



**Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others
(Application 10 of 2017) [2018] KESC 70 (KLR) (11 December 2018) (Ruling)**

Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2018] eKLR

Neutral citation: [2018] KESC 70 (KLR)

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

APPLICATION 10 OF 2017

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
SC WANJALA, JB OJWANG & N NDUNGU, SCJJ**

DECEMBER 11, 2018

BETWEEN

BIA TOSHA DISTRIBUTORS LIMITED APPLICANT

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT

UDV (KENYA) LIMITED 2ND RESPONDENT

COGNO VENTURES LIMITED 3RD RESPONDENT

EAST AFRICAN BREWERIES LIMITED 4TH RESPONDENT

DIAGEO PLC 5TH RESPONDENT

KAMAHUHA LIMITED 6TH RESPONDENT

FOUR WINDS TRADING COMPANY LIMITED 7TH RESPONDENT

(Being an application for stay of proceedings of the ruling of the Court of Appeal in Civil Appeal No. 163 of 2016 at Nairobi (Waki, Nambuye & Kiage JJ.A) delivered on 30th June, 2017)

Extent of the Supreme Court’s appellate jurisdiction under article 163(4)(a) of the Constitution.

Reported by Beryl A Ikamari

***Jurisdiction**-jurisdiction of the Supreme Court-appellate jurisdiction of the Supreme Court-matters of constitutional interpretation and application-the scope and extent of the exercise of the Supreme Court’s jurisdiction under article 163(4)(a) of the Constitution-Constitution of Kenya 2010, article 163(4)(a).*

***Jurisdiction**-jurisdiction of the Supreme Court-appellate jurisdiction of the Supreme Court-matters of constitutional interpretation and application-whether an issue of constitutional interpretation and application,*



capable of being determined at the Supreme Court, could arise from a ruling that determined an interlocutory application.

Jurisdiction-jurisdiction of the Supreme Court-appellate jurisdiction of the Supreme Court-matters of constitutional interpretation and application-substantive determination of disputed issues-whether a procedural direction issued by the Court of Appeal was a form of an order capable of being challenged by invoking the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution.

Brief facts

Under a strict distribution agreement, the applicant was the supplier of the 1st and 2nd respondents' liquor products. The respondents took up distribution in some of the areas covered by the agreement without compensating the applicant for good will and that prompted the filing of a constitutional petition at the High Court by the applicant. Within the petition, an application for conservatory orders was determined. The conservatory orders were granted on grounds that the applicant had on a *prima facie* basis established that its proprietary rights were being violated and the orders could be granted under article 23(3) of the Constitution. The respondents went to the Court of Appeal to challenge the High Court's jurisdiction to issue the conservatory orders. They applied for a stay of execution pending the hearing and determination of the appeal. The Court of Appeal ordered for *status quo* to be maintained pending the hearing and determination of the appeal. The applicant made a further application relating to contempt of court as related to the orders to maintain *status quo* against the respondents. Pursuant to an order of the Court of Appeal, made on May 30, 2017 the matter was to proceed to the substantive hearing without a hearing and determination on the pending applications for contempt. The applicant made a Supreme Court application for stay of proceedings relating to the ruling of the Court of Appeal.

The respondents raised a preliminary objection stating that the Supreme Court lacked jurisdiction to entertain the matter under article 163(4)(a) of the Constitution. The respondents explained that the matter was not a constitutional issue that was the subject of proceedings from the Courts below. They stated that the issues raised in the Supreme Court petition had not been canvassed in any court and were matters of procedural directions within the power and supervision of the Court of Appeal.

Issues

1. When would the Supreme Court exercise its appellate jurisdiction under article 163(4)(a) of the Constitution?
2. Whether the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution could be invoked where the subject matter of the appeal arose from a ruling relating to an interlocutory application.
3. Whether a procedural direction of the Court of Appeal was an order which could be challenged by invoking the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution.

Held

1. A High Court interlocutory application determination could properly lay a foundation for an appeal before the Supreme Court. However, that determination would have to relate to constitutional issues canvassed before the High Court and it would have to be appealed against and to properly rise through the Court of Appeal before coming to the Supreme Court.
2. The application before the Supreme Court did not relate to issues canvassed at the High Court and the Court of Appeal. The issues arising at the High Court were different from the issues arising at the Supreme Court.
3. Under article 163(4)(a) of the Constitution, an appeal from the Court of Appeal to the Supreme Court would lie as of right in any case involving the interpretation or application of the Constitution. There was no judgment or substantive determination of a constitutional question by the Court of Appeal, which had been canvassed and determined at the High Court, and there was no judgment from the Court of Appeal relating to such a question.



4. The Court of Appeal was yet to exercise its appellate jurisdiction, including jurisdiction relating to contempt of court, and there was no substantive decision from which the applicant could file an appeal.
5. The making of procedural directions by the Court of Appeal, did not entail the interpretation or application of the Constitution and it was not a pronouncement or declaration of the Court. It was a mere procedural direction that would assist in efficient case management.

Application dismissed.

Orders

- i. *Preliminary objection upheld*
- ii. *Application dismissed.*

Citations

Cases

1. Daniel Shumari Njiroine v Nalika Maroro, Supreme Court Motion No.5 of 2013

Statutes

1. Companies Act
2. Constitution of Kenya, 2010
3. Elections Act
4. Supreme Court Act

Advocates

None mentioned

RULING

A. Background

High Court.

1. The Applicant and Respondents are limited liability companies incorporated under the provisions of the *Companies Act*. The Applicant has been a supplier of the 1st and 2nd Respondents' liquor products in various parts of Kenya through a strict distribution agreement. The Respondents re-possessed some of the areas without refunding the good will paid by the Applicant prompting them to file High Court Petition No 249 of 2016.
2. The High Court Petition was filed on the 14th of June 2016, alongside an application for conservatory orders. The application was determined on 29th June 2016, by considering two core issues namely, whether the Court had jurisdiction to entertain the Petition and whether the Petitioner was entitled to conservatory orders.
3. Onguto J determined that the High Court had jurisdiction to entertain the matter. The trial Court found that since the dispute was laid out as a constitutional issue, it was properly before the Court.
4. Observing that the Petition could be rendered nugatory if the distribution territory was disturbed, and that the Appellants established a prima facie case that their proprietary rights had been and were in the process of being violated, he granted conservatory orders on the strength of Article 23(3) of the *Constitution* pending the hearing and determination of the Petition.

Court of Appeal.

5. Aggrieved by the High Court ruling, the Respondents, on 6th July 2016, filed Civil Appeal No 163 of 2016 disputing the trial court's jurisdiction to issue conservatory orders. They also sought, under Rule



5(2)(b) of the Court of Appeal Rules, for a stay of execution pending the hearing and determination of the appeal.

6. On 11th August, 2016 the Court of Appeal ordered that status quo be maintained between the parties pending the hearing and determination of the appeal. Subsequently, the applicant filed a Notice of Motion application seeking to cite the 1st and 2nd Respondents for Contempt of the Court Order of 11th August, 2016.
7. However, on 30th May, 2017 the Appellate Court ordered that the appeal proceed to its substantive hearing without being considering the pending applications for contempt.

Supreme Court.

8. Aggrieved, the Applicant filed the instant Application and Petition before us both prompting the Preliminary Objections by the 1st, 2nd, 4th and 5th Respondents, and in turn the Applicant filed an objection to the latter applications for contempt.

B. Preliminary Objections

Submissions

2nd Respondent's case

9. The 2nd Respondent submits that this Court lacks jurisdiction under Article 163 (4) (a) of the Constitution to entertain this appeal. It submits that in order to transmute itself to the provisions of Article 164(4)(a), a constitutional issue must have been the subject of the proceedings from the courts below and a determination must have been made there on. It urges that this is not the case.
10. To buttress this contention, it relies on this Court's decision in Daniel Shumari Njiroine v Nalika Maroro, Supreme Court Motion No.5 of 2013, [PARA 2014] eKLR, Samuel Kamau Macharia & another v Kenya Commercial Bank & 2others Application no. 2 of 2011, Hassan Joho & others v Suleiman Said Shahbal (unreported Supreme Court Appeal No. 10 of 2013(Joho) and Lawrence Nduttu & 600 others v Kenya Breweries Limited & another petition No. 3 of 2012 eKLR.
11. The 2nd Respondent submits that the Court of Appeal's order of 11th August 2016, for the maintenance of status quo pending the hearing and determination of the appeal has neither been appealed against nor reviewed to date.
12. It is argued that the issues raised in the Petition have not been canvassed in any Court and are matters of procedural directions within the power and supervision of the Court of Appeal.
13. The 2nd Respondent urges the court to dismiss the Petition and Application dated 10th July 2017 with costs to the 2nd Respondent.

1st, 4th and 5th Respondents' case

14. Similarly, the 1st, 4th and 5th Respondents submit that the appeal is incompetent as there is no automatic right of appeal in terms of Section 15(2) of the Supreme Court Act as read together with Article 163(4) (a) of the Constitution. They reinforce this contention with this Court's decision in Joho.

3rd Respondent's case.

15. The 3rd respondent filed submissions dated 20th July 2017 supporting the 1st, 2nd, 4th and 5th Respondents' preliminary objections.



16. The 3rd Respondent contends that the ‘directions’ of the Court of Appeal of 30th May, 2017 neither meet the threshold under Article 163(4) of the *Constitution* nor this Court’s definition of a judgment in *Richard Nyagaka Tongi v Chris Munga N Bichage & 2 others* [2015].
17. It urges that the decision of the Court of Appeal of 30th May, 2017 was not a final determination of any party’s rights but merely a discretionary announcement of the Appellate Court to pave way for the full and final determination of the appeal before it. As such, it is contended that the said decision does not warrant the exercise of this Court’s jurisdiction.
18. The 3rd Respondent submits that the Supreme Court has a duty to operate within its jurisdictional limits. It buttresses this assertion with the decisions in *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR and in *Re the Matter of the Interim Independent Commission* [2011] eKLR.
19. It is submitted that both the Application and Petition ought to be dismissed as they amount to an abuse of the court process and intended to delay the proceedings in Civil Appeal no. 163 of 2016.

Applicant’s case

20. The Applicant submits that if the application dated 10th July 2017 is heard on merit; it will dispose issues raised by the Respondents in their preliminary objections. The applicant cites the case of *Rawal v Judicial Service Commission* and maintains that the Preliminary Objections by the 1st, 2nd, 4th, and 5th Respondents as framed are too wide in scope and offend the scope set out in the foregoing case.
21. The Applicant contends that the supposed preliminary points are mere arguments and submissions and do not qualify as preliminary objections and fail to meet the threshold set in *Mukisa Biscuits* [1969] E.A 696.
22. The Applicant urges that the Respondents’ purported Preliminary Objections raise concluded points of law and matters that have to be resolved through the hearing of the application.
23. The Applicant urges the Court to disallow the Preliminary Objections and hold that the applicant’s application proceeds on its merit.

6th Respondent’s case

24. In support of the Applicant’s Preliminary Objection, it is the 6th Respondent’s case that the Supreme Court’s jurisdiction to hear interlocutory applications emanates from Section 21(2) and Section 24 (1) of the *Supreme Court Act* No. 7 of 2011. To support this, it cites this Court’s decision in *Board of Governors, Moi High School, Kabarak & another v Malcom Bell* [2013].
25. The 6th Respondent contends that the decision of the Court of Appeal has offended, violated and infringed a range of constitutional provisions. Accordingly, this matter arises as of right since it involves application and interpretation of the *Constitution*.
26. The 6th Respondent submits that although the 1st, 2nd, 4th and 5th respondents have cited the *Joho* case, the issue that this Court should address is whether the issues raised have progressed through the judicial hierarchical system so as to reach the Supreme Court by way of Appeal.
27. The 6th Respondent urges that the issues being raised could not be taken to the High Court as it is of a lower rank than the Court of Appeal and said issues cannot be resolved by the very Court that violated them.
28. The 6th Respondent submits that the Preliminary Objections by the Respondents are unmerited and ought to be dismissed.



7th Respondent's case

29. The 7th Respondent submits that the Applicant's appeal involves interpretation of the Constitution. It is urged that the appeal espouses constitutional issues with regard to Article 50(1) of the Constitution and its relationship with the law relating to contempt of Court.
30. The 7th Respondent asserts that the jurisdiction of a court to punish persons who are contempt of Court is paramount to the maintenance of the rule of law and respect for law and order. It relies on the decision of the High Court in *Africa Management Communication International Limited v Joseph Mathenge Mugo & another* HCCC No. 243 of 2013 [2013 eKLR] and the decision in *Watson v Williams* 36, 331 (Miss, 1858).
31. The 7th Respondent contends that the interlocutory orders sought by the Applicant are meant to preserve the substance of appeal. It submits that this Court has already asserted its competence to issue interlocutory orders in *Board of Directors, Moi Girls School and another v Malcom Bell* and in *Teachers Service Commission v Kenya National Union & 2 others* Supreme Court Application No. 16 of 2015 [2015].
32. It opposes the 2nd Respondent's Preliminary Objection urging that it lacks merit and ought to be dismissed as it neither meets the test set in *Mukisa Biscuit* nor does it establish any point of law.

D. Issue for determination

33. From the parties' respective submissions before us, the sole issue that lends itself for determination is: whether the application meets the jurisdictional threshold under Article 163(4) of the Constitution.

E. Analysis

The Question of Jurisdiction

34. The Preliminary Objections, as raised by the Respondents in this matter contest this court's jurisdiction to entertain this matter. In determining whether or not this Court has the requisite jurisdiction to determine the application before it, it is vital to trace the trajectory of the cause of action now before the Supreme Court.
35. This cause arises from High Court Petition No 249 of 2016 dated 14th June 2016 of which petition is still pending before the trial court. In that petition, the trial Court heard an interlocutory application seeking conservatory orders and proceeded to grant the orders sought pending the hearing and determination of the Petition. Aggrieved, the respondents preferred an appeal to the Court of Appeal. Before this appeal was heard, the Appellate Court ordered on 11th August 2016, that status quo be maintained by the parties.
36. Through Notice of Motion dated 31st October 2016 supported by an affidavit sworn by Anne-Marie Burugu of even date, the applicant sought to cite officials of the 1st and 2nd respondents for being in contempt of the Appellate Court's order of 11th August 2016.
37. On, 30th of May 2017, when the appeal had been set down for hearing, Counsel for the applicant indicated to the Appellate Court that the Contempt Application ought to be heard first. The Appellate Justices, (Waki, Nambuye, Kiage JJA) held that none of the interlocutory applications filed, would determine the real dispute between the parties.



38. They stated that those applications could not take precedence over the hearing and determination of the appeal. The learned Judges held all pending applications in abeyance and directed that the main appeal be set down for hearing in a bid to fast-track the appeal.
39. The instant application is anchored on Article 163 (4) of the Constitution and the intended petition on Article 163 (4) (a) of the Constitution. Since the applicant did not seek this matter certified as one of general public importance, and since the petition is anchored on Article 163 (4) (a) of the Constitution, it can be surmised that the applicant's motion is anchored on Article 163 (4) (a) of the Constitution.
40. From the history of this matter, it is evident that the High Court heard an interlocutory application and gave the orders it deemed fit. Similarly, the Appellate Court made other interlocutory orders which the applicant claimed the 1st and 2nd respondents were in breach. However, the Appellate Court declined to hear the applicant's application of contempt of Court.

On Interlocutory rulings and the Supreme Court's jurisdiction

41. The question then arises: can a determination in an interlocutory application legitimately lie on appeal before this Court as of right? This question was answered in the affirmative by this Court in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Petition No. 10 of 2013 [2014] eKLR(Joho).
42. This particular case emanated from an interlocutory ruling challenging the filing an election petition outside the constitutional timelines. This Court found that, the issue though raised by of an interlocutory application, had met the threshold of Article 163(4)(a) of the Constitution so as to lie on appeal before this Court as of right. The Court stated:

(42) It is clear, as we have established, that the issue for determination in the application before the High Court was the constitutionality of Section 76(1) (a) of the Elections Act; and the appellants invited the High Court to exercise its jurisdiction as conferred by Article 165(3)(d)(i), to interpret the Constitution and determine the validity of the provision of the Elections Act. The High Court exercised this jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to this Court.”

Further that:

(49) In the present case, the issues arising out of the interlocutory application determined by the High Court, the Court of Appeal and now before this Court are issues of law that touch directly on the interpretation of the Constitution and the statute governing the electoral process. As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us....”

43. It is therefore without doubt that an interlocutory application determination by the High Court could properly lay a foundation for an appeal before this Court. However, it is significant to note that the determination must be of a constitutional issue (s) canvassed before the High Court, a determination rendered, that decision appealed thus properly rising through the Court of Appeal before finally coming to the Supreme court.
44. We are not convinced that the instant application has thus risen. The issues for determination in the interlocutory application in the trial Court concerned the jurisdiction of the trial Court to entertain



the petition as well as whether to grant conservatory orders. The High Court petition is still pending. Indeed, Onguto J on 29th June 2016, stated at paragraph 97 of the trial Court ruling:

My view is that the Petition as drawn reveals that there did and do exist commercial agreements between the parties. For stated consideration certain proprietary rights are alleged to have been acquired and the same rights are also alleged to be taken away. Relevant Articles of the *Constitution* have been identified and stated. The question for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is “property” within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified.” (emphasis ours)

45. It is therefore evident to us, that the instant application is not on all fours with the Joho decision.

What question (s) of constitutional interpretation or application fall for consideration before this Court?

46. Article 163(4) (a) of the *Constitution*, which the appeal is predicated on provides:

(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;

...

47. From the record, the appeal before the Court of Appeal is yet to be heard and determined. As such, there is no substantive determination of a constitutional question by the Court of Appeal, of which issue in dispute has been canvassed right through from the High Court to the Court of Appeal. In other word, there is no judgment from the Court of Appeal in which constitutional issues have been canvassed and determined. As such, it can be concluded that no appeal lies, in the proper sense before us as of right.

48. An early involvement of this Court, in our opinion, would lead to premature comments on the merits on issues yet to be adjudged, at the Court of Appeal. This may likely expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

49. Furthermore, we have addressed the question as to when to assume appellate jurisdiction on the basis on Article 163(4)(a) of the *Constitution*. In Lawrence Nduutu & 6000 Others v. Kenya Breweries Ltd & Another S.C Petition No. 3 of 2012 (2012) eKLR; we noted on the true intent of Article 163 (4) (a) of the *Constitution*:

27. This Article 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. 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)”

50. We emphasize that in order to transmute itself to the provisions of Article 163(4)(a) the constitutional issue must have been subject of the proceedings in the Courts below. In *Joho* this Court remarked:

37. In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution...”

51. Further, in *Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board*, Petition No. 5 of 2012 [2012] eKLR this Court held that:

[13A] In our opinion, 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. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.”

52. As the Court of Appeal is yet to exercise its appellate jurisdiction on this matter, including the application for contempt, there is no substantive decision from which the applicant can appeal. It is therefore manifest that the applicant has not properly invoked Article 163 (4)(a) of the Constitution.

Is this court is seized with jurisdiction to interfere with a procedural direction/order of the Court of Appeal?

53. What then is before this Court? Upon perusal of the Record, we find that what is before us, is a directive in exercise of discretion by the Court of Appeal whose main intent was to give ‘procedural direction’ as to the conduct of the substantive matter before it.

54. The making of procedural directions before the Court of Appeal, did not involve the interpretation or application of the Constitution neither was it a pronouncement or declaration of the Court. It was a mere procedural direction that would assist in efficient management of the matter.

55. This Court in *Richard Nyagaka Tongi v Chris Munga N Bichage & 2others* Petition No 17 of 2014, [2015] eKLR, pronounced itself on what constitutes a judgment or determination and stated:

.... we would hold that a ‘Judgment’ is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court.”



56. The upshot is that we find that there is no determination or judgment by the Court of Appeal to bring this application within the ambit of Article 163 (4) (a) of the Constitution. Additionally, the mere allegation by the applicant herein that its Cause involves matters of constitutional interpretation and application is not enough to cloth this Court with jurisdiction.
57. Consequently, it is, our considered opinion that this Court does not have jurisdiction to entertain this application and we lay down our tools.

Orders

58. Consequently, we make the following Orders:
- i. The Preliminary Objections of the 2nd, 1st, 4th and 5th Respondents are allowed.
 - ii. The Preliminary Objection of the Applicant is dismissed.
 - iii. The matter be remitted to the Court of Appeal and listed down for hearing on priority basis.
 - v. No order as to costs.

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

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D.K. MARAGA

CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE/VICE PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

