



**Kilaveri v Ethics & Anti – Corruption Commission & another (Petition
Petition15A of 2016) [2018] KESC 20 (KLR) (9 October 2018) (Ruling)**

Boniface Katana Kilaveri v Ethics & Anti – Corruption Commission & Commissioner of Land [2018] eKLR

Neutral citation: [2018] KESC 20 (KLR)

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

PETITION PETITION15A OF 2016

PM MWILU, DCJ & V-P, MK IBRAHIM, JB OJWANG, NS NDUNGU & I LENAOLA, SCJJ

OCTOBER 9, 2018

BETWEEN

BONIFACE KATANA KILAVERI APPELLANT

AND

ETHICS & ANTI – CORRUPTION COMMISSION 1ST RESPONDENT

COMMISSIONER OF LAND 2ND RESPONDENT

Supreme Court does not have jurisdiction to determine a matter involving interpretation and application of the Constitution where the substantive matter has not been determined in the lower court

The petition revolved around the issue whether the Supreme Court had jurisdiction to determine a matter involving interpretation and application of the Constitution where the substantive matter had not been determined in the lower court. The court held that a question involving the interpretation or application of the Constitution that was integrally linked to the main cause in a superior court of first instance was to be resolved at that forum in the first place, before an appeal could be entertained.

Reported by Ian Kiptoo

Jurisdiction-jurisdiction of the Supreme Court - appellate jurisdiction - test to be applied to evaluate the jurisdictional standing of the Supreme Court - where a petition of appeal raised constitutional issues - where the substantive matter had not been determined in the Superior Courts - whether the Supreme Court, in a petition of appeal, had jurisdiction to determine a matter involving interpretation and application of the Constitution where the substantive matter had not been determined in the lower courts - Constitution of Kenya, 2010, article 163(4) (a).

Brief facts

The instant matter was a petition of appeal challenging the decision of the Court of Appeal that affirmed the High Court’s ruling that the Ethics and Anti-Corruption Commission (EACC) had *locus standi* to properly file suit for the recovery and protection of public land in conformity with its powers and mandate enshrined



in Chapter 6 and article 252 of the Constitution of Kenya, 2010, (Constitution) as read with section 11 (1) (k) of the Ethics and Ant-Corruption Commission Act (EACCA) Number 22 of 2011.

The appellant contended that the suit before the High Court was instituted by the 1st respondent, EACC, against a private citizen and not a person subject to Chapter Six, specifically articles 79 and 80 of the Constitution, which provisions only applied to a state officer or a public officer. Further, that the matter raised issues of interpretation of article 79, 80, 252 and 260 of the Constitution.

On the other hand, the 1st respondent objected to the appeal on the grounds that the matter did not fall within the purview of article 163(4) (a) of the Constitution where an appeal under the provision had to be founded on cogent issues of constitutional controversy; that leave had to have been sought and granted for the applicant to do so under article 163(4) (b).

Issues

- i. Whether the Supreme Court, in a petition of appeal, had jurisdiction to determine a matter involving interpretation and application of the Constitution where the substantive matter had not been determined in the lower courts.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 163(4) (a)

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.

Held

1. The court had previously and in a number of decisions affirmed its position on instances in which its appellate jurisdiction may be invoked. First, it had jurisdiction on an appeal from the Court of Appeal, as a matter of right, in a matter involving the application or interpretation of the Constitution; and secondly, on an appeal from the Court of Appeal on a matter certified as involving a matter of general public importance.
2. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. 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. Such a party had to be faulting the Court of Appeal on the basis of such interpretation.
3. The test to be applied to evaluate the jurisdictional standing of the court in the instant appeal was whether it raised a question of constitutional interpretation or application and whether the same had been canvassed in superior courts, progressing through the normal appellate mechanism so as to reach the instant court by way of appeal.
4. The record showed that the instant appeal was from a ruling of the High Court clothing the EACC with jurisdiction to prosecute the matter. The substantive matter was yet to be heard and still lay at the trial court. A question involving the interpretation or application of the Constitution that was integrally linked to the main cause in a superior court of first instance was to be resolved at that forum in the first place, before an appeal could be entertained.
5. The guiding principle was to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, had the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment would deserve further input of the Supreme Court. The substantive matter still lay at the High Court and until it had been heard and determined, and the proper appellate processes had been followed, the Supreme Court did not have jurisdiction to entertain the instant appeal.

Petition of appeal dismissed; each party to bear its own costs.



Citations

Statutes

None referred to

Advocates

None mentioned

RULING

Introduction

1. The matter before this court is a petition of appeal dated 17th September, 2016 challenging the decision of the Court of Appeal delivered on the 17th of July 2015.
2. That decision affirmed the High Court's ruling in application ELC Number 218 of 2013 where the trial court found that the Ethics and Anti-corruption commission (EACC) had locus standi to properly file suit for the recovery and protection of public land in conformity with its powers and mandate enshrined in Chapter 6 and Article 252 of the Constitution, as read with Section 11 (1) (k) of the Ethics and Ant-Corruption Commission Act (EACCA) Number 22 of 2011.

B. Background

i. High Court.

3. The Ethics and Anti-corruption Commission, EACC (the 1st Respondent herein) filed suit ELC No. 218 of 2013 claiming illegal allocation to the Appellant of public property, Mombasa Block XLVIII/145 & 146, situated within the Kilindini Harbor in Mombasa.
4. It is claimed that African Marine & General Engineering Company limited (the Company) was granted by the then Colonial and Protectorate Government of Kenya, LR. Number Mombasa Block 1149/45/XLVIII, for a term of 99 years with effect from January 1960. After independence, the said parcel of land was converted into a freehold title and vested on the East Africa Harbors Corporation. Subsequently, after disbandment of the East African Harbors Corporation, it was transferred to Kenya Ports Authority (KPA) as the beneficial owner. KPA was registered as lessee of the Government of Kenya LR. Number Mombasa Block 1149/45/XLVIII through the vesting order of 1969 and an allotment letter dated 9th September, 1986, issued. The Company with agreement from KPA thereafter reclaimed Mombasa Island Block XLVIII/145 & 146 (the Suit property) from the sea to facilitate berthing of sea going vessels, and KPA granted sub-leases over the suit property to the Company for a term of 59 years from 1st January, 1990.
5. It is alleged that in the absence of proper or legally recognized procedure, the 2nd Respondent allocated in favor of the Appellant the suit property on leasehold basis for a term of 99 years from 1st November, 2012. It is argued that the suit property had been identified, alienated and allocated to KPA and was therefore not available for allocation to the Appellant.
6. When instituting the High Court suit, the 1st Respondent simultaneously filed a Notice of Motion Application dated 27th September, 2013 seeking orders to restrain the Appellant from interfering and/or dealing with the suit property, and the 2nd Respondent from registering or otherwise recognizing any dealings in or over the suit property (amongst other orders). Interim orders of injunction were issued on 3rd October, 2013 against the Appellant and the 2nd Respondent, respectively.



7. Before that Application could be heard and determined, the Appellant filed an Application dated 20th November, 2013 under Articles 79 and 80 of the Constitution and Rule 23 of the Constitution of Kenya High Court Supervisory Jurisdiction Rules 2006 for orders that the suit, as presented by the 1st Respondent, be struck out as it lacked locus standi to do so. The Application was supported by the affidavit of the Appellant sworn on 25th November, 2013 where he deponed that he is the registered owner of the suit property; that it was irregular for the 1st Respondent to engage itself in a private matter between private entities, (the Appellant and the Company); further, that the dispute was between two private parties, and outside the ambit of Chapter Six of the Constitution to which the 1st Respondent is mandated to ensure compliance and enforcement.

8. The Appellant's Application was heard on 27th November, 2013 and the High Court (Mukunya, J) in its ruling delivered on 5th June, 2014, dismissed the Application for lack of merit particularly ruling that:

(5) ...the powers to prosecute are provided for in legislation to wit the Ethics and Anti-corruption Act No 22 of 2011 on section 11 (k),

‘Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.’

Those powers are allowed by the Constitution under Article 252 (1) (d). It is therefore not true to say that the Ethics and Anti-corruption Commission has no locus standi. Having held that the Commission has properly filed this suit pursuant to Article 79, 80 and 252 (i) (d) the issue of jurisdiction and whether or not the parties are State Officers falls on the wayside.’

ii. Court of Appeal

9. Aggrieved by that ruling, the Appellant sought redress at the Court of Appeal filing Civil Appeal No. 27 of 2014, where he listed 7 grounds of appeal as may be summarized as follows:

That the learned judge;

- a. erred in finding that the 1st Respondent had no locus standi by limiting its evaluation on the issue of locus standi on Article 252 (1) (d) of the Constitution, without considering other mandatory provisions of the Constitution, specifically, Articles 79 and 80 as well as the entire Chapter Six of the Constitution;
- b. failed to find that under Section 11 (1) (k) of the Ethics and Anti-Corruption Commission Act 2011, [EACCA] the 1st Respondent had no mandate to institute proceedings on behalf of or against private individuals;
- c. failed to make a finding whether the Applicant is a state officer or public officer;
- d. took into account extraneous matters not placed before it especially whether Section 11 (k) of the EACCA was unconstitutional.

10. In its judgement dated 17th July, 2015, the Appellate Court dismissed the appeal holding that the 1st Respondent had capacity to bring the matter before the Court as the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. The Court relied on Article 22 and 258 of



the Constitution which empowers every person either private or corporate a right to institute court proceedings contesting any contraventions of the Bill of Rights or the Constitution in general.

11. The Appellate Court found factually and legally incorrect the argument that the 1st Respondent can only recover public land through the Director of Public Prosecution, holding that the contention only stood in respect of criminal acts of corruption and not recovery of public land illegally acquired. The Court thus upheld the High Court pronouncement stating:

“However, in the 2010 Constitution we find that the 1st Respondent was anchored in the Constitution to wit Chapter 6 wherein, the 1st Respondent was given the mandate to check on integrity of public officers and the law enacted in pursuance to Article 79 of the Constitution gave the 1st Respondent additional powers. It is therefore incorrect to state that the 1st Respondent’s powers had been whittled down and that it could not file suit for recovery of public property illegally acquired by private citizens.”

12. The Court of Appeal rejected the Appellant’s argument that Section 11 (k) of the EACCA Act was unconstitutional and held that:

“The other argument advanced by Mr. Buti was that section 11(k) of the EACCA is unconstitutional as it is not in keeping with Chapter 6 of the Constitution. In our view, this cannot be correct as we have demonstrated that under Article 79 of the Constitution Parliament was mandated to enact legislation to deal with issues of ethics and corruption. The enactment of the EACC was in fulfillment of the dictates of Article 79.”

iii. At the Supreme Court

- 13.

a. Petition

14. Further aggrieved, the Appellant filed Petition No. 15A of 2016 in this Court. The petition is anchored on several grounds inter alia that the learned Judges of the Court of Appeal:

- i. erred by omission in failing to make a determination whether or not the 1st Respondent’s action of instituting proceedings on behalf of a private limited liability company was in accordance with and allowed under Article 79 of the Constitution;
- ii. erred in upholding the contention that the 1st Respondent had powers to institute proceedings as it is, against the Appellant who is neither a state officer nor a public servant;
- iii. erred in giving a finding on extraneous matters not placed before it especially the constitutionality of Section 11 (k) of the EACCA; and
- iv. erred by omission in failing to make a definitive finding as to whether or not the powers conferred to the 1st Respondent under section 11 (1) (k) of the EACCA extended to include persons outside the application of Chapter Six;

- 15.

(14) The petition seeks the following main reliefs:

- i. That the order of Court of Appeal sitting in Mombasa delivered on the 17th July, 2017 in Civil Appeal No. 27 of 2014 be set aside;



- ii. An order allowing the Appellant's appeal in Civil Appeal No. 27 of 2014 with costs be made;
- iii. The Appellant's Notice of Motion Application in the High Court dated 25th November, 2014 filed on 26th November, 2013 be granted as prayed and with consequence that the 1st Respondent's suit in the High Court in Mombasa Civil Suit No. 218 of 2013 be struck out with costs; and
- iv Costs.

C. Submissions by Parties

- 16. When the matter came up for hearing, at the very onset, the Court suo moto asked the parties to address it on issues of its jurisdiction in particular with reference to the fact that the appeal is on a ruling.
- 17. It is the Appellant's submission that he has approached this Court as of right under Article 163 (4) (a) of Constitution. He contends that the suit before the High Court was instituted by the 1st Respondent against a private citizen and not a person subject to Chapter Six, specifically Articles 79 and 80 of the Constitution, which provisions only apply to a state officer or a public officer. Further, they argue that this matter raises issues of interpretation of Article 79, 80, 252 and 260 of the Constitution, which will make it possible to appreciate the position of who is deemed to be or not to be a state officer.
- 18. He maintains that litigation undertaken by EACC ought to have been commenced by the Attorney General in conformity with Article 156 (6) which function the 1st Respondent had usurped. The Appellant further submits that additional functions in Article 252 of the Constitution and section 11 (k) of the EACCA do not mandate the 1st Respondent to institute any form of proceedings either on behalf of or against private individuals or entities.
- 19. The 1st Respondent on the other hand objects to the appeal filed by the Applicant on the grounds that the matter does not fall within the purview of Article 163(4)(a) where an appeal under the said provision must be founded on cogent issues of constitutional controversy. Further, that leave must have been sought and granted for him to do so under Article 163(4)(b). They contend that the matter filed before the High Court pertains to proprietary rights over parcels of land with EACC seeking restoration of Kenya Ports Authority's interest therein as mandated by the Constitution and the EACCA and has no constitutional controversies.
- 20. The 1st Respondent submits of the need for the enhancement of the EACCA mandate by the EACC Act rather than a limiting of interpretation as apprehended by the Appellant. They further argue that EACCA is a creation of the Constitution and its mandate is provided for in the constitution in Articles 79, 80 and 252 as well as the EACCA Act. That Section 11 (k) of the EACCA therefore provides for additional functions to the Commission as anticipated by Article 252 (1) (d). That the Appellant ignores the fact that EACCA is mandated by Articles 79, 80, 252 (1) (d) of the Constitution and more specifically in line with the Constitution, section 11 (1) (j) and (k) of EACCA to institute proceedings for the recovery or protection of public property.

D. Analysis

- 21. The Preliminary issue for determination is whether this court has jurisdiction to entertain this appeal.



22. The Applicant herein contends that this Court has Jurisdiction to entertain this matter as of right 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”.

23. This Court has previously and in a number of decisions affirmed its position on instances in which its appellate jurisdiction may be invoked. Firstly, it has jurisdiction on an appeal from the Court of Appeal, as a matter of right, in a matter involving the application or interpretation of the Constitution; and secondly, on an appeal from the Court of Appeal on a matter certified as involving a “matter of general public importance.” This was the position expressed in the case of Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & another, Sup Ct Petition No 3 of 2012 as regards Article 164(3) (a) where we stated:

“Article 163 (4) (a) of the Constitution 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 ...Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”

Further, at paragraph 28, this Court went on to state that:

“The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, 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...”

24. In this light, the test to be applied to evaluate the jurisdictional standing of this court in this appeal, is whether it raises a question of constitutional interpretation or application and whether the same has been canvassed in superior courts, progressing through the normal appellate mechanism so as to reach this court by way of appeal.

25. The record shows that this appeal is from a ruling of the High Court clothing the EACC with jurisdiction to prosecute the matter. The substantive matter is yet to be heard and still lies at the trial court.

26. [25]In *Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board* Petition No. 5 of 2012 where this court was presented with a matter where the Appellant sought to move the Supreme Court where the substantive matter was yet to be determined by the lower court, we held that:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

27. Further, this Court in *Peter Oduor Ngoge v Hon. Francis Ole Kaparo* Petition No. 2 of 2012 declined to hear an appeal and stated:

“In the petitioner’s whole argument, we think, he has not rationalized the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving



the interpretation or application of the Constitution - such that it becomes a matter falling within the appellate jurisdiction of the Supreme Court.”

Additionally, the Court in the Ngoge case stated that:

“the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment will deserve further input of the Supreme Court” [emphasis added].

28. Guided by the above principles, we reiterate that the substantive matter still lies at the High Court and until it has been heard and determined, and the proper appellate processes have been followed, we find that this court does not have jurisdiction to entertain this appeal.

E. Orders

29.

- i. The Petition No 15A of 2016 is hereby dismissed.
- ii. Each Party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2018.

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P. M. MWILU

DCJ & VP OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B OJWANG

JUSTICE OF THE SUPREME COURT

.....

N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

