REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

PETITION NO. 17 OF 2015

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

BETWEEN

JOHN FLORENCE MARITIME SERVICES LIMITED....1ST APPELLANT

CONKEN CARGO FORWARDERS LIMITED .... 2ND APPELLANT

AND

CABINET SECRETARY FOR TRANSPORT

AND INFRASTRUCTURE .... 1ST RESPONDENT

THE ATTORNEY GENERAL .... 2ND RESPONDENT

KENYA MARITIME AUTHORITY ....3RD RESPONDENT

OFFICE DE GESTION DU FREIT

MARITIME (OGEFREM) .... 4TH RESPONDENT

RULING

I. INTRODUCTION

[1] The Appellants moved this Court invoking Article 163(4)(a) of the Constitution, Section 15 of the Supreme Court Act and Rules 9, 33 and 42 of the Supreme Court Rules 2012. They filed a petition of appeal dated 9th September, 2015 seeking the following orders:

(a) An order does issue restraining the 1st, 2nd and 3rd Respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May, 2000, thereafter gazetted on 30th August, 2002, and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% of

the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to, and by the Merchant Shipping Office.

(b) *A declaration be made that any provision(s) not having the force of Law in Kenya and which require the payment of anything over and above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the Petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are therefore null and void ab initio.*

(c) *A declaration that the Bilateral Agreement entered into on 30th May, 2000 and known as the "AGREEMENT ON MARITIME FREIGHT MANAGEMENT" is null and void and that its continued enforcement by any person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Articles 2, 40, and 95 of the Constitution and are therefore null and void ab initio.*

(d) *A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the Petitioners' fundamental rights and freedoms under Article 95 of the Constitution be held to be null and void ab initio.*

(e) *A declaration be made that any provisions of law that contravene the Petitioners' fundamental rights and freedoms under Article 40 of the Constitution be held to be null and void ab initio.*

(f) *A declaration be made that any provisions of the Agreement that (sic) contravenes the terms of Article 2 of the Kenyan Constitution be held to be null and void ab initio.*

(g) *Such further and or other orders, directions or writs as the Court may deem fit, just and appropriate to grant.*

(h) *Costs of and incidental to the petition.*

The petition is supported by affidavits sworn by Mr. Gilbert Ojwang and Mr. Joseph Gacheru who are Directors of the 1st Petitioner.

[2] Upon being served by the petition, the 3rd Respondent, Kenya Maritime Authority, filed a Notice of Motion application dated 4th October, 2015 seeking to strike it out. The application was grounded on the following, that:

(i) *This Honourable Court does not have jurisdiction to entertain this appeal as it has not certified the same to be an appeal involving a matter of general public importance and there will not be any and/or any substantial miscarriage of justice if the appeal is not heard.*

(ii) *The intended appellant has not deigned it necessary to make an application either to this Honourable Court or to the Court of Appeal to have its intended appeal certified as an appeal involving a matter of general public importance.*

(iii) *The appeal has no reasonable prospects of success and will be a burden on the taxpayer as the petition in the High Court from which the appeal emanates, to wit,* ***HC Constitutional Petition No. 64 of 2013, Mombasa*** *is res judicata as the issues raised therein were directly and/or substantially in issue in* ***Judicial Review Application No. 130 of 2011*** *and* ***Court of Appeal Civil Appeal No. 42 of 2014****.*

(iv) *The appeal is scandalous, frivolous and vexatious and would otherwise be an abuse of the court process.*

It is this application for striking out of the Petition that is subject of this Ruling.

II. LITIGATION BACKGROUND

[3] The Appellants are Kenyan registered companies carrying on the business of clearing and forwarding of imported goods within the Mombasa port. They claim that they ran into problems with the 4th Respondent, an agent of the Democratic Republic of Congo (DRC), in respect of all imported cargo destined for DRC.

[4] They argue that a bilateral agreement on Maritime Freight Management was entered into on 30th May, 2000 between Kenya and DRC. Under the agreement, Kenya was tasked with collection of taxes and levies for DRC through the 1st to 3rd Respondents. The agreement was to remain in force for a period of three years subject to a one-off renewal for a further period of three years. The agreement provided for the assessment, levying and collection of a commission to the tune of 1.8% of the gross freight charges on the imports.

[5] On 26th October, 2012 the 4th Respondent issued circulars to Shippers, Forwarders and Agents stating that effective 29th October, 2012, all payments for Fiche Electronique de Renseigment Certificate ("FERI") as well as Certificate of Destination ("COD") would be made to its account and that such payments were to be made in US Dollars only after all documents were submitted and validated at its offices.

[6] These new requirements aggrieved the Appellants who alleged that they were onerous and in blatant breach of the bilateral agreement and that the payments could only be collected by the 1st Respondent on behalf of DRC but not by payment to a private individual's bank account in Italy. They also opined that the bilateral agreement should have been subjected to Parliamentary approval so as to form part of laws of Kenya, which was not the case, hence its enforcement amounted to a constitutional violation to the detriment of the Appellants.

a) High Court

[7] Being so aggrieved, the Appellants moved to Court and filed ***High Court Mombasa, Constitutional Petition No. 64 of 2013*** on 5th November, 2013 seeking a number of reliefs, particularly that:

(a) A conservatory order does issue restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.

(b) A declaration that any provision(s) not having the force of law in Kenya and which require the payment of anything above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are null and void ab initio.

(c) A declaration that the Bilateral Agreement entered into on the 30th day of May, 2000 and known as the "AGREEMENT ON MARITIME FREIGHT MANAGEMENT" is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Articles 2, 40 and 95 of the Constitution and is therefore null and void ab initio.

(d) A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights

and freedoms under Article 40 of the Constitution be held to be null and void ab initio.

(e) *A declaration be made that any provisions of the agreement that contravene the terms of Article 2 of the Kenyan Constitution be held to be null and void ab initio.*

(f) *General damages*

(g) *Punitive damages.*

Alongside the petition at the High Court, the Appellants also filed an Interlocutory application seeking conservatory orders in the same terms as prayer (a) of the petition.

[8] The Respondents in the High Court Petition, Kenya Maritime Authority, filed Grounds of Opposition to the Interlocutory application urging that the matter directly in issue in the petition before that Court was a matter that had been determined by the same Court in ***Mombasa HC Misc. Application No. 130 of 2011*** hence the Court lacked jurisdiction to entertain the matter. The Attorney General equally filed Grounds of Opposition, raising the same ground, that those issues had been already determined.

[9] In a ruling delivered on 31st July, 2014 the High Court first determined the question of res Judicata since, as it observed, *"**res judicata** is a matter affecting the jurisdiction of the Court, it is prudent that this be determined **in limine** before delving into the merits of the case, if jurisdiction is established."* The High Court found the petition res judicata and struck it out thus:

> ***"Accordingly, for the reasons set out above, I find that the matters raised in this petition are res judicata by virtue of the previous decision of the court in Judicial Review case No. 130 of 2011. The Petition and the Notice of Motion filed there-under are therefore barred by section 7 of the Civil Procedure***

Act. In accordance with the decision of the Court of Appeal in *Owners of the Motor Vessel Lilian SS v. Caltex Oil (Kenya) Ltd (1989) KLR 1,* ***having determined that it has no jurisdiction in the matter, the court has no power to make one more step and it must lay down its tools. For this reason, the Notice of Motion for conservatory orders together with the petition both dated 5th November 2013 are struck out with costs to the respondents."***

b) Court of Appeal

[10] Dissatisfied with the decision of the High Court, the Appellants moved to the Court of Appeal. They preferred seven grounds to wit that, the High Court erred:

a) In considering and ruling on matters in respect of which no application was filed and prosecuted before it;

b) In arriving at a decision regarding res judicata without any evidence having been tendered before it;

c) In failing to avail the appellants the opportunity to respond and produce evidence in opposition to the allegations that the matter was res judicata;

d) In failing to consider the application before him and matters that were relevant which he was seized of and instead considered matters that were irrelevant thereby arriving at a decision without any basis or evidence being laid;

e) In holding that the matters raised in the petition were res judicata, whilst the appellants and the respondents were different with the exception of 3rd Respondent;

f) In holding that the matters raised in the Petition were res judicata, whilst the reliefs sought in the JR and petition were different; and,

g) *In holding that the petition and the Notice of Motion filed by the Appellants was barred by Section 7 of the Civil Procedure Act whilst the parties in the petition were not the same parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit nor did they authorize anyone to litigate on their behalf in JR nor were they making a claim on behalf of the other people.*

[11] Upon hearing the appeal, in a Judgement dated 31st July, 2015, the Court of Appeal upheld *interalia*, that the doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation, as it is a doctrine of general application. The Court however cautioned that the doctrine should be invoked in constitutional litigation in the rarest and in the clearest of cases. It also found that the Appellants were granted an opportunity to be heard and that the High Court was justified in holding the suit before it to be *res judicata*. The appeal was therefore dismissed with costs.

[12] Aggrieved by that Court of Appeal decision, the petitioners have now preferred an appeal before this Court, which again the Respondents have asked the Supreme Court to strike it out via their Notice of Motion application dated 4th October, 2015.

III. PARTIES' SUBMISSIONS

a) 3rd Respondent, Kenya Maritime Authority

[13] The application for striking out was canvassed before the Court on 14th March, 2018. Counsel Mr. Ondego, holding brief for Mr. Ndegwa, appeared for the 3rd Respondent. He submitted that the petition before the Court had not been certified as one involving matters of general public importance under Article 163(4)(b) of the Constitution. As a consequence, counsel urged that there is need to demonstrate that

the petition involved matters of interpretation and application of the Constitution under Article 163(4)(a) of the Constitution, to which he submitted that it does not.

[14] Counsel submitted that ***Judicial Review Application No. 130 of 2011*** had sought orders of prohibition against the Bilateral Agreement between the governments of Kenya & Congo, and that *Hon. Tuiyot J*, dismissed it. That the ***Constitutional Petition No. 64 of 2013***, subject of this matter, also raised similar issues and a Preliminary Objection was raised on the grounds that the matter was res judicata and, *Mureithi, J* upheld the Preliminary Objection. Counsel submitted that an appeal was lodged at the Court of Appeal on the same issue of res judicata, which appeal the Court of Appeal dismissed. Consequently, counsel asked this Court to consider whether the question of res judicata is a question of constitutional interpretation and/or application. Counsel was emphatic that res judicata is a common law issue that ensures finality in litigation and not a constitutional question. He urged that with no constitutional question for interpretation and/or application, the Supreme Court has no jurisdiction and the Petition before it should collapse.

[15] Counsel's submissions were supplemented by the grounds in the body of the application and the Supporting Affidavit of Cosmas Cherop, the Acting Director General of Kenya Maritime Authority. The Respondent/Applicant also filed written submissions dated 8th April, 2016 in which it cited case law on what constitutes cases involving the interpretation and application of the Constitution under Article 163(4)(a) of the Constitution.

[16] The application was supported by the 4th Respondent through its learned Counsel Ms Waihenya. She referred this Court to its decisions in the cases of ***Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone***, [2013] eKLR; ***Malcom Bell v Daniel Torotich Arap Moi & another***, [2013] eKLR; ***Dhanjal***

Investments Limited v Kenindia Assurance Company Limited, [2016] eKLR and ***Teachers Service Commission v Kenya National Union of Teachers & 3 others***, [2015] eKLR, in supporting the submission that neither has the appeal been granted certification as one involving matters of general public importance, nor does it involves matters of constitutional interpretation and or application.

[17] Learned Counsel Ms Waihenya further urged that the Appellants before the Supreme Court are not parties to the Bilateral Agreement, as the parties to the Agreement are the government of Kenya and that of the Democratic Republic of Congo. She added that if the Petitioners are desirous of challenging the agreement, the best forum is before the courts in the Congo.

b) Appellants

[18] The Appellants responded to the application by filing Grounds of Opposition dated 3rd February 2016 in which they urged that the application was frivolous, misconceived, bad in law, and an abuse of the court process. It was also their case that the application was made *mala fide*. They emphasized that their appeal is well within the ambits of Article 163(4)(a) of the Constitution.

[19] Through their learned Counsel Mr. Taib Ali Taib, they submitted that their appeal was a classic case of taxation without representation where an Agreement masquerading as an International Agreement, that is not stored with the Registrar of Treaties, was being enforced against the Appellants. Counsel submitted that the matter was a constitutional one as evident from the point of filing where it was filed as a constitutional petition. He contended that the matter took a constitutional trajectory all along and that the substance of the case was a constitutional one from the beginning whose resolution needed a constitutional determination. He urged that

the irregular termination of their petition in the High Court is a matter that requires a constitutional interpretation.

[20] It was submitted that the denial of a hearing in a constitutional matter infringes on the right to fair hearing under Article 50(1) of the Constitution. That the way the High Court dealt with the Preliminary Objection infringed on the right to fair hearing. In particular, it was urged that raising a Preliminary Objection based on res judicata amounts to denial of fair hearing as it terminated the matter.

[21] Counsel cited the case of ***Henry Wanyama Khaemba v Standard Charted Bank (K) Ltd & Another*** [2014] eKLR in which the High Court cited with approval an earlier decision of *Ojwang J* (as he then was) in ***Oraro v Mbajja [2005]*** eKLR where the latter Judge thus:

> ***"... I think the principle is abundantly clear. A preliminary objection correctly understood is now identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."***

[22] Relying on the above case, it was submitted that the issue of res judicata denied the Appellants the right to be heard and it ought to have been brought by way of a formal application. Counsel submitted that there was no court file that was availed to

the High Court and/or the Court of Appeal for the court(s) to scrutinize and confirm the allegations of res judicata as raised in the Preliminary Objection.

[23] Consequently, counsel prayed that the application to strike out the petition of appeal be dismissed as it was yet another attempt to deny them their constitutional right to be heard yet the Supreme Court has a duty to afford the Petitioners the unlimited right to fair hearing as provided for in Article 50(1) of the Constitution.

IV. ISSUE(S) FOR DETERMINATION

[24] This Notice of Motion application raises a single issue for determination:

(i) Does the appeal before this Court meet the constitutional threshold under Article 163(4)(a) of the Constitution?

V. ANALYSIS

[25] The 3rd Respondent's case is that the Appellants' appeal raises no issue involving interpretation and application of the Constitution and as such this Court has no jurisdiction under Article 163(4)(a) of the Constitution to hear and determine that appeal. They also urge that neither has the appeal received certification by either the Court of Appeal or Supreme Court under Article 163(4)(b) of the Constitution.

[26] We reiterate that this Court's appellate jurisdiction as exercised under Articles 163(4)(a) and 163(4)(b) are quite distinct. This dichotomy was outlined by the Court in the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. and J. Harrison Kinyanjui & Co. Advocates,*** *SC Petition No. 3 of 2012*, at para 20-21, thus:

> ***"At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme***

Court from the Court of Appeal. <u>The first type of appeal lies as of right if it is a case involving the interpretation or application of the Constitution.</u> In such a case, no prior leave is required from this Court or Court of Appeal.
The <u>second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance</u>. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court…….then such intending appellant must convince the Court that the case is one involving a matter of general public importance.”

[27] As the two kinds of appeals are different, where a party before the Court invokes a particular appellate jurisdiction, his/her appeal cannot be challenged on the premise that it does not meet the threshold of invoking the other parallel appellate jurisdiction. We would therefore examine the matter before this Court not on whether it meets the certification criterion, but whether it involves matters of constitutional interpretation and application. This is because the Appellants have been clear that their appeal is brought under Article 163(4)(a) of the Constitution. Consequently, we would disregard any submissions bordering on the need for or lack of certification.

[28] Urging lack of jurisdiction, the Respondents’ case is that the Appellants’ case before the High Court was struck out because it was found to be *res judicata*. The Court stated that the matter had purported to raise issues already raised and determined in an earlier case: *JR Application No. 130 of 2011*. This finding was upheld by the Court of Appeal. The Appellants’ response is an interesting one. They aver that the ruling striking out of their matter as being *res judicata,* is what they are aggrieved with, but on the basis that it denied them an opportunity to be heard. They

contend that as a consequence of the *res judicata* finding, their right to a fair hearing under Article 50(1) of the Constitution was denied. This, they submit raised a constitutional matter under Article 163(4)(a) of the Constitution.

[29] We take note that we are dealing with an application to strike out an appeal for want of jurisdiction. Before the Court is not the determination of the substantive appeal. We are cognizant of the fact that we need to examine the Appellants' appeal not on its factual merit, but within the legal lens of whether the appeal invokes this Court's appellate jurisdiction under Article 163(4)(a), to wit: *Is there a constitutional issue for determination in this matter?*

[30] The Respondents' answer to the above question is in the negative. They urge that *res judicata* is a common law principle that raises no constitutional question, that *res judicata* as a principle only aids the course of justice by ensuring finality in litigation. On the other hand, the Petitioners' are emphatic that the way that principle was invoked and applied in this matter infringed on their constitutional right to be heard.

[31] Quite clearly, *the contest before the Court is not on the principle of res judicata, per se*. We find that no party is challenging the rationale or otherwise of this principle in this application. Hence, the Court will not belabor on what constitutes *res judicata*. It is worth stating that this Court has already pronounced itself on this *res judicata* principle in the case of ***Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another*** [2016] eKLR. The contention before this Court, therefore is that in its consideration of the principle of *res judicata,* the High Court *did not* grant the Petitioners *a fair hearing*. Is this a matter of constitutional interpretation and/or application?

[32] As to what constitutes a matter involving interpretation and application of the Constitution, the conventional approach is that a particular provision of the Constitution must have been in issue for an interpretation and/or application from the High Court and the Court of Appeal. However, that is not the final point of inquiry. In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others***, Application 5 of 2014, [2014] eKLR (The ***Munya I case)*** this Court developed a broader approach. Relying on its earlier decision in the ***Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others***, [2012] eKLR case, the Court stated at [paragraph] 69 thus:

> ***"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."***

[33] Therefore, a pragmatic understanding of that jurisprudence is, that it is not only specific provisions of the Constitution that brings a matter under the ambit of Article 163(4)(a) of the Constitution. There may be other factors. This point was also well elaborated in the ***Hassan Ali Joho & another v Suleiman Said shabaal & 2 others,*** Petition No. 10 of 2013 (The ***Joho case***), when this Court held as follows:

> ***"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to***

reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it."

[34] It therefore emerges that in evaluating whether a matter raises a constitutional issue of interpretation and/or application, this Court should not be narrow-minded in its inquiry. The quest for discovery should not start and stop with a determination of whether or not there is a specific provision of the Constitution that was at issue before the Superior courts. Instead, there is need for a holistic inquiry of all the various facets of the law as pleaded by the parties if they do indeed raise a constitutional question. This is the constitutional trajectory that requires a look at a Court(s)' reasoning and even the processes and procedures adopted by a court in its proceedings.

[35] Consequently, to para-phrase what we laid out in the ***Joho case***, a question regarding the interpretation and application of the Constitution may arise from a multiplicity of factors and not necessarily an interpretation and application of a specific provision of the Constitution. Upon consideration, we are inclined to find that the Appellants' case fits this bill. While the High Court and Court of Appeal were only charged with a common law doctrine of *res judicata*, it is alleged that the manner in which the High Court applied the doctrine in its proceedings infringed upon Article 50(1) of the Constitution, by denying the Petitioners a right to be heard.

[36] Such a contention by a litigant before this Court draws the Court's attention particularly given the fact that the right to Fair hearing provided for by Article 50(1) of the Constitution is a non-derogable right under Article 25 of the Constitution. If the Petitioners' contentions were to be found to have merit, then it cannot be otiose to conclude that, the determination of the High Court took a constitutional trajectory by infringing on a fundamental right. The Appellants' allegations, if affirmed, would suffice to conclude that while the Court was considering the application of a common law doctrine of *res judicata*; its determination took a trajectory that infringed on Article 50(1) of the Constitution.

[37] To ably dissect and interrogate the Appellants' case, this Court has to peruse the Record of Appeal filed alongside the Petition of Appeal. However, as a Court of law, such a venture can only be embarked on upon a satisfaction that this Court is ably clothed with jurisdiction, something the respondents have alleged this Court does not have. In determining whether the Court has jurisdiction in this matter, we take note that the Supreme Court is not only charged with the interpretation and application of the Constitution, but the protection of the Constitution as well.

[38] The Court has to be always cognizant of its mandate under section 3 of the Supreme Court Act, which mandate is partly effectuated via the appellate jurisdiction in Article 163(4)(a). This was well noted in the ***Joho*** Case thus:

> ***"[51] In defending the Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the Constitution. This aspect of defending the Constitution is replicated under Article 163 (4) (a), which allows appeals from the Court of Appeal to the Supreme Court as of right, in any case involving the interpretation or application of the***

***Constitution.* Such is the approach that this Court in hearing this appeal must seek to apply.**

[52] Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011).

[39] It again follows that a determination of whether a matter has met the appellate jurisdictional threshold embodied in Article 163(4)(a) of the Constitution is not based on principles cast in stone. This is a discretionary mandate and power that the Supreme Court exercises judiciously on a case to case basis. Therefore, where a litigant before this Court alleges that in exercise of their constitutional mandates the Superior Courts contravened the Constitution in the conduct of their proceedings, in protecting the Constitution that is the embodiment of the aspirations of the People of Kenya, this Court may assume jurisdiction to correct such an anomaly.

[40] It should be noted that it does not follow as a matter of cause that where a litigant, like the Appellants before us, files a Petition of appeal, which appeal *prima facie* triggers the discretion of this Court and the Court assumes jurisdiction, that that appeal must succeed. Assumption of jurisdiction is a legal question at the discretion of this Court. On the contrary, succession or otherwise of an appeal is a factual issue

determined on merit on the basis of the peculiarity of each case and how those facts are applied to the law.

[41] In this matter, we find that the appeal before this Court raises *a novel and prima facie* issue that rightly invokes this Court's jurisdiction under Article 163(4)(a) of the Constitution. A perusal of the Petitioners' case reveals that there is an allegation that the manner in which the High Court determined the question of *res judicata* was somehow summarily and unprocedural. That while a Preliminary Objection was raised; the same was not based on a pure point of law within the jurisprudence of ***Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696*** as regards the nature of a Preliminary Objection. It is contended that the respondents raised the issue of *res judicata,* which issue needed material determination by a court of law through presentation and examination of material evidence, something that the Petitioner alleges was not done by the High Court. Further it is contended that while there were allegations of the Appellants being parties to the previous case, no material evidence was provided to confirm that indeed the Appellants were parties.

[42] We find that these issues as framed fall squarely within this Court's appellate jurisdiction in Article 163(4)(a) of the Constitution and calls for the Court to exercise its discretion by taking up the matter. Once the Court assumes jurisdiction, it will then be able to consider the singular question which we consider correctly raises a matter constitutional interpretation and application before this Court, to wit: ***did the High Court procedurally consider the plea of res judicata or did it infringe on the Appellants' right to fair hearing in the res judicata proceedings, hence condemning them unheard?***

[43] Consequently, the Notice of Motion application for striking out of the petition, dated 4th October, 2015 is disallowed. The Court finds that it has jurisdiction and the petition of appeal is admitted for hearing of the single issue above stated.

ORDERS

- **(a) The Applicant's Notice of Motion dated 4th October 2015 is hereby dismissed.**
- **(b) The Petition as filed by the Appellant shall proceed to hearing.**
- **(c) Costs shall be in the cause.**

[44] Orders accordingly.

DATED and **DELIVERED at NAIROBI** this **25th Day** of **October 2019.**

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M.K IBRAHIM	**J.B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
…………………………………………	……………………………………………………
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA