



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome: CJ & P, Mwilu: DCJ & VP, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO. E043 OF 2024**

– BETWEEN –

**PETER ODIWUOR NGOGE T/A**

**O.P. NGOGE & ASSOCIATES ADVOCATES..... APPELLANT**

– AND –

**AMMU INVESTMENTS COMPANY ..... RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Musinga, Asike-Makhandia & Ali-Aroni, JJ. A**) in Civil Application No. NAI 163 of 2019 delivered on **22<sup>nd</sup> November 2024**)*

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Representation

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

No appearance for the Respondent

**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

**[1]** The Appeal before the Court is dated 10<sup>th</sup> December, 2024 and lodged on 18<sup>th</sup> December 2024, it is premised on Article 163(4)(a) of the Constitution. The Appellant challenges the Ruling of the Court of Appeal (*Musinga, Asike Makhandia & Ali-Aroni*) delivered on 22<sup>nd</sup> November 2024 in Civil Application

No. NAI 163 of 2019 dismissing the appellant's prayers for a mandatory interlocutory injunction to issue against the Respondent, its directors and the law firm of Wanjama & Company Advocates, as well as committal of the respondent's directors to civil jail for being in contempt of court.

## **B. BACKGROUND**

[2] The appellant, Peter Odiwuor Ngoge, is an Advocate of the High Court of Kenya, trading as O.P. Ngoge & Associates Advocates. He represented the respondent, Ammu Investments Company Limited, in ***High Court Environment and Land Case No. 252 of 2008***. Upon conclusion of the matter, the appellant sought to recover legal fees for professional services rendered, giving rise to a series of enforcement steps, that have culminated in the present appeal before this Court.

## **C. LITIGATION HISTORY**

### **a. *Proceedings at the High Court***

[3] The appellant filed an advocate-client Bill of Costs against the respondent dated 17<sup>th</sup> November 2009 in ***High Court Miscellaneous Application No. 745 of 2009*** in which he sought to recover fees. The respondent opposed the application through a preliminary objection stating that the parties did not have any advocate-client relationship. However, the court (*Ougo, R. CM/DR, as she then was*) dismissed the objection, finding that affidavits sworn by one of the respondent's directors (*Alan Cleophas Mulango*) confirmed the existence of an advocate-client relationship between the appellant and the respondent. Subsequently, in a Ruling delivered on 28<sup>th</sup> October 2011, the taxing master (*Gichohi P. DR, as she then was*) assessed and taxed the Bill of Costs at Kshs.778,569.50/=.

[4] Dissatisfied with the Ruling, the appellant filed an application dated 5<sup>th</sup> December 2011 seeking a review of certain portions thereof. The respondent

opposed the application, terming it unmeritorious, oppressive and an abuse of court process. We note that whilst the Bill of Costs arose from proceedings from the Environment and Land Court, that court (*G.K. Kimondo, J.*) nonetheless directed on 26<sup>th</sup> April 2012 that the application be heard in the High Court Civil Division. Meanwhile, a certificate of taxation dated 20<sup>th</sup> June 2012 was issued.

[5] The appellant then moved the High Court through an application dated 12<sup>th</sup> July 2012 seeking to have the taxing master's Ruling of 28<sup>th</sup> October 2011 adopted as the judgment of the court, and for the taxed sum of Kshs.778,569.50/= to accrue interest. Since the application was unopposed despite repeated service, the court (*Khaminwa, J.*) on 19<sup>th</sup> September 2012, allowed the application with costs and ordered that the taxed sum earn interest at the rate of 9% in line with the Advocates Act, CAP 16 of the Laws of Kenya.

[6] Thereafter, the appellant filed yet another application dated 18<sup>th</sup> October 2012. Although a copy of this application was not attached to the record of appeal, the prayers sought were summed up by the court as follows:

- i. *That the application be certified urgent and heard ex parte in the first instance.*
- ii. *That the veil of incorporation be lifted and warrants of arrest be issued to the Commissioner of Police forthwith to arrest Allan Cleophas Mulango- Director of Ammu Investments Company Limited and bring him in court with speed to show cause why he cannot be committed to civil jail for a period of 6 months for refusing to pay the applicant/advocate his legal fees which has been taxed and converted to a judgment of court herein under Section 51(2) of the Advocates Act against the respondent company an Act which amounts to contempt of court.*
- iii. *That the costs of this application be borne by the respondent.*

**[7]** The respondent however opposed the application asserting that it was an abuse of court process, premature, and contrary to the law.

**[8]** In a Ruling delivered on 16<sup>th</sup> November 2012, the court (*Odunga, J. as he then was*) held that applications under Order 22 Rule 31 of the Civil Procedure Rules, 2010, including an application for examination of a judgment debtor or an officer of a corporation/ judgment debtor, may be handled by the Registrar or a Judge of the High Court, in exceptional cases.

**[9]** On the substantive prayers before it, the court declined to lift the corporate veil, stating that while Order 22 Rule 35 of the Civil Procedure Rules permits the examination of a company's officers, it is strictly limited to identifying the company's assets for the satisfaction of a decree. It does not, by itself, authorize lifting the corporate veil. The court clarified that between this procedural rule and the substantive doctrine of piercing the corporate veil, which requires disregarding the company's separate legal personality to hold the shareholders personally liable, the appellant had not demonstrated that he had attempted or failed to execute the decree against the company. Moreover, while the absence of information about a respondent's assets may justify proceedings under Order 22 Rule 35, it does not, on its own, justify lifting the corporate veil.

**[10]** In this connection, the court dismissed the prayer to issue warrants against only one of the respondent's directors, Allan Cleophas Mulango, acknowledging that the respondent had multiple directors and the appellant had failed to establish a legal basis for singling him out for personal liability. It further held that such selective action, without justification, would constitute discriminatory treatment in contravention of Article 27 of the Constitution, which guarantees equality and freedom from discrimination.

**[11]** Furthermore, the court affirmed that procedural rules must generally be followed, save for instances where strict adherence would occasion a miscarriage of justice. It further clarified that mere delay in itself does not constitute a

miscarriage of justice unless the delay is so inordinate that it renders the proceedings fundamentally unfair. In this respect, the court found that execution proceedings filed under the Civil Procedure Act, CAP 21 of the Laws of Kenya did not amount to a miscarriage of justice.

**[12]** Citing the African Charter on Human and Peoples' Rights, specifically Article 14 on the right to property subject to lawful and justified limitations; Article 3 on equality before the law, Articles 6 and 7 which safeguard personal liberty and the right to a fair hearing, the court acknowledged that the appellant had a legitimate expectation of remuneration for work done. Conversely, the respondent was also entitled to due process. Consequently, the appellant's application was dismissed.

**[13]** Undeterred by the dismissal of his application, the appellant instructed Keysian Auctioneers to attach properties, purportedly owned by the respondent, in execution of the decree. This action sparked a new legal dispute. Mutiso Menezes International ('the objector') filed both an objection and an application dated 4<sup>th</sup> February 2013, contending that the attached goods belonged to it and were not subject to execution. The appellant opposed the objector's application, alleging collusion between the respondent and the objector. Central to this claim was an allegation that Allan Cleophas Mulango was a director common to the respondent and the objector, and further that the appellant had acted as the respondent's legal counsel, attending meetings at its (the respondent's) offices shared with the objector.

**[14]** According to the appellant, the objection proceedings were orchestrated by the respondent's directors, including the fabrication of invoices and receipts to falsely assert the objector's ownership of the attached goods, to delay satisfaction of the decree. He further alleged that the respondent unlawfully permitted the objector to operate its business from its premises without notifying the Registrar of Companies, thereby breaching Section 108 of the Companies Act, CAP 486 of the Laws of Kenya.

[15] In a Ruling delivered on 25<sup>th</sup> November 2013, the court (*D.A. Onyancha, J.*) allowed the objector's application since the respondent did not oppose the application. Additionally, the court found that the objector was not a party to the proceedings and was not a judgment debtor. Consequently, the execution process, insofar as it related to the objector, was set aside and discharged.

[16] Unwavering, the appellant subsequently instituted another application dated 14<sup>th</sup> August 2012, premised on Sections 1A, 1B and 3A of the Civil Procedure Act and Order 22 Rule 48 of the Civil Procedure Rules. He sought various prayers, including an order of prohibition against the respondent and third parties restraining them from dealing with the respondent's property Nairobi L.R. No. 209/14318 until the appellant's legal fees were paid. The appellant argued that he had acquired lien over the said property by virtue of his pending unpaid legal fees. However, despite evidence of filing, the record is silent on its fate.

[17] The appellant filed yet another application dated 15<sup>th</sup> January 2019, seeking the following orders:

1. *That this application be certified urgent and the same be ex-parte in the first instance owing to the urgency of the matter.*
2. *That this Honourable Court be pleased to order that the respondent/judgment debtor's directors ALAN CLEOPHAS MULANGO SIMU (architect) and ADAM SYNGIDURA MARJAN (quantity surveyor); be committed to jail for a period of time not exceeding 6 months for deliberately disobeying and refusing to honor and satisfy the decree given in favour of the appellant/applicant herein by the Honourable Lady Justice Khaminwa on the 19<sup>th</sup> day of September 2012 and thereby eroding the dignity and authority of this Honourable Court to the detriment of the Decree-holder/appellant.*

3. *That the Chief Inspector of Police and the OCS Central Police Station be ordered to effect the arrest of the said ALAN CLEOPHAS MULANGO SIMU (architect) and ADAM SYNGIDURA MARJAN (quantity surveyor).*
4. *That further, or in the alternative, the Honourable Court be pleased to observe that by deliberately refusing to honour and satisfy the decree issued herein on the 19<sup>th</sup> day of September 2012, the respondent herein and its above-mentioned directors have deliberately subjected the appellant who is an advocate to cruel and degrading treatment apart from discriminating against the applicant and subverting the socio-economic rights of the appellant contrary to Articles 10, 27, 28, 29, 40 and 43 of the Constitution and contrary to Article 16 of the United Nations Basic Principles on the Role of Lawyers.*
5. *That further, or in the alternative, the Honourable Court be pleased to award the appellant general damages to redress violations of his alleged fundamental human rights as against the respondents and the above-mentioned directors.*
6. *That the appellant be awarded costs of this application.*

**[18]** The gravamen of the application was that the respondent and its directors had willfully neglected to settle the appellant's legal fees awarded by the court. The appellant argued that this infringed on his socio-economic rights and various other constitutional rights as captured in the preamble of the application, and amounted to cruel and degrading treatment. For this, he sought damages amounting to Kshs.50,000,000/=.

**[19]** The respondent opposed the application contending that the court lacked jurisdiction, that the application had not been served upon the individuals named in the prayers and, that it amounted to abuse of court process.

**[20]** In a Ruling delivered on 3<sup>rd</sup> May 2019, the court (*J.K. Serگون, J.*) delineated the following issues for determination:

- a. *Whether the court has the jurisdiction to entertain the application;*
- b. *Whether service of the application was effected upon the directors of the respondent company; and*
- c. *Whether the respondent and/or its directors are in contempt of the order/decreed issued on 19<sup>th</sup> September 2012.*

**[21]** With regard to the first issue, at the onset, the court reviewed the earlier application dated 18<sup>th</sup> October 2012, which sought to lift the corporate veil and issue warrants against Allan Cleophas Mulango, along with the resulting Ruling dated 16<sup>th</sup> November 2012. It noted that the prior application arose from taxation proceedings in ***ELC No. 252 of 2008***, and hence part of a substantive suit. Importantly, the court (*Odunga, J. (as he then was)*) did not bar the appellant from filing a fresh application seeking to pierce the corporate veil or to initiate contempt proceedings. Accordingly, the court held that the application was proper and not barred by the doctrine of *res judicata*.

**[22]** On the issue of service, the learned Judge reiterated that whereas a company is a separate legal entity from its directors, it operates through its board of directors. Relying on Section 101(1) of the Companies Act, read together with the Civil Procedure Rules, the court held that service on a corporation is valid if effected on its advocates representing the corporation. Accordingly, service on the respondent's advocates was proper. However, since the application sought to lift the corporate veil, the appellant ought to have also effected personal service upon the respondent's directors.

**[23]** As to the prayer for committal of the respondent's directors for being in contempt, the court observed that the appellant had previously taken out warrants of attachment, the outcome of which was uncertain. Further, there was no

indication that Keysian Auctioneers had conducted any investigations as to the respondent's assets. In the court's view, the appellant had not demonstrated that he had exhausted all modes of execution, nor had he established that the respondent's directors had deliberately thwarted his efforts to realize his judgment. Accordingly, the application was dismissed with costs to the respondent.

**b. *Proceedings at the Court of Appeal***

[24] Aggrieved by the Ruling delivered by the court (*Sergon, J.*), the appellant filed a Notice of Appeal and an application dated 4<sup>th</sup> June 2019 in ***Civil Application No. NAI 163 of 2019*** brought under Rule 5(2)(b) of the Court of Appeal Rules, Section 5 of the Judicature Act CAP 8 of the Laws of Kenya and Articles 10, 19, 20, 21, 22, 25, 27, 28, 29, 40, 43, 48, 50 & 258 of the Constitution.

[25] The crux of the application was that the respondent had deliberately failed, without just cause, to satisfy the decree issued in his favour, thereby amounting to contempt of court. He sought urgent certification of the application, citing apprehension that the respondent was on the verge of being wound up. The appellant also faulted the superior court for holding that personal service ought to have been effected upon the respondent's directors despite acknowledging that the respondent was duly served with the penal notice and application through its advocates on record. He maintained that the finding by the court was contradictory, since the firm of Wanjama and Company Advocates had responded to the application on behalf of the respondent and its directors, and also previously acted for them in related proceedings within the same matter.

[26] In a Ruling delivered on 22<sup>nd</sup> November 2024, the Court of Appeal (*Musinga, Makhandia & Ali- Aroni, JJA.*) noted that while the appellant had not annexed a draft memorandum of appeal to the application, the grounds for arguability of the appeal were discernible from his supporting affidavit. These grounds disclosed an arguable appeal. However, on the question as to whether the appeal would be

rendered nugatory, the court held that the appellant's concerns regarding the respondent's potential insolvency or winding up were speculative, unsupported by evidence and unaccompanied by any investigation into the respondent's assets. The court further noted that even if it was inclined to grant the mandatory interlocutory injunction sought, there was no justifiable basis for issuing it against the respondent's legal representatives, Wanjama & Co. Advocates.

[27] On the prayer for committal of the respondent's directors to civil jail, the court found that the appellant had neither exhausted the available modes of execution under the Civil Procedure Rules nor demonstrated that the directors had obstructed the satisfaction of the decree. As such, the prayer was premature and untenable. Accordingly, the application was dismissed for failure to meet the threshold under Rule 5(2)(b) of the Court of Appeal Rules and for lack of sufficient grounds to justify the committal of the respondent's directors to civil jail.

**c. Proceedings at the Supreme Court**

[28] The appellant has now lodged the present appeal, premised on the following grounds, that the Learned Judges of the Court of Appeal:

- i. *Erred in law and fact in declining to lift the corporate veil and to commit the respondent's directors to civil jail for failing to satisfy the decree and thereby contravening Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43, 48, 50 and 159 of the Constitution of Kenya.*
- ii. *Violated Article 163(7) of the Constitution by disregarding the jurisprudence of the Supreme Court on contempt of court orders and decrees as laid out in the case of **Republic Vs Ahmed Abolfathi Mohammed & Another** (Petition 39 of 2018) [2019] KESC 47 (KLR).*
- iii. *Erred in law and fact by 'vigorously defending the appellant's application on behalf of the respondent and its directors' and displayed bias and partiality to the appellant's prejudice. Therefore,*

*the court violated Articles 10, 19, 20, 25, 27, 48 and 50 of the Constitution of Kenya, the rules of natural justice and the Bangalore Principles of Judicial Conduct.*

- iv. Erred in alleging that the appellant had successfully executed the decree, and therefore, violated Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43, 48 and 50 of the Constitution of Kenya.*
- v. Erred in law and fact by, on the one hand finding the appeal to be arguable, and on the other hand, dismissing the intended appeal by affirming the decision of the superior court. In this way, the court violated Articles 10, 25, 27, 48 and 50 of the Constitution of Kenya.*
- vi. Erred in law and fact in failing to find that by failing to satisfy the decree, the respondent's directors violated Articles 10, 19, 21, 25, 27, 28, 29, 40, 43, 48, 50 ad 159 of the Constitution of Kenya as read together with Article 16 of the United Nations Basic Principles on the Role of Lawyers and Section 1002 of the Companies Act.*
- vii. In declining to lift the corporate veil, the superior courts below violated the appellant's socio-economic rights, subjected the appellant to torture and cruel and degrading treatment and unmerited economic sanction. In this way, the appellants rights as stipulated under Articles 10, 25, 27, 28, 29, 40, 43, 48, 50 and 159 of the Constitution of Kenya and Article 16 of the United Nations Basic Principles on the Role of Lawyers and the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) were violated.*
- viii. Erred in law and fact in failing to find that by deliberately declining to advise the respondent to satisfy the decree, the firm of Wanjama & Co. Advocates violated their professional ethics and responsibility and therefore, were in contempt of the decree. Consequently, the said firm violated the appellant's rights under Articles 10, 19, 20, 21, 25, 28, 29, 40, 43, 48, 50 and 159 of the Constitution.*

- ix. *Further, or in the alternative, exhibited bias and lack of impartiality by defending the law firm of Wanjama & Co. Advocates who did not oppose the application. Consequently, the superior court violated the appellant's rights under Articles 10, 19, 20, 21, 25, 27, 28, 29, 48 and 50 of the Constitution of Kenya, the rules of natural justice and the Bangalore Principles of Judicial Conduct.*
- x. *Further or in the alternative, erred in law and fact in failing to appreciate that the inordinate delay in dispensing the appellant's application completely invalidated and delegitimized enforcement of the decree. This amounted to violation of the appellant's rights under Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43, 48 and 159 of the Constitution of Kenya, Article 16 of the United Nations Basic Principles on the Role of Lawyers as read together with the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004).*
- xi. *Exhibited bias and incompetence by affirming the superior court's ruling, which in effect, insulated and shielded the respondent and its directors and the firm of Wanjama & Co. Advocates from accountability. Therefore, this conduct violated Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43, 48, 50 and 159 of the Constitution and the Bangalore Principles of Judicial Conduct.*

**[29]** Accordingly, the appellant now seeks the following reliefs:

- i. *The appeal be allowed with costs and the ruling delivered on 22<sup>nd</sup> November 2024 be set aside ex-debito justitiae.*
- ii. *The application dated 4<sup>th</sup> June 2019 be allowed with costs to the appellant.*
- iii. *The respondent and its directors, CLEOPHAS MULANGO SIMU and ADAM SYNGIDURA MARAJAN and MS.*

*GITHAIGA and MR. WANJAMA advocates who represented them in the High Court proceedings and in the Court of Appeal proceedings be committed to civil jail for six months, without the option of a fine, for deliberately disobeying, with a lot of impunity, the decree which was issued in favour of the appellant by the Hon. Lady Justice Khaminwa on the 19<sup>th</sup> September 2012.*

- iv. General Damages of Kshs.30,000,000/= be assessed and awarded in favour of the appellant herein jointly and severally against the respondent and its 2 directors (MR. CLEOPHAS MULANGO SIMU and MR. ADAM SYNGIDURA MARJAN) and against the LAWFIRM OF WANJAMA & CO. ADVOCATES for deliberately subverting the socio-economic rights of the appellant by deliberately refusing to honour, obey and satisfy the said decree (which was given in favour of the appellant by the Hon. Lady Justice Khaminwa on the 19<sup>th</sup> September 2012) for unlawfully stalling for time in order to invalidate and delegitimize the said decree under Section 4(4) of the Limitation of Actions Act and in contravention of Articles 10, 19, 25, 27, 28, 29, 40, 48, 50 and 159 of the Constitution of Kenya and contrary to Articles 14 and 16 of the United Nations Basic Principles on the Role of Lawyers as read with the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004).*
- v. The costs of this appeal, the costs of the proceedings in the Court of Appeal and in the High Court of Kenya be awarded to the appellant against the respondent and its said two directors and against the lawfirm of Wanjama & Co. Advocates on a higher scale.*

[30] We note that despite service, the respondent did not participate in these proceedings.

#### **D. PARTIES' SUBMISSIONS**

##### ***i. The Appellant***

[31] On this Court's jurisdiction, the appellant urges this Court to adopt a holistic interpretation of Article 163(4)(a) of the Constitution, consistent with Kenya's international obligations under Article 2(5) and (6) of the Constitution. The appellant argues that contempt of court undermines the very rule of law and constitutionalism, thereby falling squarely within the ambit of Article 163(4)(a) of the Constitution. He relies on prior decisions of this Court where it has assumed jurisdiction on matters relating to contempt of court.

[33] The appellant adds that the Court of Appeal has original jurisdiction to handle applications under Section 5 of the Judicature Act. By dismissing his application, he contends that the Court of Appeal violated the Constitution and the rule of law. Furthermore, according to the appellant, failing to satisfy the decree infringes on his socio-economic rights.

##### ***The Respondent***

[34] The respondent did not file any documents or appear in Court at the hearing in opposition or support of the appeal.

#### **E. ANALYSIS AND DETERMINATION**

[35] During the hearing of this matter, we specifically directed the appellant to address us on the issue of jurisdiction since the appeal emanates from a decision from an interlocutory application. Having considered the pleadings and the

appellant's submissions, and the fact that the subject of this appeal was a ruling on an omnibus interlocutory application, we find that the primary issue for determination is *whether this Court has jurisdiction to hear and determine the instant appeal.*

***Whether this Court has jurisdiction to hear and determine the appeal.***

[36] Jurisdiction is the very cornerstone upon which any court can exercise its judicial authority, absent which, it cannot entertain any proceedings. It flows from either the Constitution or legislation, or both. As such, a court of law cannot arrogate jurisdiction to itself or source or acquire jurisdiction by judicial craft, innovation or other means. See ***Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others*** (Application 2 of 2011) [2012] KESC 8 (KLR).

[37] The appellant has invoked this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. For context, the said provision reads 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;”***

[38] This Court has, in a myriad of cases, defined the parameters of this appellate jurisdiction. In essence, the appeal must, as of necessity, involve a cogent issue on constitutional interpretation and/or application. Equally, where an ordinary subject transmutes into one involving the interpretation and/or application of the Constitution, this Court would have jurisdiction. (See ***Ngoge Vs Kaparo & 5 Others*** (Petition 2 of 2012) [2012] KESC 7 (KLR)). In addition, this question must also have been subjected to adjudication and determination by the superior courts below. Recognizing the competence of the courts in the judicial hierarchy to hear and determine matters, in ***Commission of Jurists & Another Vs Attorney***

**General & 5 Others** (Criminal Appeal 1 of 2012) [2012] KESC 4 (KLR), we observed as follows:

***“25. The Supreme Court all by itself, and without the benefit of the works of such other Courts, would be insufficiently resourced and empowered to develop rich jurisprudence as provided for. The law-making chain, indeed, goes back to the Subordinate Courts, which constitute the “grassroots” entry-point into the varied intellectual dimensions of law that will guide the process of construction of legal ideas.”***

[39] We have also set out the guiding principles under this particular facet of appellate jurisdiction. In ***Munya Vs Kithinji & 2 Others*** (Petition 2B of 2014) [2014] KESC 38 (KLR), we pronounced ourselves as follows:

***“244. In summary, the guiding principles that we have articulated under Article 163(4)(a) are:***

- i. a Court’s jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
- ii. the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;***
- iii. the lower Court’s determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;***

- iv. an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;**
- v. With regard to election petitions, the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution.”**

[40] Likewise, in *Kimani & 20 Others (On behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney-General & 2 Others* (Petition 45 of 2018) [2020] KESC 9 (KLR), we emphasized the special nature of this Court and added that it is not another layer of appeal. In that regard, we set out the following features of an appeal under Articles 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).”*

[41] Having restated the parameters of this Court’s appellate jurisdiction under Article 163 (4)(a) of the Constitution, we now turn to the present appeal. This Court has conclusively settled the parameters of its appellate jurisdiction in interlocutory applications stemming from Rule 5(2)(b) of the Court of Appeal Rules. In ***Teachers Service Commission Vs Kenya National Union of Teachers & 3 Others***, SC Application No. 16 of 2015; [2015] eKLR, we held that the purpose of Rule 5(2)(b) of the Court of Appeal Rules is to preserve the substratum of an appeal or an intended appeal. In that case, we declined to entertain the appeal, holding that an appeal to this Court founded on the said Rule would prematurely touch on the merits on issues yet to be adjudged at the Court of Appeal. This is because an appeal before this Court is based on the existence of a substantive

determination of a constitutional question by the Court of Appeal which the intending appellants seek to impugn.

[42] This position has been restated in numerous decisions of this Court; as such, it is devoid of any ambiguity. In **WMM Vs EWG** (Petition 33 (E037) of 2022) [2023] KESC 36 (KLR), this Court dismissed an appeal grounded on the Court of Appeal's decision on an application under Rule 5(2)(b) of the Court of Appeal Rules, stating that in the absence of a substantive judgment of the Court of Appeal, the jurisdiction of the Supreme Court cannot be invoked. See also **Okoti & 3 Others Vs Cabinet Secretary for the National Treasury and Planning & 10 Others** (Application E029 of 2023) [2023] KESC 69 (KLR), **Equip Agencies Limited Vs I&M Investment Bank & 3 Others** (Application 13 of 2020) [2021] KESC 70 (KLR) and **Sonko Vs Clerk County Assembly of Nairobi City & 11 Others** (Application 14 (E022) of 2021) [2021] KESC 14 (KLR).

[43] However, there are exceptions to this rule. One exception is where the interlocutory application revolves around an issue of constitutional interpretation and/or application that was canvassed before the superior courts below. We set this out concisely in the case of **Joho & Another Vs Shahbal & 2 Others** (Petition 10 of 2013) [2014] KESC 34 (KLR). The appeal therein was premised on the decision of the Court of Appeal on an interlocutory application. In finding that we had jurisdiction, we held:

***“49. In the present case, the issues arising out of the interlocutory application determined by the High Court, the Court of Appeal and now before this Court are issues of law that touch directly on the interpretation of the Constitution and the statute governing the electoral process...”***

**52. Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of article 163(4)(a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under section 3 of the Supreme Court Act, 2011 (Act No 7 of 2011).**

**53. ...It is, therefore, our considered opinion that this Court has jurisdiction to hear and determine this Appeal. While we appreciate that the appeal in respect of the main petition is pending before the Court of Appeal, we must also fulfil the constitutional mandate bestowed upon this Court.”**

Therefore, if the issue in the interlocutory application involves a controversy on the interpretation and application of the Constitution, which was also canvassed before the superior courts below and progressed through the normal judicial chain, this Court may rightfully assume jurisdiction. See para. 37 of the **Joho & Another Vs Shahbal Case (Supra)** and para. 50 **Kampala International University Vs Housing Finance Company Limited** (Petition 34 (E035) of 2022) [2024] KESC 11 (KLR).

[44] The second exception is where an order of the superior court below is unconscionable and violates express provisions of the Constitution. In **Deynes Muriithi & 4 Others Vs Law Society of Kenya & Another**, SC Civil Application No. 12 of 2015; [2016] eKLR, notwithstanding that the appeal

emanated from an interlocutory application, we assumed jurisdiction and held as follows:

***“[49] However, the foregoing principle does not limit this Court’s mandate if it is convinced that fundamental freedoms, as beckoned in Article 20(3)(a) and (b) of the Constitution, are compromised by the exercise of the discretion aforesaid; or convinced that values of the Constitution including human rights, equity, equality and integrity are departed from; or that grave injustice is occasioned by the decision in question; or that the decision in question is inconsistent with the same Court’s earlier decisions. In such instances, the Supreme Court takes into account such objective criteria as it may determine, or formulate on the basis of comparative jurisprudential perspectives, being constantly guided by the object of averting any grave injustice.*”**

***[51] It forms an integral element in the concept of jurisdiction, that whenever it becomes plain that the orders made by other Courts are destined to occasion grave injustice, and this is apparent on the fact of the decision in question, this Court, as ultimate custodian of constitutional integrity, may not turn a blind eye to such a decision, where it stands in conflict with express provisions of the Constitution.”***

**[45]** Therefore, for this Court to assume jurisdiction in this matter, the appellant must establish that his appeal falls within one of the two recognized exceptions.

**[46]** Delving into the appeal before us, it is evident that the appellant neither asserted nor demonstrated that the decision of the Court of Appeal involved a

question of constitutional interpretation or application. He has not precisely identified the constitutional provisions in question and how these issues were the subject of the decisions in the superior courts below. Equally, the appellant has not demonstrated that the appeal falls under the aforementioned exceptions. This omission is critical and falls short of the threshold of an appeal under Article 163(4)(a) of the Constitution.

[47] On the issue of committing the respondent's directors to civil jail, the appellant submits that the contempt of court orders threatens the rule of law and constitutionalism. He further urges that this Court has previously held that it has jurisdiction in matters of contempt of court. Therefore, since the Court of Appeal dismissed his application seeking committal of the respondent's directors for being in contempt of court, the appellant seeks this Court's intervention under Article 163(4)(a) of the Constitution.

[48] Applying the guidelines set out elsewhere in this Judgment on the contours of our jurisdiction under Article 163(4)(a) of the Constitution, we find that the appellant has, again, failed to establish that in dismissing this particular prayer, there arose issues related to constitutional application and interpretation. Likewise, the mere allegation, without substantiation, that the Court of Appeal violated Article 163(7) of the Constitution by ignoring this Court's jurisprudence set out in in the case of **Republic Vs Mohammed & Another** (Petition 39 of 2018) [2019] KESC 47 (KLR) on contempt of court proceedings, is insufficient to invoke this Court's jurisdiction. In any event, we find no correlation between the appellant's appeal and Article 163(7) of the Constitution.

[49] Flowing from our reasoning above, restatement and clarification of the parameters of this Court's jurisdiction under Article 163(4)(a) of the Constitution, it is apparent that the instant appeal does not meet the constitutional threshold for invocation of this Court's appellate mandate. The absence of a properly grounded

appeal renders the matter untenable before this Court. The appeal is, therefore, for dismissal.

**F. COSTS**

[50] In view of the respondent’s non-appearance and lack of participation in the appeal, we find it just and equitable to make no order as to costs.

**G. ORDERS**

[51] We hereby make the following final orders:

- i. The appeal dated 10<sup>th</sup> December 2024 is hereby dismissed.*
- ii. There shall be no order as to costs of the appeal.*
- 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 appellant.*

Orders accordingly.

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

.....  
**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE-**  
**PRESIDENT 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.**

