REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E018 OF 2025

BETWEEN

ROSELINE ORIMBA ONDUO ..... APPELLANT

AND

MAURICE OTIENO OCHOLA .....1ST RESPONDENT

ROBERT OGOLA OCHOLA.....2ND RESPONDENT

WILKISTER ADHIAMBO OTIENO.....3RD RESPONDENT

---

*(Being an Appeal from the Ruling and Order of the Court of Appeal at Kisumu (**Makhandia, Omondi & Kimaru JJ.A**.) delivered on 28th February 2025 in Civil Application No. KSM E050 of 2024)*

Representation:

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

Ms. Otieno for the 3rd Respondent
(*Otieno & Achieng' Company Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of Appeal before this Court is dated 11th April, 2025, and filed on 14th April, 2025. The appeal is filed pursuant to the provisions of Article 163(4)(a) of the Constitution. The appeal challenges the decision of the Court of Appeal *(Makhandia, Omondi & Kimaru JJ.A)* in ***Civil Application No. KSM E050 of 2024*** delivered on 28th February, 2025, declining to grant the appellant orders under Rule 5(2)(b) of the Court of Appeal Rules, staying execution of the decision of the Environment & Land Court, and restraining the respondents from taking possession of the suit property herein known as West Kasipul/Kodera-Karabach/881, measuring 1.3Ha.

B. LITIGATION HISTORY

i. Proceedings at the Environment and Land Court

[2] The appellant initiated a suit at the Environment and Land Court by way of originating summons dated 30th January, 2021, pursuant to Section 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya. It was her contention that she was entitled to recover the whole property known as West Kasipul/Kodera-Karabach/881, on the grounds that she had been peacefully and continuously in active use and possession of the aforesaid parcel of land for well over 30 years, without any interference.

[3] The 1st to 3rd respondents opposed the claim vide a joint replying affidavit sworn on 29th September, 2022, by Samson Otieno Odongo, the holder of a power of attorney for the 3rd respondent, and who was duly authorized by the 1st and 2nd respondents to swear the affidavit on their behalf. They deposed that the 3rd respondent lawfully bought the suit property from the 1st and 2nd respondents, who were the legal representatives of the deceased owner of the land, and that the appellant was a trespasser on the said land and prayed that the appellant's suit be dismissed.

[4] The ELC Court (*Ongondo, J*) vide a judgment dated 9th April, 2024, held with regard to possession and having dispossessed the owner, that the vendor in the purported sale agreement, had not obtained a grant of letters of administration to the estate of his brother, and therefore, he could not dispose of the suit property as he was not the legal representative of the estate of his brother. The court also found that there was a discrepancy between the *viva voce* evidence of the appellant and the police abstract, therefore there was nothing to establish when time started running for purposes of adverse possession in the dispute as provided under Sections 7 and 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya. To that end, the court held that the appellant had not proved the ingredients of adverse possession to the requisite standard as held in the case of ***Wilson Kazungu Katana and 101 others Vs Salim Abdalla Bakshein and anothe***r [2015] KECA 728 (KLR) and thereby dismissed the suit with costs to the 3rd respondent.

ii. Proceedings in the Court of Appeal

[5] Aggrieved, the appellant moved to the Court of Appeal vide Notice of Motion dated 24th April, 2024, in ***Civil Application No. KSM E050 of 2024*** seeking stay of execution pursuant to Rule 5(2)(b) of the Court of Appeal Rules.

[6] In its ruling delivered on 28th February, 2025, the Court of Appeal took the considered view that though the appellant had demonstrated that there existed an arguable appeal, she had failed to demonstrate that her arguable appeal would be rendered nugatory should execution of the judgment of the trial court be allowed to proceed. The court hastened to add that the ELC had dismissed the appellant's suit, and that was a negative order that was not capable of execution, therefore nothing to injunct. Further, that the appellant's averments that unless the orders sought were granted, the respondent would use the impugned orders to institute criminal proceedings were purely speculative and unworthy of consideration. Consequently, the Court of Appeal dismissed the appellant's Notice of Motion with costs to the respondents.

iii. Proceedings in the Supreme Court

[7] Dissatisfied, the appellant has filed the instant appeal, challenging the ruling of the Court of Appeal on grounds that the learned judges erred both in law and in fact in denying her stay of execution. In response to the appeal, the 3rd respondent opposes the appeal vide a replying affidavit dated 2nd May, 2025.

C. PARTIES SUBMISSIONS

i. Appellant's Submissions

[8] The appellant filed their submissions dated 10th April, 2025, wherein she avers that this Court has jurisdiction to hear and determine the appeal on merits, because the impugned decision of the Court of Appeal offends public policy by promoting forced eviction, contrary to Section 10 of the Penal Code as read with Articles 10, 19, 20, 21 and 163 (7) of the Constitution of Kenya, and this Court's decision in ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** (Petition 3 of 2018) [2021] KESC 34 (KLR) and the Court of Appeal decision in ***Gusii Mwalimu Investment Co. Ltd & Another Vs Mwalimu Hotel Kisii Ltd*** [1996] KECA 118 (KLR). The appellant further posits that the decision of the Court of Appeal contravened the doctrine of *lis pendens* as laid out in ***Annie Jepkwemboi Ngeny Vs Joseph Tirieto & Another*** [2021] KECA 464 (KLR) and ***Naftali Ruthi Kinyua Vs Patrick Thuita Gachure & Another*** [2015] KECA 911 (KLR).

[9] The appellant reiterates that forced evictions without securing eviction orders from the court, amounts to a serious violation of the human rights of the victims, as was observed in ***Mitubell*** (supra) and that the Court of Appeal's arbitrary dismissal of the appellant's application not only failed to accord the appellant a fair hearing, but also unlawfully permitted the respondents to subject the appellant to cruel and degrading treatment.

[10] The appellant submits that the impugned ruling not only manifested extreme bias, but also prejudiced the prosecution's case in the ***Oyugi Criminal case No. E202 of 2024***, thereby contravening public interest, considering that the Office of

the Director of Public Prosecutions was not a party in the matter before the Court of Appeal. The appellant also contends that in light of her prior arrest, there is a likelihood of another wave of arrest at the instance of the respondents, even before her appeal is heard and determined by the Court of Appeal, thereby denying the appellant a fair hearing or effective access to judicial remedies on equal footing with the respondents. Further, that the forced evictions subvert the socio-economic rights and the civil and political rights of victims. The appellant, therefore, urges the court to allow the prayers sought in the appeal and to dismiss the respondents' plea on jurisdiction.

ii. 3rd Respondent's Submissions

[11] The 3rd respondent submits that the appeal does not meet the criteria set out under Article 163(4)(a) of the Constitution as there are no constitutional provisions or controversy that were canvassed before the Environment and Land Court nor the Court of Appeal, and if any, the two superior courts efficiently pronounced themselves upon them. In this regard, the 3rd respondent cites this Court's decision in ***Erad Suppliers & General Contractors Limited Vs National Cereals & Produce Board*** [2012] KESC 6 (KLR). The 3rd respondent also submits that the petition involves an application of stay which was dismissed by the Court of Appeal, and, this Court has established that it will not hear matters relating to interlocutory applications where the substantive appeal has not been determined. Equally, in this regard, the respondent cites ***Paul Mungai Kimani & 2 Others Vs Kenya Airports Authority & 3 Others*** (Petition 11 of 2019) [2021] KESC 43 (KLR).

D. ISSUES FOR DETERMINATION

[12] Having carefully evaluated the pleadings, the decisions of the two superior courts below and the arguments in this appeal, we consider the following two issues as falling for our determination;

i. Whether this Court has jurisdiction to hear and determine this appeal;

ii. *If the answer to i) above is affirmative, whether the Court of Appeal erred in its decision of 28th February, 2025?*

E. ANALYSIS AND DETERMINATION

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

[13] We start by noting that the appellant has approached this Court under Article 163(4)(a) of the Constitution, which allows appeals as of right to the Supreme Court in all cases involving the interpretation and application of the Constitution. The Article provides that:

> ***"(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;"***

[14] 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. We have no doubt that the guiding principles enunciated by this Court as to when and whether it may assume appellate jurisdiction are not only clear, but, devoid of any ambiguity. In ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another,*** (Petition 3 of 2012) [2012] KESC 9 (KLR) we held that:

> ***"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).”

[15] This position was further entrenched in the case of ***Hassan Ali Joho & Another Vs Suleiman Said Shahbal & 2 Others,*** (Petition No. 10 of 2013) [2014] KESC 34 (KLR), (paragraph 37):

“In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution…”

[16] We must therefore ask whether this petition, raises issues of constitutional interpretation and application, and if the same had been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this Court by way of an appeal. Does this appeal strictly involve constitutional interpretation or application; what were the questions that engaged the two courts below, and how did the two courts resolve those questions?

[17] It is apparent to us from the pleadings before the Environment and Land Court, that the appellant’s case was purely factual and the reliefs sought had no bearing on the interpretation and application of the Constitution.

[18] We have also perused through the ruling of the Court of Appeal of 28th February, 2025, and noted that in disposing the matter, the Court of Appeal confined itself to the provisions of Rule 5(2)(b) of the Court of Appeal Rules, and took the considered view that though the appellant had demonstrated that there existed an arguable appeal, she had failed to demonstrate that her arguable appeal would very

likely be rendered nugatory should execution of the judgment of the trial court be allowed to proceed.

[19] It is evident to us that neither the Environment and Land Court nor the Court of Appeal's decisions involved a question of constitutional interpretation or application. We have also not identified the constitutional provisions in question and how these issues were the subject of the decisions in the superior courts below.

[20] From the foregoing, we find no difficulty in concluding that the issues before the Court of Appeal and the Environment and Land Court did not involve the interpretation and application of the Constitution nor take a trajectory of constitutional interpretation or application. We recall the decision of this Court in ***Lawrence Nduttu, (supra)*** in which we held that only those appeals arising from cases involving the interpretation or application of the Constitution, can be entertained by the Supreme Court under Article 163(4)(a), and ***"it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."***

[21] Additionally, we have taken note that it is not in dispute that the appeal before us is an appeal arising from the interlocutory orders of the Court of Appeal issued under Rule 5(2)(b) of the Court of Appeal Rules.

[22] This Court settled with finality the question of its jurisdiction to hear and entertain appeals arising from interlocutory orders of the Court of Appeal made pursuant to Rule 5(2) (b) of the Court of Appeal Rules. In the case of ***Teachers Service Commission Vs Kenya National Union of Teachers & 3 others,*** (Application No. 16 of 2015) [2015] KESC 29 (KLR) this Court stated:

> ***"In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court."***

[23] 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."***

[24] Further, the mere allegation, without substantiation, that the Court of Appeal violated Articles 10, 19, 20, 21 and 163 (7) of the Constitution of Kenya, by ignoring this Court's jurisprudence set out in this Court's decision in ***Mitubell Welfare Society Vs The Kenya Airports Authority & 3 Others (supra)*** on forced evictions, 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.

[25] Applying the above, we find that this appeal, challenging the exercise of discretion by the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules, in the absence of a substantive judgment of the Court of Appeal, is premature and does not meet the threshold under Article 163 (4) (a) of the Constitution. On this basis, we find that we have no jurisdiction to hear and determine this Appeal and it is hereby dismissed.

[26] Having so found, it goes without saying that we have no jurisdiction to determine the second issue herein and will say no more to it. We reiterate this Court's decision in the case of ***Nasra Ibrahim Ibren Vs Independent Electoral and Boundaries Commission & 2 others,*** (Petition No. 19 of 2018) [2018] KESC 75 (KLR), where we held that:

> "***This is for the reason that where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without***

jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a case can be heard."

COSTS

[27] On costs, the general rule in this Court as we held in ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others,*** (Petition No. 4 of 2012) [2014] [2014] KESC 31 (KLR) is that costs follow the event. We therefore deem it fit that the appellant shall bear the costs of this Appeal.

G. ORDERS

[28] Consequently, we make the following orders:

i. The Petition of Appeal dated 11th April 2025 and filed on 14th April, 2025 be and is hereby dismissed; and

ii. The appellant shall bear the costs of this 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 appellants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** day of **January** 2026.

.....

P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA

....

NJOKI NDUNGU **S.C. WANJALA**

JUSTICE OF THE SUPREME COURT **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