



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION (APPLICATION) NO. E021 OF 2024**

–BETWEEN–

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT**

–AND–

**FIVE STAR AGENCIES LIMITED.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

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*(Being an application to strike out the Petition of Appeal dated 16<sup>th</sup> May 2024)*

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**Representation:**

Mr. Ochieng holding brief for Prof. Albert Mumma for the appellant  
*(Prof. Albert Mumma & Co. Advocates)*

Mr. Fredrick Ngatia S.C. for the 1<sup>st</sup> respondent/applicant  
*(Ngatia & Associates Advocates)*

Mr. Austin Odoyo for the 2<sup>nd</sup> respondent  
*(Kipkenda & Company Advocates)*

## **RULING OF THE COURT**

**[1] UPON PERUSING** the Notice of Motion dated 18<sup>th</sup> June 2024 and lodged on 20<sup>th</sup> June 2024, pursuant to Article 163(4)(a) of the Constitution, Sections 12, 15 and 21(2) of the Supreme Court Act Cap 9B, and Rules 3(4) and (5); 31(6) and 40(1) of the Supreme Court Rules 2020, seeking *inter alia*, *striking out of the Petition of Appeal dated 16<sup>th</sup> May 2024 filed under Article 163(4)(a) of the Constitution and costs*; and

**[2] UPON READING** the grounds on the face of the application and the supporting affidavit sworn by the applicant's Director, ***Abdulsalam Shariff Abdulahi*** on 18<sup>th</sup> June 2024, wherein he contends that: the appeal raises no issue of constitutional interpretation or application; likewise, no constitutional issue was raised by the appellant before the superior courts below; and, the appellant is misleading the Court by attempting to transmute issues regarding the practice of garnishee proceedings into constitutional issues. It is urged that the same were determined by the Court of Appeal on the basis of the Government Proceedings Act, the Land Act and the Civil Procedure Rules. Further, that the appellant has feigned constitutional issues so as to bring the appeal within Article 163(4)(a) since it does not surmount the certification criteria under Article 163(4)(b) of the Constitution; and

**[3] FURTHER CONSIDERING** the applicant's submissions dated 18<sup>th</sup> June 2024, and filed on 20<sup>th</sup> June 2024, restating the applicant's challenge to this Court's jurisdiction to determine the appeal for failing to meet the jurisdictional threshold settled in ***Nasra Ibrahim Ibren v. Independent Electoral and Boundaries Commission & 2 Others***; SC Petition No. 19 of 2018; [2018] eKLR and ***Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 Others v. J Namada Simoni t/a Namada & Co Advocates & 725 Others***; SC Petition No. 13 of 2013; [2014] eKLR. Moreover, it is urged that the appellant did not participate in or seek to be joined to the proceedings before the

trial court in which the compensation award in respect of the compulsorily acquired suit property was enhanced from Kshs. 87,803,255 to Kshs. 413,192,500. Further, that the appellant only sought joinder post-judgment during garnishee proceedings, in respect of the main suit which had been concluded years earlier. Consequently, the applicant submits that since no constitutional question formed an integral part in the court of first instance as well as the first appellate court, the appeal is wrongly founded on Article 163(4)(a) of the Constitution; and

**[4] UPON PERUSING** the appellant's replying affidavit in opposition sworn by the appellant's Assistant Director, Survey Mapping, Survey Department, Directorate of Highway Design and Safety, **Milcah Muendo**, on 15<sup>th</sup> July 2024, wherein it is contended that this Court is clothed with the requisite jurisdiction to determine the appeal; in particular, it is the appellant's case that the appeal is properly lodged under Article 163(4)(a) of the Constitution as it encapsulates the constitutional provisions and principles argued by the parties, which were reflected in the decisions of the superior courts below. For emphasis, it is urged that the grounds of appeal directly involve the interpretation and application of the Constitution on issues of just compensation and access to court under Articles 40, 47 and 50 thereof; and

**[5] UPON CONSIDERING** the appellant's submissions dated 15<sup>th</sup> July 2024 and filed on 26<sup>th</sup> July 2024, wherein the appellant urges that it has moved the Court in its capacity as an acquiring entity, to interpret constitutional principles of access to court in the compulsory acquisition process, and the extent of its participation in the determination of compensation to be paid as contemplated under Article 40(3)(b)(ii) of the Constitution. Consequently, it is argued that the appeal meets the jurisdictional threshold established in **Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another**, SC Petition No. 3 of 2012; [2012] eKLR, and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**; SC Application No. 5 of 2014 [2014] eKLR; and

**[6] UPON CONSIDERING** the applicant’s submissions in response dated 31<sup>st</sup> July 2024 and filed on even date, wherein it reiterates that the issues determined by the trial court regarding quantum of compensation are distinct from the issues that arose for determination before the Court of Appeal, whose judgment on the trial court’s ruling in respect of execution by way of garnishee proceedings is the subject of the instant appeal. It cautions that contrary to the appellant’s argument, the first appellate court did not interpret Article 40(3)(b) of the Constitution, but merely made reference to it. Therefore, it is urged that the said reference did not elevate the dispute between the parties to one concerning questions of constitutional interpretation and application. To buttress its assertion, the applicant cites the case of ***Sirma v. Independent Electoral & Boundaries Commission & 2 Others*** (Petition 13 of 2018) [2019] KESC 64 (KLR); and

**[7] NOTING** that in the proceedings before the Deputy Registrar on 19<sup>th</sup> July, 2024, the 2<sup>nd</sup> respondent associated itself with the position of the applicant; and

**[8] CONSIDERING** that in their decisions, the superior courts below confined themselves to the following issues, whether execution proceedings against the 2<sup>nd</sup> respondent could proceed by way of garnishee proceedings; whether the appellant was a necessary party to the proceedings before the trial court; whether the appellant had the requisite *locus standi* to file applications seeking review and setting aside of the trial court’s garnishee nisi orders, and the judgment enhancing the compensation award, and the appellant’s joinder to the proceedings; and

**[9] 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).”***

**[10] FURTHER APPRECIATING** that in the case of ***Law Society of Kenya v. Communications Authority of Kenya & 10 Others*** (Petition 8 of 2020) [2023] KESC 27 (KLR); regarding the question as to who qualifies to file an Appeal, this Court pronounced itself thus:

***“[35] Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this Court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the Superior Courts. A person in this context should therefore be a party with locus standi in the matter.”***

**[11] WE NOW DETERMINE** as follows:

- i. Examining the record, Judgment and Ruling of the superior courts below, it is clear that the central issue before the Environment and Land Court was whether the National Land Commission was analogous to the government, and therefore not subject to execution in the manner

provided for under Order 23 rule 1 of the Civil Procedure Rules. As regards the appellant's position, the preliminary question determined by the court was whether the appellant had the requisite *locus standi* to file applications in respect of the proceedings;

- ii. Similarly, in its Judgment, the Court of Appeal interrogated the issue, *whether the appellant was a proper and necessary party to the case*, a question it answered in the negative. The appellate court affirmed the trial court in its finding that the appellant lacked the requisite *locus standi*, and applied Sections 107, 111(1A) and 113 of the Land Act to clarify the roles of the appellant as an acquiring entity and the National Land Commission, as the agency legally mandated to carry out compulsory acquisition on its behalf;
- iii. Likewise, this Court is constrained to decline admission of an appeal by a party who has filed an appeal as of right, when it did not litigate the issues in question before the superior courts below;
- iv. Flowing from the above, we are convinced that the appellant lacks the *requisite locus standi* to invoke this Court's jurisdiction. Similarly, we find that no cogent questions of constitutional interpretation or application arose for determination by the superior courts below to warrant the exercise of this Court's jurisdiction under Article 163(4)(a) of the Constitution;
- v. Consequently, guided by our findings in ***Lawrence Nduttu*** and ***Law Society of Kenya*** (*supra*), we hold that this Court lacks jurisdiction to entertain the petition of appeal dated 16<sup>th</sup> May 2024 and filed on 30<sup>th</sup> May 2024;

