

THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & V-P, Ojwang, Ibrahim, Wanjala & Njoki; SCJJ)

PETITION NO. 33 OF 2014

PETER O. NGOGE & ASSOCIATES ADVOCATES.....PETITIONER

—VERSUS—

1. COFFEE BOARD OF KENYA	}	RESPONDENTS
2. CRYSTAL VALUERS LIMITED.....		
3. RACHIER & AMOLLO ADVOCATES.....		

(An appeal from the Ruling and Orders of the Court of Appeal (Gatembu Kairu, M'Inoti and J. Mohammed JJA) at Nairobi, given on the 3rd October, 2014 in Civil Application No. NAI 47 of 2011)

RULING

A. INTRODUCTION

[1] The petition before the Court is an appeal against a Ruling of the Court of Appeal dated 3rd October, 2014 in which the Appellate Court dismissed the petitioner's application, seeking Orders of stay of execution against a Ruling of the High Court. The application had also sought further Orders to restrain the respondents and their auctioneers from interfering with the petitioner's occupation of the subject premises. In response to the petition, the respondents filed a notice of preliminary objection dated 30th January, 2015 contesting this Court's jurisdiction to entertain the petitioner's appeal. The said objection is the subject of this Ruling.

B. BACKGROUND

(a) At the High Court

[2] The appellant made an application to the High Court on 7th December, 2010 seeking a temporary injunction to restrain the respondents from interfering with his quiet possession and peaceful occupation of the premises, or levying distress on the premises, pending the hearing and determination of his suit. On 24th February, 2011 the High Court dismissed the application with costs.

(b) At the Court of Appeal

[3] Being dissatisfied with the decision of the High Court, the petitioner filed a Notice of Appeal at the Court of Appeal. Pending the hearing and determination of the intended appeal, the petitioner filed an application, under Rule 5(2)(b), of the Court of Appeal Rules, seeking:

- (i) to stay execution of the Ruling and Orders given by the High Court on 24th February, 2011;***
- (ii) to stay further proceedings in the High Court;***
- (iii) to restrain the respondents and their auctioneers from interfering with the applicant's occupation of the premises; and***
- (iv) an injunction directing the respondents and their auctioneers to restore and maintain the status quo on the premises prior to 24th of February, 2011.***

[4] In its Ruling of 3rd October, 2014, the Court of Appeal declined to issue the reliefs sought and dismissed the application with costs.

C. SUBMISSIONS

(i) Respondents' submissions

[5] Counsel for the respondents, Mr. Gichamba, submitted *inter alia*, that this Court's jurisdiction is limited predominantly to the Presidential Election

petition under Article 163(3) of the Constitution, and appeals from the Court of Appeal on issues concerning the interpretation and application of the Constitution, as well as cases of general public importance, under Article 163(4)(a) and (b) of the Constitution respectively. It was counsel's submission that the instant appeal does not fall within the ambit of this Court's appellate jurisdiction; it having been triggered by a simple dispute between landlord and tenant. It was counsel's further contention that the appellant had not canvassed any constitutional issue in his application at the Court of Appeal.

[6] Mr. Gichamba further submitted that the appellant had not sought leave to appeal in accordance with the provisions of Rules 15 and 16 of the Supreme Court Rules of 2012. Counsel contended that the appellant was seeking to stay what was, in essence, a negative Order by the Court of Appeal. Accordingly, urged Mr. Gichamba, this Court should down its tools for want of jurisdiction.

(ii) Appellant's submissions

[7] Mr. Ngoge, the appellant herein, contested the preliminary objection, urging that it does not meet the threshold laid down in ***Mukhisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.*** [1969] E.A. 696, as it was based on *disputed facts*. Counsel submitted that the preliminary objection conveyed an inaccurate picture of facts raised at the High Court, which had been overlooked by the Court of Appeal.

[8] It was counsel's argument that he did not need to seek leave before filing his appeal, since the appeal, lay to this Court as of right. Mr. Ngoge contended that peaceful enjoyment of possession under a tenancy is a constitutional right. In his view, therefore, in determining the issues raised in his applications, both the High Court and Court of Appeal should have applied Article 40 of the Constitution, which carries safeguards for property rights. Counsel further submitted that the Court of Appeal had acted beyond the scope of its jurisdiction while dismissing his application, and the Appellate

Court had negated his right of access to justice under Article 48 of the Constitution. In response to Mr. Gichamba's submission regarding the Court of Appeal's Orders, Mr. Ngoge submitted that Rule 5 (2) (b) of the Court of Appeal Rules being original in nature, could still sustain this Court's jurisdiction to entertain an appeal such as the instant one.

D. ANALYSIS

[9] In view of the preliminary objection, the main issue falling for consideration is *whether this Court has jurisdiction to entertain the petitioner's appeal challenging the dismissal of his application for a stay of execution by the Appellate Court, under Rule 5(2)(b) of the Court of Appeal Rules.*

[10] The petitioner moved this Court under Article 163(4)(a) of the Constitution, which allows appeals to the Supreme Court as of right. He is contesting an interlocutory decision of the Court of Appeal declining to grant stay of execution of the Ruling of the High Court delivered on 24th February 2011. At this stage, however, the question for the Court is not whether this appeal lies as of right, but whether, such an appeal is sustainable—it being a challenge to an interlocutory Order of the Appellate Court under Rule 5(2) (b) of the Court of Appeal Rules.

[11] The nature of Rule (5) (b) applications has been clarified by the Court of Appeal in a good number of cases. In ***Deynes Muriithi v. the Law Society of Kenya & Another***, Civil Application No. 12 of 2015, this Court revisited the issue and rendered itself thus:

“...the main purpose of Rule 5(2)(b) applications, is that the Orders issued therein are for *preserving the substratum of the appeal*. This means that the Court of Appeal, at that stage, has not yet determined and disposed of the appeal; it is yet to set out its reasoning, in

interpretation and application of the Constitution. The Appellate Court has yet to determine the main appeal which must have been heard at the High Court, moving on to the Court of Appeal, and then to this Court.”

[12] As to whether the Supreme Court has jurisdiction to entertain appeals arising from interlocutory Orders of the Court of Appeal given under Rule 5(2)(b) of the Court of Appeal Rules, the question was firmly settled by this Court in ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others***, Sup. Ct. Civil Application No. 16 of 2015. In declining jurisdiction, the Court stated:

“The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal pending 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) (a) 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.....”

[13] The Court authoritatively held that it lacked jurisdiction:

“to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court.”

[14] It is not in dispute that this is an appeal arising from the interlocutory Orders of the Court of Appeal issued under Rule 5(2)(b) of the Court of Appeal Rules. The authoritative statement of law pronounced by this Court in ***Teachers Service Commission***, as affirmed in ***Deynes Murithi***, is

squarely applicable to this appeal. We therefore hold that this Court lacks jurisdiction to entertain this appeal, based on the reasoning in the foregoing two cases.

E. ORDERS

[15] Accordingly, we hereby make Orders as follows:

- (a) *The Preliminary Objection is allowed.***
- (b) *The Petition of Appeal is dismissed.***
- (c) *Each Party shall bear its own costs.***

DATED and DELIVERED at NAIROBI this 26th Day of January, 2017.

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT
COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this

a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA