REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Koome (CJ & P), Mwilu (DCJ & VP), Ibrahim, Wanjala & Njoki SCJJ)

APPLICATION No. 32 (E043) OF 2020

BETWEEN

THE BOARD OF MANAGEMENT
VISA OSHWAL PRIMARY SCHOOL ..... APPLICANT

AND

SHREE VISA OSHWAL COMMUNITY
NAIROBI REGISTERED TRUSTEES .....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
COMMISSIONER OF LANDS.....3RD RESPONDENT
CABINET SECRETARY
MINISTRY OF EDUCATION.....4TH RESPONDENT
HON. GEDION KIOKO MBUVI.....5TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....PROPOSED INTERESTED PARTY

(An application for leave to Appeal, extension of time to file and serve Notice of Appeal and Appeal, joinder of an Interested Party and stay of execution against the judgment and Order of the Court of Appeal at Nairobi (Ouko (as he then was), Warsame & Makhandia, JJA) delivered on 22nd February 2019 in Nairobi Civil Appeal No. 126 of 2014)

RULING OF THE COURT

A. BACKGROUND

[1] The Application before this Court is brought under Certificate of Urgency dated 8th December 2020, and lodged on 10th December 2020, pursuant to Article 163(4)(a) of the Constitution, Sections 15 (2), 21(1), and (2) of the Supreme Court Act, and Rules 15(2) and 3(5) of the Supreme Court Rules, 2020.

[2] At the High Court, the 1st respondent filed Petition No. 262 of 2013, *Shree Visa Oshwal Community Nairobi Registered Trustees vs. The Attorney General, Commissioner of Lands, The Cabinet Secretary in Charge of Education and Gideon Kioko Mbuvi as an Interested Party*. It alleged that its fundamental rights and freedoms as enshrined under Articles 40, 47 and 48 of the Constitution were violated. It also challenged the constitutionality of a letter dated 4th January 2013 by the Commissioner of Lands giving the Trustees six months to surrender its land as registered in Grant No. 18152 and L.R No. 209/5996.

[3] The High Court delineated one main issue for determination: *whether Special Condition No.12 in Grant No.18152 is unconstitutional and whether the Respondents, by their actions, violated the 1st respondent's fundamental rights as contained under Article 40 of the Constitution.*

[4] In finding that the 1st respondent's right to property was not violated, the trial court observed that the 1st respondent was granted the suit property by the Crown and that the grant contained special conditions that were to be adhered to. Therefore, the special conditions in the grant obligated the construction of a school and one house for the principal. As such, Visa Oshwal Primary School was a project undertaken by the 1st respondent for the benefit of the public and as a sponsor not as an owner. The court also noted that there was evidence that the Minister in Charge of Education gave the 1st respondent information that he intended to compensate it for the buildings which the 1st respondent had put up in the suit

property but it chose to file a suit instead. Ultimately, the court dismissed the petition with costs to the respondents.

[5] Aggrieved, the 1st respondent filed Civil Appeal No. 126 of 2014, *Shree Visa Oshwal Community Nairobi Registered Trustees vs. The Attorney General, Commissioner of Lands, The Cabinet Secretary in Charge of Education and Gedion Kioko Mbuvi* raising 13 grounds condensed by the Court into 3 grounds as follows, that: the learned Judge erred *by finding that special condition No. 12 of the Grant did not violate the appellant's right to property under Article 40(3)(b) of the Constitution; that by relying on special condition Nos. 3 and 4 and finding that the school ought to have been operated as a public school, the Judge misapplied the two conditions which only required the land to be used as "a school" without insisting that the school be private or public; that by upholding the terms of condition No. 12, the learned Judge, in effect, sanctioned that the State was entitled to acquire or demand for the surrender of suit property without due process under the law.*

[6] The Court of Appeal also singled out one issue for determination: *whether the appellants were in violation of the terms of the grant, thereby inviting the invocation of condition No. 12.*

[7] On violation of the terms of the grant, the learned Judges of Appeal found that there was no violation of the terms of the grant as no evidence was tendered to show that the 1st respondent contravened condition no. 4, or any other special conditions contained in the lease. Further, that even if there was contravention of any of the terms of the lease, Section 31 of the Land Act, 2012 which was already in force at the time the impugned notice was issued, provides for the procedure for forfeiture. Consequently, the Court of Appeal allowed the appeal with no order as to costs.

[8] Affected by the said judgment and order of the Court of Appeal, the Applicant filed before this Court Application No. E043 of 2020 seeking Orders that:

(a) The Application be certified urgent and be heard on a priority basis;

(b) The Honourable Court be pleased to grant leave to the applicant to lodge an appeal, and subsequently, extend time within which to file and serve a Notice of Appeal and Appeal;

(c) Pending hearing and determination of this Application, the Honourable Court be pleased to exercise its discretionary powers to grant temporary conservatory orders staying the execution of the Judgment and consequential orders of the Court of Appeal issued on 22nd February 2019;

(d) Upon grant of leave to Appeal, file the Notice of Appeal and Appeal out of time, the Honourable Court be pleased to join the National Land Commission to the proceedings as an Interested Party.

[9] The Application is supported by an affidavit of **Ephantus Njoroge Ithagu** sworn on 8th December 2020, and a further affidavit sworn by **Wakoko Wangila** on 10th December 2020.

[10] In opposition, the 1st respondent filed a Replying Affidavit sworn on 8th September 2021 by its Vice Chairman, Vinit Shah and filed on 9th September 2021, premised on several grounds *inter-alia*:

(a) The applicant has no proper locus standi to make the application before court, not having been a party to the High Court as well as the Court of Appeal proceedings as provided for under Rules 2 and 36 of the Supreme Court Rules;

(b) The applicant has no locus standi to bring these proceedings not being the registered owner of the property subject matter of Nairobi High Court

Petition No. 263 of 2013, Shree Visa Oshwal Community Registered Trustees vs. The Attorney General & 3 Others [2014] eKLR being LR No. 209/5996 (I.R No. 18152);

(c) *The applicant also does not have proper locus standi to bring the application since it cannot perpetuate occupation of the 1st Respondent's property, being L.R No 209/5696 (I.R No. 18152) (suit property) without any legal title or registerable interest;*

(d) *The 1st respondent is the registered proprietor of LR No. 209/5996 (I.R No. 18152, the purpose of the grant was only be used for the erection of a school and one house for the Principal of the School;*

(e) *The 1st respondent has used the suit property for a school whose funding come from the Visa Oshwal Community, no government funding has been provided by the government;*

(f) *On 12th September 2003, Nairobi City County forcefully seized possession of the suit property and expelled the officials appointed by the 1st respondent from the suit property. Consequently, this action was challenged in HCCC No. 1474 of 205 Nairobi, Shree Visa Oshwal Community Nairobi Registered Trustees vs. City Council of Nairobi. The High Court ordered on 9th April 208 to vacate the property to no avail. The 1st respondent has been denied access, use, management and control of the property from 12th September 2003 to date.*

(g) *The applicant took 21 months from the date of judgment of the Court of Appeal to institute proceedings herein.*

(h) *The applicant is not a corporate body capable of being sued and suing therefore, the Applicant cannot obtain orders as to override the rights of the 1st respondent, which is a body corporate.*

C. SUBMISSIONS

i. Applicant's submissions

[11] It is the Applicant's contention that it only became aware of the Court of Appeal's judgment and the consequential orders upon service of an eviction notice by the 1st respondent's Advocate on or about 11th November 2020. It is submitted that attached to the eviction notice were two copies of judgments being High Court Petition No. 262 of 2013 and Court of Appeal at Nairobi Civil Appeal No. 126 of 2014. Further, that from the High Court judgment, it noted that there was another suit *to wit* HCCA No. 1474 of 2005 in which the 1st respondent had sued the City Council of Nairobi for vacant possession and mesne profit.

[12] The applicant argued that it had never been joined as a party in either HCC No. 1474 of 2005, High Court Petition No. 262 of 2013 or Nairobi Civil Appeal No. 126 of 2014 despite being a necessary party as per the holding of *Mativo J*, in ***JN & 5 others vs. Board of Management, St. G School Nairobi & Another*** [2017]eKLR where the court held that the Board of Management is a legal entity, capable of suing and being sued.

[13] In addition, the applicant submits that it is a body established under Section 55 of the Basic Education Act whose duties include promotion of the best interest and wellbeing of 2,200 pupils of Visa Oshwal Primary School and general public interest. Further, that the High Court Constitutional Petition No. 262 of 2013, which is the subject of the Court of Appeal judgment, was filed in 2013 after the Basic Education Act came into force, therefore Board of Members of Visa Oshwal Primary School should have been made parties to the said suit.

[14] The applicant also submitted that upon receipt of the eviction notice, it sought the assistance of the 2nd and 4th respondents who were parties to the suit in the two superior courts but they failed to institute an appeal or provide any solution to

resolve the dispute. They also failed to advise on the protection mechanisms for the pupils enrolled at the school.

[15] Furthermore, it is submitted that Visa Oshwal Public Primary School, since its establishment, was under the management of the City Education Officer (C.E.O) of the City Council Education Department. All teachers were also employed by TSC and that the C.E.O who chaired the 1978 meeting established the first school Education Committee.

[16] Also, the applicant submits that the first attempt at privatization of the school was in July 1997, which said privatization was held to be an error and cancelled in August by the then Minister for Education, the Late Joseph Kamotho and the 1st respondent's position of a sponsor reinstated. The applicant cite ***R vs District Education Board Kathiani District & Ano. Ex parte Registered Trustees- African Brotherhood Church*** [2016] eKLR to support the argument.

[17] The applicant argues that its non-joinder and that of the National Land Commission was intentional and tactical as no evidence was led to the fact that the applicant was in possession of the school and the suit property. Further, that the the 3rd respondent was no longer available in public service, the National Land Commission being the only entity mandated with reviewing grants.

[18] On the issue of grant of leave to lodge and sustain an appeal for an entity that was not a party to proceedings, the applicant relies on the Supreme Court of Judicature (Court of Appeal Civil Division) of England and Wales decision **in MA Holdings Ltd v George Wimpey UK Ltd, *R (Of the Application of) & Anot*** [2008] EWCA Civ 12 (24 January 2008) to support its case.

[19] On the enlargement of time and discretionary power of the Court, the applicant urges the Court to enlarge time within which to file an appeal as it is the one in possession, management and control of the school. It relies on the case of ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others***, SC Application No. 16 of 2014; [2014] eKLR (***Nick Salat Case***).

[20] In conclusion, the applicant urges the Court to grant it leave to lodge and appeal and sustain the appeal, for the National Land Commission be admitted as an Interested Party, and to grant conservatory order of stay of the Court of Appeal judgment.

ii. 1st Respondent's Submissions

[21] The 1st respondent filed its submissions dated 8th September 2021, and filed on 9th September 2021. It argues that it is the registered owner of the suit property being L.R No. 209/5996 whose user is 'erection of school'. Therefore, the applicant lacks *locus standi* to reinstate these proceedings. It is also argued that the applicant lacks *locus standi* on the ground that it was not a party to the High Court and Court of Appeal proceedings. However, it also submits that the 2nd, 3rd and 4th respondents represented the interests of the applicant and the learned judges of the two superior courts agreed that the 2nd to 5th respondents articulated the interests of the parents and students of Visa Oshwal Primary School.

[22] It is contended that the 2nd to 5th respondents never appealed the Court of Appeal judgment therefore, the applicant is bound by the decision of the 2nd to 5th respondents not to appeal. In that regard, they argue that the applicant cannot have a separate '***public interest***' or '***personam***' from the Attorney General and the Cabinet Secretary Ministry of Education. In this regard, they rely on the case

of ***Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & another*** [2015] eKLR.

[23] The 1st respondent submits that the applicant is not challenging the validity of its title to the suit property but the proprietorship of the suit property. Further, that it is not in dispute that there exists a decree *in rem* issued by the High Court in HCC No. 1474 of 2005 which granted the 1st respondent vacant possession over the suit property. No appeal was preferred against that judgment and decree.

[24] Furthermore, the 1st respondent also submits that the applicant cannot sustain an appeal under Article 163(4) (a) of the Constitution because he was not a party to either the High Court or the Court of Appeal proceedings. Therefore, even though the Court of Appeal interrogated the issue of interpretation and application of the Constitution, the applicant, not being a party, cannot appeal to the Court.

[25] On grant of stay of the Court of Appeal judgment, the 1st respondent submitted that, temporary injunction or stay will only serve to perpetuate the illegality committed by Nairobi City County and the 2nd to 4th respondent in disguise.

[26] Ultimately, the 1st Respondent urges that the application be dismissed with costs.

D. ISSUES FOR DETERMINATION

[27] Taking into account the pleadings and submissions of the parties, two issues emerge for determination;

i. *Whether the Court has jurisdiction under Article 163(4) (a) of the Constitution to entertain the matter?*

ii. *If the answer to (i) is in the affirmative, whether applicants have locus-standi in this matter?*

D. ANALYSIS

i. *Whether the Court has jurisdiction under Article 163(4) (a) of the Constitution to entertain the matter?*

[28] The applicant has invoked this Court's jurisdiction under Article 163(4) (a) of the Constitution. Conversely, the 1st respondent contends that the issue of interpretation and application of the applicant's rights have not been ventilated either in the High Court or the Court of Appeal therefore this Court does not have jurisdiction to entertain the matter under Article 163(4) (a) of the Constitution.

[29] Article 163 (4) (a) stipulates:

"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..."***

[30] In ***Lawrence Nduttu & 6000 others vs Kenya Breweries Ltd & another***; SC Petition no. 3 of 2012, [2012] eKLR, this Court observed as follows:

"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)".

[31] We reiterate the guiding principles set by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji& 2 Others*** S.C. Petition No. 2B of 2014; [2014] eKLR (at paragraph 244):

"In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

i. *a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;*

ii. *the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;*

iii. *the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;*

iv. *an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy...".*

[32] Similarly, in ***Peter Ngoge v Honourable Francis Ole Kaparo and 5 Others,*** Supreme Court Petition No. 2 of 2012, this Court observed that:

"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." (Emphasis added)

[33] Flowing from the above, it is common place that for this Court's appellate jurisdiction to be invoked under Article 163(4) (a) of the Constitution, the litigant must demonstrate that the matter in issue is deserving our settlement, it must revolve around the constitutional contestation that has come up the judicial hierarchy, running up to the Court of Appeal and requiring our settlement as the apex court. We are not persuaded that our jurisdiction has been properly invoked by the applicant.

iii. Whether applicants have locus-standi in this matter?

[34] On the question of *locus standi*, the 1st respondent contended that the applicant lacks *locus standi* to move the Court having not been a party to the High Court and Court of Appeal proceedings. It was the 1st respondent's submission that the High Court and Court of Appeal judgments indicate that the courts took note that Nairobi City County, 2nd to 5th respondents articulated the interests of the parents and students in Visa Oshwal Primary School.

[35] This Court in ***Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & another,*** SC. Petition No. 32 of 2014; [2015] eKLR, stated:

> "[37] *It is not, in our opinion, plausible that the jurisdiction of this Court, as enshrined in Article 163(4)(a), contemplated that a person who was not party to the proceedings at the superior Courts below the Supreme Court, will file an appeal. For the reasons set out in Ruling, we are unable to accede to the submissions by Counsel for the appellant, that the Ruling*

which is the subject of the appeal herein, falls within the criteria set under Article 163(4)(a) of the Constitution."

[36] From the foregoing, we find that the applicant does not have *locus standi* to institute a matter under Article 163(4) (a) of the Constitution having not properly invoked this Court's jurisdiction.

[37] Further, having found that this Court is not clothed with jurisdiction to entertain the matter, we are unable to exercise our discretion based on the principles in ***the Nick Salat Case*** in favour of the applicant. Consequently, we cannot delve into the determination of the prayer for conservatory orders or joinder of the intended interested party.

[38] Notwithstanding the above, the Court cannot close its eyes to the obvious public interest involving the fate of a public school and the 2000 primary school students. It is clear to us that both in the High Court and in the Court of Appeal, there was a clear *thread* relating to the existence of an existing public school on the land whose title was in controversy, and that the decision of the Court would *impact* on this school *despite* the school not being a party in both superior courts. What then in the circumstances should this Court say about this undisputed fact? In the case of Narok ***County Government v Livingstone Kunini Ntutu & 2 others***, SC. Petition No. 3 of 1025; [2018] eKLR, this Court at Paragraph [87] reiterated that the apex Court is a defender of the Constitution and that "***the Court is obligated like all other Courts to uphold the values of transparency, legality and public interest in matters of land, more so public land."*** Further under Article 159(2)(a) of the Constitution of Kenya 2010, this Court is bound by the principle that justice shall be done to all, irrespective of status.

[39] In view of the above, we take cognizance of the fact that the applicant may have a legitimate claim and that the judgment of the Court of Appeal has affected its interest even though it was not a party to the proceedings at the High Court and the Court of Appeal. We are of the opinion that the fate of a public school is a matter of public interest and the applicant ought to be allowed to ventilate its issues albeit in a proper forum. The Applicant therefore is advised that it ought to pursue its claim by instituting a suit at the Environment and Land Court forthwith.

E. DISPOSITION

[40] From the foregoing, we make the following orders:

a. **The Notice of Motion dated 8th December 2020 be and is hereby struck out.**
b. **The Orders made on 18th December 2020 be and are hereby discharged.**
c. **There shall be no Order as to costs.**

[41] It is so ordered.

DATED and **DELIVERED AT NAIROBI** this 17th day of February 2022.

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M. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....

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

.....

M.K IBRAHIM
JUSTICE OF THE SUPREME COURT

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

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA