



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram; Mwilu (DCJ & VP), Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

PETITION (APPLICATION) NO. E007 OF 2024

–BETWEEN–

KRYSTALLINE SALT LIMITED.....PETITIONER/APPLICANT

–AND–

WATER RESOURCES MANAGEMENT AUTHORITY.....RESPONDENT

(Being an application for stay of execution of the Judgment of the Court of Appeal (Musinga (P), Omondi & Ngenye, JJ.A) delivered on 23rd February 2024 in Civil Appeal No. 252 of 2018)

Representation:

Mr. Jotham Arwa for the petitioner/applicant
(Rachier & Amollo LLP)

Prof. Albert Mumma for the respondent
(Prof. Albert Mumma & Co. Advocates)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 11th March 2024 and filed on 15th March 2024, pursuant to Section 23A of the Supreme Court Act 2011, and Rules 31 and 32 of the Supreme Court Rules 2020, seeking *inter alia*, stay of execution against the Judgment and Orders of the Court of Appeal (**Musinga (P), Omondi & Ngenye, JJ.A**) delivered on 23rd February 2024, pending the hearing and determination of the appeal, and any consequential orders; and

[2] UPON READING the grounds on the face of the application and the supporting affidavit sworn by the applicant's Chief Executive Officer, **Hasmita Patel** on 11th March 2024, wherein she contends that: the appeal is arguable with high chances of success (she restates 12 grounds set out in the Memorandum of Appeal to support this argument); unless the orders sought are granted, the appeal will be rendered nugatory, should the respondent execute its judgment of Kshs. 185,500,000, thereby forcing it to shut down its operations and sell its assets to meet the exorbitant judgment debt; likewise, depositing the judgment sum in an interest earning account would impede the applicant's right of access to justice. Conversely, it is urged, there will be no prejudice suffered by the respondent, which can be compensated by way of costs should the appeal be dismissed; and it is in the interest of justice to grant the prayers sought; and

[3] UPON CONSIDERING the applicant's submissions dated 11th March 2024, to the effect that the appeal upon which the application is anchored raises issues of constitutional interpretation and application, hence this Court is clothed with jurisdiction under Article 163(4)(a) of the Constitution and Section 15A of the Supreme Court Act. Further, that the Court's jurisdiction to issue an order of stay of execution is donated by Section 23A of the Supreme Court Act as enunciated in, **Board of Governors, Moi High School Kabarak & Anor v. Malcolm Bell**; SC Application Nos. 12 and 13 of 2012; [2013] eKLR. Moreover, it is contended that the applicant has met the principles for grant of stay of execution

established in, ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***; SC Application No. 5 of 2014 [2014] eKLR; and

[4] UPON PERUSING the respondent's replying affidavit sworn by the respondent's Chief Executive Officer, ***Mohamed M. Shurie***, on 25th March 2024, wherein he urges that this Court lacks the requisite jurisdiction to hear the Motion as the same is premised on an incompetent appeal. In particular, it is the respondent's case that the appeal is improperly lodged under Article 163(4)(a) of the Constitution as it does not raise questions involving the interpretation or application of the Constitution. For emphasis, it is submitted that the applicant's grievance entails a challenge on the quantum awarded; the application is an attempt to avoid payment of the judgment sum; the applicant has not demonstrated that it is unable to settle the sum awarded; and in any event, the appeal will not be rendered nugatory as the respondent is capable of refunding the judgment sum if the appeal is allowed; and

[5] UPON CONSIDERING the respondent's preliminary objection dated 21st March 2024; submissions in support of the preliminary objection and in opposition to the application both dated 25th March 2024; restating the respondent's challenge to this Court's jurisdiction to determine both the application and appeal for failing to meet the jurisdictional threshold established in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another***, SC Petition No. 3 of 2012; [2012] eKLR. Concomitantly, the respondent urges that, there is no arguable appeal before the Court; the applicant intends to defeat the Judgment by winding up its operations while the appeal is pending determination; the applicant makes billions in profits hence the water use charges awarded by the trial court are negligible; and, contrary to its claim that the judgment debt will force it to shut down its operations, the applicant provided security of Kshs. 100,000,000 at the Court of Appeal, as a condition for the grant of stay; and

[6] UPON READING the applicant's supplementary affidavit in response sworn by *Hasmita Patel* on 27th March 2024 and rejoinder of even date, wherein she maintains that, issues of constitutional interpretation were at the center of determination by the superior courts below; it is not factual that the applicant makes billions in profits; the execution of the judgment sum will force the applicant to fold its operations affecting the livelihood of over 2800 employees; the judgment sum of Kshs. 185,500,000 was calculated based on erroneous estimates of the applicant's production capacity, as opposed to actual production; and, prosecution of the appeal would be rendered impossible if execution is allowed. Furthermore, it is averred that the applicant is willing to give security by way of a bank guarantee to enable it pursue its appeal; and

[7] UPON CONSIDERING the applicant's supplementary submissions dated 27th March 2024, wherein it reiterates its arguments on jurisdiction and further submits that the interpretation of Articles 2, 40, 42, 61, 62, 66, 67, 68, 69, 72, 209 and 260; and Section 7(1) of the Sixth Schedule to the Constitution, was in issue before the superior courts below. It cautions that contrary to the respondent's argument, a question whether an appeal is arguable does not call upon the Court to interrogate its merits or make definitive findings, but to determine whether issues raised are worthy of ventilation on appeal. To buttress this assertion, it cites the case of *George Boniface Mbugua v. Mohammed Jawayd Iqbal (Personal Representative of the Estate of the Late Ghulam Rasool Jammohamed)* SC Application No. 7 (E011) of 2021; [2021] eKLR; and

[8] NOTING that a preliminary objection has been raised by the respondent on the question whether this Court has jurisdiction under Article 163(4)(a) of the Constitution, it is our considered view that the challenge of our jurisdiction goes to the competency of the application for stay as well as the appeal. It is therefore apposite to deal with this issue in the first instance; and

[9] CONSIDERING that in their judgments, both superior courts below confined themselves to the issue whether the respondent had power under the Water Act

2002 and the Water Resource Management Rules to regulate use of sea water; and the applicant's case was that if the State has the right to regulate sea water under Article 62(l) of the Constitution, it can only be exercised by the National Land Commission as opposed to the respondent; and

[10] APPRECIATING that this Court settled with finality the question of its jurisdiction to hear and determine appeals as of right under Article 163(4)(a) of the Constitution in the *Lawrence Nduttu Case* [supra], wherein it was held that;

“[28] 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. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

[11] FURTHER APPRECIATING that in the case of *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*, SC Petition No. 5 of 2012; [2012] eKLR, we clarified that:

“[13A] In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may

decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.”

[12] WE NOW DETERMINE as follows:

- i. Examining the record and Judgments of the superior courts, it is clear that the gravamen of the case before the Environment and Land Court was the payment of outstanding water use charges by the applicant in its commercial salt production; the questions determined by the court were whether the respondent had the power to regulate usage of sea water, and if so, whether the applicant was liable to pay the charges sought and the quantum thereof; which was a factual examination of the volume of water abstracted from the sea over the period in question;
- ii. Similarly, in its Judgment, the Court of Appeal interrogated the issue, *whether the respondent was entitled to recover any amount for use of sea water*, consequent upon which it largely affirmed the trial court and applied Rules 107 and 114 of the Water Resource Management Rules 2007 to reduce the quantum awarded;
- iii. Flowing from the above, we are convinced that no contentious question of constitutional interpretation or application arose for determination by the superior courts below to warrant the exercise of this Court’s jurisdiction as of right under Article 163 (4)(a) of the Constitution. The mere pronouncement that under Articles 62 and 260 of the Constitution the territorial sea vests in the National Government is a restatement of the provisions of the Constitution, which, does not meet the threshold established in the ***Lawrence Nduttu Case***;
- iv. Consequently, guided by our findings in ***Lawrence Nduttu*** and ***Erad Suppliers*** [supra], we hold that this Court lacks jurisdiction to

entertain the petition of appeal and the attendant application for stay of execution, both dated 11th March 2024 and filed on 15th March 2024; and

- v. Having so found, the other issues from the parties' rival submissions must fall by the way side.

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

- (i) The Notice of Preliminary Objection by the respondent dated 21st March 2024 and filed on 26th March 2024 is hereby upheld;***
- (ii) The applicant's Notice of Motion dated 11th March 2024 and filed on 15th March 2024 is hereby dismissed;***
- (iii) The Petition of Appeal No. E007 of 2024 dated 11th March 2024 and filed on 15th March 2024 is hereby struck out for want of jurisdiction;***
- (iv) We hereby direct that the sum of Kshs. 6,000.00 deposited as security for costs in the appeal herein be refunded to the applicant; and***
- (v) There shall be no order as to costs.***

It is so Ordered.

DATED and DELIVERED AT NAIROBI this 2nd Day of August, 2024.

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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

.....
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**

