



## **REPUBLIC OF KENYA**

### **IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. E006 OF 2024**

**-BETWEEN-**

**NGULUNGU KITHEKA NGAO..... APPELLANT**

**-AND-**

**ALEXANDER MATUVI KITHEKA.....RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Tuiyott, Aroni & Gachoka, JJ.A dated 25<sup>th</sup> January 2024 in Civil Appeal No. 152 of 2019)*

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**Representation:**

Mr. Emmanuel Awiti for the appellant  
*(Omondi & Awiti Advocates)*

Ms. Yvonne Mati h/b for Mr. Walter Owaga for the respondent  
*(Owaga & Associates LLP Advocates)*

### **RULING OF THE COURT**

**[1] BEARING IN MIND** that this ruling is in respect of the Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 and raised by the respondent challenging this Court's jurisdiction to entertain the appeal. And that, at the commencement of the hearing of the appeal on 23<sup>rd</sup> October 2024, the Court, considering the nature of the objection directed that the objection be taken *in limine*, quite in line with its previous *dicta* and the provisions of the Supreme Court Act as well as the Rules of

the Court; that the question of jurisdiction can be raised at any stage of the proceedings; that the Court has inherent power to summarily dismiss a petition, reference or an application, which are wholly defective; and that in exercise of that inherent power, and depending on the nature of the objection, the Court can either deal with the question *in limine* or hear the objection alongside the appeal. See ***Trattoria Limited vs. Maina & 3 others*** [2022] KESC 75 (KLR) and ***Megvel Cartons Limited vs. Diesel Care Limited & 2 others*** [2023] KESC 24 (KLR); and

**[2] NOTING IN ADDITION** that the Petition dated 6<sup>th</sup> March, 2024 and filed on 19<sup>th</sup> April, 2024 has been brought pursuant to Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act, Cap 9B and Rule 33 of the Supreme Court Rules, 2020 to challenge the Judgment of the Court of Appeal delivered on 25<sup>th</sup> January, 2024 in which it affirmed the decision of the Environment and Land Court (ELC) to the effect that a constructive trust existed in favour of the respondent, a younger brother of the appellant; and

**[3] TAKING INTO ACCOUNT** the following background that led to the dispute: According to the appellant, he was the registered owner of the suit property known as MATINYANI/MUTULU/475 (parcel 475), having bought it in 1975. His main grievance was that on or about January 1998, the respondent unlawfully trespassed, entered the suit property without his consent, and started cutting down trees, burning charcoal and even building a house. In addition to the suit property, the appellant further contended that in 1984, he purchased another parcel of land No. MATINYANI/MUTULU/476 (parcel 476), upon which the respondent again trespassed. As a result, the appellant filed a suit before the Principal Magistrate's Court at Kitui in ***Civil Case No. 311 of 2004*** seeking orders to evict the respondent and also to restrain him permanently by an order of injunction from laying claim to the suit property; and

**[4] CONSIDERING** the respondent's defence and counterclaim that he was in possession of the suit property; that in 1974 he, jointly with the appellant, purchased parcels Nos. 475 and 476; and that he allowed the appellant to have the parcels registered in his name thereby creating a trust in the respondent's favour. Consequently, he sought a declaration that the appellant held the titles to the two properties in trust for him and further, that the titles to the two properties be transferred to him. He also sought that the appellant be restrained by an order of permanent injunction from interfering with his possession of the suit property; and

**[5] UPON CONSIDERING** these competing claims, the trial court by a Judgment delivered on 1<sup>st</sup> December 2011, dismissed the appellant's claim for eviction and injunction but found instead that the respondent had proved his counterclaim on a balance of probabilities and granted the reliefs sought; and

**[6] DISSATISFIED**, the appellant appealed to the Environment and Land Court (ELC) in ***Civil Appeal No. 2 of 2018***. The ELC (*Angote J.*) in a judgment delivered on 15<sup>th</sup> February, 2019 upheld the decision of the trial court, dismissed the appeal and reiterated that, from the facts of the case there was a common intention to create a trust, therefore a constructive trust existed; and

**[7] AGGRIEVED FURTHER**, the appellant preferred a second appeal to the Court of Appeal in ***Civil Appeal No. 152 of 2019***. In determining the single question; whether the courts below properly invoked the doctrine of constructive trust, the Court of Appeal was of the view that the conclusion reached by the ELC was indeed correct; that a common intention had been established that pointed to the existence of a constructive trust; and that the case fell within the exception in Section 26 of the Registered Land Act (repealed). In the end, the Court of Appeal found that the appeal had no merit and dismissed it with costs to the respondent; and

**[8] UNDETERRED**, the appellant has now filed the instant third appeal before this Court on five (5) grounds, contending that the learned Judges of Appeal erred in law by violating his constitutional rights to property and fair hearing under Articles 40 and 50 of the Constitution, respectively. He has also filed written submissions dated 14<sup>th</sup> June 2024 and replying affidavit deposed on 26<sup>th</sup> June 2024, in which he has reiterated that the appeal is filed pursuant to Article 163(4)(a) of the Constitution as it involves the application and interpretation of Articles 25(c), 40 and 50 of the Constitution; that the constitutional questions under the cited provisions are traceable in all the judgments of the three courts right from the Magistrate's Court, the ELC and finally the Court of Appeal; that this Court has an opportunity to render itself on what constitutes a question of law; whether the conclusions reached were not supported by the established facts or evidence on record; and whether the conclusions reached were so perverse or so illegal that no reasonable tribunal would arrive at the same; and

**[9] UPON CONSIDERING** the respondent's Notice of Preliminary Objection dated 28<sup>th</sup> May, 2024 contending that the Court lacks jurisdiction to entertain the Petition and therefore it ought to be struck out or dismissed with costs. In addition, the respondent has also filed Grounds of Opposition dated 28<sup>th</sup> May, 2024 as well as written submissions wherein, it is contended that the appeal does not fall within the provisions of Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act and Rule 33 of the Supreme Court Rules, cited by the appellant, since in all the matters litigated at every level, from the Magistrate's court through to the Court of Appeal, no issues of interpretation or application of the Constitution ever arose; that the word 'Constitution' was never mentioned even once in all the three Judgments of the courts below; and that all the determinations were based on evidence and fact, purely on the question of the ownership of the suit property and whether the case met the threshold of a constructive trust; and

**[10] APPRECIATING**, that an appeal under Article 163 (4)(a) of the Constitution will lie as of right only where there is a question as to the

interpretation or application of the Constitution. And that this Court in ***Wanga vs. Republic*** [2024] KESC 38 (KLR) emphasized this requirement as follows:

“iii ...

iv. Article 163 (4) of the Constitution is not a thoroughfare for all intended appeals from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution or those that can be said to involve matters of general public importance will be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes this Court with jurisdiction. See *Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd & Another*, SC Petition No. 3 of 2012; [2012] eKLR, *Samuel Kamau Macharia and Another vs. Kenya Commercial Bank and 2 Others*, SC Application No. 2 of 2011; [2012] eKLR, among many other decisions.

v. The appeal must originate from a decision of the Court of Appeal in which the question of interpretation or application of the Constitution was at play. 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).

vi. However, in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*, SC Petition No. 2 of 2014; [2014] eKLR, it was clarified that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the

**conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.**

**vii. In addition, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution and must signal the perceived difficulty or impropriety with the Appellate Court's decision. See *Zebedeo John Opore vs. Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR.**

**viii. The Supreme Court retains the discretion to determine what matter is appealable to it under Article 163(4)(a), always bearing in mind that such a matter must be founded on cogent issues of constitutional controversy to warrant its input. See *Gladys Wanjiru Munyi vs. Diana Wanjiru Munyi* [2015] eKLR.”**

**[11] UPON REFLECTION** on the Preliminary Objection and rival arguments by the parties on both sides, **WE OPINE** as follows:

- i. Applying the foregoing principles to the instant appeal, we note that the genesis of the dispute was the alleged trespass by the respondent on the suit property which the appellant also claimed to be his. The respondent for his part maintained that he had, jointly with the appellant purchased the suit property; and that the latter held it in trust for him. The trial court found in favour of the respondent holding that he had established the existence of a trust. On a first appeal, the ELC agreed with the trial court. Likewise, on a second appeal, the Court of Appeal affirmed the decision of the ELC.
- ii. Throughout the proceedings before the three courts below, the central issue was whether the suit property, registered in the appellant's name, was held by him in trust for his brother, the respondent. The determination of this

question entailed a factual examination and analysis of evidence to ascertain whether indeed there was a common intention, an agreement, joint payment of consideration towards the purchase price, and occupation of the suit property. Considering the factual nature of the pleadings, proceedings and the decisions of the courts below, we cannot, in our assessment say that the issues in contention concerned the application or interpretation of the Constitution. Indeed, none of the three judgments allude to any provision of the Constitution. The reasoning and ultimate conclusions of the Court of Appeal did not take a trajectory of constitutional interpretation or application.

- iii. But before us, the appellant has urged us to find that his rights under Articles 25(c), 40 and 50 of the Constitution were violated; and violated by the Court of Appeal. First, the Court of Appeal was never a party to the proceedings. Second, but more fundamentally, the appellant has not demonstrated that the issues at the core of this appeal were the same issues in controversy and around which both the ELC and the Court of Appeal based their respective decisions.
- iv. An examination of the five grounds upon which this appeal was brought leaves no doubt in our mind that the invocation of Articles 25(c), 40 and 50 of the Constitution was not only inappropriate but also inapplicable. Those grounds seek to draw the Court into factual analysis and consideration of the record, quite outside the ambit of a third appeal. The appellant's case appears to have mutated upon reaching this Court, from a claim of trust to a violation of constitutional rights.
- v. Based on the foregoing, we reach the inescapable conclusion that the appellant has not satisfied the strictures for the application of Article 163(4)(a) of the Constitution, with the result that we down our tools at this stage, without the need to consider the merits of the appeal. In the end, we uphold the Preliminary Objection.

vi. On costs, we underscore the fact that an award of costs is an exercise of discretion and follows the principle set out by this Court in ***Rai & 3 others vs. Rai & 4 others*** [2014] KESC 31 (KLR), that costs follow the event. In exercise of our discretion, we direct that the appellant shall bear the costs of this appeal.

[12] **ACCORDINGLY**, we make the following orders:

- i) The Notice of Preliminary Objection dated 28<sup>th</sup> May 2024 is hereby upheld.***
- ii) The Petition dated 6<sup>th</sup> March, 2024 is hereby struck out for want of jurisdiction with costs to the respondent.***
- iii) We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the depositor.***

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> Day of January 2025.**

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

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

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**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**

