

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala, Njoki, Lenaola, SCJJ)

PETITION NO. 13 OF 2016

BETWEEN

DEPOSIT PROTECTION FUND BOARD APPELLANT
(PRESENTLY KNOWN AS THE KENYA DEPOSIT INSURANCE
CORPORATION)

AND

AJAY SHAH 1ST RESPONDENT

PRAFUL SHAH 2ND RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal in Nairobi Civil Appeal No. 158 of 2013 at Nairobi (P. M. MWILU, ASIKE-MAKHANDIA And OTIENO-ODEK JJ.A) dated 17th June, 2016)

RULING

A. INTRODUCTION

[1] The matter before the Court is a Petition dated 26th July 2016 filed on even date, seeking to set aside the decision of the Court of Appeal dated 17th June 2016

which found that the Board's suit against the Respondent was not only time barred, but that the Board had not proved its case against the Respondent for misfeasance and breach of trust owed to Trust Bank Limited (in Liquidation).

B. LITIGATION BACKGROUND

(a) High Court

[2] The Board was appointed Liquidator of the Bank on 1st August 2001. On 23rd March, 2010 it commenced litigation against the Respondents, as Executive Directors of the Bank, to recover a sum of Ksh. 1,549,591,424.41 from them as at 28th February 2010 via a Notice of Motion dated 23rd March, 2010 pursuant to Sections 323 and 324 of the Companies Act. It sought the following orders:

- a) A declaration that the Respondents ... were knowingly parties to the carrying on of business of Trust Bank Ltd (in liquidation) with intent to defraud creditors of the Company and for a fraudulent purpose.*
- b) A declaration that the Respondents ... were guilty of misfeasance and breach of trust in relation to the said company.*
- c) A declaration that the Respondents ... were in breach of their fiduciary duties to Trust Bank Limited allowed and/or caused Trust Capital Services Limited, in which they had personal interest, to overdraw its accounts without proper security and thereby caused the Bank to loose over Kshs. 241, 442, 376.80 as at 16th September 1998.*
- d) An order that the Respondents ... jointly and severally are liable to make good and pay the Applicant, as Liquidator of the Bank the sum of Kshs. 1, 549, 591, 424.41 cts being the amount due in the account of Trust Capital services Limited as at 28th February 2010*

together with interest thereon at prevailing Bank rates from 1st March 2010 to the date of payment in full.

[3] It was urged by the Board that, as a Liquidator, in the course of winding up the Company, it established that the business of the Bank was carried out with intent to defraud the creditors and for other fraudulent purposes and that the Respondents, as former directors, were knowingly parties to the said frauds. It urged that the Respondents were guilty of misfeasance or breach of trust in relation to the Company. In particular, that there was fraudulent loss of money through the accounts of Trust Capital Services Limited, in which the Respondents were shareholders.

[4] The Respondents disabused the alleged evidence tendered by the Board as hearsay. The 1st Respondent also raised a Preliminary Objection (PO) alleging that the High Court lacked jurisdiction as the matter had been filed without leave of Court, a requirement under section 241(1)(a) of the Companies Act.

[5] In its decision, the High Court dismissed the need for leave holding that under section 35(1) of the Banking Act, the Board, may be appointed a liquidator and under section 36 of the Banking Act, it is exempted from the need for leave under section 241 of the Companies Act as it can sue in its own name. On the merits of the case, the Court, *Ogola J*, on 30th May, 2013 allowed the application stating inter alia thus:

“The Respondents must answer to Section 323(1)(a) and section 324 (1) and since no satisfactory answer or explanation or exculpatory evidence has been given, the Notice of Motion application dated 23rd March 2010 succeeds in its entirety with costs to the applicant.”

(b) Court of Appeal

[6] Aggrieved by the High Court decision, the 1st Respondent preferred an appeal to the Court of Appeal, which appeal was supported by the 2nd Respondent. The Court of Appeal compressed the 21 grounds of appeal into 9 grounds. He argued *inter alia*, that he was aggrieved by the High Court holding that his defence was based on mere technicalities and the Court's upholding of the Preliminary Objection. The Appellate Court in that context distilled the following as issues for determination:

- i. *Whether the 1st Respondent's (Board) claim was statute barred (Limitation of actions);*
- ii. *Whether the trial Court properly evaluated the evidence on the issue of liability of the appellant and 2nd Respondent;*
- iii. *Whether the amount of Kshs. 241, 442, 375. 80 was lost by Trust Bank Limited on account of Trust Capital Services Limited;*
- iv. *Whether interest is due and owing on cheques that were unpaid, uncleared and not honoured by the Trust Bank limited; and*
- v. *Whether compound interest is due and payable on and for any sums of money found due and owing.*

[7] In its decision of 17th June 2016, the Appellate Court allowed the appeal with costs. On limitation, it found the matter time barred, stating particularly that, *"we are of the considered view that the cause of action by the 1st Respondent against the appellant and the 1st Respondent against the appellant and the 2nd respondent is time barred since it was commenced more than six years from when the cause of action arose on 16th September 1998.*

[8] On the Appellant's ground that the trial Court relied on extraneous matters in making its decision *to wit* reliance in the Scheme of Arrangement, the Justices of Appeal found that the information in the Scheme of Arrangement was not factual; that the purpose of a Scheme of Arrangement is to reconstruct a company

while protecting the interest of creditors and shareholders. Hence the Scheme could not be relied on to prove liability of the Respondents.

[9] The Court further observed that the Respondents liability was dependent on the liability of Trust Capital Services Limited to the Bank. Consequently, it found that of the Ksh. 241,442,375.80 owed to the Bank by Trust Capital Services Limited, Ksh. 96,500,000.00 was directly credited to the Bank into the account of Trust Capital Services Limited being unpaid Bankers Cheques that had been issued, and that Trust Capital Services Limited never received the sum of Ksh. 146,687,402.45. Therefore, this sum was never lost or stolen. The Court also found that the trial Court had not addressed this issue of unpaid cheques and held that based on the evidence on record, the Board bore the legal and evidential burden to prove loss of Kshs. 241, 442, 375.80 but did not discharge it.

[10] Ultimately, the Court of Appeal allowed the appeal in the following terms:

“The upshot is that we find that the 1st respondent’s claim against the appellant and the 2nd respondent is time barred. We find that on a balance of probability, the 1st respondent did not prove that Trust Capital Services Limited owed it the principal sum of Ksh. 241, 442, 375.80 and interest accrued thereon. We find that the trial court did not properly evaluate the evidence on record to determine the legal consequences of the reversal of the sum of Ksh. 146,687,402.50 and the direct credit payment of Ksh. 96,500,000. This appeal has merit and we allow the same. The ruling and order of the trial court dated 30th May, 2013 and all consequential orders are set aside. It is trite that costs follow the event and this appeal is allowed with costs in favour of the appellant and 2nd respondent.”

C. PETITION IN THE SUPREME COURT

[11] Aggrieved by the decision, the Board filed this appeal before the Supreme Court accompanied by an affidavit sworn on 20th July 2016 by one Micah Lekeuwan Nabori of CBK Pension House, the liquidation Agent of Trust Bank Limited.

They have preferred 8 **GROUND**S of appeal summarized as follows, that the Court of Appeal:

- i. *Failed to meet the minimum standard of fairness and impartiality;*
- ii. *Violated Article 10 of the Constitution on National Values and Principles of Governance, particularly Rule of Law and Fair Treatment;*
- iii. *Violated Article 27 on equal protection of the law;*
- iv. *Violated Article 50 on fight to Fair hearing and acting contrary to rules of natural justice by relying on issues not pleaded and/or canvassed before High Court and/or Court of Appeal;*
- v. *Acted in excess of its jurisdiction in relying on issues not canvassed in the lower Court;*
- vi. *Violated the Constitution by overriding and/or amending the express statutory provisions of section 323 and 324 of the Companies Act, a mandate of the Legislature; and*
- vii. *Decided the dispute between parties without any prayers to do so in the pleadings before it, notwithstanding a separate pending Appeal No. 174 of 2013 between the parties arising from the said judgment.*

[12]. The Petitioner seeks the following **RELIEFS** produced verbatim:

- (a) *The appeal be allowed;*
- (b) *A declaration that the decision of the Court of Appeal dated 17th June, 2016 does not meet the minimum and basic standards of fairness and*

impartiality required of a Court or a judicial officer in administering justice as guaranteed under the Constitution of Kenya;

- (c) A declaration that the decision of the Court of Appeal made on 17th June 2016 deprived your Petitioner of the protection and equal benefit of the law as enshrined and guaranteed as a fundamental right by Article 27 of the Constitution of Kenya;*
- (d) A declaration that the said decision ...(sic) violated Your Petitioner's right to natural justice in the determination of the Appeal in violation of your Petitioner's constitutional rights under Articles 10 and 50 of the Constitution of Kenya;*
- (e) A declaration that the Court of Appeal in making the said decision acted contrary to and violated the national values and principles of governance as enshrined in Article 10 of the Constitution to the detriment of your Petitioner*
- (f) A declaration that the said decision ... is null and void and of no legal effect;*
- (g) The Petitioner be awarded costs of the present appeal and costs of the Appeal in the Court of Appeal;*
- (h) Any other relief or reliefs that this Honourable Court may deem just to grant.*

D. PRELIMINARY OBJECTION (PO)

[13] The 1st Respondent filed a Notice of Motion application challenging the jurisdiction of this Court but on the 12th of August 2016, applied to withdraw it via Notice of withdrawal. It was allowed on the 25th of November 2016 with no order as to costs.

[14] Upon withdrawal of the above application, a Notice of Preliminary Objection was filed on 12th August 2016 raising jurisdictional issues, urging that the appeal

does not lie under Article 163(4)(a) of the Constitution, as of right, and that no certification has been obtained.

E. RESPONDENTS' SUBMISSIONS ON THE PRELIMINARY OBJECTION

[15] The 1st Respondent filed a Replying Affidavit sworn on 27th March 2017, while the 2nd Respondent's affidavit is sworn on 18th July 2017. They filed Consolidated Submissions dated 27th March 2017 in opposition to the petition and in support of the PO where they frame the following four issues for determination:

(i) Whether the Court has jurisdiction

[16] On this, they submit that the Supreme Court has no jurisdiction as no constitutional issues were raised in this matter and no certification has been sought and obtained citing the cases of ***Lawrence Nduttu and 6000 others v Kenya Breweries Ltd & another[2012] 2KLR 804(Nduttu Case)***, ***Joho Hassan Ali & another v Suleiman Said Shahbal & 20others petition no 10 of 2013 (Joho Case)***, and ***Munya, Gatirau Peter v Dickson Mwenda Kithinji &2 others, Civil Application No 5 of 2014*** . It was their contention that the dispute between the parties emanated from the Commercial & Admiralty Division of the High Court, being proceedings incidental to the winding-up of Trust Bank Limited (in Liquidation). The case did not touch on any constitutional matter, and the alleged contraventions of Articles 10, 27 & 50 were never canvassed before the lower courts.

(ii) Whether the appeal raises any constitutional issue to warrant appeal as of right

[17] They submit that the Supreme Court cannot assume jurisdiction on the basis that the Court of Appeal violated the rights of the Petitioner or that the Court of

Appeal breached the Constitution. They argue that the Appellant seems to be crafting special jurisdiction on the basis that only the Supreme Court can overturn a decision of the Court of Appeal. In this context, they cite the case of ***Samuel Kamau Macharia and another v Kenya Commercial bank Limited and 20thers [2010]eKLR(S.K Macharia Case)*** and submit that jurisdiction cannot be so crafted.

(iii) Whether the Supreme Court has jurisdiction, and whether the Appellant has established the necessary threshold to set aside the Court of Appeal decision

[18] Even if the Court were to assume jurisdiction, it is submitted that the appeal does not raise any genuine or meaningful constitutional issues to warrant setting aside of the Court of Appeal decision. That the Appeal is also replete with unsubstantiated allegations. In particular, the allegations of bias are denied.

(iv) What dispositive orders ought to be made?

[19] They pray that the appeal be dismissed with costs.

F. APPELLANTS' SUBMISSIONS IN REPLY

[20] The Appellant opposes the Preliminary objection and submits that the Appeal lies as of right and raises issues of Constitutional interpretation and application. Council for the Appellant also submits that there was bias by the Appellate Court against the Petitioners, which bias occurred in the determination of the matter, and was therefore not an issue brought up in argument before the Court of Appeal.

[21] They contend that they are concerned with the exercise of judicial authority by the Court of Appeal in determining the questions before it, and that the Court of Appeal decision is a nullity *ab initio* for bias and it falls to the Supreme Court

to exclusively declare so. The thus pray that the court ought to dismiss the Preliminary Objection as it is merited.

G. ISSUES FOR DETERMINATION

[23] Arising from the above facts, preliminary objection raised by the Respondents and submissions of Counsel as summarized it is clear that, the only issue for determination before us, is whether this Court has jurisdiction to entertain and determine this Appeal. The Appellant herein contends that their appeal lies as of right under Article 163 (4) (a) of the Constitution. The said Article 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 this Constitution”.

[24] This court has had the occasion to pronounce itself on when a case involves matters of interpretation and application of the Constitution. In the ***Nduttu Case*** the court, interpreted the intention of Article 163(4)(a) to be that;

“..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 or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163 (4) (b) of the Constitution. (emphasis ours). Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

[25] This principle was affirmed in the ***S.K Macharia Case*** and ***Malcolm Bell v. Daniel Toroitich Arap Moi & Another*** Sup. Ct. Appl. No. 1 of 2013 [2013] eKLR.

[26] From our reading of the record of Appeal and Submissions, the matter before us has little or nothing to do with the interpretation and application of the Constitution. We state so noting that in fact and Counsel for the Appellant has urged that the prior constitutional issues arose via alleged bias and or discrimination at the point of determination of the Appeal before the Court of Appeal and that in fact no such issues were in contestation at the High Court or the Court of Appeal.

[27] We restate that in order to transmute itself to the provision of Article 164(4)(a), the constitutional issues must have been subject of the proceedings in the courts below. This is a position we have emphasized in the **Joho Case** where we explained;

“..in light of the foregoing, the test that remains to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this occurs by way of appeal, as contemplated under 163(4)(a) of the Constitution.”

[28] It is thus imperative that an appeal ought to originate from the Court of Appeal where issues of contestation revolved around the interpretation or application of the Constitution, essentially where a party is faulting the Appellate Court on the basis of such interpretation, which was not the case in this present matter.

[29] A look at the litigation history of this matter reveals that it is a commercial dispute touching on the winding up of Trust Bank Limited. It did not raise issues of application or interpretation of the Constitution and cannot purport to at this stage. In view of this, we find that we have no jurisdiction to hear this appeal and the same must be struck out.

H. ORDERS

- 1. The Notice of Preliminary Objection dated 12th August 2016 is upheld.***
- 2. The Petition of Appeal No 13 of 2016 is hereby dismissed.***
- 3. Each Party to bear their own Costs.***

DATED and DELIVERED at NAIROBI this 7th Day of December, 2018.

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT