



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E036 OF 2024

—BETWEEN—

JUSTUS GITUMA MIGUNA APPELLANT

—AND—

MUHU HOLDINGS CO. LTD. RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (*Musinga, Asike, Makhandia & Mativo, JJ. A*) in Civil Appeal No. E221 of 2024 delivered on 25th October 2024)

Representation:

Mr. Peter Ngoge for the Appellant
(O.P Ngoge & Associates)

Ms. Anyango Opiyo for the Respondent
(Anyango Opiyo & Company Advocates)

RULING OF THE COURT

A. INTRODUCTION

[1] This Ruling arises from the jurisdiction challenge raised by the respondent against the appellant's appeal. The appeal dated 28th October 2024 and filed on 29th October 2024 challenges the Ruling of the Court of Appeal (*Musinga, Asike-Makhandia & Mativo, JJ. A*) delivered on 25th October 2024 in Civil

Appeal No. E221 of 2024. The Court of Appeal declined to grant stay of execution of the Ruling of the Environment and Land Court at Nairobi (*Mwangi, J.*) dated 7th May 2024.

[2] In response to the petition, the respondent filed Grounds of Opposition dated 15th November 2024, principally challenging this Court's jurisdiction to hear and determine the appeal. The objection is premised on grounds that; no constitutional issues were raised in the dispute before the Business Premises and Rent Tribunal or the superior courts to warrant this Court's exercise of its jurisdiction; no certificate of leave has been sought or granted prior to filing the appeal; no appeal lies to this Court under Section 15(4) of the Landlord and Tenants (Shops, Hotel and Catering Establishments) Act Cap 301 (**the Act**); and finally, that the petition is bad in law and an abuse of the court process. The respondent urges that the petition be dismissed with costs.

B. BACKGROUND

[3] The respondent, as the landlord of L.R. No. 209/681/2 Jasho House, located along Mfangano Street, opposite KPCU (***the suit property***), by a letter dated 18th April 2018, sought and obtained authority from the Nairobi City Council to carry out renovations of the suit property. The letter of authority also advised the respondent to seek orders of eviction of its tenants for the renovations to be undertaken. Consequently, the respondent served its tenants with termination notices dated 20th February 2017, which were to take effect on 1st May 2017.

C. LITIGATION HISTORY

(i) First proceedings before the Business Premises and Rent Tribunal (the Tribunal)

[4] The notices culminated in References ***BPRT Case Nos. 325, 326, 327, 328, 329, 330, 332 and 333 of 2017 Nairobi***, consolidated as ***BPRT Case No. 325 of 2017***. The sole ground for termination was that the respondent intended to carry out substantial renovation works which could not be carried out without obtaining vacant possession of the suit property.

[5] Having considered the parties' pleadings and arguments, the Tribunal (*Mbichi Mboroki, Chairman*) through its judgment delivered on 13th March 2020 was satisfied that the respondent sought to develop the suit premises so as to restore it to a state that could fetch a fair market value. Similarly, informed by its site visit, the Tribunal held that the repair works were extensive. In the end, it dismissed the References, upheld the landlord's termination notices of 20th February 2017, ordered the tenants to vacate and hand over vacant possession of the suit property on or before 1st July 2020, and in default, an eviction order would issue without further reference to the Tribunal.

(ii) First proceedings at the Environment and Land Court (ELC)

[6] Dissatisfied with the Tribunal's decision, the appellant filed ***ELC Appeal No. 16 of 2020***, relying on 14 grounds of appeal. He particularly argued that, the Tribunal erred in law in finding that the notices had a legal basis and ordering eviction during the Covid-19 pandemic. The appellant further contended that the Tribunal erred in failing to consider the Expert Opinion to the effect that the repairs could be carried out without interference with the tenancy. It was the appellant's further argument that the Tribunal had erred by disregarding the economic hardship that would be visited upon the tenants were the eviction to be effected. The respondent opposed the appeal and argued in support of the Ruling by the Tribunal.

[7] The ELC delineated three issues for determination; whether at the time of hearing and disposition of the References, the Tribunal was seized of proper statutory notices issued by the respondent under Section 4(2) as read together with Section 7(1)(f) of the Act; whether the Tribunal erred in finding that the respondent had established a proper ground for termination of tenancy under Section 7(1) (f) of the Act; and whether at the time of issuing its orders, the Tribunal violated or disregarded the prevailing Practice Directions relating to court operations in the wake of Covid-19.

[8] By a Judgment delivered on 2nd February 2021, the ELC (*Eboso, J.*) dismissed the appeal on grounds that the Tribunal had jurisdiction to hear and determine the dispute before it as it was seized of proper statutory notices under Section 4(2) as read together with Section 7(1)(f) of the Act. It affirmed the Tribunal's finding that the respondent had established a proper ground for termination of tenancy under Section 7(1)(f) of the Act. Regarding the application of the Practice Directions issued by the Chief Justice to guide court operations in the wake of the COVID-19 pandemic, the court held that there was no indication that the Practice Directions were in force as at the date of the Tribunal's decision.

[9] Dissatisfied with the Court's Judgment, the appellant filed various applications, including an application seeking review of the same, dated 22nd March 2021. He argued that there was an error on the face of the record arising from the fact that the impugned notices had incorrectly referenced L.R. No. 209/681/2 which was nonexistent. He also argued that the respondent had introduced new evidence without the authority or consent of the parties. On the other hand, the respondent opposed the application stating that the identity of the suit premises was common to all parties, and denied introducing any new evidence.

[10] By a Ruling delivered on 26th July 2021, the ELC (*Eboso, J.*) dismissed the application for review and held that the issue of the correctness of the suit premises was neither placed before it in the appeal nor before the Tribunal. On the supplementary record of appeal, the court found that the same did not contain documents outside the record before the Tribunal.

(iii) *Second proceedings before the Tribunal*

[11] After the ELC had dismissed the appellant's appeal in ***ELCA 16 of 2020***, the respondent filed an application dated 12th March 2021, seeking orders of eviction and assistance of the Officer Commanding Station (OCS) Kamukunji Police Station. On its part, the appellant filed various applications, including the application dated 21st July 2021, seeking review of the Tribunal's judgment

dated 13th March 2020, a declaration that the impugned notices were null and void, and a mandatory injunction restraining the respondent from evicting the appellant.

[12] By a Ruling delivered on 5th November 2021, the Tribunal dismissed the appellant's application for review and allowed the respondent's application for eviction orders. The Tribunal reasoned that during the visit to the suit property, the Tribunal confirmed that the property was located at Mfangano Street, opposite KPCU. Further, that all parties concerned were clear as to the location of the suit premises in question.

(iv) Second Proceedings before the ELC

[13] Aggrieved by the ruling on its application for review against the Tribunal's Judgment, the appellant filed **ELC Misc. No. E085 of 2021**. He challenged the Tribunal's finding on grounds that the Tribunal erroneously determined that the suit property was situated on L.R. No. 209/682/2; failed to find that the notice dated 20th February 2017 was incurably defective for making reference to a non-existent L.R. No. 209/682/2; failed to find that there was an apparent error on the face of the record of the Tribunal; and failed to find that it lacked jurisdiction to issue eviction orders in respect of nonexistent tenancy premises.

[14] Together with the appeal, the appellant filed an application dated 8th November 2021 seeking orders of injunction restraining the respondent from evicting the appellant from the suit property, stay of the Tribunal's ruling on review and mandatory injunction requiring the respondent to restore the appellant to the suit premises. Upon considering the application, the ELC (*Mwangi, J.*) granted stay of execution pending hearing and determination of the appeal.

[15] Thereafter, by an application dated 17th January 2024, the respondent sought to strike out the appellant's appeal for being incompetent and an abuse of court process, and for vacation of stay of execution granted by the Court. By its Ruling delivered on 7th May 2024, the ELC (*Mwangi, J.*) held that the

appellant had already exercised his right of appeal under Section 15(1) of the Landlord and Tenant Act in **ELC Appeal No. 16 of 2020**. In the circumstances, *Mwangi, J.* held that the ELC had no jurisdiction to hear the appeal, and vacated the orders of stay of execution.

(v) Proceedings at the Court of Appeal

[16] Aggrieved by the ELC (*Eboso, J.*) Judgment in **ELCA 16 of 2020**, the appellant filed **Civil Appeal No. E070 of 2021**. The appellant's main contention was that the learned Judge erred in upholding the Tribunal's decisions. It also contended that the learned Judge acted *ultra vires* by considering evidence not placed before the Court, and as a result, denied the appellant a fair hearing contrary to Article 50 of the Constitution.

[17] Similarly, aggrieved by the ELC (*Mwangi, J.*) Judgment in **ELC Misc. No. E085 of 2021**, the appellant filed **Civil Appeal No. E473 of 2024**. He challenged the ELC Judgment on the ground that the learned Judge had committed jurisdictional errors by declining to hear his appeal denying him the right to access justice in contravention of Articles 10, 25, 27, 48 and 50 of the Constitution.

[18] Together with the second appeal, the appellant filed **Civil Application No. Nai E221 of 2024** dated 14th May 2024, seeking stay of execution of the ELC Judgment pending the hearing and determination of the appeal, and a mandatory injunction restraining the respondent from evicting him from the Business Premises situated on L.R. No. 209/681/2/. In the alternative, the appellant sought mandatory injunctions against the respondent requiring it to relocate him back to the business premises and pay for all the financial losses and damage incurred as a consequence of the unlawful eviction. In opposition, the respondent filed a Notice of Preliminary Objection dated 12th July 2024, challenging the appellate court's jurisdiction on grounds that no appeal lies to the Court of Appeal under Section 15(4) of the Act.

[19] In a Ruling delivered on 25th October 2024, the Court of Appeal (*Musinga, Makhandia and Mativo, J.J.A*) dismissed the application on grounds that it

failed to meet the threshold for grant of stay under Rule 5(2)(b) of the Court of Appeal Rules. The court specifically found that the memorandum of appeal did not disclose any arguable appeal. Still, on arguability of the appeal, the Court of Appeal determined that Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act barred appeals from the ELC to the Court of Appeal.

(vi) Proceedings at the Supreme Court

[20] Aggrieved by the Court of Appeal Ruling under Rule 5(2)(b) of the Court of Appeal Rules, the appellant has filed the instant appeal challenging the decision of the Court of Appeal on grounds that the impugned Ruling is in contravention of Articles 10, 19, 20, 21, 25, 27, 48 and 50 of the Constitution and the Bangalore Principles of Judicial Conduct. The appellant seeks the following reliefs:

- i. *An order that the appeal be allowed with costs and that the Ruling rendered against the appellant by the Learned Justices of the Court of Appeal on the 25th October 2024, at the interlocutory stage, be set aside **ex-debito justitiae**.*
- ii. *The said eviction orders which were arbitrarily issued against the appellant by the Business Premises Rent Tribunal in Nairobi Tribunal Case No. 32 of 2017 be set aside **ex-debito justitiae**.*
- iii. *General damages be assessed and awarded against the respondent herein for formenting the dispute contrary to the contents of the letter dated 18th April 2018 from the Nairobi City County and for attempting to enforce the said eviction orders which were issued against the appellant herein in contravention of the rules of natural justice and contrary to Articles 10, 25, 27, 28, 29, 40, 47, 48 and 50 of the Constitution of Kenya 2010.*
- iv. *Further, or in the alternative, pending the hearing and determination of the Court of Appeal **Civil Appeal No. E473***

of 2024, eviction orders which were arbitrarily issued against the appellant in Nairobi Business Premises Rent Tribunal Case No. 325 of 2017 be permanently stayed.

v. The costs of this appeal be awarded to the appellant.

D. PARTIES' SUBMISSIONS ON JURISDICTION

a. Respondent's Case

[21] In support of its challenge on this Court's jurisdiction, the respondent relies on its submissions dated 28th November 2024 and replying affidavit sworn by *Lucy Muhu* on 18th November, 2024. To this end, the respondent urges that no issues of constitutional controversy were raised before the Tribunal or the superior courts below to warrant the exercise of this Court's jurisdiction as of right. It relies on the case of ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012] eKLR to urge that only those appeals arising from cases involving interpretation or application of the Constitution can be entertained by the Court under Article 163(4)(a). The respondent further contends that the issues of constitutional violations raised by the appellant have been raised for the first time before this Court. Moreover, it is the respondent's assertion that the Court lacks jurisdiction under Article 163(4)(b) as no certification to hear the appeal has been granted by either the Court of Appeal or the Supreme Court.

[22] In any event, contends the respondent, under Section 15(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, the High Court is the last appellate court, and no further appeal lies to the Court of Appeal or the Supreme Court. Furthermore, the respondent contends that the right to move a court for review and appeal are not available to a party simultaneously. The respondent submits that the appellant having preferred to seek a review, and the same having been denied by the ELC in its Ruling delivered on 26th July 2021, the right to move the Court of Appeal or the Supreme Court through an appeal was unavailable.

b. Appellant's Case

[23] On the other hand, the appellant in his submissions dated 20th November 2024 and submissions in reply dated 5th December 2024, maintains that this Court has jurisdiction under Article 163(4)(a) of the Constitution. To support this assertion, the appellant submits that the Tribunal's determination was without jurisdiction for reasons that the Tribunal cannot issue eviction orders, and that the proceedings before the Tribunal erroneously referred to L.R. No. 209/682/2 as opposed to L.R. No. 209/681/2. As a result, the appellant submits that the Tribunal could neither afford the appellant a fair hearing, nor uphold the Constitution or the rule of law. It is the appellant's further case that having not referenced the correct premises (which it is in occupation of) before the Tribunal, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, particularly Section 15(4) did not apply.

[24] It is also the appellant's case that the ELC committed a jurisdictional error by arbitrarily, and without legal basis, upholding the Tribunal's decision and dismissing the appeal before it. It is also urged that the Court of Appeal committed a constitutional error by arbitrarily dismissing the appellant's appeal at an interlocutory stage without delving into the merits. Further, the appellant submits that the Court of Appeal's decision is premised on wrong facts warranting the intervention of this Court.

[25] For these reasons, the appellant contends that the Tribunal, ELC and Court of Appeal decisions were in contravention of Articles 10, 19, 20, 21, 25, 27, 48 and 50 of the Constitution, warranting the exercise of this Court's jurisdiction. He cites ***Asanyo & 3 Others Vs Attorney General*** (Petition 7 of 2019) [2020] KESC 62 (KLR) in submitting that this Court's jurisdiction has been properly invoked under Article 163 (4) (a) of the Constitution.

E. ISSUE FOR DETERMINATION

[26] Upon considering the parties' pleadings, the findings of the superior courts below, submissions and oral arguments by the parties, only one issue arises for our determination in limine, *whether this Court has jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution.*

F. ANALYSIS

[27] The basis of the respondent's challenge is that firstly, the appeal raises no issues of constitutional controversy and fails to meet the threshold under Article 163(4)(a) of the Constitution. Secondly, the respondent submits that the appeal has not been certified as one raising issues of general public importance under Article 163(4)(b) of the Constitution. Finally, it is his submission that no appeal lies to the Court of Appeal and consequently to this Court by virtue of Section 15(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

[28] The appellant on the other hand, submits that this Court has jurisdiction to determine the appeal on grounds that it is premised on Article 163(4)(a) of the Constitution and raises issues involving the application of Articles 10, 19, 20, 21, 25, 27, 48 and 50 of the Constitution. The appellant argues that these questions have also been in contest before the superior courts below.

[29] The question as to when this Court will assume appellate jurisdiction on the basis of Article 163 (4) (a) of the Constitution has been settled with finality. In *Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd. & Another*, Supreme Court Petition No. 3 of 2012; [2012] eKLR, we stated that;

“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).” [Emphasis added]

[30] Article 163(4)(a) lays the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation and/or application of the Constitution can be entertained by the Supreme Court.

[31] We also note that what is before the Court is an appeal against a ruling of the Court of Appeal issued by the latter in exercise of its discretionary authority under Rule 5(2)(b) of the Court of Appeal Rules, 2022. The Court has settled the question whether Article 163 (4) of the Constitution confers upon the Supreme Court jurisdiction to hear appeals arising from interlocutory Orders of the Court of Appeal under Rule 5(2)(b). In the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 3 Others**, SC Application No. 16 of 2015; [2015] eKLR, declining to assume jurisdiction, we rendered ourselves as follows;

In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court.”

[32] In **Basil Criticos Vs Independent Electoral and Boundaries Commission & 2 others**, SC Petition No 22 of 2014 [2015] eKLR the Court stated that;

“The application before us contests the exercise of discretion by the appellate court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on

the merits, being made prematurely on issues yet to be adjudged, ... Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

[Emphasis added]

[33] This dictum has been followed in subsequent decisions of the Court, including in *Clement Kungu Waibara Vs Annie Wanjiku Kibeh & Another*, SC Application 31 of 2020 [2020] eKLR; and *Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 6 Others*, SC Application 10 of 2018 [2018] eKLR.

[34] We have also settled exceptions to this principle. In *Kampala International University Vs Housing Finance Company Limited*; SC Petition No. 34 (E035) of 2022, [2024] KESC 11 (KLR) the Court elaborately stated that;

“The Supreme Court in latter decisions, tempered the foregoing principle with some exceptions, where it could assume jurisdiction notwithstanding the fact that, an appeal before it was against an interlocutory decision by the Court of Appeal. Thus, where the Court of Appeal had made an interlocutory decision which in essence amounted to a substantive determination of a constitutional question that had been canvassed right from the High Court, the Supreme Court could rightly assume jurisdiction in an appeal arising therefrom. Indeed, such had been the case in the Hassan Ali Joho case.

....

Another exception where the Supreme Court may assume jurisdiction notwithstanding the fact that the decision against which an appeal has been preferred is one which was delivered by the Court of Appeal in exercise of its

powers under rule 5 (2)(b), arises if the appellate court goes beyond the preservation of the substratum of the appeal, and issues orders that are likely to occasion an injustice to one of the parties.”

[35] We now turn to the question before us, does this appeal meet this threshold? The impugned decision by the Court of Appeal is interlocutory in nature, and as such, must be weighed against the established principles set out in the foregoing paragraphs. The appellant has submitted that what was before the ELC was a question of the interpretation and application of the Constitution, the determination of which is being appealed before this Court. On the contrary, the respondent is categorical that the only issue before the Court of Appeal was whether the appellant had met the threshold for grant of stay under Rule 5(2)(b) of the Court of Appeal Rules.

[36] We agree with the respondent that the only issue before the Court of Appeal was the issue of grant of stay, that is, the exercise of that court's discretion under Rule 5(2)(b). The substantive questions and the challenge of the ELC decisions are still depending in ***Civil Appeal Petition Nos. E070 of 2021*** and ***E473 of 2024***. Even if the Court of Appeal made a mention of its jurisdiction in the impugned ruling, it did not conclusively decide on the issue or make any orders affecting the appeals before it. Accordingly, we see no constitutional issues that have been canvassed at the Court of Appeal, the determination of which would be the subject of an appeal before this Court.

[37] Clearly, the appeal before us is premature and does not meet the threshold of Article 163 (4)(a) of the Constitution. It has to be dismissed for want of jurisdiction.

G. FINAL ORDERS

[38] Consequently, we make the following orders:

(i) The Grounds of Opposition dated 15th November 2024 are hereby sustained;

- (ii) The Petition of Appeal No. E036 of 2024 dated 28th October 2024 is hereby struck out;**
- (iii) The appellant shall bear the costs; and**
- (iv) We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs herein be refunded to the appellant.**

It is so Ordered.

DATED and DELIVERED at NAIROBI this 23rd Day of May, 2025.

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

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

.....
S. C. WANJALA
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