



**Mulwa t/a Mulwa & Partners Advocates v Mokdosio (Petition
E022 of 2025) [2025] KESC 71 (KLR) (Civ) (5 December 2025) (Ruling)**

Neutral citation: [2025] KESC 71 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL
PETITION E022 OF 2025
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
DECEMBER 5, 2025**

BETWEEN

ANGELA MULWA T/A MULWA & PARTNERS ADVOCATES APPELLANT

AND

MARTIN LEMAIYAN MOKDOSIO RESPONDENT

(Being an appeal from the Ruling of the Court of Appeal (Ochieng, Korir, Joel Ngugi, JJ.A.) in Civil Application No. E733 of 2024 dated 28th March, 2025)

RULING

1. Upon Perusing the respondent's Preliminary Objection dated 15th May, 2025 and filed on 20th May, 2025 challenging this Court's jurisdiction to hear and determine the petition dated 28th April, 2025 on the grounds that: the petition, filed pursuant to Article 163(4)(a) of *the Constitution* does not raise any issue relating to interpretation or application of *the Constitution* that has risen through the hierarchy of courts; the appellant has not obtained leave from the Court of Appeal in line with Article 163(4) (b) of *the Constitution* certifying the matter as one involving general public importance transcending the parties; and that this Court does not have jurisdiction to hear an appeal challenging the exercise of jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules, 2022 as it is not an appeal within the meaning of Article 163(3) (b)(i) of *the Constitution*; and
2. Upon Considering the respondent's submissions dated 25th June, 2025 and filed on 26th June, 2025 in support of the Preliminary Objection, and submissions dated 24th July, 2025 and filed on 25th July, 2025 also in support of the Preliminary Objection and in opposition to the petition of appeal where it is averred that: the genesis of the appeal is an Originating Summons filed by the respondent at the High Court to enforce three (3) professional undertakings given by the appellant in her capacity



as an Advocate of the High Court; the High Court, in a ruling dated 19th July, 2024 allowed the Summons and ordered the appellant to pay the sums due being Kshs.16,991,428.00 within 30 days of the decision; subsequently, the appellant filed a Notice of Appeal and a Notice of Motion dated 6th August, 2024 at the High Court seeking stay of execution of the orders pending lodging, hearing and determination of the intended appeal, which appeal is yet to be filed at the Court of Appeal. The respondent avers that the High Court, by its Ruling dated 6th December, 2024 granted the appellant stay of execution, on condition that she deposits the sum of Kshs. 16,991,428.00 within thirty (30) days of the Ruling, failure to which the stay would automatically lapse; and that this condition has not been met and therefore the Ruling lapsed on 6th January, 2025; and

3. Upon Reading the respondent's contention that: the appellant subsequently filed a Notice of Appeal against the Ruling of the High Court without seeking leave of the court under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules 2010; the appellant also filed a Notice of Motion under Rule 5(2)(b) of the Court of Appeal Rules seeking stay of execution of the Ruling of the High Court dated 6th December, 2024; and thereafter, the Court of Appeal, in its Ruling dated 28th March, 2025 made a determination based on whether there was an arguable appeal and whether the intended appeal would be rendered nugatory were it to succeed in the absence of an order staying its execution. It is the respondent's contention that: these issues did not concern interpretation or application of the Constitution; the appellant is yet to file the substantive appeal against the judgment of the High Court at the Court of Appeal; and that without a judgment of the Court of Appeal, creating finality to contested issues, this Court's jurisdiction has not been properly invoked; and
4. Considering the respondent's further averments that: the appeal is wanting in form and substance, it is vexatious, frivolous and an abuse of the court process; the Court of Appeal did not address the substance of the Ruling of the High Court dated 6th December, 2024 nor did it address the issues raised in the appellant's grounds of appeal to this Court; the appellant is inviting the Court to make a determination on a Ruling delivered by the High Court; this Court does not have jurisdiction to hear appeals from the High Court; and that making a determination on the appeal would entail making comments on the merits of the case prematurely on issues yet to be adjudged by the Court of Appeal and prejudice the parties; and
5. Further Noting the respondent's submissions wherein he relies on this Court's decisions in *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR, *Sonko v Clerk County Assembly of Nairobi City & 11 others* Application No. 14(E022) of 2021 [2021] KESC 14 (KLR), and *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] eKLR. The respondent urges that the appeal is devoid of merit and ought to be dismissed with costs, citing our decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition Application No. 4 of 2012; [2014] eKLR; and
6. Taking in Account the appellant's submissions dated 22nd July, 2025 and filed on even date in support of the petition and in opposition to the respondent's Preliminary Objection where it is contended that: this Court has inherent and intrinsic jurisdiction to uphold, promote and protect Articles 10, 19, 20, 21, 25, 27, 48 and 159 of the Constitution and to do justice between the parties; the conditional stay granted by the High Court in HCCCOMMISC E250 of 2023 to be complied with in 30 days was arbitrary, punitive, irrational, unreasonable, unconscionable and harsh; and that the High Court lacked jurisdiction to hear and determine the merits of the respondent's Originating Summons. It is the appellant's case that the relationship between the appellant and the respondent was governed by a Joint Venture Agreement which provided that any dispute arising from the agreement would be referred to an Arbitrator by the consent of the parties. She contends that the proceedings in



HCCCOMMISC E250 of 2023 offend Article 159 of *the Constitution* by circumventing Arbitration to settle the dispute, and it is therefore unconstitutional, meriting intervention of this Court; and that the authorities relied on by the respondent are irrelevant and distinguishable from the circumstances of the appellant's case; and

7. Upon Considering the appellant's further averments that: the respondent had a mandatory obligation to supply the appellant with completion documents for onward transmission to third party buyers of housing units in order for the respondent to be paid part of his bargain in the Joint Venture Agreement; that the appellant gave the undertaking as Director of HIMS Homes Limited and in her capacity as an Advocate with the responsibility of transmitting the said completion documents to third party purchasers, to induce the respondent to honour his part of the agreement. The appellant further urges that the respondent instituted arbitration proceedings before his own preferred arbitrator without service of the pleadings upon the appellant and he secured the same reliefs as in the High Court Ruling dated 19th July 2024. It is the appellant's averments that she has challenged the arbitration proceedings in Milimani High Court Misc. Cause No. E021 of 2025 and adds that unless the unconditional orders of stay of execution of the orders made on 19th July, 2024 are granted by the Court, the appellant shall be prevented from lodging her intended appeal, and will not be accorded a fair hearing, urging that the reliefs sought in the appeal ought to be granted; and
8. Bearing in Mind the provisions of Article 163(4)(a) and (b) of *the Constitution* which clothes this Court with jurisdiction to hear and determine appeals from the Court of Appeal, that is, as of right where an appeal concerns interpretation and application of *the Constitution* and upon certification by the Court of Appeal or the Supreme Court as a matter of general public importance, respectively; and
9. Having Considered the Preliminary Objection and rival submissions by the parties, WE OPINE as follows:
 - i. From our perusal of the record, we note that the High Court in the Ruling dated 6th December, 2024 in HCCOMM Misc E250 of 2023 granted inter alia, a stay of execution of a Ruling delivered on 19th July, 2024 on condition that the appellant deposits the entire decretal sum into an interest earning account to be held by both parties, within 30 days. The court further ordered that in the event of failure to comply with the order, the stay order will automatically lapse. Aggrieved, the appellant filed a Notice of Appeal and a Notice of Motion before the Court of Appeal in Civil Application No. E733 of 2024 pursuant to Rule 5(2)(b) of the Court of Appeal Rules seeking inter alia, a stay of execution of the High Court Ruling and orders delivered on 6th December, 2024. The appellate court, in its Ruling dated 28th March, 2025 declined to grant the orders sought. Dissatisfied with the Ruling, the appellant has instituted this appeal, challenging the Court of Appeal's exercise of its discretion in refusing to grant a stay of execution.
 - ii. The Court has in several of its decisions categorically held that it lacks jurisdiction to entertain appeals challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules for the reason that there is no substantive appeal, nor intended appeal before it, as the appeal is still pending before the Court of Appeal. See *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] KESC 29 (KLR) and *Deynes Muriithi & 32 others v Law Society of Kenya & another* (Civil Application 12 of 2015) [2016] KESC 13 (KLR).



- iii. The exceptions to this general principle were laid out in *Kampala International University v Housing Finance Company Limited*; SC Petition No. 34 (E035) of 2022), [2024] KESC 11 (KLR) where we stated:

“50... where the Court of Appeal had made an interlocutory decision which in essence amounted to a substantive determination of a constitutional question that had been canvassed right from the High Court, the Supreme Court could rightly assume jurisdiction in an appeal arising therefrom. Indeed, such had been the case in the *Hassan Ali Joho* case...53. Another exception where the Supreme Court may assume jurisdiction notwithstanding the fact that the decision against which an appeal has been preferred is one which was delivered by the Court of Appeal in exercise of its powers under Rule 5 (2)(b), arises if the appellate court goes beyond the preservation of the substratum of the appeal, and issues orders that are likely to occasion an injustice to one of the parties.” (Emphasis ours)

- iv. It is not in dispute that at the Court of Appeal, the issue for determination was whether the appellant had satisfied the requirements for the grant of an order of stay of execution under Rule 5(2)(b) of the Court of Appeal Rules. That is, whether the intended appeal is arguable and whether it would be rendered nugatory if the stay is not granted. From the High Court Ruling dated 6th December, 2024 we establish that, for determination before the court was whether the appellant had met the requirements for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, and whether the court could stay arbitration proceedings where the appellant was not a party to the arbitration. None of the issues in the superior courts below concerned interpretation or application of *the Constitution*, and therefore the appellant has not demonstrated the exceptions which would justify the Supreme Court to assume jurisdiction to hear an appeal arising from the Ruling of the Court of Appeal in the exercise of its discretionary power.
- v. The appellant sets out seven (7) grounds of appeal in her petition of appeal, and challenges, inter alia, the jurisdiction of the High Court to hear and determine the Originating Summons for reason that, the professional undertaking given by the appellant was made under the Joint Venture Agreement, which required disputes to be referred to an arbitrator, agreed on by the parties. The appellant further urges that the High Court and the Court of Appeal committed jurisdictional errors by refusing to grant the appellant unconditional orders of stay of execution thereby offending Articles 10, 25, 27, 28, 48, 50 and 159 of *the Constitution*. From a perusal of the grounds of appeal as set out by the appellant in the petition, we establish that the issues raised were not the subject for determination by the Court of Appeal in its Ruling of 28th March, 2025. Further, there was no substantive determination of a constitutional question that had been canvassed right from the High Court. Additionally, the substantive appeal before the Court of Appeal is yet to be filed, let alone heard and determined.
- vi. We have established in numerous of this Court’s decisions the parameters of the exercise of the Court’s jurisdiction under Article 163(4)(a) of *the Constitution*. As we held in *Paul Mungai Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others (Petition 45 of 2018)* [2020] KESC 9 (KLR), it is not enough for one to generally plead that his case involves issues of Constitutional interpretation and application. Mere allegations of constitutional violations or citation of constitutional provisions, or issues on appeal which involve 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). 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) of *the Constitution*.

- vii. This Court can only assume jurisdiction bestowed to it by *the Constitution* and statute. As stated in Yusuf Gitau Abdalla v Building Centre (K) Limited & 4 others (Petition 27 of 2014) [2014] KESC 50 (KLR):

“16...this Court will not assume jurisdiction by way of a litigant’s pestering. The Court’s mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court.”

- viii. Having set out the parameters of the exercise of this Court’s jurisdiction under Article 163(4) (a) of *the Constitution* and applying the guidelines to the instant appeal, the constitutional threshold for invocation of this Court’s appellate jurisdiction has not been met.
- ix. The award of costs is discretionary. In the circumstances of this case, we direct that the appellant shall bear the costs of this appeal.

10. Consequently, for reasons aforesaid, we make the following orders:

- i. The Preliminary Objection dated 15th May, 2025 is hereby upheld;
- ii. The Petition of appeal dated 25th April, 2025 is hereby struck out with costs to the respondent; and
- iii. The sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025.

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

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**M. K. IBRAHIM NJOKI NDUNGU JUSTICE OF THE SUPREME COURT JUSTICE OF THE
SUPREME COURT**

.....

**I. LENAOLA W. OUKO
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**

