REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO. E029 OF 2023

–BETWEEN–

OKIYA OMTATAH OKOITI ..... 1ST APPLICANT

ELIUD KARANJA MATINDI ..... 2ND APPLICANT

BENSON ODIWOUR OTIENO ..... 3RD APPLICANT

BLAIR ANGIMA OIGORO ..... 4TH APPLICANT

–AND–

THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND PLANNING ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE NATIONAL ASSEMBLY ..... 3RD RESPONDENT

THE SPEAKER, NATIONAL ASSEMBLY ..... 4TH RESPONDENT

COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY ..... 5TH RESPONDENT

THE SENATE ..... 6TH RESPONDENT

CONSUMERS FEDERATION OF KENYA (COFEK) ..... 7TH RESPONDENT

KENYA EXPORT FLORICULTURE,

HORTICULTURE AND ALLIED
WORKERS UNION ..... 8TH RESPONDENT
MICHAEL KOJO OTIENO ..... 9TH RESPONDENT
VICTOR OKUNA ..... 10TH RESPONDENT
FLORENCE KANYUA LICHORO ..... 11TH RESPONDENT

(Being applications for stay of conservatory orders and stay of proceedings pending the appeal against the Ruling and Orders of the Court of Appeal at Nairobi (Warsame, M'inoti & Omondi, JJ.A.) dated 28th July, 2023 in Civil Applications No. E304 &E310 of 2023)

Representation:

Mr. Okiya Omtatah Okoiti, the 1st applicant
(*Appearing in person*)

Mr. Eliud Karanja Matindi, the 2nd applicant
(*Appearing in person)*

Mr. Benson Odiwuor Otieno, the 3rd applicant
(*Appearing in person*)

Mr. Blair Angima Oigoro, the 4th applicant
(*Appearing in person*)

Mr. Charles Mutinda and Mr. Hassan Nura for the 1st & 2nd respondents
(*Attorney General Chambers*)

Mr. Kuyoni Josphat and Mr. Mbarak Ahmed for the 3rd & 4th respondents
(*Kuyoni N. Josphat Advocate*)

Mr. Muhoro Kiriiri and Ms. Wambui Nganga for the 5th respondent
(*Muhoro Kiriiri Advocate*)

Mr. Bryson Ometo for the 9th respondent
(*Rachier & Amollo LLP)*

RULING OF THE COURT

[1] Before us is a Notice of Motion dated 5th August, 2023 filed at the instance of the applicants. The Motion which is anchored on Articles 1, 2, 3(1), 22, 43, 47, 73, 75,

129, 153(4)(a), 159, 163(4)(a) & (b), 201(d), 210(1), 226(5), 227(1) & 259 of the Constitution seeks *inter alia* orders that-

> *"...*
>
> *ii. This Honourable Court be pleased to suspend or stay the ruling delivered on 28th July, 2023 and the orders granted on the same date by the Court of Appeal in Civil Application Nos. E304 & E310 of 2023.*
>
> *iii. This Honourable Court be pleased to suspend or stay the intended proceedings in the Court of Appeal as ordered/directed by the superior court in Civil Application Nos. E304 & E310 of 2023 ..."*

[2] The salient facts which culminated in the Motion revolve around the annual national budgetary process for the 2023/2024 financial year. More specifically, the enactment of the Finance Act, 2023 (the Act) which sets out the revenue raising measures for the National Government. The applicants together with the 9th to 11th respondents herein lodged a petition in the High Court, **HC Petition No. E181 of 2023**, on 31st May, 2023. The petition challenged the constitutionality and validity of the Finance Bill, 2023 (the Bill), which was the precursor to the Act. However, before the petition could be heard, the Bill was passed by the National Assembly on 21st June, 2023. It was later assented to by the President on 26th June, 2023 resulting in the Act.

[3] Subsequently, on 29th June, 2023 an amended petition reflecting the prevailing changed circumstances was filed before the High Court. The amended petition challenges the constitutionality of the Act on procedural and substantive grounds. In a nutshell, that, the Act was not subjected to the preliminary mandatory concurrence process of the Speakers of the two Houses of Parliament as envisaged under Article 110(3) of the Constitution. Some of its provisions were not subjected

to public participation as they were sneaked in on the floor of the National Assembly. Further, that it dealt with matters outside its intended scope under Article 114 of the Constitution.

[4] Contemporaneously, the applicants and the 9th to 11th respondents also filed an application under a certificate of urgency seeking interlocutory orders on even date. Its main ground was that a substantial portion of the Act was scheduled to come into effect on 1st July, 2023. Consequently, they sought conservatory orders suspending the Act or specified provisions thereof which they believed were sneaked in or were not considered by the Senate and an interim prohibition order stopping the 1st to the 8th respondents herein from giving effect to the Act or the specified provisions thereof. They also implored the High Court to certify, pursuant to Article 165(4) of the Constitution, that the amended petition raises substantial questions of law.

[5] Upon the application being placed before *Thande, J.* on 30th June 2023, the learned Judge certified it as urgent. She also issued *ex-parte* conservatory orders suspending the Act pending the determination of the application.

[6] The 3rd and 4th respondents opposed the above application on the grounds that, firstly, the *ex-parte* orders had been obtained through misrepresentation and deliberate concealment of material facts. In that, the two Speakers of Parliament had jointly resolved that the Bill did not affect County Governments. That the said position was within the applicants' and the 9th to 11th respondents' knowledge as well as evidenced by the correspondence exchanged. Secondly, that the Act was enacted in accordance with the Constitution and the Public Finance Management Act. Thirdly, that the National Government's main source of revenue is taxes and the Act is intended to foster the collection of revenue of over Kshs. 211 billion. Accordingly, they argued that the suspension of the Act was bound to hinder the collection of such revenue which is not capable of being recovered in the event the amended petition is unsuccessful.

[7] Fourthly, that taxation is a policy decision which falls within the exclusive mandate of the Executive. As such, the court lacked jurisdiction to delve into policy decisions. Lastly, that the applicants and the 9th to 11th respondents had not met the threshold to warrant the issuance of the orders sought. It is on the premise of the aforementioned grounds that they also lodged an application dated 30th June, 2023 seeking *inter alia,* variation and setting aside of the *ex-parte* orders.

[8] Equally, the 1st and 2nd respondents filed an application dated 1st July, 2023 seeking variation and setting aside of the *ex-parte* orders. Their application was based on more or less similar grounds as the 3rd and 4th respondents, save that they asserted, in addition, that the learned Judge ought to have exercised judicial restraint in favour of an *inter-partes* hearing of the application for conservatory orders as opposed to issuing the *ex-parte* orders.

[9] The 5th, 6th and 8th respondents also opposed the application for grant of conservatory orders on the same grounds as the 1st, 2nd, 3rd and 4th respondents. However, the 5th respondent added that the Act and the impugned provisions therein enjoyed a presumption of constitutionality. The presumption could only be rebutted after the amended petition was heard and determined on merit. Accordingly, in his opinion, conservatory orders or suspension of the Act could not issue at the interlocutory stage.

[10] The application for conservatory orders and the two applications seeking to set aside the *ex-parte* orders were heard together by *Thande, J*. By a ruling dated 10th July 2023, the learned Judge found that the applicants and the 9th to the 11th respondents had established a *prima facie* case with a probability of success. Further, that unless the conservatory orders were extended, there was real likelihood that the amended petition would be rendered a mere academic exercise. In her view, the prejudice that would be occasioned to the public by being subjected to a law which may be determined as unconstitutional far outweighed the prejudice that would be occasioned to the 1st to 8th respondents should the amended petition

fail. Ultimately, the learned Judge allowed the application for conservatory orders and dismissed the two applications seeking to set aside the *ex-parte* orders. She also certified that the amended petition raises substantial questions of law; and remitted the matter to the Chief Justice to empanel a Bench of an uneven number of Judges of the High Court to determine the same.

[11] Thereafter, the 1st and 2nd respondents, on one hand, and the 3rd and 4threspondents, on the other, filed Notices of Appeal intimating their intention to challenge the High Court's decision in the Court of Appeal. They further filed applications before the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. The 1st and 2nd respondents filed **Civil Applic. No. E304 of 2023** while the 3rd and 4th respondents filed **Civil Applic. No. E310 of 2023**. Both applications sought stay of the conservatory orders issued by the High Court on 10th July, 2023.

[12] The applications were anchored on the grounds that; the intended appeals were arguable with high probability of success; the manner in which the High Court dealt with the application for conservatory orders amounted to judicial overreach; the suspension of the Act has the effect of halting the operations of the government; the government stands to suffer substantial financial loss in reduced revenue collection which cannot be recovered; the effect of the conservatory orders are dire and irreversible; and public interest would be best served in issuing orders of stay.

[13] In similar fashion, the 5th, 6th and 8th respondents supported the applications. However, the applicants, the 9th and 11th respondents` opposed the applications contending that they had not met the requisite principles to warrant the orders sought. To them, public interest lay in not interfering with the conservatory orders issued by the High Court.

[14] Upon hearing **Civil Applic. No. E304 of 2023**, the Court of Appeal vide a ruling dated 28th July, 2023 found that the intended appeals raised arguable points. Further, unlike the High Court, the court found that public interest tilted in favour of staying the conservatory orders issued by the High Court. As a result, the Court

of Appeal granted orders under its Rule 5(2)(b) and lifted the conservatory orders suspending the Act pending the hearing and determination of the intended appeals. The court indicated that its decision would also apply to **Civil Applic. No. E310 of 2023**. It also went on to issue the following directions:

> "
> i. *We direct the applicants (the 1st, 2nd, 3rd and 4th respondents herein) to file their appeals within the next 14 days.*
>
> ii. *Parties to file and serve their submissions within the next 30 days.*
>
> iii. *Both appeals be heard and determined within 60 days from the date of this ruling."*

[15] Aggrieved by the Court of Appeal decision, the applicants lodged an appeal, **Petition No. E022 of 2023**, as well as the current Motion before this Court. In support of the Motion, the applicants lodged an affidavit sworn by the 1st applicant on 5th August, 2023 and joint written submissions of even date. It is instructive to note at this juncture that the said submissions were 48 pages long contrary to this Court's Practice Direction No. 17 (a) (i). The practice direction in question provides that submissions in relation to appeals from the Court of Appeal should not exceed 15 pages.

[16] The Motion which was lodged under a certificate of urgency was placed before the duty Judge (*Njoki, SCJ.*) on 8th August, 2023. On the same day, the duty Judge certified the matter as urgent and issued the following orders:

> "...
>
> ii. *THAT the applicants do serve the Notice of Motion dated 5th August, 2023 together with submissions on the respondents by close of business on Wednesday 9th August, 2023.*

iii. THAT upon service, the respondents do file and serve their responses together with the submissions within seven (7) days.

iv. THAT the applicants do file and serve any rejoinder (if any) together with supplementary submissions within seven (7) days from service of the responses.

v. All documents shall be filed both in hard and soft copies…"

[17] Based on the aforementioned timelines, the respondents ought to have filed their responses and/or submissions on or before 16th August, 2023. It follows therefore that the applicants should also have lodged their rejoinder, if any, on or before 23rd August, 2023.

[18] Subsequently, on 15th August, 2023, each applicant, without leave of the Court, filed written submissions in support of the Motion on the Court's online platform. They availed the hard copies thereof on 16th August, 2023. The logical inference from such filing is that the applicants intended to remedy the anomaly in their initial joint written submissions. The applicants admitted as much when the matter was mentioned before the Deputy Registrar of this Court on 25th August, 2023.

[19] As for the respondents, who filed their responses and submissions on record, they admitted during the said mention that they had done so outside the stipulated time frame. More specifically, the 1st and 2nd respondents filed a replying affidavit sworn by Prof. Njuguna Ndungu as well grounds of opposition on 17th August, 2023 on this Court's online platform. They further lodged written submissions on 25th August, 2023 on the online platform. Afterwards, they only availed hard copies of the replying affidavit and their written submissions at the Court's registry on 28th August, 2023.

[20] Mr. Mutinda, who appeared for the said respondents, attributed the delay to multiple litigation relating to the Act pending before the superior courts below. He

went on to explain that his clients were required to file responses in a total of 12 matters within the same timelines as the Motion at hand. Owing to voluminous documentation and complexity of the matters, it was overwhelming to meet the timelines set by this Court, he submitted. He also urged that no prejudice had been occasioned by the delay. In the end, he asked the Deputy Registrar to indulge the 1st and 2nd respondents and deem their pleadings as duly filed the delay notwithstanding.

[21] The 3rd and 4th respondents filed their written submissions on time on the online platform, that is, on 16th August, 2023. However, they lodged a notice of preliminary objection on 17th August, 2023 on the said platform. They later availed the hard copies on 22nd August, 2023. Mr. Mbarak who appeared for the 3rd and 4th respondents attributed the delay to the same grounds as the 1st and 2nd respondents. He also asked the Deputy Registrar to deem their pleadings as having been properly filed.

[22] The 5th respondent filed a replying affidavit sworn by Josephine Mugure and written submissions on 17th August, 2023 on the Court's online platform. He equally availed the hard copies thereof on even date. On his part, Mr. Muhoro, who appeared for the 5th respondent submitted that the delay was occasioned by difficulties that he experienced with the Court's online platform on 16th August, 2023. He claimed that he sent an email to the Court on the same and attached copies of the 5th respondent's pleadings. Nonetheless, he sought the Court's indulgence to deem the pleadings as being properly before it.

[23] Similarly, the 8th respondent lodged a replying affidavit sworn by David Benedict Omulama and written submissions on 17th August, 2023 on the Court's online platform. The hard copies thereof were also availed on even date. However, there was no appearance for the 8th respondent when the matter was mentioned before the Deputy Registrar. As such, no explanation was offered for the delay in filing all documents within time.

[24] Lastly, the 9th respondent also filed his replying affidavit and written submissions on 17th August, 2023 on the Court's online platform. He only availed the hard copies of the replying affidavit on 28th August, 2023. Like others, the 9th respondent attributed the delay in meeting the set timelines to multiple litigation and voluminous documentation. He also submitted that the delay was not deliberate and urged the Court to admit his pleadings out of time.

[25] At the conclusion of the mention, the Deputy Registrar indicated that he lacked jurisdiction to vary the orders issued by the duty Judge on 8th August, 2023. Consequently, he directed that the effect of non-compliance would be determined by the Court. He also declined to grant leave to the 3rd applicant to file a rejoinder.

[26] Taking all the above matters into account, we must state that, this Court has on several instances underscored the importance of compliance with its Orders, Rules and Practice Directions. With regard to filing and service of documents within the requisite time, the Court has in a long line of decisions stressed that it will not countenance breaches of timelines set by the Rules or by the Court, and affirmed the general constitutional principle that justice shall not be delayed. See ***Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others,*** SC Petition No. 5 of 2016; [2018] eKLR and ***Kenya Railways Corporation & 2 Others v. Okoiti & 3 Others***, SC Petition (Application) No. 13 of 2020 & Petition 18 of 2020 (Consolidated)); [2022] KESC 68 (KLR). It goes without saying that compliance with court orders goes to the root of the rule of law as well as the dignity of any court.

[27] Neither the Supreme Court Act nor the Supreme Court Rules or this Court's Practice Directions permit the applicants to file written submissions in the manner that they did. Rule 31 of this Court's Rules stipulates that an interlocutory application, such as the applicants', should be filed together with written submissions. Therefore, we find it irregular for parties to file joint submissions as well as separate submissions at the same time. Not only would it be repetitive but

also unnecessary and a waste of precious judicial time. In any event, based on the directions issued, the applicants' submissions were to be served together with the Motion. In the end and without belabouring the point, we hereby strike out the four sets of the applicants' written submissions. In addition, we caution litigants to adhere to the Court's Practice Directions relating to the length of written submissions lodged before the Court, as explained in the preceding paragraph.

[28] Moving onto the respondents' responses and/or submissions, we are not convinced with the explanation for the delay. To begin with, litigants and advocates should accord this Court the respect and decorum it deserves as the apex Court of the land. Further, nothing has been placed before us to substantiate the contention by the 5th and 9th respondents that the delay was occasioned by difficulties in accessing the Court's online platform.

[29] Be that as it may, to accede to the respondents' prayer to deem the responses and/or submissions filed out of time as properly before the Court is tantamount to sanctioning an illegality. The respondents ought to have first sought leave of the Court to file their responses out of time prior to filing the same. See ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***, SC Applic. No 16 of 2014; [2014] eKLR and ***University of Eldoret & another v. Hosea Sitienei & 3 Others***, SC Applic. No. 8 of 2020; [2020] eKLR. Consequently, save for the 3rd and 4th respondents submissions, we strike out the responses and submissions filed out of time without leave of the Court.

[30] Turning to the substance of the Motion before us the gist of the affidavit in support of the Motion and the applicants' joint submissions is that the appeal lodged before this Court is anchored on Article 163(4)(a) of the Constitution. The core of the dispute also revolves around the interpretation and application of the Constitution, specifically Article 23(3)(c) of the Constitution which deals with conservatory orders. According to the applicants, the manner in which the Court of Appeal interpreted and applied Article 23(3) and its own mandate under Article

164(3) and Rule 5(2)(b) of the Court of Appeal Rules resulted in constitutional injustice. They claimed that the appeal seeks to preserve the substratum of the matter pending before the High Court.

[31] The applicants acknowledged that this Court has held that it is bereft of jurisdiction to entertain appeals arising from Rule 5(2)(b) of the Court of Appeal Rules. Nonetheless, citing ***Bia Tosha Ltd. v. Kenya Breweries Ltd & 6 Others***, SC Petition No. 15 of 2020 [2023] KESC 14 KLR (***Bia Tosha 2020***), they contended that this Court has equally pronounced itself on exceptional circumstances that would warrant it to entertain such an appeal. Towards that end, they posited that the nature of the constitutional dispute in issue; the fact that it is yet to be heard and determined by the High Court; and the jurisdictional error committed by the Court of Appeal in the matter at hand, fall within the exceptional circumstances.

[32] To further bolster their argument on this Court's jurisdiction, the applicants relied on ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another,*** SC Applic. No. 12 of 2015; [2016] eKLR. In that regard, they argued that the impugned ruling and orders has caused grave injustice to the applicants by pre-empting the substance of the proceedings before the High Court. Further, that the ruling was inconsistent with the Court of Appeal's earlier decision in ***Denis Njue Itumbi v. Law Society of Kenya & 55 Others***, Civil Applic. No. E126 of 2023 in that, in the aforementioned case, the court was faced with a similar application under Rule 5(2)(b) seeking to lift interlocutory conservatory orders, which were issued *ex-parte* by the High Court. However, unlike the matter at hand, the Court of Appeal declined to allow the application on the ground that it was premature. This is because the court found that the High Court had not made any substantive decision capable of being challenged on appeal.

[33] Based on the foregoing, the applicants implored this Court to invoke its inherent jurisdiction and correct the injustice occasioned by the impugned ruling.

More so, it ought to do so in line with its mandate to assert the supremacy of the Constitution and to provide authoritative and impartial interpretation of the Constitution under Section 3 of the Supreme Court Act.

[34] On the arguability of its appeal before this Court, they urged that the Court of Appeal lacked jurisdiction to entertain the applications before it, because, according to the applicants, there was no decision from the High Court on merits of the amended petition. Therefore, the applications before the Court of Appeal were premature. Consequently, relying on ***Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd***. (1989) KLR 1, they argued that the impugned ruling was a nullity and void for want of jurisdiction.

[35] The applicants furthermore submitted that the impugned ruling not only validated but allowed the Act to take effect immediately. In other words, the Court of Appeal unjustly predetermined and/or disposed the substance of the amended petition pending before the High Court and intended appeals, which at the time were yet to be filed before it. In turn, the applicants' right to fair hearing and access to justice under Articles 25(c), 50(1) and 48 of the Constitution were violated.

[36] They also asserted that the learned Judges erred in finding that the intended appeals to the Court of Appeal were arguable. In their view, disposal of the intended appeals would entail delving into the substratum of the matter pending before the High Court. Furthermore, it would elicit comments on the merits of issues yet to be adjudged at the High Court.

[37] They, in addition, faulted the learned Judges of appeal for failing to apply the binding test as stipulated by this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others***, SC Applic. No. 5 of 2014; [2014] eKLR in exercising their discretion under Rule 5(2)(b). The binding test being consideration of; (i) merits of the case, (ii) public interest and (iii) preserving constitutional values. Instead, they claimed that the Court of Appeal applied an outdated test which is only

applicable in private law disputes contrary to the principle of *stare decisis* as delineated under Article 163 (7) of the Constitution.

[38] Moving on to the nugatory aspect, they reiterated that the impugned ruling gravely prejudiced the proceedings pending before the High Court. Therefore, unless the orders sought are granted, the hearing of the amended petition before the High Court will be a mere academic exercise.

[39] Moreover, they argued that it is unconscionable to subject Kenyan taxpayers to the excesses of the Act yet the High Court had found that a *prima facie* case, to the effect that, the Act is unconstitutional, had been established. Further, taxpayers would suffer irreparable harm in the event the amended petition in High Court succeeds.

[40] Lastly, they argued that the orders sought will not dispose the intended appeals before the Court of Appeal. Rather, the exceptional circumstances of this matter demand preservation of the substratum of the matter before the High Court by granting the orders sought.

[41] In their submissions, the 3rd and 4th respondents contended that this Court is devoid of jurisdiction to entertain the Motion. More so, since it challenges the exercise of the Court of Appeal's discretion under Rule 5(2)(b) of the Court of Appeal Rules yet there is neither an appeal nor intended appeal pending before this Court. To buttress their position reference was made to ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others***, SC Applic No. 16 of 2015; [2015] eKLR; ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another***, SC Applic. No. 3 of 2014 [2015] eKLR and ***Okiya Omtatah Okoiti v. Sicpa Securities SOL SA & 2 Others***, SC Applic. No. 15 of 2018; [2019] eKLR.

[42] They also submitted that, two appeals have since been filed before the Court of Appeal as per the impugned ruling. These are Civil Appeal No. E598 of 2023- ***National Assembly & Speaker of the National Assembly v. Okiya Okoiti***

Omtatah, Eliud Matindi & 11 Others; and Civil Appeal No. E623 of 2023 - ***State Law & Another v. Okiya Okoiti Omtatah, Eliud Matindi & 11 Others***. Further, that the Court of Appeal had directed that the said appeals, which are pending, be determined within 60 days of the impugned ruling. Therefore, in their view, the Motion is premature since there is no judgment by the Court of Appeal wherein constitutional issues or matters of general public importance have been canvassed. In that regard, they cited ***Bia Tosha Distributors Limited v. Kenya Breweries Limited & 6 Others***, SC Petition No. 22 of 2014; [2018] eKLR. Consequently, the 3rd and 4th respondents claimed that the Motion is incompetent and should be struck out with costs.

[43] Before delving into the merits of the Motion, we have to address the issue of jurisdiction. Jurisdiction is a pre-requisite for a court before it delves into any matter before it. A court's jurisdiction flows from either the Constitution or legislation. Further, a court cannot bestow upon itself jurisdiction beyond what is conferred by the law. See ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others***, SC Applic. No. 2 of 2011; [2012] eKLR.

[44] The Motion at hand arises from the exercise of the Court Appeal's discretion under Rule 5(2)(b) of the Court of Appeal Rules. It is well settled that the purpose of Rule 5(2)(b) is to preserve the substratum of an appeal or intended appeal before the Court of Appeal. Equally, the Court of Appeal in issuing orders under Rule 5(2)(b) exercises original and discretionary jurisdiction. It does not dispose of the appeal or intended appeal before it. In other words, it does not make definitive findings on the substantive merits of the appeal or intended appeal. See the Court of Appeal decision in ***Equity Bank Limited v. West Link Mbo Limited***, Civil Applic No. 78 of 2011; [2013] eKLR.

[45] Moreover, this Court has time and time again pronounced itself on its jurisdiction to entertain applications challenging the exercise of the Court of Appeal discretion under Rule 5(2)(b). Some of those decisions have been cited by the parties

herein. In the ***Teachers Service Commission case*** this Court held that it lacked jurisdiction to determine such applications. In doing so, the Court observed that in exercising its discretion under Rule 5(2)(b), the Court of Appeal does not determine the appeal before it. Therefore, there is no substantive determination of either a constitutional question or matter of general public importance by the Court of Appeal, which has risen from the High Court to the Court of Appeal. Consequently, such an application does not meet the constitutional parameters of this Court's appellate jurisdiction under Article 163(4) of the Constitution. See also ***Sonko v. Clerk County Assembly of Nairobi City & 11 Others***, SC Applic. No. 14 (E022) of 2021; [2021] KESC 14 (KLR).

[46] Flowing from the foregoing, we find that the Motion does not fall within the Court's appellate jurisdiction under Article 163(4)(a) as invoked by the applicants. We are equally not convinced that the decision of the Court Appeal has occasioned grave injustice to warrant invocation of our inherent jurisdiction as we did in the ***Deynes Muriithi case***. Besides, the intended appeals before the Court of appeal have since been filed and are to be disposed within 60 days of the impugned ruling. Furthermore, the hearing of the amended petition before the High Court is scheduled to commence this September, 2023. In the circumstances, we find that the issues in dispute would be properly ventilated in the appeals before the Court of Appeal as well as in the amended petition before the High Court.

[47] Before we conclude, it is important to point out that the applicants misapprehended the tenor of this Court's decision in ***Bia Tosha 2020***. It is important to clarify that this Court in the said decision did not pronounce itself on any exceptional or unique circumstances that would warrant it to entertain an appeal emanating from Rule 5(2)(b) as alluded by the applicants. The appeal also did not arise from an order made under Rule 5(2)(b) and we reiterated the settled position that this Court lacks jurisdiction to entertain an appeal arising from exercise of the Court of Appeal's discretion under the said Rule. Furthermore, in

entertaining the appeal therein, which arose from an interlocutory ruling of the High Court granting conservatory orders, we were satisfied that it had met the threshold under Article 163(4)(a) of the Constitution, in that, the issue in dispute had been considered and determined on merit by the High Court as well as the Court of Appeal. See ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, SC Petition No. 10 of 2013 [2014] eKLR. Therefore, the circumstances in the ***Bia Tosha 2020*** are distinguishable from those in the Motion at hand.

[48] Lastly, taking into account the public interest nature of the Motion and guided by this Court's decision on costs enunciated in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others***; SC Petition 4 of 2012; [2013] eKLR, we make no orders as to costs.

[49] Before issuing final orders, our attention has been drawn to a video clip circulating in the public domain showing, Okiya Omtatah Okoiti, the 1st applicant in the instant Motion, naming Judges of this Court in a derogatory manner, even as this matter was pending before us. We must remind parties that the dignity and authority of this Court or indeed any court of law should not be taken for granted. We would like to state without any equivocation that we shall not hesitate to cite and punish any party or person whose conduct interferes or attempts to interfere with the course of justice in relation to any matter pending determination before the Court or whose conduct deliberately undermines the Court's authority or dignity. We find the message delivered in that video clip contemptuous and debasing of the dignity of this Court.

[50] CONSEQUENTLY and for the reasons aforestated, we make the following Orders:

i. ***The four sets of written submissions filed out of time by the applicants on 15th August, 2023 on the Court's online platform be and are hereby struck out.***

ii. The responses and/or submissions filed out of time by the 1st, 2nd, 3rd, 4th, 5th, 8th and 9th respondents be and are hereby struck out.

iii. The applicants' Notice of Motion dated 5th August, 2023 be and is hereby dismissed.

iv. There shall be no orders as to costs.

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **September**, 2023.

.....

M. K. 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. LENAOLA
JUSTICE OF THE SUPREME COURT

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify this as a true copy of the Original

REGISTRAR
SUPREME COURT OF KENYA