



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E011 OF 2025

-BETWEEN-

STANDARD CHARTERED BANK

KENYA LIMITED 1ST PETITIONER

DAVID GICO KAMAU 2ND PETITIONER

WALTER MUNGAI 3RD PETITIONER

AZIRIKAM MUDIKA LUBIA 4TH PETITIONER

BARTESH SHAH 5TH PETITIONER

(As the trustees of Standard Chartered Kenya Pension Fund (the First Scheme))

DAVID GICO NJOROGE 6TH PETITIONER

WALTER MUNGAI 7TH PETITIONER

BEATRICE MAINGI 8TH PETITIONER

JANE CHEGE 9TH PETITIONER

NICHOLAS OTADO 10TH PETITIONER

JULIUS MWANGI 11TH PETITIONER

(As the Trustees of the Standard Chartered Kenya Staff Benefits Scheme 2006 (the 2nd Scheme))

-AND-

THE RETIREMENT BENEFITS

APPEAL TRIBUNAL 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

ABDALLA OSMAN & OTHERS 3RD RESPONDENT

RETIREMENT BENEFITS AUTHORITY 4TH RESPONDENT

(Being an application for stay of execution against the Judgment and Orders of the Retirement Benefits Tribunal delivered in RBAT Appeal No. 8 of 2021, on 28th April 2022)

Representation:

Mr. Chacha Odera & Mr. Jonathan Kisya for the petitioners
(Oraro & Company Advocates)

Mr. Fredrick Kariuki for the 1st & 2nd respondent
(State Counsel, Office of the Attorney General)

Ms. Ruth Wanyonyi for the 3rd respondent
(Wanyonyi & Muhia Advocates)

Mr. Brian Odongo & Mr. Clifton Ouko for the 4th respondent
(Kiptinness & Odhiambo Associates LLP)

RULING OF THE COURT

[1] UPON PERUSING the Motion by the petitioners dated 21st March 2025 and filed on 24th March 2025 under Articles 48, 50(1) of the Constitution, Sections 3, 3A, 21 and 23A of the Supreme Court Act, 2011 and Rules 17, 31 and 32 of the Supreme Court Rules, 2020, seeking, *stay of execution of the Judgment and*

Decree by the Retirement Benefits Appeal Tribunal (RBAT) delivered in RBAT Appeal No. 8 of 2021 on 28th April 2025, pending the hearing and determination of the instant application and petition, both dated 21st March 2025 and filed on 24th March 2025; stay of further proceedings in RBAT Appeal No. 8 of 2021; and costs; and

[2] UPON CONSIDERING the petitioners' grounds on the face of the application and affidavit in support sworn by *Fred Waswa* on 21st March 2025, in which it is contended that the application meets the threshold for stay, particularly that; the appeal is arguable and raises weighty issues for consideration; the decision by the 1st respondent was made contrary to Section 49 of the Retirement Benefits Act (*the Act*), which requires production of evidence by sworn affidavit and interrogatories; unless stay is granted, the appeal will be rendered nugatory as there is an imminent threat of execution by the 3rd respondents; following the Judgment by the Court of Appeal, the matter has now been scheduled for directions before the 1st respondent; the petitioners are not aware of any assets by the 3rd respondents that can be attached to satisfy a Judgment of this Court should the appeal be successful; if stay is not granted, the petitioners will be exposed to irreversible fiscal liability; and it is in public interest to grant the application; and

[3] UPON CONSIDERING the petitioners' submissions dated 21st March 2025 in support of the application for stay, and supplementary submissions dated 24th April 2025 in opposition of the preliminary objection, to the effect that the appeal upon which the application is anchored raises issues of constitutional interpretation and application of Articles 25, 47, 50, 165 (6) & (7) and 169 (2) of the Constitution and Section 11 of the Fair Administrative Act; the constitutional issues were not only in contest and the subject of determination by the superior courts below, but also the Court of Appeal took a constitutional trajectory in its decision. They rely on this Court's decision in ***Rutongot Farm Limited Vs Kenya Forest Services & 3 others*** (Petition 2 of 2016) [2018] KESC 27 (KLR), to invoke this Court's jurisdiction under Article 163(4)(a). It is also the petitioners' submission that their judicial review application raised issues of constitutional

interpretation and application and therefore, this Court has jurisdiction to conduct a merit review. They cite this Court's decisions in ***Dande & 3 others Vs The Inspector General, National Police Service & 5 others*** (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (***Dande***) in support of their contention; and

[4] UPON FURTHER CONSIDERING the petitioners' assertions that this Court has jurisdiction to grant interlocutory reliefs, including stay under Section 23A of the Supreme Court Act. The petitioners regurgitate their grounds in support and urge that they have met the principles for grant of stay espoused in ***Munya Vs Dickson Mwenda & 2 others***, SC Application No. 5 of 2014; [2014] eKLR; and restated in ***Kombe Vs Karisa & 3 others*** (Petition E020 of 2023) [2024] KESC 25 (KLR). To this end, the petitioners emphasize that the 1st respondent acted outside the scope of its jurisdiction under Section 49 of the Act, rendering the subsequent proceedings and judgment a nullity and a breach of their fundamental rights. Furthermore, that the Court of Appeal and the High Court misapplied the decision in ***Dande***, in holding that they could not conduct a merit review, despite the petitioners pleading violations of the Constitution. It is also urged that it is in the public interest to grant stay as the appeal involves over 628 pensioners and an opportunity for the Court to clarify its position in ***Dande***; and

[5] UPON CONSIDERING the 3rd respondents' replying affidavit, sworn by *Grace Njeri Ndirango* on 4th April 2025, wherein it is mainly asserted that the petitioners have failed to meet the threshold for the grant of stay. Particularly, the grounds relied on in the appeal and regurgitated in the application fail to demonstrate that the appeal is arguable, and fall short of the constitutional threshold envisaged under Article 163(4)(a) of the Constitution. They also argue that the Judicial review application, the subject of the appeal before the Court of Appeal and now this Court, was brought under Order 53 of the Civil Procedure Rules, seeking orders of *certiorari* and prohibition, and did not purely hinge on the interpretation or application of the Constitution; the 1st respondent conducted its proceedings per the law; and in any event, the petitioners did not object or

challenge the hearing directions by the 1st respondent, but instead participated willingly until an unfavorable decision was handed down.

[6] UPON FURTHER CONSIDERING the 3rd respondents emphatical averment that; to grant the application for stay would greatly prejudice the pensioners or families of deceased pensioners, who await the conclusion of the protracted litigation, more so, because a good number of the 3rd respondents have died during the pendency of the dispute, missing out the opportunity to enjoy the fruits of their investment; it is against public interest to continue the delay in the release of pension payment; the delay amounts to denial of the pensioners constitutional rights to life, health and social protection, especially because a majority of the pensioners are elderly and ailing. They also urge that the application is devoid of merit and is an abuse of the court process; and without prejudice to the foregoing, in the absence of sufficient security for the performance from the petitioners, it would be unjust to grant the application; and

[7] NOTING the 3rd respondents' preliminary objection dated 7th April 2025, and the 1st and 2nd respondents' preliminary objection dated 14th April 2025, both seeking to strike out the appeal, on grounds that: this Court lacks jurisdiction to hear and determine the intended appeal and instant application as the same is premised on an incompetent petition; the decision of the Court of Appeal from which the appeal is brought does not involve the interpretation or application of the Constitution; and that the Retirement Benefits Act does not provide an appellate process against decisions of RBAT; and

[8] UPON CONSIDERING the 3rd respondents' submissions dated 4th April 2025, in opposition to the application for stay, further submissions dated 30th April 2025, in support of the preliminary objection, and the 1st and 2nd respondents' submission dated 15th April 2025 in support of the preliminary objection, to the effect that this Court lacks jurisdiction to hear and determine the appeal from which the instant application emanates; it is the respondents' submission that the judicial review application and the appeal before the Court of Appeal revolved

around the interpretation and application of sections 48 and 49 of the Act and not the interpretation or application of the Constitution. They cite *inter-alia*, ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** (Petition 3 of 2012) KESC 9(KLR); in support of the Preliminary objection.

[9] UPON FURTHER CONSIDERING the submissions by the respondents, that be that as it may, the Act does not provide for appeals against the decisions of the 1st respondent, and consequently, an appeal does not lie to this Court, in support of which they cite ***George Omondi & 210 others Vs Retirement Benefits Authority Appeals Tribunal & 2 others*** [2020] KECA 666 (KLR) as persuasive authority; the appeal is not arguable for reasons set out above; there is nothing to be rendered nugatory, or put differently, nothing to be preserved; and that public interest leans towards avoiding any further delay and abuse of the court process by the petitioners so as to hasten the release of the pension funds to the 3rd respondents; and

[10] BEARING IN MIND this Court's authoritative pronouncement in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another***; SC Petition No. 3 of 2012; [2012], eKLR, regarding the circumstances pursuant to which an intending appellant may invoke the provisions of Article 163 (4) (a), wherein we stated:

*“This Article must be seen to be laying down 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 or application of the Constitution can be entertained by the Supreme Court...***

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.”

[11] **FURTHER NOTING** that in *Edwin Harold Dayan Dande & 3 others Vs The Inspector General, National Police Service & 5 others* [supra], we settled the scope of judicial review, as follows;

*“It is clear from the above decisions that **when a party approaches a court under the provisions of the Constitution, then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.**”*

[12] **HAVING CONSIDERED** the totality of the applications, responses and submissions made by the parties, **WE NOW OPINE** as follows:

- i) Examining the records and decisions by the superior court below, it is clear that the High Court in *Miscellaneous Civil Application No. E110 of 2022* mainly interrogated whether the proceedings and judgment of the 1st respondent were ultra vires the Act. Similarly, the Court of Appeal in its judgment in *Civil Appeal No. E847 of 2023* primarily confined itself to the questions whether the learned judge erred in his finding and whether the court should have conducted a merit review.
- ii) We also note that the reliefs sought in the statement filed before the High Court (upon grant of leave) were for orders of certiorari, prohibition, and costs. Likewise, the prayers sought before the Court of Appeal were for setting aside the Judgment by the 1st respondent and granting the prayers set out in the statement.

iii) Consequently, even though it was indicated that the judicial review application was also brought pursuant to Articles 25, 47, 50, 165(6) (7) and 169(2), it neither involved the interpretation or application of these constitutional provisions, nor did the superior courts below interpret or apply the Constitution or take a constitutional trajectory. The mere allegation of constitutional violations cannot bring the appeal within the ambit of this Court's jurisdiction under Article 163(4)(a).

iv) On the basis of the foregoing, it is clear to us that this Court lacks jurisdiction to hear and determine the intended appeal and the application for stay attendant thereto.

[13] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- i) The Preliminary Objections dated 7th April 2025 and 14th April 2025, filed on 8th April 2025 and 14th April 2025 respectively, be and are hereby upheld;***
- ii) The Notice of Motion dated 21st March 2025 and filed on 24th March 2025, be and is hereby dismissed;***
- iii) The Petition of Appeal No. E011 of 2025 dated 21st March 2025 and filed on 24th March 2025 be and is hereby struck out;***
- iv) The petitioners shall bear the respondent's costs; and***
- v) The sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the petitioners;***

It is so ordered.

