REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. E014 OF 2023

-BETWEEN-

ASHMI INVESTMENT LIMITED ..... APPELLANT

-AND-

RIAKINA LIMITED ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

Being an appeal from the Ruling of the Court of Appeal at Nairobi (Okwengu, Sichale & Laibuta JJ.A) dated 14th April 2023 in Civil Appeal Application No. 384 of 2022

Representation:

Prof. Tom Ojienda (SC) and Ms. Misiati for the Appellant
(*Prof. Tom Ojienda & Associates*)

Mr. Isaac Aloo for the 1st Respondent
(*A.I. Onyango & Co. Advocates*)

No appearance for the 2nd Respondent

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appellant, Ashmi Investment Limited, vide its Petition of Appeal dated 4th May, 2023 and filed on 19th May, 2023 challenges the ruling of the Court of Appeal made on 14th April 2023. In the ruling, the Court of Appeal declined to review and set aside its judgment and orders made on 19th November, 2021 in ***Civil Appeal No. 384 of 2019,*** affirming the judgment of the Environment and Land Court (ELC) in ***Civil Suit ELC No. 646 of 2014***. The net effect of the impugned decision is that the appellant's survey deed plan and resultant title to the suit properties - LR Nos. 29957 and 29955 were cancelled. The Court of Appeal also agreed with the learned trial Judge of the ELC that the property was not available for allotment to the appellant and that the titles processed in favour of the appellant could not stand, the same having been issued during the pendency of the suit.

[2] The appeal invokes this Court's jurisdiction under Article 163 (4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act No. 7 of 2011, and Rules 3 (5), 31 & 32 of the Supreme Court Rules 2020.

[3] The 1st respondent raised a preliminary objection, *inter alia*, challenging this Court's jurisdiction to hear the appeal as of right under the provisions of section 163(4)(a) of the Constitution. In the Ruling dated 4th August 2023, the Court addressing itself on the merits of the preliminary objection, partly allowed the objection and restricted the appeal to the following issues:

(i) Whether the applicant was a bona fide owner of the suit properties within the provisions of Article 40 of the Constitution; and

(ii) Whether the Court of Appeal misapplied the doctrine of lis pendens thereby denying the applicant a right to property.

B. BACKGROUND

[4] The gist of the dispute is that on 28th July 1998, both the appellant and the 1st respondent were allotted Unsurveyed Industrial Plot 'D' off Mombasa Road (*hereinafter "the Suit Property")* by the Commissioner of Lands.

[5] According to the appellant, by the Letters of Allotment dated 28th July 1998 referenced 51776/XVI/159 and 51776/XVI/158, it was allotted Unsurveyed

Industrial Plot 'C' and Unsurveyed Industrial Plot 'D' respectively for a term of 99 years from 1st August 1998. It proceeded to take up possession, paid the prerequisite fees in respect of ground rent, rates, standard premium, and survey fees on 20th February 2013 as evidenced by copies of Department of Land Fee Receipts Nos. 3195262 and 3195263, and sought approvals from the pertinent government offices. That thereafter, the Director of Surveys caused Plots 'C' and 'D' to be surveyed and given L.R. Nos. 29955 (deed plan number 358614) and 29957 (deed plan number 358616) respectively (hereinafter "*the Properties"*).

[6] The appellant alleged that due to the dispute between the National Land Commission and the Ministry of Land Housing and Urban Development at the time, no land officer had been appointed to sign new titles and as such the titles were pending registration and issuance as at the time of institution of the suit before the ELC. That on 19th May 2014, the 1st respondent invaded the Suit Property in an attempt to forcefully take possession of the same prompting the appellant to institute a suit at the Environment and Land Court together with an application for interim relief.

C. LITIGATION BACKGROUND

i. Proceedings at the Environment and Land Court

[7] The appellant lodged ***Civil Suit ELC No. 646 of 2014*** on 23rd May 2013 seeking to restrain the 1st respondent from evicting and or trespassing, alienating, leasing, selling, charging or otherwise interfering with the appellant's possession of the L.R. Nos. 29955 and 29957. Also, it sought a declaration that it was the *bona fide* owner of the Properties.

[8] Contemporaneously, the appellant filed an application for conservatory relief as against the invasion by the 1st respondent. The court, *ex parte* in the first instance and upon *inter partes* hearing granted a temporary injunction restraining the 1st respondent from evicting and or trespassing, alienating, leasing, selling, charging and or committing acts or otherwise from interfering with the appellant's possession of LR Nos. 29955 and 29957 pending the hearing and determination of the suit. The ELC on a *prima facie* case basis

found that the appellant had demonstrated that he was allotted the Suit Property on 28th July 1998; was unable to obtain title due to dispute and disagreement between 2nd respondent and Cabinet Secretary, Ministry of Land Housing and Urban Development; had shown that it had been paying rates at the Nairobi City Council (as it then was); and the property had not encroached the Kenya Airports Authority. On irreparable harm; the ELC found that being a company, the appellant's asset stood to be damaged if the court did not protect its interests.

[9] In response to the suit, the 1st respondent entered defense and filed a counter claim. It argued that on the same date, 28th July 1998, it was also allotted Unsurveyed Plot No. 'D' off Mombasa Road, *the Suit Property,* through the Letter of Allotment referenced 51176/XVI/154. Subsequently, Plot File No. 210323 was opened; and it accepted the offer on 4th August, 1998. That upon realizing the Suit Property size was smaller than indicated, it unsuccessfully attempted to negotiate payment of a reduced sum.

[10] That the 1st respondent then proceeded to pay the required fees of Kshs. 20,000/- on 3rd April 2001 and a further Kshs. 240, 563/- on 15th October 2001, and was issued with Department of Land Fee Receipts Nos. E773014 and E774210 respectively. Thereafter, it took possession of the Suit Property, erected a fence around it, and commenced processing of the title with documents prepared and sent to the Commissioner of Lands for execution of the grant. That the Director of Surveys approved the Deed Plan for the Suit Property on 25th August 2003, as Deed Plan No. 246792 recorded in Folio Register No. 285/11, and assigned it L. R. No. 24091 which was then submitted to the Ministry of Lands for processing of the grant.

[11] The 1st respondent contended that the Director of Surveys caused another survey under Folio Register No. 391/24 to be undertaken resulting in L.R. Nos. 29955, 29956 and 29557 (Deed Plans No. 358614–16). It raised complaints through its letters dated 24th March 2014 and 20th September 2015 but the

Director declined to correct the fraudulent position, necessitating it to seek the following orders in its counterclaim:

i. *The Plaintiff/1st Defendant (appellant) survey number Folio Register No. 391/24, (computation number 64318 - L.R. Numbers 29955, 29956, and 29957- Deed Plan Numbers 358614, 358615 and 358616) by the Director of Surveys be declared unlawful and fraudulent and be cancelled and that the 1st Defendant/Plaintiff's survey Folio Register Number 285/11 (computation number 41474 - L.R. Number 24091 - Deed Plan No.246792) be declared as legal and the Director of Survey should accordingly amend the survey record.*

ii. *The Chief Land Registrar be ordered to issue the 1st Defendant's (respondent's) title for plot file number 210323; Folio Register Number 285/11, computation number 41474 - L.R No. 24091- Deed Plan No.246792.*

iii. *Costs and interest.*

[12] Conversely, the 2nd respondent in its statement of defense professed that since the Suit Properties were unsurveyed, the Director of Physical Planning prepared a Part Development Plan referenced 42.14.98.03A on 11th June 1998, which was approved by the Commissioner of Lands on 25th June 1998, before effecting the allocations to the appellant. The 2nd respondent affirmed that the appellant, who was merely an allottee of the Suit Properties, accepted the offers of allotment on 20th July 2013. Then, the Director of Surveys, in its letter dated 10th December 2013, caused Unsurveyed Industrial Plot 'C' and Unsurveyed Industrial Plot 'D' to be surveyed and assigned Land Reference Nos. 29955 and 29957 respectively. That this action was taken in view of the fact that there was no objection from the defunct Nairobi City Council in allocation of the properties, and the Kenya Airport Authority having confirmed that the properties did not encroach on airport land given their proximity to Jomo Kenyatta International Airport.

[13] In the premises, the 2nd respondent argued that it was satisfied that the allocations to the appellant were lawful, based on recommendations and approvals from the aforementioned offices, titles for LR Nos. 29955 and 29957 in favour of the appellant were prepared, awaiting execution and registration.

[14] Upon hearing the parties, the court delimited four issues for determination: *(i) whether there was fraud in the allocation of the Suit Property to the appellant; (ii) who was the bona fide allottee of the Suit Property; (iii) who is in possession of the Suit Property; and (iv) Who should pay the costs of this suit.*

[15] In a judgment dated 25th September 2017, the Environment and Land Court (*Bor J.*) dismissed the appellant's suit and allowed the 1st respondent's counterclaim. Before addressing the issues before it, the court observed that the appellant had gone ahead to process the title deed in its name, which was issued on 4th March 2015, while the suit was pending. This, the court found, was intended to defeat the rights of the 1st respondent and its counterclaim as the appellant ought not to have proceeded to process the title.

[16] Regarding *who was the bona fide allottee*, the court noted that since File Numbers at the Lands Office are assigned sequentially, it was evident that the 1st respondent's File No. 210323 was opened before the appellant's File No. 242742. Moreover, the appellant's Letter of Allotment had the reference number 51776/XVI/158 while the 1st respondent's Letter of Allotment bore reference number 51776/XVI/154.

[17] Additionally, the appellant's Letter of Allotment stipulated a payment of Kshs.258,630/- payable within 30 days; however, according to the documents presented, the appellant only paid Kshs.174,750/- on 20th February, 2013. No explanation was provided neither for the appellant's underpayment, amounting to defrauding the government of revenue, nor for the delay of almost 15 years in making payment. Furthermore, it appeared that Land Reference Nos. 29955 – 29957 were issued subsequent to Land Reference No.24091. Therefore, the Learned Judge found that by 2013, when the appellant accepted the offer, the

Suit Property was no longer available, as it had already been allotted to the 1st respondent by the Commissioner of Lands.

[18] As for *actual possession of the Suit Property*, the court noted that upon payment of the sum demanded in the Letter of Allotment, the 1st respondent took possession of the Suit Property and erected a fence around it. The court acknowledged that while the 1st respondent provided photographs of the Suit Property, there was no evidence to suggest that the appellant had occupied it. Consequently, the court concluded that the 1st respondent had demonstrated on a balance of probabilities that it was in possession of the Suit Property.

[19] On *whether there was fraud in allocating the Suit Property to the appellant*, the Learned Judge recognized that the 2nd respondent participated in getting the title over the Suit Property issued to the appellant by writing to the Director of Surveys on 2nd November 2013 underscoring irregularities in preparation of Deed Plans for Unsurveyed Industrial Plots B, C and D off Mombasa Road. The Learned Judge noted that the letter accentuated that despite a grant for the Suit Property, L.R. No. 24019 under Deed Plan 246792, being in the process of registration, a new Deed Plan No. 358614 had been created for L.R. No.29955, overlapping on the Suit Property; which contradicted the position taken by the 2nd respondent's witness, one Silas Kiogora Mburugu, Land Officer at the 2nd respondent who testified that he was not aware of any other allocation of the Suit Property from the records that were available.

[20] Further, that File No. 210323 which was opened with regard to the Suit Property allotted to the 1st respondent, vanished after the Suit Property was surveyed as Folio Register No. 285/11 and Deed Plan No. 246792 processed and given L. R. No. 24091. Consequently, the learned Judge concluded that the 1st respondent's Deed Plan had been prepared prior to the appellant's and to the creation of Deed Plan No. 358614, which formed the basis for issuing title to the appellant for L.R. No. 29955 on 4th March 2015.

[21] Relying on Regulation 109 of the Survey Regulations of 1994 which mandates the Director of Surveys to cancel any Deed Plan he withdraws, it was held that there was no evidence to show that the 1st respondent's Deed Plan No.246792, prepared on 4th March 2003, was withdrawn or cancelled by the Director. By the same token, when the Director cancels survey plans, he is required to notify the registered owner, surveyor who did the work, and the Land Registrar of the cancellation pursuant to Section 33 of the Survey Act. In that case, the court held that no evidence was adduced to show that either the 1st respondent or the surveyor who undertook the 1st respondent's survey was notified of the cancellation of the 1st respondent's Deed Plan. Consequently, the court dismissed the appellant's suit, allowed the 1st respondent's counterclaim, and granted prayers (i), (ii) and (iii) of the counterclaim.

[22] Discontented, the 2nd respondent filed a Notice of Motion, supported by the affidavit of Zachariah Ndege, Chief Land Administration Officer at the 2nd respondent's office seeking a review of the judgment. It was predicated on the averments that the 1st respondent did not pay an amount of Kshs. 240,563/- as contained in Receipt No. E774210 of 15th October 2001; as the receipt was not genuine as confirmed by the Ministry of Lands and Physical Planning on 16th November 2017 on account of the said receipt not appearing in the Ministry's analysis book of 1st November 2001; therefore, the 1st respondent did not complete payment for the allocation of the Suit Property and has yet to do so; thus, the court failed to consider that the Suit Property had been registered in favour of the appellant, and a certificate of lease for L. R. No. 29957, formerly Plot D, issued on 4th March 2015.

[23] Around the same time, the appellant filed an application for review of the judgment. Its main contention was that in a letter dated 29th December 2017 from the Registrar of Companies, the details of the 1st respondent were unavailable. Thus, the appellant argued that the 1st respondent does not exist and could not therefore own property as found in the judgment. This was rebutted by the respondent who adduced a copy of its certificate of registration issued by the Companies Registry.

[24] In a Ruling dated 13 November 2018, the Environment and Land Court (*Bor J.*) dismissed the application for review with costs. It held that: the 2nd respondent's letter of 2nd October 2017 demonstrated that the 2nd respondent only sought to confirm whether the receipt in dispute was genuine after the court had entered judgment; and it was not demonstrated to the court that the 2nd respondent did not have access to the information at the time the case was heard or that it could not be produced then. It is instructive to note that no appeal has been preferred against this Ruling.

ii. Proceedings at the Court of Appeal

[25] Aggrieved by the Judgment of the ELC, the appellant moved the Court of Appeal in ***Civil Appeal No. 384 of 2019*** on eight (8) grounds of appeal out of which the court identified the following as the salient grounds before it: that the learned judge:

1. *Erred in failing to hold that the appellant is the bona fide owner of the suit properties;*
2. *Failed to appreciate the evidence adduced at the trial to the effect that the suit properties were allotted to the appellant vide letters of allotment Ref: 51776/XVI/158 and 51776/XVI/159 respectively;*
3. *Failed to appreciate that the suit properties had been allocated to the appellant and the same were not available for alienation, allocation or transfer to any other person;*
4. *Dismissed the appellant's suit despite strong evidence tendered by the appellant;*
5. *Erred in dismissing the appellant's suit to the effect of allowing the 1st respondent to unjustly enrich itself at the appellant's expense; and*
6. *Failed to consider all the issues raised by the appellant in its written submissions.*

[26] Upon considering the record of appeal, grounds of appeal and written submissions, the Court of Appeal delineated the following as issues for determination:

(i) What was the legal effect of double allocation of the Suit Properties?

(ii) Between the appellant and the 1st respondent, who was the first in time to accept the offer of allotment and pay the requisite fees, and to what effect?

(iii) After acceptance of the offer of allotment and payment in full of the requisite fees and impositions by either the appellant or the 1st respondent, were the suit properties available for allocation and transfer to the other?

(iv) Who is the rightful allottee and owner of the suit properties?

(v) Who bears the costs of this appeal?

[27] In dismissing the appeal, the learned Judges of Appeal, vide judgment dated 19th November 2021, held that it was a clear case of double allotment, being that both the appellant and 1st respondent were issued with Letters of Allotment dated 28th July 1998 from the office of the Commissioner of Lands in respect of the same Unsurveyed Plot 'D' from which Suit Properties known as L.R. Nos.29955 and 29957, were derived. That the offer remained open for acceptance by either party and, being conditional, acceptance only took legal effect upon full payment of the requisite fees and impositions, without which the Properties would not have been vested on either party.

[28] On *who between the appellant and the 1st respondent, was the first in time to accept the offer of allotment and pay the requisite fees*, the Court of Appeal held that indisputably, the 1st respondent was the first in time to pay the requisite fees and impositions. For that reason, it was entitled to the allocation and registration of the properties in its favour. Subsequently, the properties were no longer available for allotment or allocation to the appellant. This determination answered the second and third issues.

[29] The Court of Appeal agreed with the ELC's finding that neither party was lawfully entitled to deal with the properties while the suit was pending. The court deemed the appellant's attempt to alienate the properties by paying the requisite fees and impositions to facilitate transfer of the title documents as

unlawful and fraudulent. It concurred with the trial judge that the appellant ought not to have processed the title documents while a suit was pending in the trial court. Because of this, it determined that the certificates of title issued to the appellant in respect of L.R. Nos. 29955 and 29957, being the derivatives of Plot 'D', could only be presumed to have been irregularly obtained through an unlawful scheme.

[30] In the end, the court agreed with the trial court's finding that by the year 2013 when the appellant paid for the requisite fees for Unsurveyed Plot "D", it was no longer available because it had already been allotted by the Commissioner of Lands to the 1st respondent, who had paid for it, taken possession, and was in the process of procuring a certificate of title over it.

[31] The appellant, dissatisfied with the decision, filed a Notice of Motion application seeking to review and vary/set aside the judgment. The application was founded on fourteen (14) grounds, which the court considered as an argumentative restatement of its case in the ELC and in its appeal, except for: an error apparent on the face of the record and sufficient reason for review; and the applicability of the doctrine of *lis pendens* in the matter.

[32] In the Ruling dated 14th April 2023, the Court of Appeal *(Okwengu, Sichale & Laibuta JJ.A)* held that none of the grounds raised disclosed errors of law that had occasioned real injustice or failure or a miscarriage of justice to the appellant's prejudice; or that the appellant made a case for review to promote public interest and enhance public confidence in the rule of law; consequently, the Court of Appeal held that the application lacked merit and failed to demonstrate that the appellant's case fell within the instances that call for review as enunciated in the case of ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others,*** SC Petition No. 4 of 2012; [2013] eKLR.

D. PROCEEDINGS BEFORE THE SUPREME COURT

[33] Undeterred, the appellant moved to this Court, invoking its jurisdiction under Article 163 (4) (a) of the Constitution, section 15 (2) of the Supreme Court Act No. 7 of 2011, Rules 3 (5), 31 & 32 of the Supreme Court Rules 2020. The

appeal is premised on seven (7) grounds, faulting the learned Judges of the Court of Appeal for:

i. *Upholding the declaration of the appellant's survey number folio register number 391/24 (Computation number 64318 L.R. Nos. 29955, 29956, 29957 and Deed Plan Nos. 358614, 358615 and 358616) as unlawful and fraudulent and cancellation of the same, that was made on 25th September 2017, without the 1st respondent presenting any evidence, documentary or oral to strictly prove the allegations of fraud to the required standard, thus summarily infringing upon the appellant's right under Article 40 of the Constitution.*

ii. *Upholding its judgment that inferred fraud on the part of the appellant due to the alleged violation of the doctrine of lis pendens despite no evidence being led as to the alleged fraud and the 2nd respondent confirming that issuance of the Certificate of Titles to the appellant, during the pendency of the trial suit was occasioned by a jurisdiction dispute between the 2nd respondent and the Ministry of Lands and Physical Planning, thus summarily infringing upon the appellant's right to property under Article 40 of the Constitution.*

iii. *Upholding its judgment of 19th November 2021 despite the 2nd respondent affirming that the appellant was the only allottee of the suit property, hence the 1st respondent had no claim over the same whatsoever, in effect cancelling the appellant's title, in violation of its right to property under Article 40 of the Constitution.*

iv. *By making a fundamental factual error by upholding its decision that the 1st respondent was the first in time to pay the requisite fees, hence it was entitled to allocation of the suit properties when in fact, the court had completely overlooked the affidavit sworn by Zachariah Ndege who confirmed that the 1st respondent's alleged receipt of payment for the allotment of the suit property was not*

reflected in the Ministry of Lands analysis book of 15th October 2001, thus cancelling the appellant's legitimate title to the suit property on the basis of a disowned receipt in violation of the appellant's right to property under Article 40 of the Constitution.

v. *By making a fundamental factual error by upholding the ELC's decision cancelling the appellant's legitimate title to the suit property despite the 2nd respondent affirming that the appellant was allotted the Suit Property, that the appellant accepted the allotment, that the Kenya Airports Authority confirmed that the suit property was not encroaching on its property, that the Director of Surveys confirmed preparation of the Part Development Plan, and that all approvals from government agencies confirmed the appellant to be the proper allottee; thus violating the appellant's right to property.*

vi. *By usurping the mandate of the National Land Commission and the Chief Land Registrar in so far as determining which land documents are legitimate and which are not, thus anchoring its judgment and Ruling solely on the 1st respondent's unfounded allegations of fraud against the appellant, the Director of Surveys and the 2nd respondent, thus cancelling the appellant's legitimate title, in violation of its right to property.*

vii. *Upholding its decision to affirm the ELC's judgment of 25th September 2017 on the basis that the appellant violated the doctrine of lis pendens, by receiving the Certificate of Title to the suit property from the 2nd respondent, when the latter had confirmed and asserted that the process of registration of the appellant's interest had begun in February 2013 well before the civil suit was instituted and when only execution and registration of the title was pending, thus inferring fraud where there was none to the disadvantage of the appellant, and in effect cancelling its legitimate interest, in violation of its right to property.*

[34] In the result, the appellant seeks the following reliefs:

1. *The petition of appeal be allowed;*
2. *The Judgment and order of the Court of Appeal (Okwengu, Sichale and Laibuta, JJA) dated 19th November 2021, the Ruling and Order of the Court of Appeal dated 14th April 2023, and the Judgment and Order of Honourable Justice K. Bor dated 25th September 2017 be set aside in entirety;*
3. *This Honourable Court be pleased to issue a permanent injunction restraining the 1st respondent, its agents, members, servants, employees and/or representatives from entering, taking possession of, and in any other manner interfering with the appellant's quiet possession of the suit properties LR Nos. 29955 and 29957;*
4. *Costs of this petition be provided for;*
5. *Any other or further relief that this Court may deem fit to grant.*

[35] The 1st respondent, in response, filed a notice of preliminary objection dated 30th May 2023 and filed on 13th June 2023 challenging the Court's jurisdiction. This Court addressed it in the Ruling dated 4th August 2023, which partly succeeded in restricting the appeal to two questions as indicated prior. Following this, none of the respondents filed their responses despite being served with this Court's directions, nor did they appear before Court on the date of hearing despite being duly electronically served with the hearing notice on 3rd January 2024 and a return of service filed on 25th January, 2024 by the Court's process server. We note from the record that it is the same mode of service that was deployed previously in serving the directions made by the Hon. Deputy Registrar as a result of which Counsel appeared on behalf of the 1st respondent on 5th June 2023 before the Hon. Deputy Registrar.

E. PARTIES' RESPECTIVE CASES

i. Appellant's Case

[36] The appellant relies on its submissions dated 29th August 2023 and filed on 30th August, 2023 in support of its petition of appeal. It addresses the two defined issues identified by the Court.

[37] On *bona fide ownership of the Suit Property under Article 40,* the appellant submits that this question rests on whether or not the allotment process was lawful. To that end, the appellant affirms that it followed the laid down process of allocation to the letter. That its allotment was confirmed not only by the 2nd respondent but also by the Director of Surveys, Nairobi City County, Kenya Airports Authority, and the Physical Planning Department.

[38] In contrast, the appellant argues that the 1st respondent did not fulfill the allotment requirements, as it failed to pay the due allotment fees. Moreover, all the relevant government offices have denounced any alleged allocation to it. Further, that through the affidavit sworn by Zacharia Ndege, the 2nd respondent affirmed that the 1st respondent did not make any payments to it; hence, no allocation was made to the 1st respondent. The appellant propounds that its proprietary rights under Article 40 of the Constitution have consistently been affirmed by the 2nd respondent, the Chief Land Registrar, the Director of Surveys, and all other necessary stakeholders.

[39] The appellant further submits that when confusion ensues regarding the validity of land records, parties, and indeed the court, must revert to the custodians of these records to affirm the true position. To bolster this argument, the appellant relies on the case of ***Solomon Omwenga Omache & Anor v Zachary O. Ayieko & 2 Others***; [2016] eKLR as cited by the Court of Appeal in ***Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 Others***; [2019] eKLR which emphasized the court's duty to uphold the sanctity of the records at the Lands Office. Accordingly, the appellant implores the Court to allow it's Petition of Appeal not only because it fulfilled all the requirements of the

allotment but also because its title is backed by official records whose integrity and accuracy have been affirmed by the 2nd respondent.

[40] On the second issue, *whether the Court of Appeal misapplied the doctrine of lis pendens thereby denying the appellant's right to property*, the appellant urges that the doctrine of *lis pendens* applies only to actions taken after the suit has been instituted, specifically with the sole intention of stealing a match from the opposing litigant. This position the appellant asserts was espoused by the Indian Supreme Court in ***G.T. Girish v Y. Subba Raju,*** Civil Appeal No. 380 of 2022, and by the Court of Appeal in ***Dhanjal Investments Limited v Shabaha Investment Limited***; CA No.80 of 2019; (2022) KECA 366 (KLR).

[41] The appellant submits that the issuance of the titles to the Suit Property was the culmination of the registration process that had begun in 2013, as confirmed by 2nd respondent in the superior courts. The appellant underscores that it neither dealt with nor transferred the Suit Property after instituting and during the pendency of the suit. It affirms that the only reason the requisite registration documents were not signed by 2013 was due to the jurisdictional conflict between the 2nd respondent and the Ministry of Lands and Physical Planning, which halted a number of land transactions. Therefore, the appellant reiterates that there was no violation of the doctrine of *lis pendens*. To that extent, the appellant faults the Court of Appeal for misinterpreting the doctrine, resulting in an unfair infringement of its right to property under Article 40 of the Constitution. Accordingly, the appellant implores the Court to allow the appeal.

F. ANALYSIS AND DETERMINATION

[42] It is this Court's practice that when an appeal is instituted, under Article 163(4)(a) of the Constitution, as of right, in any case involving the interpretation or application of the Constitution, we must of necessity satisfy ourselves of our jurisdiction to hear and determine the matter, whether an objection has been raised or not.

[43] As earlier stated, this Court's Ruling dated and delivered on 4th August 2023, addressed the challenge to its jurisdiction, and framed the following issues:

(i) Whether the applicant was a bona fide owner of the suit properties within the provisions of Article 40 of the Constitution; and

(ii) Whether the Court of Appeal misapplied the doctrine of lis pendens and thereby denying the applicant a right to property.

[44] In arriving at the decision in the said ruling, the Court appreciated that the appeal raised several issues. Some of those issues were not found to warrant the court's exercise of jurisdiction such as inference of fraud and the attendant evidence. The Court stated as follows:

> "[14] … *From our careful perusal of the record, we are satisfied that the dispute as to the ownership of land as a bona fide allottee under the circumstances and the court's application of the doctrine of lis pendens bearing in mind the appellant's argument surrounding this court's advisory opinion concerning the dispute between the National Land Commission and the Ministry of Lands are issues that involve the interpretation and application of Article 40 of the Constitution. The issues surrounding the inference of fraud and the attendant evidence do not fall for our determination as they were fully ventilated before the superior courts below…*"

With that finding, the Court proceeded to grant conservatory relief in favour of the appellant in respect of the suit property pending the hearing and determination of the appeal.

[45] We note that since the focus of our ruling was the preservation of the substratum for purposes of the appeal, it remains open for the court, now with the benefit of the arguments in the substantive appeal, to remain satisfied of the jurisdiction. As recently held in ***Kampala International University v.***

Housing Finance Company Limited, SC Petition No. 34 (E035) of 2022; [2024] KESC 11 (KLR) at para. 46:

> *"... we consider it important to restate the principle that without jurisdiction, a court of law is incapable of rendering any valid Ruling, Order or Judgment. In the Ruling cited by the appellant as authority for its contention that the issue of jurisdiction is now res judicata, all that this Court did, was to preserve the substratum of the appeal by holding that the same was arguable. The said ruling did not foreclose future interrogation of whether, the Court's jurisdiction has been validly invoked, either by the court suo motu, or by a party to these proceedings"* [Emphasis added]

[46] Indeed, in our ruling at paragraph 15, we gave the benefit of doubt to the appellant and thought it was necessary to allow the appellant to ventilate its appeal under the *strict confines of Article 163(4)(a) of the Constitution*. With the benefit of the petition of appeal, submissions and the arguments by counsel for the parties, it emerges that the appeal transmutes from that against the ruling by the Court of Appeal on the appellant's application for review of the judgment by the same court to an appeal against the judgment of the Court of Appeal. Why do we say so?

[47] The appellant through its Petition of Appeal dated 4th May, 2023 challenges the ruling of the Court of Appeal, which dismissed an application for review of the Judgment of the Court of Appeal in ***Civil Appeal No. 384 of 2019***. This judgment by the Court of Appeal was made on 19th November 2021. In the ruling of 14th April 2023, the Court of Appeal *(Okwengu, Sichale & Laibuta JJ.A)* held that none of the grounds for review raised disclosed errors of law that had occasioned real injustice or failure or a miscarriage of justice to the appellant's prejudice, and that the appellant had not made a case for review to promote public interest and enhance public confidence in the rule of law. Consequently, the Court of Appeal found that the application for review lacked merit.

[48] This is the ruling that the appellant indicates in its Notice of Appeal dated 28th April, 2023 that it intended to challenge before this Court. Specifically, the Notice of Appeal provides as follows:

> "...
>
> ***NOTICE OF APPEAL***
>
> ***(Rule 36 of the Supreme Court Rules, 2020)***
>
> ***TAKE NOTICE*** *that* ***ASHMI INVESTMENT LIMITED, THE APPELLANT/ APPLICANT*** *herein dissatisfied with the* ***Ruling*** *made by the* ***COURT OF APPEAL*** *(Honourable Justices Okwengu, Sichale & Laibuta) sitting at Nairobi* ***delivered on 14th day of April 2023, intends to appeal to the Supreme Court against the whole of the said Ruling***.
>
> ..." [Emphasis ours]

However, in the contents of its Petition of Appeal, despite replicating in the heading of the pleadings that it is an appeal from the ruling aforesaid, the appellant's focus shifts to the merits of the judgment of the Court of Appeal rendered on 19th November 2021, which was the subject of the review application. It is trite that the filing of a Notice of Appeal is a jurisdictional pre-requisite to any appellate jurisdiction. Under the Rules, there is a procedural timeline within which the Notice of Appeal should be filed. From the facts at hand, no Notice of Appeal indicating an intention to appeal against the said Judgment was ever filed by the appellant. The Notice of Appeal filed in this appeal is therefore limited to the Ruling aforesaid.

[49] The foregoing circumstances point to the ingenuity or otherwise inattentiveness to keeping in line with this Court's limited jurisdiction in instituting and prosecuting the appeal. The Court cannot disregard such action. In ***University of Eldoret & Another v Hosea Sitienei & 3 others***, SC Petition No.33 of 2019 [2020] eKLR, the Court called out similar attempts in the following terms:

> *"[12] The main question that we interrogate is whether the appeal fits within either of the above principles. A consideration of the petition of*

appeal reveals that it is an appeal as of right against the ruling on review delivered on 9th July 2019 …

[13] … Instead, they couched their appeal on the basis of the Court of Appeal judgment delivered on 18th October 2018. There is no evidence before us to demonstrate that the judgment of 18th October 2018 was being appealed. Indeed, the Notice of Appeal filed by the Petitioners is instructive that the appeal is against the entire ruling of 9th July 2019.

[14] Had the appeal been against the judgment, we could perhaps have been persuaded differently. Any attempt by the petitioners to merge the two decisions in their appeal in our view is ingenious but must nevertheless be stifled at the outset."

[50] Unrelenting, the parties approached the Court again, this time seeking to be allowed to now pursue an appeal against the judgment. We asserted the above position in ***University of Eldoret & Another v Hosea Sitienei & 3 Others***, SC Application No. 8 of 2020; *[2020] eKLR* and held as follows:

"[33] It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before this Court within either of the applicable jurisdictional contours. … We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others [2015] eKLR, where a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse.

[34] We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences." [Emphasis added]

[51] The present situation is no different to warrant any departure from our now known position. We are not persuaded that the Court is seized of the requisite jurisdiction as the parameters of review of a judgment by the Court of Appeal are well settled. The appellant failed to construe a constitutional argument arising out of such parameters to necessitate the appeal particularly in so far as it relates to the issues framed in our ruling. The appellant went on to submit on the issues as if the appeal was against the substantive judgment, an outright affront to scarce judicial time, resources, process and procedure.

[52] Consequently, the focus of the appeal as presented is incongruent with the expectation accruing from the Notice of Appeal dated 28th April, 2023. In the premises, we have no jurisdiction to entertain the same and it should be struck out.

[53] On the issue of costs, this Court in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, SC Petition No. 4 of 2012; [2014] eKLR set out the legal principles that guide the grant of costs and enunciated that generally, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. Taking into consideration all

circumstances of the hearings herein in all the three superior courts, and the non-participation of the respondents before us, there shall be no order as to costs.

G. ORDERS

[54] We thus make the following orders:

i. ***The Petition of Appeal dated 4th May 2023 and filed on 19th May, 2023 fails and is hereby struck out for want of jurisdiction;***

ii. ***We hereby direct that the sum of Kshs.6,000/= deposited as security for costs in the appeal herein be refunded to the appellant; and***

iii. ***There shall be no order as to costs.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **June**, 2024.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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P.M. MWILU	**M. K. IBRAHIM**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA