

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Wanjala and Lenaola, SCJJ)*

**PETITION NO. 21 OF 2019**

**-BETWEEN-**

**STANLEY MOMBO AMUTI.....APPELLANT**

**-AND-**

**KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT**

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*(Being an appeal from the Judgment and Order of the Court of Appeal in Civil Appeal No.184 of 2018 at Nairobi (Waki, Gatembu and Odek, JJA) dated and delivered on the 10<sup>th</sup> May, 2019)*

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**RULING OF THE COURT**

**A. INTRODUCTION**

[1] The dispute between the parties herein revolves around an attempt by the Respondent to deprive the Appellant of assets that it claimed he had unlawfully acquired. By an Originating Summons filed at the High Court pursuant to Section 55 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) the Respondent thus sought the determination of certain questions regarding the manner of acquisition of the Appellant’s wealth and upon hearing the said summons, *Achode J.* answered the questions in favour of the Respondent and also issued a decree that the Appellant was liable to pay Kshs. 41,208,000 to the Government of Kenya.

[2] In an appeal to the Court of Appeal, the Appellant challenged that decision and in the ten grounds of appeal, specifically challenged the Learned Judge’s

findings of law and fact. In its Judgment, the Court of Appeal stated that it's “...evaluation of the evidence on record and applicable law” led it to the conclusion that the appeal had no merit and dismissed it. That decision triggered an appeal to this Court as a matter of right under Article 163(4)(a) of the Constitution.

[3] On 9<sup>th</sup> December 2018, the Respondent then filed a Preliminary Objection seeking an order that the appeal be dismissed with costs arguing that this Court lacks the requisite jurisdiction to determine it on merit.

## **B. THE PRELIMINARY OBJECTION**

[4] In submissions filed on 17<sup>th</sup> January 2020, Counsel for the Respondent argued that, what was before the superior Courts below was the simple question of unexplained wealth and its forfeiture or not. That such a matter did not call for the interpretation and application of the Constitution to necessitate a decision, under Article 163(4)(a) thereof, by this Court.

[5] He further submitted that, what the High Court and Court of Appeal did was to interrogate the applicability or otherwise of Sections 26 and 55 of ACECA and their constitutionality or otherwise, in the context of any Article of the Constitution, was never an issue. In extrapolating on this point, Counsel reproduced verbatim the questions raised in the Originating Summons filed at the High Court and concluded that in none of them had the Respondent sought an interpretation or application of any part of the Constitution. He placed reliance thereon on this Court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR where this Court laid down guiding principles in any appeal under Article 163(4)(a) of the Constitution.

### C. THE RESPONSE

[6] In his submissions filed on 12<sup>th</sup> February 2020, the Appellant through his Counsel, from the onset asserted that his appeal was properly before this Court under Article 163(4)(a) of the Constitution. Citing paragraphs 7 and 12 of the Judgment of the High Court, he stated that, when the matter was initially heard by *Rawal J. (as she then was)*, the learned Judge specifically invited Counsel for both parties “to address her on the issue of the constitutionality of Section 55 of ACECA viz-a-viz the provisions of Articles 20, 25(c) and 40(3) of the Constitution of Kenya, 2010”. The learned Judge then found the said Section to be inconsistent with the Constitution and dismissed the present Respondent’s Originating Summons. We must note that the said dismissal was however overturned by the Court of Appeal which remitted the matter back to the High Court hence the decision by *Achode J.* aforesaid.

[7] Counsel for the Appellant has added that in the appeal before the Court of Appeal and now before us, one of the issues specifically raised for determination is whether *Achode J.* “misdirected herself on Articles 40 and 50 of the Constitution and Section 55 of ACECA as to the threshold on forfeiture of property.” That issue, it is contended, was addressed at paragraphs 74 and 79 of the impugned Court of Appeal Judgment and that Court made specific findings with regard thereto which are now the subject of the appeal before us.

[8] Extensive submissions on this Court’s jurisprudence on its jurisdiction under Article 163(4)(a) of the Constitution were also made by the Appellant and citations were furthermore made from ***Lawrence Nduttu and 6000 Others v Kenya Breweries Ltd & Anor*** [2012] eKLR; ***Hassan Ali Joho and Anor v Suleiman Said Shalabal & 2 Others*** [2014] eKLR; ***Erad Supplies and General Contractors Ltd v. NCPB*** [2012] eKLR; ***Aviation and Allied Workers Union of Kenya v. Kenya Airway Ltd & 3 Others*** [2017] eKLR;

**Modern Holdings (EA) Ltd v Kenya Ports Authority** [2018] eKLR; **Prof. Tom Ojienda T/A Prof. Tom Ojienda & Associates v EACC & Others** [2012] eKLR as well as **Gatirau Peter Munya** (supra) where the jurisdiction of this Court under Article 163(4)(a) was discussed and appropriate directions given to parties invoking that Article.

#### D. ANALYSIS AND DETERMINATION

[9] The jurisdiction of this Court under Article 163(4)(a) is the only issue in contest presently. In **Lawrence Nduttu** (supra), we stated that for an appeal to lie as a matter of right;

***“(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)”.*** [Emphasis Ours]

[10] In **Erad Suppliers and General Contractors** (supra) we then rendered ourselves as follows:

***“In our opinion, 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. Where, before such a Court, parties raise question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.”*

[11] In the above context, we note that, as submitted by the Appellant, that the question whether Sections 26 and 55 of ACECA violated the right to property under Article 40 of the Constitution was addressed at paragraphs 74 and 79 of the impugned Court of Appeal Judgment and that Court stated thus:

*“(74) In this matter, persuaded by the merits of the UK comparative jurisprudence, we are satisfied that the provisions of Section 26 and 55(2) of the ACECA do not violate the right to property as enshrined in Article 40 of the Constitution. In any event, constitutional protection of property does not extend to property that has unlawfully been acquired. If it were to be held that the requirement to explain violates the right to property under Article 40 of the Constitution, enforcement of a Notice issued under Section 26 of ACECA and the requirement to explain the source of disproportionate assets would be rendered nugatory. We decline to so hold.”*

AND

***“(79) Under Section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired”.*** [Emphasis Ours]

[12] It is also obvious from a perusal of the Judgment rendered by *Achode J.* that whereas, in the Originating Summons filed by the Respondent at the High Court, no specific reference was made to the need to interpret and apply the Constitution, *Rawal J.* in the matter before her had directed that submissions ought to be made on the above issue. The Court of Appeal in overturning her Judgment found that the learned Judge had crafted, *suo motu*, the constitutional question regarding Sections 26 and 55 of ACECA and dismissed the Originating Summons without taking any evidence and addressing the factual issues raised therein.

[13] *Achode J.* on her part, took oral evidence and heard submissions before rendering her Judgment. At para. 59 thereof she then stated that “*the issue that arises for determination is whether the defendant is in possession of unexplained assets ...*” and “*whether the defendant be ordered to forfeit landed properties as well as the value of the developments thereon amounting to Kshs.32,500,000/-*”

[14] In the entire analysis of the evidence before her and in applying the law to that evidence, nowhere did *Achode J.* make any reference to the Constitution nor did she even attempt to interpret or apply Sections 26 and 55 in the context of their constitutionality or otherwise. In making her final orders at para 96 of the Judgment therefore, no orders were also made regarding the constitutionality or otherwise of the exercise of forfeiture of unexplained assets under those Sections.

[15] Having found as above and having reproduced paras 74 and 79 of the impugned Judgment, what were the specific grounds of appeal from the Judgment of *Achode J.*? In the Memorandum of Appeal dated 12<sup>th</sup> June 2018, the Appellant preferred 23 grounds of appeal. It is only in ground No.1 that any reference to the Constitution is made as follows:

***“(1) The Learned Judge misdirected herself as to the law provided under the Constitution of the Republic of Kenya Article 40 and 50 and Section 55 of the ACECA Act 2003 as to the threshold on forfeiture of property.”***

[16] It is again obvious to us that the Appellant, in crafting the above issue was focused more on the “*threshold of forfeiture of property*” than on the specific constitutional questions revolving around interpretation or application of Articles 40 and 50, which matter we have stated, was outside *Achode J.*’s remit. The

question that is left unanswered is whether the findings of the Court of Appeal at paragraphs 74 and 79 reproduced above, are sufficient to trigger our jurisdiction?

[17] In *Erad*, we specifically stated that where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this Court may not be properly invoked. Indeed, in *Aviation and Allied Workers Union* (supra) we added that the mere reference to the rich generality of constitutional principle as the Court of Appeal did in the present case, is not a sufficient ground to invoke Article 163(4)(a). The same must be said of the present cause.

[18] It is thus our finding in the above context that reference to Articles 40 and 50 of the Constitution were introduced by the Appellant at the Court of Appeal and even then, peripherally so. The Court of Appeal thereafter rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution *per se*.

[19] Having held as above, it is our conclusion that Article 163(4)(a) was wrongfully invoked by the Appellant and the Preliminary Objection is therefore merited.

#### **E. DISPOSITION**

[20] Consequent upon our findings above, these are the final orders in this matter:

- i) The Preliminary Objection dated 5<sup>th</sup> December 2019 is hereby upheld.***



**ii) The Appeal herein is struck out for want of jurisdiction under Article 163(4)(a) of the Constitution.**

**iii) The Respondent shall have the costs hereof.**

**[21]** Orders accordingly.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> Day of April, 2020.**

.....  
**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

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

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

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

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy  
of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**