



**Kiliavo Fresh Limited v National Environmental Tribunal & 4 others  
(Petition E024 of 2025) [2026] KESC 18 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KESC 18 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION E024 OF 2025  
MK KOOME, CJ & P, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ  
JANUARY 30, 2026**

**BETWEEN**

**KILIAVO FRESH LIMITED ..... APPELLANT**

**AND**

**THE NATIONAL ENVIRONMENTAL TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**BIG LIFE FOUNDATION ..... 2<sup>ND</sup> RESPONDENT**

**THE CONSERVATION ALLIANCE ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (W. Karanja, J. Mohammed & A.O Muchelule JJ. A) delivered on 4th April, 2025 in Civil Page 2 of 21SC Pet No. E024 of 2025 Appeal No. E446 of 2024 consolidated with Civil Appeal No. E447 of 2024)*

**JUDGMENT**

Representation

Mr. Wilfred Lusi for the Appellant (CM Advocates LLP)

Mr. J. Motari Matunda for the 1<sup>st</sup> and 4<sup>th</sup> Respondent

(Office of the Attorney General)

Ms. Minik Larmoi for the 2<sup>nd</sup> Respondent (Tobiko Njoroge & Company Advocates)

Ms. Elizabeth Gitari for the 3<sup>rd</sup> Respondent (Odipo, Gitari, Otweyo & Company Advocates)

Mr. Paul Nyaosi For the 5<sup>th</sup> Respondent (MCKAY & Company Advocates)



## **A. Introduction**

1. Before this Court is a Petition of Appeal dated 9<sup>th</sup> May 2025 and filed on 12<sup>th</sup> May 2025, anchored on Article 163(4)(a) of the *Constitution*. The Petition challenges the decision of the Court of Appeal, which affirmed the decision of the Environment and Land Court (ELC) in Kajiado ELC E002 of 2021. The Appellant contends that the 1<sup>st</sup> Respondent, the National Environmental Tribunal, erred in dismissing its appeal (NET Appeal No. 38 of 2020) for lack of attendance. The Appellant contends that by failing to hear and determine its case on its merit, the 1<sup>st</sup> Respondent infringed on its rights under Articles 27 (1) & (2), 47, 48 and 50 (1) of the *Constitution*. The Appellant equally challenges the provisions of Section 130 of the *Environmental Management and Co-ordination Act* (EMC Act), which provides that any person aggrieved by a decision of the National Environmental Tribunal may appeal against such a decision to the Environment and Land Court.

## **B. Background**

### **i. Factual history**

2. The Appellant is the registered proprietor of land parcels Loitoktok/Kimama- Tikondo/4209, 4210, and 4211 (hereinafter referred to as the “suit properties”) measuring 180 acres located in Amboseli, Kajiado County. The Appellant commenced an integrated mixed-use farm comprising conservation agriculture, livestock production, a wildlife ranger’s base, and necessary farm infrastructure (hereinafter referred to as “the project”). The Appellant obtained an Environmental Impact Assessment (EIA) Report Reference Number NEMA/PR/KJD/5/5408, and was issued with EIA license No. 0068059.
3. After obtaining the EIA license, the Appellant fenced off the suit property; commissioned the drilling and installation of two boreholes; employed approximately 300 local residents; prepared farm beds; and undertook the planting of seedlings intended for the cultivation of the high-quality organic fruits and vegetables for both local and international markets. In summary, the Appellant made a substantial financial investment in the suit property.
4. However, on 9<sup>th</sup> and 8<sup>th</sup> September 2020, the Appellant was issued with two notices to show cause by the 4<sup>th</sup> Respondent and was directed to cease any further development activities on the suit properties on grounds that its project was situated within a designated and zoned wildlife corridor and thereby contravened the provisions of the Amboseli Ecosystem Management Plan (Ref. KWS/AMB/6006), and that key stakeholders had not been consulted during the Environmental Impact Assessment (EIA) approval process.

### **ii. Litigation history**

#### **a. At the National Environment Tribunal**

5. In its bid to challenge the two notices to show cause, the Appellant filed an appeal (NET Appeal No. 38 of 2020) before the 1<sup>st</sup> Respondent. In the interim, the Appellant sought and obtained interim injunctive orders restraining the implementation of the impugned notices and an extension of its license pending the hearing and determination of the appeal.
6. However, on 26<sup>th</sup> April, 2021 when the matter came for hearing, all the parties and their respective advocates were present save for the Appellant and its advocates.



As result of the absence, the 1<sup>st</sup> Respondent proceeded to dismiss the Appellant’s appeal for want of prosecution.

#### **b. At the Environment and land Court**

7. Aggrieved by the decision of the 1<sup>st</sup> Respondent, the Appellant instituted a judicial review proceeding (JR Application No. E002 of 2021) at the Environment and Land Court (ELC) at Kajiado by way of Chamber Summons application seeking leave to apply for orders of certiorari and prohibition. The application was based on grounds that the 1<sup>st</sup> Respondent’s decision in NET Appeal No. 38 of 2020 was ultra vires and contravened the *Constitution*, *Wildlife Conservation and Management Act*, the Physical Planning and Land Use Act, the Environmental Management and Coordination Act and the Kajiado County Land Sub-Division Guidelines, 2018.
8. On 16<sup>th</sup> September 2021, the ELC (C. Ochieng, J) observed that the Appellant’s application was meritorious, holding that prima facie, there existed an apparent infringement of the Appellant’s rights warranting judicial interrogation. Accordingly, the Appellant was granted leave to file the substantive motion which it filed on 2<sup>nd</sup> November 2021.
9. However, Gicheru J., in his Ruling delivered on 15<sup>th</sup> May 2024 held that pursuant to section 130 of the EMC Act, the only way that the Appellant could approach the ELC was by way of appeal against the decision of the 1<sup>st</sup> Respondent. The Court therefore found that by instituting judicial review proceedings, the Appellant had acted against the express provisions of the EMC Act.

#### **c. Proceedings at the Court of Appeal**

10. The Appellant yet again challenged the decision of the ELC in the Court of Appeal wherein it contended that pursuant to the provisions of Articles 47, 165 (3) (d) (ii) and 165 (6) of the *Constitution*, as read together with section 9 (1) of the Fair Administrative Actions Act (FAA Act), any person aggrieved by an administrative action may apply to the superior court by way of judicial review. The Appellant contended too that the 1<sup>st</sup> Respondent had acted ultra vires and beyond its jurisdiction thereby necessitating the institution of the judicial review proceedings. Further, the Appellant relied on Rule 25 (1) and (2) of the National Environment Tribunal Procedure Rules to submit that, upon its non-attendance that led to the dismissal of its appeal, the 1<sup>st</sup> Respondent was either required to proceed and hear the appeal in its absence or adjourn the matter.
11. In its determination, the Court of Appeal relying on this Court’s decision in *Edwin H.D Dande & 3 Others Vs Inspector General of Police & 5 Others*, [2023] KESC 40 (KLR), underscored that, by dint of Article 47 of the *Constitution*, every person is entitled to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The court further affirmed that any person aggrieved by an administrative action may, without delay, apply for judicial review to the High Court or to any other court with jurisdiction to hear and determine the matter. However, the court observed that the Appellant’s grievance arose from the decision of the 1<sup>st</sup> Respondent dismissing its appeal for non-attendance. In its view, such a decision constituted an appealable act under Section 130 of the EMC Act. The Court of Appeal thus held that, by the Appellant electing to file a judicial review application instead of appealing as expressly provided by statute, the Appellant followed a plainly incorrect procedure.
12. Further, the Court of Appeal, relying in the cases *Speaker of the National Assembly Vs Njenga Karume* (2018) 1 KLR 425 and *Nicholus Vs the Attorney General & 7 Others* (2023) KESC 113 (KLR) held that where an alternative remedy exists, particularly where Parliament has prescribed a specific appeal procedure, courts must defer to that process. Additionally, the Court held that resort to alternative



legal procedures, such as judicial review, is only permissible in exceptional circumstances where the statutory remedy is inadequate, unavailable or ineffective. The court noted that in the Appellant's case, no such exceptional circumstances had been demonstrated by the Appellant. Therefore, the Court of Appeal proceeded to dismiss the Appeal.

#### **d. Proceedings at the Supreme Court**

13. Undeterred, the Appellant has filed the instant appeal challenging the entire decision of the Court of Appeal on the following five grounds:
  - i. That the Court of Appeal erred in its judgment by misapprehending and misapplying the hallowed constitutional rights and fundamental freedoms of equality before the law through the right to equal protection and equal benefit of the law, fair administrative action, access to justice, as well as right to a fair and public hearing, under Articles 27 (1) & (2), 47, 48 and 50 (1) of the *Constitution*;
  - ii. That the Learned Judges of the Court of Appeal erred by holding contrary to Articles 27 (1) & (2), 47, 48 and 50 (1) of the *Constitution* that the only way to approach the Environment and Land Court, by a party aggrieved by a decision or action of the National Environmental Tribunal, in the discharge of its mandate is by way of Appeal per Section 130, Environmental Management and Coordination Act;
  - iii. That the Court of Appeal erred in disregarding that the Environment and Land Court, has the same power, authority and status, in respect of matters that fall within its subject matter jurisdiction: which power, authority and status, includes supervisory jurisdiction over National Environment Tribunal, pursuant to Articles 47, and 162(2)(b) as read with 165(6) of the *Constitution* and Sections 7(1)(a) and 9 Fair Administrative Actions Act.
  - iv. That the Court of Appeal erred in disregarding that the same jurisdictional challenge, now allowed in the impugned Ruling of 15<sup>th</sup> May, 2024 by the Hon. Mr. Justice M. N Gicheru, had actually already been heard and disallowed by the very same Court differently constituted in a Ruling of 16<sup>th</sup> September, 2021 by the Hon. Lady Justice Ochieng';
  - v. The Court of Appeal erred in disregarding the inappropriateness and unsuitability of the statutory appeal procedures as well as the inadequacy indeed unavailability of an appropriate relief, in the pleaded circumstances of the instant Appeal.
14. Accordingly, the Appellant seeks the following reliefs:
  - i. The Honourable Court be and is hereby pleased to allow the Appeal herein;
  - ii. The Honourable Court be and is hereby pleased to declare that by virtue of Section 3 (1) (b), Fair Administrative Actions Act, 2011 as read with Article 27 (1) & (2), 47, 48, 50 (1), 165 (3) (d) (ii), & 165 (6) (7) of the *Constitution*; Section 9 (4), of the Fair Administrative Actions Act, and Order 53 Rule 1 (3), Civil Procedure Rules and appeal under Section 130, Environment Management and Coordination Act IS NOT THE ONLY WAY to approach the Environment and Land Court, by a party aggrieved by a decision or action of the National Environment Tribunal, in the discharge of its mandate.
  - iii. The Honourable Court be and is hereby pleased to declare that a Court cannot in the same cause admit for determination a similar issue, already determined by the same court, absent an application for review, or an order for rehearing by an appellate court;



- iv. The Honourable court be and is hereby pleased to vacate the impugned judgment of the Court of Appeal (W. Karanja, Jamila Mohamed & A.O Muchelule, JJ.A) at Nairobi, dated the 4<sup>th</sup> day of April, 2025 in Civil Appeal No. E446 OF 2024 consolidated with Civil Appeal No. E447 OF 2024;
  - v. The Honourable Court be and is hereby pleased to impugned part of the Ruling of the Environment and Land Court, at Kajiado by Mr. Justice M.N Gicheru delivered on 15<sup>th</sup> May, 2024 in ELC (Kajiado) JR E002 of 2021, be and is hereby set-aside;
  - vi. The substantive judicial review motion vide the Notice of Motion Application in ELC (Kajiado) JR E002 OF 2021, be and is hereby reinstated and remitted for expeditious hearing and disposal on its merit;
  - vii. The Honourable Court be and is hereby pleased to grant costs of this appeal.
15. In response to the Petition, the 1<sup>st</sup> Respondent relied a Notice of Preliminary Objection dated 3<sup>rd</sup> June 2025 together with a Replying Affidavit sworn by its secretary, Bellinda Akello dated 11<sup>th</sup> June 2025 and filed in this Court on 13<sup>th</sup> June 2025. The 1<sup>st</sup> Respondent contends that the Appellant has failed to identify the specific jurisdiction of this Court upon which the appeal is founded. The 1<sup>st</sup> Respondent also contends that the appeal does not meet the constitutional threshold set under Article 163 (4) (a) of the Constitution, Section 15 (2) and 15A of the Supreme Court Act and Rule 33 of the Supreme Court Rules.
  16. The 2<sup>nd</sup> Respondent relied on Grounds of Objection together with a Replying Affidavit sworn by its Chief Executive Officer, Benson Ntiyian Leyian, both dated 5<sup>th</sup> June 2025 and filed in this Court on 12<sup>th</sup> June 2025. The 2<sup>nd</sup> Respondent contends that the issues adjudicated upon by the two superior courts were primarily factual and statutory in nature and did not raise any question involving the interpretation or application of the Constitution. Consequently, the 2<sup>nd</sup> Respondent underscores that this appeal fails to meet the jurisdictional threshold of Article 163 (4) (a) of the Constitution.
  17. The 3<sup>rd</sup> Respondent relied on a Replying Affidavit sworn by its Chief Executive Officer, Steve Itela, on 26<sup>th</sup> May 2025 and filed on 28<sup>th</sup> May 2025. The 3<sup>rd</sup> Respondent underscores that the present petition is, in substance, an attempt by the Appellant to rewrite and or amend strict statutory provisions of the law, particularly Section 130 (1) of the EMC Act, which sets out the proper appellate mechanisms available to a party.
  18. The 4<sup>th</sup> Respondent did not file any response to the petition of appeal while the 5<sup>th</sup> Respondent only filed written submissions dated 1<sup>st</sup> September 2025.
  19. As a rejoinder, the Appellant on 24<sup>th</sup> June 2025 filed a Replying Affidavit sworn by its Managing Director, Harji Mavji Kerai on 20<sup>th</sup> June 2025. In the said affidavit, the Appellant substantially reiterates its position that the appeal before this Court is centered on the decision by the 1<sup>st</sup> Respondent dismissing its appeal for non-attendance. The Appellant contends that the action by the 1<sup>st</sup> Respondent denied it an opportunity to be heard on merit, thereby violating its constitutional rights under Articles 27 (1) and (2), 47, 48 and 50 (1) of the Constitution.

## C. Parties Submissions

### Appellant's Submissions

20. The Appellant submits that the two superior courts erred, and in doing so, contravened its fundamental rights under Articles 27 (1) and (2), 47, 48, and 50 (1) of the Constitution and Section 7



(1) (a) and 9 of the *Fair Administrative Action Act*. Specifically, the Appellant contends that the finding of the Court of Appeal that the only way it could have approached the Environment and Land Court in relation to the decision of the 1<sup>st</sup> Respondent was by way of appeal as provided for under Section 130 of the EMC Act was erroneous.

21. The Appellant further submits that the ELC is a superior court of record with the same power, authority, and status as the High Court in respect of matters that fall within its subject matter jurisdiction. Consequently, the Appellant argues that the ELC also possesses supervisory jurisdiction over the 1<sup>st</sup> Respondent.
22. The Appellant cited this Court's decision in *Dande* (supra), which it argues that it affirmed the entrenchment of judicial review under the *Constitution* and elevated it to a substantive and justiciable right. In conclusion, the Appellant submits that this appeal singularly concerns the enforcement and protection of its constitutional rights namely, the right to equal benefit and protection of the law, access to justice, fair administrative action and fair trial reposed in the ELC, and the right to invoke that jurisdiction. Accordingly, the Appellant urges this Court to allow the appeal.

### **1<sup>st</sup> Respondent's submissions**

23. The 1<sup>st</sup> Respondent submits that the Appellant has failed to clearly identify the specific jurisdictional basis upon which it seeks to invoke this Court's authority. It submits further that in determining whether the Court has jurisdiction under Article 163(4)(a) of the *Constitution*, the applicable test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue was canvassed and determined in the superior courts below, forming the basis of the present appeal. The 1<sup>st</sup> Respondent maintains that the Appellant has failed to meet this threshold.
24. Equally, the 1<sup>st</sup> Respondent submits that the Appellant has introduced fresh pleadings in the grounds of the petition which were neither raised nor determined by the superior courts below, thereby improperly inviting this Court to assume the role of a court of first instance. In particular, the 1<sup>st</sup> Respondent contends that the Appellant's claim alleging infringement of its constitutional rights under Articles 27, 47, 48, and 50 of the *Constitution* by the 1<sup>st</sup> Respondent and 4<sup>th</sup> Respondent is raised for the first time before this Court.
25. The 1<sup>st</sup> Respondent argues that a careful examination of the pleadings filed before the National Environment Tribunal, the Environment and Land Court and the Court of Appeal reveals that the issues now presented neither flow from the original claim nor were they subjected to judicial determination in the said courts.
26. Further, the 1<sup>st</sup> Respondent contends that the Appellant has merely framed the appeal as one involving constitutional interpretation and application to improperly invoke the jurisdiction of the Supreme Court and thus the petition amounts to an abuse of the court process. The 1<sup>st</sup> Respondent relies on this Court's decision in *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others*, [2012] KESC 4 (KLR), wherein the Court held:
  - i. The concept of 'abuse of the process of the court' bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to maneuver the court's jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of court process is that, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption..."



## 2<sup>nd</sup> Respondent's submissions

27. The 2<sup>nd</sup> Respondent submits that the subject matter of the Petition arises purely from factual and statutory considerations. It contends that the evolution of the matter from the National Environmental Tribunal, the Environment and Land Court and the Court of Appeal did not involve the interpretation and application of the Constitution. Accordingly, the 2<sup>nd</sup> Respondent submits that the purported constitutional issues have not progressed through the normal appellate chain to properly lie before this Court by way of appeal as contemplated under Article 163 (4) (a) of the Constitution and Section 15 of the Supreme Court Act.

## 3<sup>rd</sup> Respondent's submissions

28. The 3<sup>rd</sup> Respondent submits that the petition of appeal does not raise any issue involving the interpretation or application of the Constitution, and therefore does not lie as of right under Article 163(4)(a) of the Constitution, as read with Section 15A of the Supreme Court Act, Cap 9B. The 3<sup>rd</sup> Respondent further submits that the constitutional questions now advanced by the Appellant were not canvassed or determined either in the Court of Appeal or in the Environment and Land Court, and thus cannot form a legitimate basis for invoking the jurisdiction of this Court. The 3<sup>rd</sup> Respondent relies on the case of Lawrence Nduttu & 600 Others Vs Kenya Breweries Ltd & Another [2012] KESC 9 (KLR), where this Court held as follows:

“The appeal must originate from a court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the court of appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

29. The 3<sup>rd</sup> Respondent further notes that the issue for determination before the Court of Appeal was limited to “whether the learned Judge of the Environment and Land Court erred in dismissing the Appellant’s Judicial Review application for want of jurisdiction.” It submits that the Court of Appeal addressed the matter strictly within the context of statutory interpretation, specifically, the interpretation and application of Section 130 of the EMC Act. The Court did not engage with, nor make determinations on, the constitutional issues now raised under Articles 27 (1) and (2), 47, 48, and 50 (1) of the Constitution. Consequently, the 3<sup>rd</sup> Respondent maintains that the present appeal does not involve the interpretation or application of the Constitution and therefore does not satisfy the jurisdictional threshold under Article 163 (4) (a) of the Constitution.

## The 4<sup>th</sup> Respondent's submissions

30. The 4<sup>th</sup> Respondent did not file submissions in respect to this appeal.

## The 5<sup>th</sup> Respondent's submissions

31. The 5<sup>th</sup> Respondent submits that under Article 163 (4)(a) of the Constitution as read with Section 15 and 15A of the Supreme Court Act, an appeal lies to the Supreme Court from the Court of Appeal as of right in any case that involves the interpretation or application of the Constitution. It relies on the case of Gatirau Peter Munya Vs Dickson Mwendwa Kithinji & 2 Others [2014] KESC 30 (KLR), where this Court held that to qualify for the invocation of Article 163 (4)(a) of the Constitution, the



constitutional issue involved must have been the central theme of constitutional controversy in the courts below and that the applicant must demonstrate how the Court of Appeal misinterpreted or misapplied the constitutional provisions in question.

32. The 5<sup>th</sup> Respondent urges that mere allegation by the Appellant in its petition that its rights under Article 27 (1) and 2, 47, 48, and 50 (1) of the Constitution were violated by the Respondents does not suffice, as it is not pleadings that confer jurisdiction. The 5<sup>th</sup> Respondent asserts too that throughout proceedings before the Environment and Land Court and the Court of Appeal, the issue for determination was about an avenue of remedy a party aggrieved by the decision of the Tribunal could pursue in light of the express procedure mandated by section 130 of the EMC Act and not an interpretation and application of the Constitution as alleged by the Appellant.

#### **D. Issues of Determination**

33. Having considered the parties' pleadings and submissions in the instant petition, this Court is of the considered view that the issues arising for determination are as follows:
- a. Whether the Appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution; and
  - b. Whether the Court of Appeal erred in its decision of 4<sup>th</sup> April 2025.

In framing the above issues, we are conscious that should we find that we do not have jurisdiction, it will be unnecessary to proceed with the other issue.

#### **E. Analysis**

##### **a) Whether the Appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution**

34. The jurisdiction of this Court under Article 163(4)(a) of the Constitution has been brought to question by the Respondents by way of Preliminary Objections and the grounds of opposition. The Respondents argue that throughout the proceedings before the Environment and Land Court and the Court of Appeal, the issue for determination has been about the available avenue of remedy a party aggrieved by the decision of the 1<sup>st</sup> Respondent has in light of the express procedure provided for under Section 130 of the EMC Act and not the interpretation and application of the Constitution as alleged by the Appellant. The Respondents have urged that Articles 27(1) and (2), 47, 48 and 50(1) cited by the Appellant in its appeal were neither in issue nor decided by the superior courts below and therefore the same amount to mere allegations which cannot clothe this Court with jurisdiction to hear and determine the appeal.
35. On the converse, it is the Appellant's position that the present appeal is properly before this Court as it involves questions of interpretation and application of the Constitution since it touches on Articles 27(1) and (2), 47, 48 and 50(1) that the Appellant alleges were violated by the 1<sup>st</sup> and 4<sup>th</sup> Respondents in their impugned administration actions.
36. It is trite law that jurisdiction is a preliminary issue that ought to be dealt with at the onset. This is because, without jurisdiction, a court is obligated to lay down its tools as it does not have the power to adjudicate upon the proceedings before it. A court's jurisdiction normally emanates from either



the Constitution or legislation or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) this Court held as follows:

“(68) A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”

37. This Court has stipulated the confines of its jurisdiction under Article 163(4)(a) of the Constitution in a number of its decisions. For instance, in the case of Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another, [2012] KESC 9 (KLR), this Court set the guiding principles as follows:

“(28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

38. In Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others [2020] KESC 9 (KLR) we emphasized that it is not enough to invoke constitutional provisions in order to sustain an appeal to this Court. We stated as follows:

“(62) We cannot over-emphasize the specialized nature of Article 163(4)(a)’s Appellate jurisdiction of this Court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower Court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this Court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the Court(s)’determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the Constitution:

- i. The jurisdiction reverses 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



falls 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 Constitution 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).”

39. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] KESC 30 (KLR), we emphasized that at the very least where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, an Appellant should demonstrate that the appellate court’s reasoning and conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.
40. From the jurisprudence of this Court outlined hereinabove, it is evident that the issues that this Court would exercise its jurisdiction over pursuant to Article 163(4)(a) of the Constitution are only issues involving the interpretation or application of the Constitution. These issues must have been identified as involving interpretation or application of the Constitution. They must have been argued in the court of first instance and canvassed through the hierarchy of courts, at the Court of Appeal and finally to this Court. However, mere allegation by a party that a question of constitutional interpretation or application is involved does not automatically bring the appeal within the ambit of Article 163 (4) (a) of the Constitution. A party must show that the matter, by virtue of the court’s determination, took a constitutional trajectory of interpretation and application.
41. In this instance, the Appellant having moved this Court under Article 163(4)(a) of the Constitution, we have to interrogate whether its appeal meets the criteria set out under Article 163(4)(a) of the Constitution and the decisions set out above.
42. The first question to answer therefore, is whether the Appellant has identified particular issues of constitutional interpretation and application, and secondly, whether the issues were canvassed at the superior courts and progressed through the normal appellate mechanism so as to reach this Court by way of appeal, and finally, whether the superior courts misdirected themselves in relation to prescribed constitutional principles.
43. The Appellant is adamant that its appeal is as of right under Article 163(4)(a) of the Constitution as it involves the interpretation and application of the Constitution and specifically Articles, 2, 27, 47, 48 and 50(1) of the Constitution. However, although the Appellant set out the said provisions of the Constitution, it has failed, to our satisfaction, to explain the manner in which the superior courts interpreted and applied the Constitution one way or the other. Further, as correctly submitted by the Respondents, the issue for determination before the two superior courts was the avenue of remedy



available to a party aggrieved by the decision of the 1<sup>st</sup> Respondent in light of the express procedure outlined under section 130 of the EMC Act. It is evident from reading the impugned decisions that the two superior courts below did not engage interpretation and application of the Constitution as alleged by the Appellant.

44. Further, we note that the Court of Appeal mentioned Article 47 in its decision. Specifically, it observed that by dint of Article 47 of the Constitution, every person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and thus can institute judicial review proceedings to challenge a decision that is too contrary. However, the court stated that where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, the party should pursue such a procedure unless, in exceptional circumstances, the alternative remedy is not sufficient. It is important to reiterate this Court's findings in the cases of *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others*, [2017] KESC 11 (KLR) and *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others* [2020] KESC 9 (KLR) (supra), where we held that it is not granted that whenever the Court of Appeal mentions a provision of the Constitution in its decision, the matter under consideration automatically falls within the ambit of this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution.
45. As we held in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] KESC 27 (KLR), the Appellant having failed to demonstrate that its appeal raises the interpretation or application of any constitutional issues, it is our finding that the Court is not vested with the requisite jurisdiction to hear and determine the present appeal pursuant to the provisions of Article 163(4)(a) of the Constitution. For the reasons above, we decline the invitation to assume jurisdiction in respect of this appeal.
46. Consequently, it serves no purpose to address ourselves to the remaining issue.
47. On the issue of costs, we are not persuaded to make any order for costs against any of the parties in this matter since the same is in the nature of public interest.

#### **D. Orders**

48. In the end, we make the following orders:
- a. The 1<sup>st</sup> Respondent's Preliminary Objection dated 3<sup>rd</sup> June 2025 is hereby upheld.
  - b. Petition of Appeal dated 9<sup>th</sup> May 2025 and filed on 12<sup>th</sup> May 2025 is hereby struck out.
  - c. Each party shall bear their own costs.
  - d. We hereby direct that the sum of Kshs.6,000/=, deposited as security for costs upon lodging of this appeal, be refunded to the Appellant.

It is so ordered

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2026.**

.....  
**M.K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA**

.....  
**S.C. WANJALA**



**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

