

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*

**CIVIL APPLICATION NO. 31 OF 2020**

**—BETWEEN—**

**HON. CLEMENT KUNGU WAIBARA.....PETITIONER**

**—AND—**

**HON. ANNIE WANJIKU KIBEH.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

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*(Being an Application under Section 16(3) of the Supreme Court Act for leave to appeal the Ruling and Order of the Court of Appeal (**D. K. Musinga S. Ole Kantai & M. K. Koome, JJA**) staying execution of the decision of the High Court (**W. Korir** delivered on **7<sup>th</sup> October, 2020**)*

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**RULING ON A PRELIMINARY OBJECTION**

**A. INTRODUCTION**

[1] On 7<sup>th</sup> October 2020, *Korir J*, determined **H. C. Petition No.21 of 2020** between the parties herein with the result that the seat of Member of Parliament for Gatundu North Constituency was declared vacant.

[2] The 1<sup>st</sup> Respondent, Anne Wanjiku Kibeh thereafter filed **Civil Application No.E314 of 2020** at the Court of Appeal seeking stay of execution of the above

decision under Rule 5(2)(b) of the Court of Appeal Rules, 2020. The stay was granted on 28<sup>th</sup> October 2020.

**[3]** On 4<sup>th</sup> November 2020, the Applicant, Clement Kungu Waibara, filed a Notice of Motion predicated on Section 16(3) of the Supreme Act seeking leave to institute an appeal before this Court.

**[4]** While opposing the Motion, the 1<sup>st</sup> Respondent, on 26<sup>th</sup> November 2020 filed a Notice of Preliminary Objection seeking orders that the Motion be struck out on the grounds that:

- 1) *This Court lacks the jurisdiction to hear applications arising from interlocutory decisions of the Court of appeal; and*
- 2) *This Court lacks jurisdiction, under Article 163(4)(b) of the Constitution, to hear appeals, and interlocutory applications therein (or in intended appeals) from exercises, by the Court of Appeal, of judicial discretion pursuant to Rule 5 (2)(b) of the Court of Appeal Rules, 2010.*

## **B. SUBMISSIONS BY THE PARTIES**

### *i) The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's submissions*

**[5]** In submissions filed on 26<sup>th</sup> November 2020, the 1<sup>st</sup> Respondent has relied on our decisions in ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & 2 others*** Sup. Ct. Application No.4 of 2012; [2012] eKRL, ***Hassan Ali Joho & another v. Suleiman Said Shahbal & 2 others***, Sup. Ct. Petition No.10 of 2013; [2013] eKLR, ***Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscione***, Application No.4 of 2012 [2012] eKLR, ***Teachers Service Commission v. Kenya National Union of Teachers & 3 others*** [2015] eKLR, ***Daniel Kimani Njehia v. Francis Mwangi Kimani & another*** Sup. Ct. Civil Application No.13 of 2014, ***Basil Criticos v. Independent Electoral***

**and Boundaries Commission & 2 others**, Sup. Ct. Petition No.22 of 2014, among others, to argue that this Court has no jurisdiction to hear and determine any question arising from interlocutory applications at the Court of Appeal as there would be no final order to which our jurisdiction under any of the limbs in Article 163(4) could be invoked.

[6] The 2<sup>nd</sup> Respondent, by its submissions filed on 23<sup>rd</sup> November 2020, has also raised the issue of lack of jurisdiction of this Court to entertain the present Motion along the same lines as the 1<sup>st</sup> Respondent.

ii) *The Applicant's submissions*

[7] We have seen no specific response to the Preliminary Objection but in submissions filed on 4<sup>th</sup> November 2020, the Applicant has stated that;

***“Pursuant to Section 16(3) of the Supreme Court Act, the Supreme Court may grant leave to appeal against an order made by the Court of Appeal on an interlocutory application if satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded. Under Section 16(1), it shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if inter-alia, the appeal involves a matter of general public importance”.***

[8] We shall take the above submission to be the Applicant's position on the issue before us.

### C. ANALYSIS AND DETERMINATION

[9] In the *Teachers Service Commission case* we partly rendered ourselves thus:

**“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, .... 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) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court”**

[Emphasis added]

[10] Further, in *Basil Criticos*, we posed the following question as regards appeals to this Court from Rulings on interlocutory applications before the Court of Appeal:

**“In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over?”**

[11] We reiterate the above findings and in that regard, we note that the Judgment of the High Court which led to proceedings before the Court of Appeal,

thence the impugned Ruling, arose from a constitutional Petition and therefore the above question is relevant in the present circumstances.

[12] Without a Judgment of the Court of Appeal which would then create a finality to contested issues and then point parties to the specific limb in Article 163(4) to which our intervention would be required, we cannot see how our jurisdiction under that Article can be properly invoked.

[13] In the circumstances, we decline the misguided invitation to assume jurisdiction and would instead find that the Notice of Motion dated 30<sup>th</sup> October 2020 is one fit for striking out.

[14] As for costs, they follow the event and so the Applicant shall pay the costs thereof.

**D. DISPOSITION**

- i) The Notice of Motion dated 30<sup>th</sup> October 2020 is hereby struck out.*
- ii) The Applicant shall pay the attendant costs.*

[15] It is so ordered.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of December, 2020**

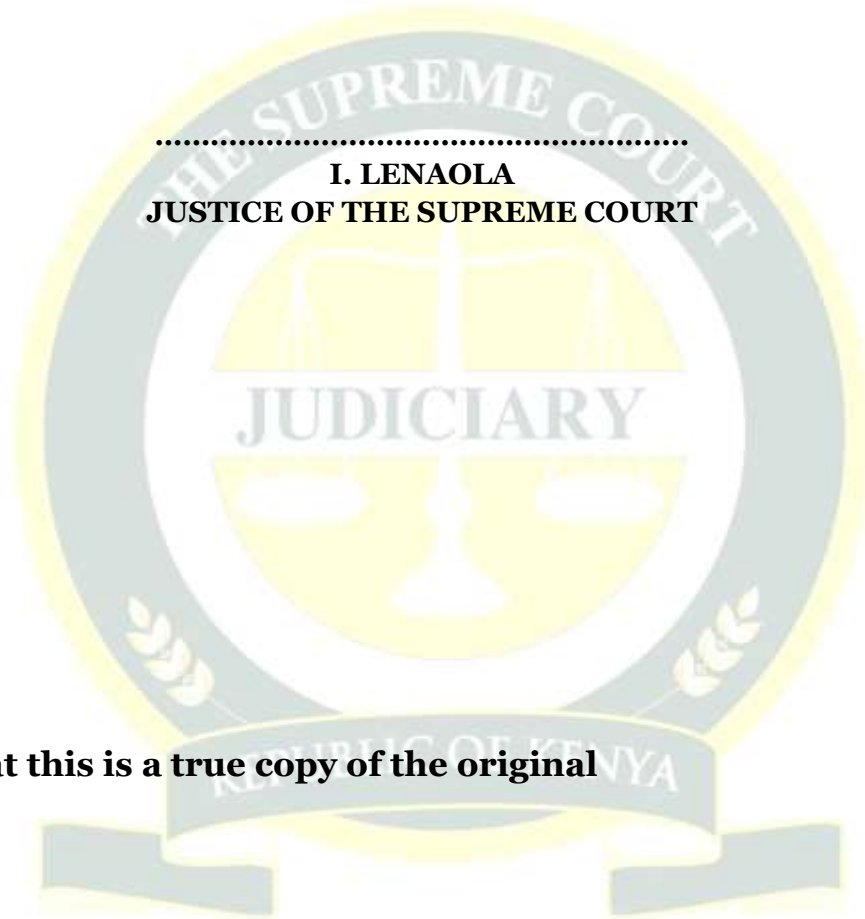
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**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

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

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

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

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



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

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