



**Maingi & 4 others v Nthimbiri Farmers Co-operative Society  
(Petition 9 of 2016) [2016] KESC 17 (KLR) (26 July 2016) (Ruling)**

*Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-operative Society [2016] eKLR*

Neutral citation: [2016] KESC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**PETITION 9 OF 2016**

**JB OJWANG, SCJ**

**JULY 26, 2016**

**BETWEEN**

**GODFREY KINUU MAINGI ..... 1<sup>ST</sup> APPLICANT  
JUSTUS MURUNGI ..... 2<sup>ND</sup> APPLICANT  
JOSEPH NTURIBI MWITHIMBU ..... 3<sup>RD</sup> APPLICANT  
HARUN MBURUGU ..... 4<sup>TH</sup> APPLICANT  
ANDREW GIKUNDI ..... 5<sup>TH</sup> APPLICANT**

**AND**

**NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY ..... RESPONDENT**

**Supreme Court has jurisdiction to determine appeals that raise issues of constitutional interpretation.**

*The appellants’ appeal at the High Court against a decision of the Co-operative Societies Tribunal was unsuccessful. Their attempt to appeal at the Court of Appeal was denied, including their request for conservatory orders, without a determination on substantive constitutional issues. When they sought to appeal to the Supreme Court, the Deputy Registrar declined, citing the absence of a substantive Court of Appeal decision. The Supreme Court, however, ruled that constitutional grievances should not be deferred and allowed the appeal to proceed. The Court ordered the filing and service of pleadings, with further mentions scheduled for assigning a hearing date.*

Reported by Beryl A Ikamari

***Jurisdiction*** - jurisdiction of the Supreme Court - appellate jurisdiction - where the Court of Appeal had not made a determination - whether the Supreme Court could hear and determine an appeal in a situation where the Court of Appeal had not made a determination on the substantive questions raised in the appeal - Constitution of Kenya 2010, article 163(4)(a).



## **Brief facts**

The appellants' appeal at the High Court against the decision of the Co-operative Societies Tribunal was unsuccessful and they sought a further appeal at the Court of Appeal. Among the questions raised in the appeal pleadings was the question as to whether section 81 of the Co-operative Societies Act was *ultra vires* section 84(7) of the repealed Constitution as well as article 163(4) of the Constitution of Kenya 2010. The Appellant did not get a hearing at the Court of Appeal; both the right of appeal and conservatory orders sought were disallowed by the Court of Appeal. The Court of Appeal did not make determinations on the substantive questions raised in the appeal.

When the appellants sought to appeal to the Supreme Court, the Supreme Court Deputy Registrar declined to allow the appeal on the basis that no substantive appeal had been heard at the Court of Appeal and therefore there was no proper case to be lodged at the Supreme Court. The Deputy Registrar cited the case of *Teachers Service Commission v Kenya National Union of Teachers and 3 others*, Application No. 16 of 2015, Supreme Court of Kenya, as an authority for the decision to disallow the Supreme Court Appeal. The Appellants appealed against the decision of the Deputy Registrar and their appeal was heard before a single judge of the Supreme Court in accordance with Rule 4A(2) of the Supreme Court (Amendment) Rules, 2016.

## **Issues**

Whether an appeal from a Court of Appeal decision, which was not a decision on the substantive rights of the party but a decision which denied the Appellants a right of appeal and conservatory orders, could be lodged at the Supreme Court.

## **Relevant provisions of the Law**

### ***Constitution of Kenya 2010, article 163(4)(a);***

*(4) 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).*

## **Held**

1. The appellants' attempt to get a hearing at the Court of Appeal was disallowed. In effect, no substantive question of rights was determined by the Court of Appeal.
2. The appellants' grievance was that their right of appeal, requiring the interpretation of the Constitution and its transitional provisions had been denied by the Court of Appeal. The appellants claimed a denial of their constitutional safeguards and that they were asking the Supreme Court to pronounce itself with respect to those safeguards.
3. Depending on the merits of the question raised and the involvement of issues of constitutional interpretation in it, a constitutional grievance which affected the rights of a party would not be held in abeyance until the Court of Appeal had determined the substantive cause.
4. It was not possible to rule out the perception that the appellants were raising serious issues of constitutional interpretation and application.

*Application allowed.*

## **Orders**

1. *The Appellants' documents of pleadings on appeal shall be duly received by the Court.*
2. *The Appellants shall duly serve the said documents of pleadings upon the Respondent, within 14 days of the date hereof.*
3. *The Deputy Registrar shall thereafter, conduct mentions as necessary, for the purpose of assigning a hearing date.*

## **Citations**

### ***East Africa***



1. *Munene, Mary Wambui v Peter Gichuki Kingara & 2 others* Petition No 7 of 2014 –(Cited)
2. *Sango Bay Estates Ltd v Dresdner Bank AG* [1971] EA 17 – (Relied Upon)
3. *Teachers Service Commission v Kenya National Union of Teachers and 3 others* No 16 of 2015 – (Followed)

### **East Africa**

#### **Statutes**

1. Constitution of Kenya Repealed sections 77(9); 84(7) – (Interpreted)
2. Constitution of Kenya, 2010 article 163(4) (a); Schedule Six rule 7; section 7(1) – (Interpreted)
3. Co-operative Societies Act (cap 490) section 81(3) – (Interpreted)
4. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3(a);11;15(2) – (Interpreted)
5. Supreme Court Rules, 2011 (Act No 7 of 2011 Sub Leg) rules 30 , 32 – (Interpreted)
6. Supreme Court (Amendment) Rules, 2016 (Act No 7 of 2011 Sub Leg) rules 4A (2) (3) – (Interpreted)

## **RULING**

### **A. Background**

1. On 8<sup>th</sup> June, 2016, the appellants moved to bring up an appeal before the Supreme Court, against the respondent. The appellants’ case was that the Court of Appeal, on 6<sup>th</sup> May, 2016 had denied them a hearing; and they were contesting that decision by the Appellate Court.
2. The Supreme Court Deputy Registrar, however, declined to allow the appeal- pleadings before this Court, on the basis that no substantive appeal-cause had been heard and determined by the Court of Appeal; and so there was no proper appeal case to be lodged in the Supreme Court. The essence of such a course by the Deputy Registrar was, in effect, that the matter sought to be laid before the Supreme Court was only a collateral cause – and was inadmissible as an appeal.
3. It is precisely the foregoing question, that brought the appellants before the single-Judge Bench of the Supreme Court, by virtue of Section 11 of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011*), and Rule 4A (2) and (3) of the Supreme Court (Amendment) Rules, 2016.

### **B. Is This A Proper Appeal?**

4. The Deputy Registrar declined to admit the appeal pleadings on specified grounds, as follows:

“There is no substantive appeal from the Court of Appeal, against which this matter is filed. The parties are appealing against a Ruling of the Court of Appeal which was based on Rule 5(2) of the Court of Appeal Rules. This Court, in Application No. 16 of 2015, *Teachers Service Commission v. Kenya National Union of Teachers and 3 Others*, has fully settled this question and, therefore, the matter cannot be admitted for filing in the Supreme Court.

“Any party aggrieved by the decision of the Registrar may appeal the decision to a single Judge, in accordance with Rule 4A(2) of the Supreme Court (Amendment) Rules, 2016.”

### **C. The Question before the Single-judge**

5. It is the appellants’ contention that the Deputy Registrar’s direction was made in error: and so it should be reversed; and an appeal before the full Bench of the Supreme Court entertained.
6. The appellants contended as follows:



- (i) the Deputy Registrar had misunderstood the appeal pleadings being brought before the Supreme Court;
  - (ii) the said pleadings are of substantive content, and come under the head of “Petition”;
  - (iii) the appellants had a proper right of appeal against the High Court’s decision of 22<sup>nd</sup> May, 2015 – by virtue of Section 84(7) of the former [1969] Constitution (as amended), as read together with Rule 7 of Schedule Six of *the Constitution* of Kenya, 2010;
  - (iv) it is contended in the appeal pleadings that Section 81 of the *Co-operative Societies Act* is ultra vires Section 84(7) of the 1969 Constitution, as well as Article 163(4) of *the Constitution* of Kenya, 2010.
  - (v) the Court of Appeal’s decision denying the appellants a right of appeal, has the effect of depriving the appellants of two entitlements: right of appeal, and conservatory order;
  - (vi) the appeal sought to be lodged in the Supreme Court, is brought against the Ruling and Order of the Appellate Court, of 6<sup>th</sup> May, 2016 denying the appellants the two entitlements indicated in (v) above;
  - (vii) the appeal to be lodged in the Supreme Court is brought under Section 15(2) of the *Supreme Court Act*, 2011; Rules 30 and 32 of the Supreme Court Rules, 2011; and Article 163(4) (a) of *the Constitution* of Kenya, 2010 – and not Rule 5(2) of the Court of Appeal Rules;
  - (viii) the appeal being brought before the Supreme Court rests on different foundations from this Court’s earlier decision, No. 16 of 2015, *Teachers Service Commission v. Kenya National Union of Teachers and 3 Others* – as in that case there was no substantive appeal or intended appeal; whereas in the instant matter there is an appeal, in the form of the Petition of the 7<sup>th</sup> June, 2016;
  - (ix) the appeal herein raises serious issues for judicial determination.
7. It was the appellants’ prayer that the Deputy Registrar’s decision of 10<sup>th</sup> June, 2016 be set aside, and substituted with an Order admitting the appeal – pleadings before the Supreme Court.

**D. Is there No Right of Appeal where the Appellate Court made No ‘substantive Decision’?**

8. In *Teachers Service Commission v. Kenya National Union of Teachers and 3 Others*, Supreme Court Application No. 16 of 2015, this Court, in a matter bearing resemblances to this one, had thus observed (paras.34-36):

“The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of Article 163(4) of *the Constitution*. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely, on issues yet to be adjudged at the Court of Appeal, and for which the priority date of 22<sup>nd</sup> September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

“In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under



Rule 5(2) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court" [emphasis supplied].

9. Learned counsel, Dr. Kamau Kuria submitted that the instant matter is unrelated to the context and particulars of the Teachers Service Commission case: as it is more concerned with the "supremacy of *the Constitution*," as contemplated in Section 3(a) of the *Supreme Court Act*. Specifically, Dr. Kuria was concerned with Section 81(3) of the *Co-operative Societies Act*, which limits appeal to the High Court, in respect of decisions taken by a co-operative tribunal. He submitted that the said Section 81(3) of the *Co-operative Societies Act* had been adopted by both the High Court and the Court of Appeal without any reference to a party's right of appeal, as provided for in Section 77(9) of the former Constitution, which coalesced into the current Constitution via the Sixth Schedule (on "transitional and consequential provisions"), Section 7(1) which provides that:

"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

10. Learned counsel submitted that his clients had a legitimate point of appeal to the Supreme Court, by virtue of Article 163(4)(a) of *the Constitution*: they intended to urge that Section 81 of the *Co-operative Societies Act* is ultra vires both Section 84(7) of the former Constitution and Article 163 (4)(a) of *the Constitution* of Kenya, 2010.

11. Learned counsel urged that a matter of constitutional interpretation, in the terms of Article 163(4)(a) of *the Constitution*, arose from the particulars of the High Court determination rendered by Msagha, J on 14<sup>th</sup> December, 2015, in the following terms:

"...it appears the applicants have filed similar applications and despite getting the same response from this Court, ...have continued to tax it with more applications in an attempt to appeal against a final decision from which no appeal lies. This application is not only res judicata but is also a gross abuse of the court process and can only be interpreted as a scheme to ensure that the respondent does not enjoy [the] fruits of tis Judgement."

12. Similarly, the Court of Appeal, on 6<sup>th</sup> May, 2016, thus held (paras. 11, 12):

"In the instant matter, the *Co-operative Societies Act* specifically limited the jurisdiction of the Court of Appeal, by providing that an appeal to the High Court shall be final. No appeal lies to this Court from the High Court and, in the circumstances, we cannot....purport to grant leave to the applicants to file an appeal to this Court.

"In view of the finding that we would not have jurisdiction to grant the applicants leave to appeal against the decision of the Tribunal to this Court, it follows that we cannot grant the Orders of stay of execution of the award of the Tribunal. Accordingly, this application must fail, and we order that it be and is hereby dismissed with costs to the respondent."

13. Dr. Kuria submitted that the question whether an appeal, on the facts of this matter, would lie from the High Court to the Court of Appeal, was one entailing constitutional interpretation; and it is in respect of this, that the appellants are coming before the Supreme Court, seeking to file the relevant papers, for a determination of the same. One of the sets of papers is a bundle of authorities, urging a certain course of constitutional interpretation.



14. Learned counsel relied on the apex Court decision in *Sango Bay Estates Ltd v. Dresdner Bank AG* [1971] E.A. 17, urging that there are in the instant matter, grounds of appeal which merit serious judicial consideration. He submitted that the appellants' case falls within the mandate of the Supreme Court, as prescribed in Section 3 of the *Supreme Court Act*, namely:
- (i) to assert the supremacy of *the Constitution*;
  - (ii) to provide authoritative and impartial interpretation of *the Constitution*;
  - (iii) to develop jurisprudence;
  - (iv) to enable important constitutional and other legal matters relating to the transition from the former Constitution to the present constitutional dispensation to be determined;
  - (v) to improve access to justice.
15. In the Sango Bay case, the following passage came from Spry,V-P (pp.20-21):
- “As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration, but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out.”
16. On those principles, learned counsel urged that leave be granted in the instant matter, so that the appellants' appeal may be properly lodged. He drew a distinction between the instant case, and the precedent in the Teachers Service Commission case: whereas in that case there was a pending appeal wherefrom a further appeal could follow, in the instant case, the Appellate Court has denied the right of appeal – with the effect that the High Court's decision will stand as final.
17. Learned counsel invoked the guardianship role of the Supreme Court, in relation to the rights declared in *the Constitution*, as stated in *Mary Wambui Munene v. Peter Gichuki Kingara & Two Others* [2014] eKLR. He cited a comparative case law passage set out in the Wambui decision (para.83):
- “Under *the Constitution* and even otherwise, this Court is naturally looked upon by the country as the custodian of the law and *the Constitution*....”
18. Counsel submitted that both the High Court and the Court of Appeal had relegated the standing of constitutional provisions, to the ordinary status of the *Co-operative Societies Act*. He sought a reconsideration of such a position by the Supreme Court, by virtue of the terms of Article 163(4)(a) of *the Constitution*.
19. Dr. Kuria urged that serious grounds of appeal had been raised, centred on constitutional interpretation which devolves to the Supreme Court; and consequently, that his client's appeal papers should be received by the Court.

## E. Conclusion

20. It emerges that the substantive decision occasioning grievance to the appellants, was taken at the Co-operative Societies Tribunal, and was subsequently sustained by the High Court. The appellant's attempt to get a hearing at the Appellate Court was disallowed; the effect being that no substantive question of rights, was determined by the Court of Appeal. The appellants' grievance is that their right of appeal, requiring the interpretation of *the Constitution* and its transitional provisions, has been



denied by the Court of Appeal. The claimed denial of their constitutional safeguards, is the question which the appellants are asking the Supreme Court to pronounce itself upon, by virtue of this Court's jurisdiction under Article 163(4)(a).

21. ] Is it proper to hold that no substantive appeal case was heard and determined before the Appellate Court, and therefore no substantive appeal is now being brought before this Court? If there truly is a constitutional grievance, on a matter affecting the rights of a party: must it be held in abeyance until the Appellate Court has determined a substantive cause – before such party would have access to this Court as ultimate appellate Court?
22. That cannot be so, depending on the merits of the question, and its objective involvement of issues of constitutional interpretation. At this stage, it is not possible to rule out the perception that the appellants are raising serious issues of constitutional interpretation and application. Prima facie, therefore, the Supreme Court should in principle, give a hearing.
23. I will, therefore, order as follows:
  - (a) The appellants' documents of pleadings on appeal shall be duly received by the Court.
  - (b) The appellants shall duly serve the said documents of pleadings upon the respondent, within 14 days of the date hereof.
  - (c) The Deputy Registrar shall thereafter, conduct mentions as necessary, for the purpose of assigning a hearing date.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2016.**

.....

**J.B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*

Registrar Supreme Court of Kenya

