REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu: DCJ & VP, Ibrahim, Njoki & Ouko, SCJJ)

PETITION NO. E003 OF 2024

–BETWEEN–

SAMWEL KIPLANGAT MWEI ..... APPELLANT

–AND–

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

JOHNSTONE TERER ..... 2ND RESPONDENT

OFFICER MUNYANJA ..... 3RD RESPONDENT

CJ OPIYO ..... 4TH RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Nakuru* ***F. Ochieng, L. Achode & W. Korir****, JJ.A at Nakuru in Civil Appeal No. 196 of 2019 dated* ***25th January 2024****)*

Representation

Mr. Samwel Kiplagat Mwei the Appellant
(*In person*)

Mr. Dennis Wabwire for the 1st -4th Respondents
(The Attorney Generals Chambers)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appeal dated 19th January, 2024, and lodged on 4th March 2024, seeks to set aside the Judgment of the Court of Appeal (*Ochieng, Achode & Korir, JJ. A)* delivered on 25th January 2024 in ***Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others****,* Civil Appeal No. 196 of 2019. The Court of Appeal upheld the High Court *(Muya, J.)* decision in ***Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others,*** HCCA No. 19 of 2017 which decision, in turn had upheld the Principal Magistrate's decision in ***Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others***, PMCC No. 33 of 2009, which had dismissed the Appellant's case.

B. BACKGROUND

[2] The Appellant before us, Samwel Kiplangat Mwei, was arrested on or around 15th December 2006 by Officer Munyanja, the 3rd Respondent, on account of a complaint lodged by Johnstone Terer, the 2nd Respondent, to the effect that he had allegedly destroyed part of the common boundary between Kericho Chesoen Plot Nos. 34 and 35. He was taken to Bomet Police Station on the same day and later confined by the 4th Respondent, CJ. Opiyo. Thereafter, the Appellant was released without any charges being levelled against him.

C. LITIGATION HISTORY

i. Proceedings before the Magistrates' Court

[3] The Appellant filed a plaint on 25th February 2009 against the 2nd Respondent alleging that he was unlawfully arrested and confined as a result of which, he suffered assault, injury and loss. The 2nd Respondent filed a defence on 26th May 2009 admitting that the Appellant was indeed arrested for destroying boundary features between Plot Nos. 34 and 35 but did not himself arrest him. Further, that the Appellant's case was defective for contravening the Government Proceedings Act, Cap 40 of the Laws of Kenya. By a notice of motion dated 9th June 2009, the Appellant successfully applied for leave to amend the plaint to join the 1st, 3rd and

4th Respondents to the suit. This was granted on 25th June 2009 and in an amended plaint dated 1st July 2009, he sought judgment against the Respondents in the following terms:

> *"a) Jointly and severally against the Respondents for unlawful arrest and unlawful confinement.*
>
> *b) Damages against the 2nd and 3rd Respondents for unlawful arrest.*
>
> *c) Damages against the 4th Respondent for unlawful confinement.*
>
> *d) Costs of the suit.*
>
> *e) Other legal consequences arising from the suit."*

[4] He stated that on 15th December 2006, the 2nd and 3rd Respondents arrested him on the allegations that he destroyed part of the common boundary between Kericho Chesoen Plot Nos. 34 and 35. He was thereafter taken to Bomet Police Station but was then released without any charges being preferred against him.

[5] The Respondents filed their defence dated 18th May 2010 and where they denied the Appellant's allegations or in the alternative, they argued that if the Appellant was arrested, detained and subsequently released, the said actions were informed by the investigations conducted, and after sufficient cause was established. In addition, the Respondents stated that they were discharging their statutory duty.

[6] On 19th December 2012, the suit was dismissed for want of prosecution. The Appellant successfully appealed against this order in **Kericho HCCA No. 15 of 2013 *Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others***, which ***(Sergon, J.)*** overturned the Magistrates' Court's decision by a ruling dated 2nd April 2014.

[7] Upon reinstatement of the suit, the Appellant filed a Notice of Motion dated 30th June 2014, seeking to have the Respondents' statement of defence struck out for being filed out of time, and for judgment to be entered in his favour. The same

was allowed and interlocutory judgment in his favour, as against the Respondents on 17th April 2015. Later, on 15th June 2017, the matter proceeded for formal proof.

[8] The Principal Magistrate Court at Sotik delivered judgment on 21st September 2017, dismissing the Appellant's case. The Court found that although the Appellant was arrested and confined, he was released on cash bail. Further, that the 3rd and 4th Respondents acted legally since they released him on cash bail pending investigations.

[9] In addition, the Court held that the Appellant had failed to prove that his son was affected mentally by the Respondents' action; to this end, the Court dismissed the suit with no order as to costs.

ii. Proceedings at the High Court

[10] Aggrieved by the Principal Magistrate's decision, the Appellant filed an appeal in the High Court, ***Bomet HCCA No. 19 of 2017, Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others***, raising the following grounds of appeal:

i. *That the trial magistrate misdirected himself and failed to give proper consideration of the failure by the Respondents to file defence in time.*
ii. *That the learned trial magistrate erred in law and in fact by requiring the Appellant who is a layman to prove admitted facts.*
iii. *That the learned trial magistrate did not consider in totality the evidence in the pleadings and the ruling by Hon. Olengo PM.*

[11] In its judgment, the High Court *(Muya, J.)* noted that the Appellant was unable to properly establish his case before the lower court, as he had not adduced evidence proving his confinement or his arrest was actuated by malice. Ultimately, the High Court upheld the Principal Magistrate's decision and dismissed the appeal for lacking merit. It is worth noting that the Respondents did not participate in the proceedings before the High Court.

iii. Proceedings at the Court of Appeal

[12] The Appellant lodged ***Civil Appeal No. 196 of 2019, Samwel Kiplangat Mwei v Attorney General of Kenya & 3 Others***. The Court of Appeal framed only one issue for determination: *whether, without opposing submissions from the Respondents, the appeal automatically succeeds*.

[13] In dismissing the appeal, the appellate court *(Ochieng', Achode & Korir, JJ. A)* referred to Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, which provides that the onus is always on the Appellant to prove his/her case to the required standard. This responsibility subsists even in the absence of any rebuttal by the Respondents. Consequently, the appellate court upheld the decision of the High Court. We also note that the Respondents again did not participate in the proceedings before the Court of Appeal.

iv. At the Supreme Court

[14] The Appellant has now filed this third appeal dated 19th January 2024, premised on the following 4 principal grounds:

i. *That the learned Honourable Judges, among (sic) W. Korir a relative of the 2nd Respondent erred in law by entering judgment not on ground (sic) set forth or implicit in the memorandum of appeal or cross appeal and also erred in law by not allowing an appeal as by appearance at hearing and procedure on non-appearance by rule of the court of appeal (sic).*

ii. *The trial learned Honourable judges erred in law by not considering the fact that no fact need to be proved in any proceedings which the parties there to or their agents agree to admit at the hearing or which before hearing they agree to admit or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings and erred by not considering the fact that when one fact is declared by law to be conclusive proof of another the court shall on*

proof of the one fact, regard the other as proved and shall not allow evidence to be given the purpose of disproving it. And Appellant was not having opposite of the said facts so that it was to be proof under said 61 (sic).

iii. *The trial learned Honourable judges misdirected themselves and failed to give proper consideration that the Honourable Principal Magistrate Benard Omwansa was allowing evidence not to be given for the purpose of disproving the said no fact need to be proved in any civil proceedings and also misdirected and failed to give proper consideration that the existing ruling was agreed by parties shown by it was unchallenged ruling. (sic)*

iv. *The trial learned honourable judges (sic) judgment was bad in law as it was entered by fraud.*

[15] The Appellant now seeks the following relief: *an order allowing the appeal, setting aside of the judgment of the Court of Appeal dismissing the appeal and to confirm the existing ruling dated 17th April 2015 entered by Hon. P. Olengo, P.M. with costs.*

D. THE PRELIMINARY OBJECTION

[16] In response to the appeal, the Respondents filed a preliminary objection dated 4th April 2024 wherein they contend that the appeal does not meet the jurisdictional threshold set out in Articles 163 (4)(a) and (b) of the Constitution. In response to the Preliminary Objection, the Appellant filed grounds of objection dated 24th April 2024 (albeit in *SC Petition No. E018 of 2024)* and submissions dated 6th May 2024.

E. PARTIES' RESPECTIVE CASES

i. The Respondents' Submissions

[17] In their submissions dated 10th April 2024, the Respondents contend that the appeal fails to meet the Court's jurisdictional threshold since no single issue

involving the interpretation or application of the constitution has been framed. In support, they cite the cases of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others,*** SC Petition No. 10 of 2013; [2014] eKLR and ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd. & Another***, SC Petition No. 3 of 2012; [2012] eKLR. In addition, they argue that the Appellant has also failed to establish that an ordinary issue has transmuted into a matter involving the interpretation and application of the constitution as per this Court's decision in ***Peter Oduor Ngoge v Francis Ole Kaparo***, SC Petition No. 2 of 2012; [2012] eKLR.

[18] Moreover, they state that contrary to the guidelines set out in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone***, SC Civil Application No. 4 of 2012; [2012] eKLR, the Appellant had also not established that his appeal raised issues of general public importance that warrant this Court's intervention. Additionally, the matter was not certified as one of general public importance. The appeal was therefore an abuse of court process and should be dismissed with costs.

ii. The Appellant's Submissions

[19] The Appellant submitted that the appeal was filed under Article 163(4)(a) of the Constitution and Section 15A of the Supreme Court Act. He submitted that this Court has the requisite jurisdiction to handle the appeal as per Rule 39(1) of the Supreme Court Rules.

[20] Further, he stated the Respondents notice of preliminary objection for failing to file and serve an address of service as required by Rule 45 of the said Rules.

F. PRELIMINARY ISSUE FOR DETERMINATION

[21] It is noted that during the hearing, the Appellant initially requested to be provided with legal assistance. He then, however, opted to proceed with the matter thereby, rescinding this request. That said, we now move to the substantive element of the matter before us.

G. ISSUES FOR DETERMINATION

[22] Upon hearing the submissions by the parties and upon perusal of the record of appeal, there is only this single issue for determination: *whether this Court has jurisdiction to hear the appeal.*

H. ANALYSIS

[23] We have stated severally that a Court cannot entertain any proceedings without jurisdiction that conferred on it by the Constitution, statute law and/or the principles laid down in judicial precedent. See ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others***, SC Application No, 2 of 2011; [2012] eKLR. In the ***S.K. Macharia Case (Supra)***,

[24] Similarly, in the case of ***In the Matter of the Interim Independent Electoral Commission (Applicant)***, SC Constitutional Application No. 2 of 2011; [2011] KESC 1 (KLR), we upheld the Court of Appeal decision in ***Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited***, Civil Appeal No. 50 of 1989; [1989] eKLR, where Nyarangi, JA stated as follows:

> *"... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction."*

[25] We have perused the appeal and we note the Appellant has not indicated the exact jurisdiction invoked. We have held in numerous decisions that failure to indicate the jurisdiction invoked is fatal. In ***Daniel Kimani Njihia v Francis Mwangi Kimani & Another***, SC Application No. 3 of 2014, we held as follows:

> ***"[16] ..... However, the extraordinary standing of this Court would demand that, in principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision, and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution."***

[26] However, we note that the Appellant in his submissions to us, stated that the appeal invoked this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. In the ***Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others,*** SC Petition No.19 of 2018**,** we reiterated at paragraph 43 that a litigant must from the onset disclose under which appellate jurisdiction they have moved the Court. This, the Appellant did not do.

[27] Further, Article 163(4)(a) of the Constitution reads as follows:

> *163. (4) Appeals shall lie from the Court of Appeal to the Supreme Court-*
>
> *a) as of right in any case involving the interpretation or application of this Constitution;*
>
> *....*

[28] We have expounded on this jurisdiction in numerous decisions. In the ***Lawrence Nduttu Case (Supra)***, we held that it is not enough to merely plead that the appeal raises issues of constitutional application and interpretation. The Appellant must challenge the Court of Appeal's interpretation or application of the Constitution that it used in disposing the matter.

[29] Similarly, in the case of ***Rutongot Farm Limited v Kenya Forest Service & 3 Others***, SC Petition No 2 of 2016; [2018] eKLR KESC 27 (KLR), faced with a similar question, we set the following guidelines:

i. ***What was the question in issue at the High Court and the Court of Appeal?***

ii. ***Did the superior Courts dispose of the matter after interpreting or applying the Constitution?***

iii. ***Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?***

[30] The matter in issue appears to be whether a litigant would still be required to prove their case in the face of an interlocutory judgment and an undefended suit. We are in agreement with the Respondents that the appeal as framed does not meet the jurisdictional threshold as set out hereinabove. There is no indication that a question of interpretation or application of the Constitution was presented to the High Court and the Court of Appeal for hearing and determination.

[31] The Appellant has also failed to establish that the issue in question mutated into a matter involving the interpretation or application of the Constitution, thereby bringing it within this Court's jurisdiction. See ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others***, (Supra). While we acknowledge that the Appellant appeared in person and as a layman, any litigant who approaches this Court is presumed to understand and appreciate this Court's jurisdictional parameters.

[32] In the end, we uphold the preliminary objection. That said, the Courts commends the Appellant for relentlessly and diligently representing himself throughout the proceedings, from the lower Court to the apex Court. As a layperson, he has navigated the complexities of the legal system. While we may have ultimately dismissed his appeal, his spirited effort is worth recognition and a testament that anyone who feels aggrieved can, should and may approach this Court, subject to the Court's jurisdictional parameters.

[33] In line with our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others,*** SC Petition Application No. 4 of 2012; [2014] eKLR, we are inclined to order each party bears their own costs.

I. ORDERS

[34] Consequently, and for the reasons aforesaid, we make the following Orders:

i. ***The Notice of Preliminary Objection dated 4th April 2024 is upheld.***

ii. ***The Appeal dated 19th January 2024 is dismissed.***

iii. ***Parties shall bear their own costs.***

iv. ***We hereby direct that the sum of Kshs.6,000/=, deposited as security for costs upon lodging of this appeal, be refunded to the Appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **November, 2024.**

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

.....	**.....**
P.M. MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
NJOKI NDUNGU	**W. OUKO**
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