REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. E005 OF 2024

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

ARTHUR NJUGUNA KAMAU .... APPELLANT

-AND-

EUNICE WANGARI KARANJA .... 1ST RESPONDENT
COUNTY LAND REGISTRAR ....2ND RESPONDENT

(*Being an Appeal from the Judgment and Orders of the Court of Appeal at Nakuru (Asike-Makhandia, Ochieng & Korir, JJ.A.) in Civil Appeals No. 91 of 2019 delivered on 25th January 2024*)

Representation:

Mr. Elijah Maragia for the appellant
(*Maragia Ogaro & Co. Advocates*)

No appearance for the respondents

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] At the heart of this appeal is a protracted dispute over the ownership, occupation, and usage rights of a parcel of land known as Nyandarua/Olkalau Central/1088 (the ***'suit property'***) between two families, the appellant's and the 1st respondent's which has been litigated at all court levels.

B. FACTUAL BACKGROUND

[2] The genesis of this dispute can be traced to a sale agreement dated 12th June 1986 between the appellant's father, John Kamau Njuguna, who was the purchaser, and Joseph Mwangi Ndagwatha, the seller. In exchange, the former gave out his parcel of land known as Nyandarua/Kiambaga/1440 in addition to a further consideration of Kshs. 13,000/-. Following this agreement, the appellant's father immediately took possession of the suit property and built a permanent residential house. It, however, turned out that the suit property had been registered in the name of the wife of the seller, the late Ludia Wachuka Ndagwatha, and that upon her death, the property devolved to her son, Hezekiah Karanja, also deceased. Hezekiah Karanja was the husband of the 1st respondent. She had obtained the documents of title to the suit property.

[3] But since the appellant's deceased father was in occupation, Hezekiah Karanja moved to the District Land Tribunal in 2004, under the now repealed Land Disputes Tribunals Act, 1990, seeking orders to evict him. During the pendency of those proceedings, Hezekiah Karanja passed on and was substituted in the proceedings by his sons. After hearing the parties, the District Land Tribunal affirmed the legality of the title deed issued to Hezekiah Karanja and ordered the eviction of the appellant and his family from the suit property.

[4] Aggrieved, the appellant lodged an appeal to the Provincial Appeals Committee. During the pendency of these proceedings, the 1st respondent obtained title to the suit property in ***Nyahururu Principal Magistrates Court Succession Cause No. 83 of 2006***. By its decision dated 17th November 2010, the Provincial Appeals Committee declined to determine the dispute on merit, citing lack of jurisdiction, since the ownership of the suit property had passed to the 1st respondent through transmission. Following this decision, and in accordance with Section 7 of the Land Disputes Tribunals Act, the 1st respondent moved the *Principal Magistrate's Court at Nyahururu in Land Dispute No. 18 of*

2011, for the adoption of the Tribunal's award following the Committee's declaration that it had no jurisdiction.

[5] Once more, being dissatisfied by this determination and also by the fact that the 1st respondent had moved to the Principal Magistrates' Court for adoption of those orders, the appellant instituted *Judicial Review No. 117 of 2011* in the High Court to prohibit the Principal Magistrate from adopting the decision of the Tribunal. He urged, in the application that the Tribunal acted in error by entertaining, without jurisdiction a dispute concerning ownership and acquisition of land; and secondly, that the 1st respondent did not have capacity to participate in the proceedings on behalf of her deceased husband without a grant of letters of administration.

[6] By a ruling dated 31st May 2007, the High Court *(Odero, J)* held that, on account of the Provincial Appeals Committee's decision that it lacked jurisdiction, there was no award capable of adoption. With this reasoning, the court in effect invalidated the Tribunal's decision which had determined on merit the question of ownership of the suit property. Consequently, it granted an order of prohibition restraining the ***Principal Magistrate's Court at Nyahururu*** in ***Succession Cause No. 83 of 2006*** from adopting the award of the ***Nyandarua Olkalau Disputes Tribunal*** issued on 15th September 2004. The court awarded costs to the appellant's father.

C. FURTHER LITIGATION HISTORY

i. Proceedings at the Environment and Land Court

[7] Armed with the above decision of the High Court, the appellant moved to the Environment and Land Court where he filed *ELC Petition No. 2 of 2018* seeking that;

i. *The proceedings and final orders in Nyahururu Principal Magistrate Court Succession Cause No. 83 of 2006 in respect of the Estate of Hezekiah Karanja Njagi be declared null and void in so far as they pertain to the suit property;*

ii. The issuance of the title deed to the 1st respondent similarly be declared illegal, null and void;

iii. The subdivision in respect of all that parcel of land, namely, Nyandarua/Olkalau Central/1088 be nullified;

iv. The title deed issued to the 1st respondent on 31st May 2007 in respect of Nyandarua/Olkalau Central/1088, and all entries or transactions resulting from the said title deed be canceled; and

v. The 2nd respondent be directed to issue to the appellant a new title deed for all that piece of land, namely, Nyandarua/Olkalau Central/1088.

[8] In response, the 1st respondent denied the appellant's claim, arguing that she acquired the suit property lawfully through succession proceedings in ***Nyahururu Principal Magistrates Succession Cause No. 83 of 2006***; that the appellant ought to have moved the subordinate court through objection proceedings instead of petitioning the Environment and Land Court; and that, though her late husband, Hezekiah Karanja, was registered as the owner of the suit property on 4th August 1988, there had been persistent efforts to remove the appellant and his family from the property.

[9] The 1st respondent also raised a Preliminary Objection, challenging the court's jurisdiction on the grounds that the matter was time-barred under Section 7 of the Limitation of Actions Act. In addition, she contended that the constitutional petition was incompetent, fatally defective, and an abuse of the court process. She asserted that the suit was purely a land recovery claim camouflaged as a constitutional petition to circumvent the law of Limitation of Actions; there was no violation of any constitutional rights to warrant invocation of Article 22 of the Constitution, and the prayers sought were unavailable to the appellant who was not a party to ***Succession Cause No. 83 of 2006.***

[10] In its Ruling dated 11th October 2018, the Environment and Land Court (*Oundo, J*) relying on ***Mukisa Biscuits Manufacturing vs. West End***

Distributors [1969] EA 696 and ***Anarita Karimi Njeru vs. Republic*** [1979] KEHC 30 (KLR), sustained the preliminary objection, and struck out the appellant's petition for lack of jurisdiction. In particular, the learned Judge found that the appellant had failed to set out with a reasonable degree of precision the constitutional rights that had been threatened or violated, the specific constitutional provisions violated, and the reliefs sought. She also agreed with the 1st respondent that the suit was time-barred by virtue of Section 7 of the Limitations of Actions Act, as the cause of action commenced 32 years ago.

[11] Ultimately, the court struck out the appellant's petition on those grounds and awarded costs to the 1st respondent.

ii. Proceedings at the Court of Appeal

[12] Aggrieved by this outcome, the appellant filed *Nakuru Civil Appeal No. 91 of 2018*, premised on ten grounds as set out in the Memorandum of Appeal and condensed as follows, that the learned Judge erred in fact and law in:

i. *Holding that the cause of action in respect to the dispute arose 32 years before the filing of the suit and consequently, the dispute was time-barred;*

ii. *Failing to appreciate that the reliefs in the petition were limited to the cancellation of title and nullification of actions of the 2nd respondent leading to the sub-division of the suit property, and that none of these two actions fell within the limitation period;*

iii. *Failing to appreciate that the claim was not for the recovery of the suit property but cancellation of the title;*

iv. *Ignoring the appellant's submissions and pleadings and or wrongly evaluating the said pleadings and submissions;*

v. *Failing to note that the appellant had specifically pleaded that upon purchase of the suit property on 12th June 1986, he immediately occupied it;*

vi. *Placing heavy reliance on form and format of the petition as opposed to the content and substance thereby occasioning miscarriage of justice;*

vii. *Holding that the appellant had made general complaints whereas the fact of the matter was that he had sequentially set out the history of facts giving rise to the cause of action and was specific on the rights and fundamental freedoms infringed or threatened with infringement; and*

viii. *Failing to note that the 1st respondent obtained the title in 2007 during the pendency of the dispute against the lis pendens rule.*

[13] The 1st and 2nd respondents did not participate in the proceedings before the Court of Appeal. In a judgment delivered on 25th January 2024, that court *(Asike-Makhandia, Ochieng & Korir, JJ. A*) upheld the trial court's decision striking out the petition and, on their part, dismissed the appeal.

[14] Relying on the jurisprudence enunciated in ***Anarita Karimi Njeru*** *(supra)* and ***Mumo Matemu vs. Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission*** [2013] KECA 445 (KLR), the appellate court restated the principle that constitutional violations must be pleaded with a reasonable degree of precision and that the appellant's petition did not meet this threshold. In addition, the court found that the petition had failed to demonstrate to the required standards how the alleged individual rights and fundamental freedoms were violated, infringed, or threatened by the respondents. The court also upheld the trial court's finding that the *petition was time-barred*, as the cause of action had arisen in 1986.

iii. Proceedings at the Supreme Court

[15] Undeterred, the appellant has now filed the instant appeal challenging the decision of the Court of Appeal and urging the Court to fault the learned Judges for;

i. *Holding that no constitutional rights had been violated;*
ii. *Holding that the appellant failed to explicitly demonstrate the rights violated, infringed, or threatened with violations and or the manner in which the same had occurred whereas, in fact such indication was made;*
iii. *Holding that the appellant failed to present evidence to demonstrate violations or infringement of its fundamental rights, whereas the appellant ably presented the said evidence;*
iv. *Wrongfully elevating statutory provisions above the provisions of the constitution;*
v. *Elevating form over substance in breach of articles 22(3) (b) of the Constitution; and*
vi. *Failing to grant the appellant a fair hearing by overlooking and ignoring contestations that outweighed the preliminary objection and arriving at an erroneous conclusion.*

[16] Accordingly, the appellant seeks;

i. *An order setting aside the decision and orders of the Court of Appeal and substituting the said decision with;*
   a. *An order allowing the appeal and directing the petition filed by the appellant be heard afresh,*
   b. *Alternatively, a rehearing of the appeal before the Court of Appeal by a different bench,*
ii. *Expedited hearing owing to the age and circumstances of the case; and*

iii. *That the respondents to bear the costs of this appeal and of the proceedings before the Court of Appeal and ELC.*

[17] Like in the Court of Appeal, both the respondents have likewise not participated in these proceedings despite being accordingly notified of the appeal. We restate the provisions of Sections 107 and 109 of the Evidence Act that cast the burden of proof on a party who desires to get a judgment from the court to prove the existence of any legal right or liability and,

> "***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person.***" See section 109 aforesaid.

[18] The point we are making is that, even though the respondents have not participated in these proceedings does not relieve the appellant from proving his claim on a balance of probabilities.

D. PARTIES' SUBMISSIONS

i. Appellant's Case

[19] Without specifying which limb of Article 163(4) of the Constitution was being invoked, the appellant nonetheless has sought to persuade the Court that his rights under Articles 40 and 47 of the Constitution were violated and that the superior courts below failed to accord him a fair hearing. The appellant therefore seeks to demonstrate that:

i. His right to property under Article 40 of the Constitution was breached by the 2nd respondent when, upon application by the 1st respondent, the former injudiciously lifted the caution on the dealings with the suit property and proceeded to allow the sub-division of the suit property contrary to the provisions of Section 73 (2) of the Land Registration Act;

and that the 2nd respondent's action violated his right to fair administrative rights under Article 47 of the Constitution.

ii. The petitions before the two courts below and even before this Court particularized the alleged constitutional violations as required in law and that the standards set in the decision of ***Anarita Karimi*** *(supra)* were sufficiently satisfied.

iii. He presented evidence in the form of supplementary affidavits in the trial court and annexures to prove the pleaded violations; that it was in error for the two superior courts to hold that the violations were neither particularized nor proved.

iv. He was entitled as of right under the provisions of Articles 22 and 258 of the Constitution to institute court proceedings, claiming that his constitutional rights had been violated or were threatened with violations. Similarly, he submitted the reliefs available, which are set out by Article 23 of the Constitution, including but not limited to the declaration of his rights and injunctive orders as sought in his petition before the trial court.

v. The two superior courts below erroneously relied on form and procedural technicalities rather than substance in contravention of Articles 23 (3) (b) and 159 of the Constitution; that the courts ignored the particulars of breaches, and facts in support thereof which were apparent on the face of the petition.

vi. By striking out his petition on the ground that it was statute-barred, the trial court violated his right to be afforded a fair hearing.

E. ISSUES FOR DETERMINATION

[20] Having carefully evaluated the arguments in this appeal, the pleadings, and the decisions of the two superior courts below, we consider the following two broad issues falling for determination;

i) Whether this Court has jurisdiction under Article 163(4)(a) of the Constitution to determine this appeal; and

ii) *If the answer to i) above is affirmative, whether the Court of Appeal erred in its decision of 25th January 2024.*

[21] Of course, should our answer to the first question be in the negative, then that will mark the end of our further consideration of the merits of the appeal.

F. ANALYSIS AND DETERMINATION

Jurisdiction under Article 163(4)(a) of the Constitution

[22] At the onset, we reiterate that the appellant has not specified under what limb of Article 163(4) of the Constitution this appeal has been brought. It is only in paragraph 20 of the written submissions that the appellant has cited a case in reference to Article 163(4)(a) of the Constitution. Is that enough for us to assume that the appeal has been brought pursuant to Article 163(4)(a)? This Court has cautioned, time without number, that, given its specialized jurisdiction, a party desiring to invoke its jurisdiction under Article 163(4) must specifically identify the limb upon which the petition is premised. See ***Steyn vs. Ruscone*** [2013] KESC 11 (KLR) and ***Ibren vs. Independent Electoral and Boundaries Commission & 2 others*** [2018] KESC 75 (KLR).

[23] In view of the fact that the two avenues of this Court's appellate jurisdiction under Article 163(4)(a) and (b) of the Constitution are distinct, counsel or a litigant invoking that jurisdiction to appeal a decision of the Court of Appeal must strictly demonstrate either that the appeal is as of right under (a) of Article 163(4) or that the appeal has been certified as involving a matter of general public importance under (b) of that Article.

[24] It is a basic rule of procedure that jurisdiction must, in the first instance exist when the proceedings are initiated, and because the question of jurisdiction is so fundamental, it can be raised at any stage of the proceedings before the final decision is rendered. It can be raised by any party or even by the Court *suo motu*.

In fact, it is now customary for this Court to independently confirm that an appeal has been properly filed and that it has jurisdiction before hearing it.

[25] To ascertain whether or not the jurisdiction has been properly invoked, the Court will consider the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought, and the decisions of the superior courts below. The onus of proving that the appeal involves a question of constitutional interpretation or application is upon the party relying on Article 163(4)(a). The Court does not automatically acquire jurisdiction merely because a party claims in their pleadings or submissions that the appeal concerns the interpretation or application of the Constitution.

[26] A party must also identify with precision the relevant Articles of the Constitution that were the subject of interpretation or application and show that the subject of the appeal before this Court was the same one upon which both the High Court or courts of equal status and indeed the Court of Appeal based their respective decisions. Where the decision being challenged on appeal has nothing or little to do with the interpretation or application of the Constitution, such a decision cannot be the subject of a further appeal to this Court under the provisions of Article 163(4)(a).

[27] These are collectively the *ratio decidendi* to be extracted from our decisions in ***Nduttu & 6000 others vs. Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR), ***Joho & another vs. Shahbal & 2 others*** [2014] KESC 34 (KLR), ***Peninah Nadako Kiliswa vs. Independent Electoral & Boundaries Commission, Ford Kenya & Edith Were Shitandi*** [2015] KESC 17 (KLR), ***Opore vs. Independent Electoral and Boundaries Commission & 2 others*** [2018] KESC 5 (KLR) and ***Daniel Kimani Njihia vs. Francis Mwangi Kimani & Thika District Land Registrar*** [2015] KESC 19 (KLR). In the latter, we expressly declared that;

> ***"… 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; <u>and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.</u>" (Our emphasis).

[28] Although we have given the background to this dispute in one of the preceding paragraphs, it bears repeating that, at the heart of this case is a long-drawn ownership dispute of the suit property, which began in 1986. But of immediate relevance to answer is the first question we have framed is a constitutional petition together with an application under certificate of urgency filed at the Environment and Land Court at Nyahururu in 2018. In the two, the appellant applied for interim orders to restrain the respondents from further subdividing, selling, trespassing and or in any manner interfering with the suit property. In response to this application, the 1st respondent raised a preliminary objection on the ground that the court had no jurisdiction to hear the petition as the same did not disclose the rights and the manner in which the respondents violated them; and that both the application and the petition offended Section 7 of the Limitation of Actions Act.

[29] The Environment and Land Court *(Oundo, J.)* agreed and sustained the preliminary objection on two fronts: that the petition did not set out with a reasonable degree of precision the constitutional rights that had been violated or threatened, the specific constitutional provisions alleged to have been violated, and the reliefs sought; and that the petition was time-barred by virtue of Section 7 of the Limitation of Actions Act. For these two reasons, the petition was struck out. The Court of Appeal affirmed this decision on the second appeal.

[30] The question before us now is whether this appeal meets the criteria for invocation of Article 163(4)(a) as enunciated in ***Nduttu*** (supra), ***Joho*** (supra), ***Peninah Nadako Kiliswa*** (supra), in a long line of such similar decisions. In other words, does this appeal strictly involve constitutional interpretation or application; what were the questions that engaged the two courts below, and how did the two courts resolve the said questions?

[31] It is apparent to us that, though the grievance was presented as a constitutional question, there was no constitutional issue involved that required the ELC's interpretation or application. The question was simply, who between the appellant and the 1st respondent was entitled to the suit property? It is evident from the pleadings that the issues raised in the petition were purely factual, and the reliefs sought had no bearing on the application or interpretation of the Constitution at all. The appellant simply asked the court to declare;

i. ***"The proceedings and final orders in Nyahururu Principal Magistrate Court Succession Cause No. 83 of 2006 in respect of the Estate of Hezekiah Karanja Njagi be declared null and void in so far as they pertain to the suit property;***
ii. ***The issuance of the title deed to the 1st respondent similarly be declared illegal, null and void;***
iii. ***The subdivision in respect of all that parcel of land, namely, Nyandarua/Olkalau Central/1088 be nullified;***
iv. ***The title deed issued to the 1st respondent on 31st May 2007 in respect of Nyandarua/Olkalau Central/1088, and all entries or transactions resulting from the said title deed be canceled; and***
v. ***The 2nd respondent be directed to issue to the appellant a new title deed for all that piece of land, namely, Nyandarua/Olkalau Central/1088."***

[32] Based on the fact that the petition did not specify what constitutional rights had been violated, the trial court allowed the 1st respondent's Notice of Preliminary Objection, agreeing that it lacked jurisdiction to entertain the petition.

[33] The Court struck out the petition for failure to set out the constitutional provisions threatened or violated by the respondents, the specific constitutional provisions violated, and the reliefs sought. Secondly, the court found that the claim was statute-barred in terms of Section 7 of the Limitation of Actions Act.

[34] There having been no constitutional question before the trial court, none arose, indeed none was expected to arise in the Court of Appeal, which affirmed the decision of the trial court. The Court of Appeal confined its consideration of the first appeal to the trial court's determination on whether or not the petition raised constitutional issues and whether it was barred by the statute of limitation. The two courts below were unanimous in their conclusions on the twin issues that the appellant did not particularize or present evidence of how the respondents breached his rights. The petition was dismissed at a preliminary stage without its merits being considered by both courts. We reiterate that the mere citation of constitutional provisions in the pleadings does not in itself bring an appeal within the scope of Article 163(4)(a) of the Constitution.

[35] We, therefore, come to the inescapable conclusion that the appellant has failed to directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution and that, in our view, the matter turned purely on factual issues now being camouflaged as constitutional violations, and for which this Court lacks jurisdiction to determine.

[36] Having arrived at this conclusion, no purpose will be served to go into the second issue framed in this appeal as it does not present exceptional circumstances or distinctive opportunity for the Court to provide interpretive guidance on the question, as was the situation in ***Rai & 3 others vs. Rai & 5 others*** [2013] KESC 21 (KLR); ***Speaker of the Senate & another vs. Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)*** [2013] KESC 7 (KLR); and ***Sonko vs. County Assembly of Nairobi City & 11 others*** [2022] KESC 76 (KLR). This is indeed another of those cases where we must down tools as we do at this stage.

[37] We accordingly dismiss this appeal for lack of merit.

G. COSTS

[38] Costs follow the event but are at the discretion of the Court, as enunciated in ***Rai & 3 others*** *(supra)*. The party who initiates a suit will bear the costs if the

suit fails, but if this party succeeds, then the respondent will bear the costs. We also note that this is not a matter of public interest. However, since the respondents did not participate in these proceedings, we make no orders as to costs.

H. ORDERS

[39] In light of the above, we order that:

i) ***The Petition dated 4th May 2024 is hereby dismissed.***

ii) ***We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs herein be refunded to the appellant; and***

iii) ***There shall be no orders as to costs.***

It is so ordered.

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

JUDICIARY

....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

....
S.C. WANJALA
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