



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 8 OF 2020

—BETWEEN—

LAW SOCIETY OF KENYA..... APPELLANT

—AND—

COMMUNICATIONS AUTHORITY OF KENYA.....1ST RESPONDENT

BROADBAND COMMUNICATIONS
NETWORKS LTD.....2ND RESPONDENT

OKIYA OMTATAH OKOITI.....3RD RESPONDENT

KENYA HUMAN RIGHTS COMMISSION.....4TH RESPONDENT

CABINET SECRETARY INFORMATION
COMMUNICATION AND TECHNOLOGY.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

ORANGE TELKOM KENYA LTD.....7TH RESPONDENT

AIRTEL NETWORKS KENYA LTD.....8TH RESPONDENT

SAFARICOM LTD.....9TH RESPONDENT

COALITION FOR REFORMS
AND DEMOCRACY.....10TH RESPONDENT

ARTICLE 19- EAST AFRICA.....11TH RESPONDENT

*(Being an appeal from the Judgment of Court of Appeal at Nairobi (**Ouko(P)** (as he then was), **Koome** (as she then was) & **Musinga, JJA**) delivered on 24th April 2020 in Civil Appeal No.166 as consolidated with Civil Appeal No.167 of 2018)*

Representation:

Mr. Ochiel Dudley, Ms. Ruth Ogolla &
Ms. Ray Odanga for the Petitioner
(Ochiel J. Dudley Advocate)

Prof. Githu Muigai SC, Mr. Wambua Kilonzo &
Mr. Dennis Nkarichia for the 1st Respondent
(S.M Kilonzo & Associates Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The subject matter of this appeal is the proposed installation of a device management system on mobile networks by the 1st respondent, Communication Authority of Kenya.

[2] The Law Society of Kenya, the appellant herein, has challenged the decision of the Court of Appeal in its judgment of 24th April 2020, which allowed the 1st respondent to continue developing the Device Management System hereinafter referred to as DMS on condition that the guidelines or regulations on its installation be subjected to public participation.

[3] The appellant instituted the appeal pursuant to article 163 (4)(a) of the Constitution, section 15(2) of the Supreme Court Act 2011 and rule 9(1), 33 (2) of the Supreme Court Rules 2020. The Appellant also alleges infringement of rights as provided under articles 10, 22 (3) (b), 24, 31, 46 and 47 of the Constitution.

B. BACKGROUND

[4] In 2011, the East Africa Communications Organization, in a bid to counter the global theft of mobile devices and the proliferation of counterfeit or illegal devices recommended that the mobile service operators in the member countries would implement an Equipment Identification Register (EIR) which is an International Mobile Equipment Identification (IMEI). Following various stakeholder consultations, the 1st Respondent implemented the first phase of its strategy to deal with stolen and counterfeit devices. Consequently, Mobile Service Providers, handset vendors and the 1st Respondent entered into a *Memorandum of Understanding on Verification of Genuine Mobile Handsets in Kenya* which resulted in the switch off of 1.89 million illegal mobile handsets by 30th September, 2012.

[5] Despite the initial phase's success, counterfeit phone vendors grew more sophisticated and according to the submissions of the 1st respondent, this necessitated a more robust strategy to deal with the issue. In 2016, the 1st respondent rolled out steps towards the implementation of the Device Management System (DMS) which is a centralized Equipment Identification Register that would have access to the International Mobile Equipment Identification database by mobile network operators.

[6] In undertaking the implementation of the Device Management System, the 1st respondent engaged with Mobile Network Operators on various dates and had a series of meetings to discuss the process of implementation. Following the meetings, there were a series of letters issued by 1st respondent to the Mobile Network Operators which included the 7th, 8th and 9th respondents. By letters dated 31st January 2017 and 6th February 2017, the 1st respondent requested the Mobile Network Operators to provide it with access to information on the International Mobile Equipment Identification (IMEI), International Mobile Subscriber Identity (IMSI) which is the number assigned by the 1st Respondent for uniquely identifying

the subscribers and Mobile Station Integrated Subscriber Directory number (MSISDN), a number assigned to each subscriber by a mobile service provider. The purpose of the request was for 1st respondent's technical team to conduct a survey and installation of the Device Management System. This precipitated the filing of a constitutional petition before the High Court and subsequently an appeal to this Court.

C. LITIGATION HISTORY

i. Proceedings in the High Court

[7] The 3rd Respondent, Okiya Omtatah in the Constitutional Petition before the High Court contended that the DMS proposed by the 1st respondent, would allow Government to eavesdrop on its citizens private conversations, spy on calls and texts and examine all mobile money transactions. The 3rd respondent cited that the 1st respondent had violated a number of constitutional rights and freedoms: that the installation of the DMS would threaten the right to privacy under Article 31, violate consumer rights under Article 46 and the right to fair administrative action under Article 47.

[8] He also argued that the 1st respondent did not involve subscribers in public participation yet their data was affected. Further, he stated that the 1st respondent neither conducted a regulatory impact assessment nor presented its directive to Parliament as provided for under the Statutory Instruments Act, 2013.

[9] The 7th, 8th and 9th respondents supported the Petition contending that the 1st Respondent had failed to address the issues they had raised concerning infringement of their consumers right to privacy and also had not put measures into place to curb manipulation and interference of their mobile networks.

[10] The 1st respondent in opposing the petition asserted that the Petition was premature and hypothetical and that under the Kenya Information and Communications Act, it is mandated to monitor compliance and that the DMS was

not a new policy but a continuation of a 2011 policy to stop proliferation of counterfeit or illegal devices into the country. The 1st respondent denied the alleged violation of constitutional rights.

[11] In determining the case before it, the High Court, allowed the Petition, in the following terms:

- a) *A declaration be and is hereby issued that policy decisions or Regulations affecting the Public must conform to the Constitution and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, Regulation or guideline invalid.*
- b) *A declaration be and is hereby issued decreeing that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the Constitution, Section 5 (2) of KICA and the Statutory Instruments Act, hence the said decision, policy and or regulation is null and void for all purposes.*
- c) *Further and or in the alternative a declaration be and is hereby issued decreeing that the decision, policy and or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the Constitution, Section 5A (2) of KICA and the Statutory Instruments Act in that there was no adequate public participation prior to its adoption and implementation with the first, second and third interested parties and further the subscribers of the first, second and third Interested Parties were not engaged at all in the public consultations, hence the same is null and void for all purposes.*
- d) *A declaration be and is hereby issued decreeing that the first Respondent was obligated to craft and implement a meaningful programme of public*

participation and stakeholder engagement in the process leading to the decision, policy and or regulation or implementation of the DMS System.

- e) A declaration be and is hereby issued declaring that the first Respondents request and or purported intention and or decision and or plan contained in its letter dated 31st January 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.*
- f) A declaration be and is hereby issued declaring that the first Respondents decision to set up connectivity links between the DMS and the first, second and third Interested Parties networks communicated in its letter dated 6th February 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights.*
- g) An order of prohibition be and is hereby issued prohibiting the first Respondent, its servant or agents from implementing its decision to implement the DMS system to establish connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network.*

[12] A separate constitutional petition, HC Petition No. 86 of 2017, filed by the Kenya Human Rights Commission against the Communications Authority of

Kenya, (which also challenged the implementation of the DMS) was similarly determined in a judgment delivered on the same day of 18th April 2018.

ii) Proceedings before the Court of Appeal

[13] Aggrieved by the decision of the High Court, the 1st respondent filed an appeal before the Court of Appeal which framed 5 issues for determination as follows: whether the suit was hypothetical and or premature; whether there was adequate public participation in the proposed design and installation of the DMS; whether the installation of the DMS threatened the consumer's rights to privacy and therefore a breach of the Constitution; whether the pleadings disclosed any violation of the respondents' or consumers' rights or the Judge construed a different cause of action; and whether the mandate of the appellant as the communications regulator was misapprehended by the Judge and thereby curtailed.

[14] Having heard submissions by all parties, the matter was determined and in allowing the appeal, the Court of Appeal set aside all the orders of the High Court.

iii) Proceedings before the Supreme Court

[15] The Law Society of Kenya, the appellant herein being aggrieved by the decision of the Court of Appeal instituted an appeal before this Court. The appellant was neither a party in the proceedings before the High Court or Court of Appeal. In filing the Petition of appeal, the appellant relied on Articles 22 and 258 of the Constitution and Rule 36 of the Supreme Court Rules which provides that "any person" who intends to make an appeal and is not limited to parties to the initial cause.

[16] Additionally, the appellant also asserts that it has a perpetual statutory obligation provided for under Section 4 of the Law Society of Kenya Act, 2014 to uphold the Constitution of Kenya and advance the Rule of law and the administration of justice” and “to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.”

[17] The appellant prays for the following reliefs:

- a) *An order setting aside the Court of Appeal decision and reinstating the High Court judgments of Mativo, J on 19th April, 2018 or;*
- b) *In the alternative, a declaration that the 1st respondent’s decision as communicated through the letters of 31st January, 2017 and 6th February, 2017 to procure and install the DMS is unconstitutional; and*
- c) *There be no orders as to costs.*

[18] The appeal is premised on the grounds that the Court of Appeal erred by applying the wrong standard of review to an appeal requiring constitutional interpretation and application and cited the cases of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Abok James Odera T/A A.J Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR. That the Court of Appeal erred by drawing inferences, findings and conclusions inconsistent with the evidence on record; while ignoring evidence, submissions and pleadings on other issues raised. The appellant further raised the ground that the Court of Appeal erred by misapprehending epistolary jurisdiction, the law on judicial notice and presumption of genuineness of newspapers and the dicta in the case of *Anarita Karimi Njeru*.

[19] Additionally, the appellant has raised the ground that the Court of Appeal erred by not finding that the DMS limits the right to privacy and subsequently it failed to conduct the Article 24 test on limitation; it further disputed the Courts

finding that it was premature to adjudicate on the issue of public participation, even though the 1st respondent had already procured and was preparing to install the DMS from the 2nd respondent.

[20] On its part, and in opposition to the appeal, the 1st respondent, filed grounds of objection to the Petition dated 22nd June 2020. The 1st respondent contends that the Petition is a nullity for having wrongfully invoked the jurisdiction of this Court under Article 163 (4)(a) of the Constitution. Further, that grounds of appeal neither involve constitutional interpretation or application nor have they taken a constitutional trajectory as provided for in article 163 (4) (a) of the Constitution. The 1st respondent cited, in support of its arguments, the cases of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others* [2014] eKLR and *Gatirau Peter Munya v. Dickson Mwendwa Kithinji & 2 Others* [2014] eKLR. The 1st respondent further argued that the grounds of appeal are premised on factual findings by the Court of Appeal and that wrong standard of review, misapprehension of the principles of epistolary jurisdiction and the law of judicial notice were not matters canvassed before the High Court and Court of Appeal.

[21] Okiya Omtatah, the 3rd respondent filed a Memorandum of Cross Appeal dated 3rd August 2022. He prayed for the Court of Appeal judgment to be set aside, and for the Court to allow both the appeal and cross appeal. The cross appeal intends to challenge the Court of appeal's decision on the grounds that the learned judges erred in holding that the Petition was hypothetical despite the provisions of Article 22 and 258 of the Constitution, in failing to find that the DMS could access information on the IMEI, IMSI, MSISDN and CDRs of subscribers whereby this would constitute a threat to the right to privacy; and failing to hold that the limitation on the right to privacy was not by law, did not pursue a legitimate aim, and was not the least restrictive measure.

[22] Additionally, the 3rd respondent urged that the Court of Appeal erred by failing to hold that, contrary to Article 10, the 1st respondent has failed to engage the public on the decision to acquire, install and implement the DMS, failing to hold that the decision to implement DMS was subject to the Statutory Instruments Act, failing to hold that the claimed goal of the DMS to combat counterfeit and illegal devices was outside the statutory mandate of the 1st respondent. Further, that the learned judges of Appeal failed to determine the question of consumer rights raised in the appeal and find that CAK's conduct amounted to unfair administrative action.

[23] The 1st respondent filed grounds of objection to the Cross Appeal dated 25th August 2020. The 1st respondent contends that the cross appeal is a nullity for failing to properly invoke the jurisdiction of this Court as provided for in Article 163(4) of the Constitution. The 1st respondent contends that all the grounds of the cross appeal do not arise from a trajectory of constitutional interpretation or application taken by the Court of Appeal in its conclusion. It argued that the grievances raised in the grounds of the cross appeal were canvassed by the Court of Appeal under the question of ripeness of the Petition at the High Court which is a question of fact that was determined based on the evidence before that court. Additionally, that the 3rd respondent's rights under Article 22 and 258 were neither in issue before the Court of Appeal nor did the Court of Appeal make such finding on the violation of those rights. Lastly, the 1st respondent argued that the Court's finding that the DMS was still in its architectural or configuration design stage, and that consultations were still ongoing cannot be faulted, as the same was based on evidence and averments of parties.

D. PRELIMINARY OBJECTION: Submissions

[24] When this matter came before the Court for formal hearing of oral submissions on 19th October 2022, Counsel for the 1st respondent Prof Githu

Muigai raised a preliminary objection on the issue of jurisdiction. Having heard the submissions of all parties, it is the opinion of the Court that the preliminary matter ought to be disposed of at this stage, before going into the merits or otherwise of the appeal itself.

[25] The 1st respondent has stated that appellant has wrongfully invoked the jurisdiction of this Court, stating it is not a proper party before this Court and that even where the appellant claimed it is exercising its statutory mandate, a reading of the Supreme Court Act and regulations show that the Appellant does not constitute 'a person' who has locus. The 1st respondent made reference to relevant case law, including, ***Elijah Sikona and George Pariken Narok, on Behalf of Trusted Society of Human Rights Alliance v. Mara Conservancy and Five Others*** [2014] eKLR and the case of ***Mumo Matemu & Trusted Society of Kenya Rights Alliance*** [2014] eKLR. The 1st respondent urged that the appellant had filed a fresh petition and not an appeal from the Court of Appeal; and further that it did not meet the requirements of article 163 (4) of the Constitution as in any event it required certification.

[26] The appellant has opposed the preliminary objection and filed written submissions on the same. The appellant submitted that article 22 and 258 of the Constitution was not only applicable to the High Court but also to the Supreme Court. The appellant argued there was a wide-ranging locus provided for in Rule 36 of the Supreme Court Rules, that allowed for its participation in the appeal. Additionally, the appellant submitted that no law forbids a non-party like the appellant from appealing from a judgment *in rem* in public interest litigation. Counsel for the appellant further asserted that the petition which challenges the rights to privacy, is admissible under article 163(4)(a) of the Constitution. In support of its submissions, the appellant cited the case of ***Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others*** [2014] eKLR.

[27] The appellant further distinguished this court's decision in the cases of ***Jeniffer Koinante Kitarpei vs Alice Wahito Ndegwa & another*** [2015] eKLR and ***Board of Management Visa Oshwal Primary School vs Shree Visa Oshwal Community Nairobi Registered Trustees & 4 Others*** [2022] eKLR which neither involved an appeal as of right under article 163(4)(a) of the Constitution nor invoked article 22 and 258 of the Constitution or Rule 36 of the Supreme Court Rules unlike in the instant appeal. The appellant further submitted that its mandate, under section 4 of the Law Society of Kenya Act, is to uphold the Constitution of Kenya and advance the rule of law and the administration of justice, and to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.

E. FINDING

[28] Upon considering the preliminary objection raised *in limine* by the 1st respondent and upon hearing the oral arguments by the parties in Court, and the submissions in opposition filed by the appellant, the issue for determination is whether this Court has jurisdiction to hear and determine this appeal and whether the appellant is a proper party before this Court and has *locus standi* in this appeal. This court in the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** [2014] eKLR held that the issue of *locus standi* raises a point of law which touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity.

[29] In filing the instant appeal, the appellant invoked the Court's jurisdiction under Article 163 (4)(a) of the Constitution and Rule 36 of the Supreme Court Rules. The appellant further invoked Article 22 and 258 of the Constitution to give it a legal standing in this matter. We now turn to consider the jurisdictional ambit invoked by the appellant in filing the instant appeal.

[30] Firstly, appeals raising constitutional issues and filed by the appellant as a matter of right under article 163(4)(a) of the Constitution must meet the constitutional threshold on jurisdiction of this Court. In the case of **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others** [2014] eKLR the Court's jurisdictional test was underscored giving rise to following principles for consideration. The principles being, whether an appeal raises a question of constitutional interpretation or application, whether the constitutional issues were canvassed in the Superior Courts and whether the determination of the constitutional issues has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal filed under article 163(4)(a) of the Constitution.

[31] Additionally, in the cases of **Gitirau Peter Munya vs Dickson Mwenda & 2 Others** [2014] eKLR and **Lawrence Nduttu & 6000 Others vs Kenya Breweries Limited & Another** [2012] eKLR this Court determined the question of jurisdiction and pronounced itself as follows:

'The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.'

[32] The crux of the appellant's case before us is that it challenges the determination of the judgment of the Court of Appeal on the grounds that the learned judges erred in applying the wrong standard of review in appeals requiring constitutional interpretation and application. The appellant maintained that the Court of Appeal made inferences, findings and conclusions that were inconsistent with the evidence on record while ignoring pleadings, evidence and submissions. The appellant further challenged that the Court of Appeal failed to find that the

DMS to be rolled out by the 1st respondent limits the right to privacy and faulted the finding of the court that it was premature for the 1st respondent to adjudicate public participation.

[33] Gleaning from the record, we find that the issues for determination before the Superior Courts and more so the Court of Appeal relate to the application of the Constitution in relation to the installation of a Device Management System by the 1st respondent which will affect millions of mobile phone subscribers. And with this, came the challenge of the intent, utility, procurement and usage of the system. Be that as it may, the question that arises now before us, is whether the party adjudicating this matter is properly before this Court.

[34] The appellant relied on Rule 36 of the Supreme Court Rules which provides wide locus for any party to institute an appeal before this Court. Rule 36 stipulates that; '**A person** who intends to make an appeal to the Court shall file a Notice of Appeal within fourteen (14) days from the date of judgment or ruling is which is the subject of appeal.' The scope of who 'a person' is, should mirror the jurisdiction of this court. Article 163(3)(a) and (b) of the Constitution provides that the jurisdiction of the court shall be exclusive original jurisdiction to hear and determine disputes relating to elections to the office of the President and appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.

[35] Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of 'a person' seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this Court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to

a party who did not litigate those issues before the Superior Courts. A person in this context should therefore be a party with *locus standi* in the matter.

[36] The Court of Appeal in the case of ***Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 others*** [2014] eKLR held as follows on the sanctity of a suit in court:

‘A suit in court is a solemn process, owned solely by the parties. This is why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined to a suit as an interested party, this new party cannot be heard to seek to strike out the suit on the grounds of defective pleadings.’

[37] Further, in the case of ***Kingori vs. Chege & 3 Others*** [2002] 2 KLR 243 the High Court described a proper party in a suit as follows; *‘A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest, which the Court will enforce.’* We agree with these observations of the superior courts regarding this issue of who can be a proper party before a Court. Therefore, while we recognise the objectives of the appellant as provided for in section 4 of the Law Society of Kenya Act, 2014, we find that it is not and cannot be a proper party in this appeal.

[38] Lastly, the appellant invoked the provisions of articles 22 and 258 of the Constitution in preferring the appeal. Article 22 of the Constitution provides that *‘every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.’* The Court of Appeal in ***Mumo Matemu*** cited above described

that ‘a person’ in this regard, includes one who acts in the public interest. Be that as it may, we find that while Article 22 of the Constitution provides a pathway for parties to contest the denial, violation or infringement of a right or fundamental freedoms, the proper avenue is at the High Court which grants that Court jurisdiction to determine questions of denial, violation or infringement of a right or fundamental freedom.

[39] In view of the above, we determine that this Court does not have jurisdiction to hear and determine the instant Petition of Appeal. Similarly, the Cross appeal finds itself with no legs to stand on.

F. ORDERS

[40] Consequently, the Court makes the following orders:

- i) The appeal is hereby dismissed for want of the locus of the appellant;***
- ii) The cross appeal is also hereby dismissed;***
- iii) The Appellant shall bear the costs of this appeal.***

DATED and DELIVERED AT NAIROBI this 21st Day of April 2023

.....
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

I certify that this is a true copy of the original

**REGISTRAR,
SUPREME COURT OF KENYA**

