REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ojwang, Ndungu, SC JJ)

PETITION NO. 5 OF 2012

ERAD SUPPLIERS & GENERAL CONTRACTORS LIMITED .....APPELLANT

-VERSUS –

NATIONAL CEREALS & PRODUCE BOARD.....RESPONDENTS

RULING

1. *PRELIMINARY QUESTIONS BEARING ON PETITION OF APPEAL*

[1] This Ruling will address only preliminary matters raised by counsel at this stage, and not the substantive appeal filed by the appellant. We note, however, that in the pending petition of appeal, the appellant is contesting the Court of Appeal's Ruling on the ground that the Ruling arises from *proceedings that are in violation of Article 160(1) of the Constitution.* This foundation to the petition is being contested at the very threshold, by way of *preliminary objections.* And this is the issue to be cleared by the Supreme Court at this stage.

[2] Some of the matters raised in submissions do touch on the substantive appeal. For instance, one or more of the parties have raised the following questions:

> *(i) Is this a genuine appeal against a Ruling of the Court of Appeal, or rather, a ploy for initiating an entirely different cause of action?*
>
> *(ii) Does a question arise from the conduct of the Court of Appeal, touching on the independence of the Judiciary under the Constitution, Article 160(1)?*
>
> *(iii) Can a Court of law be moved, for any purpose, by a member of the Executive who is not a party to proceedings already in progress?*
>
> *(iv) Did the letter from the Permanent Secretary for Agriculture, who is not a party, cause the fixing of a mention session before the Court? Was the stay of execution issued by the Court of Appeal made on the basis of the request of the Permanent Secretary who is not a party in the matter, and if so, does it amount to a constitutional violation, an interference with the Judiciary by the Executive?*
>
> *(v) Would a communication to the Court by a third party not enjoined in the suit, compromise on-going proceedings, and does it infringe on the rights of the parties to the suit?*

[3] Upon hearing counsel's arguments both on 28th June, 2012 and 12th July, 2012, this Court recognised that a number of preliminary issues had been raised and that this two-Judge Bench would hear and dispose of them. It would, therefore, be improper to address issues raised in the

appeal, before settling the preliminary matters, including that of *jurisdiction*.

2. THE QUESTION OF JURISDICTION

[4] Counsel for the respondents raised preliminary objections relating to jurisdiction, couched in the following questions:

1. Does a two-Judge Bench have the capacity under the law to preside over this matter, where the issue of jurisdiction is to be determined?
2. Is this a matter that lies on appeal as of right, as provided in Article 163 of the Constitution?
3. Was the matter occasioning appeal a matter of interpretation or application of the Constitution? Was the preliminary question before the Court of Appeal only a question of stay of execution, and not that of interpretation of the Constitution?
4. If not, then, has leave to appeal been sought from the Court of Appeal, as required by the Constitution and by the Supreme Court Act, 2011, sections 15 and 19?
5. In the instant case, is this an appeal as envisaged by the Constitution, such that the Court of Appeal has already exercised its appellate jurisdiction over a matter of application or interpretation of the Constitution?
6. Should leave to appeal be obtained from the Court of Appeal in matters of interlocutory applications?

3. *DOES A TWO-JUDGE BENCH HAVE THE COMPETENCE TO HEAR THIS MATTER?*

[5] The question whether or not a two-Judge Bench of the Supreme Court has the capacity to hear this matter, has been raised by both the appellant and the respondent. The Court has already given a Ruling on this particular issue, in the course of submissions, but as a matter of record, we reiterate as follows.

[5A] We are conscious of the fact that both the Constitution and the accompanying statutes and rules, which are new instruments, will for some time be the subject of basic interpretations and, essentially, unless initiatives are taken within other institutions than the Judiciary, it will be the *responsibility of the Court to fix the operative meanings of the relevant provisions.*

[6] The Court, in giving meaning and effect to the drafts-person's language, cannot be purely technical or literal. The Court must take into account the *reality* and the *context as a whole* – so as to give *meaning* to the provisions: in particular the definition of the word "proceedings" under Art.163(2) of the Constitution. We find that the steps of this Court run in a *series of events* – and it is the last event, namely, the *hearing and determination of the substantive cause,* that must come before the full

Bench of five Judges; and this is what amounts to hearing-proceedings before this Court.

[7] In the run-up to the hearing before the five-Judge Bench, there are *preparatory steps* – beginning with proceedings on record before the Supreme Court Registrar, to any settling of deserving legal-procedural issues before a more limited Bench of the Court, and ending up with the substantive hearing before a Bench of five Judges. Without this mode of case-management, the task of the Court under the Constitution would be incapacitated. This would be contrary to the provisions of Art.159(2)(d) of the Constitution. It is, therefore, our duty to give full meaning to the terms of the Constitution as regards the determination of contested questions – i.e., the questions of merit.

[8] In that context, we find that this Bench as constituted today, is a valid and lawful framework for clearing *initial and preliminary questions preceding the hearing and determination of the substantive cause,* before arriving at the stage of a Bench of five Judges. We also rule that, while the category of preliminary issues preparatory to a hearing before five Judges is by no means closed, this Bench is a lawful forum for determining and directing on *issues of jurisdiction* – as a basis for intended hearings before the full Bench.

4. *IS THE LEAVE REQUIREMENT EXCLUDED, DUE TO THE NATURE OF THE INSTANT CAUSE?*

[9] Learned counsel, Mr. Ahmednasir argues that the matter before us is not a substantive appeal against Judgment, or Ruling of the Court of Appeal. Rather, he states, it is an issue of monumental importance, that addresses a unique situation where, what is in question, is the *nature of the procedures or proceedings before the Court of Appeal,* and not the substantive case which is being canvassed – procedures or proceedings which, allegedly, constitutionally flawed the orders of that Court. Mr. Ahmednasir asks the Court to determine the question: what happens where *"during a mention session, an issue arises before the Court, relating to the interpretation and application of the Constitution?"*

[9A] Learned counsel argues that leave to appeal, in such circumstances, is not required under Article 163 (4) of the Constitution, which states, *"[a]ppeals shall lie from the Court of Appeal to the Supreme Court –*

> ***(a)*** *as of right in any case involving the interpretation or application of this Constitution....",*

or under Section 15 of the Supreme Court Act, 2011 which states:

> ***"(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.***
>
> ***(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to***

the interpretation or application of the Constitution."

Mr. Ahmednasir argues that the words 'any case' under Article 163(4) includes a *mention* or other *interlocutory matter* as in the present instance.

[10] The respondents contend that this is not an appeal on a matter of interpretation or application of the Constitution and, therefore, does not fall within the parameters of Article 163(4), or Section 15(2) of the Supreme Court Act. It is argued that there is no case relating to the interpretation or application of the Constitution that came up before the Court of Appeal from the High Court as a matter on appeal, and upon which the appellate Court ruled – so that a further appeal may now lie to the Supreme Court. Mr. Katwa Kigen, for the respondent, argues that this, in fact, is a matter concerning an interlocutory order pending the hearing of the full appeal – and as such, the Court of Appeal is yet to exercise its appellate jurisdiction on the matter. In the circumstances, counsel urges, there is no substantive decision from which the appellant can appeal, with or without leave.

[11] Further, learned counsel contends that the real issue at hand is the grant of an order by the Court of Appeal – order of stay of execution of the High Court's order, in this matter. Such an order, and the associated cause

before both the High Court and the Court of Appeal, it is urged, do not meet the requirements of Article 163(4) (a) of the Constitution, as it is not a case involving the interpretation or application of the Constitution; rather, it is a matter that raises questions of commercial and contract law, none of which are of a constitutional nature.

5. THE SUPREME COURT'S APPELLATE JURISDICTION

[12] As the respondent quite rightly pointed out, the Supreme Court, in ***In the matter of the Independent Electoral and*** *Boundaries Commission,* Constitutional Application No. 2 of 2011 [at pp. 23-24, para. [43]] clearly stated:

> "***....The High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High court an exclusive jurisdiction; for by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court..... Only where*** *litigation* ***takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of***

Appeal and the Supreme Court will have been limited to the appellate stages."

[13] The course of legal practice shows that the main cause in litigation often spawns collateral claims which also claim judicial time. The Courts, in the discharge of tasks of case-management, have to deal with all such matters. In this regard, further principles may be drawn from this Court's decision in Constitutional Application No.2 of 2011.

[13A] In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.

[13B] This principle will in particular apply in relation to interlocutory matters that do not fall within the terms of Article 163(4) of the Constitution.

[14] Indeed, this Court has recently, in ***Peter Oduour Ngoge v Hon. Francis Ole Kaparo, SC*** Petition 2 of 2012, [para. 29-30] stated as follows:

> ***"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.***
>
> ***In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

[15] The appellant's position is that a letter written by the Permanent Secretary in the Ministry of Agriculture, occasioning a mention session before the Court of Appeal, was the direct cause of the Court issuing orders of stay – and that this was a major constitutional matter: an

infringement of the independence of the Judiciary. Whether or not the said communication from the Executive Branch was so crucial, is essentially an evidentiary question; but the Court of Appeal's record shows that Court's perception to be that the letter had no relevance. We would take judicial notice of the solemnity of the Court of Appeal's record, while bearing in mind that the appellant's main cause is not before the Supreme Court. The judicial position to take, in our opinion, is that the matter before us has a collateral nature, falling outside this Court's jurisdiction, failing the express consent of the Court of Appeal.

[16] We, therefore, decline jurisdiction in respect of the appeal, at this preliminary stage. The appellant shall bear the respondent's costs incurred before this Court.

DATED and **DELIVERED** at **NAIROBI** this 12th day of September, 2012.

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J.B. OJWANG
JUDGE OF THE SUPREME COURT

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N.S. NDUNGU
JUDGE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA