



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E015 OF 2025

— BETWEEN —

**ATTORNEY GENERAL ON BEHALF OF THE
CABINET SECRETARY, MINISTRY OF INTERIOR
AND COORDINATION OF
NATIONAL GOVERNMENT APPELLANT/RESPONDENT**

— AND —

NGURUMAN LIMITED RESPONDENT/APPLICANT

*(Being an application to strike out the appeal, SC Petition No. E015 of 2025, dated 4th April 2025 against the Judgment of the Court of Appeal (**Kiage, Achode & Korir, JJ.A**) dated 28th February 2025 in Civil Appeal No. E026 of 2022)*

Representation:

Mr. Oscar Eredi for the Appellant/ Respondent
(Attorney General's Chambers)

Ms. Jerioth Muthoni holding brief for
Mr. Ahmednassir Abdullahi, SC for the Respondent/ Applicant
(Ahmednassir Abdullahi Advocates LLP)

RULING OF THE COURT

[1] COGNISANT that, the appeal herein stems from a judgment of the Court of Appeal dated 28th February 2025 (impugned judgment), which substantially upheld the Environment and Land Court's (ELC) decision in **ELC Petition No. 18 o 2018**. In particular, the appellate court found that the prolonged failure by the police and

other state agencies to enforce court orders relating to LR No. Narok/Nguruman/Kamorora/1 (suit property) as well as protection of the same from invasion amounted to violation of Nguruman Limited's (the applicant's) right to property; and

[2] UPON PERUSING the Notice of Motion dated 26th June 2026 and filed on 29th June 2026 pursuant to Article 163(4)(a) of the Constitution, Section 15A of the Supreme Court Act, Cap 9B and Rule 31(6) of the Supreme Court Rules, 2020 wherein the applicant seeks that the appeal herein, **SC Petition No. E015 of 2025**, be struck out with costs; and

[3] UPON CONSIDERING the grounds on the face of the Motion, submissions of even date, the affidavits sworn by the applicant's director, Martin Richard Steyn on 26th June 2026 and 24th July 2026 respectively, challenging this Court's jurisdiction to entertain the appeal herein on two grounds. Firstly, that, the impugned judgment was reviewed by the appellate court on 13th March 2026 and as such, that judgment has been superseded or overtaken by the said review. In any event, the applicant contends that, despite service of the review application before the Court of Appeal, the Attorney General (the respondent) in abuse of this Court's process went ahead to file the appeal, subject of the instant Motion; the impugned judgment was not final at the time the appeal was filed before this Court since the review application was still pending before the Court of Appeal; and

[4] NOTING that the applicant argues that the appeal while anchored on Article 163(4)(a) of the Constitution does not raise any issue of interpretation or application of the Constitution as explained in ***Nduttu & 6000 Others Vs Kenya Breweries Ltd. & Another*** [2012] KESC 9 (KLR). Expounding further, the applicant asserts that, the appeal does not raise any issue of constitutional controversy since the Court of Appeal only invoked the common law principle of negligence to determine the liability of the National Police Service and did not interpret or apply the Constitution. Therefore, according to the applicant, the appeal simply calls upon this Court to review

concurrent findings of facts or conclusions by the superior courts below, which mandate it is devoid of. Moreover, some of the issues raised by the appeal were neither canvassed nor considered by the superior courts below, for instance, whether the applicant should have been awarded damages for violation of its rights under Article 23(3) of the Constitution as opposed to an award of the value of the property; and

[5] UPON EXAMINING the respondent's grounds of opposition dated 13th July 2026 and replying affidavit sworn on even date by Kepha Onyiso, the Deputy Chief State Counsel, as well as submissions dated 13th June 2026, to the effect that, the petition filed by the applicant at the trial court alleged violations of various constitutional provisions; the superior courts below interpreted and applied Article 40 of the Constitution in arriving at their decisions; the appeal herein equally raises questions relating to the interpretation and application of various provisions of the Constitution on the extent of State responsibility in the protection of property, the principles relating to compensation for constitutional violations amongst other issues; the appeal does not merely call for a re-evaluation of facts but challenges the appellate court's findings which resulted to material error of law; and therefore, the the appeal meets the jurisdictional parameters set out in ***Joho & Another Vs Shahbal & 2 Others*** [2014] KESC 34 (KLR). The respondent maintains that, the Motion raises contested jurisdictional and constitutional issues which can not be properly disposed of through an interlocutory application and should be canvassed at the hearing of the appeal; and

[6] TAKING INTO ACCOUNT the respondent's assertion that, the impugned judgment has not been overtaken by the review by the Court of Appeal as the review only relates to the ancillary issue of interest on the damages awarded to the applicant; despite being *functus officio*, the appellate court erred in granting the said interest after delivery of the impugned judgment; it is the applicant who has abused the court process since it has sought a similar prayer for interest before this Court vide its cross appeal. Be that as it may, the respondent submits that, striking out pleadings should be a last resort as espoused in the persuasive decision of the Court of Appeal in ***DT***

Dobie & Company (Kenya) Ltd. Vs Muchina & Another [1980] KECA 3 (KLR); and the Motion violates the respondent's right to the appellate process contrary to Articles 48, 50 and 159 of the Constitution; and

[7] UPON DELIBERATIONS on the Motion and the rival arguments, **WE NOW OPINE** as follows:

- i. In the Motion before us, the applicant posits that the appeal herein should be struck out on two grounds. The first being that the appeal does not raise any issue of constitutional interpretation or application. Towards this end, the parameters for invoking this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution are well settled. In ***Nicholus Vs Attorney General & 13 Others*** [2023] KESC 113 (KLR) this Court restated that the constitutional question(s) placed before this Court for determination must have been the subject of interpretation or application before the superior courts below and must also remain in contest before this Court.
- ii. Contrary to the applicant's contention, it is the applicant that filed a constitutional petition in the ELC, **ELC Petition No. 18 o 2018**, alleging violation of its right to property under Article 40 of the Constitution and attributing its dispossession of the suit property, as a result of invasion by third parties, to the State's inaction and complicity. In the end, the applicant sought a number of declaratory orders and compensation for violation of its right to property.
- iii. Upon hearing the parties' respective evidence, ELC (*Kullow, J.*) by a judgment dated 28th July 2021, found that the State had violated the applicant's constitutional rights by failing to protect and/or prevent the invasion of the suit property in light of the court orders. More importantly, the court issued a declaration to the effect that the applicant's right to protection of property as guaranteed under Article 40 of the Constitution was violated by the State. Consequently, the ELC awarded damages to the applicant.

- iv. On its part, the Court of Appeal vide the impugned judgment concurred with the trial court that the State was liable for the violation of the appellant's right to property. The court found that the prolonged failure by the police and other state agencies to enforce court orders and protect the suit property, coupled with the conduct of state officials surrounding the invasion thereon, amounted to acquiescence and a breach of Article 40.
- v. Based on the foregoing, we find that the superior courts below did apply Article 40 of the Constitution to the extent they found that the State had violated the applicant's right to property. In effect, Article 40 was the subject of adjudication before the said courts. Likewise, our perusal of the record of appeal before this Court reveals that one of the grounds therein challenges the appellate's court finding that the state violated the applicant's right to property under Article 40. Consequently, we are satisfied that the appeal does fall within the confines of this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution.
- vi. Having found that the appeal discloses a constitutional issue/question as set out above, we need not delve into other issues which were fronted by the parties either in support or opposition of this contention. More so, taking into account that those issues may entail merit consideration or analysis of the impugned judgment, which is beyond our mandate at this interlocutory stage while considering the Motion at hand.
- vii. We also understood the applicant to argue that the impugned judgment has been overtaken or superseded by the review of the said judgment by the Court of Appeal vide a ruling dated 13th March 2026.
- viii. Having perused the review ruling, it is not in dispute that following the delivery of the impugned judgment on 28th February 2025, the applicant filed a Notice of Motion dated 20th March 2025 before the same court seeking *inter alia*:

“

1. ...

2. *That the judgment of this honourable court dated and delivered on 28th February 2025 be reviewed.*
3. *That consequent upon the review of the judgment of the Court dated and delivered on 28th February 2025, the respondent be and is hereby awarded interest on the awarded damages at Court rates from the date of delivery of judgment of the Environment and Land Court at Narok (M. N. Kullow, J.) until payment in full.* [Emphasis added]

The prayer for review was specific and related to the issue of an award of interest on the damages which were granted to the applicant in the impugned judgment.

- ix. Furthermore, the appellate court in acceding to the review application by its ruling dated 13th March 2026 held that –

“ 11. ... It is thus proper and just that in order to maintain the compensatory force of the damages awarded, and thus meet the ends of justice, interest be awarded.

12. In the result, we find the application to be merited and grant it with the effect that the sum of Kshs.16,675,000,000 awarded as general damages shall attract interest at court rates with effect from 28th July 2021 being the date of the judgment of the Environment and Land Court. [Emphasis added]

- x. It is quite clear from the foregoing that the impugned judgment was reviewed to the extent that an award of interest was granted on the general damages issued in the said judgment. Therefore, the said review did not in any way alter, vary or discharge the appellate court’s finding that the respondent had violated the applicant’s right to property under Article 40 of the Constitution and the damages awarded as a result thereof, all of which are subject of the appeal before this Court. Consequently, we find that the substratum of the appeal herein

remains intact and can be considered separately and disntictively from the award of interest.

- xi. Accordingly, we find that the Motion lacks merit and is dismissed. In line with the principles set out by this Court's decision in ***Rai & 3 others Vs Rai & 4 Others*** [2014] KESC 31 (KLR), we order that costs of this Motion abide the outcome of the appeal.

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

- i. The Notice of Motion dated 26th June 2026 and filed on 29th June 2026 is hereby dismissed.***
- ii. The costs shall abide the outcome of the appeal.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of October, 2026.

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

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

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

.....
NJOKI NDUNGU
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

