



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. E038 OF 2024

– BETWEEN –

PAULINE CHEMUGE SUGAWARAAPPELLANT/RESPONDENT

-AND-

NAIRUKO ENE MUTARAKWA KIRUTI

(Sued in her capacity as the Administratrix of the

Estate of *Mutarakwa Kiruti Lepaso* alias *Mutarakwa Kiroti Lepaso*

and on her own)1ST RESPONDENT/APPLICANT

MOSES ORIKAE MUTARAKWA2ND RESPONDENT/APPLICANT

JOHN LESIAN MUTARAKWA3RD RESPONDENT/APPLICANT

ADMINISTRATORS OF THE ESTATE

OF KIRUTI LEPASO (DECEASED)4TH RESPONDENT/APPLICANT

(Being an application to strike out the Petition of Appeal dated 14th November 2024)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 27th January 2025 and lodged before this Court on 3rd February 2025, by the Applicants seeking orders *inter alia*-

- a. **THAT** the application herein be heard and determined in limine and in priority to the Petition of Appeal dated 1st November 2024.
- b. **THAT** this Honourable Court lacks jurisdiction to hear and determine the appeal herein under Article 163 (4) (a) of the Constitution.
- c. **THAT** the Appeal/Petition of Appeal herein dated 14th November 2024, be struck out for want of jurisdiction as no certification or leave to appeal to the Supreme Court has either been sought or granted under Article 163 (4) (b) as read with Article 163 (5) of the Constitution, 2010.
- d. **THAT** the cost of the application be borne by the Petitioner; and

[2] TAKING INTO ACCOUNT the affidavit in support of the Motion sworn by **Nairuko Ene Mutarakwa Kiruti** and written submissions both dated 27th January 2025 to the effect that; the main issue before the trial court and the Court of Appeal was whether the appellant could obtain title to the suit premises namely Land References numbers Kajiado/Kitengela/10624,10625,10630 and 10631 under the doctrine of adverse possession; the issues considered by the High Court and the Court of Appeal were not questions of constitutional interpretation or application to warrant the institution of the present appeal as a matter of right; issues touching on adverse possession are dealt with under Section 38 (1) of the Limitations of Actions Act; the appellant never asked the trial court to consider the unconstitutionality of Section 38 of the Limitations of Actions Act and this Court cannot be the first point of call to ventilate the said issue. The applicant cites the Courts decisions in **Heineken East Africa Import Company Limited & Another vs Heineken International By & 2 Others** SC Pet. (Application) e027 & E028 of 2024 (Consolidated) [2024] KESC 59 (KLR) and **Kenya National Highways Authority Vs Five Star Agencies Limited & Another** SC Pet. Appl. No. E021 of 2024 [2024] KESC 62 (KLR) to urge that jurisdiction is a preliminary issue and ought to be dealt with at the onset of any court matter; **Dina Management Limited vs County Government of Mombasa & 5 Others** SC Petition No. 8 (E010) of 2021; [2023] KESC 30 (KLR) and **Mitubell Welfare Society vs**

Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (amicus curiae) [2021] KESC 34 (KLR) to urge that the Court does not have jurisdiction to revisit the factual findings of superior courts; ***Lawrence Nduttu & 6000 Others vs Kenya Breweries Ltd & Another*** [2012] eKLR and ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others*** [2020] eKLR to submit that any appeal said to be brought under Article 163(4)(a) must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution; and

[3] UPON CONSIDERING the appellant's replying affidavit dated 10th February 2025 and submissions dated 13th February 2025, both filed on 17th February 2025 wherein he submits that the Court is invited to settle conflicting decisions of the lower courts and pronounce itself on the failure of lower courts to address all issues raised by a litigant, and in this instance whether Section 26 of the Limitations of Actions Act rendered the respondent's counterclaim in the trial court statute barred. Further, that the Court of Appeal on its own motion introduced the question of jurisdiction and the claim for adverse possession which were not raised at the trial court. The petitioner in so arguing relies on this Court's determination in ***Githiga & 5 Others vs Kiiru Tea Factory Company Limited*** (Petition No. 13 of 2019) [2023] KESC 41 (KLR) (16th June 2023) (Judgement) to urge that if a party alleges breach of his fundamental rights and freedoms as envisaged in the Constitution albeit, at the Court of Appeal, this court cannot afford to shut its eye to such serious legal issues that call for settling at the apex court. He also cites ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*** S.C. Petition No. 2B of 2014; [2014] eKLR and ***Evans Odhiambo Kidero & 5 Others***, Sup. Ct. Petition No. 18 of 2014 to highlight the guiding principles that warrant the Court's jurisdiction and to make the point that the issues raised in his petition are of a jurisprudential moment that deserve further input by this Court; and

[4] BEARING IN MIND that this Court in *Kimani & 20 other (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* [2020] KESC 9 (KLR) set out the following attributes as imperative for an appeal to this Court under Article 163 (4) (a) of the Constitution:

(i) The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

(ii) The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of Constitution interpretation and application.

(iii) A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

(iv) Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).

(v) Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)."

[5] WE NOW OPINE AND DETERMINE as follows:

- i. The issues raised in the Magistrate's Court, related to ownership of Land Reference Numbers Kajiado/Kitengela/10630, 10631, 10624 and 10625. The trial Court found that the appellant did not establish that she purchased the suit properties as there was no record of the sale agreement, Land Control Board consent and payment of stamp duty. The court also held that the 1st respondent could not have sold the suit properties since she had not obtained the requisite letters of administration to enable her do so.
- ii. At the High Court, the appellant urged that the trial magistrate should have found that she was entitled to the suit properties through adverse possession; the respondent's counterclaim was statute barred and was not supported by a verifying affidavit and that the 1st respondent had admitted to intermeddling with the estate of the deceased original proprietor of the suit property and therefore she ought to have been estopped from denying that she had no authority to sell and transfer the suit properties. The High Court dismissed the appeal upon finding that the trial court had no jurisdiction to hear claims for adverse possession; the counterclaim was not defeated by the failure to file a verifying affidavit and that the appellant could not be considered a bona fide purchaser for value as no evidence was produced to show that she had paid valuable consideration for the suit parcels. The judge also held that the counterclaim was not statute- barred as under Section 26 of the Limitation of Actions Act, there is no limitation for land transferred by mistake, and that Sections 32 and 33 of the Law of Succession had no bearing on the suit since the issues in dispute pertained to land and not to succession.
- iii. The Court of Appeal on its part held that, notwithstanding the expansion of the jurisdiction of environment and land usage to the Magistrates Courts, it is instructive that under Section 9 (a) of the Magistrates Court Act, various matters are specified for determination, but claims for adverse possession are not included in that section. And that, it is only the

Environment and Land Court which has jurisdiction to hear and determine claims for adverse possession. On *whether the appellant had established that she was a bonafide purchaser for value of the suit parcels*, the Court of Appeal noted that there were concurrent findings of fact by the High Court and the trial court and was therefore not persuaded that the appellant had established that she obtained proper title to the suit parcels. On *whether the respondent's counterclaim ought to have been struck out for failure by the respondents to file a verifying affidavit*, the court noted that, given the position taken by the appellate court that the striking out of a plaint or counterclaim on account of omission is discretionary, the court was satisfied that both the trial magistrate and the first appellate judge rightly declined the invitation to strike out the respondent's counterclaim.

- iv. From the long history of the matter set out above, there is clearly no live controversy relating to constitutional interpretation or application. The issues related to ownership of the suit premises which have substantively been determined from the trial court, the High Court, then mandated to hear environment and land matters, and later at the Court of Appeal. In the circumstances, we lack jurisdiction to delve into the issues now before us and we must therefore down our judicial tools.
- v. The respondents being the successful parties in this suit and while applying the principle in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***; SC Petition 4 of 2012; [2013] eKLR that costs normally follow the event, we find that the respondents are entitled to costs of the appeal.

[6] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. The Applicant’s Notice of Motion of Motion dated 27th January 2025 and filed on 3rd February 2025 is hereby allowed as prayed.***
- ii. The Petition of Appeal dated 14th November 2024 and filed on 2nd December 2024 is hereby struck out.***
- iii. The appellant shall bear the costs of the appeal.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of March, 2025.

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF
THE SUPREME COURT OF KENYA

.....
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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

