REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ojwang, Ndungu, SCJJ.)

PETITION NO. 2 OF 2012

PETER ODUOR NGOGE.................................PETITIONER

-VERSUS-

1. HON. FRANCIS OLE KAPARO.....................
2. THE CLERK OF THE NATIONAL ASSEMBLY
3. THE ELECTORAL COMMISSION OF KENYA
4. THE HON. THE ATTORNEY-GENERAL........ ....RESPONDENTS
5. GEORGE ODINGA ORARO t/a ORARO & COMPANY ADVOCATES..........................
6. THE NATIONAL ASSEMBLY OF KENYA....

RULING

(1) Preliminary Questions bearing on Petition of Appeal

[1] It is not the substantive appeal by the petitioner that is, at this stage, being disposed of. The proposed appeal bears grievance against a Ruling of the Court of Appeal, upholding the High Court's Ruling in the following terms:

> ***"We are in no doubt that the applicant's chamber summons dated 8th October, 2007 was a frivolous side-show intended to keep the [main cause] pending in court. We therefore find that the High Court was right in dismissing it......"***

[2] In a lengthy petition of appeal, the petitioner is contesting the Court of Appeal's Ruling, on the basis of a varied set of Articles of the Constitution of Kenya, 2010.

[3] Whether or not such a grievance will be considered by the Supreme Court, is dependent on certain *preliminary issues* being raised at this stage. Such issues are concerned with *procedure,* and with *jurisdiction.* In the category of procedure, the following issues have been raised:

(i) can an Advocate in private practice represent a public servant who has been sued in official capacity?

(ii) can an advocate in private practice represent a public servant who has been sued in official capacity when the Attorney-General is present in Court, albeit representing a different party?

(iii) would such representation be in breach of Rule 9 of the Advocates (Practice) Rules?

(iv) can the Attorney-General's powers under Article 156 of the Constitution be delegated to other persons?

(v) who is the Attorney-General representing, in these proceedings?

(vi) if it be the case that the Advocate for 5th respondent is improperly before the Court, to grant this Advocate audience –

does it violate the petitioner's rights to fair trial and access to justice as contemplated in the Constitution?

[4] Upon examining these "preliminary" issues on the first occasion of hearing counsel, on 24th July, 2012 this Court made a Ruling which we still uphold, as follows:

> ***"At the core of learned counsel, Mr. Ngoge's case is the subject of representation of the parties. It is a question which ultimately will lead to the success or failure of the whole cause before this Court.***
>
> ***"Therefore, at this preliminary stage, it is improper to go into the subject of representation – until prior preliminary issues such as jurisdiction have been cleared. Accordingly, we now rule that the preliminary issue is to be settled first, before there is any possibility of considering the issue of jurisdiction."***

(2) The Vital Question of Jurisdiction

[5] The vital jurisdictional questions canvassed by counsel were as follows:

(i) does this matter involve the interpretation and application of the Constitution, so as to be in compliance with Article 163(4) which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right, in any case involving the interpretation or application of the Constitution?

(ii) what is the exact decision the petitioner is appealing against – does it fit within the terms of Article 163(4)?

(iii) did the applicant seek leave of the Court of Appeal, before lodging an appeal in the Supreme Court?

(iv) can the Supreme Court entertain an application where the Court of Appeal has either not determined such motion by the petitioner for leave under s.19 of the Supreme Court Act, 2011, or, has entertained such an application but declined to grant leave?

(v) can the instant petition of appeal be heard, on the terms of s.19 of the Supreme Court Act, even where the Court of Appeal's refusal to grant leave for further appeal cannot be referred to the Supreme Court for reconsideration?

(3) ***Citing Fundamental Rights: Does this obviate the Rules of Jurisdiction?***

[6] Learned counsel, Mr. Ngoge entered upon his case by arguing that the Supreme Court's core duty is "to hear appeals from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution" [Article 163(4)(a)] – and that "[his] grounds of appeal are generally to the effect that the respondents violated his fundamental human rights...with the complicity of a recalcitrant High Court and Court of Appeal." Counsel urged that "the appellant discloses serious allegations of human rights abuses involving...State officers and

State organs" – and that these "automatically [give] the [Supreme Court]… supervisory [appellate] jurisdiction to hear the appeal and to make full inquiries." Mr. Ngoge urged that Article 163(4)(a) as read with Articles 10, 19, 20, 21, 159, 258 and 259 of the Constitution, "gives the [Supreme Court] supervisory appellate jurisdiction to hear the appeal with [the] view of realizing its object and purpose as a Court of last resort…[,] upholding fundamental human rights and the Constitution, in the process of supervising the High Court and the Court of Appeal." Counsel urged that on such imperative grounds, "it should….appear strange to [the Supreme] Court that the respondents who are being accused of violating the appellant's…..fundamental human rights and the Constitution [,] are the ones causing [an] unnecessary spectacle by urging the [Supreme] Court eloquently to down tools and shut its doors on the appellant."

[7] Mr. Ngoge submitted that the Supreme Court cannot "uphold the Constitution [and] the fundamental rights of the [individual] and the rule of law" if there is any limitation to "the possibility of accessing [that Court] automatically." Consequently, he urged, "the question of jurisdiction raised by the respondents should….be treated very cautiously, carefully and with a lot of trepidation because of the great risks of shutting the doors of the Supreme Court on a genuine appellant…"

[8] Counsel urged as a basis of compliance with the terms of admission to appeal, on the basis of Article 163(4)(a) of the Constitution, that "the simplest thing to do is to examine the grounds of appeal without digging deeper into the merits or [demerits] of the appeal." He submitted: "If upon examination the [Supreme] Court is satisfied that [,] *prima facie*, the grounds of appeal [disclose] a cause of action involving interpretation or application of the Constitution [read human rights] [,] it shall admit the appeal...."

[9] Mr. Ngoge illustrated his general argument by referring to case law: the East African Court of Justice case, ***Prof. Peter Anyang' Nyong'o & Ten Others v. Attorney-General & Others,*** Reference No.1 of 2006 in which a cause of action meriting a motion in Court was defined as "a set of facts or circumstances that in law gives rise to the right to sue or to take out an action in Court for redress or remedy."

[10] Counsel then urged that "the grounds of appeal herein...*prima facie* ...[disclose] a constitutional cause of action which gives the Supreme Court jurisdiction to sit and make full inquiries on the complaints made by the [appellant]...under Article 163(4)(a)....as read with Articles 258 and 259 of the Constitution."

[11] Counsel relied on the Court of Appeal decision in ***Rashid Odhiambo Aloggoh & 245 Others v. Haco Industries Ltd,*** Civil

Appeal No. 110 of 2001**,** which he urged to have settled the principle that "where allegations touching on violations of the Constitution are made by a party, the Court has a [constitutional] duty to investigate the said allegations and to give a remedy if the allegations are merited." And to the same intent counsel invoked another Court of Appeal decision, ***Epco Builders Ltd. v. Adam S. Marjan, Arbitrator & Another, Civil Appeal No. 248 of 2005***, which he urged to bear the principle that "once a cause of action is disclosed by the pleadings especially on matters touching on violations of fundamental human rights and freedom [,] the Courts are under the mandatory constitutional obligation to hear the party making such allegations". Learned counsel submitted that these several authorities had persuasive effect, especially as they are in line with the terms of Articles 10, 22, 258 and 259 of the Constitution which the Supreme Court is required to uphold.

(4) Seeking Leave to Appeal differs from raising a Constitutional Question: The Stand of the Respondents

[12] The respondents contend that the petitioner's appeal does not lie, on grounds of *jurisdiction:* for the Court of Appeal's decision being contested is one expressly denying leave to appeal against a High Court decision which had refused the petitioner's application for the review of a decision. The said decision, in relation to which a review had been

sought, was the "decision not to bar the 5th respondent...from acting on behalf of the 2nd respondent." It is contended that s.19(b) of the Supreme Court Act, 2011 safeguards the said Court of Appeal decision, and hence the Supreme Court lacks jurisdiction to entertain an appeal on the matter.

[13] The respondents urge that the petitioner has invoked fundamental-rights provisions in vain, as a basis for initiating a constitutional petition in which it is claimed that the petitioner's rights have been violated by the High Court and the Court of Appeal: "The petitioner does not stop at requesting the appeal to be allowed but further seeks declaratory relief that the Court of Appeal, the High Court and the respondents have violated Articles 10 and 159 of the Constitution..."

[14] Is it proper to bring such a case as an *appeal* before the Supreme Court? No, in the submissions of learned counsel – on account of the provisions of the Constitution of Kenya, 2010 and the attendant Supreme Court Act, 2011 (Act No. 7 of 2011). Article 163 of the Constitution provides:

"(3) The Supreme Court shall have –

(a) ....

(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from –

(i) the Court of Appeal; and

(ii) any other court or tribunal as prescribed by national legislation.

(4) Appeals 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; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

(5) A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

[15] Counsel submitted that, by Article 163(9), the Constitution authorises the regulation of the Supreme Court's exercise of its powers by ordinary legislation; and s.19 of the Supreme Court Act is relevant in this regard, providing thus:

"The Supreme Court shall hear and determine appeals from the Court of Appeal or any other court or tribunal against any decision made in proceedings, only to the extent that –

(a) ....

(b) the decision is not a refusal to grant leave to appeal to the Court of Appeal."

[16] Learned counsel submitted that the proceedings before the Court of Appeal, against which the petitioner has moved this Court, "was *an application for leave* under the rules of that Court….", and not a case "involving the interpretation or application of [the] Constitution."

(5) Only Weighty Matters consign to the Supreme Court, the rest devolve to Other Courts

[17] Learned counsel urged it to be a purposive approach in developing the constitutional law, which the Court may adopt, that "there should be a …..restriction of rights to appeal to the Supreme Court against decisions of the Court of Appeal denying leave to appeal"; for the requirement for leave helps to "sieve out at the earliest possible stage frivolous appeals, allowing judicial time and resources to be dedicated to serious appeals."

[18] To illustrate that principle, counsel relied on a decision of the English House of Lords: ***Geogas SA v. Trammo Gas Ltd*** [1991] 3All ER 554, in which the relevant consideration appears in the judgment of Lord Jauncey of Tullichettle (pp.558-559):

> ***"No appeal lies to the Court of Appeal unless the High Court or Court of Appeal gives leave. The legislative intention of limited review would be rendered nugatory if appeals were to lie to the Court of Appeal and then to [the House of Lords] against a decision of a judge***

refusing or granting leave to appeal an award to the High Court and if an appeal were to lie against a decision of the Court of Appeal to refuse to grant leave to appeal from the High Court to itself under s.1(7) [of the Arbitration Act, 1979]. To allow such a situation would be to produce the absurdity referred to by Lord Esher MR in Ex p. Stevenson [[1892] 1 QB 609] [Per Lord Esher:

> *"...if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from the decision, the result is an absurdity, and the provision is made of no effect']....*

"My Lords, I have no doubt that this is a case in which the rule of Lane v. Esdaile [1891] AC 210 and the principle stated by Lord Esher MR in Ex p. Stevenson apply. It follows that your Lordships have no jurisdiction to entertain the appeal, which must be dismissed."

[19] Counsel relied further on the English House of Lords decision, ***R v. Secretary of State for Trade and Industry,*** *ex parte* ***Eastaway*** [2001] 1 All ER 27, in which the following passage [*per* Lord Bingham of Cornhill] occurs [pp.32-33]:

> *"The requirement of permission to appeal is imposed primarily to protect the courts against the burden of*

hearing and adjudicating on appeals with no realistic chance of success. The purpose of these filters is different, even though there is an incidental benefit to the courts in the first case and the successful litigant (or both litigants) in the second…

"…In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist" [emphasis supplied].

[20] Learned counsel submitted that the foregoing principle, well established in persuasive authority, should be the basis for this Court to decline jurisdiction in the instant matter. For the petitioner had endeavoured to bar the respondents from being represented in Court, and when he failed, had then sought leave to appeal from the High Court – an application which was refused by both the High Court and the Court of Appeal, the latter Court holding the proposed appeal to be frivolous. It is not, in these circumstances, permissible for the petitioner to come before the Supreme Court on an "as-of-right" basis – counsel

urged. Counsel urged that this Court should down tools on jurisdictional grounds, on the basis of s.19(b) of the Supreme Court Act, 2011.

[21] Counsel contested the petitioner's argument, that the High Court and the Court of Appeal had "erred in failing to recognise that he had an automatic right to appeal": for it was the petitioner himself who had applied for leave to appeal, realizing that indeed, leave ***was*** required; the two superior Courts adjudicated this question, and dismissed the claim.

[22] Learned counsel urged this Court to uphold the law defining its jurisdiction, which already appears in an earlier Ruling, in ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution,*** Constitutional Application No. 2 of 2011:

> ***"[30] The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme***

Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

[23] Counsel submitted that the Supreme Court's adjudicatory powers "must be restricted to matters of sufficient weight and importance [warranting] authoritative guidance", consistent with the objects set out in the Supreme Court Act, 2011, namely [s.3] to –

> ***"(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***
>
> ***"(b) provide authoritative and impartial interpretation of the Constitution;***
> ***"(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;......."***

[24] Counsel submitted that the instant petition does not fall within the larger objects of the Supreme Court, thus defined; that this Court should be guided by "practical considerations of justice"; and that, "not every single instance of alleged error by the Court of Appeal should be reviewed by the Supreme Court."

(6) The Supreme Court's Appellate Jurisdiction under Article 163 of the Constitution and Section 19 of the Supreme Court Act, 2011: Resolving the Question

[25] It is not contested that the dispute now before this Court arose at

the High Court, when the petitioner sought, by interlocutory motion, to secure orders barring the respondents herein from being represented. The High Court, after considering the matter, came to the conclusion that the petitioner's object was essentially diversionary and tendentious, and accordingly, dismissed the proceedings. The petitioner, who felt aggrieved by the High Court's decision, sought leave to appeal therefrom; but the High Court refused leave, whereupon he now sought leave from the Court of Appeal. The Court of Appeal, similarly, refused leave, taking the position that the proposed appeal was frivolous. The petitioner has, in effect, departed from his initial perception – which was correct, in our view – that the interlocutory matter before the High Court was a question requiring leave to lodge an appeal; instead, he now frames his claims in the initial interlocutory matter as a major *constitutional question*, which must be taken up on appeal to the Supreme Court as of right.

[26] In the petitioner's whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution – such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court. On our own, we have also not appreciated how an interlocutory matter

as to the representation of parties, could have prevailed over the petitioner's main cause in the High Court, and assumed the vitality now being ascribed to it. We have, besides, noticed nothing improper with the Rulings delivered by both the High Court and the Court of Appeal, holding the petitioner's interlocutory proceedings to be merely frivolous.

[27] We are in agreement with counsel for the respondents, that the appellate jurisdiction of the Supreme Court is defined clearly enough under Article 163 of the Constitution, and s.19 of the Supreme Court Act – and that the petitioner's case which has been brought without the leave of the Court of Appeal, falls outside the jurisdiction of this Court. At this preliminary stage, therefore, *we dismiss the petition, and order that the petitioner shall bear the incidental costs of the other parties.*

[28] Although this Court has in the past pronounced itself on the jurisdictional limits within which it operates, the instant matter, thanks to the persuasive authority which it brings along, has given occasion for us to further explicate this Court's appellate jurisdiction.

[29] We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents a progressive new trend of governance. 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.

[30] 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.

[31] Orders as indicated hereinabove.

DATED and **DELIVERED** at **NAIROBI** this 4th day of September, 2012.

....	....
J.B. OJWANG	**N.S. NDUNGU**
JUDGE OF THE SUPREME COURT	**JUDGE OF THE SUPREME COURT**

I certify that this is a true Copy of the original

REGISTRAR
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