



Phillip v Maingi (Petition 6 of 2017) [2018] KESC 31 (KLR) (28 September 2018) (Ruling)

Adiel Muriithi Phillip v Thomas Maingi [2018] eKLR

Neutral citation: [2018] KESC 31 (KLR)

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

PETITION 6 OF 2017

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

SEPTEMBER 28, 2018

BETWEEN

ADIEL MURIITHI PHILLIP APPELLANT

AND

THOMAS MAINGI RESPONDENT

Supreme Court does not have jurisdiction to entertain an appeal that does not raise a question of constitutional interpretation or application

The appellant appealed against the judgement of the Court of Appeal that held the consent letter was signed by the parties' Advocates who were their duly appointed. The court held that it does not have jurisdiction to entertain an appeal that did not raise a question of constitutional interpretation or application.

Reported by Ian Kiptoo

Jurisdiction - jurisdiction of the Supreme Court-appellate jurisdiction-appellate jurisdiction on matters involving the interpretation or application of the Constitution-whether the Supreme Court had jurisdiction to entertain an appeal that did not raise a question of constitutional interpretation or application-Constitution of Kenya, 2010, article 163(4) (a)

Brief facts

The Appellant's appealed against the Judgement of the Court of Appeal that held the consent letter was signed by the parties' Advocates who were their duly appointed agents and that moreover the Appellant had ratified it by executing the discharge voucher after receiving the compromised sum of Kshs 1,898,978/- in full.

Issues

- i. Whether the Supreme Court had jurisdiction to entertain an appeal that did not raise a question of constitutional interpretation or application.

Held

1. It was not the mere allegation in the pleadings by a party that clothed an appeal with attributes of constitutional interpretation or application. To be competently before the Court, an appeal under article 163(4)(a) of the Constitution of Kenya, 2010 had to relate to a matter involving the



- interpretation or application of the Constitution that had actively been litigated before the High Court or Courts of coordinate jurisdiction as well as before the Court of Appeal. In other words, 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.
2. The history of the matter clearly involved, leave alone alluded, to any issue of constitutional interpretation or application. The ground the Appellant had raised before the Court that the Court of Appeal sat on appeal on the decision of the High Court, a judge of co-ordinate jurisdiction, had no basis at all as the Court of Appeal did not even cast aspersions on High Court's Judgement leave alone reversing it. It just stated the parties were bound by their consent which compromised High Court's Judgement.
 3. There was no issue of interpretation or application of the Constitution invoking the Court's jurisdiction under article 163(4) (a) of the Constitution. It followed that the appeal was therefore incompetent. Consequently, the Preliminary Objection was upheld.

Appeal dismissed with costs to the Respondent.

Citations

East Africa

1. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 article 163(4) (a) – (Interpreted)

RULING

1. This appeal, brought as of right under Article 163(4)(a) of the Constitution, arises from a running down claim that originated in the High Court in which Kasanga Mulwa, J awarded the appellant Kshs.2,495,425/-. The respondent evinced his intention to appeal against that decision by filing a notice of appeal. To forestall the appeal, the parties' advocates compromised the decree at Kshs.1,898,978/- and executed and filed a consent to that effect. After the said sum of Kshs.1,898,978/- had been paid in full to the appellant and he had executed a discharge voucher, on the grounds that though filed in court, the consent having not been transmuted into a court order a nullity, the appellant disowned the consent and applied to execute the decree to recover the balance of the decretal sum. In an application by the respondent to set aside those execution proceedings, the appellant also contended that the respondent having filed a notice of appeal, the High Court was functus officio and had therefore no jurisdiction to entertain the matter.
2. Lenaola J (as he then was) identified the issue in that application as being "the effect of the consent letter vis a vis the decree, whether the consent letter could vary, amend or otherwise change the important tenor of the judgment and decree" and after hearing he dismissed it.
3. The appellant's 17 grounds of appeal to the Court of Appeal also revolved around the effect of the consent letter. Dismissing the appeal, the Court of Appeal found that the consent letter was signed by the parties' Advocates who were their duly appointed agents and that moreover the appellant had ratified it by executing the discharge voucher after receiving the compromised sum of Kshs.1,898,978/- in full. Aggrieved by that decision, the appellant has preferred this appeal, as stated, as of right under Article 163(4)(a) of the Constitution.
4. As this Court has repeatedly stated and more specifically in the case of *Lawrence Nduttu and Others v. Kenya Breweries Ltd & Another*, [2012] eKLR, "it is not the mere allegation in the pleadings by



a party that clothes an appeal with attributes of constitutional interpretation or application.” To be competently before this Court, an appeal under Article 163(4)(a) of the Constitution must relate to a matter involving the interpretation or application of the Constitution that has actively been litigated before the High Court or Courts of coordinate jurisdiction as well as before the Court of Appeal. “In other words,” as this Court added in the Lawrence Nduttu Case, “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.”

5. The history of this matter as related above clearly involved, leave alone alluded, to any issue of constitutional interpretation or application. The ground the appellant has raised before this Court that Justice Lenaola sat on appeal on the decision of his brother Justice Kasanga Mulwa, a judge of co-ordinate jurisdiction, has no basis at all as Justice Lenaola did not even cast aspersions on Justice Mulwa’s judgement leave alone reversing it. He just said the parties were bound by their consent which compromised Justice Mulwa’s judgement.
6. In the circumstances, we agree with counsel for the respondent that there is no issue of interpretation or application of the Constitution invoking this Court’s jurisdiction under Article 163(4)(a). It follows that this appeal is therefore incompetent. Consequently, we uphold the Preliminary Objection and hereby strike out this appeal with costs to the respondent.

DATED and DELIVERED at NAIROBI this 28th day of September 2018

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D.K. MARAGA M.K. IBRAHIM

**CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME
OF THE SUPREME COURT COURT**

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J.B. OJWANG S. WANJALA

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

.....

N.S. NDUNGU

**JUSTICE OF THE SUPREME
COURT**

