



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E004 OF 2025

-BETWEEN-

HIRAM BERE KINUTHIA

(Through the Administrators of his Estate).....APPELLANT

-AND-

EDICK OMONDI ANYANGA.....1ST RESPONDENT

ANNE ANYANGA.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL....4TH RESPONDENT

COMMISSIONER OF LANDS.....5TH RESPONDENT

ELIZABETH WANJIRU NGIGI.....6TH RESPONDENT

ROBERT MATATHIA NGIGI.....7TH RESPONDENT

*Being an appeal from the Judgment of the Court of Appeal at
Nairobi (Asike Makhandia, Ali-Aroni & Achode, JJ.A) delivered on
20th December 2024 in Civil Appeal No. E251 of 2023)*

Representation:

Mr. Desterio Oyatsi and Mr. James Mdogo for the Appellant
Shapley Barret & Co Advocates

Mr. Abidha Nicholas for the 1st and 2nd Respondents
Abidha & Company Advocates

Mr. Motari for the 3rd, 4th and 5th Respondents
Office of the Honourable Attorney General

Mr. Mwaniki Gitau for the 6th and 7th Respondents
Mwaniki Gitau & Co. Advocates

RULING OF THE COURT

[1] COGNIZANT THAT the question of jurisdiction may be raised at any stage of the proceedings; appreciating the Court's inherent power under Section 18 of the Supreme Court Act to summarily dismiss a petition, reference, or application that is wholly defective on the face of it; and mindful that, consistent with the Court's prior dicta, the Supreme Court Act, and the Supreme Court Rules, the Court retains the discretion to determine preliminary objections *in limine*, as it did in ***Ngao Vs Kitheka*** (Petition E006 of 2024)[2025] KESC 1 (KLR), or in the course of considering the substantive appeal; and

[2]ACKNOWLEDGING THAT this Court has elected to exercise its discretion to address, *in limine*, the two Notices of Preliminary Objections: the first, by the 1st and 2nd respondents dated 12th February 2025 and filed on 19th February 2025, and the second, by the 3rd, 4th and 5th respondents dated 13th February 2025 and only filed online on 17th March 2025; both challenging this Court's jurisdiction to entertain the Petition dated 6th February 2025 filed pursuant to Section 15A of Supreme Court Rules, Rules 8 and 32 of the Supreme Court Rules 2010; and

[3]NOTING THAT the antecedent giving rise to the dispute according to the appellant is that: he, and one Francis Ngigi Matathia (now deceased) were, at all material times, the registered joint proprietors of LR No.28/6 obtained an approval in the year 1983 to subdivide the property, subject to certain conditions, including the surrender of a portion thereof, subsequently designated as LR. No.

28/14 (hereinafter the “**suit property**”) for public use as a nursery school; dissatisfied with this surrender requirement, they successfully appealed against the approval; inevitably, the suit property was neither surrendered nor alienated; yet, in 1999, they discovered that a Certificate of Title had been irregularly issued to one Joseph Kinyanjui Mwai, without their knowledge or consent, thereby

prompting them to institute **Misc. Civil Case No. 1291 of 1999 R Vs Registrar of Titles**; resulting in a *certiorari* order quashing the title and directing the 3rd respondent to issue a title to them; an order that was, however, not complied with. Be that as it may, it is further claimed that in 2005 when the Nairobi City Council declined to receive their payment of land rent and rates, it emerged that the suit property had been fraudulently transferred to the 1st and 2nd respondents through a fraudulent scheme orchestrated by the latter in collusion with the 3rd and 5th respondents; and

[4] TO THAT END, the appellant, along with the 6th and 7th respondents, filed a suit in the Environment and Land Court (ELC) against the 1st to 5th respondents seeking among other reliefs: a declaration that the registration of the suit property in the names of the 1st and 2nd respondents was null and void, cancellation of the said title, a vesting order of the title in their favour, or in the alternative, compensation equivalent to the suit property's market value being Kshs. 160 Million; and

[5] HAVING REGARD to the fact that the 1st and 2nd respondents, in their defence and counterclaim, denied the allegations and averred that, trading as Anocma Enterprises Limited, they applied in the year 2000 for allocation of the suit property, which was, at the time, unallocated and free from alienation; that upon fulfilling the requisite conditions, including payment of stand premium and annual rent, they took possession and have remained in control of the property while continuing to pay rates; and that the appellant together with the 6th and 7th respondents, were fraudulently and illegally interfering with their rights to the suit property; and

[6] HAVING FURTHER regard that the 3rd, 4th and 5th respondents denied the allegations against them, and asserted that the subdivision conditions required, *inter alia*, surrender of the suit property to the government, and public utility land to the City
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Council free of cost; pursuant to which the appellant and the late Francis Ngugi Matathia accepted and complied with the said conditions, surrendered the required portions, and the subdivision was duly approved, finalized, and titles issued, leaving the suit property as government land; further,

that there being no procedure that existed for appealing against the subdivision conditions, no such appeal was lodged; likewise, they had no knowledge of **Misc. Civil Case No. 1291 of 1999; R Vs Registrar of Titles** and disputed the existence, service and registration of the alleged court order issued; on account of this, they profess that the Commissioner of Lands subsequently allocated the suit property to the 1st and 2nd respondents; and

[7] UPON CONSIDERATION of the competing claims, the ELC (*Komingoi J*) by a Judgment delivered on 28th July 2022 dismissed the claim by the appellant and the 6th and 7th respondents', and allowed the 1st and 2nd respondents' counterclaim by finding that: the suit property had been lawfully surrendered to the government upon subdivision of LR No. 28/6, and that the alleged revocation of this condition was unsubstantiated; no contempt had occurred as the land was never registered in the name of Joseph Kinyanjui Mwai as earlier mentioned thus, the 1st and 2nd respondents were legally allocated the suit property. She accordingly awarded the 1st and 2nd respondents Kshs.500,000/- in general damages for loss suffered from being unable to develop or utilize the property, together with costs and interest; and

[8] DISSATISFIED, the appellant and the 5th and 6th respondents lodged an appeal at the Court of Appeal (*Asike-Makhandia, Ali-Aroni, & Achode JJ.A*) which, vide its Judgment dated 20th December, 2024 affirmed the Judgment of the ELC and dismissed the appeal; and

[9] DISCONTENTED, the appellant has now filed the instant appeal before this Court on eleven grounds, contending that it raises constitutional issues relating to the interpretation and application of the Constitution; specifically, the appellant questions whether the Court of Appeal, in exercising its constitutional jurisdiction, violated the Constitution by: (i) failing to follow the statutory procedure under Section 99 of the Government Lands Act (GLA) for **SC Petition No. E004 of**

extinguishing the appellant's land rights; (ii) disregarding the evidentiary requirements under Section 100 of the GLA for establishing a valid surrender;

(iii) failing to defer to the decision of the Commissioner of Lands under Section 5 of the GLA that the suit property was not to be surrendered to the government

free of charge; (iv) making a factual finding based on alleged falsehoods that the appellant had signed a surrender; (v) denying the appellant justice contrary to Articles 159 and 50 of the Constitution; and (vi) failing to uphold, respect, and defend the Constitution as mandated under Article 3 of the Constitution; and

[10]MINDFUL OF the 1st and 2nd respondents Notice of Preliminary Objection, and submissions dated 10th April 2025 and filed on 11th April 2025, it is posited that this Court lacks jurisdiction to entertain the appeal on grounds that: it does not fall within the scope of Article 163 (4) of the Constitution, Section 15 (2) of the Supreme Court Act and Rule 33 of the Supreme Court Rules; since, no constitutional issues of interpretation or application were raised or determined before the ELC and Court of Appeal as to warrant a direct appeal; that the appeal introduces new issues not pleaded or canvassed in the superior courts below and seeks to rely on evidence not previously adduced or evaluated, thereby infringing the respondents' right to a fair hearing under Article 50(1) of the Constitution; that the allegation that the superior courts violated his rights are unfounded, as the said courts were not parties to the proceedings; and that, the appellant has failed to seek leave or certification from either the Court of Appeal or this Court pursuant to Sections 15(a) and 15(b) of the Supreme Court Act; and

[11]COGNISANT OF the 3rd, 4th and 5th respondents' Notice of Preliminary Objection, and submissions dated 9th April 2025 and filed on 22nd April 2025 wherein they argue that: at the onset, the appellant, as described in the Notice of Appeal and Petition, is a non-existent party lacking *locus standi* to move this Court; equally important, is that he has failed to identify the specific constitutional jurisdiction of this Court relied upon, thereby depriving the 4th respondent of a fair opportunity to respond; accordingly, the appeal falls outside the scope of Article 163(4) of the Constitution, Section

15(2) of the Supreme Court Act, and Rule 33 of the Supreme Court Rules; even assuming, for the sake of argument, that the appeal was brought under Article 163(4)(a), which is not expressly stated, the grounds do not pertain to issues determined by the Court of Appeal or ELC; over and above that, the appellant has introduced fresh pleadings

not tested in the lower courts, thereby converting this Court into a court of first instance; and

[12]MINDFUL OF the appellant's submissions dated 3rd April 2025 and filed on 14th April 2025, in response to the 1st and 2nd respondents' Preliminary Objection wherein he maintains that the Court of Appeal admitted in its reasoning and conclusions, at paragraph 25, that its decision had a trajectory of constitutional interpretation or application of the Constitution and human rights; likewise, the appellate court was constitutionally bound, under Article 27, to protect the appellant's land rights under the GLA and ensure equal benefit of the law, and under Article 60, to consider the security of the appellant's land rights;

[13]CONSEQUENTLY, the appellant avers that this appeal does not introduce new issues but continues the same litigation initiated in the ELC, particularly concerning whether the appellant lawfully surrendered the suit property to the government under constitutional and statutory provisions; concerning his grievances against the Justices of the appellate court, that complaint stems from errors made by the court in exercise of its judicial authority under Article 159 of the Constitution and that such errors are corrected by way of appeal and not by commencement of legal action against the judges who made the decision in line with the provisions of Article 160 (5) of the Constitution; and

[14]REGARDING the Preliminary Objection raised by the 3rd, 4th and 5th respondents', the appellant adopts his earlier submissions and reiterates that the appellant is deceased and is suing through the administrator of his estate, a fact that is uncontested; taking note that all affidavits in the appeal have been sworn by the said administrator, who was accepted by the respondents as the proper appellant before the Court of Appeal and fully litigated the matter on that basis; besides, any defect in the title or heading of the appeal is

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a procedural irregularity that does not affect the substance of the appeal; and

[15]BEARING IN MIND that although the 6th and 7th respondents support the Petition as indicated during their appearance before the Deputy Registrar of this Court, they did not file their response due to non-compliance with the prescribed timelines; and

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

- (i)** Rule 12 of the Supreme Court Rules provides that pleadings and any other document filed in the Court shall be in both printed and electronic form. Thus, in case of any inconsistency between the hard copy and soft copy, the hard copy shall prevail. We note that the 3rd to 5th respondents only filed their Preliminary Objection electronically on 17th March 2025. They failed to deliver the physical copies but nevertheless proceeded to file submissions on 22nd April 2025. We re-emphasise the need for compliance with the Court's rules and caution counsel and litigants against doing so selectively.
- (ii)** However, as the appellant has had ample time to respond to both objections, and the objection is in material respect similar to that made by the 1st and 2nd Respondent, we have taken the liberty to deal with both Objections, the procedural non-compliance by the 3rd to 5th respondents notwithstanding. This is in order to give a conclusive decision in its proper context under the circumstances considering that the issue of *locus standi* raised in the objection by the 3rd to 5th respondents also goes to the root of the competence of the appeal.
- (iii)** As a settled principle, only a party with *locus standi*, may competently move the Court. The 3rd to 5th respondents allude that the appellant, Hiram Bere Kinuthia, lacks standing, as he is deceased and now appears through administrators who, they allege, are neither disclosed nor properly identified in the pleadings.
- (iv)** A perusal of the ELC proceedings reveals that one Charles Gitonga Kinuthia, appeared as the son and co-administrator of the appellant's estate. His involvement was initially opposed

by counsel for the 1st and 2nd respondents, Mr. Abidha Nicholas, particularly when he sought to file an affidavit before being formally substituted on record upon the appellant's demise. In response, the court directed that a formal application for substitution be filed. When the matter came up on 12th November 2018,

the proceedings on record indicates the following: “*by consent the notice of motion dated 11/7/2018 was allowed, as was the notice of motion dated 14/9/2018 in terms on prayer (b) and (c).*” Although inexplicit, it is reasonably inferred that substitution was allowed, as the matter proceeded to full hearing shortly thereafter.

- (v) While the Record of Appeal before us does not include the application for substitution and the letters of administration, the judicial record, coupled with all the respondents’ conduct and full participation in the proceedings before the ELC and Court of Appeal, confirms that substitution was addressed. As such, the respondents are estopped from now contesting the legal standing of the administrator of the appellant’s estate to appear in this matter.
- (vi) Suffice it to say, we concur with the appellant that any defect in the formal citation on record amounts to a procedural irregularity curable under Article 159(2)(c) of the Constitution, which obligates the Court to administer justice without undue regard to procedural technicality, particularly where the identities of the parties are clear and undisputed. It is clear that in the affidavit in support of the petition of appeal, the said Charles Gitonga Kinuthia avers that he is the appellant in his capacity as an Administrator of the Estate of the late Hiram Bere Kinuthia. In our understanding, the 3rd to 5th respondents do not challenge this averment or capacity but merely the description set out in the pleadings. Consequently, we are satisfied that the appellant has the requisite *locus standi* to prosecute this appeal.
- (vii) Turning to this Court’s jurisdiction to entertain this appeal, at the outset, we take note that this appeal is brought pursuant to Section 15A of the Supreme Court Act, which

operationalizes Article 163(4)(a) of the Constitution. This provision confers a right of appeal to this Court as of right in any matter involving the interpretation or application of the Constitution. To this end, the appellant invokes this Court's jurisdiction under Article 163(4)(a), contrary to the 3rd, 4th and 5th respondents'

assertion that no specific jurisdiction has been indicated by the petition. The basis of jurisdiction is clearly anchored in both the Constitution and the enabling statutory provision, which the appellant has relied on. See ***Macharia & another v Kenya Commercial Bank Limited & 2 others*** [2012] KESC 8 (KLR).

(viii) 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*** (Petition 3 of 2012) [2012] KESC 9 (KLR) and ***Munya Vs Kithinji & 2 others*** (Petition 2B of 2014) [2014] KESC 38 (KLR).

(ix) 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 suit property had been surrendered to the government, thereby rendering it available for allocation to the 1st and 2nd respondents. At that instance, the ELC and Court of Appeal were called upon to evaluate the evidence and make factual findings surrounding the proper owner of the suit property. In our assessment, this was certainly a matter of fact that touched on evidence without any constitutional underpinning as per the pleadings filed.

(x) We take note that of the appellant's asserts that the Court of Appeal at paragraph 25 of its Judgment ostensibly recognised

that its decision would bear constitutional ramifications upon the appellant's rights; and as a result, placing the matter in the ambit of this Court's jurisdiction under Article 163(4)(a) of the Constitution.

(xi) To contextualize the appellant's contention, the relevant paragraph reads:

“25. Back to the first issue framed, it is not lost on us that land ownership and land rights are both historical and emotive subjects in this country. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or any other Statute or written law. The condition precedent to taking away anyone’s property is that the authority must ensure compliance with the Constitution and statutory provisions.”

It is our considered opinion that, while the Court of Appeal rightly acknowledged the foundational importance of property rights as both constitutional and human rights entitlements, such a general pronouncement does not, by its own nature, elevate the matter into the realm of one involving interpretation or application of the Constitution. It is also a confirmation that, but for the Court of Appeal’s pronouncement, there was no discernible and specific contestation relating to constitutional interpretation or application. The issues before the superior courts were grounded on purely factual and statutory considerations on which basis the judgments were rendered.

(xii) Moreover, the appellants recourse to complaints against the specific Judges of Appeal for alleged errors in exercise of their judicial authority resulting in violation of his constitutional rights are unfounded. Finality of litigation process remains anchored in the administration of justice. With every contested litigation in an adversarial system, one party is bound to be dissatisfied with the outcome. The right to appeal, while open to any litigant, must be exercised within the narrow contours of the jurisdictional limits, particularly to this Court.

(xiii) In consequence, we are unequivocally satisfied that this appeal has fallen short of the stringent threshold mandated for appeals under Article 163(4)(a) of the Constitution. In light of this, we uphold the Preliminary Objections and decline to consider the substantive merits of the appeal. The appeal is one for striking out.

(xiv) In light of the findings herein, and guided by the firmly established principle that costs ordinarily follow the event, a principle consistently reaffirmed by this Court in **Rai & 3 Others Vs Rai & 4 Others** (Petition No. 4 of 2012) [2014] KESC 31 (KLR); and there being no cogent or exceptional justification advanced to warrant a departure from this settled norm, we are persuaded that only the 1st and 2nd respondents are entitled to an award of costs, which is both just and appropriate in the circumstances. The 3rd, 4th and 5th Respondents are public officers who are merely executing their mandate. The 6th and 7th Respondents did not file any pleadings as to warrant any costs in their favour.

[17] ACCORDINGLY, for the reasons aforesaid, we make the following Orders:

- (i) The Notices of Preliminary Objection dated 12th February 2025 by the 1st and 2nd respondents on one hand; and 13th February 2025 by the 3rd, 4th and 5th respondents on the other hand be and are hereby upheld.**
- (ii) The Petition dated 6th February 2025 be and is hereby struck out for want of jurisdiction with costs to the 1st and 2nd respondents.**
- (iii) We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.**

It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of October, 2025.

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

.....
.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT
COURT

S. C. WANJALA
JUSTICE OF THE SUPREME

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

