**Njau v Mbuki (Election Petition 13 of 2015) [2017] KESC 14 (KLR) (27 July 2017) (Judgment)**

*Joseph Ndung'u Njau v Margaret Magiri Mbuki [2017] eKLR*

Neutral citation: [2017] KESC 14 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**ELECTION PETITION 13 OF 2015**

**MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**JULY 27, 2017**

**BETWEEN**

**JOSEPH NDUNG'U NJAU ....................................................................... APPELLANT**

**AND**

**MARGARET MAGIRI MBUKI ......................................................... RESPONDENT**

***(Being an appeal from the Ruling and Orders of the Court of Appeal at Nairobi (Kihara Kariuki, Githinji and Okwengu, JJA) dated 13th July, 2015 in Nairobi Civil Appeal No.69 of 2009)***

**Appeals to the Supreme Court under Article 163(4)(a) of the Constitution of Kenya, 2010.**

Reported by Reson Sheila

***Jurisdiction*** *- jurisdiction of the Supreme Court - appeals from the Court of Appeal to the Supreme Court - threshold to be met for an appeal to be determined as one that required the interpretation or application of the Constitution - whether an appeal on ownership and alleged fraudulent acquisition of title to land was one that met the threshold for determination by the Supreme Court - Constitution of Kenya article 163(4)(a).*

**Brief facts**

The appellant instituted a civil suit at the High Court, alleging *inter alia* that he was entitled to be registered as proprietor of the suit property. Having taken possession of that parcel of land, it came to his knowledge that the respondent had fraudulently obtained a certificate of lease in respect of the same parcel of land, to his detriment.

Simultaneously with his plaint, he filed a chamber summons application under section 3A of the Civil Procedure Act, and order 39 of the Civil Procedure Rules, seeking orders to restrain the respondent, her agents or proxies from interfering with the appellant's occupation, possession or ownership of the land in dispute pending the hearing and determination of the suit.

Having heard both parties, and noting the respondent's grounds of opposition and preliminary objection in respect of both the suit and chamber summons application, the court issued orders in favour of the respondent.

Dissatisfied with the orders, the appellant filed Civil Appeal No.69 of 2009, but before it could be determined on its merits, advocates for the parties filed a consent letter dated May 11, 2015. On July 13, 2015, the Court of Appeal delivered a short ruling and issued orders, pursuant to the consent letter in favour of the appellant.

The Court of Appeal reinstated the suit and directed that the same be heard on merit before any other judge of the High Court, provoking the filing of the petition of appeal in the Supreme Court for appropriate intervention. The respondent while stating that the consent order had fully been implemented, argued that the proper recourse for the appellant was an application for review and that the appeal was incompetent, frivolous, vexatious and an abuse of court process.

**Issues**

Whether an appeal about ownership and alleged fraudulent acquisition
of title to land was one that met the threshold for hearing and determination by the Supreme Court

**Held**

1. The appeal was said to be premised on article 163(4)(a) of the Constitution. While appellant maintained that the provision clothed the court with original jurisdiction in matters of alleged violation of the Bill of Rights specifically, and of the Constitution in general, the court had been emphatic in holding to the contrary.
2. For the court's jurisdiction to be invoked properly under article 163(4)(a), the appeal must have originated 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 could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
3. The only question was whether the appellant was entitled to possession and ownership of the suit property and whether the respondent had fraudulently obtained a certificate of lease to the said parcel of land. The above issues had not been substantively determined by any court, and there was no contestation of the fact that ELC No.1608 of 2007 was currently pending before the Environment and Land Court.
4. The argument that the court had a duty under articles 10 and 159 of the Constitution, to entertain the appeal and determine it in the first place, on the issues raised before it; and that by so doing, the court was acting squarely within its mandate under article 163(4)(a), to interpret and apply the Constitution, was somewhat labored, and so indirect as to miss the linkage between the court and the theme of constitutional interpretation and application. None of the articles, 10, 22, 25, 27, 48 and 159 of the Constitution, which were only casually cited at the hearing, were the subject of interpretation or application by either the High Court or the Court of Appeal.
5. The instant appeal required no interpretation or application of the Constitution, as nowhere in the appeal or in the submissions made, was the court asked to specifically find how the two superior courts below had incorrectly interpreted or applied any provisions of the Constitution, and thereby affected the appellant's case, to his detriment. The court had no jurisdiction to determine the instant appeal.

*Appeal struck out.*

***Orders***

*Each party to bear own costs.*

**Citations**

**Cases**

***Kenya***

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)' (1976-1980) KLR 1272 - (Followed)
2. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)

3. *Kamau , Stephen Kinoru v Wanjiku Kinuthia & another* Civil Miscellaneous Application 108 of 2001; [2001] KECA 73 (KLR) - (Followed)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Explained)
5. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
6. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) ; [2012] 2 KLR 804 - (Explained)
7. *OP Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co. Advocates & 725 others* Petition 13 of 2013; [2014] KESC 8 (KLR) - (Explained)
8. *Ongoma, Kasmir Wesonga & another v Wanga* Civil Appeal 25 of 1986; [1987] KECA 82 (KLR) - (Mentioned)

**South Africa**

*Beinosi v Wiyley* 1973 SA 721 CSCA - (Followed)

***Regional Court***

*Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 - (Followed)

**Statutes**

***Kenya***

1. Civil Procedure Act (cap 21) section 3A - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21, Sub Leg) order 39 - (Interpreted)
3. Constitution of Kenya articles 10, 22, 25, 27, 48, 77, 159, 162(2); 163(4)(a); 258 - (Interpreted)

**International Instruments**

African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 7 - (Mentioned)

**Advocates**

1. *Mr. OP Ngoge* for the appellant.
2. *Mr. Kyengo* for the respondent.

## JUDGMENT

### A. Introduction

1. The appellant, Joseph Ndung'u Njau, filed this appeal dated August 7, 2015 pursuant to article 163(4)(a) of the *Constitution*, against the Ruling and Orders of the Court of Appeal at Nairobi, dated July 13, 2015, in Civil Appeal No.69 of 2009.

### B. Background

2. On August 8, 2005, the appellant instituted a civil suit at the High Court in Nairobi, being HCCC No.1032 of 2005, alleging inter alia that he was entitled to be registered as proprietor of all that parcel of land known as Nairobi/Block 63/399 situated at Jamhuri Phase II Estate in Nairobi, but having taken possession of that parcel of land, it came to his knowledge that the respondent had fraudulently obtained a certificate of lease in respect of the same parcel of land, to his detriment. He therefore approached the High Court seeking the following orders:

   “ a) A declaration that having been allotted Nairobi/Block 63/399 by the City Council of Nairobi, the plaintiff is entitled to ownership and possession of the said plot No.326 Jamhuri Phase II, and to be registered as such.

(b) A declaration that having been disowned by the City Council of Nairobi, the defendant is not entitled to ownership and possession of plot No.326 Jamhuri Phase II known as Nairobi/block 63/399, and that the certificate of lease purportedly given on the 24th day of December, 2002 was forged or obtained by fraud.

(c) A permanent or mandatory or perpetual injunction be issued restraining the defendant by herself, her proxies, servants or agents or otherwise howsoever from encroaching into or from interfering with the plaintiffs occupation ownership and possession of plot No.326 parcel of land situated at Jamhuri Phase II Estate Nairobi being title number Nairobi/block 63/399 and general damages for trespass.

(d) Costs of this suit and interests thereon.

(e) Any other or further relief as the honourable court may deem fit to grant."

3. Simultaneously with his plaint in the aforementioned suit, the appellant filed a chamber summons application under section 3A of the *Civil Procedure Act*, and Order 39 of the *Civil Procedure Rules,* seeking Orders to restrain the respondent, her agents or proxies from interfering with the appellant's occupation, possession or ownership of the land in dispute pending the hearing and determination of the suit.

4. Having heard both parties, and noting the respondent's grounds of opposition and preliminary objection in respect of both the suit and chamber summons application, Ang'awa J. on March 22, 2007 issued the following Orders:

"(1) That this suit cannot stand as it is in direct continuation with CMCC 4404/05. This was an injunction that was issued on 22nd April 2005 against the 1st defendant [sic].

(2) That I hereby dismiss this application of August 18, 2005 filed on the same day.

(3) That I hereby strike out the main suit as being scandalous and frivolous.

(4) That the defendant is already a party in the subordinate court case CMCC 4404/05. If he is not to be so enjoined therein" [sic].

5. Dissatisfied with the above orders, the appellant filed Civil Appeal No.69 of 2009 aforesaid, but before it could be determined on its merits, advocates for the parties filed a consent letter dated 11th May 2015 at the Court of Appeal, in the following terms:

> "We the undersigned shall be most obliged to have the following consent order entered into the court record: 'By Consent Civil Appeal No.69 of 2009 be and is hereby allowed with no order as to costs.' We remain very much obliged to you."

6. On July 13, 2015, the Court of Appeal (Kihara Kariuki, PCA; Githinji and Okwengu JJA) then delivered a short Ruling and issued the following Orders, pursuant to the consent order above:

> "Upon this appeal being called out for hearing, learned counsel, Mr. Khalware, who is holding brief for the appellant's counsel and learned counsel, Ms. Kanini, who is appearing

for the respondent, have informed this Court that the parties have consented to the appeal being allowed with no Orders as to costs.

"In the circumstances, we allow the appeal with no Orders as to costs. We further make Orders that the decision of Ang'awa J. given on March 22, 2007 be set aside. The appellant's suit [be] reinstated and admitted to hearing on merit in the Superior Court before any other Judge of the High Court."

7. To put the above ruling into perspective, in the memorandum of appeal dated April 20, 2009 filed in the Court of Appeal, the appellant had prayed for the following Orders:

    (1) An Order that the appeal herein be allowed with costs and that the decision of the Honourable Lady Justice M.A. Ang'awa given on the March 22, 2007 being the Ruling and Order given on the March 22, 2007 be set aside *ex debito justitiae*.

    (2) That the appellant's main suit be reinstated and admitted to hearing on merit in the Superior Court before another Judge of the Superior Court.

    (3) That pending the hearing and determination of the appellant's main suit, the appellant's application dated August 18, 2005 which was not opposed by the respondent in the Superior Court, be allowed as prayed.

    (4) That the respondent be condemned to pay the appellant's costs both in the superior court and the appellate court herein.

    (5) That the learned judge, the honourable Lady Justice M. A. Ang'awa, be rebuked by this honourable court for violating the appellant's fundamental rights not to be condemned contrary to Rules of Natural Justice and the right not to be denied a fair trial in violation of section 77 of the *Constitution* and article 7 of the *African Charter on Human and Peoples Rights*.

8. In the appeal before this court, the appellant seeks the following Orders:

    "(a) An Order that the appeal herein be allowed with costs and that the Ruling and Orders of the Court of Appeal dated July 13, 2015 be set aside *ex debito justitiae*.

    (b) The appellant's Court of Appeal Civil Appeal No.69 of 2009 be allowed as prayed for in the memorandum of appeal dated April 20, 2009 with no Orders as to costs, in line with the parties consent/settlement.

    (c) That the appellant's suit be heard on merit, but exclusively before the Environment and Land Division of the High Court, upon the parties complying with all the procedural requirements.

    (d) That the costs of this appeal be borne by the respondent in any event."

### C. Submissions of the Parties

#### (a) Appellant

9. Mr OP Ngoge, learned counsel for the appellant, filed brief submissions on February 20, 2017, stating firstly that, on July 13, 2015 when advocates for the parties appeared before the Court of Appeal, Mr. Khalware, Advocate, held his brief and read out the contents of the consent letter reproduced

above, but the Judges of the Court of Appeal "decided to arbitrarily waste time by re-writing the Agreement or the parties' consent ... [and], upon delivering the said Ruling, the Judges arbitrarily clarified [off the record] that their Orders did not apply or, simply put, did not cover prayers 3 and 5 in the memorandum of appeal. The Court of Appeal also reinstated the suit, and directed that the same be heard on merit in the Superior Court before any other judge of the High Court, provoking the lodgment of this petition of appeal in the Supreme Court for appropriate intervention."

10. Secondly, learned counsel submitted that by re-writing the consent between the parties, the Court of Appeal curtailed articles 10 and 159 of the *Constitution*, apart from subverting the fundamental rights of the appellant; and his submission in the alternative, is that the said articles do not grant the Court of Appeal jurisdiction to re-write the parties' agreement or consent.

11. Thirdly, learned counsel urged that the Order remitting the dispute to the High Court was made in error, as that Court has no jurisdiction to hear and determine land disputes, by dint of the express provisions of article 162(2) of the *Constitution*.

12. At the hearing of the Petition of Appeal on May 24, 2017, Mr Ngoge added that articles 22 and 258 of the *Constitution* grant this Court original jurisdiction to determine any question relating to violation of the Bill of Rights, or of the *Constitution* in general; that, therefore, the present appeal is properly before this court, and the prayers sought should be granted with costs.

**(b) Respondent**

13. In his submissions filed on May 16, 2017, Mr Kyengo, learned counsel for the respondent, stated that since it is not contested that a consent Order was negotiated and recorded by the parties, and the same recorded by the Court of Appeal as an Order of the court, he did not understand why the present appeal was filed. He urged further, that the Orders of the Court of Appeal have been fully implemented, and the dispute between the parties is now properly before the Environment and Land Court, in ELC No 1608 of 2007 (formerly HCCC No 1032 of 2005), and is awaiting hearing and determination by that Court.

14. Regarding the allegation that the Court of Appeal rewrote the consent duly entered into by the parties, counsel stated that the Court of Appeal neither did so, nor did it negate its core duty of rendering justice to the parties before it. In any event, he submitted, if the appellant was dissatisfied with the manner in which the consent Order was recorded, he still had recourse by way of an application for review, before the court of Appeal, instead of filing an "incompetent, frivolous and vexatious appeal" to this court. He relied on *Kasmir Wesonga Ongoma & anor v Wanga* [1987] eKLR and *Brooke Bond Liebig (T) Ltd v Malya* [1975] EA 266, for that proposition.

15. On the submission by the appellant that articles 10, 25, 27, 48 and 159 of the *Constitution* were applicable, and ought to be invoked in determining the present appeal, counsel contended that neither in the memorandum of appeal nor in the submissions, was it shown how those provisions were specifically violated; and he relied on *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 in support of that submission.

16. Lastly, counsel submitted that as the appeal before us is nothing short of an abuse of the court process, the same should be dismissed with costs. On what amounts to an abuse of court process, he relied on the decisions in *Beinosi v Wiyley* 1973 SA 721 CSCA; and *Stephen Kinoru Kamau v Wanjiku Kinuthia & Anor* [2001] eKLR, to back up the point that any suit that is found to be an abuse of court process is for dismissing.

**D. Issues for Determination**

17. Taking into account the pleadings and submissions, as well as the special circumstances of the appeal before us, the following issues, in our view, fall for determination:

    (i) whether the appeal meets the jurisdictional threshold under article 163(4)(a) of the *Constitution*. (If we find that it does not, then we shall not proceed to determine any other issue);

    (ii) if we have the jurisdiction to determine the appeal, whether the Ruling of the Court of Appeal dated July 13, 2015 was properly made;

    (iii) whether the appeal should be allowed, and on what terms.

**E. Analysis**

**(a) Whether the appeal meets the jurisdictional threshold under article 163(4)(a) of the Constitution**

18. The appeal before us is said to be premised on article 163(4)(a) of the *Constitution*; and the question whether that article was properly invoked by the appellant is an issue that arose during the hearing of the appeal – and so we consider it relevant now.

19. In that regard, it must be recalled that the jurisdiction of this Court under article 163(4)(a) has been the subject of ascertainment by this Court, previously. For avoidance of doubt, the article provides as follows:

> "(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
>
> (b) ..."

20. While Mr Ngoge maintained that the above provision clothes this Court with original jurisdiction in matters of alleged violation of the Bill of Rights specifically, and of the Constitution in general, this Court has been emphatic in holding to the contrary. That is why in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd and another*, Sup Ct. Petition No 3 of 2012; [2012] eKLR, the Court stated thus:

> "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)" [emphasis supplied].

21. Similarly, in *O. P. Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 Others*, Sup Ct Petition No.13 of 2013, which was a matter filed by Mr. Ngoge (the present counsel for the appellant), the Court had this to say, on the contention that the Supreme

Court has original jurisdiction in matters of interpretation and application of the [Constitution]() under article 163(4)(a):

> "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. The only other instance when an appeal may lie to the Supreme Court is one contemplated under article 163(4)(b) of the *Constitution*."

22. In furtherance of the above holding, the Court stated as follows in *Gatirau Peter Munya v Dickson Mwenda & 2 others*, Sup Ct. Application No 5 of 2014; [2014] eKLR:

> "The import of the court's statement in the *Ngoge Case* is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

23. The principle set out above was also succinctly explained, *inter alia*, in *Hassan Ali Joho & another v Suleiman Shahbal & 2 others* Sup. Ct Petition No 10 of 2013; and in applying the same to the present appeal, elsewhere above, we reproduced the specific prayers that the appellant made in HCCC No.1032 of 2005; and these may be summarized as relating only to the question whether the appellant was entitled to possession and ownership of land parcel number Nairobi/block 63/399; and whether the respondent fraudulently obtained a certificate of lease to the said parcel of land. The above issues have not been substantively determined by any Court, and there is no contestation of the fact that ELC No 1608 of 2007 is currently pending before the Environment and Land Court.

24. What of the proceedings before the Court of Appeal? Civil Appeal No 69 of 2009 was limited to the question whether Ang'awa J fell into error, when she struck out HCCC No 1032 of 2005 on March 22, 2007. That issue was not addressed at a substantive hearing of the appeal, because parties agreed by the consent letter of May 11, 2015, and the subsequent Ruling of the Court of Appeal delivered on July 13, 2015, that the appeal was merited; and from the record before us, it was allowed with no Orders as to costs. The court, however, made further Orders as follows:

> "... that the decision of Ang'awa J given on March 22, 2007 be set aside. The appellant's suit [be] reinstated and admitted to hearing in the Superior Court before any other Judge of the High Court."

25. In the above context, and returning to the principle that the jurisdiction of this Court under article 163(4)(a) can only be properly invoked where the Court of Appeal and/or a Court below it had been engaged upon an issue which had taken the trajectory of constitutional interpretation and application, is the present appeal properly before us?

26. Mr. Ngoge spiritedly argued in his submissions, that prior decisions of this Court (he mentioned none but we have cited some of them above) are wrong, and that this court has a duty under articles 10 and 159 of the *Constitution*, to entertain the appeal and determine it, in the first place, on the issues that he has raised before us; and that by so doing, the court would be acting squarely within its mandate under article 63(4)(a), to interpret and apply the *Constitution*. With respect, we find such an argument to be somewhat laboured, and so indirect as to miss the linkage between this Court and the theme of constitutional interpretation and application.

27. None of the articles, 10, 22, 25, 27, 48 and 159 of the *Constitution*, which were only casually cited at the hearing, was the subject of interpretation or application by either the High Court or the Court of Appeal.

28. It is obvious to us, in the above context, that the appeal before us requires no interpretation or application of the *Constitution*, as nowhere in the appeal, or in the submissions made, are we being asked to specifically find how the two superior courts below had incorrectly interpreted or applied any provisions of the *Constitution*, and thereby affected the appellant's case, to his detriment.

**(b) Whether the Court of Appeal Ruling dated July 13, 2015 was properly made**

29. Having held as above, that we have no jurisdiction to determine the present appeal, it would be unnecessary to answer the above question, because jurisdiction is everything and without it, a court is not to undertake a jurisprudential adventure. That is why, in *Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 others*, Sup Ct. Application 2 of 2011 this Court remarked as follows:

> " A court's jurisdiction flows from either the Constitution or legislation, or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution, or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...[The] issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

30. We would reiterate the above finding, and therefore, will not delve into the merits or demerits of the appeal before us.

**(c) Whether the appeal should be allowed, and on what terms**

31. Having declined the appellant's invitation to determine his appeal, on account of lack of jurisdiction, the appeal is rendered incompetent, and no Orders can issue in favour of the appellant.

32. On the issue of costs, however, although ordinarily they follow the event, since parties while recording the consent bearing upon the appearance at the Court of Appeal, had agreed that there would be no order as to costs; and since ELC No 1608 of 2007 is still awaiting determination – we deem it necessary to order that each party should bear own costs.

**F. Final Orders**

33. Flowing from our findings above, we now make the following final Orders:

    (a) The appeal herein is struck out.

    (b) Each party to bear own costs.

**DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2017.**

**......................................................**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

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**N. S. NJOKI**

**JUSTICE OF THE SUPREME COURT**

**..................................................**

**I. L. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**

**SUPREME COURT OF KENYA**