

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

APPLICATION NO. 8 (E014) OF 2022

—BETWEEN—

ZEHRABANU JANMOHAMMED, SC (*suing as the Executrix of the Estate of the Late*

H.E DANIEL TOROITICH ARAP MOI) **APPLICANT**

—AND—

RAI PLYWOOD (K) LIMITED **1ST RESPONDENT**

NATHANIEL K. LAGAT **2ND RESPONDENT**

SUSAN CHERUBET CHELUGUI &

DAVID K. CHELUGUI (*suing as the Administrators of the Estate of the Late*

NOAH KIPNGENY CHELUGUI) **3RD RESPONDENT**

DISTRICT LAND REGISTRAR,

UASIN GISHU **4TH RESPONDENT**

THE REGISTRAR OF TITLES **5TH RESPONDENT**

THE NATIONAL LAND COMMISSION **6TH RESPONDENT**

(Being an application for stay of execution of the Judgment and Order of the Court of Appeal at Kisumu (**Kiage, M'noti & Mumbi Ngugi, JJ. A**) delivered on the 22nd July, 2022 in Civil Appeal No. 159 of 2019 as consolidated with Civil Appeal No. 254 of 2019)

RULING OF THE COURT

[1] **UPON** considering the Petition dated 28th July 2022 and filed on 1st August 2022, which is brought pursuant to Article 163 (4) (a) of the Constitution, Section 15 of the Supreme Court Act, 2011 and Rules 3 (5), 31 and 39 of the Supreme Court Rules, 2020, in which the appellant challenges the entire Judgment and Orders of the Court of Appeal delivered on the 22nd July, 2022 in Civil Appeal No. 159 of 2019 (consolidated with Civil Appeal No. 254 of 2019); and

[2] UPON perusing the Notice of Motion dated 28th July 2022 and filed on 1st August 2022, which is brought pursuant to Article 163(4)(a) of the Constitution, Sections 21 (1) (a) and 24 (1) of the Supreme Court Act, 2011 and Rules 3 (5), 31 and 32 of the Supreme Court Rules, 2020, wherein the applicant seeks a Stay of Execution of the said Judgment and Orders of the Court of Appeal pending the hearing and determination of the application and appeal; and

[3] UPON reading the supporting affidavit and further Affidavit in support of the motion sworn by **Zehrabanu Janmohammed (SC)** on 28th July 2022 and 5th August 2022, respectively and considering the grounds in support therein, mainly that the applicant has met the threshold for grant of stay; and

[4] UPON reading the 1st respondent's replying affidavit sworn by **Jaswant Singh Rai** on 4th August 2022 and submissions dated 4th August 2022 in support of the application, wherein it is urged that the 1st respondent is equally aggrieved by the said Judgment and is in the process of filing an appeal before this Court; and

[5] UPON considering the 3rd respondent's replying affidavit and supplementary affidavit in opposition to the Motion sworn by **David K. Chelugui** on 5th August 2022 and 31st August 2022, respectively; raising a Preliminary Objection challenging the jurisdiction of this Court to hear and determine the appeal and present Motion; for the reasons that, no constitutional provisions of relevance or controversy were canvassed before the High Court or the Court of Appeal, and if any, that the two superior courts efficiently pronounced themselves upon them; and

[6] UPON considering the 6th respondent's replying affidavit sworn by **Brian Ikol** on 3rd August 2022 and submissions dated 8th August 2022, to the effect that no cause of action has been disclosed against it and that for this reason, the applicant should be condemned to bear its costs; and

[7] FURTHER, UPON considering the written submissions by the applicant dated 28th July 2022 and further submissions dated 8th August 2022 to the effect that; the applicant is apprehensive that the 3rd respondent will commence execution of the decretal sum of Kshs. 1,060,000,000 to the prejudice of the applicant's estate, who in the event the Court finds in its favour would bear an unreasonable burden recovering the decretal sum; and that the appeal is arguable and unless stay is granted, will be rendered nugatory. It is also

urged that the Court's jurisdiction under Article 163 (4) (a) of the Constitution has been properly invoked as the appeal challenges the interpretation and application of Articles 24 and 40 of the Constitution by both the High Court and Court of Appeal; and that in any event, by a letter dated 2nd August 2022, the 3rd respondent unconditionally conceded the applicant had an automatic right of appeal; and

[8] UPON considering the 4th and 5th respondents' submissions dated 5th August 2022 in support of the Motion. Similarly, considering their contention that in order to protect the parties' competing interests and to ensure justice is done to all the parties; the decretal sum herein be deposited in an interest earning account managed by counsel for the applicant and 1st and 2nd respondent; in the alternative, that the applicant be ordered to deposit in Court any other security of equal value; or to issue a professional undertaking for the performance of the decree; or a prohibitory order be directed against the suit property herein; and

[9] UPON considering the written submissions by the 3rd respondent dated 5th August 2022, to the effect that the application is premature and frivolous for reasons that; there is no threat of execution against the estate of the late Daniel Toroitich Arap Moi; and that the applicant has failed to meet the threshold for grant of stay. Further, that the 3rd respondent is apprehensive that, if a stay is granted, the Decree will be defeated. Consequently, it is his prayer that in the event the Court is minded to grant a stay, it should simultaneously order the applicant to deposit the entire decretal sum with his advocates on record or to provide a bank guarantee from a licensed bank securing due performance of the Decree; and

[10] NOTING that the applicant has filed **Petition No. E021 of 2022** as is required by Rule 31(2) of the Supreme Court Rules, 2020 and directed by this Court in ***Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 Others*** SC Petition No. 27 of 2014; [2014] eKLR, and ***Mohamed Ali Sheikh v. Abdiwahab Sheikh Osman Hathe & 3 Others***, Election Petition No. 38 of 2018; [2019] eKLR.

WE NOW OPINE as follows:

[11] We have carefully considered the reasoned arguments and submission by all parties in this matter. Regarding the issue as to whether the Court has jurisdiction to entertain the appeal, we are guided by the provisions of Article 163 (4) (a) of the Constitution and

our interpretation thereof. In *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*, S.C Petition No. 3 of 2012; [2012] eKLR (*Lawrence Nduttu Case*), we stated the *true intent of Article 163 (4) (a) of the Constitution as follows*:

“This Article must be seen to be laying down the principle that *not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court ... Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.*”

...

The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. ...” [Emphasis added].

[12] We consequently emphasized in *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013; [2014] eKLR, that in order to transmute itself into the provisions of Article 163(4)(a), the constitutional issue must have **“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] In this matter, the 3rd respondent’s case before the Environment and Land Court revolved around the protection of his right in the suit property under Article 40 of the Constitution. The applicant on the other hand, contended that Article 40 as invoked could not be applied retrospectively. Similarly, before the Court of Appeal, the applicant faulted the trial Court for retrospectively applying the provisions of the Constitution, 2010 and for failing to find that the cause of action was barred by Section 7 of the Limitation of Actions Act.

[14] In its Judgment, the Court of Appeal considered the question as to whether, claims of violation of rights and freedoms guaranteed under the Constitution, were subject to the

Limitations of Actions Act, and secondly, whether the provisions of the Constitution of Kenya, 2010 could apply retrospectively. It consequently interpreted and applied the provisions of Articles 24, 40 and 259 (1) and dismissed the appeal for being unmeritorious. It is evident that the appeal raises issues *involving the interpretation or application of the Constitution*, therefore, in keeping with this Court's decision in **Lawrence Nduttu**, we find that we have the jurisdiction to entertain the appeal and application before us.

[15] On the substantive issue, the applicant's Executrix has urged that she is apprehensive that the 3rd respondent will commence execution of the colossal decretal sum of Kshs. 1,060,000,000, which would render her appeal nugatory. Having determined that we have jurisdiction, we also find that the appellant has demonstrated that the appeal is arguable, and that unless a stay is granted, it will be rendered nugatory. The application thus meets the principles set out in the **Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell** SC Petition No. 6 & 7 of 2013, [2013] eKLR as affirmed in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, Application No. 5 of 2014, [2014] eKLR on the threshold for grant of stay of execution.

[16] The 3rd, 4th and 5th respondents have also submitted that should the Court deem it fit to grant stay, it should further direct the applicant to deposit the entire decretal sum in an interest earning account managed by counsel for the applicant and 1st and 2nd respondent or to provide a bank guarantee from a licensed bank securing the payment of the full Decree sum. The only ground advanced to support this assertion is that there has been perceived intermeddling in the Estate of the late Moi aforesaid and that it would also be in the interest of justice to do so. We find that the respondents have not sufficiently substantiated this allegation to warrant grant of conditional stay.

[17] In any event, the Executrix of the Estate/ of the late Moi/applicant is a party to these proceedings and is under a legal obligation to among other things collect, and preserve the estate for purposes of satisfying any resultant decree, awarded by this Court.

[18] Accordingly, we make the following Orders:

- (i) *The Notice of Motion dated 28th July 2022 and filed on 1st August 2022 be and is hereby allowed;*
- (ii) *Execution of the Judgment and Order of the Court of Appeal at Kisumu (Kiage, M'noti & Mumbi Ngugi, JJ. A) delivered on the 22nd July, 2022 in Civil Appeal No. 159 of 2019 as consolidated with Civil Appeal No. 254 of 2019 shall rest in abeyance pending the hearing and determination of the appeal.*
- (iii) *The costs of this Application shall abide the Court's decision in the appeal.*

[19] Orders accordingly.

DATED and DELIVERED at NAIROBI this 28th Day of October, 2022.

.....
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

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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR,
SUPREME COURT OF KENYA**