



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

**PETITION NO.17 (E021) OF 2022 AS CONSOLIDATED WITH
PETITION NO. 24 (E027) OF 2022**

–BETWEEN–

ZEHRABANU JANMOHAMED S.C

(Suing as the Executrix of the Estate of the Late

H.E. DANIEL TOROITICH ARAP MOI).....1ST APPELLANT

RAI PLYWOOD (K) LTD2ND APPELLANT

–AND–

NATHANIEL K. LAGAT.....1ST RESPONDENT

SUSAN CHERUBET CHELUGUI & DAVID K. CHELUGUI

(Suing as the Administrators of the Estate of the Late

NOAH KIPNGENY CHELUGUI)2ND RESPONDENT

DISTRICT LAND REGISTRAR UASIN GISHU.....3RD RESPONDENT

THE REGISTRAR OF TITLES.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

*(Being an application to strike out Petition No. 17(E021) of 2022 as consolidated
with Petition No. 24(E027) of 2022)*

Representation:

Mr. Julius Kemboy..... for the 1st appellant
(*Kemboy Law Advocates*)

Mr. Kibe Muigai..... for the 2nd appellant
(*Kinoti & Kibe Company Advocates*)

Mr. Ahmednasir M. Abdullahi SC.....for the 2nd respondent/applicant
(*Ahmednasir Abdullahi Advocates LLP*)

Mr. Odongo, State Counsel..... for the 3rd and 4th respondents
(*Office of the Attorney General*)

Ms. Niuster, Advocate..... for the 5th respondent
(*National Land Commission*)

RULING OF THE COURT

[1] UPON considering the Motion by the 2nd respondent dated 14th June 2023, and lodged on 15th June 2023, pursuant to Article 163(4)(a) of the Constitution, Sections 12, 15, 21(2) of the Supreme Court Act, No. 7 of 2011 and Rules 3(4) and (5), 31(6), 40(1) of the Supreme Court Rules 2020, seeking orders, to; *stay the determination of the application dated 13th January 2023 for leave to adduce additional evidence; strike out Petition No. 17 (E021) of 2022 (as consolidated with Petition No. 24 (E027) of 2022); alternatively, in relation to Petition No. 17 (E021) of 2022, expunge grounds of appeal pleaded at paragraph 22 (a) to (g) of the petition, with the exception of paragraph 22(d), paragraphs 23 to 59, 71 to 75 setting skeletal arguments in support of the appeal, and paragraphs 76(a),(b),(c),(e) and (f) with the exception of (d) delimitating issues for determination by the Court; sanction and punish the firms of Kinoti Kibe & Company Advocates and Kemboy Law Advocates for filing a frivolous and*

vexatious petition outside the purview of Article 163(4)(a) of the Constitution; and any further orders the Court deems fit to grant; and

[2] UPON examining the grounds on the face of the application, supporting affidavit sworn by Mr. David K. Chelugui on 14th June 2023, and the applicant's written submissions dated 14th June 2023, wherein it is argued that; the appeal raises no issues of constitutional interpretation or application; of the five issues delimited by the appellate court for determination, the only constitutional issue is on retrospective application of the Constitution, which was only addressed from a theoretical perspective and did not constitute the *ratio decidendi* of the impugned judgment; the 1st appellant's arguments at paragraphs 22(a) to (g) and 27 of Petition No. 17 (E021) of 2022 are a unilateral construct of constitutional provisions and not questions addressed or determined by the Court of Appeal; and the issue of retroactive application of the Constitution has not transmuted through the hierarchy of courts, but was raised for the first time before the Court of Appeal; and

[3] FURTHER, noting the 1st appellant's replying affidavit sworn by Zehrabanu Janmohamed SC on 29th June 2023 and submissions dated 30th June 2023 in opposition, on grounds *inter alia* that; the applicant's prayer seeking stay of the determination of the application dated 13th January 2023 has been overtaken by events in view of the ruling delivered on 16th June 2023; that the Court's jurisdiction to entertain the appeal was settled in the affirmative in the ruling of this Court delivered on 28th October 2022; and the applicant's advocate on record, Mr. Ahmednasir Abdullahi SC has made unfounded and disparaging remarks against this Court, the Deputy Registrar, the disputing parties, and advocates *en masse*, once again evincing conduct deprecated and admonished by this Court in the case of ***Republic v. Ahmad Abolfathi Mohammed & Another*** KESC Petition No. 39 of 2018 [2019] eKLR; and

[4] UPON considering the 2nd appellant's replying affidavit sworn by **Jaswant Singh Rai** on 27th July 2023 and submissions of even date, to the effect that; the consolidated appeal involves the interpretation and application of the Constitution, thus falls squarely within the ambit of Article 163(4)(a) of the Constitution; the proceedings at both the Eldoret Environment and Land Court in Petition No. 9 of 2014 and the Court of Appeal in Kisumu Civil Appeal No. 159 of 2019 as consolidated with Kisumu Civil Appeal No. 254 of 2019, involves interpretation of Articles 24, 40 and 259(1) of the Constitution, particularly, the application of the Limitation of Actions Act to the enforcement of fundamental rights and freedoms protected under the Bill of Rights; and, the question of retrospective application of the Constitution was raised before the trial court in the replying affidavit of Philip Vargese dated 25th November 2014, and ground 4 of the grounds of opposition dated 25th November 2022 but no determination was made; and

[5] UPON noting the applicant's rejoinder to the 1st appellant's submissions dated 18th July 2023, and response to the 2nd appellant's submissions dated 3rd August 2023, wherein the applicant faults the 1st appellant's counsel for making unwarranted remarks against its advocate on record; reiterates that Article 24 of the Constitution was not cited, interpreted or applied in the determinative portion of the Court of Appeal's judgment; and that the Court of Appeal did not interpret or apply Article 40 of the Constitution, but only adhered to precedent set by the Supreme Court in the cases of **Kiluwa Limited & Another v. Business Liaison Company Limited & 3 Others** (Petition 14 of 2017) [2021] KESC 37 (KLR) (6 August 2021) (Judgment); and **Samuel Kamau Macharia v. Kenya Commercial Bank** SC Application No. 2 of 2011 [2012]eKLR; and

[6] NOTING this Court's ruling dated 28th October 2022, on the question of its jurisdiction to determine this appeal, wherein we pronounced ourselves thus:

“[14] 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.”

[7] WE NOW DETERMINE as follows:

Having carefully considered the application, responses thereto, and rival submissions by the parties, and guided by this Court’s Ruling dated 28th October 2022, in this same appeal; we find that the issue as to whether the Court has jurisdiction under Article 163(4)(a) was conclusively determined in the Ruling aforesaid. All other issues raised by the applicant are in the circumstances completely misguided and do not require our attention at all. Consequently, and without saying more, we deem the application before us frivolous, vexatious, and an abuse of the process of court.

[8] WE THEREFORE, make the following Orders:

- (i) The Notice of Motion dated 14th June 2023 and lodged on 15th June 2023, is hereby dismissed;***
- (ii) The costs of this application shall be borne by the applicant.***

It is so Ordered.

DATED and DELIVERED at NAIROBI this 6th Day of October, 2023.

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**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 that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

