Mugenda v Itolondo & 4 others; President & 6 others (Interested Parties) (Civil Application 21 of 2015) [2016] KESC 16 (KLR) (17 March 2016) (Ruling)

Olive Mugenda v Wilfred Itolondo & 11 others [2016] eKLR

Neutral citation: [2016] KESC 16 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 21 OF 2015

KH RAWAL, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

MARCH 17, 2016

BETWEEN

PROF OLIVE MUGENDA ..... APPLICANT

AND

DR.WILFRED ITOLONDO ..... 1ST RESPONDENT

DR. MUMAH SOLOMON ..... 2ND RESPONDENT

DR ELENA KORIR ..... 3RD RESPONDENT

MARTHA MIYANDAZI ..... 4TH RESPONDENT

FRED OBARE ..... 5TH RESPONDENT

AND

THE PRESIDENT ..... INTERESTED PARTY

THE ATTORNEY GENERAL ..... INTERESTED PARTY

THE COUNCIL, KENYATTA UNIVERSITY ..... INTERESTED PARTY

THE CHANCELLOR, KENYATTA UNIVERSITY ..... INTERESTED PARTY

THE MINISTER FOR HIGHER EDUCATION, SCIENCE AND TECHNOLOGY ..... INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

NATIONAL COHESION & INTEGRATION COMMISSION .... INTERESTED PARTY

(Being an application for review of grant of leave to appeal to the Supreme Court from the ruling and decision of the Court of Appeal at Nairobi in Civil Application (Sup) 7 of 2015 (Mwilu, Visram & Odek, JJA) dated 31st July, 2015)

RULING

Introduction

1. The instant application seeks review of a decision of the Court of Appeal, certifying an intended appeal as one raising matters of general public importance.

2. This matter began in the High Court, with the respondents instituting Judicial Review proceedings, by way of Application No. 232 of 2012. The respondents contended that the applicant had continued unlawfully to hold and exercise the powers vested in the office of the Vice - Chancellor of Kenyatta University, after the expiry of her term in March 2011. They alleged that while so acting, the applicant mismanaged the University, sustaining corruption, tribalism and nepotism. The respondents were, in effect, asking for the appointment of a new Vice-Chancellor.

3. The respondents contended that the applicant's occupancy of office was invalid, urging that since the applicant had been appointed after the promulgation of *the Constitution* in 2010, there should be a letter signed by the President of Kenya, making such appointment. They contended that since no such letter existed, the applicant's occupancy of office was illegal. The respondents contended that the letter of re-appointment signed by the Permanent Secretary in the Office of the President, which the applicant held, dated 16th December, 2010, was invalid. They also contested Gazette Notice No. 15500 dated 31st October, 2012, signed by the President, as an instrument of appointment, on the grounds that it came long after the Judicial Review Proceedings had begun.

4. All the grounds raised by the respondents in the High Court suit were contested by the applicant, who urged that she had been validly reappointed by the President, in accordance with Section 10 of the Kenyatta University Act. (This Act has since been repealed).

5. The respondents herein had sought the following Orders:

    i. an Order of mandamus, compelling the 1st to 5th respondents in the High Court suit to institute the process of appointment, and to appoint the Vice-Chancellor of Kenyatta University;

    ii. an Order of prohibition, to prohibit the applicant from acting, or purporting to act as the Vice -Chancellor of Kenyatta University, unless appointed/ reappointed by law; and

    iii. costs.

6. Odunga,J in his decision dated 21st March, 2014 determined that in the absence of a prayer for certiorari, the Orders sought in the application would be futile. He held that the letter by the Permanent Secretary had validly effected the reappointment of the applicant. He also observed that, gazettement was merely directory, and that, failure to gazette an appointment did not necessarily occasion nullity. The learned Judge held that neither Section 10 of the Act, nor the provisions of *the Constitution*, required the reappointment to be gazetted; and accordingly, the application was unmerited, and was for dismissal with costs to the respondents and interested parties.

7. Aggrieved by the decision of the High Court, the respondents herein appealed to the Court of Appeal. Their appeal was based on the grounds that the High Court had:

i. failed to determine whether or not there was any lawful appointment/reappointment to the position of Vice- Chancellor of the University;

ii. failed to determine whether the alleged reappointment of the 6th respondent undermined the need for competitive recruitment of public officers in accordance with Articles 10, 73, 134 (2) (b), 135 and 232 of *the Constitution*;

iii. failed to determine that the continued occupancy of the Vice-Chancellor's office by the 6th respondent, violated Section 10 of the Kenyatta University Act; and

iv. misdirected itself as to the validity of the Gazette Notice aforesaid.

8. The Appellate Court, in its Judgement dated 11th May, 2015 considered the affidavit evidence placed before the High Court. It held that due process was followed in reappointing the applicant. It further determined that Odunga J did not fail to determine whether there was a lawful reappointment to the position of Vice- Chancellor; and that he had considered both law and fact, in declining to declare the re-appointment of the applicant invalid. On the question whether the reappointment violated Articles 10, 73, 134 (2) (b) 135 and 232, of *the Constitution*, the Appellate Court found only the last three Articles to be of relevance. It found that in reappointing the applicant, the President was exercising a statutory function, rather than a power under *the Constitution* and there was no need for a signed and sealed instrument under Article 135 of *the Constitution*.

9. On the question whether the principle of competitive recruitment in the public service had been upheld when the applicant was reappointed as Vice-Chancellor, the Appellate Court determined that the applicant was not being "recruited", but was being was "reappointed", pursuant to Section 10 (3) of the Kenyatta University Act; and so the terms of Article 232 (1)(9) of *the Constitution* were not relevant.

10. The Appellate Court held that the applicant was lawfully in office, having been validly reappointed by a competent authority, as required by law. It also upheld the High Court's finding that neither Section 10 of the Kenyatta University Act, nor *the Constitution*, required the reappointment to be gazetted. The Court observed that though gazettement had taken place, the appellants did not show how that fact was relevant to the validity of the applicant's reappointment.

11. An issue had been raised, to the effect that the High Court (Odunga J) failed in its supervisory role, by not directing the Ethics and Anti-Corruption Commission (EACC) and the National Cohesion & Integration Commission (NCIC) to act on certain complaints of malpractices, especially corruption and tribalism, at the University. The Appellate Court held that the said issue was not part of the application in the High Court, and so could not be entertained on appeal.

12. The Appellate Court dismissed the issue raised in relation to costs, on the basis of Section 27 of the *Civil Procedure Act*: it held that costs are discretionary. As the appellants had failed to demonstrate that that Court's discretion was irregularly exercised, the appellants had to pay costs to the respondents.

13. Aggrieved by that decision, the respondents herein, acting in person, moved the Court of Appeal by Civil Application No. Sup. 7 of 2015, to certify their intended appeal to the Supreme Court as one involving matters of general public importance. The Appellate Court in its Ruling dated 31st July, 2015, held that even though the application did not cite Article 163 (4) (a) of *the Constitution*, it was not fatally defective in light of this Court's decision in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others S.C. Petition No.2 of 2014 [2014] eKLR. The Court found that the intended appeal raised issues of application of Articles 10, 73, 134, 135, 232 of *the Constitution*, and Section 7 of the Sixth Schedule to *the Constitution*, and that this was a proper case for the input of the Supreme Court.

14. The Appellate Court formulated as the issue of general public importance to be considered in the intended appeal, the following: whether any of Articles 10, 73, 134, 135, 232, and Section 7 of the Sixth Schedule to *the Constitution*, is relevant and applicable, and must be complied with during the appointment or reappointment of an individual to a statutory office.

15. Though cognizant of the fact that under Article 163 (4) (a) of *the Constitution* appeals to the Supreme Court were "as of right", the Appellate Court issued a certificate under both Articles 163 (4) (a) and (b), that the intended appeal involves a matter of general public importance.

B. The Petition and Application before the Supreme Court

16. Following certification by the Court of Appeal, the respondents filed Petition 12 of 2015 on 6th August, 2012 contesting the decision of the Court of Appeal delivered in Appeal No. 120 of 2014. They also sought to have the petition certified as urgent, which was done by Ibrahim SCJ on 16th September, 2015. However, before that petition was heard, the applicant also approached this Court by way of originating motion dated 12th August, 2015, supported by an affidavit sworn on the same date. The said application (No. 21 of 2015) is anchored on Article 163 (5) of *the Constitution*, Rule 24 (2) of the Supreme Court Rules, 2012 and all enabling provisions of the law. The application seeks the following Orders:

    i. the leave to appeal, and certification granted by the Appellate Court in Civil Application (Sup) 7 of 2015 to appeal to the Supreme Court be set aside and/ or overturned;

    ii. the decision of the Court of Appeal in Civil Appeal No. 130 of 2014 be upheld; and

    iii. costs be provided for.

17. The 3rd and 4th interested parties in this matter also approached the Court, by Originating Motion No. 20 of 2015. They sought the same Orders as in Application 21 of 2015. These two applications were consolidated, with Application No. 21 of 2015 as the lead file.

C. Parties' Submissions

ii. Application No. 21 of 2015: the Applicant's Case

18. Learned counsel for the applicant, Mr. Regeru, submitted that the application had not been overtaken by events, as it was filed within the requisite period, and under the correct provisions of the law. The applicant urged that the application raised the vital issue of jurisdiction of the Court, and so, had to be determined at the beginning.

19. Counsel submitted that the Appellate Court had erred, in certifying the procedure for appointment or reappointment of an individual to a statutory office as a "matter of general public importance". He urged that such issues are routinely dealt with by the High Court on a day- to -day basis. He further contended that the matter before the Court of Appeal did not meet the principles set out in Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone, Sup. ct. Application 2 of 2012, on the criteria that identify a matter as being "of general public importance".

20. Counsel submitted that the Appellate Court had fallen into errors of both fact and law, when it considered the applicability of *the Constitution*, even though such issues were not raised or canvassed in the High Court, or in the Court of Appeal. He urged that such issues cannot, therefore, be raised belatedly at the Supreme Court. Citing the decisions of the Court of Appeal, such as *Chumo Arap Songok v. David Kibiego Rotich, Nakuru CACA 141 of 2004*; Baber Alibhai Mawji v. Greenfied

Investments Limited & Another, Nairobi Civil Appeal No. 269 of 2001 (consolidated with Greenfied Investments Limited v Baber Alibhai Mawji, Civil Appeal 155 of 2004); and Independent Electoral & Boundaries Commission & another v. Stephen Mutinda Mule & 3 Others [2014] eKLR, learned counsel submitted that parties are bound by their pleading.

ii. Application No. 20 of 2015: The Applicant's Case

21. Learned counsel for the applicant, Mr. Wetangula urged that the Court of Appeal had erred, by holding that the procedure for re-appointment of statutory officers raises issues of general public importance. He submitted that the issue for determination at the High Court was whether the applicant in Application No. 21 of 2015, had been reappointed as Vice-Chancellor of Kenyatta University. He urged that the facts of the current case do not transcend the circumstances of the case. He submitted that an inquiry into whether a State Officer has been re-appointed, does not create a jurisprudential moment; hence, the current matter did not fall within the parameters set out in Hermanus.

22. Counsel urged that the Appellate Court erred by determining issues that had neither been canvassed in the High Court, nor before itself. He contended that the prayers sought by the respondents did not invite the Court to inquire into the legality of the reappointment.

23. Counsel urged that in the matter before this Court, the constitutional issue being pleaded is not linked to the main cause that was in the Court of first instance, and so should not now be presented as a constitutional grievance. He called in aid, in this regard, the Supreme Court decisions in Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board, SC Petition No. 5 of 2012; [2012] eKLR, and Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another SC Petition No. 3 of 2012; [2012] eKLR.

24. While admitting that the Appellate Court addressed its minds to the fact that the reappointment was not in breach of the provisions of *the Constitution*, counsel urged that the case in that Court did not involve that issue. Citing Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR, counsel urged that neither the matter at the Appellate Court nor at the High Court had taken a constitutional trajectory; and hence there was no basis for certification.

iii. The 1st, 2nd and 5th Interested Parties' Case

25. Counsel for the interested parties, Ms. Mbilo, was in support of both applications. She submitted that the matter before the High Court (Odunga J), was in the form of judicial review proceedings, seeking two Orders: prohibition and mandamus. She urged that the respondents had sought the empanelling of a three-Judge Bench; but it was declined, because the Judge did not consider there to be a substantial question of law; and no appeal has been lodged in that matter. It was her submission that as no constitutional issues were raised in the High Court, none could be raised before this Court.

The 6th Interested Party's Submissions

26. Counsel for the 6th interested party, Ms. Shamalla associated herself fully with the submissions of learned Counsel, Mr. Regeru.

The Respondents' Case

27. The respondents, acting in person through Dr. Itolondo, contested both applications. She submitted that this Court has jurisdiction to entertain this appeal, pursuant to Article 163 (4) (a) of *the Constitution*.

28. Dr. Itolondo contended that there was no law that allowed the hearing of applications before the petition is heard, and that the applicants had not shown that they would suffer any prejudice if their applications were not heard before the petition. She also contended that the deponent in Application No. 20 of 2015 was neither the chairman of the University Council, nor the Chancellor of Kenyatta University, and was therefore a stranger to the suit. As such, she urged the that application was incompetent.

29. The respondents submitted that both applications had been overtaken by events, as there was already in existence Petition No.12 of 2015. She urged that this Court lacked jurisdiction to set aside a matter at a preliminary stage, before it is substantively canvassed, and determined. She contended that the application had come as an ambush and an afterthought; and that it was prejudicial to the respondents, as they had spent much time, energy and money in preparation of their petition. She submitted that failure by the applicant to admit the existence of the petition, amounted to material non-disclosure, such as should not be countenanced by this Court.

30. Dr. Itolondo submitted that Articles 10, 73, 75,134 (1) (b) and 232 of *the Constitution* had been pleaded by the respondents in their replying affidavit at the High Court, and the issues in the petition were not being raised for the first time. She urged that even though the High Court did not make a judicial determination on the various Articles of *the Constitution*, the Court of Appeal had alluded to them. She submitted that the Appellate Court erroneously held the applicant to have been lawfully reappointed as Vice- Chancellor, since it ignored the provisions of Articles 10,73, 132 (2) (b) 135 and 232 of *the Constitution*; and that on this account, this matter fell squarely within the jurisdiction of the Supreme Court.

31. The respondents urged that the matter before this Court is one of general public importance since, as the Appellate Court had observed, Kenyatta University is a public institution of higher learning, funded by the State, and with a nationwide enrolment of students, apart from employing thousands of Kenyans who are also taxpayers. The respondents contended, besides, that the attribution of high-level financial mismanagement, corruption, embezzlement of funds, abuse of office and bad government, to the applicant, raises public concern, and is an issue of general public importance. They urged that the High Court in its Ruling delivered on 6th June, 2013 acknowledged that the matter was of great public interest, a Ruling which remains unchallenged to date.

32. Dr. Itolondo submitted that the respondents were challenging the purported reappointment, for the greater public good. She urged that cases relating to appointments to public office, are matters of public interest. In this regard she invoked earlier decisions, such as: Centre of Human and Democracy v. Moi Teaching and Referral Hospital Board and 2 Others [2011] eKLR; Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Sup. Ct. Petition No. 12 of 2013 [2013] eKLR; Benson Riitho Mureithi v. J. W. Wakhungu and 2 others [2014] eKLR. She submitted that the mere fact of certain institutions, such as the EACC and NCIC, being enjoined, is evidence that the matter herein is of general public importance. She asked this Court to dismiss the applications, arguing that to allow them would violate the respondents' rights as outlined in Articles 2; 3(a), (b) & (d) ; 4; 22 (2) (c); 47; 50 (2); 159 (2) (a) & (b) ; 258 and 259 (1) of *the Constitution*. She also urged the Court to review the costs that had been awarded against the respondents in the High Court.

33. The respondents, cited the decision of this Court in Hassan Ali Joho & another v. Suleiman Said Shahbal and 2 Others, Petition N0.10 of 2013 [2014] eKLR, to reinforce their contention that this Court has jurisdiction; and Mwau & 2 Others v. Attorney- General & 2 Others [2012] eKLR, in which the Court held that an unlawful election is a real threat to *the Constitution*, with the effect of bringing such a matter firmly within the jurisdiction of the Court. They relied on Musiara Ltd. v. William Ole

Ntimama, Civil Application No. 271 of 2003, to support their contention that this Court has no jurisdiction to review its own decision, where there was already a Court Order that had set the petition in motion. Dr. Itolondo contended that allowing the consolidated application (No.21 of 2015) would amount to this Court reviewing its decision.

34. The respondents invoked this Court's decision in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others (paragraph *69*), urging that their case can be said to have taken a trajectory of constitutional interpretation, or application.

35. The respondents submitted that the reappointment of the applicant should have been done in accordance with Articles 10, 73, 75 and 232 and of *the Constitution*, on the strength of case-precedents such as: Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 Others (2012) eKLR; David Muigua v. Attorney General & Another, Petition No. 161 of 2011; Joseph Mutuura Mberia & Another v. Cabinet Secretary for Education, Science & Technology & 2 Others, Petition No. 33 of 2013 [2014] eKLR .

36. The respondents urged that the matter is one of general public importance, citing in support several authorities: Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 Others [2012] eKLR; The Trusted Society of Human Rights Alliance & 5 Others v. Mumo Matemu (op.cit).

(vi) The Rejoinder

37. In his response, learned counsel Mr. Regeru urged that his application was properly before the Court and had not been overtaken by events. He submitted that this Court should not deal with the further issue of costs, since what was before the Court was an application for review on the grant of certification. He submitted that the authorities filed by the respondents did not address the issues raised in both applications, and should be disregarded. He urged that the authorities filed had little relevance on "matters of general public importance", in the terms of the Hermanus precedent.

38. Learned counsel Mr. Wetangula, in response, urged that issues for determination would be those recognized by the Court as matter for judicial interpretation and application; and that a party's perceived issues for determination, though enumerated in the submissions, do not necessarily qualify for determination by the Court. As such, mere listing of constitutional Articles, as done by the respondents, did not qualify them for judicial determination. He also contended that Article 134 of *the Constitution*, which related to incumbency of a President, was not relevant in this matter.

ISSUES FOR DETERMINATION

39. In view of all the pleadings, the supporting affidavits, and the written and oral submissions made by the parties, the following are in our view, the relevant issues for determination:

    i. whether this Court has jurisdiction under Article 163 (4) (a) of *the Constitution*; and

    ii. whether a matter of general public importance is involved in the intended appeal.

a Jurisdiction under Article 163 (4)

40. The appellate jurisdiction of the Supreme Court is defined in Article 163 (4) of *the Constitution* as follows:

> " 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)" [emphasis supplied].

41. Clause 5 provides that a certification by the Court of Appeal under clause 4 (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

42. The instant matter was certified by the Court of Appeal on 31st July, 2015 as raising both issues of constitutional application, as well as matters of general public importance. That certification is being contested before this Court, pursuant Clause 5 aforesaid. The applicants and interested parties urged that the appellate jurisdiction of this Court has not been set in motion, and that this matter does not meet the threshold prescribed under Article 163 (4)(a) and (b). The application is briskly contested by the respondents, who also contend that the same has been overtaken by events.

43. The respondents maintain that their petition of appeal should have been heard first, as it was first in time. Jurisdiction is always a prior question, and where it is being contested, a Court must first determine whether it is indeed, seized of jurisdiction. This is by no means an issue of mere procedural technicality; it goes to the very heart of the matter, and without it, the Court is not set to hear any proceedings (Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others, Supreme Court Application No. 2 of 2011 [2012] eKLR).

Jurisdiction under Article 163 (4) (a)

44. The Appellate Court, in granting certification, determined that there were no issues of interpretation of *the Constitution* in the intended appeal though there were issues of application of Articles 10, 73, 134, 135, 232, and Section 7 of the Sixth Schedule to *the Constitution* ? warranting the input of the Supreme Court. Two pertinent questions arise at this stage, namely:

(i) are parties bound by their pleadings?

(ii) does the intended appeal originate from a case that involved issues of constitutional application? In other words, is there a constitutional trajectory in the intended appeal?

Are parties are bound by their pleadings?

45. In determining that issues of constitutional application exist in the matter, the Appellate Court was guided by the principle set out in Article 159 (d) of *the Constitution*, that justice shall be administered without undue regard to procedural technicalities. The Court also considered that it was not fatal to fail to cite a constitutional provision, to invoke the Supreme Court's jurisdiction in light of this Court's decision in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others S.C. Petition No.2B of 2014 [2014] eKLR. The Appellate Court made a determination that the matter raised issues of constitutional application, despite the fact that the application before it was anchored on Article 163 (4) (b) of *the Constitution*.

46. Counsel for the applicant urged that the Appellate Court fell into error of both fact and law, when it raised the issues of applicability of *the Constitution* while such issues had neither been raised nor canvassed in the High Court or in the Court of Appeal. We note with commendation, that the Court of Appeal has made several decisions upholding the principle that parties are bound by their pleadings; amongst them, Independent Electoral & Boundaries Commission & another v. Stephen Mutinda Mule & 3 others [2014] eKLR and Kinyanjui Kamau v. George Kamau Njoroge, civil Appeal no 132 of 2005 [2015] eKLR.

47. We are in agreement with Mr. Regeru, with respect, that the Appellate Court fell into error of both fact and law when it raised the issues of applicability of *the Constitution*, when such issues had neither been raised nor canvassed in the High Court or in the Court of Appeal. They were denied the opportunity to make a rebuttal on whether issues of Constitutional application existed in the matter.

48. All Courts must ensure that they maintain their role as independent and impartial adjudicators. This is the only proven way to ensure that they do not descend into the arena of conflict. They will inevitably descend into this tumultuous arena when they unilaterally frame new issues for determination, completely distinct from the issues pleaded and canvassed by the parties. This manifestly denies the relevant party the right of reply, and compromises the terms of Article 50 (1) of *the Constitution*. This is not to be allowed to happen. We cite with approval the dictum of Lord Denning in Jones v. National Coal Board [1957] 2 QB 55 that:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

49. We also take judicial notice that the Court of Appeal is bound under Section 3B of the *Appellate jurisdiction Act* to handle all matters that come before it, for the purposes of attaining a just determination of the dispute before it. This would as a matter of course entail the need to ensure that the principle of proportionality is adhered to, and that there exists a level playing ground for all parties.

50. The foregoing is a sufficient basis for us to decline to exercise our jurisdiction under Article 163 (4) (a) of *the Constitution*. However, we shall proceed to consider the second issue.

Does the appeal entail issues of constitutional application?

51. In the High Court, the respondents were contesting the applicant's stay in office, on the basis that she had not been validly re-elected. They were contending that the office of Vice- Chancellor of Kenyatta University had fallen vacant, following the expiry of the term of office of the applicant. They were demanding due process, in re-filling that office. They sought an Order of mandamus, to compel the persons responsible to commence the process of appointing a new Vice- Chancellor. They also sought an Order of prohibition, restraining the applicant from carrying out the functions of that office, unless appointed, or reappointed, by the due process of Law.

52. The respondents did not contend that any of their rights, or fundamental freedoms in the Bill of Rights had been denied, infringed, violated, or threatened. They also did not contend that there was any act done in contravention of *the Constitution*. Their contention was that the appointment or re-appointment of the applicant was contrary to the statute governing the University. Mr.Justice Odunga, in his decision dated 21st March, 2014 considered the following issues for determination:

    i. whether the replying affidavits ought to be expunged from the record;

    ii. whether judicial review Orders could issue to restrain the conduct of the President of the Republic of Kenya;

    iii. whether the respondents were guilty of non-disclosure, and whether the judicial review Orders sought were efficacious.PARAGRAPH 54.

    The applicability of Articles 10, 73, 134 (2)(b), 135 and 232 of *the Constitution* was not in issue, and was not the subject of judicial determination either.

53. In the Court of Appeal, the Orders sought were:

i. to set aside the entire decision of the trial Court;

ii. to declare that the applicant was not re-appointed to a second term of office;

iii. to prohibit the applicant from acting as Vice- Chancellor, unless re-appointed or required by law so to act;

iv. to instruct the relevant persons to institute the process for re-appointment, and to appoint the Vice- Chancellor of Kenyatta University in accordance with *the Constitution* and statute law.

54 One of the issues that the Appellate Court identified for determination was: whether the High Court failed to determine whether the alleged re-appointment of the 6th respondent, undermined the need for competitive recruitment of public officers, in accordance with Articles 10, 73, 134 (2)(b), 135 and 232 of *the Constitution*. The Appellate Court restricted its examination to Articles 134 (2) (b), 135 and 232. The respondents had urged that the reappointment was invalid, as the letter of reappointment of the applicant had not been signed by the President himself, as required under Article 134 (2) (b) as read with Article 135 of *the Constitution*.

55. The Appellate Court determined that in reappointing the applicant, the President was not exercising a power under *the Constitution*, so as to bring this matter within the purview of Article 135. The Court also determined that Article 232, with regard to competitive recruitment, was inapplicable, as the issue at hand was a reappointment of the applicant, and not a fresh recruitment.

56. It is evident from the foregoing that the cause in the High Court and Appellate Court was aimed at instituting the process of appointment of a new Vice-Chancellor, and this could not take place, save after a successful challenge to the process of reappointment of the applicant. The two Superior Courts were, thus, called upon to determine the legality of the process of reappointment of the applicant.

57. This Court has already adverted to the nature of its jurisdiction, under Article 163(4) (a) of *the Constitution*, on a number of occasions. In Lawrence Nduttu, we held that, a bare citing of fundamental rights, does not obviate the application of the rules of jurisdiction. We noted (paragraphs 26-28) as follows:

> ". . . We understand Mr. Ngoge to be arguing that a mere allegation of violation of human rights automatically brings an intended appeal within the ambit of Article 163 (4) (a) of *the Constitution*, hence dispensing with the need for leave under Article 163 (4) (b) of *the Constitution*.
>
> > "With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by counsel if adopted, would completely defeat the true intent of Article 163 (4) (a) of *the Constitution*. 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*. 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.
> >
> > > "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)" (emphasis supplied).

58. In Peter Oduor Ngoge v. Hon. Francis Ole Kaparo and Five Others Supreme Court Petition No. 2 of 2012 [2012] eKLR, this Court declined to entertain an appeal on an ordinary question in contest. It delivered itself thus:

> " 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, as of right, a matter falling within the appellate jurisdiction of the Supreme Court."

59. The decision in The Kenya Section of the International Commission of Jurists v. The Attorney-General and Two Others, Supreme Court Crim. App. No. 1 of 2012 [2012] eKLR, is equally relevant. It related to a Ruling on a preliminary point in the Court of Appeal. The appellant had objected to the appearance of the Attorney-General as a party, an objection which was overruled. This was amplified into a substantive constitutional issue, and the Supreme Court was urged to exercise its jurisdiction in the interpretation or application of *the Constitution*. The Court determined that:

> " There was, therefore, no legitimate issue of interpretation or application of *the Constitution*, regarding the role of the Attorney-General in the proceedings before the Court of Appeal, which merited an appeal to the Supreme Court. The issue raised before the Court of Appeal and which is now sought to be brought to the Supreme Court, squarely fell within the category of a collateral cause – a matter not appealable, save with the leave and certificate of the Court of Appeal. There being no such certificate, and there not having been a reference leading to a differing position taken in this Court, this is the typical case in which no appellate jurisdiction lies in the Supreme Court."

60. In the instant case, we are of the view that the constitutional issues raised and determined at the Appellate Court, which are the subject of the intended appeal, are issues of application of *the Constitution* which fell squarely within the category of a collateral cause in the Court of Appeal. The matter before that Court was not one of constitutional application. It revolved around the validity of the reappointment of the applicant. Therefore, that being a collateral cause, it is not appealable to us under Article 163 (4) (a). Further, the Appellate Court's reasoning, and the conclusions which led to the determination of the issue, cannot properly be said to have taken a trajectory of constitutionalinterpretation or application (Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Sup. Ct. Civil Application No. 5 of 2014 [2014] eKLR-).

61. Furthermore, we note that the High Court routinely deals which issues of appointment or reappointment to statutory offices. In the instant case, the issue for intended appeal cannot be said to be of any special jurisprudential moment. In J. Harrison Kinyanjui v. Attorney General & Another,

HC Petition 74 of 2011 [2012] eKLR, the High Court (Majanja, J) observed as follows (paragraphs 11 and 12):

> " Matters concerning legality or otherwise of appointment of persons to constitutional office under *the Constitution* can no longer be considered novel or difficult. Since *the Constitution* was promulgated, the High Court has had to deal with cases concerning appointment of persons to state and public office. For example, the case of the Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 dealt the appointment of Supreme Court Judges; Centre for Rights Awareness and Others v Attorney General and Others Nairobi Petition No. 16 of 2011 dealt with the appointment of the Chief Justice and the Attorney-General.
>
> > ".....In any case, the nature and statute of the office challenged does not automatically translate the matter into one that falls within the provisions of Article 165(4) as a substantial question of law."

62. Yet another example is Benson Riitho Mureithi v. J. W. Wakhungu and 2 Others, HC Petition No. 19 of 2014 [2014] eKLR, where the constitutionality of the appointment of the Chairman of the Athi Water Services Board was being contested; and Trusted Society of Human Rights Alliance v. The Attorney-General and Others, Nairobi High Court Petition No 229 of 2012 [2012] eKLR.

63. We would cite with approval a passage from Peter Ngoge v. Ole Kaparo (op. cit.):

> " 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."

64. On the basis of the foregoing principle it is clear to us that, we cannot possibly exercise our jurisdiction under Article 163(4) (a) of *the Constitution*, in the instant matter.

Is this a matter of general public importance?

65. The Appellate Court determined one issue of law to be of general public importance, and requiring determination in the intended appeal: whether any of Articles 10, 73, 134, 135, 232, and Section 7 of the Sixth schedule to *the Constitution*, is relevant and applicable, and must be complied with during appointment or reappointment to a statutory office.

66. The respondents contend that since Kenyatta University is a public institution of higher learning, funded by the State, having a nationwide enrolment of students, and employing thousands of Kenyans who are also tax payers, the intended appeal necessarily becomes one of general public importance. Besides, it is contended that the applicant is involved in high-level financial mismanagement, corruption, embezzlement of funds, abuse of office and bad governance, all issues of public concern – and thus the matter necessarily becomes one of great public importance.

67. This Court, in Hermanus and Malcolm Bell, did set out the guiding principles for ascertaining that a matter is one "of general public importance".

One such principle is that, "such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination".

68. In Malcolm Bell, this Court thus pronounced itself (paragraph 8):

> " Such a position is consistent with this Court's holding in the Hermanus Steyn case, that "the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination" – for them to become a "matter of general public importance" meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial- focus, or a clear consideration of facts in the other Courts, will often be found to fall outside the proper appeal cause in the Supreme Court."

69. Having perused the record, it is plain to us that the issues claimed to be of general public importance by the respondents, had not been the subject of judicial determination in any of the Superior Courts, and do not, therefore, fall for determination in this Court.

70. Besides, the question as framed by the Appellate Court is fraught with difficulty: for Articles 10, 73, and Section 7 of the Sixth Schedule to *the Constitution*, have also not been the subject of judicial determination in the Courts below; and thus, these have no place within the framework of the intended appeal. The essence of the question then outstanding, is as follows: Whether any of the Articles, 134, 135,or 232 is relevant and applicable, and must be complied with, in the appointment or reappointment of an individual to a statutory office. Such a question is so broad, as to be lacking in the specific focus that brings a grievance before the Court. In so far as the question is so broad in texture, it brings no clear element of "matter of general public importance" before the Court – thus failing to invoke the Supreme Court's jurisdiction under Article 163(4)(b) of *the Constitution*.

71. It is to be recalled that, by the decisions of this Court in Hermanus and Malcolm Bell, "the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought." The 1st Respondent has failed to meet this condition, in our perception.

E. Determination

72. The effect is that this Court's jurisdiction has not been properly invoked; and the Appellate Court should not have granted certification for a further appeal, whether under Article 163 (4) (a) or 163 (4) (b) of *the Constitution*.

73. Consequently, we make Orders as follow:

    (a) The Originating Motion dated 12th August, 2015, filed by the applicant, is hereby allowed.

    (b) The Ruling of the Court of Appeal dated 31st July, 2015, granting leave to appeal to this Court, is hereby overturned.

    (c) For the avoidance of doubt ,Petition No. 12 of 2015, filed by the respondents on 6th August, 2012 is hereby disposed of.

    (d) The respondents shall bear the cost of the instant application.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH,2016.

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K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE 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

.....

S.N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court