

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

***(Coram: Maraga, CJ & President; Ibrahim; Ojwang; Wanjala;
Njoki; SCJJ)***

PETITION NO. 6 OF 2017

ADIEL MURIITHI PHILLIPAPPELLANT

VERSUS

THOMAS MAINGIRESPONDENT

*(An appeal from the judgement and decree of the court of appeal at
Nairobi (Okwengu, Azangalala & Mohammed, JJA) delivered on 24th
March, 2017 in Court of Appeal Civil Appeal No. 282 of 2017)*

R U L I N G

[1] This appeal, brought as of right under Article 163(4)(a) of the Constitution, arises from a running down claim that originated in the High Court in which Kasanga Mulwa, J awarded the appellant Kshs.2,495,425/-. The respondent evinced his intention to appeal against that decision by filing a notice of appeal. To forestall the appeal, the parties' advocates compromised the decree at Kshs.1,898,978/- and executed and filed a consent to that effect. After the said sum of Kshs.1,898,978/- had been paid in full to the appellant and he had executed a discharge voucher, on the grounds that though filed in court, the consent having not been

transmuted into a court order a nullity, the appellant disowned the consent and applied to execute the decree to recover the balance of the decretal sum. In an application by the respondent to set aside those execution proceedings, the appellant also contended that the respondent having filed a notice of appeal, the High Court was *functus officio* and had therefore no jurisdiction to entertain the matter.

[2] Lenaola J (as he then was) identified the issue in that application as being “the effect of the consent letter vis a vis the decree, whether the consent letter could vary, amend or otherwise change the important tenor of the judgment and decree” and after hearing he dismissed it.

[3] The appellant’s 17 grounds of appeal to the Court of Appeal also revolved around the effect of the consent letter. Dismissing the appeal, the Court of Appeal found that the consent letter was signed by the parties’ Advocates who were their duly appointed agents and that moreover the appellant had ratified it by executing the discharge voucher after receiving the compromised sum of Kshs.1,898,978/- in full. Aggrieved by that decision, the appellant has preferred this appeal, as stated, as of right under Article 163(4)(a) of the Constitution.

[5] As this Court has repeatedly stated and more specifically in the case of **Lawrence Nduttu and Others v. Kenya Breweries Ltd & Another**, [2012] eKLR, “*it is not the mere allegation in the pleadings by a party that clothes an appeal with attributes of constitutional interpretation or application.*” To be competently before this Court, an appeal under Article 163(4)(a) of the Constitution must relate to a matter involving the interpretation or application of the Constitution that has actively been litigated before the High Court or Courts of coordinate

jurisdiction as well as before the Court of Appeal. *“In other words,”* as this Court added in the **Lawrence Nduttu Case**, *“an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum.”*

[6] The history of this matter as related above clearly involved, leave alone alluded, to any issue of constitutional interpretation or application. The ground the appellant has raised before this Court that Justice Lenaola sat on appeal on the decision of his brother Justice Kasanga Mulwa, a judge of co-ordinate jurisdiction, has no basis at all as Justice Lenaola did not even cast aspersions on Justice Mulwa’s judgement leave alone reversing it. He just said the parties were bound by their consent which compromised Justice Mulwa’s judgement.

[7] In the circumstances, we agree with counsel for the respondent that there is no issue of interpretation or application of the Constitution invoking this Court’s jurisdiction under Article 163(4)(a). It follows that this appeal is therefore incompetent. Consequently, we uphold the Preliminary Objection and hereby strike out this appeal with costs to the respondent.

DATED and DELIVERED at NAIROBI this 28th day of September 2018

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

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M.K. IBRAHIM
JUSTICE OF THE SUPREME
COURT

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J.B. OJWANG
JUSTICE OF THE SUPREME
COURT

.....
S. WANJALA
JUSTICE OF THE SUPREME
COURT

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME
COURT