



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

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

**PETITION NO. E025 OF 2024**

**as consolidated with**

**PETITION NO. E026 OF 2024**

— BETWEEN —

**MARY JACINTA CHEPKORIR KIPTUI..... APPELLANT**

— AND —

**GLADYS J. KIPTIONY ..... RESPONDENT**

*(Being an appeal from the Judgment and Orders of the Court of Appeal at Nakuru (Sichale, Achode & Korir JJ.A) delivered on 26<sup>th</sup> April, 2024 in Civil Appeal No. 21 of 2020)*

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Representation:

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

No appearance for the Respondent

### **JUDGMENT OF THE COURT**

#### **A. INTRODUCTION**

[1] Before this Court are two appeals, Petition of Appeal Nos. E025 of 2024 and E026 of 2024 both dated 5<sup>th</sup> June, 2024 and filed on 11<sup>th</sup> June, 2024. The two appeals are filed by the appellant pursuant to Article 163(4)(a) of the Constitution and challenge the decision of the Court of Appeal in *Civil Appeal No. 21 of 2020*, delivered on 26<sup>th</sup> April 2024. This Court on its own motion, vide the Order dated 5<sup>th</sup> December, 2024 consolidated the two appeals after it was noted that they both

challenge the same judgment of the Court of Appeal, and they raise more or less similar issues.

## **B. BACKGROUND & LITIGATION HISTORY**

### **(i) At the High Court**

[2] The deceased, Laban Kiplagat Kiptui died intestate on 24<sup>th</sup> December, 1994. He was survived by his wife, Mary Jacinta Chepkorir Kiptui, the appellant herein and her 5 children, and Gladys J. Kiptiony, the respondent, a daughter to the deceased but not with the appellant. The appellant, in ***Nakuru High Court Succession Cause No. 70 of 1995*** petitioned the High Court for the grant of Letters of Administration intestate for the deceased's estate on 13<sup>th</sup> February, 1995. The Letters of Administration of the estate were issued to her on 1<sup>st</sup> November, 1995 and the grant was confirmed on 28<sup>th</sup> June, 1996.

[3] Years later, the respondent filed summons dated 5<sup>th</sup> June, 2007 seeking that the grant of Letters of Administration issued to the appellant be revoked. This was on the grounds that the grant of Letters of Administration was obtained and confirmed without the consent of the respondent, who was at the time an adult. Further, that even after confirmation, she had not received her share of the deceased's estate.

[4] On 7<sup>th</sup> December, 2007 the court (*Kimaru J., as he then was*) revoked the grant issued to the appellant and ordered that the Letters of Administration in respect of the deceased's estate be jointly issued to the appellant and the respondent. Aggrieved by the said decision, the appellant filed a Notice of Motion dated 18<sup>th</sup> December, 2007 seeking a revocation of the grant dated 7<sup>th</sup> December, 2007 and for the application dated 5<sup>th</sup> June 2007 to be heard *inter partes* as it was heard in her absence. In response and in opposition to the application, the respondent averred that the application was heard in the presence of the appellant's advocate before the orders were granted and no valid reasons were given to warrant the orders sought.

[5] Through another advocate who had since come on record for her, the appellant also filed a Notice of Motion dated 26<sup>th</sup> June, 2008 seeking review and setting aside of the orders of 7<sup>th</sup> December, 2007 for reason that the court had no jurisdiction.

The respondent opposed the application and maintained that the court had jurisdiction and powers to revoke the grant. She further urged that the appellant's application was an attempt to have the court sit on an appeal on the orders made by a judge of concurrent jurisdiction.

[6] In the course of the proceedings, on 6<sup>th</sup> July, 2009 the appellant's counsel, Mr. Ngoge made an oral application seeking to have *Mugo J.* disqualify herself from hearing the appellant's Notice of Motion dated 26<sup>th</sup> June, 2008 on the grounds that the court had made remarks that it would dismiss the application. In a Ruling dated 6<sup>th</sup> July, 2009 the High Court (*Mugo J.*) found that there was no proper cause disclosed for the court to disqualify itself, noting that the court did raise the issue of the competence of the application with counsel for the appellant and expressed the view that the court considered itself not suited to entertain the application being in the nature of an appeal. The court further noted that the appellant seemed not desirous to have the matter concluded with expediency. Consequently, the court *suo moto* struck out and dismissed the application dated 26<sup>th</sup> June, 2008 stating that the appellant had squandered the opportunity to be heard.

[7] The appellant successfully appealed against the said Ruling dated 6<sup>th</sup> July, 2009 in *Nyeri Civil Appeal No. 268 of 2009*. The Court of Appeal (*Waki, Nambuye & Kiage J.J.A*) set aside the High Court order dismissing the application dated 26<sup>th</sup> June, 2008 and remitted the matter to the High Court for hearing vide the Judgment dated 25<sup>th</sup> February, 2016.

[8] On 18<sup>th</sup> July, 2016, by consent of the parties, the application dated 26<sup>th</sup> June, 2008 was allowed as prayed. Effectively, the orders of 7<sup>th</sup> December 2007 were set aside to pave way for *inter partes* hearing of the application for revocation of the grant made in 1995. The court then directed that the application dated 5<sup>th</sup> June, 2007 be heard *viva voce* before *A.K. Ndung'u J.* After the close of the hearing, parties were directed to file submissions, and the appellant was directed to file and serve the statement of accounts of the deceased's estate. The matter was mentioned a number of times wherein it was noted that appellant had failed to comply in filing the statement of accounts. On 7<sup>th</sup> May, 2019 the court gave the appellant the last

opportunity to render the accounts before the next date, failure to which the grant shall be revoked.

**[9]** When the matter was mentioned on 11<sup>th</sup> June, 2019 for compliance, the appellant had not provided the statement of accounts. Consequently, the court revoked the grant pursuant to Section 76 of the Law of Succession Act.

### ***iii. Court of Appeal***

**[10]** Aggrieved by the decision of the High Court, the appellant filed *Civil Appeal No. 21 of 2020* based on seven (7) grounds of appeal. The appellant urged that the learned judge erred in law and in fact by revoking the confirmed grant arbitrarily, without a formal application during a mention date. The appellant contended that this was in contravention of the rules of natural justice and Articles 10, 19, 20, 21, 25, 27, 48 and 50 of the Constitution. The appellant also submitted that she had complied with the order to render the statement of accounts and therefore the revocation of the grant was arbitrary.

**[11]** In a judgment delivered on 26<sup>th</sup> April, 2024 the Court of Appeal framed one issue for determination, *whether the High Court considered each rival case before it pronounced itself on the revocation of the grant confirmed on 28<sup>th</sup> June, 1996*. The court noted that the appellant's application was heard *viva voce* and thereafter the parties filed submissions. It found that the grant was revoked without considering or advertent to the evidence and submissions before the court. Further, the ground upon which the grant was revoked was failure to render accounts, which was not a ground for determination before the court. It was its view, that the High Court held the appellant in contempt of the court order for failing to render the account without giving them notice to show cause why she should be held in contempt.

**[12]** The appellate court noted that under Rule 31(1)(a) of the Court of Appeal Rules, 2022 the court has power to re-appraise the evidence and draw inferences of fact, reconsider the evidence, evaluate it and draw its own conclusions. However, in this appeal it could not do so there being no ruling before the court emanating from the evidence and arguments before the trial court for the appellate court to consider. The court was therefore of the view that the parties were not accorded a

fair hearing as was noted in their previous judgment dated 25<sup>th</sup> February, 2016. It found that the appeal had merit and allowed it with orders that: the matter be remitted back to the superior court for determination on the merits of the application dated 18<sup>th</sup> December, 2007; the matter be heard by any other judge of the High Court other than *A.K. Ndung'u J*; and costs to abide the outcome of the trial.

## **ii. Supreme Court**

**[13]** The appellant has filed the instant appeal, being aggrieved by the decision of the Court of Appeal. It is premised on the grounds that the learned judge erred in law and fact by:

- i. Contravening Articles 10, 25, 27, 48, 50, 159 and 164 of the Constitution and rules of natural justice, thereby committing jurisdictional errors.*
- ii. Transmitting the dispute back to the High Court for a fresh trial without setting aside the impugned decision of the High Court which they had found to be in contravention of Articles 10, 25, 27, 48, and 50 of the Constitution.*
- iii. Perpetuating contravention of Articles 10, 25, 27 and 50 of the Constitution and the rules of natural justice apart from preparing the High Court in advance to deny the appellant fair hearing and to deny the appellant the legal right to effectively access remedies before the High Court at Nakuru contrary to Articles 10, 25, 48 and 50 of the Constitution.*
- iv. That any decision of the High Court found by the Court of Appeal to have contravened Articles 10, 25, 27, 48 and 50 of the Constitution and the rules of natural justice is liable to be set aside ex-debito justitiae.*
- v. Distorting and misrepresenting the appellant's case and thereby preparing the High Court at Nakuru in advance to deny the appellant a fair hearing and equality of arms in contravention of Article 10, 25, 27, 48 and 50 of the Constitution and the rules of natural justice.*
- vi. Failing to decide issues which the appellant had presented to the Court of Appeal for determination in contravention of Article 10, 25, 27, 48 and 50 of the Constitution and the rules of natural justice besides manifesting extreme bias against the appellant contrary to the rules of natural justice.*

- vii. *Giving the wrong impression that the respondent was also aggrieved by the impugned decision when the records of the proceedings shows that it is the respondent's advocates who had orchestrated and misled the High Court to unlawfully revoke the grant to the detriment of the appellant.*
- viii. *Giving the wrong impression that the respondent's advocates had opposed the appeal via written submissions whereas no submissions were drawn and filed by the respondent's advocates, thereby failing to accord the appellant a fair hearing and equality of arms in contravention of Article 10, 25, 27, 48 and 50 of the Constitution.*
- ix. *Directing that costs of the appeal abide the outcome of the High Court proceedings as if the Court of Appeal had not concluded its proceedings and thereby conferring upon the High Court the appellate jurisdiction it does not have in contravention of Article 10, 25, 27, 48 and 50 of the Constitution.*

**[14]** The appellant therefore seeks the following orders:

- a) *The appeal be allowed with costs and that the Judgment be partly reviewed and set aside as follows;*
- b) *The impugned Ruling and Orders given by the High Court at Nakuru on 11<sup>th</sup> June, 2019 in Nakuru High Court Succession Cause No. 70 of 1995 be set aside.*
- c) *The costs of the appeal in Nakuru Court of Appeal Civil Appeal No. 21 of 2020 be awarded to the appellant.*
- d) *The costs of this appeal be awarded to the appellant.*

## **C. SUBMISSIONS**

### **i. Appellant**

**[15]** In support of the petition of appeal, the appellant filed submissions dated 17<sup>th</sup> July, 2024 on 18<sup>th</sup> July, 2024. The appellant contends that this appeal raises weighty questions on interpretation and/or application of the Constitution arising from jurisdictional errors made by the appellate court. She avers that whereas the Court of Appeal found that the decision of the High Court was arrived at in contravention of Article 10, 25, 27, 48 and 50 of the Constitution, and referred the

dispute back to the High Court for hearing on merits, it did not set aside the impugned orders of the High Court. It is urged that in holding so, the appellate court promoted a culture of impunity and denied the appellant effective access to judicial remedies and fair hearing. To support her case, the appellant cites this Court's decision in ***Geoffrey Asanyo & 3 others vs. the Attorney General & 3 others*** (Petition 21 of 2015) [2018] KESC 15 (KLR) (***Geoffrey Asanyo case***).

[16] The appellant submits that the Court of Appeal rightly held that the appellant was not accorded a fair hearing by *A.K. Ndung'u J.* Having found so, she contends that it was bound to set aside the offending decision of the High Court before transmitting it back to the High Court. The appellant adds that since the impugned order was not set aside, the appellant cannot be accorded a fair hearing and equality of arms before the High Court with the said order still in place.

[17] It is the appellant's contention that by failing to set aside the impugned order, the appellate court manifested bias against the appellant and perpetuated subversion of the rule of natural justice and Article 10, 25, 27, 48 and 50 of the Constitution, meriting intervention of this Court. The appellant submits in the alternative that the refusal to set aside the order is an abuse of Rule 31 of the Court of Appeal Rules and Article 10 of the Constitution, judicial discretion and authority to the detriment of the appellant.

[18] It is also the appellant's case that the decision of the Court of Appeal contradicts its earlier decision dated 25<sup>th</sup> February, 2016 in ***Civil Appeal 268 of 2009, Mary Jacinta Kiptui & 5 others vs. Gladys J. Kiptiony*** wherein the appellate court set aside the orders of the High Court before remitting the matter back to the High Court for fresh hearing.

[19] The appellant posits that the Court of Appeal became *functus* after it rendered the judgment of 26<sup>th</sup> April, 2024. She urges that by directing that the costs of the appeal abide by the outcome of the High Court proceedings, the appellate court contravened Articles 10, 25, 27, 48, 50 and 164 of the Constitution. This she avers, that by giving the High Court jurisdiction it does not have, gives a false impression that the Court of Appeal has not yet concluded its proceedings on the issue of costs.

Further, by refusing to award her costs of the appeal, the court manifested bias against her in violation of Articles 10, 25, 27, 48, 50, 159, and 164 of the Constitution.

**[20]** The appellant urges that the Court of Appeal misrepresented and distorted the appellant's case by refusing to find that the appellant had complied with the orders earlier given by *A.K. Ndung'u J.* in the matter to serve the respondent with the statement of accounts, and failing to recognize that the judge has acknowledged that the appellant had complied with the orders. She submits that by doing so, the appellate court failed to accord the appellant fair hearing and equality of arms.

**[21]** Lastly, it is the appellant's contention that the Court of Appeal falsely observed that the respondent was aggrieved with the impugned orders of *A.K. Ndung'u J.*, whereas it was the respondent's Advocate who misled the learned Judge of the High Court to issue the impugned orders. The appellant avers that the Court of Appeal contravened Articles 10, 25, 27, 48 and 50 of the Constitution, rules of natural justice, the Bangalore Principles of Judicial Conduct and the Judicial Code of Conduct by stating in the judgment that the respondent's counsel had opposed the appeal by way of written submissions whereas the appeal was opposed by way of oral submissions. The appellant asserts that judicial proceedings must be accurate and must avoid distorted or misrepresented facts so as to accord parties a fair hearing and equality of arms.

### ***b. Respondent***

**[22]** We note that the respondent did not file any response or submissions on the petition of appeal. We also note that the respondent filed a Preliminary Objection and a Notice of Motion both dated 8<sup>th</sup> July, 2024 electronically, challenging this Court's jurisdiction to hear and determine the matter pursuant to Article 163 of the Constitution and Section 15 of the Supreme Court Act. The respondent did not avail copies of the documents filed to the Court in line with Rule 12(1) of the Supreme Court Rules 2020 which requires that pleadings must be filed in the Court in both printed and electronic form to be considered complete.

**[23]** In ***Sonko vs. Clerk, County Assembly of Nairobi City & 11 others*** (Petition (Application) 11 (E008) of 2022 [2022] KESC 28 (KLR), and ***Kenya***

***Hotel Properties Limited vs. Attorney General & 5 Others*** (Application 2 (E004) of 2021) [2021] KESC 49 (KLR) concerning the said Rule, we emphasised that filing of any pleading is considered complete under Rule 12(1) of the Supreme Court Rules when a party submits pleadings and documents in both printed and electronic form, failing which, the pleadings will not be considered as properly filed. We further note that when the matter was mentioned for compliance before the Hon. Deputy Registrar on 19<sup>th</sup> July, 2024 the respondent's counsel was informed of the need to comply with Rule 12 of the Court's Rules. Despite this, the respondent did not provide the hardcopies of the pleadings. This being the case, the Notice of Motion and the Preliminary Objection dated 8<sup>th</sup> July, 2024 are not properly before this Court.

#### **D. ANALYSIS AND DETERMINATION**

**[24]** This appeal has been brought pursuant to Article 163(4)(a) of the Constitution. The appellant framed the following issues for determination:

- a. *Whether this Court has jurisdiction to hear and determine the petition of appeal under Article 163(4)(a) of the Constitution;*
- b. *Whether the Court of Appeal contravened rules of natural justice and Articles 10, 25, 27, 48, 50 and 159 of the Constitution;*
- c. *Whether the Court of Appeal contravened rules of natural justice and Articles 10, 25, 27, 48, 50 and 159 of the Constitution by directing that the costs of the appeal to abide by the outcome of the High Court proceedings;*
- d. *Whether the Court of Appeal contravened rules of natural justice and Articles 10, 25, 27, 48, 50 and 159 of the Constitution by misinterpreting the appellant's case;*
- e. *Whether the respondent was also aggrieved by the impugned orders issued by Hon. Justice A. K. Ndung'u at the High Court as was observed by the Court of Appeal; and*
- f. *Whether the respondent's advocate Mr. Biko had opposed the appeal before the Court of Appeal via written submissions as was pronounced by the Court of Appeal.*

[25] As has been the practice of this Court for appeals brought pursuant to Article 163(4)(a) of the Constitution, before delving into the appeal, we must first satisfy ourselves that this Court has jurisdiction to determine the appeal. This is so even if the appeal has not been opposed by the respondent as is the case in the instant appeal. As we stated in **Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & another**, Petition No. 3 of 2012; [2012] eKLR (**Lawrence Nduttu case**), it is the Court’s ultimate duty as the ultimate custodian of the Constitution to satisfy itself that the appeal meets the constitutional threshold.

[26] Jurisdiction can only be exercised by a court as conferred by the Constitution or written law. As we held in **Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 Others**, Civil Application No. 2 of 2011 [2012] KESC 8 (KLR) a court’s jurisdiction flows from either the Constitution or legislation, or both. A court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by Law.

[27] The Supreme Court’s appellate jurisdiction is set out in Article 163(4) of the Constitution of Kenya which states as follows:

*“(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; and*  
*b) in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”*

[28] The guiding principles for the exercise of this Court’s jurisdiction were set out in the **Lawrence Nduttu Case (Supra)** where we held that for this Court to have jurisdiction pursuant to Article 163(4)(a):

*“[28] 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 ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a). It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold."*

**[29]** In ***Rutongot Farm Ltd vs. Kenya Forest Service & 3 others*** SC Petition No. 2 of 2016 [2018] eKLR we determined that in order to address the issue whether the Court has jurisdiction or not, the questions that need to be answered are:

- (i) *What was the question in issue at the High Court and the Court of Appeal?*
- (ii) *Did the superior Courts below 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]** In determining whether the matter concerns interpretation or application of the Constitution and whether the same was canvassed in the superior courts below and has progressed through the appellate mechanism, each case must be evaluated based on its own facts.

**[31]** Applying the set-out principles to the instant case, and having perused the record before us, we note that the genesis of the matter is ***Succession Cause No. 70 of 1995*** wherein the appellant petitioned for the grant of Letters of Administration for the estate of Laban Kiplagat Kiptui, her husband. The respondent thereafter filed summons for revocation of grant dated 5<sup>th</sup> June, 2007. On 7<sup>th</sup> December, 2007 the grant was subsequently revoked and Letters of Administration in respect of the deceased's estate jointly issued to the appellant

and the respondent. The appellant thereafter filed a Notice of Motion dated 26<sup>th</sup> June, 2008 seeking to have the orders of 7<sup>th</sup> December, 2007 set aside.

**[32]** We note that after the judgment of the Court of Appeal dated 25<sup>th</sup> February, 2016 in *Civil Appeal No. 268 of 2009*, the matter was remitted to the High Court for hearing. The court (*A.K. Ndung'u J.*) directed that the application be heard *viva voce*, and after the hearing, parties to file submissions. The appellant was also directed to provide the statement of accounts of the deceased's estate. After several mentions to confirm compliance, the court noted that the appellant had not provided the statement of accounts. The appellant was then given the last opportunity to provide the statement of accounts, failure to which the grant would be revoked. The appellant having failed to provide the statement of accounts, the court revoked the grant pursuant to Section 76 of the Law of Succession Act on 11<sup>th</sup> June, 2019.

**[33]** At the Court of Appeal, in the judgment dated 26<sup>th</sup> April, 2024 the issue framed for determination was, *whether the court considered each rival party's case before it pronounced itself on the revocation of the grant confirmed on 28<sup>th</sup> June, 1996*. The Court of Appeal determined that the ground upon which the grant was revoked, which was failure to render accounts, was not a ground in the matter for determination before the court. It further stated that the High Court held the appellant in contempt of the court order for failing to render accounts without giving notice to show cause why she should be held in contempt. The Court of Appeal thus found that the parties to the suit were not accorded a fair hearing and therefore allowed the appeal.

**[34]** From the foregoing we establish that the High Court did not determine any constitutional issue in the orders issued on 11<sup>th</sup> June, 2019 leading to the revocation of the grant. Further, the Court of Appeal only tangentially held that the parties were not accorded a fair hearing in arriving at its decision, thereby remitting the matter back for trial. There was therefore no question on interpretation of application of the Constitution before the High Court or before the Court of Appeal.

[35] As we held in *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) vs. Attorney-General & 2 others* [2020] eKLR (*Paul Mungai Kimani Case*), 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). It is 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) of the Constitution.

[36] The appellant relies on this Court's decision in *Geoffrey Asanyo case* where we held that this Court has the inherent jurisdiction to right jurisdictional wrongs committed by the superior courts in executing their constitutional mandates. Whereas this Court has jurisdiction to do so, the *Geoffrey Asanyo case* is distinguishable from the instant case. The appeal in the *Geoffrey Asanyo case* did not arise from the subject matter before the High Court, but was on the mode of delivery of the judgment by the Court of Appeal, and not the substance of the judgment itself. On the other hand, the appellant's contention in the instant case is the substantive judgment of the Court of Appeal and its subsequent orders.

[37] The appellant contends that: the Court of Appeal misrepresented the appellant's case by refusing to find that the appellant had complied with the orders earlier given by *A. K. Ndung'u J.* of filing statement of accounts; it falsely observed that the respondent was aggrieved with the impugned orders of *Hon. A.K. Ndung'u*; and that the respondent had filed written submissions, whereas the respondent made oral submissions. At the core of the appellant's case is the contention that the Court of Appeal failed to set aside the order of the High Court before the remitting the matter to the High Court and that the court's record is inaccurate.

[38] We note from the record, that in the appellant’s Memorandum of Appeal dated 16<sup>th</sup> March, 2020 filed before the Court of Appeal, one of the prayers sought was:

*“An order that the appeal be allowed with costs and that the decision/ruling/orders given by Hon. Justice A.K. Ndung’u on 3<sup>rd</sup> April 2019 and consequential orders thereupon be set aside ex-debito justiae”*

[39] In the judgment of the Court of Appeal dated 26<sup>th</sup> April, 2024 the court stated:

*“[18] On those grounds, we are of the view that once again and despite the orders of the judgment of this court dated 25<sup>th</sup> February, 2016 the parties to this suit were not accorded a fair hearing. In the premise this appeal is found to have merit and is hereby allowed with the orders that:*

- i. This matter be and is hereby remitted back to the superior court for determination on the merits of the application dated 18<sup>th</sup> December 2007.*
- ii. The matter shall be heard by any other judge of the High Court other than the Hon. K. Ndung’u.*
- iii. Costs shall abide the outcome of the trial.”*

[40] From the foregoing, we establish that the appellant sought that the High Court order be set aside. The appellate court found merit in the appeal and allowed it. However, in its final orders, the Court of Appeal did not expressly indicate the setting aside of the order of the High Court. As we held in ***Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission Chairman (IEBC) & another*** [2017] eKLR, this Court has no jurisdiction to interpret its decisions or those of other courts.

[41] Having examined the crux of the appellant’s case before this Court, our considered view is that this is an issue that can be addressed by the Court of Appeal. The appellant ought to have moved the Court of Appeal appropriately to either confirm or clarify the import of its judgment noting that the appellate court found that the appeal had merit and allowed it. However, it did not set aside the order

which was the main subject of contention in the appeal. It also directed that the matter be determined by the High Court on the merits of the application, the decision of which was subject to appeal.

**[42]** In *Espie Njuguna & 46 others vs. Spire Properties (K) Limited & 12 others* (Petition 28 (E030) of 2022) [2023] KESC 37 (KLR) where one of the issues for determination was whether there was an anomaly in the judgment of the Court of Appeal which this Court ought to assume jurisdiction, we examined Rule 37 of the Court of Appeal Rules. Rule 37 of the Court of Appeal Rules makes provision for correction of errors. It states-

- (1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.*
- (2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person,*
  - a) if it does not correspond with the judgment it supports to embody or,*
  - b) where the judgment has been corrected under sub-rule (1), with the judgment as so corrected.*

**[43]** The appellant is also aggrieved, that the Court of Appeal directed that the costs abide by the outcome of the High Court proceedings. The appellant avers that by giving the High Court jurisdiction to determine the costs gives an impression that the Court of Appeal has not yet concluded its proceedings, and further, that by refusing to award her costs of the appeal, the court manifested extreme bias against her in violation of Articles 10, 25, 27, 48, 50, 159, and 164 of the Constitution.

**[44]** It is well established that the award of costs is discretionary. In *Kenya Electricity Transmission Co. Ltd (KETRACO) vs. Instalaciones Inabensa S.A* (Petition 17(E024) of 2021) [2022] KESC 64 (KLR) we held that,

*“[8] ...discretionary pronouncements by the Court of Appeal is one of the categories of decisions falling outside the set of questions appealable to this Court. Such discretionary decisions are by no means the occasion to turn this Court into a first appellate Court.”*

**[45]** For the reasons set out above, we decline the invitation to assume jurisdiction in respect of this appeal. As stated in ***Daniel Kimani Njihia vs. Francis Mwangi Kimani & another*** SC Application No.3 of 2014 [2015] eKLR:

*“This Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.”*

**[46]** We reiterate as we held in the ***Lawrence Ndutu case***, not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application. It is only matters founded upon cogent issues of constitutional controversy.

**[47]** On the issue of costs, in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others***, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR we set out the legal principles that guide the grant of costs. Generally, costs follow the event. Costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. Noting that the respondent did not participate in the proceedings before this Court, there shall be no order as to costs.

**ORDERS**

**[48]** Consequently, we make the following orders:

- i. Petition of Appeal No. E025 of 2024 consolidated with Petition of Appeal No.E026 of 2024 be and is hereby dismissed;*
- ii. We hereby direct that the sum of Kshs 6,000/= deposited as security for costs in Petition of Appeal No. E025 of 2024 and Petition of Appeal No. E026 of 2024, respectively, be refunded to the petitioner.*
- iii. There shall be no order as to costs.*

It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of May, 2025.**



.....  
**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**