Nduttu & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012) [2012] KESC 9 (KLR) (4 October 2012) (Ruling)

Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another [2012] eKLR

Neutral citation: [2012] KESC 9 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 3 OF 2012

PK TUNOI & SC WANJALA, SCJJ

OCTOBER 4, 2012

BETWEEN

LAWRENCE NDUTTU & 6000 OTHERS & 6000 OTHERS & 6000 OTHERS & 6000 OTHERS & 6000 OTHERS .... APPELLANT

AND

KENYA BREWERIES LTD .... 1ST RESPONDENT

JOHN HARRISON KINYANJUI T/A J. HARRISON KINYANJUI & CO. ADVOCATES .... 2ND RESPONDENT

Jurisdiction of the Supreme Court to entertain appeals against interlocutory orders of the Court of Appeal

The ruling was on a preliminary objection on the grounds that: no leave to appeal had been granted by the Supreme Court; the Constitution did not confer any right of appeal from the hearing and determination of an interlocutory application of the Court of Appeal to the Supreme Court; and that the appellate jurisdiction of the Supreme Court lay only from the determination of a substantive appeal and not an interlocutory ruling of the Court of Appeal. The court found that the appeal was not based on article 163(4)(b) of the Constitution hence the appellants did not need to obtain prior leave or certification before filing their appeal. Further, even if it were to be assumed that the court had appellate jurisdiction in appeals against interlocutory orders, the interlocutory order being appealed against was not one that would inspire the court to exercise jurisdiction in favour of the appellants.

Reported by Kakai Toili

Civil Practice and Procedure *- appeals -appeals to the Supreme Court - appeals against interlocutory orders from the Court of Appeal - whether the mere allegation of a violation of human rights by a litigant in his/her pleadings gave rise to an automatic right to access the Supreme Court on appeal - whether the Supreme Court could entertain appeals against interlocutory orders of the Court of Appeal - Constitution of Kenya, article 163(4)(b).*

Brief facts

The appellants challenged the ruling by the Court of Appeal on the basis that the Court of Appeal, in granting the stay which had been prayed for but declining to grant the other orders sought by the applicants, had violated some ten articles of the Constitution of Kenya.

The ruling by the Supreme Court was therefore on a preliminary objection in respect of the appeal on the grounds that: no leave to appeal had been granted by the Supreme Court pursuant to sections 15(1) and 16(1) of the Supreme Court Act; the Constitution did not confer any right of appeal from the hearing and determination of an interlocutory application of the Court of Appeal to the Supreme Court and the appellate jurisdiction of the Supreme Court lay only from the determination of a substantive appeal and not an interlocutory ruling of the Court of Appeal. It was argued that if the court were to hold that it had jurisdiction under section 16 (3) of the Supreme Court Act to entertain an appeal against an interlocutory order of the Court of Appeal, then the same section prohibited the granting of leave to appeal against such order unless the court was satisfied that it was in the interest of justice for it to hear and determine the appeal before the proceedings were concluded.

Issues

i. Whether the Supreme Court could entertain appeals against interlocutory orders of the Court of Appeal.
ii. Whether the appellants were required to obtain leave of the court before filing their appeal to the Supreme Court.
iii. Whether the appeal constituted an abuse of the process of court on grounds that it canvassed matters that were pending for determination before the Court of Appeal hence *sub-judice.*
iv. Whether mere allegation of a violation of human rights by a litigant in his/her pleadings gave rise to an automatic right to access the Supreme Court on appeal.

Held

1. Only two types of appeals lay to the Supreme Court from the Court of Appeal.
    a. The first type of appeal lay as of right if it was from a case involving the interpretation or application of the Constitution. In such a case, no prior leave was required from the instant court or Court of Appeal.
    b. The second type of appeal lay to the Supreme Court not as of right but only if it had been certified as involving a matter of general public importance. It was the certification by either court which constituted leave. That meant that where a party wished to invoke the appellate jurisdiction of the court on grounds other than the fact that the case was one which involved the interpretation or application of the Constitution, then such intending appellant must convince the court that the case was one involving a matter of general public importance. If the Court of Appeal was convinced that such was the case and the certification was affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal. The question as to what constituted "a matter of general public importance" was one that was bound to be addressed by the Supreme Court in the foreseeable future as litigants sought certification or leave to lodge appeals on that basis.
2. The appeal was not based on article 163(4)(b) of the Constitution of Kenya hence the appellants did not need to obtain prior leave or certification by either the Court of Appeal or the Supreme Court before filing their appeal.
3. Even if it were to be assumed that the court had appellate jurisdiction in appeals against interlocutory orders, the interlocutory order the nature of which was being appealed against in the case in question was not one that would inspire the court to exercise jurisdiction in favour of the appellants. At any rate, such a scenario could revive the question as to whether prior leave of the court would be necessary.

4. The court had no jurisdiction in respect of the appeal. The appellants had to take advantage of the stay granted by the Court of Appeal and seek a quick disposal of the issue of legal representation by the Court of Appeal so that proceedings in the main High Court Case Number 279 of 2003 could commence expeditiously. That was the only logical course of action open to the appellants.

Petition dismissed.

Citations

East Africa

1. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* Petition No 5 of 2012- (Explained)

2. *Interim Independent Electoral Commission (Applicant),* Constitutional Application No 2 of 2011 - (Followed)

3. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 - (Affirmed)

4. *Ngoge, Peter Oduor v Francis Ole Kaparo & others* Petition No 2 of 2012 - (Mentioned)

Statutes

East Africa

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 1 rule 8 - (Interpreted)

2. Constitution of Kenya, 2010 sections 80; 82 articles 10; 19; 20; 25; 27; 29; 47; 48; 50; 159; 163(4)(a), (b), (5) - (Interpreted) 3.Supreme Court Act, 2011 (Act No 7 of 2011) sections 15(1)(2); 16(1)(3) 4.Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 32 - (Interpreted)

RULING

1. The origins of this Appeal can be traced to High Court Civil Case Number 279 of 2003 (Lawrence Nduttu & others vs Kenya Breweries Ltd.). In that case, which is still pending to date, the Plaintiffs (Applicants Herein) sought (and still do) a declaration and a number of orders against the Defendant (First Respondent Herein). More particularly, the Plaintiffs prayed for judgment against the Defendant in terms of:

   i. A declaration that the decision to cause their early retirement was unlawful and breached section 80 and 82 of the *Constitution* and was wrongful and a nullity.

   ii. An order that the defendant does supply to the Plaintiffs and each of them audited statements of account detailing their dues.

   iii. An order that the Plaintiffs and each of them be paid all outstanding dues and other consequential entitlements pursuant to prayer (ii) above.

2. In the alternative, the Plaintiffs prayed for damages against the Defendant.

3. Initially, the Plaintiffs were represented by the firm of Gitobu Imanyara and Co Advocates. Later, the firm of OP Ngoge and Associates took over the representation of the Plaintiffs through the usual Notice of Change of Advocates. The records show that the changeover was not without its twists and turns whose details we do not find it necessary to highlight. The issue of representation appeared to have settled with Mr Ngoge as the sole representative of the Plaintiffs until the March 4, 2010 when, through a Notice of Appointment, Mr Laurence K Nduttu and 140 others appointed the firm of J Harrison Kinyanjui & Company Advocates to represent them in the suit. The action triggered a series of events that finally culminated in the current Appeal before this Court.

4. Mr Ngoge filed an Application in the High Court wherein he vigorously opposed the appointment of Mr Harrison Kinyanjui to represent some of the Plaintiffs. He urged the Court to expunge the names of the latter's firm from the court records. In his written submissions in support of his application, Mr Ngoge urged that, this being a representative suit, the rights of parties to be represented by an Advocate of their choice was regulated by order 1 rule 8 of the Civil Procedure Rules 2010. Towards, that end, Counsel urged, the right to appoint an Advocate or to act in person rests with the representatives who have been appointed by the Court to represent the whole group. In this regard, the Court had in earlier directions appointed four representatives whose consent was needed by any Co-Plaintiff to be represented by another advocate or to represent him/herself in person. As such consent had not been obtained from the four court appointed representatives, Mr Harrison Kinyanjui could not impose himself on the suit. Mr Ngoge further argued that he had all along been acting for all the Plaintiffs in the suit and wondered how he could now share his pleadings with another Advocate who had just recently come onto the scene. The only solution was to expunge the names of the "hostile minority Plaintiffs" from the suit and order them to file through their newly appointed Advocate a fresh suit against the Defendant.

5. In reply, as far as can be deduced from the resultant Ruling of the Court, Mr Kinyanjui, argued that he had rightly been appointed by the group of Plaintiffs he was now representing, having received written authority to act on their behalf. Parties in such suits had a right to be represented by an Advocate of their choice. A Notice of Appointment had duly been filed and served upon all the parties. This was in response to an advertisement that had appeared in the press calling upon any interested parties who wished to be enjoined in the suit to do so.

6. On December 16, 2011, the Court (Judge Ang'awa) after hearing the submissions of Counsel, and for reasons stated in the Ruling, determined that the firm of M/s JH Kinyanjui & Co. Advocates had been properly appointed and was correctly before the Court. The latter was therefore not required to file a separate suit as such action would defeat the purpose of "representative suits" whose main objective was to avoid multiplicity of suits. It allowed Mr Kinyanjui to appear and represent the other group. The Court consequently nominated one member from the group, to wit, the chairman to be enjoined as a representative together with the four that had been earlier appointed by the Court. It is against this Ruling that Mr Ngoge moved to the Court of Appeal.

7. Through a Notice of Motion, dated December 23, 2011, filed by the firm of OP Ngoge and Associates Advocates, which motion was supported by an Affidavit sworn by one Mohammed Omar, the Applicants sought an order of stay of execution of the High Court's Ruling dated the October 16, 2011 pending appeal. The application also sought inter alia, a mandatory injunction to permanently restrain the First Respondent from dealing with or continuing to front firm of Harrison Kinyanjui as Advocates for the Plaintiffs. There was no replying affidavit by the firm of Kinyanjui and Co. Advocates. However, the first Respondent opposed the motion for stay through a replying affidavit filed on January 17, 2012. On behalf of the First Respondent, Mr Gachuhi argued that the right to legal representation cuts both ways and that just as Mr Ngoge's clients may not wish to be represented by Mr Kinyanjui, so also the latter's clients may not wish to be represented by Mr Ngoge.

8. In its ruling dated April 20, 2012, the Court of Appeal observed that it would not be practically possible for the suit to proceed at the High Court before the issue of representation was sorted out. If the stay sought was not granted, the court reasoned, there was a risk that the matter could be concluded without proper representation of some of the parties who had come on record. It was therefore important that the issue of legal representation be finally determined by the court before the main suit proceeds for hearing. The Court proceeded to grant an Order of Stay of the ruling and orders of the Hon Lady Justice Ang'awa dated October 16, 2011. The Notice of Motion succeeded to that extent only.

1. The Appeal

9. It is from this ruling that Mr Ngoge has appealed to this Court. The Appellants through their Advocate in a Petition running up to twenty two (22) paragraphs in length have challenged the ruling by the Court of Appeal on the basis of the grounds listed therein. The gist of the Appeal in our view is that the Court of Appeal, in ruling the way it did, i.e. granting the stay which had been prayed for but declining to grant the other orders sought by the Applicants, had violated ten articles of the *Constitution*, namely articles 10, 19, 20, 25, 27, 29, 47, 48, 50 and 159. The alleged violation of these articles by the Court of Appeal is repeated in all the twenty two grounds of Appeal.

10. The Appellants seek inter alia, a declaration that both the High Court and Court of Appeal violated the above listed articles of the *Constitution* and general damages against the Respondents. The Appellants also seek an Order from this Court allowing their application of December 23, filed in the Court of Appeal. They further seek directions from this Court to the effect that Civil Suit number 279 of 2003 should be heard urgently and on a priority basis.

11. Although the Appellants do not indicate in their formal petition the constitutional and other legal provisions upon which they have grounded their Appeal (other than rule 32 of the Supreme Court Rules), it is clear from the written and oral submissions of counsel for the Appellants that the Appeal is based upon article 163(4) of the *Constitution*.

2. The Preliminary Objection

12. The First and Second Respondents have raised a Preliminary Objection in respect of this Appeal. In support of the preliminary objection, Counsel for the First Respondent, Mr Gachuhi, has argued both in his written and oral submissions as follows:

    i. No leave to appeal has been granted by the Supreme Court pursuant to sections 15(1) and 16(1) of the *Supreme Court Act*.

    ii. The *Constitution* does not confer any right of appeal from the hearing and determination of an interlocutory application of the Court of Appeal to the Supreme Court. The Appellate Jurisdiction of the Supreme Court lies only from the determination of a substantive appeal and not an interlocutory ruling of the Court of Appeal.

    iii. If the Court were to hold that it has jurisdiction under section 16(3) of the *Supreme Court Act* to entertain an appeal against an interlocutory order of the Court of Appeal, then the same section prohibits the granting of leave to appeal against such order unless the Court is satisfied that it is in the interest of justice for it to hear and determine the appeal before the proceedings are concluded.

    iv. The Appeal does not meet the jurisprudential threshold of the *Constitution*, it being not an appeal from a case involving the interpretation or application of the *Constitution*. The Appeal is therefore fatally flawed and should not be allowed.

    v. Supreme Court lacks jurisdiction to determine the issue of legal representation when the matter is pending for determination as a substantive appeal before the Court of Appeal.

    vi. Neither the Supreme Court nor the Court of Appeal has certified the present Appeal as raising a matter of general public importance.

13. Counsel for the Second Respondents, Mr Kinyanjui has raised similar arguments as those proffered by Counsel for the First Respondent in grounds 1, 5, and 6 above. In addition Counsel for the Second

Respondent has urged that to the extent to which the Appellants have not exhausted the legal fora to ventilate the dispute, the petition of appeal amounts to an abuse of the Court Process.

14. In answer to the Preliminary Objection by the Respondents, Counsel for the First Applicant filed written submissions which he buttressed through oral argument before this Court on August 18, 2012. It is noted that there was no appearance by Counsel for the Second Respondents on this occasion but the Court proceeded to hear Counsel for the Applicant and Counsel for the First Respondent. Mr Ngoge urged the Court not to shut out the Applicants from accessing this Court and arguing their appeal simply because the Respondents had raised a Preliminary Objection. This was a dangerous trend where parties who are alleged to have violated the fundamental rights of others had taken to the habit of raising preliminary objections with the sole intention of shutting out litigants from a court of last resort. Mr Ngoge urged the Court to go ahead and hear the Appeal. He contended that it was only through hearing the appeal that the Court would determine whether it had jurisdiction over the matter or not. Counsel for the Applicants was however advised to respond to the preliminary objection by the Respondents before the Court could determine whether to proceed and hear the appeal or not.

15. Mr Ngoge then highlighted his written submissions the gist of which we summarize below:

    i. The complaints lodged in court through the petition of appeal had disclosed serious violations of the Appellants Human Rights thus giving rise to an automatic right to invoke this Court's "supervisory appellate jurisdiction" to hear their appeal without the necessity of leave to appeal. Mr Ngoge further urged that whenever a citizen alleges a violation of human rights in his pleadings, before the Supreme Court, the latter should automatically assume jurisdiction and hear the appeal without having to satisfy itself as to whether it has jurisdiction in the first place or not. A mere allegation of violation is enough. This argument, on which Mr Ngoge placed a lot of reliance, runs through his written and oral submission.

    ii. The Appeal was filed before this court on the basis of article 163(4) of the *Constitution* and as such no leave was required since the right to appeal had risen as of right, it being a matter of the interpretation and application of the *Constitution*. Mr Ngoge also contended that he had relied on the African Charter on Human and Peoples Rights which guarantees the right to a fair hearing. It being the ultimate protector and guarantor of human rights, the Supreme Court had no option but to assume jurisdiction and hear the Appellants. The Court has a constitutional duty to embark upon a full enquiry into the alleged violations.

    iii. Regarding the issue of legal representation, which both Counsel for the Respondents had contended was the only issue in dispute and in respect of which the Appellants had sought the Court of Appeal's intervention by way of stay of the High Court's Ruling, Mr Ngoge made the following submission which we quote in extenso and with added emphasis, for reasons that will become apparent in the course of this ruling.

    > " The Appellants did not go to the Court of Appeal to ask the Court of Appeal (under certificate of urgency) to determine the alleged issue of legal Representation. And neither did they go to the Court of Appeal to pray for orders staying the proceedings of the High Court pending the resolution by the Court of Appeal of the alleged question of legal representation in the Appellants intended appeal as purported by the respondents in their diversionary preliminary objections filed herein . . ."

    iv. Counsel for the Appellants nonetheless goes on in his submissions to urge that the firm of Kinyanjui Advocates should be expunged from the records of suit number 279 of 2003.

3. The Issues for Determination

16. Arising from the facts, preliminary objections raised by the Respondents and submissions of Counsel as summarized, are a number of issues which we must resolve in order to arrive at a reasoned determination of the matter at hand. We hereby frame the issues as follows:

    i. Were the Appellants required to obtain leave of the Court before filing their Appeal to this Court? If so, from which Court was the leave to be obtained?

    ii. Does the Supreme Court have jurisdiction under the *Constitution* to entertain appeals from interlocutory orders of the Court of Appeal or is such jurisdiction limited to cases which have been substantially determined and finalized by the Court of Appeal?

    iii. Is the present appeal from a case involving the interpretation or application of the *Constitution* as to fall within the ambit of article 163(4)(a) of the *Constitution*?

    iv. Does the mere allegation of a violation of human rights by a litigant in his/her pleadings give rise to an automatic right to access the Supreme Court on appeal and is the Court required to assume "supervisory appellate jurisdiction" and inquire into the matter?

    v. Does the present Appeal constitute an abuse of the process of court on grounds that it canvasses matters that are pending for determination before the Court of Appeal hence Sub-Judice?

4. The Question of Leave

17. In addressing the issue as to whether leave was required before filing the Appeal by the Appellant, it is important to restate the provisions of article 163(4) of the *Constitution* which 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. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)
    >
    > 5. A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

    Section 15(1) of the Supreme Court provides that Appeals to the Supreme Court shall be heard only with the leave of the Court. Section 15(2) on the other hand provides that sub-section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the *Constitution*.

18. The language of "leave of the Court" as relates to appeals to the Supreme Court is introduced by the *Supreme Court Act* as opposed to the *Constitution* which adopts the phrase of "a certification by the Court". We hasten to state that for purposes of resolving the issue at hand and indeed in any future disputes revolving around the appellate jurisdiction of the Supreme Court, the words "leave of the Court" in the *Supreme Court Act*, bear the same legal meaning as "certification by the Court" which is the phraseology used in the *Constitution*. We say this because were the words in the *Supreme Court Act* purport to carry a different meaning from that used in the *Constitution*, they would be of no value or effect whatsoever in proceedings before this Court. In this regard, sections 15(1) and (2) of the

Supreme Court Act should simply be read as restatements of the provisions of article 163(4)(b) and (a) respectively.

19. Be that as it may, this Court had occasion at the earliest opportunity to pronounce itself upon the dimensions of its jurisdiction in In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. At paras 29 and 30, the Court emphasized that assumption of Jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. Reaffirming the principle laid down in the Lillian "S" case, the Court made the following observation and we quote:

> " jurisdiction flows from the law, and the recipient - Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*."

20. Guided by the foregoing pronouncement by the Court, it is now appropriate to consider if as contended by Counsel for the Respondents, in the preliminary objection, the Appeal must be disallowed at this preliminary stage on the ground that it was filed without leave. At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is from a case involving the interpretation or application of the *Constitution*. In such a case, no prior leave is required from this Court or Court of Appeal.

21. The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court on grounds other than that the case is one which involves the interpretation or application of the *Constitution*, then such intending appellant must convince the Court that the case is one involving a matter of general public importance. If the Court of Appeal is convinced that such is the case and the certification is affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal. The question as to what constitutes "a matter of general public importance" is one that is bound to be addressed by this Court in the foreseeable future as litigants seek certification or leave to lodge appeals on this basis.

22. Did the Appellants in this matter require prior certification or leave before filing their appeal? Our perusal of the Petition of Appeal and the written submissions filed by Counsel for the Appellant in opposition to the preliminary objection does not lead us to the conclusion that the appeal was based on the provisions of article 163(4)(b). Neither does an examination of his oral submissions lead us to the said conclusion. Nowhere does Counsel argue that the appeal is from a case involving a matter of general public importance. It is clearly apparent from the pleadings and submissions by Counsel that the Appellants are basing their appeal not on article 163(4)(b), but on a different article. The upshot of this conclusion is that the Appellants did not need to obtain prior leave or certification by either the court of Appeal or the Supreme Court before filing their Appeal. This ground of objection cannot be relied upon by the Court to disallow the Appeal at this preliminary stage. This aspect of the objection thus far fails.

5. A Case Involving the Interpretation of the *Constitution*

23. The foregoing analysis logically leads us to ask the following question: if the Appellants did not base their appeal on the provisions of article 163(4)(b), then on what provision of the *Constitution* did they base their appeal? The only plausible answer to this question is that the Appellants are seeking to anchor their appeal on the provisions of article 163(4)(a). In plain language, the Appellants are urging this Court to hear and determine their appeal because it is a case involving the interpretation or application of the *Constitution*. This must be taken to be the Appellants' argument; it has to be so otherwise they would have no constitutional leg on which to stand.

24. During his oral submissions in support of the preliminary objection, Mr Gachuhi, Counsel for the First Respondent urged that the Appeal was fatally flawed since it had not originated from a case involving the interpretation or application of the *Constitution*. None of the constitutional provisions whose violation the Appellants were alleging in their petition of appeal was ever the subject matter of appeal at the Court of Appeal. The issue before the Court of Appeal, Counsel contended, was whether within the context of the applicable civil procedure rules, Counsel for the Second Respondents had properly been entered as the legal representative of a group of plaintiffs. It was never an issue of constitutional interpretation.

25. What then is a case involving the interpretation or application of the *Constitution*? Does the mere allegation by an intending Appellant that a question of constitutional interpretation or application is involved automatically, without more, bring an appeal within the ambit of article 163(4)(a) of the *Constitution*? A two judge bench of this Court had occasion to deal with this issue in the case of Erad Suppliers & General Contractors Limited vs National Cereals & Produce Board SC Petition No 5 of 2012. In disposing of this issue among others, the Court opined as follows and we quote:

> "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."

26. Mr Ngoge has urged that whenever a citizen alleges in his pleadings before the Supreme Court that the High Court and Court of Appeal were complicit in facilitating violations of his fundamental Human Rights, the Supreme Court automatically assumes jurisdiction without the necessity of leave in order to uphold the *Constitution*, human rights and the rule of law. Anything to the Contrary would be unconstitutional and retrogressive. We understand Mr Ngoge to be arguing that a mere allegation of a violation of human rights automatically brings an intended appeal within the ambit of article 163(4)(a) of the *Constitution* hence dispensing with the need for leave under article 163(4)(b) of the *Constitution*.

27. With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by Counsel if adopted, would completely defeat the true intent of article 163(4)(a) of the *Constitution*. 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*. (emphasis ours). 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.

28. 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 ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a). It is the Court's duty as the ultimate custodian of the *Constitution* to satisfy itself that the intended appeal meets the constitutional threshold.

29. This issue was the subject matter of extensive explication by a two- judge bench of this Court in the case of Peter Oduor Ngoge vs Hon Ole Kaparo & others, SC Petition No 2 of 2012. Mr Ngoge who was the petitioner in that case made similar arguments and cited the same authorities as he has done in this case. In dismissing the Petition on grounds that it did not meet the Constitutional threshold of article 163(4) (a), the Court made the following instructive observation at Para 26, and we quote:

> " In the Petitioners' whole argument, we think he has not rationalized the transmutation of the issue from an ordinary subject of leave-to appeal, to a meritorious theme involving the interpretation or application of the *Constitution*-such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court. On our own, we have also not appreciated how an interlocutory matter as to the representation of parties, could have prevailed over the petitioner's main cause in the High Court, and assumed the vitality now being ascribed to it."

30. In the instant case, the Petitioner is appealing against an Interlocutory Order of the Court of Appeal which was triggered by its application against a High Court Order. Rather interestingly, just as in the foregoing case, the issue revolved around legal representation. The Applicants who are the Petitioners in this case had moved to the Court of Appeal seeking inter alia, a stay of execution of the ruling and orders of the Hon Lady Justice Mary Ang'awa wherein she had allowed Mr Harrison Kinyanjui to act for a group of Plaintiffs in a suit in which hitherto, Mr Ngoge had been acting for all the Plaintiffs. Following this application by of Notice of Motion, the Court of Appeal in granting the stay prayed for, stated as follows and we quote:

> " The upshot of all this is that it is important that the issue of the legal representation be sorted out before the main suit proceeds to hearing. An order of stay of the ruling and orders of the Hon Lady Justice Mary Ang'awa given on 16/12/2011 in Nairobi HCCC No 279 of 2003 is hereby granted pending the hearing and determination of the appeal. The Notice of Motion succeeds only to that extent."

31. Flowing from the application and resultant order by the Court of Appeal, one is bound to ask whether the Motion even as of an interlocutory nature as it was, was a matter involving the interpretation or application of the *Constitution*. Was the issue before the High Court and Court of Appeal of such a nature as to bring the present appeal within the ambit of article 163(4)(a)? In our firm opinion based on our reasoning in the foregoing paragraphs, the answer to this question must be in the negative. The

matter before the Court of Appeal was not one of constitutional interpretation or application. The question before the Court of Appeal revolved around the proper meaning and import to be ascribed to order 1 rule 8 of the Civil Procedure Rules within the context of a Representative Suit. The Court of Appeal rightly in our view granted a stay of the ruling and orders of the High Court as prayed by the Applicant/Petitioner herein to allow the matter to be substantively argued before it. A final determination would then allow the main suit to proceed at the High Court expeditiously. Although it is not very clear from the Ruling by the Court as to why it granted the first prayer of the application only, it is our understanding that the grant or refusal to grant the other orders sought in the Notice of Motion was dependent on the final determination of the question as to whether Mr Kinyanjui had properly entered upon HCCC 279 of 2003, as the legal representative of a group of plaintiffs.

32. The order by the Court of Appeal granting the stay of proceedings as prayed by the Applicants was largely if not wholly in their favour. Yet Mr Ngoge has appealed to this Court against the Court's Ruling even before that Court disposes of the interlocutory issue regarding legal representation. One may ask, what are Appellants complaining about? To our bewilderment and perhaps in an attempt to transmute an ordinary question of interpreting a Rule of Civil Procedure to one of constitutional interpretation, so as to fit it into the ambit of article 163(4)(a), Mr Ngoge, now denies that he sought a stay from the Court of Appeal. At page 6 of the bundle of his written submissions he states and we quote:

> "The Applicants did not go to the Court of Appeal to ask the Court of Appeal (under certificate of urgency) to determine the alleged issue of legal Representation (sic). And neither did they go to the Court of Appeal to pray for orders staying the proceedings of the High Court pending the resolution by the Court of Appeal of alleged question of legal representation in the Appellants intended Appeal as purported by the respondents in their diversionary objections filed herein."

33. The above quoted statement by Counsel for the Appellants is as surprising as it is strange. Strange because the whole question that has catapulted this appeal to the Supreme Court is about whether the firm of Kinyanjui Advocates is rightly on record. The less said about it, the better. But for purposes of record, we hereby reproduce the first paragraph of the Notice of Motion in Civil Application No 291 of 2011 the Ruling pursuant to which the Petition of Appeal has been filed in this Court. The Para in question reads as follows:

34. For Orders:

    1. That the Honourable Court be pleased to stay the execution of the Ruling and orders of the Honourable Lady Justice Mary Ang'awa given on December 16, 2011 arbitrarily and unconstitutionally imposing the Second Respondent Advocate to act for the applicants in Nairobi HCCC No 279 of 2003 bypassing the 4 representatives appointed by the High Court in the matter on October 27, 2009 to sue and Act on behalf of all Plaintiffs/Applicants under order 1 rule 8 of the former civil procedure Rules.

35. It is clear that the Appellants went to the Court of Appeal to seek a stay of the ruling and orders of the High Court in HCCC No 279 of 2003 pending the determination of a legal question. They obtained that stay but before the Court of Appeal makes a final determination, they rush to this Court alleging violations of their constitutional rights by both the High Court and Court of Appeal. The entire Petition of Appeal reads as if it is the High Court and Court of Appeal that are on trial. Such conduct in our view, whether inspired by the zeal of the parties or advice of Counsel amounts to a serious abuse of the process of Court. We wholly embrace the view expressed by the two judge bench of this Court in the Erad case that the Supreme Court, as the ultimate judicial agency, ought . . . , to exercise its powers

strictly within the jurisprudential limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of other courts and tribunals . . . it would be perverse for this Court to assume a jurisdiction which by law, is reposed in the Court of Appeal.

36. Coming to the question whether article 163(4) confers upon the Supreme Court the jurisdiction to entertain not just concluded cases but interlocutory orders from the Court of Appeal, all we can say at this stage is that even if it were to be assumed that the Court has appellate jurisdiction in appeals against interlocutory orders (which position we hesitate to declare at this stage), the interlocutory order the nature of which is being appealed against in the present case is not one that would inspire this Court to exercise jurisdiction in favour of the Appellants. At any rate, such a scenario might revive the question as to whether prior leave of the Court would be necessary.

37. In view of the reasons proffered, we decline jurisdiction in respect of this Appeal. The Appellants would be well advised to take advantage of the stay granted by the Court of Appeal which stay they themselves sought. They should seek a quick disposal of the issue of legal representation by the Court of Appeal so that proceedings in the main High Court Case Number 279 of 2003 can commence expeditiously. This is the only logical course of action open to the Appellants. We have no doubt in our mind that what all the Appellants crave for in this matter is the quick conclusion of the main suit currently stuck at the High Court so that each of them can move on with life.

The Respondents' costs in this case shall be borne by the Appellants herein.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2012.

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P. K. TUNOI

JUDGE OF THE SUPREME COURT

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S. C. WANJALA

JUDGE OF THE SUPREME COURT

I certify that is a true copy of the original

Ag. REGISTRAR