



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Mwilu; DCJ & VP, Wanjala, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. E028 OF 2025

- BETWEEN-

**KAMUTHI FARMERS COOPERATIVE
SOCIETY LTD.....APPELLANT/APPLICANT**

-AND-

NAIROBI CITY COUNTY.....RESPONDENT

-AND-

**CATHOLIC ARCH DIOCESE OF NAIROBI (KAHAWA WEST
CATHOLIC CHURCH) & 18 OTHERS.....INTERESTED PARTIES**

*(Being an application for stay of execution of the Judgment of the Environment
and Land Court at Nairobi (Komingoi J) dated 21st February 2025) in Nairobi
Milimani ELC No. 6898 of 1991)*

Representation

Ms. Wangui for the Applicant
(Paul Mwangi & Co. Advocates)

Ms. Muthoni h/b for Mrs. Maina for the 1st Respondent
(Wanjiku Maina & Co. Advocates)

No appearance for the Interested Parties

RULING OF THE COURT

[1] UPON CONSIDERING the Notice of Motion dated 24th June 2025, the supporting affidavit sworn by **Bernard Kungu Maina** both filed on 18th July 2025 and written submissions dated 17th July 2025, filed on 18th July 2025 wherein the applicant seeks a stay of execution and/or enforcement of the entire judgment (and resultant order) of the Environment and Land Court of Kenya at Nairobi delivered on 4th June 2020 in *Nairobi Milimani ELC No. 6898 of 1991* pending the hearing and determination of this appeal, and a stay of further proceedings in *Nairobi Milimani ELC No. 6898 of 1991* pending the hearing and determination of the appeal; and

[2] NOTING THAT the applicant states that it is a cooperative society with over 7000 members and claims ownership of two parcels of land measuring approximately 154.5 acres and 21.238 acres, respectively, located in Kahawa within Nairobi County. Further, that at the trial court and subsequently at the Court of Appeal, the applicant's case was that the respondent forcefully and without legal authority entered and occupied the suit property known as L.R. No. 71/7, measuring 415 acres prompting proceedings before the two courts below; and

[3] FURTHER NOTING that the respondent filed a defence and counterclaim before the trial court claiming that it purchased the two suit properties in 1973, namely the one measuring 154.5 acres and the other measuring 21.238 acres, from the previous owner of L.R. No. 71/7, Kahawa Farmers Cooperative Society and has therefore been in lawful occupation of both parcels since then. The applicant in response to that claim submitted that for the parcel measuring 154.5 acres, the respondent's counterclaim dated 13th July 1992 relied on a Sale Agreement dated 2nd January 1973, which is beyond the seven-year limitation period. For the parcel measuring 21.238 acres, it was the applicant's response that the respondent did not initially plead a written contract but in its amended defence and counterclaim dated 9th April 2009, the claim was made in pleadings for the first time 30 years after the alleged contract was entered into; and

[4] FURTHERNOTING that the applicant submits that the High Court lacked jurisdiction to entertain the counterclaim pursuant to Section 7 of the Limitations Act, Cap 22, Laws of Kenya hence the appeal before us. The applicant, in its submissions, states that this jurisdictional issue was raised for the first time in the Court of Appeal in *Civil Appeal No. EO47 of 2021* and the applicant in that regard contends that the Court of Appeal violated its right to a fair trial by failing to address the trial court's jurisdiction regarding the limitation of time in respect of the respondent's claim, thereby infringing upon its right to equal protection under Article 27 (1) of the Constitution. The applicant further states that the anticipated execution of the decree would adversely impact its economic and social interests and cause significant hardship. The applicant, in addition, maintains that it has an arguable appeal and that its members would suffer substantial loss and irreparable harm if the transfer proceeds, as the respondent may dispose of the subject properties before the appeal is heard, rendering it nugatory. It references the principles for a stay of execution as outlined in *Gatirau Peter Munya Vs Dickson Mwenda and 2 Others* SC Appl. No. 5 of 2014 [2017] eKLR, and relies on the decision of *Kenya Hotel Properties Limited Vs Attorney General & 5 Others* (Application 27 of 2020) [2020] KESC 6 (KLR), to argue that it has an arguable appeal. It also cites *Rhoda Mukuma Vs John Abuoga* (Civil Application 95 of 1987) [1988] KECA 107 (KLR) to support the principle that substantial loss must be prevented by preserving the status quo, as such loss would otherwise render the appeal nugatory; and

[5] UPON CONSIDERING the 1st respondents' replying affidavit sworn by **Christine Ireri**, its County Attorney, and written submissions both dated 24th July 2025 and filed on 28th July 2025, wherein it is submitted that the Court of Appeal affirmed the decision of the Environment and Land Court that Kahawa Farmers Cooperative Society held the two parcels of land in trust for the respondent, and accordingly dismissed the appeal. Further, the issue of the Court of Appeal's jurisdiction to hear the appeal from the Environment and Land Court

was neither contested nor raised at any stage during the appeal proceedings. In any event, the applicant submitted to the jurisdiction of the Court of Appeal and actively participated in the proceedings, and is, therefore, estopped from raising such claims solely due to dissatisfaction with the court's decision. It is furthermore contended by the respondent that the issue of the respondent's claim being time-barred under the Limitation of Actions Act was raised only at the Court of Appeal, and contrary to the applicants' assertions, the Court of Appeal concluded that the creation of a constructive trust barred the said issue from being determined by it; and

[6] **IN ADDITION** to the above assertions, the respondent firmly believes and submits that the matter does not involve any question requiring constitutional interpretation or application and therefore urges the Court to exercise its jurisdiction under Section 18 of the Supreme Court Act, 2011, and issue an order for summary dismissal of the appeal since, on its face, it appears entirely defective. The respondent relies on the decision in ***United Millers Limited Vs Kenya Bureau of Standards & 5 Others*** [2021] KESC 72 (KLR) to argue that this Court lacks jurisdiction to entertain the appeal, and ***Kenya Electricity Transmission Co. Limited (KETRACO) Vs Instalanciones Inabensa S.A.*** (Petition No. 17 (E024) of 2021) to contend that, on the question of whether the appeal shall be rendered nugatory, the Court's concern is whether what is sought to be stayed, if permitted, is reversible; or, if not reversible, whether damages would reasonably compensate the aggrieved party. The respondent further claims that, given this is a land matter, damages would constitute adequate compensation if a stay is not granted. Regarding whether granting a stay serves the public interest, the respondent submits that the properties form part of the extensive Kahawa West Estate and are occupied by thousands of families who live and do business there. These families have never been issued titles to their properties due to litigation in this suit, which began in the High Court in 1991, and they continue to wait for titles 34 years later. This case adds to the existing

uncertainty, and this court should consider that factor and refuse to grant the requested stay, so the respondent pleads; and

[7] UPON ALSO CONSIDERING the applicant's rejoinder submissions dated 7th August 2025 and filed on the same date, wherein it reiterates that this Court has jurisdiction to hear and determine the matter, submitting that in challenging the jurisdiction of the Court of Appeal in hearing and determining the counterclaimed pieces of land, the appeal has taken a constitutional interpretation trajectory and it is also its contention that the issues in contest are normative derivative of and flow from Articles 25 (c), 50 and 159 (2) (e) of the Constitution; and

[8] IN CONCLUSION the applicant urges that the respondent's claim for the suit properties was based on an agreement of sale, which it argues was statute-barred and in any event, that no claim of constructive trust was raised by the respondent in the trial court; and

[9] BEARING IN MIND that in addition to its submissions, the respondent has filed a notice of Preliminary Objection to the appeal dated 26th June 2025 (filed on 27th June 2025); and **NOTING** that the appellant has filed grounds of objection to the Preliminary Objection dated 4th July 2025, and both raise similar issues as submitted herein; and

[10] TAKING INTO ACCOUNT the pleadings and submissions summarized above, **WE NOW OPINE AND DETERMINE** as follows:

- i. The question whether this Court's jurisdiction has been properly invoked under Article 163 (4) (a) of the Constitution was addressed in *Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & another* SC petition No. 3 of 2012; [2012], eKLR where we stated thus:

“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. [Emphasis Added]

- ii. The main issue before the trial court concerned the question on who is the valid owner of 154.5 acres and 21.97 acres within LR. No. 71/7. It was not disputed that the respondents have been in occupation of the suit premises since 1973, which include a permanent residential estate, schools, churches, a market, a sewerage plant, and other amenities. The applicant did not also contest the occupation of the respondents but challenged the two agreements allegedly entered into by its former officials and the 1st respondent, specifically the agreement dated 21st January 1973 and an unwritten agreement entered into in 1979.
- iii. The trial court found the two agreements to be valid and determined that upon purchase of the two portions, the 1st respondent was granted vacant possession, and a constructive trust was created in its favour. The Court of Appeal agreed with the trial court's reasoning that indeed the agreements were valid and a constructive trust existed.
- iv. The Court of Appeal, in passing, held that faulting the trial judge on the finding that the counterclaim was time-barred by the Laws of Limitation had no basis or place, since the issue was not raised in the appellants' reply to defence and defence to counterclaim; and that it was also not one of the issues raised during the proceedings for the judge to decide. In any event, the appellate court concluded, this contention was displaced by the fact that

a constructive trust had arisen after the respondent was permitted to take possession, occupy, and develop both parcels of land.

- v. Our analysis of the records leads us to the conclusion that the dispute between the parties was solely regarding the ownership of the suit property and no constitutional issues were raised. We also find that the Court of Appeal addressed concerning the counterclaims and the limitation of actions, concluding that the issue was not raised in the trial court and was superseded by the creation of the constructive trust. In our view, this determination by the Court of Appeal did not in any way follow a constitutional trajectory. The Court of Appeal considered the issue as presented by the appellant and responded negatively to the same.
- vi. From the foregoing, it is our considered view that the application does not warrant the need to evaluate it against the criteria set out in ***Gatirau Peter Munya Vs Kithinji & 2 others*** [2014] KESC 30 (KLR), because we lack the jurisdiction to entertain both the appeal and the application before us.
- vii. Section 18 of the Supreme Court Act 2011 grants this Court the jurisdiction to make an order for summary dismissal of a petition where it is apparent on the face of it that it is wholly defective. Having determined that this Court lacks jurisdiction to entertain the appeal under Article 163 (4) (a) of the Constitution, we can only but firmly conclude that the appeal has no legal basis and must be struck out. And whereas we note that the Preliminary Objection dated 26th June 2025 has raised the same issue and has been directed to be subsumed in the appeal, we are certain that the appeal ought to be struck out at the earliest as we shall shortly do. We have shown why.
- vii. Having so held, we must also hold that the Notice of Motion dated 24th June 2025 is unmerited and is hereby dismissed for lack of jurisdiction.

[9] Consequently, and for the reasons afore-stated, we make the following orders:

- i. The Preliminary Objection dated 26th June 2025 and filed on 27th June 2025 is hereby upheld.***
- ii. The Notice of Motion dated 24th June 2025 and filed on 18th July 2025 is hereby dismissed.***
- iii. The Petition of Appeal dated 24th June 2025 and filed on 18th July 2025 is hereby struck out for want of jurisdiction.***
- iv. The applicant shall bear the costs of the application.***
- v. The deposit for security of costs to be refunded to the appellant.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 5th day of December 2025.

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

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
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

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W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

