



Kitarpei v Ndegwa & another (Petition 32 of 2014) [2015] KESC 6 (KLR) (22 July 2015) (Ruling)

Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & another [2015] eKLR

Neutral citation: [2015] KESC 6 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 32 OF 2014
SC WANJALA & N NDUNGU, SCJJ
JULY 22, 2015**

BETWEEN

JENNIFER KOINANTE KITARPEI APPELLANT

AND

ALICE WAHITO NDEGWA 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

*(Being an appeal against the Ruling and Order of the Court of Appeal sitting at Nairobi
(G.B.M. Kariuki, K. M’Inoti and J. Mohammed, JJA) delivered on 3rd October, 2014)*

Only Parties privy to the proceedings in the Superior Courts below the Supreme Court may file an appeal to the Supreme Court.

Reported by Teddy Musiga and John Ribia

***Constitutional Law** – jurisdiction – appeals - appeals to the Supreme Court – appellate jurisdiction of the Supreme Court - Whether a party not subject to the proceedings in a Superior Court could file an Appeal at the Supreme Court - whether the Supreme Court had the jurisdiction to entertain an appeal where the appellant was not a party to the proceedings forming the subject of appeal but had been affected by that decision – Constitution of Kenya 2010 article 163(4(a)).*

Brief facts

The 1st respondent together with three others not enjoined in this suit filed a petition at the High Court seeking orders that the 2nd respondent do include the names of the 1st respondent and three others in the final list of nominees for various County Assemblies. The High Court dismissed that petition. The 1st respondent being dissatisfied with that decision appealed to the Court of Appeal. However, the appellant in the instant matter was not enjoined as a party to that appeal. The Court of Appeal allowed that appeal with orders that the Independent Electoral & Boundaries Commission gazette the 1st respondent as the duly elected special member under the general category for Laikipia County Assembly. Being dissatisfied with that Court of Appeal



decision, the appellant in the instant matter filed an application before the Court of Appeal seeking orders to set it aside. The Court of Appeal dismissed it holding that the appellant lacked standing to apply for review since she was not a party in the matter before that Court or the High Court. She then filed a petition of appeal to the instant Court, the Supreme Court.

The appellant sought redress in the Supreme Court by invoking article 163(4)(a) of the Constitution of Kenya 2010. The respondent via a notice of motion raised a preliminary objection on the grounds that the appellant's right of appeal was extinguished and that the appellant had not demonstrated that the appeal fell within the ambit of article 163(4) (a) of the Constitution of Kenya, 2010.

Issues

- i. Whether the Supreme Court had the jurisdiction to entertain an appeal under article 163(4)(a) of the Constitution of Kenya 2010, where a party who was not a party to the proceedings forming the subject of appeal but had been affected by that decision.
- ii. Whether a party not subject to the proceedings in a Superior Court could file an Appeal at the Supreme Court.

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—

1. As of right in any case involving the interpretation or application of this Constitution.

Held

1. For appeals to fall under the ambit of article 163(4)(a) of the Constitution of Kenya, 2010, they 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. 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) of the Constitution of Kenya, 2010.
2. The basis upon which the appellant had appealed to the instant Court was not on the application or interpretation of the Constitution by the Court of Appeal in arriving at its determination, but rather the fact that she was affected by the judgment of the Court of Appeal in a matter where she was not a party to the proceedings.
3. As much as the appellant could have had a legitimate claim that the judgment of the appellate Court affected her interests, even though she was not a party to the suit, such an issue, in the first instance, fell outside the jurisdiction of the Court. The Constitution plainly conferred jurisdiction upon the High Court to deal with such a claim in the first instance. The Court could not arrogate to itself jurisdiction that was reposed in another Court.
4. The Supreme Court had no jurisdiction to entertain the petition of Appeal. It was not plausible that the Jurisdiction of the Supreme Court as was enshrined under article 163(4)(a) of the Constitution of Kenya 2010, contemplated that a person who was not party to the proceedings at the superior Courts below the Supreme Court, would file an appeal. The subject matter of the appeal did not meet the criteria set out under the article 163(4)(a) of the Constitution of Kenya 2010.

Preliminary objection allowed.

Orders

- i. *Preliminary objection allowed*
- ii. *Petition dismissed*
- iii. *Parties to bear their own costs.*



Citations

Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

Advocates

None mentioned

RULING

A. Introduction

1. This is an appeal against the Ruling of the Court of Appeal at Nairobi, in which the Court dismissed an application by the appellant for the review of the Judgement of that Court delivered on 20th December, 2013. It upheld the Judgement of the High Court at Nairobi (Ngugi, Korir, & Majanja, JJ) delivered on 12th July, 2013 dismissing the application by the 1st respondent and three others. Those applicants had sought Orders of the High Court, requiring the Independent Electoral and Boundaries Commission to include the 1st respondent and three others in the final list for nomination to various County Assemblies.

B. Background

2. The 1st respondent together with three others not enjoined in this suit filed a petition at the High Court (Petition No. 305 of 2013) seeking Orders that the 2nd respondent herein do include the names of the 1st respondent and three others in the final list of nominees for various County Assemblies. The High Court dismissed that petition in its Judgement delivered on 12th July, 2013.
3. Being dissatisfied with that decision, the 1st respondent moved to the Magistrate's Court in Nanyuki, and filed an Election Petition No. 2 of 2013, *Alice Wahito Ndegwa v Jennifer Koinante Kitarpei, IEBC & The National Alliance Party*. Judgement in this matter was delivered on 4th December, 2013 in favour of the 1st respondent. Consequently, the appellant herein appealed against that Judgement in the High Court at Nyeri (Election Appeal No. 94 of 2013).
4. Pending hearing and determination of the appeal before it, the High Court granted Orders for stay of execution of the Magistrate's Court's Judgement.
5. In the meantime the 1st respondent had, at the time of moving the Magistrate's Court, filed an appeal before the Court of Appeal in Nairobi (Civil Appeal No. 194 of 2013), against the High Court's Judgement of 12th July, 2013. However, the appellant herein was not enjoined as a party to that appeal. Petition 2 of 2013 before the Magistrate's Court in Nanyuki, and Civil Appeal No. 194 of 2013 were heard by the respective Courts concurrently.
7. The Court of Appeal delivered its Judgement in Civil Appeal No. 194 of 2013 on 20th December, 2013, allowing the appeal, with Orders that the IEBC gazette the 1st respondent as the duly-elected special member under the general category for Laikipia County Assembly. This Judgement was brought to the attention of the High Court at Nyeri on 20th January, 2014 when Election Appeal No. 94 of 2013 came up for mention.
7. Being dissatisfied with the said Court of Appeal Judgement, the appellant filed an application dated 5th February, 2014 before the Court of Appeal seeking Orders to set it aside. The Court of Appeal in



its Ruling of 3rd October, 2014 dismissed that application, holding that the appellant lacked standing to apply for review, since she was not a party in the matter before that Court, or the High Court.

8. Consequently, the appellant filed a petition of appeal before this Court, on 10th October, 2014, against the said Court of Appeal Ruling. The appellant comes seeking the following reliefs:
 - (a) a declaration that the hearing and determination of Civil Appeal No. 194 of 2013 violated her constitutional rights under Articles 10, 47, 48 and 50(1) of the Constitution of Kenya, 2010;
 - (b) an Order to set aside the Appellate Court's Ruling of 3rd October, 2014, and to nullify the entire Judgement delivered on 20th December, 2013;
 - (c) an Order that the costs of this petition be borne by the 1st and 2nd respondents; and
 - (d) any such declaration or Order as the Court may deem fit, in the interest of justice.
9. The appellant's grounds of appeal all contest the Appellate Court's decision, contending that the learned Judges of that Court –
 - (a) erred in failing to set aside their Judgement delivered on 20th December, 2013, in spite of a finding that the appeal had proceeded without affording the appellant the right to fair hearing;
 - (b) infringed upon the appellant's right to fair trial under Article 25(c) as read together with Article 50(1) of the Constitution;
 - (c) erred in finding that the appellant had no locus standi to seek review, despite the fact that the said orders directly affected her;
 - (d) wrongly interpreted and applied Article 164 of the Constitution, by holding that they could not review the case.
10. Before the petition of appeal was set for hearing, the appellant filed Civil Application No. 40 of 2014 on 10th October, 2014 seeking orders for stay of execution of the Judgement and Order of the Court of Appeal delivered on 20th December, 2013. However, on 15th October, 2014 the matter was mentioned before this Court (Ibrahim, SCJ) and counsel for the appellant informed the Court that the 1st respondent had been sworn in as a special Member of the County Assembly of Laikipia, that very morning. This Court, therefore, issued an Order for the petition of appeal to be expedited taking into account the fact that the application for stay had been overtaken by events.
11. On 23rd October, 2014 the 1st respondent filed a preliminary objection on a point of law, that:
 - (i) the appellant having applied for review by the Court of Appeal, in effect extinguished her right of appeal to this Court;
 - (ii) the 1st respondent has been sworn in, and the application was incompetent; and
 - (iii) the application was fatally defective, for challenging the judgement delivered on 20th December, 2013.

C. Parties' Submissions

(i) The 1st Respondent

12. Learned counsel for the 1st respondent, Mr. Ondieki, set the basis for the preliminary objection by urging that the petition was incompetent, in so far as it sought to challenge a Ruling of the Appellate Court dated 3rd October, 2014, as opposed to the Judgment of 20th December, 2013.



13. Counsel submitted that since the appellant had opted for a review of the Court of Appeal's Judgement, she had no basis for an appeal before this Court. He submitted further, that this Court had no jurisdiction to adjudicate on the matter before it, there being no proper appeal as contemplated by Articles 163(3)(b) and 163(4)(a) of *the Constitution*, Section 15(2) of the *Supreme Court Act*, and Rules 9 and 33 of the Supreme Court Rules.
14. Counsel urged that, since the appellant had opted for a review of the Appellate Court's decision, her right of appeal is now extinguished.
15. He submitted that litigation must come to an end, and that, where due process was followed leading to a substantive Judgement, such Judgment can be overturned only through a substantive contest on its merits.
16. Counsel urged that the appellant had not demonstrated that the appeal fell within the ambit of Article 163(4) (a), as no constitutional issues were evident in the petition.
17. Counsel submitted that it was not for this Court to amend or cure defective pleadings, and that in the absence of a substantive appeal, there was no jurisdiction to consider the merits of the appeal; the effect being that the declarations sought in the petition are unknown to law.

(ii) The Appellant

18. Learned counsel for the appellant, Mr. Macharia, contested the premise of the preliminary objection. Nothing, according to him, bars the Court from entertaining this appeal, under Article 163(3)(b) and (4)(a) of *the Constitution*.
19. Learned counsel attributed to this matter "peculiar circumstances" such as warranted the attention of this Court. He gave the example that the appellant was not a party in the Appellate Court proceedings, yet the Court proceeded to enter Judgement that affected her position as a nominated Member to the Laikipia County Assembly. Counsel urged that the Court of Appeal, in its Ruling, denied the appellant the right to be heard, a fundamental right under Article 50(2) of *the Constitution*. He submitted that a Judgement imposed on a party who has not been heard is a nullity, drawing from the case, *Adolf Gitonga and 4 others v Mwangi Thiongo* [1986] eKLR.
20. Learned counsel urged that the rights safeguards of Article 25 of *the Constitution* cannot be limited; and urged the Court to apply the terms of Article 38, in that regard.
21. On the question whether the appeal properly invokes this Court's jurisdiction, under Article 163(4) (a), his submission was that the question embodied in the appeal relates to the right of the appellant, as a member of the minority to be nominated as Member of the County Assembly for Laikipia. He submitted that the Court of Appeal had made a decision directly affecting the appellant, even though she was not a party before the Court, in breach of her unlimited right to fair hearing as provided for in Article 50(1) of *the Constitution*. Counsel argued that the appellant's rights of such a category, ought not to be perceived as having been extinguished. He submitted that the failure to grant review orders by the Appellate Court occasioned an injustice to the appellant, as she had been condemned unheard.
22. Learned counsel urged that the 1st respondent has proceeded on a misapprehension: that the petition was filed as an appeal against the decision of the Court of Appeal in Civil Appeal No. 194 of 2013. He submitted that the petition was an appeal against the Ruling of the Court of Appeal in Civil Application 18 of 2014, delivered on 3rd October 2014; and so it falls within the timeline for filing an appeal before the Supreme Court.



23. Counsel urged that the appellant could not participate in the Court of Appeal proceedings in any way, other than by the filing an application for review.

(iii) The 2nd Respondent

24. Learned counsel, Mr. Kibicho, for the 2nd respondent, who contested the preliminary objection, submitted that Article 163 of *the Constitution* places no bar on appeals against a Ruling. He urged that the preliminary objection was not sound in law, and the appellant's right of appeal to the Supreme Court was uncompromised.
25. Learned counsel urged that the preliminary objection failed to satisfy the conditions of a proper objection; and he prayed that the same be dismissed.

D. Analysis and Determination

26. The matter before us is the Notice of Preliminary Objection by the 1st respondent dated 23rd October, 2014. The issue which has crystallized for this Court's determination is: whether this Court has jurisdiction to entertain the Petition of Appeal dated 20th October, 2014.

27. The jurisdiction of this Court, which the appellant seeks to invoke, is founded on Article 163(4)(a) of *the Constitution*, which stipulates that:

“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...”PARAGRAPH 29.

28. Does the petition herein fall within the terms of Article 163(4)(a) of *the Constitution* as well as within the principles enunciated in past decisions of this Court on the question of jurisdiction?

29. In Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, this Court pronounced itself on the question of jurisdiction thus [paragraph 68]:

“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. We agree with counsel for the first and second respondents in his submission that 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.” [Emphasis supplied]

30. In Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another [2012] eKLR, this Court, in depicting the extent of its jurisdiction, stated (paragraph 28) as follows:

“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]



31. Equally relevant is this Court’s decision in the Peter Ngoge v Honourable Francis Ole Kaparo and 5 Others, Supreme Court Petition No. 2 of 2012, in which the following passages appear (paragraphs 29-30):

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, 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 the further input of the Supreme Court.”

32. It is clear that the basis upon which the appellant has appealed to this Court, is not the “application or interpretation of *the Constitution*” by the Court of Appeal in arriving at its determination, but rather, the fact that she was affected by the Judgement of the Court of Appeal, arrived at, when she was not a party to the proceedings. This goes against the grain of the principle set out in the Lawrence Nduttu case, which requires that an appeal be a contest to the interpretation or application of *the Constitution* at the Court of Appeal.
33. We recognize that the appellant may have a legitimate claim, that the Judgement of the Appellate Court affected her interest, even though she was not a party to the suit. However, such an issue now arising for the first time, falls outside the jurisdiction of this Court. *The Constitution* plainly confers jurisdiction upon the High Court to deal with such a claim in the first instance. Just as this Court held in Peter Ngoge, this Court would not arrogate to itself jurisdiction that is reposed in another Court.
34. We recall also the relevant principles set out by this Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others S.C. Petition No. 2B of 2014; [2014] eKLR (paragraph 244):

“In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

- (i) a Court’s jurisdiction is regulated by *the Constitution*, by statute law, and by the principles laid out in judicial precedent;
- (ii) the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;
- (iii) the lower Court’s determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
- (iv) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy...” [Emphasis supplied]

35. The Court of Appeal, in the contested Ruling held that the appellant was not entitled to seek review of the decision of 20th December, 2013, as she was not privy to that cause while it was in the High Court and in the Court of Appeal.



36. It is not contested, that the appellant was not party to the proceedings in this matter at the High Court, or at the Court of Appeal. Indeed, the appellant avers that she was unaware of the said proceedings, and only got to know of the matter after the Appellate Court's Judgement was delivered. The question as to the point at which the appellant became aware of the existence of the proceedings at the Court of Appeal, in Civil Application No. 194 of 2013, does not fall for determination at this moment.
37. It is not, in our opinion, plausible that the jurisdiction of this Court, as enshrined in Article 163(4) (a), contemplated that a person who was not party to the proceedings at the superior Courts below the Supreme Court, will file an appeal. For the reasons set out in Ruling, we are unable to accede to the submissions by Counsel for the appellant, that the Ruling which is the subject of the appeal herein, falls within the criteria set under Article 163(4)(a) of *the Constitution*.
38. In the circumstances, we find that this matter is not properly before this Court, and accordingly hold that we have no jurisdiction to entertain the Petition of Appeal.

E. Orders

39. Consequently, we will make Orders as follows:
- (i) The Preliminary Objection raised by the 1st respondent, dated 22nd October, 2014 is hereby allowed.
 - (ii) The petition herein dated 10th October, 2014 is hereby dismissed.
 - (iii) Parties shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2015.

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SMOKIN WANJALA

JUDGE OF THE SUPREME COURT

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S. N. NDUNGU

JUDGE OF THE SUPREME COURT

I certify that this is a true copy of the original.

Registrar

Supreme Court of Kenya

