



REPUBLIC OF KENYA



KENYA LAW
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**Shah & another v Co-op Merchant Bank Ltd & another (Petition
9 of 2015) [2017] KESC 12 (KLR) (27 July 2017) (Judgment)**

Susan Jane Shah & another v Co-op Merchant Bank Ltd & another [2017] eKLR

Neutral citation: [2017] KESC 12 (KLR)

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

PETITION 9 OF 2015

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & I LENAOLA, SCJJ

JULY 27, 2017

BETWEEN

SUSAN JANE SHAH 1ST APPELLANT

REKHAVANTI PANKAJ SHAH 2ND APPELLANT

AND

CO-OP MERCHANT BANK LTD 1ST RESPONDENT

GARAMA INVESTMENTS LTD 2ND RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Karanja,
Okwengu & GBM Kariuki, JJA) dated 3rd July, 2015 in Civil Appeal No. 87 of 2008)*

For a case to lie from the Court of Appeal to the Supreme Court as of right, it must involve the interpretation and application of the Constitution

Reported by June Jumbari and John Ribia

Jurisdiction – jurisdiction of the Supreme Court - appellate jurisdiction – appeals to the Supreme Court as of right – jurisdiction to determine matters involving the interpretation or application of the Constitution - whether an appeal on the title to land involved the interpretation and application of the Constitution for it to lie in the Supreme Court as of right - Constitution of Kenya article 163(4)(a)

Civil Practice and Procedure - appeals - grounds of appeals - where an appellant raised issues that had not been pleaded at the trial court - tenability of the ground of appeal to be heard and determined by the court - whether issue or plea that had not been the subject of a determination by a the trial court or first appellate court could be raised as the subject of an appeal before the Supreme Court

Civil Practice and Procedure - appeals - grounds of appeal - contention that counsel sabotaged ones case at the trial court - whether on appeal, a party could make a claim against their counsel's conduct as one of the grounds of appeal without giving the counsel a chance to file a response



Brief facts

The appellants sought orders from the court to allow the instant appeal, and to set aside the consent order recorded in HCCC No. 1743 of 2001, as well as the sale of the appellants' property. The appellants contended that by upholding the High Court's decision that struck out their case as *res judicata*, the Court of Appeal had denied them their rights of access to justice and to a fair trial, thus upholding the violation of their rights. The appellants considered themselves entitled to appeal to the instant court as of right under article 163(4) (a) of the Constitution.

In response to the petition of appeal, the respondents filed a notice of preliminary objection and challenged the competence of the appeal. The respondents contended that the appeal did not lie as of right under article 163(4) (a) of the Constitution as contended by the appellants. They also contended that the dispute that led to the instant appeal raised no issue that involved the interpretation or application of the Constitution and that the appeal was incompetent because the appellant had not sought leave to appeal to the instant court as required by article 163(4)(b) of the Constitution.

Issues

- i. Whether an appeal on title to land was a case involving the interpretation and application of the Constitution for it to lie in the Supreme Court as of right.
- ii. Whether issue or plea that had not been the subject of a determination by a the trial court or first appellate court could be raised as the subject of an appeal before the Supreme Court.
- iii. Whether an appellate court could determine a new issue arising before it which ought to have been determined by courts with original jurisdiction.
- iv. Whether on appeal, a party could make a claim against their counsel's conduct as one of the grounds of appeal without giving the counsel a chance to file a response

Held

1. The Supreme Court had limited original and appellate jurisdiction. The original jurisdiction was limited to:
 - a. the determination of presidential petitions under article 140 as read with article 163(4)(a) of the Constitution; and
 - b. rendering advisory opinions on matters concerning county governments, at the instance of State organs under article 163(6) of the Constitution.
2. The Supreme Court's appellate jurisdiction was limited to the determination of appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.
3. No issue of constitutional interpretation or application was raised before either the High Court or the Court of Appeal. The dispute in both the suits in the High Court was grounded on the factual situation of the matter as the appellants' contention in the first suit was that the 1st respondent had no right to sell their property as the charge forming the basis of the sale was null and void, on the ground that the same was never executed by the 2nd respondent and the bank, the 1st respondent.
4. The suit was compromised by a consent order that condemned the appellants with costs but gave them 90 days to redeem the charged property. The appellants could not have consented to paying the costs of that suit, and redeeming their property, if it was not charged. Besides that fear, the charge instrument was in the record of appeal before the court, and it could be seen that it was properly executed. It could not have been registered if it had not been properly executed.
5. On the basis of the consent, the claim in the second suit, which was basically the same as the one in the first suit, was *res judicata*. The further claim in the second suit, that the appellants had no knowledge and, therefore, did not authorize the recording of the consent order, was rejected by the High Court. The High Court's was correctly upheld by the Court of Appeal.
6. The appellants had engaged counsel to represent them, in the first suit. If their counsel had thus compromised the suit without their authority, which contention was incredulous, noting that the



- consent gave the appellants 90 days to redeem their property, an offer counsel could not have plucked from the air, that was a matter purely between the appellants and their previous advocates. In any case, for one to make and sustain such allegations or claims against the counsel, such advocates ought to have been necessary parties that had the opportunity to defend themselves.
7. The decisions of both the High Court and the Court of Appeal in the matter were grounded on the facts of the case, and no issues of constitutional interpretation or application were involved, so as to warrant an appeal as of right under article 163(4)(a) or (b) of the Constitution. The alleged violations of the appellants' rights were raised for the first time in the Supreme Court. That was not legally tenable.
 8. The court had to determine whether or not the decision appealed against was correctly decided upon the facts and the law existing at the time of the decision. An issue or plea that had not been the subject of a determination by a court or tribunal or agency, as the case could be, could not be the subject of an appeal.
 9. An appellate court, in hearing an appeal, was called upon to redress errors on the part of the court below. In deciding whether or not there was an error, the appellate court looked at the material which was before the court below. New issues ought to be determined by courts with original jurisdiction and not appellate courts.

Preliminary objection allowed. Appeal struck out with costs to the respondent.

Citations

Cases

Kenya

1. *Center for Rights Education and Awareness & others v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR); [2012] 2 KLR 261 - (Explained)
2. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR) - (Explained)
3. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
4. *Ngoge v Ole Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR); [2012] 2 KLR 419- (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 10, 19, 20, 21, 25, 27, 40, 43, 48, 50, 140, 163(4)(a)(b) - (Interpereted)
2. Supreme Court Act (cap 9B) sections 15(1); 19 - (Interpereted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 2, 7
2. Basic Principles on the Role of Lawyers, 1990 articles 12 - 15

Advocates

1. *Mr. Ngoge* for the appellants.
2. *Mr. Mubea* for the respondents.



JUDGMENT

A. Introduction

1. This is an appeal from the judgment of the Court of Appeal dismissing the appellants' appeal with costs, and upholding the High Court decision in Nairobi HCCC No. 1548 of 2002. The High Court had struck out the appellants' suit on the ground that the dispute between the parties was *res judicata*.

B. The Appeal

2. The substratum of the appellants' prolific memorandum of appeal is that both the two courts below erred in failing to find that the appellant's constitutional rights were abrogated. Their contentions are that the two courts below had failed to find that the consent order in an earlier suit (to which the 1st appellant had been enjoined as one of the plaintiffs without her knowledge) was recorded without the appellants' authority; that the appellants' erstwhile advocates subverted articles 12, 13, 14 and 15 of the [United Nations Basic Principles on the Role of Lawyers](#), by deliberately and fraudulently concealing from the trial court the fact that the charge instrument allegedly executed in favour of the 1st respondent had not in fact been executed by either the 2nd appellant or the 1st respondent; that the said concealment resulted in the denial of the appellants' constitutional rights to property; and that in violation of articles 10, 19, 20, 21, 27, 43 and 48, of the [Constitution](#), as read with articles 2 and 7 of the [African Charter on Human and Peoples Rights](#), the Court of Appeal curtailed the appellants' right of access to justice by dismissing their appeal and, thereby, sanctioning the illegal sale of the appellants' prime property. On *res judicata*, the appellants faulted the two courts below for finding, against the evidence on record, that the issue of non-execution of the charge had been raised in paragraph 15 of the plaint, and thus settled in the purported consent order; and for holding that the appellants were directors of Unigate Industries Ltd, the borrower.
3. On the basis of those averments, the appellants seek orders from this court allowing this appeal, and setting aside the consent order recorded in HCCC No 1743 of 2001, as well as the sale of the appellants' property. They seek orders for general damages for violation of their constitutional rights.
4. In response to the Petition of Appeal, the respondents, on December 15, 2015, filed a notice of preliminary objection and challenged the competence of this appeal.

C. The Preliminary Objection

5. On February 22, 2017, when the appeal was listed for hearing before us, the respondents raised a preliminary objection, written notice of which they had given. Relying on their written submissions, Mr Mubea, learned counsel for the respondents, submitted that this appeal does not lie as of right under article 163(4)(a) of the [Constitution](#) as contended by the appellants. In counsel's view, the dispute leading to this appeal raised no issue involving the interpretation or application of the Constitution. And the appellants having not sought and obtained leave to appeal under article 163(4)(b) of the [Constitution](#) as read with section 15(1) of the [Supreme Court Act 2011](#), counsel submitted that this appeal is incompetent and should therefore be struck out with costs. He cited this Court's decisions in [Peter Ngoge v Honourable Francis Ole Kaparo & 5 others](#), SC Petition No 2 of 2012 and [Lawrence Nduitu & 6000 Others v Kenya Breweries & another](#), SC Petition No 3 of 2012 in support of those submissions.



6. In response, the appellants submitted that the respondents' preliminary objection challenging the competence of their appeal is frivolous. Mr Ngoge, learned counsel for the appellants, also termed the preliminary objection as a cover-up to block this court from upholding the appellants' constitutional rights. In the written and oral submissions for the appellants, Mr Ngoge contended that there is indisputable evidence on record that neither the appellants nor the bank executed the charge instrument. He added that the appellants also did not authorize the recording of the consent order in HCCC No 1743 of 2001. Counsel further argued that by finding that the appellants were directors of Unigate Industries Ltd, the Court of Appeal deliberately distorted the factual situation in the case. On the basis of those facts, the appellants contended that by upholding the High Court's decision striking out their case as *res judicata*, the Court of Appeal had denied them their rights of access to justice and to a fair trial, thus upholding the violation of their rights under articles 10, 19, 20, 21, 25, 27, 40, 43, 48 and 50 of the *Constitution*. In the circumstances, the appellants considered themselves entitled to appeal to this Court as of right under article 163(4)(a) of the *Constitution*. Counsel concluded his submissions by stating that the matter requires examination of the facts on record, to determine whether the appellants' constitutional rights were violated. The appellants, therefore, prayed that the preliminary objection be overruled, with costs to them.

D. Analysis

7. The appellants have not claimed that the issues in this appeal raise matters of general public importance, requiring certification by the Court of Appeal or this court under article 163(4)(b) of the *Constitution*. Instead, their case is that the matter involves the interpretation and application of the *Constitution* entitling them to appeal to this court as of right under article 163(4)(a). So what falls for our determination in this preliminary objection is whether or not this appeal lies, under article 163(4)(a). This also calls for an examination of the issues before the two courts below but before we do that, we find it appropriate to set out at this stage the legal principles guiding the determination on when an appeal lies under article 163(4)(a) or (b) of the *Constitution*.
8. The Supreme Court has a limited original and appellate jurisdiction, as provided in the *Constitution*. The original jurisdiction is limited to the determination of presidential petitions under article 140 as read with article 163(4)(a) of the *Constitution*; to rendering advisory opinions on matters concerning county government, at the instance of state organs under article 163(6) of the *Constitution*; and as specified in article 163(3),(4) and (5), its appellate jurisdiction is limited to the determination of appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation. It is now well settled and our law reports are replete with decisions of this court that "the appellate jurisdiction of the Supreme Court is defined clearly enough under article 163 of the *Constitution* and s 19 of the *Supreme Court Act*..." — *Peter Ngoge v Honourable Francis Ole Kaparo & 5 Others*, Supreme Court Petition No 2 of 2012; eKLR 2012. With regard to appeals that lie as of right under article 163(4)(a), which is what we are concerned with in this appeal, as this court stated in *Lawrence Nduku & 6000 Others v Kenya Breweries Ltd & another* (Supreme Court Petition No 3 of 2012); eKLR 2012:

"...it is not a mere allegation in pleadings by a party that [the matter involved interpretation and/or application of the constitution which] clothes an appeal with attributes of constitutional interpretation or application.... 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)" of the Constitution.



As this court further stated in *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board*, SC Application No 5 of 2012; [2012] eKLR, at Para [13A]:... [must have been] integrally linked to the main cause, in a superior Court of first instance, ...[and] resolved at that forum in the first place, before an appeal can be entertained....” under article 163(4)(a).

“...a question involving the interpretation or application of the Constitution... [must have been] integrally linked to the main cause, in a superior court of first instance,[and] resolved at that forum in the first place, before an appeal can be entertained....” under article 163(4)(a).

9. On the basis of these principles, does this appeal lie as of right under article 163(4)(a) of the *Constitution*? As submitted by learned counsel, this requires the examination of the issues raised and determined by the two courts below, to determine the question.
10. By a charge dated June 10, 1999[the charge] and registered as No. IR 80343/2, the appellants charged to the 1st respondent, as collateral for a sum of Kenya Shillings Twelve Million, Five Hundred Thousand (KShs. 12,500,000) together with interest thereon, lent and advanced to Unigate Industries Limited (the borrower), their property containing by measurement Nought Decimal Five Nought Seven Three (0.5073) of a hectare or thereabouts situate in the City of Nairobi and known as Land Reference No. 1870/VIII/15 [the property]. It is common ground that the borrower defaulted in the repayment of the said sum and the 1st respondent sought to realize the security. To forestall the sale of the property, the appellants instituted Nairobi HCCC No. 1743 of 2001, alleging that the execution of the charge was fraudulent, null and void, as they had not signed it. They therefore sought a declaration that the charge was “illegal, void and incapable of being enforced”; a perpetual injunction to restrain the 1st respondent by itself, its auctioneers (the 2nd respondent), its agents and/or servants from disposing of the property, or in any way interfering with the appellants’ quiet possession of it. Contemporaneous with the filing of the suit, the appellants filed an application and sought, albeit on a temporary basis, a similar order of injunction as the one sought in the plaint.
11. Through its credit officer, one Charles Mutunga, the 1st respondent filed a replying affidavit in which he dismissed as false the appellants’ claims, both in the plaint and in the affidavit in support of the said application for a temporary injunction, as he himself had witnessed the execution by the appellants of the charge before Mr. Gachoka, advocate.
12. Neither the application nor the suit was heard because on February 13, 2002, the parties recorded a consent, which compromised and settled the entire suit, on terms that the appellants were to pay the costs of the suit and redeem the charged property within 90 days. That was not to be. The appellants again defaulted. In the 1st respondent’s second attempt to realize the security, the appellants filed another suit—Nairobi HCCC No 1548 of 2002—with an accompanying application for a temporary injunction, and sought more or less the same reliefs as the ones sought in the earlier suit.
13. In response, the 1st respondent applied to strike out the second suit on the ground that it was an abuse of court process, as the matter was *res judicata*. After inter partes hearing, the High Court granted that application and accordingly struck out that suit as being *res judicata*. On appeal, the Court of Appeal upheld that decision and dismissed the appellants’ appeal with costs thus provoking this second appeal.
14. It is clear from this background that no issue of constitutional moment arose in either of the two courts below. No issue of constitutional interpretation or application was therefore raised before either the High Court or the Court of Appeal. The dispute in both the suits in the High Court was grounded on the factual situation of the matter as the appellants’ contention in the first suit was that the 1st respondent had no right to sell their property as the charge forming the basis of the sale was null



and void, on the ground that the same was never executed by the 2nd respondent and the bank, the 1st respondent. As earlier stated, that suit was compromised by a consent order, that condemned the appellants with costs but gave them 90 days to redeem the charged property. The appellants could not have consented to paying the costs of that suit, and redeeming their property, if it was not charged. Besides that fear, the charge document is in the record of appeal before us, and we can see that it was indeed properly executed. How else could it have been registered if it had not been properly executed?

15. On the basis of the said consent, the claim in the second suit, which was basically the same as the one in the first suit, was clearly *res judicata*. The further claim in the second suit, that the appellants had no knowledge and, therefore, did not authorize the recording of the consent order, was rejected by the High Court, a decision the Court of Appeal, quite correctly in our view, upheld. The appellants had engaged counsel to represent them, in the first suit. If their counsel had thus compromised the suit without their authority, which contention is incredulous noting that the consent gave the appellants 90 days to redeem their property, an offer counsel could not have plucked from the air, that was a matter purely between the appellants and their erstwhile advocates. In any case, for one to make and sustain such allegations or claims against the counsel, such advocates would be necessary parties to defend themselves.
16. In the circumstances, we agree with counsel for the respondents and find that the decisions of both the High Court and the Court of Appeal in this matter were grounded on the facts of the case, and no issues of constitutional interpretation or application were involved, so as to warrant an appeal as of right under article 163(4)(a) or (b) of the *Constitution*.
17. This finding disposes of this appeal but we need to say something about the constitutional issues the appellants raised before us at the hearing of the preliminary objection. As we have stated, no issue of constitutional interpretation or application was raised, either before the High Court or the Court of Appeal. As a matter of fact, no constitutional issue was raised or even alluded to. The alleged violations of the appellants' constitutional rights under articles 10, 19, 20, 21, 27, 43 and 48, of the *Constitution*, as read with articles 2 and 7 of the *African Charter on Human and Peoples Rights*, have been raised for the first time in this court. That is not legally tenable. As the Court of Appeal stated in *Centre for Rights Education and Awareness & others v John Harun Mwau & others*, Civil Appeal No 74 of 2012, in exercising its jurisdiction, an appellate court-

“has to determine whether or not the decision appealed against was correctly decided upon the facts and the law existing at the time of the decision.... An issue or plea that has not been the subject of a determination by a court or tribunal or agency, as the case may be, cannot, in my humble view, be the subject of an appeal. This is because an appellate court, in hearing an appeal, is called upon to redress errors on the part of the court below. In deciding whether or not there was an error, the appellate court looks at the materials which were before the court below. New issues should be determined by courts with original jurisdiction” not appellate courts.

We adopt the same reasoning and it follows that the constitutional issues which the appellants have raised, cannot be entertained in this appeal.

E. Final Orders

18. For these reasons, we uphold the respondents' preliminary objection that this appeal is incompetent. Accordingly, we hereby strike it out with costs to the respondents.

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



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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT

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M. 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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I.LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

