



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)*

**PETITION NO. E035 OF 2024**

– BETWEEN –

**PETER ODIWOUR NGOGE T/A  
O.P. NGOGE & ASSOCIATES ADVOCATES ..... APPELLANT**

– AND –

**W. M. MUIRURI (FORMER CHIEF MAGISTRATE) ..... RESPONDENT**

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*(Being an appeal from the Ruling of the Court of Appeal (M’Inoti, J.A.) dated 23<sup>rd</sup> September, 2024 in Civil Applic. No. E440 of 2024)*

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**Representation:**

Mr. Peter Ngoge for the appellant  
*(In person)*

Mr. Rajinder Billing for the respondent  
*(R. Billing & Co. Advocates)*

**RULING OF THE COURT**

**[1] COGNISANT** that this Court’s jurisdiction to hear appeals from the Court of Appeal is circumscribed in terms of Article 163 (4) of the Constitution; in that, it can only be invoked through two avenues, that is; under Article 163(4)(a) as of right where an appeal involves the interpretation and application of the Constitution; and under Article 163(4)(b) upon certification either by the Court of Appeal or this Court that an appeal raises matters of general public importance. It is also well settled that the mere clothing of an appeal as involving a question of

constitutional interpretation or application does not grant jurisdiction to this Court under Article 163(4)(a). Rather, this Court must be satisfied that either the interpretation or application of the Constitution said to be in issue had formed the basis for the determination(s) at the superior courts below and that the same issue(s) had therefore progressed through the normal appellate mechanism to reach this Court; or that the challenge relates to the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in question as aptly set out in ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR); and

**[2] UPON CONSIDERING** the Preliminary Objection raised by the respondent in his submissions dated 28<sup>th</sup> November, 2024 challenging this Court's jurisdiction to entertain the appeal herein which is anchored on Article 163(4)(a) of the Constitution. The tenor of which is that, the appeal does not meet the threshold under Article 163(4)(a) and Section 15A of the Supreme Court Act given that the Court of Appeal's (*M'Inoti, J.A*) ruling dated 23<sup>rd</sup> September, 2024 (impugned ruling), subject thereof did not consider any issue of constitutional interpretation or application and therefore, the appeal is unequivocally incompetent; and

**[3] BEARING IN MIND** the salient facts that culminated in the appeal *to wit*; that the appellant, by a letter dated 21<sup>st</sup> December, 2006 to the Chief Justice lodged a complaint against the respondent, who at the time was a Chief Magistrate, with regard to alleged misconduct in handling certain taxation matters wherein the appellant was a party. In turn, the respondent filed a suit in the High Court, **HCCC No. 813 of 2007**, seeking general and exemplary damages against the appellant for libel; the suit, which is still pending, is premised on the complaint letter to the Chief Justice wherein the appellant also copied a number of persons and institutions; that according to the respondent, the letter contained falsehoods which the appellant maliciously published the contents thereof to a number of persons and institutions as well as the general public; and

**[4] NOTING** that meanwhile, the complaint was forwarded to the Judicial Service Commission (JSC), and by a letter dated 22<sup>nd</sup> March 2010 the JSC decided to compulsorily retire the respondent; subsequently, the appellant filed a Preliminary Objection dated 8<sup>th</sup> July, 2023 which basically challenged the High Court's jurisdiction to entertain the libel suit; the objection was to the effect that the suit is *res-judicata*; the issues therein revolve around a complaint letter which was a privileged document; that the suit contravenes the doctrine of separation of powers since the respondent is asking the High Court to sit on appeal against the disciplinary proceedings of JSC; that the Defamation Act is subordinate to Articles 10, 25, 27, 33, 28, 29 and 172 of the Constitution; and

**[5] FURTHER NOTING** that the High Court (*J. Mulwa, J.*) vide a ruling dated 31<sup>st</sup> July, 2024 dismissed the appellant's Preliminary Objection on the ground that it did not raise pure points of law; that it could not abdicate its jurisdiction as conferred by the Constitution and statute solely because the suit involved disciplinary proceedings before JSC; and

**[6] APPRECIATING** that as a result, the appellant filed a notice of appeal signifying his intention to challenge the High Court ruling before the Court of Appeal; in addition, the appellant filed before the same court an application dated 26<sup>th</sup> August, 2024, **Civil Applic. No. E440 of 2024**, pursuant to Rule 5(2)(b) of the Court of Appeal Rules under a certificate of urgency; that application seeks *inter alia*, an order of stay of the proceedings in the High Court pending the hearing of the intended appeal before the Court of Appeal; nonetheless, on 29<sup>th</sup> August, 2024 the Court of Appeal (*M'Inoti, J.A*) declined to certify the stay of proceedings application as urgent; unrelenting, the appellant filed another application on 2<sup>nd</sup> September, 2024 urging the appellate court for an urgent *inter partes* hearing of the stay of proceedings application; similarly, the appellate court (*M'Inoti, J.A*) by the impugned ruling declined to issue the order sought; and

**[7] TAKING INTO ACCOUNT** the appellant's submissions dated 3<sup>rd</sup> December, 2024 pertaining to the objection to the effect that, *M'Inoti, J.A* in declining to

certify his application, which seeks stay of the proceedings before the High Court as urgent allowed the High Court to exercise jurisdiction it lacked in entertaining the libel suit filed by the respondent; quoting this Court in ***Asanyo & 3 others Vs Attorney-General*** [2020] KESC 62 (KLR) and ***Erad Supplies & General Contractors Limited Vs National Cereals And Produce Board*** [2012] KEHC 4372 (KLR), the appellant urges that jurisdictional errors, such as in the current matter, are appealable to this Court as of right; according to him, Article 163(4)(a) should be interpreted in a manner that does not place Kenya in breach of its international obligations; more so, since Chapter 4 of the Constitution is derived from international human rights treaties and conventions that Kenya has ratified; accordingly, the respondent has subjected the appellant to torture and cruel punishment by filing the libel suit based on the disciplinary proceeding at the JSC; and

**[8] UPON DELIBERATIONS** on the Preliminary Objection and the rival arguments, **WE OPINE** as follows:

- i. It is common ground that the learned Judge of Appeal (*M’Inoti, J.A*) by the impugned ruling declined to give a priority *inter partes* hearing date for the appellant’s stay of proceedings application. It follows therefore that the appeal before us challenges the exercise of discretion by a single judge of the appellate court. Towards this end, this Court’s position is that it would not normally entertain an appeal from a ruling emanating from the Court of Appeal’s exercise of its discretion. More so, when the substantive appeal at the Court of Appeal is still pending. See ***Bia Tosha Distributors Limited Vs Kenya Breweries Limited & 6 others*** [2023] KESC 14 (KLR).
- ii. In this case, not only is the stay of proceedings application before the Court of Appeal, as admitted by the appellant, yet to be heard but also the appeal against the High Court ruling which is the basis of the said application remains undetermined. As such, if this Court were to render itself on the appeal herein it would certainly entail comments on the merits being made

prematurely on the stay of proceedings application and the appeal yet to be adjudged at the Court of Appeal.

- iii. Besides, our perusal of the impugned ruling does not reveal any instance of constitutional interpretation or application by the appellate court. The learned Judge simply rendered his mind on whether there were any prevailing circumstances that would justify the stay of proceedings application being given priority hearing over other matters filed before it. Needless to state that under the Court of Appeal Rules, the appellant had an opportunity to seek review of the single judge ruling before a full bench instead of lodging this appeal. Be that as it may, the question as to when this Court will assume appellate jurisdiction on the basis of Article 163 (4) (a) of the Constitution has been repeatedly addressed in a number of cases. The guiding principles as enunciated by this Court in ***Ngao Vs Kitheka*** [2025] KESC 1 (KLR) as to when and whether it may assume appellate jurisdiction, are devoid of any ambiguity.
- iv. In the circumstance, we find the appeal herein does not meet the threshold for invoking our appellate jurisdiction under Article 163(4)(a) of the Constitution. Accordingly, the Preliminary Objection prevails and as a result, we shall down our tools as far as the merits of the appeal is concerned.
- v. The issue of award of costs lies within the Court's discretion and follows the general principle set out by this Court in ***Athi River Steel Plant Limited Vs Rao & 4 others*** [2025] KESC 23 (KLR), that costs follow the event. In exercise of our discretion, we direct that the appellant shall bear the costs of this appeal.

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

- i. The Preliminary Objection raised by the respondent in his submissions dated 28<sup>th</sup> November, 2024 is hereby upheld.*
- ii. The Petition dated 8<sup>th</sup> October, 2024 and filed on 11<sup>th</sup> October, 2024 is hereby struck out with costs to the respondent.*
- iii. We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the depositor.*

It is so ordered.

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> day of June, 2025.**

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

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

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

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**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**