

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

APPLICATION NO. 10 OF 2016

(Coram: Wanjala and Njoki, SCJJ)

COMMUNITY UPLIFT MINISTRIES INC.....APPLICANT

VERSUS

1. NATHAN CHESANG MOSON.....

2. JOSEPHINE CHELANGAT.....

3. SERVANTHOOD & LIGHT DEVELOPMENT

FOUNDATION.....

RESPONDENTS

(Being an Application for stay of execution of the part of the Judgment and Consequential Orders of the Court of Appeal of Kenya (Musinga, Gatembu, and Murgor JJ.A) delivered at Kisumu on 27th May, 2016)

RULING

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 6th July, 2016 filed under a certificate of urgency, seeking the following orders:

- (a) That the part of the Judgment of the Court of Appeal delivered on 27th May, 2016 setting aside the appointment of Receiver/Interim Manager to take care of the affairs, business and property of the

3rd respondent be stayed pending the hearing and determination of the Petition of Appeal filed herewith; and

- (b) That the Costs of the Application to await the outcome of the intended Petition of Appeal.

[2] On 8th July, 2016, *Ojwang SCJ* certified the Application urgent and ordered that the Registrar allocate the earliest available date for *inter partes* hearing. The hearing took place on 19th July, 2016 and is the subject of this Ruling.

B. BACKGROUND

[3] On 7th April, 2011, the applicant brought an action against the respondents by way of a plaint filed in the High Court at Kitale. In it's Plaint the applicant seeks *inter alia* the transfer and possession of all the assets of the 3rd respondent and a declaration that the 1st and 2nd respondents have illegally appropriated the assets registered in the name of 3rd respondent. The Plaint is still pending at the High Court for determination. Simultaneously to the filing of the Plaint, the applicant lodged an application by way of a Notice of Motion seeking interim orders under Order 40 rule 1, 2 and 3, Order 41 and Order 50 of the Civil Procedure Rules, 2010. It sought the following orders:

- (a) That the Court appoints Mr. Esau Mneria Mengich as the Receiver/Interim Manager of the affairs, business and property of the 3rd respondent pending hearing and determination of the suit.
- (b) That the possession and custody of the affairs, business and property of the 3rd respondent be committed to the Receiver.
- (c) That the respondents, their servants, agents, or any other person acting on their behalf be restrained by an order for injunction from selling, charging, advertising for sale, disposing off, or by completing conveyance or transfer of any sale concluded by auction or leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in the suit property.

[4] The application was heard and in a ruling delivered on 15th May, 2012, *Karanja J*, held that the applicant had established a *prima facie* case with a probability of success warranting the granting of an order of temporary injunction for purposes of preserving the suit property pending the hearing and determination of the case. Further, the High Court appointed a Receiver Manager to take charge of the affairs, business and property of the 3rd respondent on a temporary basis.

[5] Aggrieved by that decision, the respondents filed an appeal faulting the legal consideration of the learned Judge in granting the interim orders. Upon consideration, the Court of Appeal partly affirmed the High Court's decision and held that the learned Judge rightly concluded that the applicant herein had made out a *prima facie* case satisfying the conditions for grant of an interim injunction. The appellate Court however found that there was no basis upon which the learned Judge appointed a Receiver Manager at that interlocutory stage and consequently set aside his appointment.

[6] The applicant has now moved to this Court seeking a stay of execution of part of the Court of Appeal decision which lifted the orders of the High Court appointing a Receiver Manager. The application annexes a copy of a Petition of Appeal filed under Article 163(4)(a) of the Constitution.

C. ANALYSIS

[7] Before us, is the question *whether a stay of execution should be granted against the decision of the Court of Appeal which lifted the High Court orders requiring the appointment of a Receiver Manager*. However this question can only be addressed if we first affirm positively to the question whether *the Court has jurisdiction to entertain this application*. This requires the Court to satisfy itself whether the application is properly placed before it. Resolving this jurisdictional issue upfront will determine the course of this application.

[8] The applicant approaches the Court under Article 163(4)(a) of the Constitution. This provision allows appeals as of right to the Supreme Court in all cases involving interpretation or application of the Constitution. The extent to which a matter qualifies for admission to the Supreme Court under Article 163(4)(a) has time and again been the subject of judicial interpretation by this Court.

[9] In the case of ***Peter Oduor Ngoge v. Hon Ole Kaparo & Others***, Sup. Ct Petition No. 2 of 2012; [2012] eKLR, the Court was categorical that [paragraph 30]:

“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.”

[10] Subsequently, in ***Erad Suppliers & General Contractors Ltd. v. National Cereals & Produce Board*** Sup. Ct Petition No. 5 of 2012; [2012] eKLR the Court held that [paragraph 13A]:

“...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a Superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained.”

[11] The principles demonstrated above were expounded in the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another***

Sup.Ct Petition No. 3 of 2012; [2012] eKLR where a two-Judge-Bench of this Court (*Tunoi and Wanjala SCJJ*) observed 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).”

[12] In *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Sup.Ct. Petition No. 10 of 2013, (*Joho case*) the Court affirmed [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 added]

[13] Most recently in the case of *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others*, Sup. Ct. Civil Application No. 16 of

2015, this Court held that it has no jurisdiction to interfere with the exercise of the Court of Appeal's discretion on an application made under Rule 5 (2) (b) of the Court of Appeal Rules. Citing the earlier decision in **Joho**, the Court observed thus [paragraph 34]:

“In the Joho case, we heard and determined an appeal emanating from a substantive determination by the Court of Appeal of a constitutional question. The appeal had originated from an interlocutory application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal.”

[14] Flowing from the foregoing judicial pronouncements, it is crystal clear that this Court has repeatedly and consistently affirmed the guiding legal principles in the determination of the extent of the exercise of the Court's jurisdiction under Article 163(4) (a) of the Constitution. It is an undisputed fact that *the Complaint in this matter filed over six years ago is still pending at the High Court for determination*. We therefore find that the application before us involves a dispute that has yet to be canvassed in the Superior courts and we therefore have no jurisdiction to hear it.

[15] ORDERS

- 1. The application dated 6th July 2016 is hereby dismissed.***
- 2. Each Party to bear its own costs.***

DATED AND DELIVERED ON 9TH MAY 2017

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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S.N.NDUNGU

JUSTICE OF THE SUPREME COURT

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

REGISTRAR, SUPREME COURT