REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala, & Njoki Ndungu & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 8 OF 2016

BETWEEN

KENSALT LIMITED……..……..…..… APPELLANT

AND

WATER RESOURCES MANAGEMENT

AUTHORITY……..……..RESPONDENT

(Being a Preliminary Objection (dated 2 November 2016) to the Supreme Court's jurisdiction to entertain intended appeal)

RULING OF THE COURT

A. INTRODUCTION

[1] The respondent raises a preliminary objection (dated 2 November 2016), contesting the jurisdiction of this Court to hear and determine the petition of appeal dated 6 June 2016. It is contended that the petition does not disclose any issue involving the interpretation or application of the Constitution, yet leave to appeal has not been secured from either the Court of Appeal or the Supreme Court, in the terms of Article 163(4) (b) of the Constitution.

B. BACKGROUND

[2] The respondent, on 21 November 2013, filed a suit in the Environment & Land Court (ELC) at Malindi, against the petitioner, claiming the sum of Kshs.270,295,759.90, as water charges allegedly due, for the use of water in the respondent's salt-manufacturing process.

[3] The petitioner herein, by Notice of Motion of 17 January 2014, under Order 2, Rule 15 (a) and (d) of the Civil Procedure Rules, sought to have the plaint struck out, and the ELC proceedings dismissed, on the ground that the respondent lacked *locus standi* to bring the said suit, as it had no mandate whether by the Water Act or the Constitution, or any other law, to levy charges for the use of sea-water. The petitioner urged that, for such lack of

locus standi, the ELC lacked jurisdiction to conduct the proceedings; entertain the ELC proceedings; that sea water was *"res nullius"*, and incapable of ownership whether in law or equity; and that the respondent lacked constitutional authority to levy a tax, in the absence of an express provision permitting it to do so either under the Water Act, or the Water Resources Management Rules 2007 (the Water Rules).

[4] By its Ruling of 17 October 2014, the ELC *(Angote J.)* allowed the application by the petitioner, and struck out the ELC proceedings on all the grounds except the one that sea-water was "*res nullius*".

[5] Aggrieved by the ELC Judgment, the respondent filed Civil Appeal No. 9 of 2015, against the decision of the ELC. The petitioner, for its part, lodged a cross-appeal, limited to challenging the ELC finding that sea-water was not "*res nullius*".

[6] The Court of Appeal (*Makhandia, Ouko,* and *M'inoti JJA*) at Malindi delivered its Judgment on 22 April 2016, setting aside the Ruling and Order of the trial Court, and directing that the matter be heard on its merits by a different Judge. The Appellate Court observed that the respondent's case raised triable issues which could only be determined through a full hearing.

C. SUBMISSIONS OF COUNSEL

[7] The respondent, in written submissions dated 2 May 2019, has raised one issue: *whether this Court has jurisdiction to hear appeals from interlocutory decisions of the Court of Appeal.* The respondent calls in aid guiding principles in the case of ***Lenny Maxwell Kivuti v. Independent Electoral and Boundaries Commission (IEBC) & 3 Others*** [2019] eKLR; the question being: whether or not this Court is clothed with jurisdiction to hear the instant appeal from the Court of Appeal. It is urged that the petition does not meet the test endorsed in ***Kivuti,*** and that this Court lacks jurisdiction.

[8] It is submitted that the appeal relates to an interlocutory Judgment of the Court of Appeal, on an interlocutory issue, which did not involve the *interpretation* or *application of the Constitution.* It is urged that the petition has been improperly lodged under Article 163 (4) (a) of the Constitution, and that it falls not under that provision. It is submitted that the Judgment appealed from was premised upon an interlocutory application made pursuant to Order 2 Rule 15(1) (a) and (b) of the Civil Procedure Rules, which is subsidiary legislation.

[9] It is submitted that the Court of Appeal had undertaken no interpretation or application of the Constitution, when it set aside the interlocutory Order of the trial Court; and reliance is placed on the case of ***Community Uplift Ministries INC v. Nathan Chesang Moson & 2 Others*** [2017] eKLR, where this Court declined to hear a similar matter, as the petition arose from a Ruling of the Court of Appeal which did not involve the interpretation or application of the Constitution. Reliance is also placed on another decision of this Court, ***SAJ v. AOG & 2 Others*** [2013] eKLR, where it was held that a proper invocation of jurisdiction is attained only when substantive matters in the appellant's petition have been addressed. It is urged that the petition is premature, since the substantive matters raised in the petition remain unanswered.

[10] Learned counsel urged that, as the petition had not met the criteria under Article 163(4) (a) of the Constitution, it was incumbent upon the petitioner to seek leave of the Court under Article 163 (4) (b) of the Constitution, to challenge the Judgment of the Appellate Court, on an interlocutory issue as to whether or not the respondent's suit disclosed a reasonable cause of action, to warrant full trial on merits. It was urged that the petition is an attempt to circumvent the mandatory terms of Article 163(4) (b) of the Constitution — and so, this Court should dismiss the same.

[11] The petitioner, by way of written submissions dated 4 August 2019, raised three issues for determination, namely:

(i) whether the petitioner meets the terms for its appeal to lie as of right before this Court, under Article 163 (4) (a) of the Constitution;

(ii) whether the petition herein arises from an interlocutory appeal, and if so, whether this Court has jurisdiction to entertain such; and

(iii) whether the petition herein is premature, misconceived, vexatious or in any way an abuse of Court process, and thus due for striking-out and/or dismissal.

[12] On the first issue, the petitioner has relied on certain decisions of this Court. The first in line is ***Erad Suppliers & General Contractors Ltd v. National Cereals & Produce Board*** [2012] eKLR, where it was held that for an appeal to be admissible under Article 163(4) (a), the petitioner is to demonstrate that the matter coming on appeal had first been a subject of litigation before the High Court, and had risen through the judicial hierarchy on appeal. Also cited was the case of ***Hassan Ali Joho & Another v. Suleiman Said & Others*** [2014] eKLR, where this Court restated the issues to be considered in establishing admissibility under Article 163(4) (a) of the Constitution. The petitioner has, furthermore, reproduced the guiding principles for hearing appeals under Article 163 (4) (a), as set out in ***Gatirau Peter Munya v. Dickson M. Kithinji & Others*** [2014] eKLR.

[13] The petitioner poses the question *"whether the instant appeal has taken a trajectory of constitutional application or interpretation through the superior courts below, thus entitling the petitioner to bring it before this Court as a matter of right"*. The petitioner recalls its grounds for seeking the striking out the plaint at the ELC: it had on that occasion referred to Articles 62(1) and (3), 67, 206, 210, and 260 of the Constitution — that the trial Court did take into consideration these provisions, in arriving at its decision; and so, the cause did take a "trajectory of constitutional application or interpretation".

[14] The petitioner urged that the respondent's submissions on appeal had sought to establish whether the respondent, or the National Land Commission (NLC), was constitutionally mandated to regulate the use of water resources; and whether such mandate did extend to jurisdiction over sea-water and its use. It was also submitted that the Court of Appeal, in its summary of the case, had stated that it had no doubt that the subject-matter of the appeal and the cross-appeal before it, concerned the application and interpretation of various provisions of the Constitution.

[15] However, the petitioner submitted that, contrary to the Court of Appeal's finding, the subject for determination before it was confined to two pure points of law, namely, (a) whether the respondent had *locus standi* to bring the suit, and if so, (b) whether the respondent had authority to levy charges for the use of sea-water. It is urged that the Court of Appeal's failure to address the issue of jurisdiction was a fundamental error going to the root of the petitioner's constitutional right to a fair trial. It was submitted that the Court of Appeal's failure to address either the constitutional or the jurisdictional questions raised by parties, cannot restrict the petitioner's right of appeal under Article 163 (4) (a), and that this failure cannot undermine the legitimacy of this appeal. The petitioner sought reliance on the case of ***Mohamed A. Mahamud v. Ahmed A. Mohamad & Others*** [2019] eKLR, where this Court considered its jurisdiction to determine issues not addressed by the Appellate Court.

[16] The petitioner submitted that the non-determination of fundamental issues by the Court of Appeal, would by itself be a factor in the proper invocation of the jurisdiction of the Supreme Court; and thus, in urging this Court to correct jurisdictional wrongs, it is pertinent to cite the Supreme Court decision in ***Geoffrey M. Asanyo & others v. AG*** [2018] eKLR, where it was held that: "…*where an issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs…"*

[17] It was the petitioner's standpoint that the appeal herein is not interlocutory in nature, as the Orders of the ELC had been made with finality, leaving no question outstanding. Learned counsel considered it quite relevant, in this regard, that the Appellate Court's decision came in the format of "Judgment" — thus conveying the impression of finality.

[18] Besides, learned counsel urged, an interlocutory decision could properly found an appeal to this Court under Article 163(4) (a): so long as it involved a constitutional issue, determined by the High Court, becoming the subject of appeal through the Court of Appeal, to this Court — by the precedent of the ***Joho*** case.

[19] It was submitted that the petition is neither premature, nor misconceived, having been brought as a matter of constitutional right under Article 163(4) (a). It was urged that the petition does not constitute an abuse of Court process, in the light of authorities on record, such as ***Hassan N. Charo v. Khatib Mwashetani & Others*** [2014] eKLR, where the Court adopted ***Black's Law Dictionary's*** definition of "abuse of process", as "*improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process or scope*…" So it was urged that the preliminary objection merits dismissal.

D. ANALYSIS AND DETERMINATION

[20] The sole question for determination is whether the petition dated 6 June 2016 has been properly brought under Article 163 (4) (a) of the Constitution. This Court has already set clear precedents to guide the application of Article 163 (4) (a) of the Constitution, which relates to *jurisdiction.* The applicability of the guidelines embodied in such precedents will depend on the facts of each case.

[21] In the ***Erad Suppliers & General Contractors Ltd*** case *(supra)* this Court held that, for an appeal to be admissible under Article 163(4) (a), a petitioner must demonstrate that the matter coming on appeal was *subject to litigation before the High Court,* and has *risen through the judicial hierarchy on appeal*. In the ***Lenny Kivuti*** case *(supra)* and ***Gatirau Peter Munya*** *(supra),* we set out the guiding principles for entertaining appeals under Article 163 (4) (a). In the ***SAJ*** case *(supra),* the Court addressed the issue of injustice, as it may flow from an appeal brought under Article 163(4) (b).

[22] We have attentively considered the content of the plaint at ELC; the application to strike out the plaint; and the appeal before the Appellate Court: and it is apparent to us that the issues in controversy between the parties are novel and complex, and are vigorously contested. The trial Court, however, in its Ruling of 17 October 2014, did strike out the suit.

[23] It is the petitioner's standpoint that the matter did entail issues of constitutional application and interpretation, at the trial Court. Upon perusing the Ruling of the trial Court, we find that it addresses various articles of the Constitution, before arriving at the conclusion that the respondent lacks the mandate to regulate the use of the sea's resources. These include Articles 62(1) and (3); 67 (2) (a); 206; 210; and 260. It is no less clear, however, that the Appellate Court *had not interpreted or applied the Constitution*. But the petitioner submits that, non-determination of fundamental issues by the Court of Appeal, is a proper basis for lodging the petition as a matter of right.

[24] It is necessary for us to consider the context in which various articles of the Constitution were applied or interpreted by the trial Court. The application that led to the respondent's suit being struck out, was brought under Order 2, Rule 15 (1) of the Civil Procedure Rules, whereunder no evidence was admissible. As rightly held by the Appellate Court, the remedy of striking out pleadings is resorted to most sparingly, and as a last resort; the alternative being a recourse to Rule 15(1), which gives an exception. The trial Judge, however, engaged in a mini-trial, and decided upon substantial issues between the parties: and this led the Appellate Court to observe, quite rightly, that the parties' ultimate rights are not to be decided at an interlocutory stage, except in the clearest of circumstances, and that the trial Court was only required to decide whether the respondent's case disclosed a

reasonable cause of action, or was an abuse of Court process. No less clear is it to us, that the trial Judge did misapprehend the import of the application before him. This is the context in which the trial Court applied various articles of the Constitution.

[25] In ***SAJ v. AOG & 2 Others*** [2013] eKLR, this Court held that its jurisdiction can only be invoked when substantive matters in the appellant's petition have been answered. Although the Court was, in that case, dealing with jurisdiction under Article 163 (4) (b), the decision is relevant in this case. The trial Court had acted upon pleadings without an oral hearing, to determine a contested action; and this is the basis of our view that, substantive matters in the plaint and the petition have not been answered in the proper forum. There had been triable issues that warranted full trial — these emerging from the issues listed for determination by the trial Court. Such questions as: whether or not the respondent had the power to regulate the use of sea-water, or levy charges for its use; whether sea-water is *res nullius*, and who, between the appellant and NLC, had power to regulate the use of the water-resource — should have been determined on merits, at the trial. As rightly, in our view, perceived by the Appellate Court, an expert witness would have been called to give evidence, in due conduct of proceedings. Only in these circumstances should the trial Court have applied various articles of the Constitution, in resolving issues of rights between the parties. It emerges, consequently, that the determination made by the trial Court was premature.

[26] It was premature to determine the rights of the parties at the interlocutory stage — a position which remains unaffected by any numbers of reference made to articles of the Constitution. It would, in our view, cause injustice to ascribe such matters to Article 163 (4) of the Constitution, as the issues in controversy between the parties may not be determined on merit. We are in agreement with the Appellate Court, that the issues raised ought to have gone to trial.

E. ORDERS

[27] Accordingly, we make the following Orders:

(a) The Preliminary Objection dated 2 November 2019 is hereby allowed.

(b) The petition dated 6 June 2019 is hereby struck out.

(c) The petitioner shall bear the costs entailed before this Court and Courts below.

DATED and **DELIVERED** at **NAIROBI** this ***10th*** day of ***January, 2020.***

…….. **……**

M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……. **…….**

S.C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…….

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA