

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala & Lenaola, SCJJ)

PETITION NO.39 OF 2019

—BETWEEN—

PRAXIDIS NAMONI SAISI.....PETITIONER

—AND—

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION...2ND RESPONDENT

CHIEF MAGISTRATE ANTI-CORRUPTION COURT

AT NAIROBI.....3RD RESPONDENT

Being an appeal from the Judgment of Court of Appeal at Nairobi (W. Makhandia & Murgor JJA) of 20th September 2019 allowing Civil Appeal No.2 of 2017 as consolidated with Civil Appeal No.184 of 2016 as well as setting aside the Judgment of the High Court (G.V. Odunga J) in Miscellaneous Judicial Review Application No.502 of 2015 delivered on 19th April 2016

RULING ON A PRELIMINARY OBJECTION

A. INTRODUCTION

[1] This Ruling arises from a Preliminary Objection raised by the 1st Respondent against the Petitioner’s appeal filed on 25th October 2019. The appeal challenges

the Judgment of the Court of Appeal at Nairobi (*Warsame, Makhandia & Murgor, JJA*) of 20th September, 2019 allowing Civil Appeal No. 2 of 2016 as consolidated with Civil Appeal No. 184 of 2016 which set aside the Judgment of the High Court (*Odunga J*) in Miscellaneous Judicial Review Application No. 502 of 2015 delivered on 19th April, 2016.

[2] By way of context, in her Petition of appeal, the Petitioner seeks the following orders:

- a. *The Judgement and Order of the Court of Appeal (Warsame, Makhandia & Murgor, JJA) sitting in Nairobi delivered on 20th September, 2019 in Nairobi Civil Appeal No. 2 of 2017 consolidated with Civil Appeal No. 184 of 2016 be set aside and the Judgment and Decree of the High Court in Miscellaneous Application No. 502 of 2015 at Nairobi delivered by the Honourable Mr. Justice G.V. Odunga on 19th April 2016 be reinstated and reaffirmed;*
- b. *The Costs of this Appeal (Petition) and the costs of proceedings in the Court of Appeal and in the High Court be awarded to the Petitioner; and*
- c. *Such consequential and appropriate relief, further or other order(s) as this Honourable Court may deem just and fit to grant.*

B. THE PRELIMINARY OBJECTION

[3] In response to the Petition, the 1st Respondent filed the instant notice of preliminary objection dated 3rd December, 2019 based on two grounds that is, that the matter does not concern the interpretation or application of the Constitution

and that no leave was obtained prior to instituting the appeal. Hence, the appeal is incompetent and should be struck out with costs.

C. BACKGROUND

(i) Proceedings at the High Court

[4] The appeal originates from an advertisement for tender No. REF. GDC/HSQ/o86/201 r-12 (*the tender*) by the Geothermal Development Company (GDC) for the provision of rig move services which was awarded to Bonafide Clearing and Forwarding Company Limited for KES. 42, 746, 000 per rig move. Subsequently, the 2nd Respondent carried out investigations concerning procurement anomalies in the tender process and concluded that the contract price for the tender was unjustifiably inflated above the normal market rates in comparison to the same rig move services undertaken by other government institutions during the same period by the same provider. Consequently, the 2nd Respondent recommended that the then Managing Director of GDC, the General Manager and the members of the tender committee including the Appellant herein, *Praxidis Namoni Saisi*, be charged with various anti-corruption offences. The 1st Respondent implemented the 2nd Respondent's recommendation by filing *Anti-corruption Case no. 20 of 2015* before the Chief Magistrates Court in Milimani. Before the said criminal cause could be heard and determined, the Petitioner filed an *ex parte* Chamber Summons seeking leave to apply for *inter alia* an order of *certiorari* to quash the decision of the 2nd Respondent to recommend to the 1st Respondent that she be charged with the aforesaid anti-corruption offences and to quash the decision of the 1st Respondent to direct her prosecution as was contained in the press statement dated 13/11/2015 and in *Anti-corruption case No. 20 of 2015*. She also sought leave to apply for an order of prohibition to prohibit the 1st Respondent from prosecuting and proceeding with the charges in *Anti-corruption Case No. 20 of 2015* against her or instituting other charges against her over the

award of the tender and the contract of the tender between GDC and Bonafide Clearing and Forwarding Limited.

[5] The Petitioner was granted leave to apply for the aforementioned orders and filed Miscellaneous Civil Application No. 502 of 2015, **Republic v. Director of Public Prosecutions & 2 others Ex-parte Praxidis Namoni Saisi** contending *inter alia* that the 1st Respondent's decision to prefer charges against her was reached without proper direction or logical connection to the relevant law; that the charges against her did not entitle her to know the case against her or have an opportunity to defend herself, and that the decision to charge her was incomprehensible, irrational and without basis. The Application was opposed by the 1st and 2nd Respondent.

[6] On 19th April 2016, *Odunga J*, having considered the application, the affidavits both in support of and in opposition to the Petition, the submissions for and against the grant of the orders sought and the authorities cited on behalf of the parties thereto concluded that the charges leveled against the Appellant were far-fetched and proceeded to grant the orders sought. The learned Judge specifically concluded as follows:

“[94] Therefore where it is clear to the Court that based on the admitted factual scenario the charges leveled against the applicant are far-fetched, it would not be permissible for the Court to permit the applicant to face the charges simply because she will have an opportunity of defending herself. It is therefore clear that the said three counts facing the applicant are untenable.”

[7] Aggrieved by the High Court's decision, the 1st Respondent preferred an appeal to the Court of Appeal, Civil Appeal No. 2 of 2016. The 2nd Respondent filed a cross appeal against the decision of the High Court in Civil Appeal No. 184 of 2016. Subsequently, Civil Appeals Nos. 2 of 2016 and No. 184 of 2016 were consolidated and heard as one.

(ii) Proceedings at the Court of Appeal

[8] At the Court of Appeal, the 1st Respondent's main contention was that the learned Judge of the High Court erred by interrogating, interfering with and quashing its decision to prosecute the Petitioner by delving into evidence and the examination of facts.

[9] The 2nd Respondent's case on the other hand was that the intended prosecution had a proper factual foundation and could not be said to have been unreasonable and that there was no justification for the large sum awarded in the tender; that the absence of a Market Price Index by the Public Procurement Oversight Authority did not discharge the Tender Committee from its duty under Regulation 10 (2)(e) of the Public Procurement and Disposal Regulations, 2006 which mandates the Tender Committee to ensure that the procuring entity does not pay in excess of prevailing market prices. They also submitted that the Committee could have obtained outside advice or directed the procurement unit to carry out a market survey. They concluded that a prerogative order should not have been granted where there was an abuse of the process of the law, which has the effect of stopping the prosecution already commenced and that the Petitioner had not adduced any evidence of malice or abuse of the Court process.

[10] The Petitioner on her part, opposed the appeal and invited the Court to review the Market Price Index and the contract document which she stated were the most crucial documents in the appeal. She maintained that the High Court did

not make any error of law and that the 1st Respondent's appeal was predicated on a complete misapprehension of the matters framed for determination and the findings of the High Court. She also submitted that the High Court's decision was arrived at, upon a correct interpretation and application of judicial review principles. Further, that her case at the appellate Court was also misconstrued by the Respondents by purporting to elevate Regulation 10(2) (e) of the Public Procurement and Disposal Regulations, 2006 to supersede the provisions of Sections 66 (2), 30 (3) and 52 of the repealed Public Procurement and Disposal Act.

[11] The Court of Appeal listed one issue for determination that is, *whether or not the learned Judge was entitled to grant the orders sought*. The said Court on 20th September 2019, overturned the decision of the High Court on the ground that *the Petitioner's application did not merit the exercise of the Court's discretion and it was not necessary for the learned Judge to delve into such elaborate analysis at that stage*. The Court also found that the High Court Judge misdirected himself in arriving at the decision to issue orders of *certiorari* and prohibition.

D. PARTIES' SUBMISSIONS ON THE PRELIMINARY OBJECTION

i) *The 1st Respondent's*

[12] In support of the Preliminary Objection, the 1st Respondent relied on the submissions filed in opposing the Petitioner's application in Civil Application No. 2 of 2020, ***Praxidis Namoni Saisi v. Director of Public Prosecutions & 2 others***, filed on 25th February, 2020 i.e. the application seeking stay of execution of the decision of the Court of Appeal aforesaid.

[13] The 1st Respondent in that regard submits that the Petitioner's appeal does not lie as of right under Article 163(4) (a) of the Constitution because it does not relate to the question of interpretation and application of the Constitution which first arose and was argued and resolved in the High Court and has arisen through the judicial appellate hierarchy from the High Court, to the Court of Appeal and finally to the Supreme Court. They urge that, the Court of Appeal in determining the case did not interpret or apply any single provision of the Constitution but made its decision *on the basis that the learned Judge of the superior court misdirected himself in the exercise of his discretion and thereby arrived at a wrong decision*. To support their submissions, the 1st Respondent cites this Court's decision in various cases namely, **Lawrence Nduttu & 600 others v. Kenya Breweries Ltd & another**, Supreme Court Petition No. 3 of 2012, **Erad Supplies & General Contractors Ltd v. National Cereals & Produce Board**, [2012] eKLR and **Hassan Ali Joho & another v. Suleiman Said Shahbal & 2 others** [2014] eKLR.

ii) The 2nd Respondent's

[14] The 2nd Respondent filed its written submissions in support of the Preliminary Objection on 17th January, 2020. It is their submissions that no constitutional questions were raised or determined by either the High Court or the Court of Appeal. Further, that the decisions were made on the basis of the facts and consideration of judicial review principles. The 2nd Respondent also urges that since no leave of Court was obtained, it can only be presumed that the Appeal is filed under Article 163(4)(a) of the Constitution. The 2nd Respondent cites this Court's decision in **Wavinya Ndeti v. Independent Electoral Boundaries Commission (IEBC) & 4 others** [2015] eKLR where this Court restated the principles of interpretation as espoused in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others** SC. Petition No. 2B of 2014; [2014] eKLR to support their submissions on this point. The 2nd Respondent also cites this Court's

decision in ***Boniface Katana Kaliveri v. EACC and another***, SC Petition No. 15A of 2016 on the same issue.

[15] There was no response from the 3rd Respondent in respect of the Preliminary Objection. The Court further takes note of the fact that the 3rd Respondent has never taken part in any of the proceedings before this Court.

iii) The Petitioner's

[16] The Petitioner opposed the preliminary objection by filing her written submissions on 24th January, 2020. She submits that her appeal raises issues falling within the purview of the rule of law (Constitutional principles) pursuant to Article 163 (4) (a) of the Constitution. Further, that her judicial review application before the High Court was filed under Articles 22, 23 and 165 of the Constitution to challenge the legality, rationality and propriety of the charges preferred by the 1st Respondent against her in exercise of its state powers under Article 157(6)(a) of the Constitution. In addition, that the application challenged violation of Articles 10, 22, 23, 27, 28, 29, 41, 50, 157 and 165 of the Constitution together with applicable statutory provisions.

[17] It is the Petitioner's other submission that the constitutional issues raised at the High Court and Court of Appeal included, the jurisdiction of the High Court under Articles 10, 23 and 165(3)(b)(d)(ii) of the Constitution; the violations of and or in the matter of Articles 10,22,27, 28, 29, 41 and 50 of the Constitution; the exercise of the powers of the 1st Respondent under Article 157 of the Constitution; the question of judicial review as embodied in the Constitution *vis a vis* the common law implicit and intrinsic in Articles 25, 27(1) (2), 28, 29 and 50 of the Constitution and the jurisdiction of the High Court and the Chief Magistrate's Court in hearing and determining the alleged offences with which she was charged.

[18] The Petitioner cites this Court's decisions in *Teachers Service Commission v. Kenya National Union of Teachers & 3 others* [2015] eKLR, *Cyrus Shakhhalaga Khwa v. Soy Developers Limited & 9 others* [2019] eKLR, *Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others*, Petition 18 of 2014 as consolidated with Petition No. 20 of 2014 in support of her submissions and prays for the Preliminary Objection to be overruled.

E. ANALYSIS AND DETERMINATION OF THE PRELIMINARY OBJECTION

[19] The Preliminary Objection before us raises one issue for determination by this Court that is, *whether the appeal raises any issue involving the interpretation or application of the Constitution, as contemplated under Article 163(4)(a) of the Constitution.*

[20] The basis of the 1st Respondent's preliminary objection is that the appeal raises no constitutional issues hence, fails to qualify as an appeal as of right to invoke this Court's jurisdiction, a position the 2nd Respondent concurs with. On the contrary, the Petitioner urges that the Appeal is premised upon Article 163(4) (a) of the Constitution and entirely raises issues involving the application and interpretation of the Constitution. Further, that the same challenges violation of Articles 10, 22, 23, 27, 28, 29, 41, 50, 157 and 165 of the Constitution together with applicable statutory provisions.

[21] This Court has previously set the guiding principles for bringing an appeal before it under Article 163 (4) (a) of the Constitution in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*, S.C. Petition No. 2B of 2014; [2014] eKLR [*Munya 2*] *inter alia* as follows:

- i. *a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;*
- ii. *the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them, and only cardinal issues of law or jurisprudential moment, deserve the further input of the Supreme Court;*
- iii. *the lower Court's determination of the issue on appeal must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;*
- iv. *an appeal within the ambit of Article 163(4)(a) is to be one founded on cogent issues of constitutional controversy;*

[22] Further, in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another***, Supreme Court Petition No. 3 of 2012; [2012] eKLR (***Lawrence Nduttu Case***), this Court held that mere allegation that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within the ambit of Article 163(4)(a) of the Constitution. It was specifically stated as follows:

“[27] This Article 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 and/or application of the Constitution can be entertained by the Supreme Court.”

[23] In ***Peninah Nadako Kiliswa v. Independent Electoral & Boundaries Commission (IEBC) & 2 others***, Petition No. 28 of 2013; [2015]

eKLR, this Court found that even in matters originating as judicial review, the issues have to fall under the canopy of Article 163 (4)(a). The Court then proceeded to set guiding principles which a party must comply with in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review. It was stated thus:

“[33] It follows that for an appeal to lie to this Court, in a matter originated under judicial review, the issues have to fall under the canopy of Article 163(4)(a). As judicial review is concerned with process, but for a case where the process is contested as being unlawful, irrational or procedurally unfair – elements falling within the purview of the rule of law (a constitutional principle) – the matter cannot lie to the Supreme Court. Hence in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review, the party concerned should comply with certain principles, as follows:

- i. not all Judicial Review matters are appealable to the Supreme Court, as of right;***
- ii. it is open to the party concerned to move the Court on appeal under Article 163(4)(b) of the Constitution, in which case, the normal certification process applies;***
- iii. where such an appeal comes under Article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;***
- iv. the party concerned should demonstrate that the superior Courts had misdirected themselves in relation to prescribed constitutional principles, and either***

granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.”

[24] We have set out the law above in detail for emphasis but more importantly, we have taken note of a prior Ruling of this Court that is connected with the present matter. The same is dated 30th April 2020 in Petition No.40 of 2019 – ***Dr. Peter Odoyo Omenda & 6 Others v. Ethics & Anti-Corruption Commission & 2 Others.***

[25] The Applicants in that matter were, together with the present Petitioner, the original Joint Applicants in **Miscellaneous Judicial Review Application No.502 of 2015** and later the Joint Respondents in **Civil Appeal No.313 of 2017** whose Judgment is now before us in two separate appeals – **Petitions Nos.39 and 40 of 2019.**

[26] As regards the jurisdiction of this Court to determine the issues raised in Petition No.40 of 2019 and which are not different from those raised by the present Petitioner, we rendered ourselves as follows (in a Ruling delivered on 30th April 2020 based on a Preliminary objection by the Respondents):

“[16] The summation of the above position is that we are persuaded, without going to the merits of the case, that the appeal raises constitutional issues that were originated from the High Court at the first instance. We therefore affirm that we have jurisdiction to entertain the appeal as filed and that the same should be heard on merit. Consequently, the preliminary objection dated 3rd December 2019 lacks merit and is disallowed. The costs of the objection will abide the outcome of the appeal.”

[27] Having considered the present Application and the objection to our jurisdiction, and noting the issues canvassed in Petition No.40 of 2019 leading to the Ruling aforesaid, we see no reason to depart from our findings and would therefore agree that we have the jurisdiction to determine the present Appeal in its unique circumstances.

[28] In the event the Preliminary Objection by the 1st Respondent must be overruled and as regards costs, we deem it appropriate that each party should bear its costs of the objection.

F. DISPOSITION

[29] Having therefore found that the Preliminary Objection is without merit, the final orders to be made are that:

- i) The Preliminary Objection filed on 29th October 2019 is hereby overruled.***
- ii) Each Party shall bear its costs of the Objection.***

[30] It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of September, 2020

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

