

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP; Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 2 OF 2016

–BETWEEN–

RUTONGOT

FARM

LTD.....APPELLANT

–AND–

KENYA FOREST SERVICE.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND
RESPONDENT

PERMANENT SECRETARY,
MINISTRY OF FOREST & WILDLIFE.....3RD
RESPONDENT

COMMISSIONER OF LANDS.....4TH RESPONDENT

*(An appeal from the judgment of the Court of Appeal of Kenya in Eldoret Civil
Appeal No. 267 of 2014 (Musinga, Gatembu & Murgor, JJA) dated and
delivered in Eldoret on 10th December, 2015)*

RULING OF THE COURT

A. INTRODUCTION

[1] On 15th February, 2016, the Appellant filed the instant appeal under Article 163(4)(a) of the Constitution. The Petition dated 22nd January, 2016, is an appeal

from the Judgment and Order of the Court of Appeal at Eldoret, Civil Appeal No. 267 of 2014, dated 10th December, 2015.

B. BACKGROUND

[2] On 28th August, 1973, the Appellant entered into a sale agreement with Andres Johannes Olsen (“Olsen”) to purchase land parcels numbers L.R. Trans-Nzoia 6657 and 10832 (“the suit land”). The Appellant paid a deposit of Kshs.400,000/- towards the purchase price. The balance of Kshs.720,000/- was to be paid at a later date. On 17th January, 1974, the Appellant obtained consent from the Trans-Nzoia District Land Consent Board to have the suit land transferred to it. It seems that before the transfer was effected, and the balance of the purchase price paid, Olsen entered into another sale agreement with the 1st Respondent, Kenya Forest Services, which culminated in the suit land being transferred and registered in favour of the 1st Respondent on 3rd February, 1975.

[3] After the said transfer, a Gazette Notice was issued by the then Minister for Natural Resources giving a twenty-eight days’ notice of the intention to declare the suit land a forest area as per the provision of Section 4(2) of the Forests Act, Cap 385 (now repealed). The notice period lapsed with no objection to the gazettelement of the suit land as a forest area. Consequently, the land was gazetted as such and named Sekhendu (sometimes referred to as “Shikhendu”) Forest vide Gazette Notice No. 152 of 2nd June, 1977 (erroneously referred to as 17th June, 1977).

(a) High Court

[4] On 12th January, 2011, 34 years after the gazettelement of Sekhendu forest, the Appellant moved the High Court at Kitale—Petition No. 1 of 2011— seeking *inter alia*, the following Orders:

- (i) *An order of certiorari to quash Gazette Notice contained in Legal Notice No.152 dated the 2nd June, 1977 which declared the suit land as forest land named Sekhendu.*
- (ii) *A declaration that the suit land is owned by the Appellant and the same be transferred and registered in the name of the Appellant.*
- (iii) *That the Respondents be compelled to sign transfer forms to have the land transferred to the Appellant and be issued with allotment letters for the suit land.*
- (iv) *That the Respondents be compelled to pay damages to the Appellant for non-user of its land namely Trans-Nzoia 6657 and 10832 since the date of purchase to date.*
- (v) *That the Respondents be compelled to compensate the Appellant for loss of its properties destroyed or taken away when the members of the Appellant were being evicted from the suit land.*
- (vi) *A restraining order stopping the Respondents by themselves, their agents, servants, employees or any other person acting on their behalf from interfering with the suit land.*
- (vii) *An order for payment of damages to the Appellant for pain and suffering for having been deprived of its land unconstitutionally and left without food, clothing, shelter, health, education among others.*

[5] In its judgment dated 3rd July, 2014, the High Court allowed the Petition and issued the following Orders:

- (a) *An order of certiorari quashing Gazette Notice No. 152 of 1977 dated 2nd June, 1977.*
- (b) *A declaration that LR.No 6657 and 10832 belongs to the Appellant.*
- (c) *An order that the Commissioner of Lands or any other person under his charge do sign transfer documents to transfer LR. No. 6657 and 10832 to the Appellant or the transfer documents be signed by the Deputy Registrar in case the Commissioner of Lands decline to do so.*

(b) Court of Appeal

[6] Aggrieved by the High Court decision, the 1st Respondent filed an appeal to the Court of Appeal —Civil Appeal No. 267 of 2014— arguing that the High Court erred in allowing and determining an incompetent petition and enforcing a private contractual sale of land through public law remedies. In addition, it argued that the Appellant’s claim to the suit land was statutorily barred and further that the Petition did not satisfy the tenets and principles enunciated in ***Annarita Karimi Njeru v. Republic*** Criminal Application No. 4 of 1979; [1979] eKLR as well as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 in that the Appellant failed to state precisely which provisions of the Constitution had been violated, and the manner in which the rights were violated or breached.

[7] After considering the matter, the Court of Appeal set aside the decision of the High Court and held that the 1st Respondent had established proprietary interest in the suit land. The Court of Appeal in doing so, reasoned that the

dispute before the High Court arose out of a relationship between a willing buyer and a willing seller and that Olsen had exercised his right to sell the suit land to the 1st Respondent and therefore the question of whether the Appellant was deprived the right to acquire land did not arise. On the issue of eviction and destruction of property belonging to members of the Appellant, the Court found that there was no evidence to support those allegations hence the Court was unable to make a finding on whether any rights were violated as alleged. The Court further held that there was no basis for the allegations of constitutional violation as the dispute arose out of a sale of land agreement and nothing else.

(c) Supreme Court

[8] Aggrieved by the decision of the Court of Appeal, the Appellant filed this appeal which is premised on the following summarized grounds:

- (a) The Court of Appeal violated Article 40 of the Constitution when it held that the Appellant's remedy was against the seller and not the Respondents who evicted the Appellant from the suit land hence violating the Appellant's constitutional rights;*
- (b) The Court of Appeal violated Article 27 of the Constitution on equality by allowing the 1st Respondent to obtain ownership of land without compensating the Appellant and also by failing to make a finding that based on the recommendation of the Commissioner of Lands, the suit land should have been transferred to the Appellant;*
- (c) The Court of Appeal violated Article 68(c) of the Constitution which grants Parliament powers to regulate use of land yet Parliament had granted the Appellant right over the suit land but the Court of Appeal failed to take that fact into consideration; and*

- (d) *The Court of Appeal infringed on the Appellant's right to fair trial and hearing when it failed to take into account the evidence before it which showed that between 1973 and 1975, the Appellant had duly settled on the suit land and that its members had been forcefully evicted from the same.*

[9] In its response, the 1st Respondent filed a Preliminary Objection dated 19th April, 2016 seeking to strike out the Petition on the grounds that:

- (a) *This honourable Court lacks jurisdiction to entertain the Appellant's appeal as the Court was not meant to be merely an additional Appellate Court but is one whose appellate jurisdiction is clearly circumscribed by the Constitution as well as statute;*
- (b) *The nature of this appeal is such that it could not be instituted without the Appellant first seeking and obtaining leave of the Court of Appeal; and the Appellant having failed to obtain such leave, this appeal is incompetent and fatally defective for violating Article 163 of the Constitution as well as Section 19 of the Supreme Court Act;*
- (c) *The chain of the Courts in Kenya's constitutional set-up, running up to the Court of Appeal has and had the professional competence and proper safety designs to resolve all matters touching on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, would deserve the further input of the Supreme Court; and which is not the case with this Appeal;*
- (d) *The Appellant's claim is a contractual claim for land and having been filed after a lapse of over 30 years instead of the six years*

prescribed by the Limitation of Actions Act (Cap 22 of the Laws of Kenya) the same is time barred and cannot be entertained by any Court of law including the Supreme Court; and

- (e) *There is also no certificate of the Court of Appeal or this honourable Court obtained by the Appellant certifying that this appeal is of general public importance.*

[10] When the Petition came up for hearing on 9th May, 2018, and before the Appellant could be heard, the 1st Respondent sought leave to argue its Preliminary Objection. The said Preliminary Objection is the subject of this determination.

C. SUBMISSIONS OF THE PARTIES

(a) *1st Respondent*

[11] The 1st Respondent relies on its written submissions dated 21st February, 2017, as well as the oral submissions made in Court. The crux of its objection is that the appeal does not meet the jurisdictional threshold envisaged under Article 163(4)(a) of the Constitution. That noting the nature of the dispute, the Appellant can only approach this Court under Article 163(4)(b) and as such, the Appellant ought to have first obtained certification, either from the Court of Appeal, or this Court, certifying that the appeal raises matters of general public importance.

[12] The 1st Respondent further urges that the dispute arises out of a contractual claim based on the law of contract and which ought to be enforced

within the domain of private law and not public law. It also cautions the Court against entertaining vexatious litigants whose aim was to protract litigation by filing frivolous claims. In support of its' case, it relies on the case of ***Peter Oduor Ngoge v. The Hon. Francis Ole Kaparo & 5 Others***, SC Petition No. 2 of 2012; [2012]eKLR.

(b) 2nd and 4th Respondents

[13] The 2nd and 4th Respondents filed their written submissions dated 1st March, 2017, in support of the 1st Respondent's Preliminary Objection. It is their contention that the Appellant's case does not require interpretation or application of the Constitution. That therefore, this Court lacks jurisdiction to hear and determine the instant appeal, given that it was also not certified as a matter of general public importance under Article 163(4)(b) of the Constitution. In support of their case, the 2nd and 4th Respondents relies on this Court's decisions in ***Peter Oduor Ngoge (supra)***, ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013;[2014]eKLR and ***Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscione*** SC Application. No. 4 of 2012; [2013]eKLR, which all define the scope of the Supreme Court's jurisdiction under Article 163(4)(a) and (b) of the Constitution.

(c) Appellant

[14] In opposing the Preliminary Objection, the Appellant filed its submissions dated 6th February, 2017. It urges that the jurisdiction of this Court was properly invoked through Article 163(4)(a) of the Constitution, as the issues in contention revolve around the interpretation and application of the Constitution. It also explains that the Petition at the High Court raised constitutional issues and it had pleaded violation of constitutional rights. In that regard, it refers to paragraph 22

of the High Court decision where the Court recognized that the “**respondents violated the [appellant’s] constitutional right to acquire property.**”

[15] The Appellant in addition argues that, right from the High Court to the Court of Appeal, the central issue for determination revolved around whether the State illegally or unlawfully acquired the suit land thereby violating its right to property under Article 40 of the Constitution. It relies on the decisions of *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another* SC Petition No. 3 of 2012; (2012) eKLR and *Gatirau Peter Munya v. Dickson Mwenda & 2 Others* SC Application No. 5 of 2014; [2014] eKLR in support of its claim that the appeal is properly before the Court. It thus urges the Court to dismiss the Preliminary Objection and hear its Appeal on merits.

D. DETERMINATION

[16] Upon considering the Preliminary Objection filed by the 1st Respondent, the submissions filed thereto in support of the Preliminary Objection by the 1st, 2nd and 4th Respondents and those in opposition by the Appellant, and upon hearing the oral arguments by the parties in Court, the only issue for determination is whether this Court has jurisdiction to hear and determine the appeal as a matter of right under Article 163(4)(a) of the Constitution.

[17] The question whether a litigant has properly invoked this Court’s jurisdiction under Article 163(4)(a) of the Constitution has been determined time and again by this Court. The established guiding principles were indeed pronounced in cases such as *Lawrence Nduttu (supra)*, *Hassan Ali Joho*

(supra), *Gatirau Peter Munya (supra)* and *Peter Oduor Ngoge (supra)*.

[18] As can be deduced from the above quoted cases, in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior Courts leading to the present appeal. In order to establish that fact, the Court needs to ask itself the following questions:

- (i) *What was the question in issue at the High Court and the Court of Appeal?*
- (ii) *Did the superior Courts dispose of the matter after interpreting or applying the Constitution?*
- (iii) *Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?*

[19] In that context, we note that the Appellant moved the High Court to assert its ownership over the suit land. The Appellant had then claimed that it was entitled to the suit land having paid a deposit of the purchase price and obtained consent from the Land Control Board. The High Court in its judgment noted that the **“terms [of the sale agreement] were that the [Appellant] was to pay a down payment of Kshs.400,000/= and take possession and the balance was to be paid after the maize season for January 1976.”** The High Court dismissed the 1st Respondent’s argument that it bought the property after the Appellant had failed to pay the balance of the purchase price. It also noted that the suit land was transferred to the 1st Respondent on 3rd February,

1975, yet, the Appellant had up to January 1976 to pay the balance of the purchase price. On that basis, the High Court found that the Appellant was entitled to the suit land. It then concluded that the actions of the Respondents violated the Appellant's constitutional right to property under Article 40 of the Constitution and issued the specific orders set out above.

[20] On its part, the Court of Appeal found that the Appellant did not acquire any proprietary interest in the suit land. As such, it found that Article 40 of the Constitution or Section 75 of the repealed Constitution were inapplicable.

[21] It is apparent from a reading of the record before us that both the High Court and the Court of Appeal, were called upon to determine the rightful owner of the suit land. Neither Court was confronted with a specific question of constitutional interpretation or application as the dispute revolved around analyzing the factual evidence presented and based on the law, determining the ownership of the suit land. Obviously, once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.

[22] In that context, this Court in *Hassan Ali Joho (supra)* and *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* SC Petition No.5 of 2012; [2012]eKLR, stated that an appeal lies to this Court under Article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the Constitution, and that the interpretation or

application of the Constitution had formed the basis for the determinations at the superior Courts below this Court and the same issue had therefore progressed through the normal appellate mechanism to reach this Court.

[23] Further, in ***Lawrence Nduttu (supra)*** we pronounced ourselves as follows:

“The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, 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. Such a party must be faulting the Court of Appeal on the basis of such interpretation.” (Emphasis added.)

[24] The above position was even more succinctly explained in ***Gitarau Peter Munya (supra)*** and ***Hassan Ali Joho (supra)*** where it was stated that the lower Court’s determination of an issue appealed must have taken a trajectory of constitutional application or interpretation and an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy.

[25] Applying the above expressions of the law to the present matter, we note that the Appellant faults the Court of Appeal for allegedly violating various provisions of the Constitution such as Articles 21, 25, 27, 40 and 68 of the Constitution. It thus contends infringement of the right to fair hearing and trial

and alleges discrimination for being denied an opportunity to exercise the right to acquire the suit land. Even though the Appellant thus alludes to infringement of its constitutional rights, the issue for the Superior Court's determination was, who is the rightful owner of the suit land? This would entail examination of the facts on record and based on the governing laws, deciding on who between the 1st Respondent and the Appellant was entitled to the suit land. No question of constitutional interpretation or application was therefore before those Courts or this Court. And as already stated, neither was such an issue canvassed at the superior Courts.

[26] Having so stated and the Appellant having not sustained a case that raises any constitutional issues, this Court is not vested with the jurisdiction to hear and determine the present appeal pursuant to the provisions of Article 163(4)(a) of the Constitution. If the Appellant has not invoked this Court's jurisdiction on an issue involving an interpretation or application of the Constitution, would its actions then be deemed to be an abuse of the process of the Court as has been alleged by the 1st Respondent?

[27] In *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others* Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held *inter alia*:

“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a

case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

[28] We reiterate that holding and would only add that, as already stated, this Court has pronounced itself severally on the issue of its appellate jurisdiction under Article 163(4)(a) of the Constitution. The mere clothing of an appeal or intended appeal as a question of constitutional interpretation or application does not grant jurisdiction to this Court. We hope that the litigants will take time to acquaint themselves with the now almost settled jurisprudence on this issue and always endeavour to rightly approach the Court, in order to save the Court’s time.

[29] For the reasons above, we decline the invitation to assume jurisdiction in respect of this appeal and make the following orders:

- a. The Preliminary Objection dated 19th April, 2016 is hereby upheld.***
- b. The Petition of Appeal dated 22nd January, 2016 is hereby struck out.***
- c. The Appellant shall bear the costs of the Appeal as costs follow the event.***

[30] It is so ordered.

DATED and DELIVERED at NAIROBI this 19th Day of September, 2018

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT 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

.....

N. S. NDUNG’U
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR

SUPREME COURT OF KENYA