

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ. & P; Mwilu, DCJ & VP; Ibrahim; Wanjala & Njoki , SCJJ)

CIVIL APPLICATION NO. 15 OF 2020

– BETWEEN –

ATTORNEY GENERAL..... APPLICANT

– AND –

KENYA PORTS AUTHORITY 1ST RESPONDENT
WILLIAM ODHIAMBO RAMOGI 2ND RESPONDENT
ASHA MASHAKA OMAR 3RD RESPONDENT
GERALD LEWA KITI 4TH RESPONDENT
KENYA RAILWAYS CORPORATION 5TH RESPONDENT
MUSLIMS FOR HUMAN RIGHTS 6TH RESPONDENT
MAINA KIAI 7TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 8TH RESPONDENT

*(Being an application for extension of time to file the Petition and Record of Appeal out of time against the Judgment and Decree of the Court of Appeal sitting at Mombasa (**Hon. Warsame, Kiage & Murgor, JJA**) delivered on the 26th day of September, 2019, in Mombasa Civil Appeal No. 166 of 2018).*

RULING OF THE COURT

[1] Before the Court is a Notice of Motion dated 25th June 2020 brought by the Attorney General under the provisions of Articles 159 and 163(4)(a) of the Constitution, Sections 21(2) and 24(1) of the Supreme Court Act, and Rules 23 and 53 of the Supreme Court Rules 2012. It is supported by the affidavit of Solomon Kitungu, Principal Secretary, State Department of Transport at the

Ministry of Transport and Infrastructure, Housing and Urban Development, sworn on the same date. It seeks leave to file the petition and record of appeal out of time and that the costs of the application do abide the result of the intended appeal.

[2] The background of the matter is that by a Take or Pay Agreement dated 30th September 2014 between the Kenya Ports Authority, the 1st respondent herein and the Kenya Railways Corporation, the 5th respondent, Kenya Ports Authority agreed to consign a set volume of containers through the Standard Gauge Railway to its Inland Container Depot in Embakasi, Nairobi. William Odhiambo Ramogi, Asha Mashaka Omar, and Gerald Lewa Kiti (2nd-4th respondents) filed a petition in the High Court at Mombasa challenging that agreement on the grounds that it would ruin the economy of the City of Mombasa as 40% of its business is attributable to the activities at the Port of Mombasa; that it would also ruin the petitioners' businesses as well as those of many others thus infringing on their constitutional rights to fair administrative action under Article 47 and their economic rights under Article 43; and affect devolution under Articles 174 and 186. They therefore sought various orders and declarations set out in their petition in the High Court.

[3] In response, KPA, the 1st respondent, filed an application to strike out the petition on the grounds that the petitioners had not attempted or exhausted the alternative dispute resolution mechanisms under Section 34 of the Intergovernmental Relations Act for resolution of intergovernmental disputes; that the matter was *res judicata*; that it was an invitation to the court to legislate on policy guidelines; that the petitioners were busybodies who lacked *locus standi* to institute the suit; and that the issue was *sub judice*. The Attorney General, and the Cabinet Secretary, Ministry of Transport & Infrastructure (not listed as a party in this application), on their part, filed a preliminary objection raising more or less the same issues, that is, contesting the court's original jurisdiction on the

basis of Articles 6, 159(2)(c) and 189(3) and (4) of the Constitution and Sections 30 to 35 of the Intergovernmental Relations Act.

[4] The High Court dismissed that application and overruled the preliminary objection, a decision the Court of Appeal upheld in its judgment delivered on 26th September 2019. Aggrieved by that decision, the applicant wishes to prefer a further appeal to this Court.

[5] In this application, the Attorney General's case, as can be gleaned from the averments in the supporting affidavit and his written submissions, is that after the Court of Appeal delivered its judgment in the matter on 26th September 2019, he lodged a Notice of Appeal on 8th October 2019 together with a letter requesting for the proceedings. The same were, however, not availed to his office until 21st May 2020 by which time the thirty days appeal period had long expired. He said the intended appeal is being brought as of right under Article 163(4)(a) of the Constitution and the record of appeal was, pursuant to Rule 31(b) of the Supreme Court Rules, filed in this Court on 13th July 2020 awaiting this Court's ratification by the granting of this application that it is properly on record. The applicant concludes that he has an arguable appeal which raises pertinent issues on resolution of intergovernmental disputes through the ADR mechanisms and that the matter is of great public importance as it directly affects about 6,300 persons and indirectly thousands of others. In the applicant's view, the respondents will not suffer any prejudice if this application is granted.

[6] The application is opposed by the 2nd, 3rd, 4th and 8th respondents who term it as a frivolous endeavor intended to perpetuate their woes. They contend that this Court has no jurisdiction to entertain any appeal in this matter under Article 163(4)(a) of the Constitution as the issue in the two Superior Courts below gravitated on the interpretation of Sections 30 to 35 of the Intergovernmental Relations Act and not on any provision of the Constitution. They further argued that in the absence of a certificate of delay from the Deputy Registrar of the Court of Appeal, the allegations that there was delay in obtaining the proceedings have

not been substantiated; that under Rule 46(1) of the Supreme Court Rules the applicant's Notice of Appeal stands withdrawn for failure to institute an appeal within the prescribed time and in the absence of a notice of appeal, the Court cannot entertain this application; and that the **42 days** delay in filing this application after obtaining the proceedings has not been explained.

[7] On delay, they rely on the case of ***Charles Karathe Kiarie & 2 Others vs Administrator of the Estate of John Wallace Mathare (Deceased) & 2 Others*** [2019] eKLR, in which this Court found a 27 days' delay unreasonable and dismissed an application for extension of time.

[8] We have considered these rival submissions. As stated, the intended appeal emanates from the interlocutory ruling of the High Court which dismissed an application that sought to strike out a petition, and overruled a preliminary objection challenging the competency of the same petition. The substantive petition before the High Court is therefore yet to be heard and determined.

[9] As this Court has repeatedly stated, it 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. We made this clear in 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 that:

“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.”

[10] As stated in ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another***; SC Application No. 12 of 2015; [2016] eKLR, this Court may also interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law apparent from the decision in question.

[11] The reason for the refusal to assume jurisdiction to entertain appeals from interlocutory decisions is simple and clear. Article 163(4) of the Constitution circumscribes the jurisdiction of this Court to Court of Appeal decisions “involving the interpretation or application of ... [the] Constitution” or matters certified as being of “general public importance ...” Stressing this position, in the case of ***Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another***, Sup Ct Petition No 3 of 2012, [2012] eKLR this Court observed:

“Article 163 (4) (a) of the Constitution 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”

[12] Interlocutory decisions are not only outside the ambit of this jurisdiction but involving this Court at such early stages may also be prejudicial to some parties. Declining to entertain an appeal from the Court of Appeal discretionary decision on an application for stay of execution made to it under Rule 5(2)(b) of the Court of Appeal Rules, this Court stated thus in ***Teachers Service Commission v Kenya National Union of Teachers & 3 others*** [2015] eKLR:

“An application so tangential, cannot be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of this

Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.”

This was reiterated in this Court’s recent decision in ***Boniface Katana Kilaveri v Ethics & Anti – Corruption Commission & Commissioner of Land*** [2018] eKLR.

[13] In the case of ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others*** [2014] eKLR, this Court heard and determined an appeal emanating from a substantive determination by the Court of Appeal of a constitutional question. In that case, the appellants had invited the High Court to exercise its jurisdiction as conferred by Article 165(3)(d)(i), to interpret the Constitution and determine the validity of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). The High Court exercised this jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to this Court. The Court of Appeals’ decision in that matter triggered the jurisdiction of this Court not only because the appellant had sought to contest a substantive determination of a constitutional question by the Court of Appeal, but also because the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal.

[14] Guided by these principles and bearing in mind that the substantive matter is pending before the High Court we find that this Court does not have jurisdiction to entertain this appeal and the same must be dismissed.

Final Orders:

- (a) The Notice of Motion application dated 25th June 2020 is dismissed for want of jurisdiction;**
- (b) For avoidance of doubt, the Record of Appeal dated 13th July 2020 and registered as Petition No. 12 of 2020 is hereby struck off the Court's record.**
- (c) Each party to bear its own costs.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 11th Day of December 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

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

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA

