

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Mwilu (DCJ & V-P), Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION 11 OF 2019

PAUL MUNGAI KIMANI 1ST PETITIONER

JAMES KIMANI 2ND PETITIONER

NEW JAMBO TAXIS 3RD PETITIONER

VERSUS

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

JULIUS NJOROGE 2ND RESPONDENT

MS. MWENDE 3RD RESPONDENT

FREDRICK MURUNGA 4TH RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting in Nairobi (**Hon. Waki, Musinga & Odek JJA**) dated the 25th January, 2019 in Nairobi Civil Appeal No. 2 of 2013).*

JUDGMENT OF THE COURT

I. INTRODUCTION

[1] This is a Petition of Appeal dated 15th March, 2019 and filed on 19th March, 2019 pursuant to Section 15(2) of the Supreme Court Act, 2011, Rule 32 of the Supreme Court Rules 2011, Articles 2(4) and 163(4) (a) of the Constitution. A supplementary record of appeal was filed on 26th June 2020. The Appeal is

challenging the entire judgement of the Court of Appeal (*Waki, Musinga & Odek JJA*) delivered on the 25th January 2019 in Nairobi Civil Appeal No. 2 of 2013. The Court of Appeal upheld the decision of the High Court (*Mwera J*) which struck out the Appellants' suit with costs.

[2] In particular, the Petition seeks the following reliefs, reproduced verbatim, that:

- (i) *The Petition be allowed with costs.*
- (ii) *There be substituted, for the orders of the superior court and the Court of Appeal, an order allowing the Plaint dated 14th October, 1996 as prayed.*

II. BACKGROUND

a. Proceedings in the High Court

[3] The Appellants moved the High Court via HCCC No. 2543 of 1996 challenging their exclusion from operating their taxis at the Jomo Kenyatta International Airport (JKIA) by the 1st Respondent in breach of an existing lease. They sought the following specific orders, produced verbatim:

- (a) A declaration that a taxi business like that operated by members of the third plaintiff is property within the meaning of Section 75 of the Constitution.***
- (b) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff from Jomo Kenyatta International Airport on grounds of their ethnic origin is in breach of the plaintiffs' right under Section 82 of the Constitution of Kenya not to be subjected to discriminatory practices.***

(c) A declaration that the removal of the taxis of the first and second plaintiffs and of the members of the third plaintiff from Jomo Kenyatta International Airport was in breach of the plaintiffs' right under Section 75 of the Constitution of Kenya not to be deprived of property.

(d) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff was a contravention of their right under Section 77, to the protection of the law.

(e) A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff is a contravention of their right under Sections 78 and 82 of the Constitution to hold such opinions and views including political as persuades their consciences.

(f) A permanent and perpetual injunction to restrain the first defendant from further excluding the plaintiffs' taxis from the said Airport.

(g) A mandatory injunction to compel the first defendant to allow the return of the excluded taxis of the third plaintiff.

(h) A permanent and perpetual injunction to restrain the defendants from trespassing to the plaintiffs' offices.

(i) A mandatory injunction to remove the second, third and fourth defendants from the plaintiffs' office.

(j) Mesne profits for trespass against the defendants.

(k) Damage for breach of contract against the first defendant.

(l) Costs of this suit.

(m) Interest.

[4] Pending the hearing and determination of the suit, the Appellants filed an application seeking an interlocutory mandatory injunction to compel the 1st Respondent to allow them to continue operating their taxi business at JKIA. The 1st Respondent opposed the application on the grounds that: ***no statutory notice had been served upon the 1st Respondent as required by Section 34(a) of the Kenya Airports Authority Act (KAA Act) (Cap. 395); the provisions of Section 33(1) of Cap. 395 which provide for Statutory arbitration had not been followed by the Appellants; the proceedings were wholly misconceived, incompetent and bad in law; the application did not satisfy the tests in GIELLA VS. CASSMAN BROWN AND COMPANY LIMITED (1973) E.A. 358. the application did not meet the conditions for the granting of a mandatory injunction; and that the application is frivolous, vexatious and an abuse of the court process.***”

[5] In a Ruling delivered on *24th January 1997*, *Hayanga J*, reinstated the Appellants’ operation at JKIA pending the hearing and determination of the suit. Aggrieved by the said ruling, the 1st Respondent appealed against the decision and the Court of Appeal, in a judgment delivered on *27th November 2009* set aside the orders made by *Hayanga, J.*

[6] Subsequently, upon resumption of the hearing in the High Court, the 1st Respondent filed a Preliminary Objection dated 23rd August, 2010, seeking to have the Appellants’ suit struck out on grounds that: ***the Appellants’ suit and the entire proceedings therein had been filed in contravention of the mandatory provisions of Section 33 and Section 34(a) of the Kenya Airports Authority Act, Cap. 395, (“the Act”); the suit and the entire proceedings therein were premature, misconceived, incompetent and a complete nullity;*** and that consequently, ***the High Court lacked***

jurisdiction to entertain the suit. They sought the Court to strike out the suit with costs

[7] *Mwera, J (as he then was)*, upheld the Preliminary Objection and struck out the Appellants' suit with costs to the Respondents.

b. Proceedings in the Court of Appeal

[8] Aggrieved by that High Court ruling striking out the suit, the Appellants appealed to the Court of Appeal, in *Civil Appeal No.2 of 2013*. They raised 10 grounds of appeal, which the Learned Judges of Appeal summarized into five (5) issues for determination as follows:

- (i) ***Whether the Preliminary Objection was res judicata.***
- (ii) ***Whether the learned judge erred in both law and in fact in upholding the application of Sections 33 and 34 of the KAA Act.***
- (iii) ***Whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed.***
- (iv) ***Whether the Preliminary Objection constituted a pure point of law.***
- (v) ***Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under Section 84 of the Constitution.***

[9] In a ruling delivered on 25th January, 2019 the Court of Appeal dismissed the appeal in its entirety and ordered each party to bear its own costs. On the first issue, *as to whether the Preliminary Objection was based on issues which were res judicata*, the appellate Court found that it was not since neither the High Court nor the Court of Appeal had previously pronounced themselves on Section 34 in the course of the dispute.

[10] On the second issue, ***whether the learned judge erred in both law and in fact in upholding the application of Sections 33 and 34 of the KAA Act in striking out the Appellants' suit***, the appellate Court found that since it had previously pronounced itself on the constitutionality of the Appellants' claim, and particularly Section 33(1) of the KAA Act, it was functus officio and could not revisit that issue. Thus, the Learned Judges rejected the Appellants' claim that the learned Judge erred in failing to appreciate that the suit before him was for enforcement of fundamental rights.

[11] As regards the third issue, ***whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed***, the appellate Court found that there was no basis for finding that there was inordinate delay in filing the Preliminary Objection as the same had been raised in the 1st Respondent's grounds of opposition dated 24th October, 1996 and repeated in their defence dated 28th January, 1997 and later filed in 23rd October, 2010 after the resumption of hearing of the main suit. The Court also noted that the delay in this matter was partly occasioned by the hearing of the interlocutory application and the appeal thereto.

[12] On the fourth issue, ***whether the Preliminary Objection constituted a pure point of law***, the Court's finding was in the affirmative and agreed with the trial Court's finding that there was no denial that the Appellants had not complied with Section 33(1) and 34 of the KAA Act.

[13] Lastly, ***on whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under Section 84 of the Constitution (repealed)***, the Court of Appeal declined to find that the 1st Respondent's assertion that the mandatory provisions of **Sections 33(1) and 34** of the **KAA Act** had not been complied with was a mere technicality which the trial court ought to have disregarded as was persuaded by the Appellants. Rather, it found that parties' rights were contained in a lease which expressly incorporated the aforesaid provisions of the law and that they had to be complied with.

III. APPEAL BEFORE THE SUPREME COURT

[14] The Appellants are aggrieved by the Court of Appeal decision and moved this Honourable Court by filing this Appeal. The Appeal is premised on five (5) grounds, namely that the Learned Judges of the Court of Appeal:

- i. *Erred in holding that they had pronounced themselves on the constitutionality of the Appellants' claim and that it was functus officio;*
- ii. *Erred in taking the position that the question of constitutionality which had been pleaded in the plaint could be resolved through a Preliminary Objection which had been raised for a second time;*
- iii. *Were wrong in failing to find that the 1st Respondent's prayer to have the suit struck out on grounds that the Appellants had not observed the arbitral clause was res judicata;*
- iv. *Were wrong in failing to recognize that the Appellants had sought a substantive order for a declaration that Section 33 of the Kenya Airports Authority Act is unconstitutional to the extent of its inconsistency with Section 75, 77 and 82 of the Constitution of Kenya (former), which needed to be considered and determined on its merits at the hearing of the main suit; and*

- v. *Ignored wholly the principle that legal and factual issues are never resolved through interlocutory proceedings and further that all the proceedings that preceded the appeal were interlocutory.*

IV. PARTIES' SUBMISSIONS

[15] The Parties filed written submissions, which they highlighted before the Court. The Appellants were represented by Senior Counsel Mr. Gibson Kamau Kuria, while the 1st Respondent was represented by Counsel Mr. Daniel Mukeli. There was no appearance for the 2nd -4th Respondents and they also never filed any submissions.

a. The Appellants' submissions

[16] The Appellants filed their Written Submissions on 16th April, 2019. Further submissions were filed on 20th June 2020. They reiterated the issues for determination as set out in their Petition, thus:

- 1) *Whether based on Article 163(4) (a) of the Constitution, the Petitioners have a right of appeal and whether this Honourable Court has jurisdiction to hear and determine the appeal.*
- 2) *Whether the High Court and the Court of Appeal ignored the doctrine of supremacy of the Constitution which was written into both the current and the former Constitution.*
- 3) *Whether the Appellants were discriminated against on grounds of ethnicity by the Respondents.*
- 4) *Whether the Petitioners right to property under Section 75 of the Constitution had been contravened by the Respondents.*

- 5) *Whether the Appellants rights under Section 82 of the former Constitution not to be subjected to arbitrary and capricious exercise of power had been contravened.*
- 6) *Whether the Petitioners are entitled to the reliefs claimed in their plaint dated 14th October 1996.*
- 7) *Whether the 1st Respondent filed a Preliminary Objection which was res judicata.*
- 8) *Whether the question of the constitutionality of the arbitration clause as was raised in the plaint has been left without being substantively determined.*
- 9) *Whether the Court of Appeal ignored the requirement that it do consider comparative constitutional jurisprudence when interpreting the Constitution.*

[17] Citing Article 163(4)(a) of the Constitution, the Appellants submit that this Court is clothed with jurisdiction to hear and determine an appeal from the Court of Appeal. In order to find whether a constitutional issue is involved in a matter, it is urged that the Court should look at the original pleadings filed at the inception of the suit to find whether a constitutional issue was pleaded.

[18] They contend that they had pleaded contravention of their fundamental rights to property under Section 75 and right to protection of the same under Sections 77(9), 82 and 84 of the repealed Constitution. To buttress their arguments, they cite this Court's cases of *Anami Silverse Lisamula v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR, *Petition No. 9 Of 2014*; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR, Supreme Court *Petition No. 2 of 2014*, *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2014] eKLR, SC Application No. 10 of 2014.

[19] It is submitted that the Court of Appeal ignored the doctrine of supremacy of the Constitution and provisions of Sections 3, 75, 77, 82 and 85 of the former Constitution, which the Appellants had relied on. That the Court of Appeal instead elevated and applied sections of the KAA Act providing for arbitration as the first point of call in event of a dispute for resolution, as cited by the Respondents. This they urge was in total disregard of the Constitution, especially by finally holding that the Appellants ought to have pursued arbitration first. Further, that the Court of Appeal ignored the decision of this Court on ***Speaker of the Senate & Another v Hon. Attorney General & 3 others***, [2013] eKLR that a Constitution is a charter for transforming a country. It is also urged that the superior court had entertained a Notice of Preliminary Objection on a point that had been deemed *res judicata*.

[20] The Appellants urge that the 1st Respondent raised the Preliminary Objection 15 years later thereby contravening the provisions of Article 159(2)(d) of the Constitution and the overriding objective of the Civil Procedure Act. The Preliminary Objection was raised in disregard of the principle that the same should be raised at the earliest time possible. They maintain that the Preliminary Objection as was raised in the defence was never raised as a pure point of law since it required evidence from the lease agreement to prove. The Appellants contend that the issue as to whether the subject matter fell under Section 33 of the KAA Act was a question of fact and evidence and that the Court ought to have taken in evidence to determine the same.

[21] Furthermore, the Appellants urge, that Section 33(1) of the KAA Act was *ultra vires* Sections 75, 77 and 84 of the former Constitution, hence, null and void by virtue of Section 3 of the former Constitution as it restricts the enjoyment of a right to property and the right to access the court on claims of constitutional violations. They also submit that the alleged section purported to restrict the remedies which

were available to the person whose fundamental right had been infringed especially those of prohibition, mandamus and certiorari.

[22] While citing Sections 12, 14 and 15 of the KAA Act, the Appellants urge that the issue as to whether the 1st Respondent committed the wrongs complained of fell under the said sections and was a question of fact and evidence which could not be determined by way of a preliminary objection. To buttress their submissions, they cite the cases of **Stanley Munga Githunguri Vs Jimba Credit**, Civil Appeal No. 144 of 1988 and **A.G v Manchester Outfitters Limited, Milimani** Misc. Appl. No. 551 of 2008.

[23] The Appellants argue that their claim at the High Court was one for reliefs for breach of fundamental rights, under Section 84 of the former Constitution and not Section 33 of the KAA Act. Consequently, they maintain that the court has a wide unfettered jurisdiction to grant effective reliefs including declarations, damages and judicial review orders which they are entitled to. They cite the cases of **Kenya Bankers Association v Minister of Finance** [2001] eKLR, **Wanjuguna v Republic** [2004] 1 KLR 520, and **Ramanoop v AG** [2004] 1 CLR to support their submissions.

[24] They maintain that other than the reliefs sought in their plaint at the High Court, they sought the declaration that Section 33 of the KAA Act was inconsistent with the Constitution for limiting the reliefs parties can seek and containing unreasonable time periods of one month for service of notice and a one-year claim limitation period, which limit access justice. They relied on the cases of **Dominic Arony Aroyo vs the Attorney General**, High Court Misc. Application No. 494 of 2003 and **Rhumba Kinuthia vs Attorney General**, High Court Misc. Application. No. 1408 of 2004.

[25] They contend that the Preliminary Objection was misconceived as the subject matter entailed breach of fundamental rights, which the court has a duty to investigate first once it is raised. On this, they relied on the case of **Rashid**

Odhiambo Allogoh & 245 Others vs Haco Industries Limited, Civil Appeal No. 110 of 2001. It is submitted that Section 33 of KAA Act relied on by the Respondents to argue that the court did not have jurisdiction, provided for compensation only, whereas the Appellants complaint was in breach of their fundamental rights. They urge that the Constitution provides for unlimited guarantee for access to court for redress of violation of constitutional contraventions. Accordingly, they urge the Court to grant the prayers sought in the Petition before the High Court.

[26] Buttressing the written submissions, SC Kamau Kuria argued that Section 33 of KAA Act, was unconstitutional. This is because it limits redress for wrongs committed by the Respondents to compensation and arbitration only, contrary to Section 84 of the retired Constitution which granted access to the High Court for enforcement of fundamental rights with wide range of orders of redress. He urged that a law enacted by the legislature should not overrule the People's will as expressed in the Constitution as was held in the famous case of ***Marbury vs Madison*** 5 U.S. (1 Cranch) 137 (1803), 2 L. Ed. 60; 1803 U.S. Lexis 352. Counsel urged that this section offends the Appellants' rights in Sections 75, 77 and 82 of the retired Constitution because it denies them the right to pursue property rights without fair hearing. Reliance was placed on the case of ***Mary Wambui Munene v Peter Gichuki King'ara & 2 others*** [2014] eKLR, **Petition No. 7 of 2014, for the assertion** that the Supreme Court is the custodian of the Constitution. SC Kamau Kuria urged that the words used by the 1st Respondent's representative in chasing the Appellants away from accessing the airport were discriminatory and should not be allowed to stand unquestioned.

b. 1st Respondent's Submissions

[27] The 1st Respondent, (KAA) in its submissions filed on 24th June 2020, vehemently opposed the appeal. It framed the following as the issues for determination by the Court:

- (i) *Whether the Court has jurisdiction to hear and determine the petition of appeal before it.*
- (ii) *Whether the suit in the High Court was brought in contravention of Sections 33 and 34 of the KAA Act.*
- (iii) *Whether the Preliminary Objection was res judicata.*
- (iv) *Whether there was delay in filing the preliminary objection.*
- (v) *Whether the High Court suit was a suit for enforcement of fundamental rights under the then Constitution.*

[28] It is submitted that the Appellants do not have an automatic right of appeal to the Supreme Court under Article 163(4)(a) of the Constitution. That this Court lacks jurisdiction to entertain the appeal as it did not originate from a case involving the interpretation or application of the Constitution. It is KAA's case that the appeal before the Court of Appeal was premised on the High Court's ruling to the 1st Respondent's preliminary objection, upholding the 1st Respondent's argument that the Appellants ought to have first taken the suit before an arbitrator as per the mandatory provisions of Sections 33 and 34 of the KAA Act which governed the lease subject of the suit and any disputes arising out of its execution of its mandate, being a creature of statute. It is urged that filing the suit before the High Court was a contravention of those provisions.

[29] The 1st Respondent cites the following cases to support his argument on the Court's lack of jurisdiction: ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others*** [2018] eKLR; ***Lawrence Nduttu & 6000 others vs Kenya Breweries Limited & another*** [2012] eKLR; ***Erad Suppliers & General Contractors Limited vs National Cereals & Produce Board*** [2012] eKLR; ***Peter Oduor Ngoge vs Francis Ole Kaparo***

& 5 others [2012] eKLR; and **Lenny Maxwell Kivuti vs Independent Electoral Boundaries Commission (IEBC) & 3 others** [2019] eKLR.

[30] Further, it is submitted that the Appellants had time to comply with the provisions of Sections 33 and 34 of the KAA Act as incorporated in the lease, but instead chose to file a suit in the High Court, ignoring the clear statutory and contractual mechanism for redress. That a party required by a statute to exhaust procedural dispute resolution mechanisms before approaching the court, cannot invoke jurisdiction of the court unless it has complied with the suit governing statute first. The suit was thus premature because the one-month notice required under Section 34 of KAA was not served upon the 1st Respondent, before commencement of the suit.

[31] It is urged that the doctrine of the supremacy of the Constitution over the KAA Act does not come into question as the main issue in dispute here is based on the contractual obligations, the parties voluntarily entered into. By entering into the lease agreement, the Appellants had agreed voluntarily to be bound by the provisions of Section 33(1) of the KAA Act. Counsel denied allegations of discrimination based on ethnicity and urged that after inspection, the Authority excluded many taxis of different operators which did not meet the required standards and not only those of the Appellants. That the license to operate was always issued upon inspection and the taxis which did not qualify as per set standards were not issued with licenses.

[32] The 1st Respondent urged that the jurisdiction of the High Court is unlimited but not 'limitless' and can be limited by a statute like in this case. To anchor its argument, KAA cites the following cases; **Narok County Council vs Transmara County Council** [2009]1 EA 161; **Taxtar Investment vs Kenya Airports Authority**, HCCC No. 1238/1999; **Parapet Limited vs Kenya Airports Authority**, HCCC No. 4 of 1999; and **Kenya Association of Air Operators vs Kenya Airports Authority**, HCCC No. 974/2002(unreported),

Joseph Nyamamba & 4 Others vs Kenya Railways Corporation (2015) eKLR, ***Maya Duty Free Limited vs Attorney General & Another*** (2019) eKLR among others.

[33] Moreover, the 1st Respondent submits that the Preliminary Objection was not *res judicata*. First, because both the Rulings by *Justice Hayanga* and the Court of Appeal were on an interlocutory application and an interlocutory appeal respectively, not on the Preliminary Objection. Secondly, the Court of Appeal did not agree with Justice Hayanga's position on Section 33 and ruled that it was one of the issues to be determined in the suit between parties, and therefore it was never dealt with finality. That neither the High Court nor the Court of Appeal dealt with Section 34(a) of the KAA Act. It cites the case of ***Maithene Malindi Enterprises Limited vs Kaniki & 2 others*** [2018] eKLR in support of its submissions.

[34] The 1st Respondent also submits that there was no inordinate delay in filing its Preliminary Objection and that the same was on a pure point of law, that is, Sections 34(1) and 33 of the KAA Act. In that respect it is urged that since the issue raised pertained to the Court's jurisdiction, it ought to have been raised by way of a Preliminary Objection and further that there are no timelines for filing a Preliminary Objection. That it was in any event raised in paragraphs 27-29 of the 1st Respondent's defence.

[35] KAA asserted that parties were required to follow the procedure set out in Section 33 of the KAA Act on compensation failure to which they can have an arbitrator chosen for them by the Chief Justice. However, if a party is dissatisfied with that avenue, one is required to issue a one-month notice under Section 34 of the KAA Act before approaching court, which was not done. In any event, it was urged that the Court of Appeal dismissed the appeal after finding it was not concerned with violation of fundamental rights but based on contractual obligations between the parties.

[36] Finally, the 1st Respondent submitted that the issue of the alleged violation of fundamental rights under the Constitution was rejected and dealt with in finality by the Court of Appeal which found that the parties could not invoke constitutional issues to their aid to deal with alleged contractual breaches. KAA urged that the appeal to be dismissed.

V. ANALYSIS AND DETERMINATION

[37] Upon appreciation of the parties' pleadings and submissions, the following are the issues for determination by the Court:

(i) The jurisdiction question:

(a) whether the Petitioners have a right of appeal to this Court; and

(b) whether this Court has jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution.

(ii) Whether the Court of Appeal ignored the doctrine of supremacy of the Constitution by elevating Section 33(1) of the KAA Act over constitutional provisions.

(iii) Whether the Preliminary Objection was res judicata and whether the same was filed out of time in contravention of Article 159(2)(d) of the Constitution.

(iv) Whether the orders sought can issue.

(i) The Jurisdiction question

[38] On the twin jurisdictional question of whether this Court has jurisdiction to hear and determine this matter under Article 163(4)(a) of the Constitution, and whether the Appellants have a right of appeal before this Court, parties raised parallel arguments. The Appellants urge that the Court should look at the original pleadings filed at the inception of the matter in the High Court. That it will find

that constitutional issues were pleaded, to wit, contravention of their fundamental rights to property under Section 75 and right to protection of the same under Sections 77(9), 82 and 84 of the repealed Constitution. Further that the Court of Appeal disregarded the doctrine of supremacy of the Constitution particularly Sections 3, 75, 77, 82 and 85 of the former Constitution, and instead elevated and applied sections of the KAA Act.

[39] The 1st Respondent urge that the Court lacks jurisdiction to determine this appeal as the appeal did not originate from a case involving the interpretation or application of the Constitution. That the appeal is founded on a High Court ruling on the 1st Respondent's preliminary objection, that the Appellants ought to have first taken the suit before an arbitrator as per the mandatory provisions of Sections 33 and 34 of the KAA Act which is the Statute that governed the lease agreement between the parties. KAA dismisses the invocation of the doctrine of the supremacy of the Constitution as alleged by the Appellants urging that the same does not come into question as the main issue in dispute here was based on contractual obligations, the parties having voluntarily entered into a contract as between them.

[40] In *Fahim Yasin Twaha V Timamy Issa Abdalla & 2 Others* [2015] eKLR, the Court settled that where an appeal involves a matter of constitutional interpretation and/or application, it signals access to the Supreme Court "as of right", and no form of authorization or leave from the Court is required. Thus in the matter before us, once we establish that there is an issue that involves a matter of constitutional interpretation and/or application, it follows that the Appellants will have right of appeal before this Court.

[41] The contours of a matter falling within Article 163(4)(a) jurisdiction are now set in a number of decisions of this Court, starting with the case of *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another* [2012] eKLR where the Court stated that:

“Article 163 (4) (a) 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.....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.

... 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 of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)”

[42] The warning signaled by this Court in the above decision is that the Court should be wary of litigants who merely cite constitutional provisions in their pleadings with the intention of finally seeking an appeal to the Supreme Court, even when their case has nothing to do with constitutional interpretation and/or application. To the contrary in determining whether it has jurisdiction, the Court should keenly evaluate the Court of Appeal decision, whether in disposing of the matter, there were elements of constitutional interpretation and/or application. This does not however mean that citing constitutional provisions in one’s pleadings is not a ground for founding an appeal before this Court. In ***Gatirau***

Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, the Court stated thus:

“[69] The import of the Court’s statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant 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.”

This holding clearly shows that where specific constitutional provisions of the Constitution were cited and formed the gist of the matter before the Court of Appeal, the appeal is well anchored in Article 163(4)(a) of the Constitution.

[43] Consequently, we will agree with the Appellants that in determining whether the Court has jurisdiction one way is to look at the original pleadings to determine whether indeed specific constitutional provisions were pleaded. This is however, only conclusive where the matter as originally filed in the superior court has been wholly heard and determined and the same has been appealed to the Court of Appeal and is now subject of the appeal before the Supreme Court. What of where the substantive matter as originally filed is still pending and what is before the Supreme Court is subject of an interlocutory matter? Does the inquest start and end with the original pleadings as originally filed? We do not think so.

[44] We have severally held that this Court has no jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question is a substantive determination of a constitutional issue that has been canvassed through the Superior Courts below. (See the cases of *Daniel Kimani Njihia v Francis Mwangi Kimani & another* [2015] eKLR; *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR; and *Bia Tosha Distributors Limited v Kenya Breweries Limited*

& 6 others [2018] eKLR). In the *Ananias N Kiragu v Eric Mugambi & 2 others* [2020] eKLR we stated thus:

“8. As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the Superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that had been canvassed right through from the High Court to the Court of Appeal even though the substantive matter is still pending before the High Court.”

[45] A perfect example of a matter where despite the substantive matter as originally filed was still pending before the superior court but this Court assumed jurisdiction on an interlocutory matter was in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR. In that matter, the Court discerned and found that the issue it was being called upon to adjudicate (determination of the constitutional validity of Section 76(1)(a) of the Elections Act, 2011), though raised as an interlocutory issue, it had a constitutional permutation and had been determined by both the High Court and the Court of Appeal.

[46] With the foregoing analysis and having evaluated the record before us, we dismiss the Appellants’ assertion that the Court has jurisdiction, and that they have a right of appeal before this Court because in their original pleadings, they alleged contraventions of their rights under Sections 3, 75, 77, 82 and 85 of the former Constitution. This is because, their substantive suit as filed before the High Court was not fully determined. The same was struck out by *Mwera, J* (as he then was) in determining a Preliminary Objection filed by the 1st Respondent. Hence, in determining the jurisdiction question in this matter, this Preliminary Objection is the focal reference point.

[47] Did the Preliminary Objection as raised in the high Court involve a matter of constitutional interpretation and application? The Preliminary Objection sought to strike out the suit on the ground that the same was premature as it had been filed in contravention of the mandatory provisions of Section 33 and Section 34(a) of the Kenya Airports Authority Act. The particular grounds in support of the preliminary objection were that:

- i. *the plaintiffs' suit and proceedings have been filed in contravention of the provisions of Section 33, 34 (a) of the Kenya Airports Authority Act (Cap. 395);*
- ii. *by virtue of those provisions of law, the entire suit plus proceedings were premature, misconceived, incompetent and a nullity; and*
- iii. *further by reason of the same provisions, the court had no jurisdiction to entertain the suit and so it must be struck out with costs.*

[48] Outrightly, at this juncture, it is clear that the Preliminary objection as raised invoke no issue of constitutional interpretation. This leads us to the second consideration signaled in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others***: “*whether 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*”.

[49] A perusal of the Ruling reveals the contrary. The submissions of the 1st respondent in support of its Preliminary objection centred on the applicability of Section 33(1) and 34 of the KAA Act. It never invoked any constitutional provision or issue. On their part, the Appellants in opposing the Preliminary Objection referred to the Ruling that had been made earlier by *Hayanga, J*, in which injunction orders were granted and submitted that the provisions of the KAA Act being cited had been dismissed. On that basis, the Appellants urged that the

Preliminary objection was *res judicata*. *Mwera, J* (as he then was), upheld the preliminary objection. He dismissed the *res judicata* plea holding that the Court of Appeal had in fact stated that it left the issue of Section 33 for consideration by the trial court, and found that indeed the suit had been brought in contravention of Sections 33, for not being subjected to arbitration; and Section 34 for lack of serving a notice to the respondent. Suffices it to say that clearly, at the High Court, the matter had nothing dealing with the Constitution.

[50] Before the Court of Appeal, the Learned Judges of Appeal summarized the Appellants appeal and framed five (5) issues for determination as follows:

- (1) *Whether the Preliminary Objection was res judicata.*
- (2) *Whether the learned judge erred in both law and in fact in upholding the application of Sections 33 and 34 of the KAA Act.*
- (3) *Whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed.*
- (4) *Whether the Preliminary Objection constituted a pure point of law.*
- (5) *Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under Section 84 of the Constitution.*

[51] Outrightly, save for the fifth (5th) issue for determination, which we will shortly interrogate whether it really warrants invocation of this Court's jurisdiction under Article 163(4)(a), all other issues are not constitutional. Did the Court of Appeal apply the Constitution in its determination of the framed issues?

[52] On *res judicata*, the Court of Appeal, invoking Section 7 of the Civil Procedure Act, found that it was not applicable since neither the High Court nor the Court of Appeal pronounced themselves on Sections 33(1) and 34. It held:

“21. We have considered the ruling of Hayanga, J. and the judgment of this Court against the said ruling. We do not agree

that Mwera, J. erred in finding and holding that the preliminary objection was not res judicata. An issue can only be considered res judicata when it has been finally determined and is no longer subject to an appeal. If a lower court determines a matter or pronounces itself on an issue and subsequently an appellate court reverses that decision or finding and thereafter the hearing proceeds before the trial court, it cannot be said that the issue that had been raised and determined by the trial court earlier is res judicata.”

In making this finding, there was no indication of application or interpretation of the Constitution.

[53] Turning to the *application of Sections 33 and 34 of the KAA Act*, in striking out the suit, the Appellants had urged that the learned Judge erred as he failed to appreciate that the constitutionality of these sections was being challenged in the main suit. Further, that their case was for breach of fundamental rights and as such these sections did not apply. Prima facie, this is a constitutional issue. But does it warrant invocation of this Court’s jurisdiction?

[54] We have stated above that it is not the mere allegation or citing of constitutional provisions that places a matter within the four corners of Article 163(4)(a) of the Constitution. A party must demonstrate that those provisions were indeed subject of the court’s findings and determination. In this appeal, the appellate Court found that it had previously pronounced itself on the constitutionality of the Appellants’ claim, and particularly Section 33(1) of the KAA Act. That it had twice made a finding that the Appellants claim was not for enforcement of fundamental rights as alleged and it was thus *functus officio* on the issue. Did the Court of Appeal interpret and/or apply the Constitution in making this finding? We do not think so.

[55] It is trite law that a court of law takes judicial notice of its decisions. In holding that it was *functus officio* on the issue, the Court of Appeal made reference to its previous two decisions in: “Civil Application No. NAI 29 of 1997, **KENYA AIRPORTS AUTHORITY v PAUL NJOGU MUNGAI, JAMES KIMANI & NEW JAMBO TAXIS**, (*being an application for stay of execution of Hayanga, J’s ruling pending appeal*), and Civil Appeal No. 282 of 2001, **KENYA AIRPORTS AUTHORITY v PAUL NJOGU MUNGAI, JAMES KIMANI & NEW JAMBO TAXIS**. Upon that reference the appellate Court concluded thus:

“29. This Court, having pronounced itself on the constitutionality of the appellants’ claim, and particularly **Section 33(1)** of the **KAA Act**, it is *functus officio* and cannot revisit it. We must therefore reject the appellants’ contention that the learned judge erred in failing to appreciate that the suit before him was for enforcement of fundamental rights. As was held by this Court in **REPUBLIC v NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY [2011] eKLR**, “It is for the court to undertake a proper scrutiny based on the pleadings before it to determine whether the dispute has a complete constitutional trajectory”.”

[56] We do not find anything constitutional in a court making a finding that on an issue or suit before it, it is *functus officio*. Be that as it may, the Court of Appeal having made a finding that it has twice determined the issue in separate cases, which cases are not before this Court on appeal, the Supreme Court cannot sit on ‘appeal’ on those issues. Consequently, this allegation as framed by the Appellants does not invoke this Court’s jurisdiction under Article 163(4)(a) of the Constitution.

[57] The issue whether there was inordinate delay in the filing of the Preliminary Objection and as determined by the Court of Appeal, dismissing it, has no constitutional aspect. So is the issue whether the Preliminary Objection

constituted a pure point of law. The Court of Appeal found that there was a pure legal question, whether the Appellants had complied with Section 33(1) and 34 of the KAA Act or not. A question the Court of Appeal answered in the agreement with the 1st respondent that the same had not been complied with. Hence on all four these issues framed and determined by the Court of Appeal, we find no constitutional issue to cloth this Court with jurisdiction.

[58] We now turn to consider the last issue framed by the Court of Appeal: *Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under Section 84 of the Constitution.* We warn ourselves for the umpteenth time that it is not the alleging or framing of issues by a party as raising a constitutional matter that clothes this Court with jurisdiction. The Court will zealously guard against schemes that may seek to invoke this Court's jurisdiction where none is available through the craft of pleadings drafting.

[59] Be that as it may, on this issue it was urged before the Court of Appeal that the learned judge, in upholding the Preliminary Objection and thereby striking out the appellants' suit, disregarded the provisions of Article 159(2)(d) of the Constitution that obliges the court to administer justice without undue regard to procedural technicalities. The Court of Appeal disabused this argument citing this Court thus:

*“In **RAILA ODINGA v I.E.B.C. & OTHERS [2013] eKLR**, the Supreme Court held that **Article 159(2)(d) of the Constitution** was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”*

Consequently, the appellate Court found that the mandatory provisions of Sections 33(1) and 34 of the KAA Act ought to be complied with and were not a mere technicality to be disregarded. The appellate Court found that parties' rights were contained in a lease which expressly incorporated the aforesaid provisions of the law and that they had to be complied with.

[60] We reserved this issue for determination last because this is the only issue that in its determination, the Court of Appeal made reference to the Constitution, Article 163(4)(a). Is this reference enough to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution? We do not think so. First we have found that the Court of Appeal dismissed the Appellants attempt at clothing their suit as one for enforcement of fundamental rights and held that it was pure a contractual dispute. Equally, the Court of Appeal dismissed the Appellants' allegations that the High Court disregarded Article 159(2)(d) of the Constitution by resorting to statutory provisions of the KAA Act. Looking at the Court of Appeal Judgment on this issue we do not think that its sentiments on the issue were material enough to reach a finding that the Court of Appeal interpreted and/or applied Article 159(2)(d) of the Constitution.

[61] It is not granted that whenever the Court of Appeal mentions a provision of the Constitution in its decision, the matter under consideration automatically invokes this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. In any event, the Constitution is the supreme law of the land and all decisions have to abide and follow it. Hence a mention of the Constitution by the court when making a determination will not always cloth the matter with constitutional issues. In ***Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others***, [2017] eKLR, ***Petition No. 4 of 2015*** we held that the mere reference to the rich generality of the constitutional principle is not a sufficient ground to invoke Article 163(4)(a).

[62] At this juncture, it is imperative to reiterate this Court's holding in a recent matter that involved some of the Appellants, being ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others*** [2020] eKLR. In this matter, the Court re-stated its jurisprudence on Article 163(4)(a) Constitution as follows:

“[62] We cannot over-emphasize the specialized nature of Article 163(4)(a)’s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the Court(s)’determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the Constitution:

(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

(ii) The jurisdiction is discretionary in nature at the instance of the Court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfactory of the Court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of Constitution interpretation and application.

(iii) A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a).

(iv) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a).

(v) Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of Article 163(4)(a).”

[63] It is upon these principles that we have holistically evaluated the jurisdiction question in this matter. We have already demonstrated that of all the issues framed and determined by the Court of Appeal, none involved interpretation or application of the Constitution. While the original suit alleged violation of specific constitutional provisions, that suit was not determined on its merit, the same having been struck out in a ruling on a Preliminary objection, subject of this appeal. Hence those specific sections of the repealed Constitution do not aid the Petitioner by clothing this Court with jurisdiction. Turning on the Preliminary Objection in the High Court, it was on a pure statutory point of law, whether in filing the suit, the Appellants contravened Sections 33(1) and 34 of the KAA Act. Again, nothing turns on this to cloth this Court with jurisdiction. Lastly, the Court of Appeal reference to the Constitution, particularly Article 159(2)(d) was so remote that the same cannot warrant assumption of jurisdiction as of right by this Court. The same was in reference to a general constitutional principle that frowns upon preference

to procedural technicality instead of substantive justice, which in fact was found not to be applicable in the appeal before it.

[64] The upshot of the foregoing is that this appeal fails the jurisdictional test before this Court. The Appellants have nothing that grants them the right of appeal before this Court.

[65] Before the final orders, we would like to state that even on the single question of constitutionality of Section 33(1) of the KAA Act, which issue we have found was not determined in this particular matter, this Court pronounced itself on its constitutionality in ***Modern Holdings (EA) Limited v Kenya Ports Authority*** [2020] eKLR. Called upon to determine the constitutionality of Section 62 of the Kenya Ports Authority Act, which has the same import as Section 33 of the KAA Act, this Court held Section 62, *together with similar sections in other statutes*, as being constitutional and in accordance with Article 159(2)(c). The Court held:

“48. We have no doubt that expeditious and efficient (with the input of experts) disposal of disputes like the one in this case was one of the objectives that informed the enactment of Section 62 of the KPA Act and other similar provisions such as Section 83(1) of the Kenya Railways Corporation Act; Section 33 of the Kenya Airports Authority Act; Section 29 of the Kenya Roads Act; and Section 32 of Inter-Governmental Relations Act (IGRA).

...

51. For these reasons, we affirm the Court of Appeal decision that Section 62 of the KPA Act is not unconstitutional. It simply provides for ADR mechanism of arbitration reinforced by Article 159(2)(c) of the Constitution...”

[66] In light of the foregoing determination, we find that we lack jurisdiction to interrogate the other issues and make the following orders:

(i) The Appellants’ petition dated 15th March, 2019 is hereby dismissed.

(ii) There is no order as to costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th Day of July, 2021.

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT