REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P, Wanjala, Lenaola, Ouko & Warsame SCJJ)

PETITION NO. E024 OF 2026

–BETWEEN–

BENARD OTIENO ANYUOR.....1ST APPELLANT

ANYUOR NICHOLAS ODHIAMBO.....2ND APPELLANT

-AND-

CHIEF EXECUTIVE OFFICER

NATIONAL IRRIGATION AUTHORITY .....1ST RESPONDENT

NATIONAL IRRIGATION AUTHORITY..... 2ND RESPONDENT

(Being an appeal against the Judgment of the Court of Appeal at Kisumu (Makhandia, Mwita & Ongaya JJ. A) in Kisumu Civil Appeal No. E065 of 2026 delivered on 12th June 2026)

Representation:

Mr. Kennedy Okongo H/b for Ms. Awuor for the Petitioners

(*Winnie Awuor Paul, Advocates*)

Mr. Delbert Ochola for the respondents

(*G & A Advocates LLP*)

RULING OF THE COURT

[1] BEARING IN MIND that jurisdictional questions are fundamental and may be raised at any point in judicial proceedings; and **RECOGNIZING** this Court's power pursuant to Section 18 of the Supreme Court Act to strike out petitions that are fundamentally flawed for lack of jurisdiction; and **GUIDED BY** this Court's established practice and precedent, which affirm the discretion to address preliminary objections at the threshold stage to ensure efficient administration of justice; and

[2] TAKING INTO ACCOUNT that this Court has deemed it appropriate to exercise its discretion by considering, at the outset, the respondents' Notice of Preliminary Objection dated 12th August 2026 and filed in this Court on 1st September 2026 which contests this Court's jurisdictional competence to adjudicate the Petition of Appeal dated 8th July, 2026 and filed in this Court on 15th July, 2026; and

[3] NOTING THAT, from the record of appeal, the appellants challenged the alleged compulsory acquisition of their land before the Land Acquisition Tribunal, which allowed their claim with costs; that the Migori Environment and Land Court (ELC) affirmed the Tribunal's decision but later dismissed the appellants' attempt to enforce costs in the Tribunal through judicial review proceedings for want of jurisdiction; that the Court of Appeal upheld this position, holding that enforcement of costs does not arise under Articles 23(2) and 47(3) of the Constitution and that the Tribunal's jurisdiction is confined to matters set out in Section 133C(8) of the Land Act; that the appellants have now petitioned this Court under Article 163(4)(a), contending that the Court of Appeal erred in its interpretation of Articles 23(2) and 47(3), wrongly monopolized judicial review remedies under the High Court, and unduly restricted the Tribunal's statutory jurisdiction, thereby infringing upon their rights to fair hearing and fair administrative action; and

[4] UPON PERUSAL of the respondents' notice of Preliminary Objection and submissions dated 12th August 2026 and filed in this Court on 1st September 2026, wherein they contend that the appellants' appeal does not raise any constitutional question but is instead concerned with a matter of statutory interpretation; that from the Tribunal to the Court of Appeal, the main contention was whether the Tribunal had jurisdiction to enforce its own award of costs by way of judicial review orders such as mandamus; that such an issue was a statutory question under the Land Act, the Fair Administrative Action Act, and the Law Reform Act and not a constitutional one; that this Court in ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR) held that only appeals involving the interpretation or application of the Constitution fall within the ambit of Article 163(4)(a), and that statutory disputes cannot be transformed into constitutional ones merely by invoking constitutional provisions; that this Court in ***Ngoge Vs Kaparo & 5 others*** [2012] KESC 7 (KLR) emphasized that only cardinal constitutional issues of jurisprudential moment deserve this Court's input, while ordinary statutory questions are to be resolved by lower courts**;** that this Court in ***Gwaro Vs Kenya Revenue Authority*** [2026] KESC 40 (KLR) further stressed that jurisdiction is everything and the burden lies on an appellant to demonstrate that an appeal falls within Article 163(4)(a); that equally, this Court in ***Aviation & Allied Workers Union of Kenya Vs Kenya Airways Limited & 3 others*** [2017] KESC 11 (KLR) held that references to constitutional values do not convert a statutory dispute into a constitutional one; that additionally, in ***Munya Vs Kithinji & 2 others*** [2014] KESC 30 (KLR), this Court clarified that a matter involves constitutional application only if a constitutional provision formed the gist of the cause at the Court of Appeal and the reasoning took a trajectory of constitutional interpretation and application; that in this case, no constitutional provision formed the gist of the proceedings below; that the Court of Appeal's determination was purely statutory, concerning the limits of the Tribunal's jurisdiction; that the appellants' invocation of Articles 10, 47, 48, and 232 in the Petition of Appeal cannot retrospectively alter the nature of the dispute; that the Petition of Appeal is an attempt to reopen a statutory question already determined

by the lower courts, and therefore does not fall within the Supreme Court's jurisdiction under Article 163(4)(a); and that this Court should down its tools and dismiss the appeal with costs; and

[5] COGNISANT of the appellants submissions dated 10th August 2026 and filed in this Court on 27th August 2026, wherein they contend that the Respondents' Preliminary Objection is procedurally defective because Rule 42 of the Supreme Court Rules requires a respondent to file grounds of objection or an affidavit within fourteen days, not a belated objection; that a proper preliminary objection must raise a pure point of law, not contested facts as was observed by this court in the case of ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*** [2014] KESC 34 (KLR) to show that the respondents' objection is improperly framed; that their appeal raises substantive constitutional questions under Article 163(4)(a), particularly whether the Land Acquisition Tribunal is a judicial forum with jurisdiction under Articles 23(2), 47(3), 162(2), and 169(1)(d) of the Constitution, and whether Section 133C(8) of the Land Act empowers it to enforce its own decisions; that the lower courts misapplied the doctrine of constitutional avoidance, stripping the Tribunal of its legislative mandate and leaving citizens with unenforceable decrees; that their appeal squarely requires constitutional interpretation and application, thus satisfying the threshold for the Supreme Court's jurisdiction; that as was held by this **Court in *Communications Commission of Kenya Vs Royal Media Services Ltd* [**2014] eKLR**,** constitutional avoidance should preserve specialized tribunals' jurisdiction rather than oust them; and that the Preliminary Objection is incompetent, prejudicial, and contemptuous of the Court's constitutional role, and the same should be dismissed to allow the Court to proceed to determine the appeal on its merits.

[6] HAVING REFLECTED on the Preliminary Objections and the opposing arguments presented**, WE NOW OPINE** as follows:

i. The sole and pivotal issue for our determination at this stage is whether this Court possesses the jurisdiction to entertain the instant appeal. It is

trite law that jurisdiction is everything, and without it, a court must down its tools. The burden therefore lies upon the appellants to demonstrate that this appeal properly falls within Article 163(4)(a) of the Constitution.

ii. It is well established by precedents of this Court that for an appeal to lie under Article 163 (4) (a), it must originate from a decision of the Court of Appeal involving the interpretation or application of the Constitution. Where no specific constitutional provisions are identifiable as having formed the gist of the Court of Appeal's decision, an appellant must, at a minimum, demonstrate that the appellate court's reasoning and conclusions, when properly contextualized, disclose a discernible trajectory of constitutional interpretation or application. See **Nduttu & 6000 others Vs Kenya Breweries Ltd & another *(supra)*** and ***Munya Vs Kithinji & 2 others (supra).***

iii. Upon examination of the record of proceedings before the superior courts, the central issue, pegged on the reliefs sought by the appellant, was whether the Land Dispute Tribunal had jurisdiction to issue judicial review orders in the form of mandamus compelling the respondents to pay the taxed costs it had awarded the appellants against the defendants. The Court of Appeal upheld the finding of the ELC that enforcement of costs is not one of the matters that would arise under Articles 23(2) and 47(3) of the Constitution, and therefore the Tribunal did not have jurisdiction to grant the orders sought in the Motion before it. The Court of Appeal further agreed with the ELC that the Tribunal cannot issue judicial review orders under Articles 23(2) and 47(3) of the Constitution as read with the Fair Administrative Action Act, except under the circumstances contemplated under Section 133C (8) of the Land Act, which only involve determining a complaint and granting a relevant relief, as it had already done. That provision did not confer upon the Tribunal any further mandate to issue judicial review orders of mandamus compelling the respondents to pay the appellants the costs it had earlier awarded to them.

iv. As correctly pointed out by the respondents in their submissions, the Court of Appeal was only engaged in an interpretation of whether Section 133C (8) of the Land Act granted statutory mandate upon the Tribunal to grant the judicial review orders of mandamus to compel the respondents to pay the costs of the suit it had awarded. The Court determined that the said provision did not confer such mandate. This determination did not require interpretation or application of the Constitution, but rather a statutory interpretation of Section 133C (8) of the Land Act.

v. While the Court of Appeal made reference to Articles 47(3) and 23(2), such reference was only to provide clarity that, indeed, the Tribunal had jurisdiction to entertain complaints under those provisions of the Constitution as provided for under Section 133C (8) of the Land Act as it had already done by allowing the appellants' claim and awarding them costs. However, the said jurisdiction did not extend to issuing judicial review orders in the form of mandamus under Sections 8 and 9 of the Law Reforms Act compelling the respondents to pay them costs awarded to them as that jurisdiction is reserved for the High Court under the constitution. It is important to reiterate this Court's findings in ***Aviation & Allied Workers Union of Kenya Vs Kenya Airways Limited & 3 others (supra)*** and ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney General & 2 others (supra)***, where we held that it is not automatic that whenever the Court of Appeal mentions a provision of the Constitution in its decision, the matter under consideration then falls within the ambit of this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution.

vi. From the foregoing, it is clear that there is no live controversy relating to constitutional interpretation or application before us. Consequently, we find that the appellants have not demonstrated that this appeal meets the

jurisdictional threshold. The Preliminary Objection is therefore merited and is hereby upheld.

vii. The respondents being the successful parties in this suit and while applying the principle in ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others,*** [2014] KESC 31 (KLR) that costs normally follow the event, we find that the respondents are entitled to costs of the appeal.

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

i. The respondents' Preliminary Objection dated 12th August 2026 and filed in this Court on 1st September 2026 is allowed.

ii. The Petition of Appeal dated dated 8th July 2026 and filed in this Court on 15th July 2026 is hereby struck out for want of jurisdiction.

iii. Costs of the Petition of Appeal and the Preliminary Objection are awarded to the respondents.

iv. 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 **20th** day of **November**, 2026.

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

.....	**.....**
S.C. WANJALA	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
W. OUKO	**M. WARSAME**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA