



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION NO. E050 OF 2025

-BETWEEN-

MARIA LILIAN ODONGO OUYA..... APPELLANT

-AND-

MATHEW O. OSEKO.....1ST RESPONDENT

JULIE O. OSEKO.....2ND RESPONDENT

DAVID AWORI.....3RD RESPONDENT

JUDITH MHINA.....4TH RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Kiage, Jamila Mohammed & Odunga, J.J.A.) delivered on 24th October, 2025 in Civil Appeal No. E697 of 2021 as consolidated with Civil Appeal No. E715 of 2021)

Representation:

Mr. Wekesa for the Appellant
(Wekesa & Simiyu Advocates)

Ms. Michelle Ouma Oseko for the 2nd Respondent
(Busaidy, Mwaura & Ouma & Co. Advocates LLP)

Ms. Lourine Ochogo for the 3rd Respondent
(Okello Ochogo Advocates LLP)

No appearance for the 1st & 4th Respondents

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is a Petition of Appeal dated 1st December, 2025 and filed on 3rd December, 2025. While the appellant does not expressly cite the specific constitutional provision upon which the appeal is anchored, the gravamen of her appeal concerns the legal implications attendant to the failure to serve summons to enter appearance, and the application of the doctrine of *lis pendens*.

B. BACKGROUND

[2] The dispute revolves around the ownership of L.R. No. 12219/3 and L.R. No. 12219/4 (*hereinafter “the suit properties”*). The 1st and 2nd respondents claim ownership of the suit properties pursuant to an oral sale agreement allegedly entered into with Mr. Nicholas Wandia Raballa (*deceased*) and Lero Luno Enterprises Limited. On the other hand, the appellant and the 3rd respondent assert proprietary interests in the suit properties on the basis of purchases made from the 4th respondent, who is said to have acquired the suit properties from Lero Luno Enterprises Limited.

[3] The competing claims over the suit properties culminated in the filing of several suits before the Environment and Land Court (ELC).

C. LITIGATION HISTORY

i. Proceedings before the Environment and Land Court (ELC)

[4] The dispute traces its origins to a larger ten-acre property, L.R. No. 3589/6, from which the two suit properties were eventually subdivided. Around 1992, the 1st and 2nd respondents (Mathew O. Oseko, *now deceased*, and Julie O. Oseko) entered into an arrangement with Mr. Nicholas Wandia Raballa (Mr. Raballa) (now deceased) for the purchase of a plot designated as “G”, for which they made a deposit of Kshs. 80,000/=. They were subsequently notified that the said plot had been sold to a third party. In its place, Mr. Raballa proposed to sell the two suit properties at an aggregate price of Kshs. 850,000/=: a sum that incorporated the earlier deposit. The 1st and 2nd respondents made an additional payment of Kshs. 300,000/= and were granted possession of the land on 15th March, 1993. Although a draft sale agreement was subsequently prepared, it was never executed, as the

property was registered in the name of Lero Luno Enterprises Limited (Lero Luno) rather than Mr. Raballa, leading to amendments that were never finalized.

[5] Nevertheless, the 1st and 2nd respondents undertook development of the land, including clearing, fencing, paying architectural fees, and purchasing construction materials. However, a dispute arose when Mr. Raballa demanded payment of the balance of the purchase price and, following non-payment, forcibly re-entered the property on 7th and 8th June, 1993, destroying the developments undertaken by the respondents.

[6] Consequently, the 1st and 2nd respondents filed **ELC No. 2905 of 1993** (formerly HCCC No. 2905 of 1993) against Mr. Raballa and Lero Luno, seeking specific performance, damages for breach of contract, an injunction, damages for trespass, and special damages. Contemporaneously with the plaint, they filed an application for an interlocutory injunction.

[7] In response to the said application, the firm of Shapley Barret & Co. Advocates entered appearance on behalf of Mr. Raballa and Lero Luno by filing a Notice of Appointment of Advocates dated 2nd July, 1993. The firm also filed Grounds of Objection and a Replying Affidavit sworn by Mr. Raballa in opposition to the injunction application. The application for an interlocutory injunction was heard and dismissed on 29th November, 1993, for want of an executed written contract. Mr. Raballa died in or about 1996 and was not substituted. The firm of Shapley Barret & Co. Advocates later withdrew from acting for Mr. Raballa and Lero Luno due to lack of instructions.

[8] While the suit was still pending, Lero Luno transferred the suit properties to the 4th respondent, Judith Mhina, on 26th March, 1998. The 4th respondent subsequently transferred L.R. No. 12219/3 to the 3rd respondent, David Awori, on 28th October, 2002, and L.R. No. 12219/4 to the appellant, Maria Lilian Odongo Ouya, on 29th October, 2002. In August 2003, the 3rd respondent entered the land and destroyed structures belonging to the 1st and 2nd respondents, escalating the dispute.

[9] On 20th August, 2003, the 1st and 2nd respondents filed **ELC No. 870 of 2003** against the appellant, the 3rd respondent, and the 4th respondent, seeking declarations that the transfers were illegal, fraudulent, null and void, an injunction, damages for trespass, and costs.

[10] On 22nd August, 2003, allegedly unaware of that suit, the appellant and the 3rd respondent filed **ELC No. 877 of 2003** being against the 1st and 2nd respondents, seeking a declaration that they were the rightful registered proprietors, an injunction, damages, and costs. The two suits were consolidated on 28th August, 2003, with **ELC No. 870 of 2003** being the lead file. Subsequently, on 29th September, 2003, the two were further consolidated with **ELC No. 2905 of 1993** by consent, with **ELC No. 870 of 2003** remaining the lead file. The 1st respondent died while the suits were pending hearing.

[11] In a judgment delivered on 25th February, 2021, the ELC (*Okong'o, J.*) identified three primary issues for determination. On *whether the 1st and 2nd respondents had a legally binding and enforceable agreement for the sale of the suit properties with Mr. Raballa and Lero Luno*, the court examined the provisions of the pre-2003 Section 3(3) of the Law of Contract Act, which permitted a suit to be brought upon an oral contract for the disposition of an interest in land where the purchaser had taken possession in part performance of the contract. The court found that the 1st and 2nd respondents had paid a total deposit of Kshs. 380,000/=, taken possession of the suit properties in 1993, and were willing to perform their part of the bargain. Accordingly, the court held that there existed a legally binding and enforceable oral agreement between the 1st and 2nd respondents, on the one hand, and Mr. Raballa and Lero Luno, on the other.

[12] As to *whether the transfer of the suit properties by Lero Luno to the 4th respondent*, and the subsequent transfers to the appellant and the 3rd respondent, were lawful, the court considered the doctrine of *lis pendens* as a doctrine of general application. It found that **ELC No. 2905 of 1993** was pending at the time Lero Luno transferred the suit properties to the 4th respondent in 1998. The court held that the transfer to the 4th respondent, and subsequently to the appellant and

the 3rd respondent, were in breach of the doctrine and therefore unlawful, null and void.

[13] On *whether the appellant and the 3rd respondent were entitled to the reliefs sought in **ELC No. 2905 of 1993** and **ELC No. 877 of 2003***, the court determined that since the transfers to the appellant and the 3rd respondent were founded on an invalid title, they could not sustain their claim for declaratory relief in **ELC No. 877 of 2003**. Consequently, the court dismissed that suit. The ELC proceeded to issue orders cancelling the appellant's and 3rd respondent's titles, directing Lero Luno to transfer the suit properties to the 2nd respondent, and dismissing **ELC No. 877 of 2003**.

ii. Proceedings before the Court of Appeal

[14] Aggrieved by the judgment of the trial court, the appellant and the 3rd respondent lodged two separate appeals, namely **Civil Appeal No. E697 of 2021** and **Civil Appeal No. E715 of 2021**, which were subsequently consolidated, by consent, on 29th September 2003. The grounds of appeal were, as abridged by the Court of Appeal, crystallized into twenty-four (24) limbs, from which the court distilled the following four issues for determination:

- (i)** *Whether the trial court had jurisdiction to hear and determine **ELC No. 2905 of 1993** (formerly, **HCCC No. 2905 of 1993**);*
- (ii)** *Whether there was a legally enforceable agreement for sale of the suit properties between the 1st and 2nd respondents, and Mr. Raballa and Lero Luno Enterprises Ltd;*
- (iii)** *Whether the doctrine of lis pendens was applicable; and*
- (iv)** *Whether the appellant and 3rd respondent were bona fide purchasers for value without notice.*

[15] On *jurisdiction*, the Court of Appeal held that since neither the appellant nor the 3rd respondent had sought a review of the consolidation order, the individual suits were subsumed and proceeded as one suit. Moreover, the dispute in the HCCC No. 2905 of 1993 revolved over the same suit property. Subsequently, Lero Luno and Raballa, having participated in the proceedings through the firm of

Shapley Barret & Co. Advocates, were taken to have submitted to the court's jurisdiction and were therefore estopped from challenging it on account of non-service of summons. The court also found that **ELC No. 2905 of 1993** did not abate upon Raballa's death because the suit against Lero Luno continued.

[16] As to *the existence of an enforceable agreement*, the Court of Appeal applied the pre-2003 Section 3(3) of the Law of Contract Act, which permitted a suit on an oral contract for the disposition of an interest in land where the purchaser had taken possession in part performance thereof. The court found that the 1st and 2nd respondents had taken possession of the suit properties in 1993, long before the appellant and 3rd respondent purchased the properties in 2002. As a matter of course, the court concluded that there was a meeting of minds between the 1st and 2nd respondents and Mr. Raballa, to sufficiently construe an oral agreement.

[17] Turning to the *doctrine of lis pendens*, the Court of Appeal held that it is a doctrine of general application. In that regard, the court found that the suit properties ought to have been preserved during the pendency of **ELC No. 2905 of 1993**, and that the transfers to the 4th respondent, the appellant, and the 3rd respondent breached that doctrine.

[18] Regarding *the claim of being bona fide purchasers*, the Court of Appeal found that a letter dated 11th November, 1996, from Munikah & Co. Advocates (who acted for Lero Luno and later for the 4th respondent) to the 1st and 2nd respondents demonstrated that the vendor, that is the 4th respondent, was aware of the 1st and 2nd respondents' interest and possession. The court concluded that the appellant and 3rd respondent had not exercised sufficient due diligence and were therefore not *bona fide* purchasers for value without notice. Consequently, the Court of Appeal dismissed the appeals with no order as to costs.

iii. Proceedings at the Supreme Court

[19] Undeterred, the appellant has filed the instant appeal on the following four grounds, that the learned Judges of Appeal erred in law:

- i. *in holding that the jurisdiction was conferred to the trial court by consent of the parties through consolidation of the suits to hear a suit, ELC 2905*

of 1993 in which no summons was taken out and served upon the defendants in that suit and which defendants in that suit were not part of the alleged consent on consolidation.

- ii. by failing to apply the statutory enacted doctrine of lis pendens and the attendant conditions which must be fulfilled prior to its invocation including registration of a prohibitory order and an injunction and upheld the decision of the Environment and Land Court from the shackles of the common strictures of the doctrine of lis pendens that the mere filing of a suit invoked the application of the doctrine rather than a statutory premise given that the said doctrine had been enacted under the Indian Transfer of Property Act, 1882 thereby desecrating the appellant's constitutionally vested and entrenched right to property in violation of Article 40 of the Constitution, 2010.*
- iii. in holding that the transfer of the suit property to the 4th respondent and the subsequent transfer to the appellant were null and void in breach of the doctrine of lis pendens in the absence of a pending suit and the conditions precedent for application of the statutory doctrine of lis pendens under the Indian Transfer of Property Act, 1882 were not met, thereby vitiated the appellant's title to L.R. No. 12219/4 and unlawfully and unconstitutionally vested it to the 2nd respondent.*
- iv. in holding that the defendants in ELC 2905 of 1993 having filed a notice of appointment for the purpose of defending interlocutory application for injunction only, acquiesced to the proceedings and thus conferred jurisdiction to the trial court to hear and determine ELC 2905 of 1993 in which no summons to enter appearance were taken out and served and contrary to the established jurisdictional principles by this Court thus violating the clear provisions of the law which then violated the petitioner's right to equal protection and benefit of the law and fair hearing.*

[20] Accordingly, the appellant seeks the following reliefs:

- i. The judgment and order of the Court of Appeal (Kiage, Jamila Mohammed & Odunga, JJA) sitting at Nairobi delivered on 24th October*

in Nairobi Civil Appeal No. E697 of 2021 consolidated with Civil Appeal No. E715 of 2021 upholding the judgment and decree of the Environment and Land Court delivered on 25th February, 2021 (Okong'o J) be set aside in its entirety and substituted with an order allowing the appeal;

- ii. The judgment of the Environment and Land Court delivered on 25th February, 2021 at Nairobi (Okong'o J) be and is hereby set aside in its entirety;*
- iii. ELC 877 of 2003 be and is hereby allowed in terms prayed;*
- iv. A declaration be issued declaring that the petitioner's title to property L.R. 12219/4 is legal, lawful and indefeasible and thus protected under Article 40 of the Constitution 2010;*
- v. ELC 2905 of 1993 be and is hereby struck out;*
- vi. ELC 870 of 2003 be and is hereby dismissed;*
- vii. The costs of this Appeal and the costs of the proceedings in the Court of Appeal and in the Environment and Land Court be and are hereby awarded to the appellant as against the 2nd respondent; and*
- viii. Such consequential and appropriate relief, further or other order (s) as this Honourable court may deem just and fit to grant.*

[21] On 22nd January 2026, the 3rd respondent, filed a Notice of Cross-Appeal dated 12th December 2025, together with a Memorandum of Appeal dated 17th December 2025, challenging the same judgment of the Court of Appeal. The 3rd respondent contends that the decision of the Court of Appeal ought to be reversed on the following seven grounds:

- i. That the Environment and Land Court and the Court of Appeal did not have jurisdiction to adjudicate and determine HCCC No. 2905 of 1993 and use it to quash/nullify the 3rd respondent's property Land Reference Number 12219/3 as protected by Article 40 (1) of the Constitution.*
- ii. The learned Judges of the Court of Appeal interpreted and applied their constitutional and statutory authority erroneously in upholding that the Environment and Land Court had jurisdiction over HCCC No. 2905 of 1993 to adjudicate and determine the same and equally that the Court of Appeal had jurisdiction to adjudicate and determine HCCC No. 2905 of*

1993, where summons to enter appearance were never issued in the case and used it to take away Land Reference Number 12219/3 from the 3rd respondent and give it to the 2nd respondent.

- iii. A deprivation of property under Article 40 (1) of the Constitution by the Court of Appeal and any other court must be scrupulously founded on lawfulness and most fundamentally jurisdictional lawfulness and not abstract non-existent jurisdiction as was used by the two superior courts to quash/nullify the 3rd respondents property rights in Land Reference Number 12219/2 lawfully owned and protected by Article 40 (1) of the Constitution.*
- iv. No lawful jurisdiction could flow to the Environment and Land Court and the Court of Appeal out of HCCC 2905 of 1993 to be a basis for the lawful application of the doctrine of lis pendens after Justice Bosire's ruling on 29th November 1993 that dismissed the 1st and 2nd respondents' application for an injunction to restrain Lero Luno Enterprises Limited and Nicholas Wandia Raballa from alienating Land Reference No.12219/3. As the lawful registered proprietors of Land Reference No.12219/3, fully protected at Article 40 (1) of the Constitution, the Court of Appeal and the Environment and Land Court did, without jurisdiction, quash/ nullify the 3rd respondent's title and deprive the 3rd respondent of his property in violation of the Constitution.*
- v. The learned Judges of Appeal erred in law by quashing the 3rd respondent's property and proprietary rights in the suit land LR. No. 12219/3 protected under Article 40 of the Constitution, by invoking the inapplicable doctrine of lis pendens based on HCCC No. 2905 of 1993 that they did not have jurisdiction over, the suit and the doctrine and/or whereof the doctrine had already been exhausted.*
- vi. The 3rd respondent/cross-appellant's protection under Article 40 (1) of the Constitution, and of his L.R. No. 12219/3, as embodied in the reliefs sought in ELC No.877 of 2003 were displaced through the superior courts' using HCCC No.2905 of 1993 and to which case the two courts lacked the requisite jurisdiction to adjudicate and determine, no summons to enter appearance having ever issued.*

vii. *Jurisdiction is a fundamental matter and it can be raised at any stage of the proceedings, even on appeal and even by the court itself and the 3rd respondents raised it (jurisdiction) as appertains to competence of HCCC No. 2905 of 1993 that was applied to quash/nullify the 3rd respondents' property rights at Article 40 (1) over L.R. No. 12219/3.*

[22] Accordingly, the cross-appellant/3rd respondent seeks the following reliefs:

- (a) The appeal herein be allowed;*
- (b) The cross-appeal herein be allowed with costs;*
- (c) The judgment and the decree of the Court of Appeal of 24th October, 2025 be set aside in its entirety and substituted with an order allowing the consolidated appeals;*
- (d) The judgment and decree of the Environment and Land Court of 25th February 2021 be set aside in its entirety and substituted with an order:
 - (i) Dismissing ELC 870 of 2003 with costs;*
 - (ii) Allowing ELC 877 of 2003 as prayed with costs; and*
 - (iii) Striking out and/or dismissing HCCC No. 2905 of 1993 in its entirety with costs.**
- (e) Such other order (s) as the Honourable Court may make to meet the ends of justice in this appeal; and*
- (f) The 3rd respondent be awarded the costs of this appeal and/or cross appeal in this Court, costs of consolidated appeals in the Court of Appeal and costs of the proceedings in the Environment and Land Court.*

[23] On 12th January, 2026, the 2nd respondent sought leave to file her response out of time. The Deputy Registrar declined the application, finding the reasons advanced to be misleading. No other respondent, apart from the 3rd respondent (cross-appellant), filed any substantive response to the Petition.

D. PARTIES' SUBMISSIONS

i. Appellant's Submissions

[24] The appellant relied on her written submissions dated 30th January, 2026 advancing the following arguments. On jurisdiction, she submits that the dispute regarding the cancellation of her title and the court's application of the doctrine of

lis pendens involves the interpretation and application of Article 40 of the Constitution, and therefore this Court has jurisdiction under Article 163(4)(a) of the Constitution as of right. In support of this argument, the appellant relies on ***Lisamula Vs Independent Electoral and Boundaries Commission & 2 others*** [2014] KESC 23 (KLR), and ***Ashmi Investment Limited Vs Riakina Limited & another*** [2023] KESC 66 (KLR).

[25] On the substantive merits of the appeal, the appellant argues that the ELC and the Court of Appeal lacked jurisdiction over ***ELC No. 2905 of 1993*** on account of alleged failure to issue or serve summons to enter appearance upon Mr. Raballa and Lero Luno. She relies on Section 20 of the Civil Procedure Act (Cap. 21) and Order IV Rule 1 of the Civil Procedure Rules (1985), as well as the persuasive decisions in ***Karandeep Singh Dhillon & another Vs Nteppes Enterprises Limited & another*** [2010] KEHC 3650 (KLR) and ***Alfred Makhongo & 2 Others Vs Zablon Nthamburi & another*** [2010] KEHC 39 39 (KLR), for the proposition that a plaint filed without valid summons is impotent and the court lacks jurisdiction to deal with it.

[26] She further contends that the Court of Appeal erred in holding that jurisdiction could be conferred by consent of the parties, contrary to the established principle that parties cannot confer jurisdiction on a court where none exists. In this regard, the appellant draws support from ***Equity Bank Limited Vs Bruce Mutie Mutuku t/a Diani Tour & Travel*** [2016] KECA 250 (KLR) and this Court's decision in ***In the Matter of Interim Independent Electoral Commission*** [2011] KESC 1 (KLR).

[27] On the doctrine of *lis pendens*, the appellant contends that at the material time, the doctrine was codified under Section 52 of the Indian Transfer of Property Act, 1882 (now repealed), which, she argues, required active prosecution of the suit and a prohibitory order accompanied by an injunction. In support of this position, she relies on the Court of Appeal decision in ***Barclays Bank of Kenya Limited Vs Henry Ndungu Kinuthia & another*** [2018] KECA 252 (KLR).

[28] She further submits that, since the application for injunction was dismissed on 29th November, 1993, and there was no active prosecution of ***ELC No. 2905***

of 1993 until 2003, the statutory prerequisites for *lis pendens* were not met. As a result, the Court of Appeal violated Section 3(1) of the Judicature Act (Cap. 8) by applying the common law doctrine of *lis pendens* notwithstanding that the issue was already governed by statute, in that regard she places reliance on ***Tukai Vs Muge & 2 Others*** [2014] KECA 155 (KLR).

[29] To that end, the appellant posits that the transfer of the suit property to her in 2002 was lawful, on the basis that ***ELC No. 2905 of 1993*** had become invalid after 24 months for want of service of summons; and that there was therefore no valid pending suit capable of grounding the doctrine of *lis pendens*.

ii. 3rd Respondent/Cross-Appellant's Submissions

[30] The 3rd respondent relies on his filed written submissions dated 13th February, 2026, in which he identifies four issues for determination before this Court. To begin with, *on the validity of ELC No. 2905 of 1993*, the 3rd respondent submits that a suit in which summons were never issued is stillborn and incapable of clothing a court with adjudicatory authority. He relies on this Court's decision in ***Macharia & another Vs Kenya Commercial Bank Ltd & 2 others*** [2012] KESC 8 (KLR).

[31] With regards to *whether jurisdiction can be created, revived, or assumed through consolidation*, the 3rd respondent submits that consolidation is a procedural tool, not a jurisdiction-conferring mechanism, and that the issue of jurisdiction can be raised at any stage of the proceedings. He cites ***Aramat & another Vs Lempaka & 3 others*** [2014] KESC 21 (KLR) and ***Law Society of Kenya Vs Centre for Human Rights and Democracy & 12 others*** [2014] KESC 29 (KLR).

[32] The 3rd respondent also argues that the invocation of the doctrine of *lis pendens* was legally untenable because a void suit cannot anchor *lis pendens*. He submits that the application of the common law doctrine of *lis pendens* while disregarding the statutory provisions of Section 52 of the Indian Transfer of Property Act elevated equity above statute, violating the hierarchy of norms under

Section 3(1) of the Judicature Act. He therefore urges this Court to set aside the judgments of the superior courts as nullities.

[33] As to *whether the superior courts violated Article 40(1) of the Constitution*, the 3rd respondent argues that the application of *lis pendens* in these circumstances resulted in the deprivation of property through a process that was neither jurisdictionally sound nor statutorily compliant. By reverting to common law *lis pendens* while disregarding Section 52 of the ITPA, the Court of Appeal elevated equity above statute and constitutional protection, a position inconsistent with this Court's jurisprudence on constitutional supremacy.

[34] The 3rd respondent concludes by submitting that the impugned judgments were nullities since they were rendered without jurisdiction. He urges the Court to therefore set aside the decisions of the trial court and of the Court of Appeal.

E. ISSUES FOR DETERMINATION

[35] Having carefully considered the pleadings, the record of appeal, the written submissions of the parties, and the authorities cited, the following issues emerge for determination:

- a) *Whether this Court has jurisdiction to hear and determine the Petition of Appeal and the Cross-Appeal;*
- b) *Whether the Environment and Land Court and the Court of Appeal had jurisdiction to hear and determine HCCC No. 2905 of 1993;*
- c) *Whether the Court of Appeal correctly applied the doctrine of lis pendens; and*
- d) *Whether Article 40 (1) of the Constitution was violated.*

F. ANALYSIS AND DETERMINATION

a) Whether this Court has jurisdiction to hear and determine the Petition and Cross-Appeal

[36] A preliminary issue arises regarding this Court's jurisdiction to entertain the appeal. The 2nd respondent belatedly raised a preliminary objection challenging the Court's jurisdiction. As that objection was filed out of time without the leave of

this Court, the same is inadmissible and not properly before us. Consequently, we say no more about it.

[37] The inadmissibility of the preliminary objection notwithstanding, our approach remains guided by the principle we have consistently reaffirmed, emphasizing that jurisdiction is the foundational pillar upon which judicial authority rests and must be determined at the outset. ***In the Matter of the Interim Independent Electoral Commission (Applicant)*** [2011] KESC 1 (KLR), the Court endorsed the reasoning in ***Owners of the Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Ltd*** [1989] KECA 48 (KLR), wherein Nyarangi, JA famously stated:

“... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. 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 that it is without jurisdiction.”

[38] Jurisdiction is therefore not a mere procedural technicality; it is a fundamental prerequisite to the exercise of judicial authority. As we underscored in ***Macharia & another Vs Kenya Commercial Bank Limited & 2 others*** [2012] KESC 8 (KLR), a court’s jurisdiction is not an open-ended discretion. It is conferred by the Constitution, legislation or both. Certainly, no court can arrogate unto itself jurisdiction that exceeds the boundaries prescribed by law.

[39] In that vein, Article 163 of the Constitution comprehensively delineates the jurisdiction of the Supreme Court in unequivocal terms. The appellate jurisdiction of this Court is conferred under Article 163 (4) which 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; and

(b) in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

[40] The constitutional architecture of appellate jurisdiction under Article 163(4) is clear. A party must elect whether to approach this Court as of right under Article 163(4)(a) or to seek certification under Article 163(4)(b). The two avenues are not mutually inclusive but operate independently, each with distinct procedural and substantive thresholds. In ***Ibren Vs Independent Electoral and Boundaries Commission & 2 others*** [2018] KESC 75 (KLR), we emphasized that:

“Article 163(4) of the Constitution clearly demarcates a two-prong appellate jurisdiction of this court from decisions of the Court of Appeal. These two jurisdictional avenues are not mutually inclusive but are independent of each other and there is need for a party that comes before this court to clearly state which one she/he invokes.”

[41] Turning to the invocation of this Court’s jurisdiction, neither the appellant nor the 3rd respondent expressly stated the specific limb of Article 163(4) of the Constitution under which they sought to invoke this Court’s appellate jurisdiction. This Court has numerously cautioned litigants that, given its specialized jurisdiction, a party desiring to invoke its jurisdiction under Article 163(4) must explicitly specify the limb upon which the petition is premised. In ***Sonko Vs County Assembly of Nairobi City & 11 others*** [2022] KESC 76 (KLR) the Court was explicit that:

“(90) It can never be the role of the court to wander around in the maze of pleadings and averments to ascertain by way

of elimination which of the two limbs of article 163(4) a party intends to rely on.”

Therefore, the Court cannot be expected to guess or deduce which jurisdictional limb a party intends to rely upon; that burden rests squarely on the appellant.

[42] In *Twaha Vs Abdalla & 2 others* [2015] KESC 20 (KLR) this Court previously provided authoritative guidance on the forensic obligation of a litigant, holding that:

“Thus, a litigant is under forensic obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Supreme Court. The pathway thus identified, is for pursuit. And where it is perceived that an appeal raises both categories of issues, the course of merit is to comply with the requirements of both: file an appeal “as of right” on the constitutional issues; and seek leave as regards “matters of general public importance”. As regards the latter, the relevant appeal is to be filed only after grant of leave. It is then left to the Supreme Court in its exercise of discretion, whether the two causes should be consolidated and resolved as one.”

[43] Once a litigant chooses the appellate path, the Court subjects it to the applicable jurisdictional threshold. The failure by the appellant and the 3rd respondent to specify the jurisdictional limb under which they seek to invoke this Court’s authority is, on its own, a sufficient basis for this Court to decline jurisdiction.

[44] It is common ground that no application for certification was made by the appellant. In her submissions, the appellant posits that her petition is filed as of right, under Article 163(4)(a) of the Constitution. The procedural deficiency notwithstanding, such an appeal must be premised on a genuine constitutional controversy, one that directly shaped the outcome at the Court of Appeal. Mere allusions to constitutional provisions or the incidental mention of constitutional

principles are insufficient. See ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR).

[45] The foregoing position was reinforced in ***Munya Vs Kithinji & 2 others*** [2014] KESC 30 (KLR) and ***Joho & another Vs Shahbal & 2 others*** [2014] KESC 34 (KLR). Consequently, an appeal under this provision must be premised on clear and compelling constitutional contestation. A litigant must also demonstrate that the interpretation or application of the Constitution was the central basis upon which the appellate court's decision rested or that the determination by the Court took a constitutional trajectory.

[46] In ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney-General & 2 others*** [2020] eKLR, we summed up the requisite attributes that are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the Constitution as follows:

- i. ***The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.***
- ii. ***The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/issues of his matter which in his opinion fall for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of constitutional interpretation and application.***
- iii. ***A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which***

involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

- iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).*
- v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a).*

[47] In the instant Petition, the appellant maintains that the proceedings before the superior courts below were a nullity. This is on account of alleged failure to issue or serve summons to enter appearance upon Mr. Raballa and Lero Luno in **ELC No. 2905 of 1993**. The cross appellant adds that consolidation of the said **HCCC No.2905 of 1993** with **ELC 870 of 2003** and **ELC 877 of 2003** could not confer jurisdiction on the trial court. Accordingly, any findings by the trial court on the basis of **HCCC No.2905 of 1993** was a nullity which extended to subsequent proceedings before the Court of Appeal. Both the appellant and the 3rd respondent cited their grievance: mis-application of the doctrine of *lis pendens* and the attendant violation of Article 40 of the Constitution.

[48] We are satisfied that in so far as the exercise of jurisdiction by the superior courts below is the fundamental dispute before this Court, then we are inclined towards determining the petition as of right. It is only upon being satisfied of the jurisdiction of the superior courts below that this Court can render itself on the attendant issues of the applicability of the doctrine of *lis pendens* and the violation of Article 40(1) of the Constitution. In doing so, we are mindful that the underlying dispute on ownership of the suit properties is not only dependent on factual contestations but also interpretation of statutory provisions, something beyond the scope of our jurisdiction, as invoked.

b) Whether the Environment and Land Court and the Court of Appeal had jurisdiction to hear and determine ELC No. 2905 of 1993

[49] While we agree that a challenge on jurisdiction can be raised at any time, it is prudent that such a challenge be raised at the earliest. This is with the underpinning that should the objection be upheld, the court would down its tools. Such early dispensation with jurisdictional issues ensures prudent use of resources and optimal use of scarce judicial time.

[50] The appellant and cross appellant fault the superior courts below of proceeding without jurisdiction. Section 20 of the Civil Procedure Act (Cap. 21) and Order IV Rule 1 of the Civil Procedure Rules (1985) on the prerequisite issuance of summons to accompany a plaint when serving a defendant, including the validity thereof is trite.

[51] To interrogate the appellant's argument regarding summons, recourse is made to the record. Undoubtedly, on 28th August 2003 before *Hayanga J.*, ***HCCC No. 870 of 2003*** and ***HCCC No.877 of 2003*** were consolidated under ***HCCC No.870 of 2003*** by consent of the parties. On 29th September 2003, before the same Judge, the cases were, by consent, consolidated with ***HCCC No.2905/93***. No appeal or review against the consent orders of consolidation have been instigated by either of the parties.

[52] What emerges from the record is that ***HCCC No.2905/93*** was instituted by the 1st and 2nd respondents against Mr. Raballa and Lero Luno. Though the 1st and 2nd respondents' interlocutory application for injunction did not eventually succeed, Mr. Raballa and Lero Luno were represented by the firm of Shapley Barret & Co. Advocates. The appellant contends that such representation was limited to the defence of the interlocutory application, on the basis of a Notice of Appointment. She postulates that summons were never issued to the defendants in that suit.

[53] This position is difficult to comprehend on various grounds. First, neither the appellant nor the 3rd respondent (cross appellant) was a party to ***HCCC***

No.2905/93 as to conclusively submit on service of summons upon the defendants in that suit. Second, the appellant and 3rd respondent (cross appellant) were only made aware of this 1993 suit upon its consolidation, by consent, with their respective suits being **HCCC No.870 of 2003** and **HCCC No.877 of 2003**. Third, the firm of Sharpley Barret & Co. Advocates representing the defendant never raised a concern relating to failure to be served with summons to enter appearance. Further, the appellants who were defending the issue of the title to the suit premises did not demonstrate what prejudice they suffered if summons were not served in the 1993 case after all the cases were consolidated.

[54] Though the firm of Advocates did not file a defence and later ceased acting for the respondents in the matter on account of lack of instructions, the judgment by the ELC affirms the existence of summons in the following excerpt:

“ . . . Upon being served with summons, they appointed the firm of Shapley Barret & Co. Advocates to represent them in the suit. . . .” (Emphasis ours)

[55] In view of the foregoing, and based on the sanctity of the judgment, we can only conclude that summons were issued and served accordingly. At any rate, the issue of summons in relation to the appellant and the 3rd respondent does not arise under the present circumstances. Moreover, neither the appellant nor the cross appellant has produced copies of the impugned summons in the record as to challenge their validity.

[56] It is noteworthy that the dismissal of the application for interlocutory injunction in **HCCC No.2309/93** cannot form the basis for rendering the suit a nullity as a final finding on the merit of the entire suit cannot be made at the interim stage. This position is buttressed by the fact that at the time of consolidation, the suit was valid, no orders either striking out or dismissing the suit had been made by court. In the same breadth, the appellant and cross appellant have not challenged the finding that the suit had not abated upon the death of Mr. Raballa in or around 1996.

[57] With the above finding, there is no merit in the grievance that the proceedings before the ELC or the Court of Appeal were a nullity. The consents to consolidate the cases, were merely a procedural posture to aid in prudent use of judicial resources. This did not amount to grant of jurisdiction to the courts by acquiescence or consent as argued by the appellant and cross appellant. It is also useful to point that prior to the establishment of the ELC after the promulgation of the 2010 Constitution, all land matters were filed in the High court and that explains why all the matters were transferred to ELC where they were determined. We therefore affirm that the ELC and Court of Appeal had the requisite jurisdiction to hear and determine **HCCC No.2905/93**.

c) Whether the Court of Appeal correctly applied the doctrine of *lis pendens*

[58] The challenge in this appeal to the application of the doctrine of *lis pendens* is two-fold. First, that it was founded on a nullity since the suit **HCCC No.2905/93** was not accompanied by the requisite summons to enter appearance and second, is that the court misapplied this common law doctrine. This doctrine, the appellant and cross appellant urge, was applied outside of the scope as delineated by the courts in their decisions and in disregard to the fact that the same has since been codified in statute. They referred to the Court's decision in **Ashmi Investment Limited Vs Riakina Limited & another** [2023] KESC 66 (KLR) (*the Ashmi ruling*) and Section 52 of the Indian Transfer of Property Act, 1882 (now repealed).

[59] Before proceeding further, we must address the appellant's reliance on this Court's ruling in **the Ashmi ruling**. At paragraph 14 of that ruling, the Court stated that "***the dispute as to the ownership of land as a bona fide allottee under the circumstances and the court's application of the doctrine of lis pendens ... are issues that involve the interpretation and application of Article 40 of the Constitution.***" The appellant contends that this compels the conclusion that any appeal touching on *lis pendens* falls within this Court's jurisdiction. That contention misapprehends the context of **the Ashmi ruling**.

[60] First, the **Ashmi ruling** was rendered at interlocutory stage on an application for conservatory orders, where the threshold for establishing jurisdiction is lower. In considering an application for conservatory relief, the Court need only to be satisfied that the appeal is arguable. The Court explicitly preserved its jurisdiction to revisit the matter, stating that it was necessary “**to allow the appellant to ventilate its appeal under the strict confines of Article 163(4)(a) of the Constitution**” (See para 15). The ruling did not foreclose future interrogation of jurisdiction, as this Court later affirmed in the subsequent judgment on the merits (see **Ashmi Investment Limited Vs Riakina Limited & another** [2024] KESC 30 (KLR) at para 45).

[61] Second, **the Ashmi ruling** is distinguishable on its facts. In that case, the appellant directly claimed to be the *bona fide* registered owner of the suit properties and argued that the misapplication of *lis pendens* deprived it of property it already owned under Article 40 of the Constitution. In contrast, the appellant in the instant case does not assert a direct constitutional claim to ownership. Her primary grievance is that the ELC lacked jurisdiction to hear **ELC No. 2905 of 1993** on account of non-service of summons. The *lis pendens* argument is incidental to that jurisdictional challenge. The cross appellant is more tacit in his argument as he faults the court for not applying the doctrine of *lis pendens* as codified under section 52 of the ITPA (repealed).

[62] In addressing this issue we discern that the dispute was fundamentally a private land dispute concerning the validity of competing claims to ownership of L.R. No. 12219/3 and L.R. No. 12219/4. The ELC and the Court of Appeal were primarily engaged, as they were called upon, in the interpretation and application of statutory law: Section 3(3) of the Law of Contract Act (pre-2003) regarding the enforceability of oral contracts for the sale of land; Order IV and Order V of the Civil Procedure Rules regarding the issuance and service of summons; and Section 52 of the Indian Transfer of Property Act, 1882 (repealed) regarding the doctrine of *lis pendens*. Accordingly, the Court of Appeal did not make a constitutional determination and none of the Articles of the constitution were invoked.

[63] The Court has always remained reluctant to invoke its jurisdiction when the issue of *lis pendens* has been raised. In ***Dhanjal Investments Limited Vs Shabaha Investments Limited*** [2022] KESC 41 (KLR) the Court was not persuaded that the doctrine of *lis pendens* fell within its jurisdiction, as of right. The Court did not also find it necessary to interfere with the Court of Appeal's application of the doctrine of *lis pendens* in ***Cove Investment Limited v Rono & another (Suing as the Legal Representatives of the Estate of Mathias Kimnyole Langat) & 2 others*** [2026] KESC 24 (KLR). The doctrine is fairly settled and the manner in which it is applied to a dispute is specific to facts, a factual contestation that cannot be descended into.

[64] In the premises, and having dispensed with jurisdiction of the superior courts below, we are persuaded that the central controversy in the courts below did not revolve around the interpretation or application of Article 40 of the Constitution. The ***Ashmi ruling*** does not stand for the proposition that any mention of *lis pendens* automatically converts an appeal into a constitutional matter. We therefore find that ***the Ashmi ruling*** does not compel a different conclusion. The Court of Appeal's mention of "constitutional protection" of property rights was incidental to its determination of the parties' statutory and equitable rights.

[65] As this Court held in ***Aviation & Allied Workers Union of Kenya Vs Kenya Airways Limited & 3 others*** [2017] KESC 11 (KLR), the mere mention of a constitutional provision in a decision does not automatically bring a matter within this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution. The issue as framed before the courts below, in our view, was not a constitutional challenge to the statutory framework, but rather an inquiry into whether the doctrine of *lis pendens* applied on the facts.

[66] This Court has previously cautioned against such jurisdictional overreach. In ***Njuguna & 46 Others Vs Spire Properties (K) Limited & 12 Others*** [2023] KESC 37 (KLR), we declined jurisdiction where a party sought to invoke Article 163(4)(a) on grounds that a statutory provision had been applied in a manner that allegedly curtailed constitutional rights. We reaffirmed that where the constitutional validity of a provision was not in issue before the lower courts, this

Court cannot assume jurisdiction merely because a party alleges that the provision was applied in a manner inconsistent with constitutional principles.

[67] While the appellant and the 3rd respondent have couched their grievances in constitutional tenor, the substance of their appeal challenges the factual findings and statutory interpretations of the superior courts. This Court has repeatedly cautioned that it was not established as an additional layer of the appellate hierarchy for the correction of factual errors or the re-evaluation of evidence. Its jurisdiction under Article 163(4)(a) of the Constitution is reserved for cardinal issues of constitutional interpretation or application.

[68] Applying the foregoing reasoning to the present matter, it is evident that the appellant is not challenging a constitutional interpretation rendered by the Court of Appeal, but rather the manner in which the court applied statutory provisions and evaluated the evidence before it. The jurisdiction of this Court cannot be invoked simply because an appellant is dissatisfied with a lower court's interpretation of legislation or its findings of fact. Since this ground does not meet this constitutional threshold, the same must fail.

d) Whether Article 40 (1) of the Constitution was violated

[69] Flowing from this finding, the argument on the violation of the constitution was hinged on the misapplication of the doctrine of *lis pendens*. As we have determined that this Court lacks jurisdiction to hear and determine this ground of appeal, any determination on those issues would be an exercise in futility and an affront to the constitutional limits of this Court's authority. We therefore refrain from making any pronouncements on this issue.

G. THE CROSS-APPEAL

[70] The Cross-Appeal filed by the 3rd respondent is subject to the same jurisdictional requirements as the main Petition. The gist of the cross appeal is on the application of the doctrine of *lis pendens*. As we have found, this is a matter within the interpretation and application of a Statute and not a constitutional question.

[71] Having found that this Court lacks jurisdiction under Article 163(4)(a) of the Constitution to entertain the ground on *lis pendens*, it follows that the Cross-Appeal, which is predicated on the same constitutional provision and arises from the same judgment of the Court of Appeal, is also incompetent and must suffer the same fate. The Cross-Appeal is hereby struck out for want of jurisdiction.

H. COSTS

[72] The general principle in litigation is that costs follow the event. However, this Court has the discretion to depart from this principle where the circumstances of a case so warrant. This Court in ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others*** [2014] KESC 31 (KLR), held that although costs follow the event, the Court has the discretion to make a different order based on the circumstances of each case.

[73] In this matter, the primary issue we have determined is one of jurisdiction, and the appeal has been dismissed without a determination on the merits. Considering the nature of the dispute and the circumstances of this case, and that the appellant and cross appellant were basically on the same side of the appeal, and the other parties did not participate in the appeal, we find it appropriate that each party bears its own costs. We also make no order as to the costs of the proceedings before the Environment and Land Court and Court of Appeal.

I. ORDERS

[74] For the reasons set out above, this Court makes the following final orders:

- i. ***The Petition of Appeal dated 1st December, 2025 and filed on 3rd December, 2025 is hereby dismissed for want of jurisdiction.***
- ii. ***The Notice of Cross-Appeal dated 12th December, 2025 and the Memorandum of Appeal dated 17th December, 2025 are hereby struck out for want of jurisdiction.***
- iii. ***Each party shall bear its own costs of the Petition and the Cross-Appeal.***

- iv. No order as to costs of the proceedings before the ELC and Court of Appeal.*
- v. The sum of Kshs. 6,000/= deposited as security for costs upon the lodging of this appeal shall be refunded to the appellant.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd 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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA