



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E019 OF 2024

-BETWEEN-

DIASPROPERTY LIMITED.....1ST APPELLANT
SAMUEL THUITA MWANGI.....2ND APPELLANT

-AND-

JACK KAGUU GITHAE.....1ST RESPONDENT
JAMES MUGO KINGA.....2ND RESPONDENT
DANIEL NGATIA KINGA.....3RD RESPONDENT
HENRY WAITHAKA KINGA.....4TH RESPONDENT
CRISPIN MUCHERU KINGA.....5TH RESPONDENT
MICHAEL MAINA KINGA.....6TH RESPONDENT
STANLEY KINGA MWENDIA.....7TH RESPONDENT
MOSES KANYUTU MWENDIA.....8TH RESPONDENT
JOSEPH MWENDIA KINGA.....9TH RESPONDENT

*(Being an appeal from the Judgment and Orders of the Court of Appeal at Nyeri
(J. Mohammed, Kimaru & Muchelule, J.J.A.) Civil Appeal No. E155 of 2023
consolidated with E157 of 2023 delivered on 22nd March 2024)*

Representation

Mr. Wilfred Nderitu, SC & Ms. Wambui Ng'ang'a for the Appellants
(Kariuki Mwangi & Company Advocates)

Mr. Anthony Gikaria for the 1st Respondent
(Anthony Gikaria & Co. Advocates)

Mr. Jesse Kariuki for the 2nd, 6th, 7th and 8th Respondents
(*Jesse Kariuki & Co. Advocates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The petition of appeal before this Court is dated 6th May, 2024 and filed on 24th May 2024 pursuant to Article 163(4) of the Constitution, without specifying whether it is brought under Article 163(4)(a) or (b) of the Constitution. It is challenging the decision of the Court of Appeal (*J. Mohammed, Kimaru & Muchelule, JJ.A.*) which upheld the judgment of the Environment and Land Court (*K. Bor, J.*) allowing the 1st respondent's suit and finding that a constructive trust existed in favour of the 1st respondent as regards 200 acres which formed part of LN 11306 Ex-Moller Farm situated in South West of Rumuruti Township in Laikipia, Grant No. IR 20579 measuring approximately 264 acres (*hereinafter 'the suit property'*).

B. BACKGROUND

[2] The genesis of this dispute can be traced to a sale agreement dated 3rd July 1986 between the 1st respondent, Jack Kaguu Githae, (the purchaser), and Kinga Wamwendia (deceased) (the seller). Kinga Wamwendia was the owner of the suit property. The deceased had a loan of Kshs.315,539.10 with the Settlement Fund Trustees (*hereinafter 'SFT'*) over the suit property. In the agreement dated 3rd July 1986, the 1st respondent, Jack Kaguu Githae was to buy 200 acres of the suit property from the deceased.

[3] The deceased agreed to transfer to the 1st respondent 200 acres which area contained the main house, and other permanent improvements on the suit property in consideration of Kshs. 600,000/=. It was agreed that, the 1st

respondent would pay the outstanding Kshs.315,539.10 owing to SFT and then pay the balance to the deceased. An initial deposit of Kshs. 100,000/= was to be paid upon signing of the agreement while the balance of Kshs. 500,000/= would be paid in instalments of Kshs. 100,000/= per month until payment in full. The agreement also provided that the first instalment of Kshs. 100,000/= would be paid less the monies due to the SFT.

[4] Further, the agreement provided that the transaction was subject to the grant of Consent by the Laikipia Land Control Board (LCB). The parties undertook to apply for consent within three (3) months of execution of the agreement. Upon receipt of the purchase money, the deceased was to pay the balance of the loan as per the charge registered in favour of SFT in order to have the title over the land released free of encumbrances. It was also a term of the Sale Agreement that upon receipt of the first instalment, the deceased would allow the 1st respondent to take full possession and use of the 200 acres of the suit property. However, the premises would only be transferred to his name upon payment of the final instalment. Lastly, the costs of the transaction were to be paid by the purchaser.

[5] It is not contested that though the timelines of the agreement were not adhered to, the deceased still went ahead and put the 1st respondent in possession and occupation of the 200 acres of the suit property. The deceased also applied for and obtained the LCB consent for subdivision. By the time the deceased passed on in the year 1999, the 200 acres to be excised from the suit property had not been conveyed to the 1st respondent as agreed since the process of subdivision was still underway.

[6] Subsequently, the 2nd to 9th respondents in their capacity as the administrator and beneficiaries, respectively, of the deceased's estate commenced succession proceedings vide ***Nairobi High Court Succession Cause No. 1711 of 2006***. Following the grant of letters of administration and confirmation of the grant, an Assent was registered on 15th July 2008 vesting and transferring the mother title

to the suit property to the 2nd to 9th respondents. The Assent was endorsed as entry No. 8 on Grant No. 2079.

[7] The above actions were undertaken without the knowledge and consent of the 1st respondent and without disclosure of the 1st respondent's interest in the suit property. Ultimately, the 2nd to 9th respondents sold the entire parcel of land to the 1st and 2nd appellants.

C. LITIGATION HISTORY

i) Proceedings before the Environment and Land Court

[8] Aggrieved by the 2nd to 9th respondent's actions, the 1st respondent filed a claim before the Environment and Land Court ***ELC Case No. 56 of 2021***. It was his case that upon the expiry of the completion period indicated in the agreement, the parties through their conduct extended the completion period indefinitely while waiting for the sub-division exercise to be completed. He stated that he took actual occupation, exclusive and lawful control of the land with the full knowledge and acquiescence of the deceased upon payment of the deposit. Thereafter, he dealt with the land as his own by setting up and operating a satellite herbal medical clinic known as the School of Alternative Medicine & Technology (SAMTECH). He maintained that he had acquired a beneficial interest in the land. Based on mutual trust, he waited patiently for the conclusion of the titling and transfer of the suit land into his name based on the words, representations and overall conduct of the deceased. He submitted that he had relied on the procedural steps which the deceased needed to initiate before he could transfer the 200 acres of the suit property to him. He pointed out that the deceased took steps to have the entire land sub-divided into two portions and submitted the prints for the proposed sub-division on 12th January 1987. He maintained that the only issue that was pending in relation to the sub-division of the land was the demarcation of the access road.

[9] The 1st respondent further contended that a presumptive and/or an implied trust was created in his favour and that such trust was not subject to the Limitation of Actions Act and therefore was legally enforceable. In any event, argued the 1st respondent, his occupation of the 200 acres of the suit property upon acquisition constituted an overriding interest and burden against the land held by the 2nd to 9th respondents. He stated that throughout the entire period, the deceased kept him fully apprised and updated on the steps he was pursuing in order to convey the 200 acres from the suit property to his name. He further contended that on 21st December 1995, the deceased executed the application for LCB consent to transfer the 200 acres from the suit property to his name and that the deceased obtained consent to transfer the property on 20th August 1997.

[10] He challenged the Assent vesting and transferring the suit property to the 2nd to 9th respondents as well as all subsequent entries made on the grant. He sought to have the 2nd respondent and the appellants ordered to deliver up and surrender to the court the original grant for L.R No. 11306 for purposes of cancellation and transfer of his interest in 200 acres of that land. Moreover, the 1st respondent sought, in the event that the court found that the LCB consent which the deceased applied for on 21st December 1995 and which the board issued on 20th August 1997 was not valid, then the court was urged to direct the 2nd respondent as Administrator of the Estate of the late Kinga Wamwendia, to apply to extend the time to obtain a valid LCB consent to transfer the 200 acres to him.

[11] In their defence, the 2nd to 9th respondents conceded that part of the purchase price was paid to set off the SFT loan balance but denied that the entire purchase price was paid maintaining that a balance of Kshs. 61,450.90 was still outstanding. They conceded that consent for sub-division was obtained by the deceased before his demise, but asserted that the process of the transfer of the 200 acres from the suit property in favour of the 1st respondent was never completed before the demise of the deceased. Equally, they denied that the deceased executed an application to

the LCB dated 21st December 1995 seeking to transfer the 200 acres from the suit property to the 1st respondent. They asserted that the succession proceedings were conducted openly, procedurally and lawfully thereby vesting them with the mother title which they were entitled to pass to the 1st and 2nd appellants on a willing buyer/seller basis. Finally, the 2nd to 9th respondents submitted that the doctrine of laches defeated any claim the 1st respondent may have had over the suit property.

[12] Conversely, the 1st and 2nd appellants contended in their defense and counterclaim that the 1st respondent did not occupy or take possession of the suit property. They argued that they were the legal owners of the suit property, having purchased it legally from the 2nd to 9th respondents, who were the registered owners, through a sale agreement dated 22nd September, 2011. This sale agreement was executed after the appellants conducted an official search at the Lands Registry and confirmed that the 2nd to 9th respondents held a good title to transfer to them. Lastly, they claimed that the suit was time-barred under the Limitation of Actions Act because the agreement was entered into in 1986 while the suit was filed 26 years later. They therefore urged the court to dismiss the suit.

[13] The 2nd to 9th respondents raised two preliminary objections to the suit at the ELC, arguing that the suit was incompetent because it was based on a contract for the sale of land, which was time-barred. Furthermore, the 1st respondent could not claim any right or interest in the suit property due to the provisions of the Land Control Act (Cap 302) of the Laws of Kenya. By a Ruling dated 28th March 2014 the court (*Ombwayo, J.*) upheld the 2nd to 9th respondents' contention that the claim was founded on contract that was time-barred and accordingly dismissed the suit. Aggrieved, the 1st respondent filed an appeal. By a judgment dated 22nd November 2019, the Court of Appeal dismissed the 2nd to 9th respondents' preliminary objection and allowed the appeal, thereby reinstating the suit and remitting it to the ELC for hearing and disposal on merit by a judge other than *Ombwayo, J.*

[14] The ELC (*Bor J.*) after hearing the parties on merit, found that the 2nd respondent, as the administrator of the deceased's estate, was aware that his father had sold 200 acres of the property to the 1st respondent in 1986. Despite this knowledge, he proceeded to file succession proceedings and obtained a grant of letters of administration. He then caused the entire property, measuring 264 acres, to be registered in his name jointly with his siblings.

[15] Subsequently, the 2nd to 9th respondents sold the entire suit property to the 1st and 2nd appellants for a sum of Kshs.9,500,000/= in a sale agreement dated 22nd September 2011. It was found that the 2nd respondent ought to have disclosed to the succession court that 200 acres of the property had already been sold by the deceased to the 1st respondent who had been put in possession which evidence was corroborated by the area Chief. Lastly, the trial court held that when the 1st and 2nd appellants were buying the suit property from the 2nd to 9th respondents, they knew that the 1st respondent was in possession, and had been cautioned against the purchase. Consequently, they were not innocent purchasers for value without notice.

[16] In the end, the trial court declared that a constructive trust existed between the 1st respondent and the estate of the deceased. The trust was in respect of 200 acres of the suit property by virtue of the deceased having sold the same to the 1st respondent, placed him in possession and having received payments from the 1st respondent on the understanding that the deceased would convey the 200 acres to him. The court thus directed that the Assent vesting and transferring the suit property to the 2nd to 9th respondents be cancelled so that the land is restored to the prior position. Moreover, it was held that the sale of the entire property including the 200 acres belonging to the 1st respondent by the 2nd to 9th respondents was illegal. The 2nd to 9th respondents were directed to surrender and deliver up to the Deputy Registrar of the court the original Grant No. I.R 20579 for L.R No.11306 for onward transmission to the Chief Land Registrar for cancellation

of entry number 8 registered against the Grant No. I.R 20579. Thereafter, the mother title would be subdivided at the 1st respondent's expense for the excision of the 200 acres belonging to him and a title processed for the 200 acres in his name.

ii) Proceedings Before the Court of Appeal

[17] Aggrieved by the decision of the trial court, two appeals were filed before the Court of Appeal at Nyeri; ***Civil Appeal No. E155 of 2023*** by the appellants herein and ***Civil Appeal No. E157 of 2023*** by the 2nd to 9th respondents. The grounds in their respective memoranda of appeal can be summarized as follows the learned judge erred by:

- i) Finding that the 1st respondent had successfully met the burden of proof and established his case resulting in the infringement of the appellants' right to property under Article 40;*
- ii) Not properly recognising the jurisdiction of the ELC compared to that of the High Court according to the Law of Succession Act, in HC Succession Cause number 1711 of 2006 and the context of the dispute before her in light of the express injuncts of Articles 1(1), 2(1), 2(2), 2(4), 3(1), 10(1)(a), 10(1)(b), 19(3)b), 19(3)(c), 20(1), 20(2), 20(3), 20(4), 21(1), 40, 162(2)(b), 162(3) and most pertinently 165(6) of the Constitution;*
- iii) Finding a constructive trust for 200 acres of the suit property without satisfying herself whether the requirements of a constructive trust had been met and declaring the 1st respondent as the legal owner of the 200 acres without sufficient justification;*
- iv) Deeming the purchase of the property by the appellants as illegal, despite evidence showing an uncontested succession process and the absence of any inhibitions or cautions on the land;*
- v) Making a presumption and/or inference to the fact the 2nd respondent knew of the transaction between his deceased father Kinga Wamwendia*

- and the 1st respondent before the filing of the Succession Cause, without any basis or credible evidence whatsoever;*
- vi) Disregarding clear provisions of the statutes that were breached, and/or defaulted by the 1st respondent and shifting the burden to the deceased for the breach;*
 - vii) Finding that the 1st respondent was in occupation of the suit land whereas there is no evidence whatsoever of his eviction there from when the appellants took over possession of the suit land after the purchase thereof;*
 - viii) Overturning a decision of a court of a similar jurisdiction without following due process and gave orders to counter a determination already made by the High Court in Succession Cause Number 1711 of 2006;*
 - ix) Holding that the 1st respondent, as a creditor to the estate of the deceased could not initiate a Probate and Administration Cause by himself and that the fact that the Probate and Administration Cause of the deceased was published in the Kenya Gazette was not relevant as the 1st respondent did not object to the said process;*
 - x) Issuing directives to the 1st respondent to apply to revoke the grant in favour of the appellants which may be deemed to be an order directed against another court and therefore made the wrong decision; and*
 - xi) Dismissing the appellants' counterclaim without first analyzing the evidence and documents provided and laying a basis thereof and making the wrong decision.*

[18] Accordingly, they sought the following Orders:

- i) The Judgment and/or Orders made on 3rd July 2023 be set aside and in its place the appeal be allowed; and*

ii) *Costs before the ELC and Court of Appeal be awarded to the appellants and the 2nd to 9th respondents.*

[19] In determining the two appeals, the Court of Appeal framed the following contested issues: whether the 1st respondent had paid the full purchase price for the 200 acres of the suit property; whether or not the 1st respondent was put in possession of the 200 acres once he had paid the deposit of Kshs.100,000/= as was required by the agreement; whether the agreement between the 1st respondent and the deceased over the 200 acres received the consent of the LCB under the Land Control Act; whether the appellants were innocent purchasers for value without notice; whether a constructive trust over the 200 acres of the suit property was created in favour of the 1st respondent; and the interplay between the jurisdiction of the ELC and that of the High Court under the Law of Succession Act.

[20] The appellate court in its judgment held that there existed an agreement made in 1986 between the 1st respondent and the deceased pursuant to which, 200 acres of land was to be excised from the suit property. The Court also found that the 1st respondent had paid the full purchase price and taken possession of the property, and staying in possession until the deceased's death in 1999. Further, the court noted that throughout this period, the deceased had endeavoured to have the property transferred to the 1st respondent, but had not succeeded by the time of his death. The 1st respondent was therefore in possession by the time the 1st and 2nd appellants were making inquiries from Francis Kiprono Chepkwony, the area Chief, on whether the suit property was occupied. The Court thus agreed with the trial court that, given the evidence of the Chief, the contention by the 1st and 2nd appellants, that they were innocent buyers for value without notice, could not hold in the circumstances. In the Court's view, it was quite clear that the 1st respondent was at all times, in occupation of the 200 acres that he had bought from the deceased. Based on this evidence, the appellate court found that at the time the 1st and 2nd appellants bought the suit property, they knew that the 1st respondent was

in possession, which possession, the Court held to be an overriding interest on the land.

[21] As regards the 1st and 2nd appellants' assertions that they have a title over the suit property, and that such title is protected by Sections 24, 25 and 26 of the Land Registration Act, 2012 (LRA). The Court observed that the appellants' transfer was not registered as there was a caveat placed in the register, as such, they did not acquire title. Even then, the Court determined that under Section 28 of the LRA the rights of a title holder are subject to overriding interests, which do not need to be recorded on the register. Under Section 28(b) of the LRA, trusts including, customary trusts, constitute an overriding interest. There was in that regard proof that, following the purchase and the occupation of the 200 acres by the 1st respondent, a constructive trust over the portion was created in his favour. The constructive trust thus became an overriding interest over the land and the failure by the deceased to obtain the necessary Land Control Board consent within the time indicated under the Land Control Act did not render the transaction void and unenforceable. Agreeing with the trial court, the appellate court found that, the constructive trust was a necessary equitable remedy to enable the 1st respondent obtain justice as against the unconscionable conduct of the appellants.

[22] On the interplay between the jurisdiction of the ELC and that of the High Court under the Law of Succession Act, the Court found that when the 2nd respondent approached the succession court he did not notify the 1st respondent of his action as he ought to have. However, it was clear that the 2nd respondent knew or ought to have known of the 1st respondent's claim to the land, based on the sale agreement with the deceased. The Court further stated that, even assuming that he did not know of that interest, he went to the succession court on the basis that the suit property was the property of the deceased, while it was not. On the other hand, the court observed that even if the 1st respondent had become aware that the 2nd respondent had filed the succession cause, what would have been open to him

would have been to lodge a claim in the cause as a creditor to the estate of the deceased. Since the 2nd respondent and his siblings disputed his claim, the succession court would have had no jurisdiction to hear and determine the claim. It would have asked the 1st respondent to file a suit in the ELC to have the claim determined there. In the meantime, it would have adjourned the confirmation of the grant to allow for such determination. The result of such determination would then have formed the basis for the distribution of the deceased's estate to the beneficiaries. To this end, the Court found that this correct procedure was not followed since the 2nd respondent concealed the succession proceedings from the 1st respondent.

[23] In the end, the Court of Appeal dismissed both appeals with costs to the 1st respondent.

iii) Proceedings Before the Supreme Court

[24] Undeterred, the appellants have now filed this second appeal challenging the decision of the Court of Appeal on 19 grounds which they have in their submissions condensed into 9 proposed issues as follows:

- i) Whether there was a violation of the appellants' fundamental right to acquire and own property as guaranteed in Article 40 of the Constitution;*
- ii) Whether an agreement for sale such as in the instant case is an agreement which the courts can take cognizance of given its failure to comply with the express provisions of Section 3(3) of the Law of Contract Act as to attestation of the signature of each party signing by a witness who was present when the contract was signed by such party (sic);*
- iii) Whether an unsurveyed and unascertained portion of property which is the subject of a legal dispute can, without more, give rise to an enforceable title to land against the vendor and therefore the subject of specific performance as against such vendor;*

- iv) *What amounts in law to an “interest in land” and in particular, whether mere possession of an unsurveyed and unascertained portion of property by a person without more gives such a person an interest in land;*
- v) *Whether mere possession of an unsurveyed and unascertained portion of property gives the person in possession of such unascertained portion an “interest in land”, the parameters, nature and extent of such interest;*
- vi) *Whether being in mere possession of an unascertained portion of property which is the subject of a legal dispute per se gives rise to the existence of an overriding interest;*
- vii) *Whether a constructive trust can exist where there is no certainty of subject matter on account of:*
 - a) *The fact that the land to be sold has not been ascertained, surveyed and subdivided; and*
 - b) *Lack of clarity as to whether the interest in the land to be sold in an estate in fee simple or leasehold.*
- viii) *Whether or not the publication of petitions for Letters of Administration in the Kenya Gazette is sufficient notice to all parties concerned in an Estate, and to the general public; and*
- ix) *Whether the Land Registration Act can have retrospective application in relation to the facts of the ELC suit.*

[25] The appellants seek the following reliefs:

- i) *The Petition be allowed;*
- ii) *The Judgment of the Court of Appeal dated 22nd March 2024 and the Judgment of the ELC dated 3rd July 2023 be quashed and set aside;*
- iii) *Consequential to the setting aside of the Court of Appeal decision, this Court do substitute the said decision with its own Judgment; and*
- iv) *Costs of this appeal and the suits below be awarded to the appellants and be borne by the 1st respondent.*

D. THE PRELIMINARY OBJECTION

[26] In response to the Petition, the 1st respondent filed a Notice of Preliminary Objection dated 5th June 2024 on the ground that the petition does not meet the jurisdictional threshold as envisioned under Article 163(4)(a) and (b) of the Constitution.

i) The 1st respondent's submissions in support of the Preliminary Objection

[27] In his submissions dated 5th July 2024, the 1st respondent contends that this Court lacks jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution, as there are no framed issues involving the interpretation or application of the Constitution. He cites the cases of ***Joho & another Vs Shahbal & 2 others*** (Petition 10 of 2013) [2014] KESC 34 (KLR); ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another***, SC Petition No. 3 of 2012 [2012] eKLR; and ***Ngoge Vs Kaparo & 5 others*** (Petition 2 of 2012) [2012] KESC 7 (KLR) in support of this argument. Further, he submits that there are no novel issues raised by the appellant that transcend the circumstances of the parties, and which have an impact on society or bearing on public interest. He urges that the issues raised are civil in nature and do not occasion a jurisprudential moment that would warrant intervention by this Court. The 1st respondent furthermore posits that not every decision of the Court of Appeal is amenable to challenge before the Supreme Court, and a party moving this Court must properly invoke the Court's jurisdiction.

[28] Additionally, the 1st respondent argues that issues related to claims under the doctrine of constructive trusts are typically proven and determined through the examination of evidence and specific factual scenarios in each case. Questions such as whether LR No. 11306 was surveyed and whether the 1st respondent fully paid for the 200 acres involve factual disputes that the Superior courts below were

addressing to enable them reach a conclusion on the matter. Finally, he argues that the issue of retrospective application of the Land Registration Act, 2012 is being introduced for the first time before this Court. For these reasons, the 1st respondent urges the Court to uphold the preliminary objection and strike out the appeal for want of jurisdiction with costs to the 1st respondent.

ii) Appellants' submissions in opposition to the Preliminary Objection

[29] The appellants have filed submissions dated 29th July 2024 in response to the Preliminary Objection. Therein, they assert that the appeal is filed as of right pursuant to Article 163(4)(a) of the Constitution. They maintain that the question of the fundamental right to acquire and own property guaranteed in Article 40 of the Constitution featured in the series of litigation between the parties right from the ELC. In particular, they posit that the issues relating to the interpretation and application of the Constitution in relation to a constructive trust were addressed by the ELC and were also raised before the Court of Appeal. They argue therefore that there is no contemplation under Article 163(4)(a) of the Constitution that an issue requiring the application or interpretation of the Constitution “*must have progressed through the normal appellate mechanisms*” as was held in ***Joho & another Vs Shahbal & 2 others*** [2014] KESC 34 (KLR). Accordingly, they urge the Court to review this position since in their view, Article 163(4)(a) contemplates an appeal lying as of right in any case involving the interpretation or application of the Constitution generally.

E. PARTIES' RESPECTIVE CASES

i) Appellants' submissions

[30] In their submissions dated 28th October 2024, the appellants submit on 3 issues as follows: On *whether their right to property under Article 40 of the*

Constitution was violated, they posit that they bought the entire 264 acres comprised in the suit property from the legal representatives and beneficiaries of the deceased having conducted due diligence through physical inspection, conducting a search at the relevant land registry and were satisfied that the property was free from adverse claims, encumbrances and that it belonged to the deceased. They rely on the case of ***Dina Management Limited Vs County Government of Mombasa & 5 others*** [2023] KESC 30 (KLR) and the persuasive High Court cases of ***Eunice Grace Njambi Kamall & Another Vs The Hon. Attorney General & 5 others***, Civil Suit No. 976 of 2012 and ***Kazungu Fondo Shutu & another Vs Japhet Noti Charo & another*** [2021] eKLR to assert that they were bona fide purchasers. In addition to the conducting of due diligence, they submit that upon completion of the sale, they engaged in various overt acts such as taking possession, erection of an electric fence, construction of two semi-permanent houses, the sinking of a dam and setting aside 18 acres for horticulture all without any objection from anyone, hence the only reasonable inference is that the land was free from encumbrances. Moreover, they assert that the 1st respondent cannot be said to impose an existing trust between himself and the appellants based on a sale agreement that the appellants were not party to.

[31] On *whether an unsurveyed and unascertained portion of a property, which is the subject of a legal dispute, can without more, give rise to an enforceable title to land against the deceased vendor and therefore be the subject of specific performance against such deceased vendor*, they submit that an order of specific performance may be made where there is a valid contract and where the party seeking to enforce the same is not in breach. To this end, they submit that although the 1st respondent alleged that he bought 200 acres from the deceased, he admitted in evidence that he did not pay the purchase price in full. It is therefore the appellants' contention that the 1st respondent was in breach of Clause 6 of the agreement which required full payment of the purchase price; that there was no

evidence of the land being surveyed and that the 200 acres was excised from the suit property; and there was no consent to sub-divide and transfer the property from the deceased to the 1st respondent. Consequently, they maintain that it was wrong for the ELC to issue an order for specific performance that was void and unenforceable on the grounds of uncertainty as the land was not only unsurveyed but also unascertainable. In any event, they add that the 1st respondent's suit was time barred having been brought 26 years later.

[32] Finally, on *whether mere possession of an unsurveyed and unascertained portion of property by a person, gives such person an interest in land and whether such possession gives an overriding interest*, they rely on Section 28 of the LRA to submit that the manner in which both superior courts below declared that the 1st respondent had an overriding interest over the land was not supported by law. Citing the case of ***Pankajkumar Hemraj Shah & another Vs Abbas Lali Ahmed & 5 others*** [2019] eKLR, they submit that the 1st respondent failed to adduce any evidence in support of his claim of being in possession and occupation and therefore the court erred in upholding his claim. For these reasons, they pray that their petition be allowed with costs.

ii) 2nd, 6th, 7th and 8th respondents' affidavit in support of the appeal

[33] James Mugo Kinga, the 2nd respondent, swore an affidavit on 7th June 2024, as the administrator of the estate, on behalf of the 6th, 7th, and 8th respondents in support of the appeal. He states that the 3rd, 4th, 5th, and 9th respondents passed away while the case was still pending before the ELC. He also depones that the 1st respondent failed to obtain consent from the LCB and did not pay the full purchase price of the 200 acres of the suit property and so no rights to it accrued to him. Additionally, the beneficiaries of the estate were not involved in the alleged transactions between the deceased and the 1st respondent. As a result, they proceeded to file succession proceedings and since no affidavit of protest was filed

against the confirmation of the grant, the estate was distributed, and the entire suit property was later sold to the appellants. He asserts that the 1st respondent had a duty to notify the estate of any adverse claims and given that the 1st respondent was aware of the deceased's passing, having been his personal doctor, he should not benefit from his own misfortunes. Moreover, they argue that the 1st respondent neglected his rights and only asserted them after the property had already changed hands. Lastly, he deposes that at the time of the alleged sale transaction, there was no title to the land, no survey had been conducted, and the land was not capable of being alienated.

iii) The 1st respondent's submissions

[34] In his submissions dated 20th November 2024, the 1st respondent, maintains that he has always enjoyed *de facto* use and occupation of the suit property having been given immediate and exclusive possession by the deceased upon acquisition and in furtherance of his right to possession captured by Clause 6 of the agreement. He argues that the overt acts and developments purportedly undertaken by the appellants were so undertaken during the pendency of active litigation between the parties and were in violation of the doctrine of *lis pendens*. As such, they cannot erode his rights to enjoy all the benefits of ownership by possession.

[35] He disputes that the appellants were innocent purchasers for value without notice contending that by the time the appellants were making pre-contract inquiries from the area chief, they were aware that he was in possession. He submits that in 2011 when he got wind of trespassers who had the intention to grab his land, he lodged a caveat on 12th April 2012 against the property to safeguard his interest in the suit property. He contends that the Court of Appeal found that the appellants did not acquire title to the suit property since the transfer was not registered as there was a subsisting caveat in place.

[36] Finally, the 1st respondent reiterates his arguments on the issue of jurisdiction maintaining that the contestation on violation of the appellants' right

to acquire and own property as guaranteed under Article 40 of the Constitution did not form part of the arguments before the superior courts below and is being raised for the first time before this Court.

F. ISSUES FOR DETERMINATION

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

- i. Whether this Court has jurisdiction to hear and determine the appeal;*
- ii. If the answer to i) above is affirmative, whether the Court of Appeal erred in its decision of 22nd March, 2024*

G. ANALYSIS

[38] It is a basic rule of procedure that jurisdiction must, in the first instance exist when the proceedings are initiated, and because the question of jurisdiction is so fundamental, it can be raised at any stage of the proceedings before the final decision is rendered. It can be raised by any party or even by the Court *suo motu*. For these reasons, it has become a matter of practice, for this Court to independently satisfy itself that an appeal is properly lodged and that it has jurisdiction before it can entertain it.

[39] We start by observing that the appellants, in bringing the petition, stated that the same is filed pursuant to Article 163(4) of the Constitution. The petition fails to specify whether the appellants approached this Court under either Article 163(4)(a) as a matter of constitutional interpretation and application or under Article 163(4)(b) upon certification, by either the Court of Appeal or this Court, as concerning matters of general public importance.

[40] It is only from paragraphs 5 to 24 of the appellants' written submissions dated 29th July, 2024 filed in response to the 1st respondent's preliminary objection

that the appellant states that, “... *that Article 163(4)(a) of the Constitution is clear and there is no ambiguity as to the jurisdiction of this Honourable Court to entertain the Appellants’ Appeal (and a corresponding right on the part of the Appellants to file their Appeal to the Court). This right of appeal, we submit, carries with it an equally clear, unambiguous and unqualified expectation that the Court will hear and determine the Appeal (if, of course, it is an Appeal of the type contemplated in Article 163).*” It is from this statement in the written submissions that we discern, for the first time, that the appeal has been brought pursuant to Article 163(4)(a) of the Constitution.

[41] In the above context, this Court has cautioned advocates and litigants, time without number, that, given its specialized jurisdiction, a party desiring to invoke its jurisdiction under Article 163(4) must specifically identify the limb upon which the petition is premised. Article 163(4) of the Constitution is not a thoroughfare for all intended appeals from the Court of Appeal to the Supreme Court. Though this should be clear, several considerations bear restating. Firstly, as we stated in the cases of ***Sonko Vs Clerk, County Assembly of Nairobi City & 11 others*** (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) and ***Wanjigi Vs Chebukati & 2 others*** (Application 6 (E012) of 2022) [2022] KESC 40 the Court was clear that “*it can never be the role of the court to wander around in the maze of pleadings and averments in order to assume jurisdiction by way of elimination*”.

[42] Secondly, due to the two avenues of this Court's appellate jurisdiction under Article 163(4)(a) and (b) of the Constitution being distinct, counsel or a litigant invoking that jurisdiction to appeal a decision of the Court of Appeal must strictly categorize their case and demonstrate either that the appeal is as of right under (a) of Article 163(4) or that the appeal has been certified as involving a matter of general public importance under (b) of that Article. We reiterate what we said in ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR) and in ***Ibren Vs Independent***

Electoral and Boundaries Commission & 2 others [2018] KESC 75 (KLR)
as follows:

“It is trite law that a court of law has to be moved under the correct provisions of the law.” In this court, this is not an idle requirement but has its rationale anchored in the ‘specialized’ nature of the jurisdiction of the Supreme Court as provided in Article 163(3) of the Constitution. Appeals to this court from the Court of Appeal are therefore not as a matter of course as the Supreme Court was not established as another tier of court in the judicial hierarchy. Not every appeal from the Court of Appeal is also appealable to this court.”

[43] The justification behind the requirement of specifying the limb of article 163(4) should be obvious, but one of them is that the applicable considerations and principles for each of the limbs are different. In an adversarial system like ours, rules of pleading also serve to ensure that parties define succinctly the issues for determination so as not to take the rest of the parties by surprise

[44] Further, the onus of proving that the appeal involves a question of constitutional interpretation or application is upon the party relying on Article 163(4)(a) of the Constitution. The Court does not automatically acquire jurisdiction merely because a party claims in their pleadings or submissions that the appeal concerns the interpretation or application of the Constitution.

[45] A party must also identify with precision the relevant Articles of the Constitution that were the subject of interpretation or application and show that the subject of the appeal before this Court was the same one upon which both the High Court or courts of equal status and indeed the Court of Appeal based their respective decisions. To ascertain whether or not the jurisdiction has been properly invoked, the Court will consider the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought, and the decisions of the superior courts below. Where the decision being challenged on appeal has nothing or little to do with the interpretation or application of the Constitution, such a decision cannot

be the subject of a further appeal to this Court under the provisions of Article 163(4)(a) of the Constitution. The appellants, while asking us to depart from this firm position, have not given us any just cause to review that position either under Section 21A of the Supreme Court Act or under the legal principles as set out in the ***Outa Vs Okello & 3 others*** (Petition 6 of 2014) [2017] KESC 25 case.

[46] Be that as it may, we are constrained to still consider substantively whether this appeal meets the criteria for invocation of Article 163(4)(a) of the Constitution. In other words, we ask, 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? These are the issues that should ordinarily have been raised by the parties and answered before the two superior courts below.

[47] It is apparent to us that the grievance at first instance was not presented as a matter raising constitutional issues. Rather it was presented as an environment and land matter that required the ELC to make a factual inquiry. This inquiry necessitated a determination of, among other issues, whether there existed a sale agreement between the 1st respondent and the late Kinga Wamwendia for the excision of 200 acres from the suit property; whether the deceased, having sold the said portion of land, placed the 1st respondent in possession thereof, and continued to receive payments from him towards the purchase price; whether the deceased had made representations indicating that he would transfer the 200 acres of land to the 1st respondent prior to his demise; and ultimately whether a constructive trust existed between the 1st respondent and the deceased in respect of the aforementioned land.

[48] It is further evident from the pleadings that the issues raised in the petition before the ELC were purely factual, and the reliefs sought had no bearing on the application or interpretation of the Constitution at all. The 1st respondent in his Further Amended Plaint of 30th March, 2022 prayed for the following orders:

- a) A declaration that there exists a constructive trust between himself and the estate of the late Kinga Wamwendia (deceased) in respect of the 200 acres of land comprised in L.R No. 11306 Ex-Moller Farm situated South West of Rumuruti Township Grant I.R 2059 by virtue of the sale between the 1st respondent and the late Kinga Wamwendia (deceased) with the 1st respondent taking possession.
- b) A declaration that the 1st respondent was the legal and bona fide owner of the 200 acres of land.
- c) The cancellation of the Assent registered on 15th July, 2008 vesting the entire suit property to the 2nd to 9th respondents.
- d) The appellants and the 2nd to 9th respondents to surrender the Original Grant for the suit property to the Chief Land Registrar through the Deputy Registrar for purposes of cancellation of all the illegal entries with the Deputy Registrar being authorised to execute all the instruments necessary to transfer the 1st respondent's interests in the 200 acres of the suit property.
- e) In the event that the Land Control Board consent is found to be invalid, an order directing the 2nd respondent as the administrator of the estate of Kinga Wamwendia (deceased) to seek an extension of time to apply for and obtain a valid Land Control Board consent to transfer the 200 acres from the suit property to the 1st respondent.
- f) A permanent injunction to prohibit the appellants and the 2nd to 9th respondents from trespassing, damaging, transferring, evicting, harassing the 1st respondent or in any manner interfering with his ownership and quiet possession of the 200 acres of the suit property.

The appellants as well as the 2nd to 9th respondents on their part, only prayed for the dismissal of the 1st respondent's suit with costs.

[49] It was only after the judgment of the Environment and Land Court cancelling the Assent and eventual transfer to the appellants, that the appellants introduced the issue of infringement of their rights under Article 40 of the Constitution. We note that the Court of Appeal confined its consideration of the first appeal to the trial court's determination on whether or not there existed a constructive trust in favour of the 1st respondent. The two superior courts were also unanimous in their conclusions that from an analysis of the facts and evidence, a constructive trust over the portion of 200 acres forming part of the suit property had been created in favour of the 1st respondent.

[50] We therefore come to the inescapable conclusion that the appellants have failed to specify the grounds upon which they are challenging the Appellate Court's interpretation and/or application of the Constitution. In our view, the matter turned purely on factual issues now being camouflaged as constitutional violations, and for which this Court lacks jurisdiction to determine. Both the suit and the appeal before the Superior Courts below were determined after a careful and elaborate factual analysis. We reiterate that the mere citation of constitutional provisions in the pleadings does not of and in itself bring an appeal within the scope of Article 163(4)(a) of the Constitution.

[51] For the aforementioned reasons, we find and hold that this Court lacks jurisdiction to determine the appeal herein. Accordingly, we down our tools at this stage. In so doing, we remain true to our earlier decisions in which this Court has declined to assume jurisdiction in similar circumstances to the ones in the present appeal.

H. COSTS

[52] In line with our decision in ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others***, (Petition 4 of 2012) [2014] KESC 31 (KLR), and taking into account the nature of this matter, to award costs to the 1st respondent.

I. ORDERS

[53] Consequently, and for the reasons aforestated, we make the following orders:

- i. The preliminary objection dated 5th June 2024 be and is hereby upheld.*
- ii. The Petition of Appeal dated 6th May, 2024 be and is hereby struck out.*
- iii. The appellants shall bear the 1st respondent’s costs of this appeal.*
- iv. 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 11th day of April 2025.

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

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

.....
S. C. WANJALA
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**

