



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

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

**APPLICATION NO. E014 OF 2023**

**-BETWEEN-**

**LINET ADHIAMBO AMOLLO .....APPLICANT**

**VERSUS**

**REUBEN OPILE WILSON .....RESPONDENT**

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*(Being an application for leave to appeal against the Ruling and Orders of the Hon. A.K. Murgor JA in Civil Application No. E099 of 2023)*

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Representation:

Mr. Dola Indidis for the Applicant  
*(Dola Magani & Co. Advocates)*

Mr. Mbichire for the Respondent  
*(Mbichire & Co. Advocates)*

**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion application dated 30<sup>th</sup> March, 2023 and filed on 16<sup>th</sup> May, 2023 pursuant to Section 3A of the Civil Procedure Act, Sections 15, 16, 17, 20 of the Supreme Court Act, Articles 28, 40, 48, 50(1) and 159(1)(d) of the Constitution, in which the applicant seeks leave to file an appeal against the ruling of Murgor, JA. dismissing her application for extension of time to lodge an appeal to the Court of Appeal, and stay of execution of the judgment of the Environment and Land Court; and

**[2] UPON** perusing the grounds on the face of the application and the affidavit in support thereof sworn by Dola Indidis, Advocate, on 30<sup>th</sup> March, 2023 in which the applicant contends that: it is in the interest of justice that leave be granted to allow the applicant to appeal; the appeal has high chances of success; and that the application has been brought without inordinate delay; and

**[3] UPON** further perusing the applicant's submissions dated 30<sup>th</sup> March, 2023 and filed on 16<sup>th</sup> May 2023 wherein the applicant contends that: her vital witness was prevented from testifying in ELC Case No. 667 of 2013 on 21<sup>st</sup> July 2021; Hon. Justice B.M. Eboso took the file with him to his new station in Thika and delivered the judgment while an application to appeal against the ruling dated 21<sup>st</sup> July, 2021 that closed her case was still pending; the delay to file the appeal was inadvertent and was cured by the certificate of delay; the applicant is the registered owner of the suit property since 1/11/1987 and relies on it for rental income; the application ought to be allowed for the case to be heard wholesomely including the vital evidence locked out; she was denied justice on technicalities; the respondent did not oppose the impugned appeal to the Court of Appeal; and that granting the prayers sought will not prejudice the respondent; and

**[4] CONSIDERING** the respondent's Grounds of Opposition dated 9<sup>th</sup> August, 2023 filed in response to the application and his submissions dated 15<sup>th</sup> August, 2023 where he contends that: the jurisdiction of the Supreme Court has not been properly invoked to warrant hearing of this appeal or application under Article 163(4) of the Constitution; the application lacks foundation and is irregularly filed as the appellant has neither filed a Notice of Appeal as required by law nor sought extension of time to file the appeal out of time; and that the applicant is guilty of laches and is underserving of the discretion of the Court; and

**[5] FURTHER** considering the respondent's submissions where he relies on this Court's decision in ***Wanjigi v Chebukati & 2 others*** SC Petition 19 (E022) of 2022 [2023] eKLR where the Court stated that its appellate jurisdiction is set out in Article 163(4), and under Article 163(4)(a) of the Constitution, only issues involving interpretation or application of the Constitution may be considered by the Court and that mere allegation by a party that a question of

constitutional interpretation or application was involved, does not automatically bring the appeal within the ambit of Article 163(4)(a) of the Constitution; and

**[6] UPON** further perusing the applicant's submissions dated 19<sup>th</sup> August, 2023 as a rejoinder to the respondent's Grounds of Opposition, where she contends that the objection is an issue of procedural technicality which falls within the ambit of Article 159(1)(d) of the Constitution; the Court ought not to be tied by procedural technicalities; the authority relied on by the applicant is not relevant to the instant application; and the respondent's averments are false, as it filed its Notice of Appeal dated 30<sup>th</sup> March, 2023; and

**[7] BEARING IN MIND** this Court's jurisdiction under Article 163(4)(a) and (b) of the Constitution, as read with Section 15, 15A and 15B of the Supreme Court Act, to hear appeals from the Court of Appeal on matters relating to the interpretation and application of the Constitution and those involving matters of general public importance upon certification;

**[8] WE HAVE CONSIDERED** the application, affidavit, grounds of opposition, and submissions filed and **NOW OPINE** as follows:

- (i) From our understanding of the application, the applicant's grievance is against the decision of a single Judge of the Court of Appeal (*Murgor JA.*) wherein she declined to grant leave to the applicant to file the Notice of Appeal out of time and stay of execution, arising out of the judgment of the Environment and Land Court. We note that the applicant did not resort to Rule 57(1)(b) of the Court of Appeal Rules 2022 by filing a reference to the full bench of the Court of Appeal to vary, discharge or reverse the said decision of the single Judge of the Court of Appeal. Thus, the applicant's prayer for leave to appeal against this dismissal, does not at the first instance, fall for our determination.
- (ii) The applicant has invoked the provisions of Section 3A of the Civil Procedure Act, which provisions we held in *Daniel Kimani Njihia v Francis Mwangi Kimani & Another* [2015] eKLR and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, to be inapplicable when moving this Court. The Supreme

Court is only moved under the Constitution, the Supreme Court Act, and the Supreme Court Rules 2020.

- (iii) The appellate jurisdiction of this Court to hear appeals from the Court of Appeal is exercised pursuant to Article 163(4)(a) or (b) of the Constitution as read together with Sections 15, 15A and 15B of the Supreme Court Act. These provisions grant this Court jurisdiction to hear appeals from the Court of Appeal on matters relating to the interpretation and application of the Constitution and those involving matters certified as involving general public importance.
- (iv) The application does not indicate which appellate jurisdiction of the Court it seeks to invoke. A perusal of the orders sought by the applicant suggests that the applicant seeks leave in two respects. The first leave is towards the appeal to the Supreme Court and the second leave is towards the appeal to the Court of Appeal. The latter leave is sought alongside stay of execution of the decision of the Environment and Land Court. To the extent that the applicant seeks leave under Section 15B(2) of the Supreme Court Act, a certification for leave to appeal to the Supreme Court on a matter involving general public importance shall only be made first at the Court of Appeal, and a party dissatisfied with the Court of Appeal decision may apply to this Court for review. See ***Sum Model Industries Ltd v Industrial and Commercial Development Corporation***, Civil Application No. 1 of 2011 [2011] eKLR. The application has not distilled and framed any specific questions that transcend the parties as to be certified as involving general public importance as set out in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione***, Sup. Ct. Appl. No.4 of 2012 [2013] eKLR. The applicant does not proffer any explanation or reasons for failure to adhere to this prerequisite step. We therefore see no reason to excuse this omission to enable us consider the prayer for leave.
- (v) We note that the applicant is yet to file the substantive appeal as she only alluded to a draft Memorandum of Appeal as annexed to the affidavit in support of the application. The Supreme Court Act, and the Supreme Court

Rules provide for the institution of an appeal to this Court, including the form of the petition of appeal.

(vi) Pursuant to Rule 36 of the Supreme Court Rules, a person intending to make an appeal to this Court, shall file a Notice of Appeal within fourteen days from the date of judgment or ruling, and file it in the first instance with the Registrar of the court from which the appeal originates and upon filing, transmit a copy of the notice to the Supreme Court registry. The Notice of Appeal annexed to the application, though indicated to have been filed on 30<sup>th</sup> March 2023 has not been signed and sealed by the Registrar of the Court of Appeal. There is no evidence of transmission of the same to the Supreme Court. That being said, the failure to file or transmit a notice of appeal is not mandatory in relation to an appeal on a matter of general public importance, and can as well be filed upon grant of certification. However, as already stated above, it is not indicated which of the Court's jurisdiction herein invoked.

For the reasons set out above, the jurisdiction of this Court has not been properly invoked. As for costs, we see no reason to award costs to either party.

**[9] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) ***The Notice of Motion dated 30<sup>th</sup> March, 2023 and filed on 16<sup>th</sup> May, 2023 be and is hereby dismissed for lacking in merit;***
- (ii) ***Each party to bear own costs.***

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of September, 2023.**

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

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

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**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**

