



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E016 OF 2024

-BETWEEN-

JOHN MATHARA MWANGIPETITIONER

-AND-

**CONSOLIDATED BANK OF
KENYA LIMITED1ST RESPONDENT/APPLICANT
COMMERCIAL MART LIMITED2ND RESPONDENT
JOSEPH KARIUKI t/a
JOSERICK MERCHANTS AUCTIONEERS..... 3RD RESPONDENT
THE CHIEF LAND REGISTRAR4TH RESPONDENT**

Being an application to strike out the Petition and Record of Appeal

Representation:

Mr. Harrison Kinyanjui for the Petitioner
(J. Harrison Kinyanjui & Co. Advocates)

Mrs. Sharon Lipwop Maina for the 1st Respondent/Applicant
(Issa & Company Advocates)

Mr. Ochieng Owiny for the 2nd Respondent
(Muiruri & Wachira Advocates)

N/A for the 3rd and 4th Respondents

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion application dated 17th May, 2024 and filed on 20th May, 2024 by the 1st respondent pursuant to Article 163 of the Constitution, Sections 15, 15A and 15B of the Supreme Court Act, Rule 31, 33(1), 33(2), 38(1), 40(1), 65(1) and 65(2) of the Supreme Court Rules, 2020 seeking, *inter alia*, an order to strike out the Petition and Record of Appeal dated 11th April, 2024;

[2] UPON READING the grounds on the face of the application, the supporting affidavit sworn on 17th May 2024, and the further affidavit sworn on 7th June, 2024 both by Albert Anjichi, the applicant's Acting Company Secretary/Head of Legal Department, where he contends that: the petition of appeal is fatally defective as leave to appeal to the Supreme Court was neither sought nor granted pursuant to Article 163(4)(b) as read together with Article 163(5) of the Constitution; the appeal does not lie as a matter of right as it does not involve any interpretation or application of the Constitution pursuant to Article 163(4)(a) of the Constitution; the genesis of the petitioner's grievance is a commercial suit filed before the High Court, being ***HCCC No. 162 of 2019, John Mathara Mwangi vs. Consolidated Bank of Kenya Limited & Others*** instituted vide a Plaint dated 17th December, 2017 where he sought declaratory orders that the sale of the suit property to the 3rd respondent by public auction was null and void;

[3] UPON FURTHER PERUSING the applicant's grounds in support of its application wherein it is averred that: the main issue for determination before the Court of Appeal was whether the High Court (*Majanja J.*) properly exercised its discretion in dismissing the suit and in declining to set aside the dismissal order under Order 12 Rule 3(1) of the Civil Procedure Rules; the Court of Appeal in its judgment of 8th March, 2024 held that it did not perceive any honest mitigating mistake or blunder on the part of the petitioner and his Counsel that would warrant an adjournment, consequently it did not find any merit in the appeal;

[4] UPON CONSIDERING the applicant's submissions dated 17th May, 2024 where it reiterates its arguments and cites this Court's decisions in ***Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012 [2012] eKLR, ***Sum Model Industries Ltd. vs. Industrial & Commercial Development Corporation and Development Corporation*** SC Application No.1 of 2011 [2011] eKLR and ***Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 others*** [Petition No.2 of 2012 [2012] eKLR to urge that the petition of appeal does not meet the Supreme Court's jurisdictional test; and that it ought to be awarded costs pursuant to this Court's decision in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others***;

[5] TAKING INTO ACCOUNT the petitioner's replying affidavit sworn on 30th May, 2024 in opposition to the application where he contends that: this Court has jurisdiction pursuant to Article 163(4)(a) of the Constitution to hear and determine the petition of appeal; the basis of the refusal on his plea to be heard by the High Court under Article 50(1) was the foundational basis of his appeal to the Court of Appeal and is the basis of the appeal before this Court; no commercial arguments arose or were canvassed before the Court of Appeal; the scope, application, and interpretation of the import of Article 48 of the Constitution on the circumstances of the court starting at 8.00 am in the face of the Covid 19 pandemic restrictions are an issue for interpretation of this Court; and that all the grounds set out in the Memorandum of Appeal before the Court of Appeal were on the denial of the right to be heard as espoused in Article 25(c) and 50(2)(d) of the Constitution;

[6] FURTHER CONSIDERING the petitioner's submissions dated 30th May, 2024 where he cites this Court's decisions in ***Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 others*** Petition 10 of 2013 [2014] eKLR, ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** SC Application No. 5 of 2014 [2014] eKLR and ***Geoffrey Asanyo & 3 others vs. Attorney General Supreme Court*** Petition No. 21 of 2015 [2018] to urge that the heart of

the petition of appeal is the application and interpretation of Article 50(1) of the Constitution and therefore his appeal is within the jurisdiction of this Court;

[7] NOTING the 2nd respondent's replying affidavit sworn on 28th May, 2024 by its director, Simon Kagiri Kamatu, and submissions of even date in response to and in support of the 1st respondent's application where he reiterates the averments of the 1st respondent and states that: the petitioner's suit at the High Court was dismissed for want of prosecution for reason that on the hearing date of 10th February 2021, the petitioner failed to attend the virtual hearing and had failed to attend court on five (5) previous occasions; Counsel holding brief for Mr. Kinyanjui, Counsel on record for the petitioner, sought adjournment informing the court that the petitioner was indisposed; the application for adjournment was declined and the court ordered that the matter proceeds; that later, Mr. Kinyanjui appeared before the court and sought adjournment on the grounds that he was not ready to proceed as his client was not in court, and that he was engaged in other matters in a different court; he again informed the court that he could not proceed as the petitioner would like to proceed physically in court;

[8] FURTHER NOTING the 2nd respondent's contention that: the petitioner's advocate's request to prosecute the suit physically was an afterthought and in bad faith as at the time, the Chief Justice had published Practice Directions on Electronic Case Management 2020, which were applicable as one of the measures amidst the height of Covid-19 pandemic for virtual hearings; mere citing of provisions of the Constitution alleged to have been violated is not sufficient to invoke this Court's jurisdiction under Article 163(4)(a) or (b) of the Constitution; and that the petition of appeal is misconceived, incurably defective and an abuse of the court process as it does not meet the constitutional threshold to warrant this Court's jurisdiction pursuant to Article 163(4)(a) and (b) of the Constitution;

[9] NOTING that the 3rd and 4th respondents, despite service of the application, neither filed a response, submissions nor participated in these proceedings;

[10] BEARING IN MIND the provisions governing this Court's jurisdiction as set out under the Constitution at Article 163(4) (a) and (b) and Sections 15, 15A and 15B of the Supreme Court Act;

[11] WE HAVE CONSIDERED the application, affidavit in support, the responses and submissions filed and **NOW OPINE** as follows:

- (i) The petitioner's grievance arises from the Order of *Majanja J.* in *HC (C & TD) C No. 162 of 2019* dated 10th February, 2021 wherein the petitioner's suit was dismissed with costs for want of prosecution. On appeal to the Court of Appeal, the main issue for determination was thus, whether there was wrongful exercise of discretion on the part of the learned Judge in either denying the application for adjournment or in dismissing the petitioner's suit pursuant to Order 12 Rule 3(1) of the Civil Procedure Rules. In its Judgment dated 8th March, 2024 the Court of Appeal did not perceive any wrongful exercise of discretion on the part of the learned Judge. The Court found no lacuna in the legal framework for conduct of virtual hearings, and that there was no indication of bias on the part of the Judge in awarding costs.
- (ii) Our perusal of the judgment of the Court of Appeal does not reveal any issue of application or interpretation of the Constitution on the right to be heard pursuant to Article 50(1) of the Constitution or on the right to access justice under Article 48 of the Constitution as averred by the petitioner. The gist of the petitioner's grievance is the dismissal of the suit for want of prosecution. From the record, several attempts were made on behalf of the petitioner to adjourn the suit and it is in that context that the adjournment was declined by the High Court resulting in the dismissal of the suit. The High Court was not obligated to agree with the petitioner's plea for adjournment and having not been persuaded as such, the learned Judge exercised discretion to dismiss the suit.

- (iii) In ***Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others*** SC Application No. 16 of 2015 [2015] eKLR, ***Deynes Muriithi & 4 others vs. Law Society of Kenya & Another*** SC Application No. 12 of 2015 [2016] eKLR and ***Kibira vs. Independent Electoral & Boundaries Commission & 2 others*** Petition 29 of 2018 [2019] KESC 62 (KLR) we set the parameters of the exercise of our jurisdiction to interfere with the exercise of discretion by another court. This can only be where there was a plain and clear misapplication of the law and if based on a whim, was prejudicial or was capricious, which is not the case herein.
- (iv) Further, as we held in ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) vs. Attorney-General & 2 others*** Sup Ct Petition No. 45 of 2018 [2020] eKLR, mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution, and that only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under Article 163(4)(a) of the Constitution.
- (v) The petitioner's arguments under Articles 48 and 50 of the Constitution were not the subject of contestation before the High Court. They have arisen as a result of the dismissal, albeit at the first instance, before the Court of Appeal. This goes against our settled jurisprudence that once the petitioner approached the Court as of right, under Article 163(4)(a) of the Constitution, it is upon him to satisfy the Court that he meets the requisite threshold. It is now established that the Court is not another appellate layer of court to attract appeals from the Court of Appeal. In matters relating to the interpretation and application of the Constitution, the issue in

contestation must have arisen at the first instance before the High Court and followed the court hierarchy culminating in the Supreme Court's input. The issue of certification or leave to appeal to the Supreme Court does not therefore arise as that is a different jurisdiction, not being invoked in the present matter.

- (vi) On costs, in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR we set out the legal principles that guide the grant of costs. Generally, costs follow the event. It 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. Additionally, the award of costs is discretionary. We also note that this matter did not proceed to hearing of the appeal on the merits. To this end, each party shall bear its costs.

[12] APPRECIATING that the 2nd respondent filed a Notice of Preliminary Objection dated 16th May, 2024 challenging the jurisdiction of this Court to hear and determine the petition of appeal pursuant to Article 163(4)(a) of the Constitution on similar grounds as argued by the 1st respondent in its application, and having made our findings above, the findings are dispositive of the preliminary objection with the effect that the same is upheld.

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

- (i) The Notice of Motion dated 16th May, 2024 and filed on 20th May, 2024 be and is hereby allowed;**
- (ii) The Preliminary Objection dated 16th May, 2024 be and is hereby allowed;**
- (iii) The Petition and Record of Appeal dated 11th April 2024 be and are hereby struck out;**
- (iv) We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs in the appeal herein be refunded to the petitioner; and**

