



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

[Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ]

PETITION 40 OF 2018

DYSARA INVESTMENT LIMITED.....1ST APPELLANT

INTERNATIONAL LEGAL RESOURCES CORPORATION LIMITED.....2ND APPELLANT

LIVIO LUIGI BERETA.....3RD APPELLANT

VERSUS

WOBURN ESTATE LIMITED.....1ST RESPONDENT

WOBURN MANAGEMENT LIMITED.....2ND RESPONDENT

UGO TROIANI.....3RD RESPONDENT

ROBERT FERRARI.....4TH RESPONDENT

DR. MINAZI PUNJANI.....5TH RESPONDENT

DOTTORESSA FRANCESCA TURINA.....6TH RESPONDENT

(An appeal from the judgment and Orders of the Court of Appeal (Visram, Karanja & Koome JJA)

dated the 20th September, 2018 at Malindi Court of Appeal No. 20 of 2018)

RULING

[1] Before the Court is a Notice of Motion Application dated 27th February, 2019 and filed on 27th February, 2019, within Petition 40 of 2018. It is filed pursuant to Sections 21 and 24 of the Supreme Court Act, 2011 and Rules 3 (5) and 23 of the Supreme Court Rules, 2012. The Application is supported by the sworn affidavit of Victoria Simiyu Okata, Counsel for the Applicants.

[2] The Applicants seek leave to file a Supplementary Record of Appeal comprising of documents that were omitted from the Record of Appeal filed on 31st October, 2018. These documents are the Notice of Appeal lodged in the High Court, Memorandum of Appeal lodged in the Court of Appeal and the parties' written submissions which they had filed and relied on in the Court of Appeal. All these are mandatory documents in a record of appeal under Rule 33 (4) and 33(7) of the Supreme Court Rules. The Applicants aver that their omission was due inadvertent omission given the hasty filing of the appeal before the lapse of the statutory

30 days provided for filing an appeal. The Applicants urge that the orders sought be granted as the Respondents will not be prejudiced by their issuance.

A. LITIGATION SUMMARY

[3] The suit before the High Court, *ELC No. 51 of 2014*, concerned a dispute between the parties arising from a contract pertaining to the service charge payable by the Appellants. This was in regard to the leases entered into with the Respondents, in respect of some of the apartments erected on Plot No.10714 situated in Malindi also known as Woburn Residence Club. At execution of the lease contracts, the Appellants were to pay a provisional monthly rate service charge. The charge payable was subject to review upon the Respondents availing statements of accounts which the Appellants would ratify. However, contrary to that agreement it is alleged that the Respondents demanded for amounts which exceeded the provisional rate without availing the required statements of account to enable proper calculations.

[4] The Respondents filed a Preliminary Objection dated 3rd April, 2014 on even date challenging the Court's Jurisdiction. The Preliminary Objection was based on the ground that clause 2.5 of the contract provided for the manner of solving disputes. The trial Judge (*Angote, J.*), however, dismissed the Preliminary Objection on the main ground that it did not raise pure points of law. The Respondents appealed to the Court of Appeal against that finding. The Court of Appeal overturned the decision finding that the Preliminary objection raised a pure point of law on jurisdiction. That court's opinion was informed by the uncontroverted fact that the parties had agreed on how to resolve disputes under clause 2.5.

[6] That finding has triggered the Appeal before this court pursuant to which the instant Application is filed. The 1st and 2nd Respondents responded to the appeal by filing a Preliminary Objection, Submissions and their list of authorities in support of the Preliminary Objection on 19th Dec 2018. The Deputy Registrar directed the Appellants to respond to the Preliminary Objection. The Appellants however filed the instant Application on 27th February, 2019 seeking leave to file a Supplementary Record of Appeal so as to include documents left out during the filing of the record of appeal.

[7] On 7th March 2019, the Respondents in opposition to this Application filed another Preliminary Objection dated 6th March, 2019. It is a replica of the Preliminary Objection filed in opposition to the appeal. The Hon. Deputy Registrar directed parties on 25th March 2019 to file and exchange written submissions on or before 1st April, 2019 in respect of the Application. The Applicants filed their Submissions dated 26th March 2019 in opposition to the Preliminary Objection dated 6th March, 2019.

B. THE PARTIES' PLEADINGS AND SUBMISSIONS

The Applicants' Written Submissions

[8] The Applicants' submissions are in support of the Application herein and in opposition to the Preliminary Objection dated 6th March 2019. Relying on the case of *Nicholas Kiptoo Arap Salat vs. IEBC & 7 Others (2014) eKLR*, they submit that the orders sought to extend time are discretionary and should be exercised as per the guiding principles laid therein. They also rely on the Court of Appeal decision in the case of *Pithon Waweru Maina vs. Thuka Mugiria (1983) KLR*, which also laid guiding principles on exercise of judicial discretion.

[9] They argue in that context they have met the requirements set for grant of the orders sought. This argument is backed by the reasons that they obtained the typed proceedings on 28th October 2018, four days before lapse of time for filing an appeal. That time started running on the 1st October 2018, when they filed the Notice of Appeal and that in the process of the rush to comply and file the said Notice within time, counsel inadvertently forgot to include the documents sought to be filed in the supplementary record of appeal. They submit that contrary to the Preliminary Objection filed by the Respondents, the court has jurisdiction to hear and determined the appeal herein. They thus urge that the prayers sought ought to be granted.

(ii) *The Preliminary Objection*

[10] The Preliminary Objection disputes this Court's jurisdiction on grounds that the Appeal does not involve the interpretation or the Application of the Constitution. That it did not also raise any constitutional question before the Courts below and that certification had not been sought to declare the matter as one of General Public Importance. They refer to their Preliminary Objection and submissions filed earlier on in making these submissions and aver that the Appellants had no right of access to this

Court. They sought to adopt their submissions filed earlier in support of the first Preliminary Objection in that regard.

(iii) 1st and 2nd Respondents' Written Submissions

[11] The 1st and said Respondents submit that the issue they raise on jurisdiction is a point of law informed by the jurisprudence originating from this Honourable court in decisions. That this court's appellate jurisdiction in previous matters arising from the Court of Appeal is only exercised pursuant to either Article 163(4) (a) or 163 (4) (b). They further submit that the issues before the court arose from the interpretation of a contract entered between the parties and since the Appellants have not sought Certification to appeal under Article 163 (4) (b) as a matter of General Public Importance [GPI], it means that their appeal lies under Article 163(4a) as of right, as guided by the case of *Prof. Ayiecho Olweny vs. James Onyango K'Oyoo & 2 Others (2018) eKLR*.

[12] They also relied on the case of *Lawrence Nduttu & 6000 others vs Kenya Breweries Ltd (2012) eKLR*, and *Charles Michael Angus Walker Munro vs. Pamela Ann Walker Munro* please add citation here that appeals under Article 163(4) (a) must revolve around interpretation of the Constitution from the courts below and that pleadings and mere allegations of parties asserting that constitutional issues are involved does not clothe the court with jurisdiction. They thus argue that an examination of proceedings in the courts below does not reveal any interpretation of the Constitution by any court in this matter.

[13] In citing the case of *Hermanus Phillipus Steyn vs. Giovanni Ruscone (2013) eKLR* that private contract was negotiated between the parties as to terms and further that the terms of the Contract did not have any bearing on public interest. They argued that the appeal is an abuse of the court process, relying on the decided case of *Rutongot Farm Limited vs. Kenya Forest Service & 3 Others (2018) eKLR*, they urge that the appeal be dismissed with costs.

C. ANALYSIS AND DETERMINATION

[14] We have considered the parties' pleadings and submissions concerning the Application, the issues for determination are as follows: -

[a] Whether the court has jurisdiction to entertain the Application and the appeal.

[b]. Whether the orders sought in the Application can issue

[15] In addressing both issues seriatim, we note that the Respondents challenge this court's jurisdiction to hear and determine not only the Application but also the appeal generally, on grounds that the appeal is not within the four corners of the court's express jurisdiction as per the law; that an appeal from the Court of Appeal can lie before this Court either upon certification as a matter of GPI by the Court of Appeal under Article 163(4) (b), or it be filed directly if it involves matters of interpretation and Application of the Constitution under Article 163(4) (a).

[16] Since the Applicants never sought certification under the first limb, the Respondents urge the court to deem that the appeal is then one involving interpretation or Application of the Constitution. And that subject matter of the suit, being the parties' obligations in a contract and interpretation of contract terms, they argue that these are not matters of constitutional interpretation. That there is no other avenue left to confer this court with jurisdiction. They thus urge the court to dismiss the Application and strike out the appeal with costs for lack of jurisdiction.

[17] The Applicants did not submit extensively on the issue of jurisdiction save on the single averment in their submissions that the court has jurisdiction to hear and determine the appeal.

[18] On our part, we have perused the plaint in **Environment and Land Court [ELC] Case No. 51 of 2014** where we note that the issues raised were based on fraud, breach of trust and misrepresentation in a contract. Further the ruling of that court dated 8th Nov 2017 on the Preliminary Objection on the jurisdiction of the court to hear the suit in light of dispute resolution clause 2.5 triggered appeal proceedings. We have also considered **Civil Appeal No. 20 of 2018** in the Court of Appeal and which is the basis of the appeal before us. We note that in all of the above, there was no mention of any Article of the Constitution.

[19] We have further perused the petition of appeal before us. The Petitioners in Para 46 state that the appeal is brought under Article 163(4)(a), as guided by the case of *Peter Munya vs. Dickson Mwenda Githinji & 2 Others Petition No. 2 of 2014*. That the

matters before the Court of Appeal also allegedly revolved around interpretation of Articles 50 and 159 of the Constitution.

[20] This court has had the occasion to define what constitutes a Preliminary Objection. In the case of *Aviation & Allied Workers Union Kenya vs. Kenya Airways Limited & 3 others [2015] eKLR, Application No. 50 of 2014, held in Para 15;*

‘Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.’

[21] Having considered the contents of the preliminary objection of the Respondents, we are satisfied that the challenge on the Court’s jurisdiction in the appeal amounts to an issue capable of being addressed as a preliminary point of law. This is because the jurisdiction of this court is set by the Constitution and the statute. Since the Applicants indicate that they are coming to this court under Article 163(4) (a), they have the duty to demonstrate that the issues in the appeal involve constitutional interpretation and Application and not a mere reference of constitutional provisions in the appeal, as we held in the case of *Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 others [2012] eKLR, Petition 2 of 2012.*

[22] We have furthermore noted that the first time article of the Constitution was mentioned in this appeal is in the petition of appeal filed before this court. In that regard, we note our holding in the case of *Lawrence Nduttu & 6000 Others vs. Kenya Breweries Limited & Anor – SC Petition No. 3 of 2012 [2012 eKLR] and Erad Suppliers & General Contractors Limited Versus National Cereals & Produce Board SC Petition No. 5 of 2012* where we stated that such an issue must have formed an integral part of the issues in the superior court of the first instance and should have formed part of the courts’ decisions through the hierarchy of courts. As we further held in the case of *Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others [2014] eKLR (The Joho case)* at paragraph 37, the superior courts below must have interpreted it and made a finding so that the appeal rises through the hierarchy of courts.

[23] We have furthermore found in our past decisions that what amounts to a matter of Constitutional interpretation in instances when the alleged Constitutional issue must have been infused in the matter before the superior courts so that though not specifically raised, it forms and informs the decision of the courts below and thus took a trajectory of constitutional interpretation or Application. In *Peter Gatirau Munya vs. Dickson Mwenda Kithinji & Others Supreme Court Application No. 5 of 2014*, (Peter Munya Case 1) we held in para 69:

“... Where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an applicant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or Application.”

[24] Having gleaned through all the pleadings before us, we find that the Appellants’ before this court did not raise any constitutional issue either in the Environment and Land Court in the first instance neither was such an issue addressed in the findings of the Court of Appeal. We have also not seen any issue taking a constitutional trajectory in either of the two courts. It is our view therefore that the issues raised and the arguments presented turned on the terms of the contract which was the subject of the suit and on the interpretation of not any constitutional provision. In fact, there was no effort demonstrated by the applicant as to the existence of such a constitutional trajectory.

[25] In light of the findings above, observation, we hereby find that the preliminary objection has merit and is hereby upheld.

[26] In the circumstances, we make the following orders:

- (a) *The Preliminary Objection is hereby allowed.*
- (b) *The petition of appeal dated 25th October 2018 and filed on 31st October 2018 is hereby struck out.*
- (c) *The Applicants shall bear the costs of the appeal.*

DATED and DELIVERED at NAIROBI this 24th of January, 2020.

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M.K IBRAHIM

JUSTICE OF THE SUPREME

COURT

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S. C. WANJALA

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

.....

J.B OJWANG

JUSTICE OF THE SUPREME

COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME

COURT



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