



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**APPLICATION NO. E014 OF 2024**

— BETWEEN —

**FREEDOM LIMITED.....APPLICANT**

-AND-

**OMAR AWADH MBARAK.....RESPONDENT**

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*(Being an application for stay of execution of the Judgment and the Order of the Court of Appeal in Civil Appeal No. E028 of 2022 at Mombasa (Murgor, Laibuta & Odunga, JJ. A) dated and delivered at Nairobi on 23<sup>rd</sup> February 2024)*

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Representation:

Anjarwalla & Khanna for the Applicant

Muturi Gakuo & Kibara & Co. Advocates for the Respondent

**RULING OF THE COURT**

**[1] UPON CONSIDERING** the Petition of Appeal No. E009 of 2024 dated 20th March 2024 and filed on even date which is brought pursuant to Article 163 (4) (a) of the Constitution, Section 3A of the Supreme Court Act, CAP 9B of 2011, Rules 3 (5), 31 (1) (a) & (2) and 38 of the Supreme Court Rules, 2020 and Paragraph 34 of the Supreme Court (General) Practice Directions, 2020 in which the Applicant challenges the entire Judgment of the Court of Appeal delivered on the 23rd

February 2024 and the resultant Order subsequently issued on 5th March 2024 in Civil Appeal No. E028 of 2022; and

**[2] UPON PERUSING** the Notice of Motion dated 22nd March 2024 and filed on even date which is the subject of this Ruling and brought pursuant to Sections 3A, 23A and 24 of the Supreme Court Act, CAP 9B of 2011 and Rules 3 (5) and 31(6) of the Supreme Court Rules, 2020, wherein the applicant seeks an order of stay of execution of the said Judgment and Order pending the hearing and determination of Supreme Court Petition No. E009 of 2024 between the parties herein; and

**[3] UPON PERUSING** the supporting affidavit sworn by *Harji Govind Ruda*, the Director of the applicant on 21st March 2024, considering the grounds in support therein mainly that the applicant has met the threshold for grant of stay of execution and the supplementary affidavits sworn thereto on 9th and 24th April 2024 in response to the respondent's reply; and

**[4] FURTHER, UPON** considering the written submissions by the applicant dated 21st March 2024 and further submissions dated 9th and 24th April 2024 to the effect that the applicant is apprehensive that pursuant to the Order under challenge, the Respondent will, in the absence of an order of stay, forcibly evict it from the suit property in dispute being Plot Number 1948 (Original Number 412/10) Section V Mainland North as delineated on Land Survey Plan Number 223946 measuring 376 HA (approximately 929.1 acres); and that the structures standing on the suit property will similarly be demolished in compliance with the aforementioned Order to the detriment of the applicant who claims to be the registered owner; that the appeal is arguable and the denial of an order of stay will render the appeal nugatory; and that it is in the public interest to grant the relief sought. It is also urged that the Court's jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked as the appeal challenges the interpretation and application of Articles 40, 47, and 50(1) of the Constitution by the Court of

Appeal; and in any event, the Court of Appeal directly invoked the provisions of the Constitution or its decision took a trajectory of constitutional interpretation and application of Article 40 thereby invalidating the applicant's title to the suit property; and

**[5] NOTING** that the respondent in his replying affidavit sworn on 28th March 2024, the Notice of Preliminary Objection, the Grounds of Opposition of even date, and the written submissions all dated 2nd April 2024 are opposed to the application on the grounds that this Court lacks jurisdiction to entertain the application under Article 163(4) of the Constitution; that neither the Supreme Court nor the Court of Appeal has certified that a matter of general public importance is involved in the appeal; that no question of constitutional interpretation or application was integrally linked to the dispute before the trial court or in the Court of Appeal; that the reference to Article 40 by the Court of Appeal was peripheral and did not have a substantial bearing on the merits of the case before that court; that the Court of Appeal only cited Article 40 of the Constitution in tandem with this Court's findings relating to root of title in the recently decided cases of ***Rutongot Farm Ltd vs. Kenya Forest Service & 3 others*** (Petition 2 of 2016) [2018] KESC 27 (KLR) and ***Dina Management Limited vs. County Government of Mombasa & 5 others*** (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR); and that the appeal clearly only challenges the merits of the judgment of the Court of Appeal relating to ownership of the suit property; and

**[6] FURTHER NOTING** that the applicant has filed **Petition No. E009 of 2024** as is required by Rule 31(2) of the Supreme Court Rules, 2020 and in terms of this Court's long line of decisions, for example ***Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 Others***; SC Petition No. 27 of 2014; [2014] eKLR, and ***Mohamed Ali Sheikh vs. Abdiwahab Sheikh Osman Hathe & 3 Others***, Election Petition No. 38 of 2018; [2019] eKLR, among others.

**WE NOW OPINE** as follows:

[7] It is almost an every day [common] practice of this Court to determine the question whether its jurisdiction has been properly invoked under Article 163(4) of the Constitution. The applicant has come as of right under Article 163(4)(a). This Article has likewise been the subject of numerous judicial pronouncements by the Court. The leading authority being ***Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd & Another***; SC Petition No. 3 of 2012; [2012] eKLR, where we explained our jurisdiction under Article 163(4)(a) as follows:

***“This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.***

***The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum.”*** [Our Emphasis].

[8] Also, we emphasized in ***Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 others***; SC Petition No. 10 of 2013 [2014] eKLR and ***Gatirau Peter Munya vs. Dickson Mwenda & 2 Others***; SC Application No. 5 of 2014 [2014] eKLR that an appeal lies to this Court under Article 163(4)(a) if the issues placed before it involves the interpretation and application of the Constitution and had formed the basis of arguments for the determinations before the superior Courts below.

[9] We note from the outset that this litigation began in 2015 with the institution of Constitutional Petition No. 58 of 2015 (**Freedom Limited vs. The Chief Land Registrar & 2 Others**) in which the applicant had sought a declaratory order to the effect that failure by the Chief Land Registrar and the County Land Registrar, Mombasa County to supply it with an official certificate of search together with other particulars in respect of the title to the suit property was an infringement of its rights under Article 35 of the Constitution and Section 34 of the Land Registration Act, CAP 300 of 2012. The orders were granted. Upon perusal of the documents in the applicant's possession, the Land Registrar was satisfied that the applicant was the true proprietor of the suit property and proceeded to construct the land registry records based on the documents and records presented by the applicant.

[10] The dispute was escalated by the filing of Environment and Land Case No. 358 of 2016 in the Environment and Land Court by the applicant who sought to preserve its ownership and possession of the suit property from any form of interference by the respondent. The applicant expressly pleaded that its title in respect of the suit property was "*indefeasible save for as provided in law and its proprietary and other rights were protected pursuant to the provisions of the Constitution*"; and that the continued wrongful and unlawful actions of the respondent with regard to the suit property amounted to interference with the applicant's "*proprietary rights and interest including its rights of possession and occupation*". It asked the trial court to declare that the respondent had "*no right or interest in or over*" the suit property which it claimed was registered in its name in 2010. It also prayed for a permanent injunction to restrain the respondent from interfering with its "*proprietary rights and quiet occupation and possession*" of the suit property or dealing with the suit property "*under the pretext that he has any right or interest therein*".

[11] The respondent's claim to the suit property as far as we can gather from his defence and counterclaim was that his late grandfather purchased the suit property

as long ago as 1978 from the then-registered owner; that he did not subdivide it; that his grandfather died before it was formally transferred to him (grandfather); that upon realization of this omission, he (the respondent) attempted to register the transfer in vein as he had not obtained a grant of letters of administration to the estate of his deceased grandfather; that had the applicant undertaken due diligence at the time the suit property was allegedly transferred to it, it would have been apparent that the suit property was still registered in the name of the person who sold it to his grandfather.

**[12]** N. Matheka, J, was persuaded after analyzing the rival positions, that the applicant was registered as proprietor of the suit property on 12th November 2010 following a transfer from the original owners; that it was a *bona fide* purchaser; that the respondent, on the other hand, had failed to establish his proprietary interest over the suit property. As a consequence, thereof, the learned Judge declared that the respondent had no right or interest in or over the suit property which she declared to belong to the applicant. As a result, the respondent was restrained by an order of permanent injunction from interfering with the applicant's "*proprietary rights and quiet occupation and possession of the property*".

**[13]** Of the six grounds isolated by the Court of Appeal for its determination, the one upon which its judgment was anchored was, "*who, as between the estate of Mbarak Awadh Salim (under which the appellant -Respondent here- claims) and the respondent company-the applicant herein, has an indefeasible proprietary right over the suit property.*" The appellate court identified Article 40 of the Constitution as the vehicle for the resolution of the conflicting claims over the suit property and devoted considerable space in the judgment to consider the constitutional principle of the sanctity of title to property under that Article, and relying on a plethora of judicial precedents, many of which were drawn from this Court.

[14] In its determination, the appellate court concluded that the acquisition of the suit property by the applicant was in breach of the respondent's deceased grandfather's constitutional right to property; and that the transactions leading to the transfer and registration of the applicant as the owner of the suit property "*went against the grain of the doctrine of seisin, and of the deceased's constitutional right to property*".

[15] In view of the foregoing analysis of the pleadings and the decisions of the two courts below, it is inconceivable to argue, as the respondent has, that the petition as lodged in this Court is bereft of any issues involving the interpretation and application of the Constitution. ***Gatirau Peter Munya***, (supra), ***Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 others***; SC Petition No. 2 of 2012; [2012] eKLR and recently ***Abidha Nicholus vs. Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)*** (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) in a long line of other decisions of this Court, we have been clear that the Supreme Court's jurisdiction under Article 163(4)(a) is discretionary at the instance of the Court. That jurisdiction does not guarantee a blanket route to appeal; and that the appeal must be founded on cogent issues of constitutional controversy. A bare statement that a question of constitutional interpretation or application is involved, without more, cannot bring an appeal within the provisions of Article 163(4)(a) of the Constitution. The citation of constitutional provisions, or raising issues that involve peripheral constitutional issues or have nothing to do with the application or interpretation of the Constitution, will similarly not be sufficient to move this Court.

[16] Secondly, we have emphasized previously that, in answering the question as to what constitutes a matter involving interpretation and application of the Constitution, the Court's focus should not solely be on the explicit mention of a constitutional provision but, instead, the Court must look at the various facets of the law as pleaded by the parties and the overall context and impact of the

reasoning and conclusions of the superior Courts below in relation to the alleged constitutional issue to ascertain if indeed the same can properly be considered to have taken a trajectory of constitutional interpretation or application.

[17] Thirdly, the provisions of the Constitution cited as requiring interpretation or application by this Court, must have been the central theme of constitutional controversy, in the courts below, with the applying party indicating how the Court of Appeal misinterpreted or misapplied the constitutional provision in question.

[18] It is our view therefore that a determination of whether an appeal as of right to this Court lies is not governed by rigid principles, but is a jurisdiction exercised by the Court on a case-by-case basis but within the confines of the Constitution and the law as explained by case law cited above.

[19] We note that, right from the High Court, the central issue around the dispute was the title the applicant holds in respect of the suit property and specifically whether that title was indefeasible under operative principles of Article 40 of the Constitution. Throughout their analysis, assessment of the evidence, and determination, the central theme of the judgments of the two superior courts below remained the rights of the two parties to acquire and own property. It is our firm conclusion on the objection raised by the respondent that the applicant has properly invoked this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution and therefore pursuant to the principles enunciated in **Lawrence Nduttu** (*supra*), we declare that we have jurisdiction to entertain the petition and the objection is consequently overruled.

[20] Turning to the Notice of Motion, we bear in mind that under section 21 (2) of the Supreme Court Act, and rule 3(5) of the Supreme Court Rules, this Court has inherent power to make any ancillary or interlocutory orders that it deems fit to make as may be necessary for the ends of justice or prevent abuse of the process of the court. Pursuant to this power, we reiterate the well-established principles for

the grant of an order of stay as enunciated in ***Gatirau Peter Munya*** (*supra*). An applicant must satisfy three conditions, that the appeal is arguable and not frivolous; that the appeal would be rendered nugatory if the stay orders are not granted, and that it would be in the public interest to do so.

[21] What constitutes an arguable appeal? In ***Kenya Hotel Properties Limited vs. Attorney General & 5 others***; SC Application No 27 of 2020 [2020] eKLR, we gave the following answer:

***“Arguability of an appeal would entail this Court looking at the record and the Petition of Appeal and determine, without finality but at a prima facie level, whether the appeal has substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quicksand.”***

[22] In considering whether or not the appeal is arguable, the Court is not called upon to interrogate the merits of the appeal but merely to see if at this stage there is a *prima facie* case to justify the grant of the order. An arguable appeal is therefore not one which must necessarily succeed but one which ought to be argued fully before the court.

[23] In ***Haki Na Sheria Initiative vs. Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)***; (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR) (Civ) (3 December 2021) (Ruling) we considered how an appeal will be rendered nugatory if an order of stay is not granted thus:

***“On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.”***

[24] This Court in considering an application for stay cannot ignore the impact of such an order beyond the parties to the case should an order of stay be granted or denied. Consequently, the Court will make a general inquiry as to where the public interest lies.

[25] From what we have said in the preceding paragraph, we finally conclude as follows;

- i. On arguability, there cannot be any doubt that the issues being raised in the Petition are not frivolous as they concern the rights of the two parties herein to acquire and own property.
- ii. Bearing in mind the nature of the competing claims, against the background of the impugned orders directing the eviction of the applicant from the suit property and the demolition of the structures on the property within 45 days of the judgment, it is mete and just to preserve the *status quo* by granting a temporary order of stay of execution pending the hearing and determination of SC Petition No. E009 of 2024.
- iii. Issuing a temporary stay will not be prejudicial to the respondent, considering that he is presently not in possession. We believe that the public interest will be served when competing constitutional rights are preserved and protected.

[26] **HAVING** found that the objection has no merit and the Court has jurisdiction, we order as follows:

- i) The Notice of Preliminary Objection dated 28th March 2024 is overruled.***
- ii) The Notice of Motion dated 21st March 2024 is hereby allowed.***
- iii) Pending the hearing and determination of SC Petition No. E009 of 2024 the execution of the entire judgment of the Court of Appeal dated 23rd February 2024 and the Order dated 5th March 2024 is hereby stayed.***

***iv) Costs of this application shall abide the outcome of the  
Petition.***

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> Day of July 2024.**

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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**

.....  
**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**