmute into a constitutional question. The court noted that article 163(4)(a) of the Constitution provided that appeals founded on interpretation or application of the Constitution would lie as of right from the Court of Appeal to the Supreme Court. Further, mere allegations that clothed an appeal with attributes of constitutional interpretation and application would not suffice.

Reported by Beryl A Ikamari

Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction - right of appeal -appeals relating to questions on the application and interpretation of the Constitution -where it was alleged, in an appeal, that an award of alimony by the High Court discriminated against the petitioner as it failed to consider the respondent’s financial means and was based on an assumption that the petitioner had to pay alimony - whether such allegations raised questions of constitutional interpretation or application -Constitution of Kenya 2010, article 163(4)(a).

Brief facts

The petitioner and the respondent married on May 31, 1997 in London, England. They resided in England until the year 2007 when they relocated to Kilifi, Kenya. In March 2009, the petitioner left Kenya to attend a wedding in England but never returned. Via a petition dated February 26, 2009, the respondent sought the



dissolution of the marriage and she also sought alimony of at least Kshs. 250, 000/= per month, a variation of marriage settlement and costs. On the other hand, the petitioner made an application seeking 1,000 Great British pounds as monthly maintenance. The High Court awarded the respondent interim alimony in the sum of Ksh. 127,000 per month. Against the ruling on alimony an appeal was lodged at the Court of Appeal. The Court of Appeal dismissed the appeal.

The petition filed at the Supreme Court was based on grounds similar to those raised at the Court of Appeal. The petitioner's assertion was that the High Court and Court of Appeal violated articles 25 and 27 of the Constitution by assuming that the petitioner had to pay alimony while not considering the respondent's affidavit of means. The petitioner's contention was also that the Court of Appeal wrongfully found that the petitioner abandoned grounds 1 to 4 of the memorandum of appeal and yet he had not.

The petition was opposed by the respondent who contended that the petitioner did not have a right of appeal to the Supreme Court under article 163(4)(a) of the Constitution and that the petition did not raise matters of general public importance. The respondent said that it was necessary for the petitioner to obtain certification that the petition raised matters of general public importance over which the Supreme Court could assume jurisdiction under article 163(4)(b). The Respondent denied that the petitioner's right to be heard was violated and stated that the right to privacy was not absolute as the right to information was recognized by the Constitution. The respondent also stated that the petitioner was not discriminated against in the making of the award of alimony as the Court took into account the financial capacity of the spouses.

Issues

- i. Whether the Supreme Court had jurisdiction to determine a family dispute revolving around the question of alimony as of right in a case on interpretation or application of the Constitution.

Held

1. Article 163(4)(a) of the Constitution provided that appeals founded on interpretation or application of the Constitution would lie as of right from the Court of Appeal to the Supreme Court. Mere allegations that clothed an appeal with attributes of constitutional interpretation and application would not suffice. The appeal had to originate from a Court of Appeal case where the issues revolved around the application and interpretation of the Constitution.
2. The appeal had nothing to do with the interpretation or application of the Constitution as contemplated by article 163(4)(a) of the Constitution. The appeal was about a family dispute revolving around the question of alimony. The issue did not transmute into a constitutional question.

Appeal struck out with costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. The matter before the Court is a petition dated 9th July, 2015 and filed on 10th July, 2015. The petitioner appeals against the Judgment of the Court of Appeal delivered on 29th May, 2015 which dismissed the petitioner's appeal, with costs.



B. Statement of Facts

2. The petitioner and the respondent were married on 31st May, 1997 in the London Borough of Richmond upon Thames, England. Thereafter, they lived and cohabited in England until around the year 2007 when they relocated to Kenya and settled in Kilifi. All was well until March 2009 when the petitioner left Kenya for England apparently to attend a wedding but never returned. The respondent thereafter lodged a petition for the dissolution of the marriage on 26th February, 2009. She also sought alimony pending suit in the sum of at least Kshs. 250,000, per month, a variation of marriage settlement, and costs.

C. Background

(a) At the High Court

3. The respondent filed a petition for the dissolution of their marriage on 26th February, 2009. In summary she sought the following Orders:
 - (a) The marriage be dissolved
 - (b) An award of alimony pending suit and maintenance in the sum of at least Ksh.250,000 per month secured upon the petitioner's (respondent in the High Court) assets in Kenya.
 - (c) There be a variation of marriage settlement.
 - (d) The petitioner to pay all costs.
4. The respondent also filed a chamber summons application dated 3rd March, 2010 seeking, among others, a temporary injunction restraining the petitioner from transferring or alienating Title No. [Particulars Withheld] of Group V, Kilifi (the land on which the couple had lived), and to allow the respondent quiet enjoyment of the said property until the determination of the suit. In its Ruling dated 23rd June, 2010 the High Court (H. A. Omondi J) granted the Orders of injunction as sought.
5. On 6th May, 2010 the respondent filed another Chamber Summons application seeking Orders, inter alia, "that alimony pending suit in the sum of Ksh.250,000 per month or such other sum as the court may deem reasonable and just ... be awarded".
6. The petitioner on the other hand, filed a chamber summons application dated 28th August, 2012 seeking Orders, among others, that the respondent pay to the petitioner the sum of £1,000, (Great Britain pounds one thousand) as monthly maintenance pending the determination of the suit with effect from November, 2010 and the amount be secured by a charge on the respondents house at 2 Galloway Close, Fleet Hampshire United Kingdom.
7. The two applications were heard concurrently, and in its Ruling delivered on 20th May, 2013 the High Court (Meoli J.) awarded interim alimony to the respondent in the sum of Ksh.127,000 per month, with effect from 1st April, 2010 until the suit is heard and determined. The petitioner's application dated 28th August, 2012 was struck out, with costs in the cause. Dissatisfied by that Ruling, the petitioner proceeded to the Court of Appeal.
8. At the Court of Appeal
The petitioner challenged the Ruling of the High Court on various grounds which may be summarized as follows:



- (a) The learned Judge erred in striking out the petitioner's chamber summons application dated 28th August, 2012 and finding that it is an abuse of the process of Court.
 - (b) The learned Judge erred in awarding the respondent maintenance despite her refusal to disclose her needs and by holding that the petitioner was barred from applying for a maintenance order against the respondent.
 - (c) The learned Judge erred by contravening and violating the Constitution of Kenya, 2010 in favouring the respondent over the appellant on grounds of sex and by awarding the respondent maintenance even though she has her own independent and sufficient means.
 - (d) The learned Judge erred by relying upon evidence improperly obtained by the respondent in violation of the petitioner's privacy.
 - (e) The Petitioner avers that the Judge relied on documents that the Respondent had been barred by a consent order in England from producing or relying upon in determining the Petitioner's means including the Petitioner's Will.
 - (f) The learned Judge erred by awarding the respondent 50% of the petitioner's income against the maximum of 20% permitted by Section 25 of Matrimonial Causes Act.
 - (g) The learned Judge erred by relying on *Donaldson v. Donaldson* (1958) All ER and *Rayden on Divorce*, an English text book, and disregarded the provisions of the Constitution.
9. The petitioner sought from the Court of Appeal Orders that:
- (a) The award of interim alimony be set aside with costs.
 - (b) The Order dismissing the chamber summons application dated 28th August, 2012 be set aside with costs.
 - (c) The petitioner's chamber summons application dated 28th August, 2012 be allowed with costs.
 - (d) In view of the various comments made by the Honorable Judge upon the character of the petitioner the petition and cross-petition be heard by a different Judge.
 - (e) The costs of the appeal be paid by the respondent.
10. The appeal was dismissed by the Appellate Court in its judgment delivered on 29th May, 2015. That Judgment is the basis of the petition before this Court.

D. The Petitioner's Case

11. The petition before this Court raises grounds which are largely similar, in substance, to those raised at the Court of Appeal. The petitioner urges, inter alia, that the two superior courts violated Articles 25 and 27 of the Constitution by proceeding with a predetermined mind to the effect that, the petitioner must pay interim alimony, without considering the respondents affidavit of means. The petitioner also contends that the Court of Appeal wrongfully held, that the petitioner had abandoned grounds 1-4 of the memorandum of appeal yet he had not.
12. The petitioner therefore seeks the following Orders:
- (a) An Order setting aside the entire Judgment of the Court of Appeal delivered on 29th May, 2015.
 - (b) An Order setting aside the Ruling and Order of the High Court at Malindi given on 20th May, 2015 in Divorce Petition No. 1 of 2010.



- (c) An Order dismissing the Respondent's chamber summons application dated 6th May, 2010.
- (d) A declaration that the Court of Appeal ought not to have held that the petitioner abandoned the respondent as such finding cannot be made until the Divorce Petition and Cross-Petition are heard and determined and that by making premature determinations of the Divorce Petition and Cross-Petition the Court of Appeal has rendered a fair trial of those issues impossible.
- (e) An Order requiring the respondent to maintain the petitioner at £1000 per month from 1st September, 2012.
- (f) Costs of the chamber summons applications dated 6th May, 2010, 28th August, 2012 and of Civil Appeal No. 2 of 2014 be paid by the respondent to the petitioner.
- (g) Costs of this appeal/petition be paid by the respondent to the petitioner.
- (h) Stay of execution pending the hearing and determination of this petition.

E. The Respondent's Case

13. Through written submissions filed on 25th May 2017, the Respondent canvasses the following five issues:

(i) Whether the Supreme Court has jurisdiction to handle the matter

14. The respondent contends that, the Supreme Court lacks jurisdiction to hear the matter. She argues that the Petitioner misdirected himself in relying on Article 163(4) (a) of the Constitution in approaching the Supreme Court, yet he does not have an automatic right of appeal. It is her argument that the appeal herein, does not meet the criteria set out by this Court in Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. Sup Ct. Petition No. 3 of 2012 [2012] eKLR and Evans Odhiambo Kidero v. Ferdinand Ndungu Waititu & 4 Others [2014] eKLR.
15. According to the respondent, the only other avenue of access to this Court by the petitioner, would have been an application for certification pursuant to Article 163 (4) (b) of the Constitution. However, this option, submits the respondent, was no longer available to the petitioner, as he had not sought the requisite certification from the Court of Appeal. It is therefore the respondent's case that the appeal should be struck out for want of jurisdiction.

(ii) Whether the issues raised by the Petitioner are those of general public importance

16. The Respondent submits that the Petitioner failed to obtain certification and the Supreme Court should declare that the Petitioner does not have the automatic right to appeal as the matters raised in the petition are not of general public importance. She further submits that the Court's adjudicatory powers must be restricted to matters of sufficient weight and importance consistent with the objects set out in Section 3 of the Supreme Court Act. The Respondent relies on the court decisions on the issue of general public importance as set out in the English case of *Glancare Teorada v. A.N. Board Pleanala* [2006] FEHC 250 and the Supreme Court decisions in *Malcolm Bell v. Daniel arap Moi & Another* Sup Ct. Appl. No. 1 of 2013 [2013] eKLR and *Hermanus Phillipus Steyn v. Giovanni*, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR.
17. In the alternative if the court were to try this petition, then it is submitted that the Court should uphold the decision of the Court of Appeal with regard to the Petitioner's application for maintenance which was exercised judiciously in dismissing the Petitioner's appeal.



(iii) Whether the Petitioner has been denied the right to be heard under Article 25

18. The Respondent submits that the Petitioner has not been denied the right to be heard as alleged, the Petitioner having misdirected himself as to the jurisdiction of the Supreme Court to determine the matter, and without jurisdiction, the petitioner is not properly before the Court. The respondent refers to the S.K. Macharia Case and Another v. Kenya Commercial Bank Ltd. & 2 Others, Sup. Ct. Civil Application No. 2 of 2011, [2012] eKLR, in the Matter of the Interim Independent Electoral Commission, Sup. Ct. Constitutional Advisory Opinion Application No. 2 of 2011 [2011] eKLR and The Owners of Motor Vessel “Lillian S” v. Caltex Oil Kenya Ltd. [1989] eKLR cases on the issue of court’s jurisdiction.

(iv) Whether the Court breached the Petitioner’s right to privacy under Article 31

19. The respondent submits that while the right to privacy is protected under the Constitution, the same is not absolute as Article 35(b) of the Constitution recognizes the right to access information.

(v) Whether the Petitioner has been discriminated against under Article 27 as well as Article 45(3)

20. The respondent submits that the petitioner had not only deserted her, but was living with another woman. In addition, she submits that the two superior courts, in making the award of alimony, had taken into account, the financial capacity of the spouses, in line with Section 77 of the Marriage Act.

F. At the Supreme Court

21. When the matter came up for hearing at the Supreme Court on 19th February 2018, the parties were asked to limit their submissions to the single issue of jurisdiction. Ms. Gathara, counsel for the respondent, chose not to address the issue frontally, but instead, left it to the Court. Mr. Kinyua, counsel for the appellant, on the other hand, submitted that the case was one of constitutional interpretation and such, no certification was required. It was counsel’s contention that the issues canvassed in the pleadings revolved around the violation of Articles 25, 25, 31 and 50 of the Constitution.
22. However, in response to a question from the Bench (Lenaola SCJ), Mr. Kinyua conceded that no single issue of constitutional interpretation or application had arisen or been pleaded, as to be the basis for the superior courts’ decisions in the divorce cause.

G. Issues for Determination

23. It is clear that, the only issue for determination before us, is whether this Court has jurisdiction to entertain and determine this appeal. Towards this end, all that we need to determine is whether the appeal is one of those that rightly lie from the Court of Appeal to this Court, under Article 163 (4) (a) of the Constitution. The said Article provides that:

“Appeals shall lie from the Court of Appeal to the Supreme Court, as of right in any case involving the interpretation or application of this Constitution”.

24. This Court has long settled the question of when and whether an appeal lies from the Court of Appeal under Article 163 (4) (a) of the Constitution. A perusal of any of the decisions wherein the Court has pronounced itself on the applicability of the said Article, would immediately reveal that for an appeal to lie to this Court, the impugned decision must have turned on the appellate court’s interpretation or application of the Constitution.



25. We hereby revisit the pronouncement of this Court, (affirmed by a full bench in succeeding decisions) in Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. this Court was categorical that Article 163 (4) (a) must be seen ...

“to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. ... it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application. The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the constitution...Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4) (a).”

This principle was affirmed in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd. & 2 Others Sup. Ct. Appl. 2 of 2011 [2012] eKLR and Malcolm Bell v. Daniel Toroitich Arap Moi & Another Sup. Ct. Appl. No. 1 of 2013 [2013] eKLR.

26. Applying this principle to the matter before us, we find that this appeal has nothing or little to do with the interpretation or application of the Constitution, as contemplated by Article 163(4) (a). This is a family dispute in which the main issue of contestation has always revolved around the award of alimony. At no stage has it transmuted into a constitutional question. This finding, leads to the inescapable consequence that this appeal must be struck out for want of jurisdiction.

H. Orders

The appeal herein is struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2018.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

N. S. 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

