

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ &P, Ibrahim, Ojwang, Wanjala, Njoki SCJJ)

PETITION NO.1 OF 2017

SAMUEL NDIBA SENIOR &

**SAMUEL NDIBA JUNIOR (Suing as legal Administrators of the Estate
of PETER KIHARA GATHOGA DECEASED..... APPELLANTS**

VERUS

ESTHER WANGARI

KIHARA.....REPOSNDENT

**(Being an Appeal against the whole of the judgment of E.M. Githinji, M.
Warsame and S. Ole Kantai, JJA delivered on 9th December, 2016 in the
Court of Appeal No. 172 of 2011)**

BETWEEN

SAMUEL NDIBA SENIOR &

**SAMUEL NDIBA JUNIOR (Suing as legal Administrators of the Estate
of PETER KIHARA GATHOGA DECEASED..... APPELLANTS**

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RULING

A. INTRODUCTION

[1] Before the court is a Preliminary Objection dated 23rd March 2017, raised in respect of a petition of appeal dated 23rd January 2017 seeking to set aside the decision of the Court of Appeal delivered on the 9th of December 2016.

[2] The appeal is anchored on grounds that:

- i. *The learned judges failed to adopt an interpretation of the law that favors the enforcement of the Appellants right to sanctity of property contrary to Article 20(3) (b) of the Constitution by holding that the point of limitation of time was being raised for the first time on appeal, when the point had been pleaded in the Appellant's defense.*
- ii. *The learned judges failed to note that the Respondents had indeed opposed the point of limitation in its last amended defense and was estopped from arguing that the issue on limitation was being urged on appeal for the very first time.*
- iii. *The learned judges failed to appreciate that there was a breach of Appellant's right to a fair hearing contrary to article 50 of the Constitution.*
- iv. *The learned judges failed to appreciate that the appeal touched on the sanctity of the Appellants' title to land which is constitutionally protected under Article 40 of the Constitution of Kenya.*
- v. *The Appellants' right of land had been denied on the basis of an erroneous holding by the Court of Appeal that the issue of limitation of time was raised for the first time in the court of appeal*
- vi. *The Appellants right to a fair trial was compromised because the trial started in 1985 whereby the Plaintiff's case was heard by Justice Shields and the Appellant's case heard by justice Kubo.*
- vii. *The right to a fair hearing presupposes the hearing of a suit by a single judge who records the evidence and writes a judgment within a reasonable time and not 30 years it took to hear the Plaintiff's case.*
- viii. *A right to a fair hearing presupposes that litigants are availed equal opportunity to interrogate the exhibits adduced and cross examine the witnesses thereupon.*

- ix. *The court failed to appreciate that the trial court relied on the evidence of a green card which were part of a record of an application but not part of exhibits adduced during the hearing denying the Appellants the right to a fair trial and to cross-examine the respondent's witnesses in respect of the green cards*

[3] The appellant therefore seeks the following reliefs:

- i. *That the petition be allowed*
- ii. *That the judgment of the Court of Appeal dated 9th December, 2016 be set aside and in its place an order to issue allowing the appeal and directing the suit to proceed for re-trial before the ELC division of the High Court.*

[4] The Respondent's preliminary objection, raises the following grounds:

1. *The Petition is incompetent, bad in law and an abuse of the court process as no leave has been sought from neither the Court of Appeal nor the Supreme Court contrary to Article 163(4)(b) of the Constitution*
2. *The petitioners have failed to demonstrate that their Appeal constitutes a matter of general public importance as set out in the Case of **Hermanus Philipus Steyn V Giovanni Gnechi-Ruscione Application no. 4 of 2012**(Unreported)*
3. *That further the petitioners have totally failed to comply with part of the Supreme Court Rules 2012, which provides under rule 24 (1) that an application for certification shall first be made in the court or tribunal it is desired to appeal from.*

[5] The Respondent prays that the petitioner's appeal be struck out with costs.

B. BACKGROUND

[6] The Appellants are Administrators of the Estate of Peter Kihara Gathoga (Deceased) who was the Defendant in High Court Civil Case no. 3859 of 1979 and subsequently the Appellant in the Court of Appeal Civil Appeal no. 172 of 2011.

[7] The Respondent (now deceased) is represented by the administrators of the Respondent's estate. The Respondent was the Plaintiff and Respondent in High Court Civil Appeal no. 3859 of 1979 and Civil Appeal no. 172 of 2011 respectively.

[8] At the High Court, the Suit commenced via a plaint dated 28th November, 1979, amended on 23rd April, 2003 and further amended on 17th June, 2007.

[9] It is alleged that Land Parcel Number Githunguri/Githiga/1121 comprising of 10.025 acres or 4.01 hectares belonged to the Respondent upon the demise of her husband. It is claimed that, during land demarcation in 1957, via oral agreement, it was agreed that the deceased Appellant holding in trust the property to transfer to her at a later time, as he was the eldest in the family.

[10] The appellant refuted the claim seeking that the respondent be put to strict proof, further, that the suit be dismissed with costs and interest to the executors of the Appellants estate.

[11] At the close of hearing, parties agreed that Judgment could be delivered by any judge in the land division. Subsequently, on the 24th November 2010, Lady Justice Nambuye found in favor of the Respondent that indeed the portion of land was held in trust for her and made the following orders:

- i. An order declaring that the administrators and/or executors of the estate of the deceased late Peter Kihara Gathoga held land parcel no.*

Githunguri/Githiga/1121 comprising of 10.75 acres or 4.01 hectares in trust for the benefit of the plaintiff Esther Kihara irrespective of whether the trust was created or not.

- ii. *An order bringing the trust to an end in respect to land parcel no. Githunguri/Githiga/1121 comprising of 10.75 and the defendants were ordered to transfer it to the plaintiff's name.*
- iii. *Costs of the suit to the plaintiff.*

[12] The appellant was aggrieved by the decision of the High Court, and filed **Civil Appeal No 172 of 2011** at the Court of Appeal in Nairobi. He relied on the following grounds of appeal that:

1. *The learned judge erred in law and in fact in failing to find that the Plaintiff's claim was time-barred and that no plausible explanation was given in lodging the claim belatedly from the time when the alleged was created if the trust was at all created.*
2. *The learned judge erred in law and fact in condemning the defendants unheard by delivering a judgment before reading the demeanor of the parties and their witnesses as a trial court and conducted before her and without actual consent of the parties*
3. *The matter was heard by Hon. Mr. Shields, Justice Kihara Kariuki, Hon. Justice Mbogholi, Hon. Mr. Justice Kubo before the judgment was prepared and delivered by Lady justice Nambuye who never heard nor examined the demeanor of a single witness thereby rendering it unlikely to attain the constitutional threshold of a fair trial*
4. *The learned judge erred and contradicted herself by holding in first instance that there was a controversy as to whether the plaintiff remarried after the death of her late husband, yet without the benefit of hearing any further evidence, she proceeded to hold at the same time that the plaintiff never remarried after the death of her husband.*

5. *The learned judge erred and misdirected herself by granting the plaintiff and order which she had not prayed for that is of 10.75 acres instead of 15.75 acres of land*
6. *The learned judge erred and misdirected herself by assuming without the benefit of the cogent evidence that the sub-division effected by the late peter Kihara was on account of a trust created in favour of the Respondent by their father.*
7. *The learned judge misdirected herself by ordering that land parcel no. Githunguri/Githiga/1121 comprising of 10.025 acres be transferred into the respondents name when there was no specific prayer for the same.*
8. *The learned judge erred and misdirected herself by acting on untested evidence adduced by the court in the course of writing the judgment without inviting the parties input thereto thereby rendering the judgment a mistrial*
9. *The learned judge erred and misdirected herself by finding without the benefit of evidence by either party that land parcel no. Githunguri/Githiga/1121 was part of the acreage “the one whose acreage was part of the acreage that the deceased defendant held in trust for the house of Wanjiru” simply because the deceased defendant exercised the land to be 10 acres while the rest was 5 acres each.*
10. *The learned judge erred and misdirected herself in finding that the plaintiff had proved her case on a balance of probability against the foregoing irregularities.*

[13] In a judgment delivered on the 9th of December 2016, the Court of Appeal (Githinji, Warsame, & Kantai JJA) upheld the High Court decision.

[14] The Appellate court found that to entertain the limitation of time, as a central issue, at that late stage would be giving one party an undue advantage. Further, as it was not specifically pleaded, it would undermine the administration

of justice to fault the trial judge for failing to render a decision on an issue that was never raised.

[15] They observed that the record showed that on 27th May 2009 respective counsel for the parties, recorded a consent order, agreeing that the judgment could be delivered by any judge before the Land Division. They noted that the evidence recorded by Justice Shields and Justice Kubo was done in accordance with prescribed procedure pursuant to Order 18 rule 7 and that the official record of trial is a permanent and immutable public record. Further, by dint of section 84 of the Evidence Act, there is a presumption that the record of evidence given in judicial proceedings is genuine. Consequently, they found that no principle of fair trial was violated by Justice Nambuye (as she then was).

[16] The Court found that the plaintiff amended her plaint to claim 10.75 acres when she realized that 5 acres had been transferred to Samuel Kamau Gathoga who was also entitled to the share of 15.75 acres earlier pleaded.

[17] Consequently, the appellant filed Supreme Court Petition Number 1 of 2017, where they seek to set aside the Appellant Courts decision.

C. ANALYSIS

[18] The preliminary issue for determination in this matter is whether, this court has jurisdiction to entertain this present appeal.

[19] The Appellant has moved this court under Article 163(4)(a) of the Constitution, but, the respondents argue that the appeal does not lie as of right and could only come before the court upon certification either by this court or the Court of Appeal by virtue of Article 163(4)(b) of the Constitution. They contend that the appellants appeal does not involve matters of constitutional interpretation or application, nor were these issues that were raised before the superior courts. They urge that the appellant's only recourse is to invoke this court's jurisdiction if the appeal raises matters of general public importance and

as they have not sought certification confirming the same, the matter should be struck out.

[20] This court has had the occasion to define the delineation of its jurisdiction under Article 163(4)(a) of the Constitution and establish guiding principles that clarify the nature and scope of its jurisdiction. In the matter of **Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & Another** Sup. Ct. Petition No. 3 of 2012; [2012] eKLR a two Judge Bench of this Court (*Tunoi and Wanjala SCJJ*) remarked that [paragraph 28]:

“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. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

[21] Further, in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others**, Sup.Ct. Petition No. 10 of 2013, this Court observed that [paragraph 37]:

“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 Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution... [emphasis supplied].

[22] Additionally in ***Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012***, this Court declined to hear an appeal and stated:

“In the petitioner’s whole argument, we think, he has not rationalized 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 a matter falling within the appellate jurisdiction of the Supreme Court.”

the Court in the ***Ngoge case*** went on to state that:

“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 further input of the Supreme Court”
[emphasis added].

[23] The foregoing principle is affirmed, in this Court’s decision in ***Gatirau Peter Munya v. Dickson Mwenda & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR [paragraph 69]:

“The import of the Court’s statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the

very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

[24] In this light, to properly assess the matter before us, we must advert to the nature of the issues from which the appeal has arisen. The Record of Appeal reveals that at the High Court, the trial judge identified the following issues as being central to the determination of the matter:

- (i) *Whether a trust was created in favor of the Plaintiff;*
- (ii) *If such trust was created, what was the exact demarcation of the trust property; and*
- (iii) *Whether the plaintiff remained after the demise of her husband, and whether she remained on the property,*

[25] The Appellate Court on the other hand canvassed the following issues/grounds in determination of the appeal

- (i) *Whether the learned judge erred in law and in fact in failing to find that the plaintiff’s claim was time barred;*
- (ii) *Whether the appellants were denied a fair trial as Nambuye J delivered a judgment without consent of the parties and without substantively hearing the case;*
- (iii) *Whether the learned judge granted reliefs that were not specifically prayed for; and*
- (iv) *Whether the judge erroneously relied on copies of the register in respect of five sub-divisions and the award of Parcel No. Githunguri/Githiga/1121.*

[26] From the record, it is apparent the main question for determination at the High Court was the existence of the trust in favor of the plaintiff. On the other

hand, the Court of Appeal, reconsidered and reevaluated the evidence in totality in coming to its finding. At no point in either of the superior courts did the question of constitutional interpretation and application become central in determination of the matter. Although reference may have been made in certain instances, it was not a dominant issue, nor was it at the center of cause.

[27] Applying the foregoing principles to the matter at hand, we find that the appellants case does not meet the requisite jurisdictional threshold under Article 163(4)(a), and as such cannot stand.

[28] Flowing from this determination, we make the following orders:

- (a) The Preliminary Objection dated 23rd March 2017 is hereby upheld.***
- (b) The Petition of Appeal No. 1 of 2017 is hereby dismissed.***
- (c) Each party to bear its own costs.***

DATED and DELIVERED at NAIROBI this 6th Day of February 2019.

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D.KMARAGA

CHIEF JUSTICE &

PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT