



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. E047 OF 2024

–BETWEEN–

**ERIC KIBINU KINUTHIA (Suing as the
Legal/Personal Representative of
the Estate of Loise Gachiku Kinuthia(deceased)).....APPELLANT**

–AND–

JOSEPHAT GACHERU RUGIRI.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE LAND REGISTRAR KIAMBU.....3RD RESPONDENT

**DR. THITU KIBATA & MITHAMO KIBATA
(As the Legal/Personal Representatives of
the Estate of Amos Kibata Githeko (deceased)) 4TH
RESPONDENT**

*(Being an appeal from the judgment and orders of the Court of
Appeal at Nairobi (**Musinga (P), Ali- Aroni & Mativo, JJ.A.**)
delivered on 8th November 2024 in Civil Appeal No. E420 of
2022)*

Representation:

Mr. Francis Njanja for the Appellant
(*F. N. Njanja & Co. Advocates*)

Mr. Masore Nyang'au for the 1st Respondent
(*Masore Nyang'au & Co. Advocates*)

Ms. Njuguna for the 2nd and 3rd Respondents
(*State Law Office*)

Ms. Veronica Kimiti for the 4th Respondent
(*Kimiti & Associates*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is a Petition dated 23rd December 2024 and filed on 10th February 2025. The appellant is challenging the Judgment of the Court of Appeal at Nairobi (*Musinga (P), Ali- Aroni & Mativo, JJ.A*) in *Civil Appeal No. E420 of 2022* delivered on 8th November 2024, which set aside the decision of the Environment and Land Court, on the grounds that Loise Gachiku Kinuthia (deceased), whose estate is represented by the appellant, lacked capacity to sue on behalf of her deceased husband's estate.

B. FACTUAL BACKGROUND

[2] The dispute concerns the ownership of L.R. No. Kabete/Lower Kabete/47, measuring approximately 3.8 acres, subdivided into Kabete/Lower Kabete/3162, 3163 and 3164 (hereinafter referred to as "***the suit property***"). It arose from a claim lodged before the Kikuyu Land Disputes Tribunal by one Margaret Njambi Mbithi, seeking a share of the suit property and the adjacent parcel known as L.R. No. Kabete/Lower Kabete/43.

[3] In its award, the Land Disputes Tribunal approved the subdivision of L.R. No. Kabete/Lower Kabete/43 among three beneficiaries. However, it declined to make any orders regarding the suit property, finding that the suit property had been lawfully purchased by Kang'ethe Mbithi, who is now deceased. The Tribunal's decision was subsequently adopted as a judgment of the court on 3rd December 1998 in *Kikuyu SRM Miscellaneous Application No. 17 of 1998*, and a decree was duly issued. Notably, the Tribunal rectified its Award *vide* a letter dated 27th August 1999, clarifying that reference to *Kang'ethe Mbithi* was erroneous as it ought to have read *John Kinuthia Mbithi (now deceased)*.

[4] Despite this correction, a series of transactions were undertaken on the strength of the Tribunal's initial findings. On 10th December 1999, the suit property was registered in the name of Kang'ethe Mbithi alias Francis Felix Kangethe. Thereafter, on 23rd July, 2001, Margaret Njambi Kangethe and Edward Mbithi Kangethe (both now deceased) obtained a grant of letters of administration in *Nairobi High Court Succession Cause No. 1449 of 2000* in respect of the estate of Felix Kangethe, and registered the suit property to themselves by way of transmission. The suit property was subsequently transferred solely to Edward Mbithi Kang'ethe (deceased), who later sold it to Amos Kibata Githeko (now deceased), whose estate is represented by the 4th respondent. The suit property was thereafter subdivided into Kabete/Lower Kabete/3162, 3163, and 3164, and title deeds were issued on 31st August 2012. Finally, the 4th respondent sold the three parcels to the 1st respondent, Josephat Gacheru Rugiri, who was issued with title deeds on 24th February 2017.

[5] A dispute thereafter arose between the 4th respondent and John Kinuthia Mbithi's widow, Loise Gachiku Kinuthia (now deceased) and whose estate is represented by the appellant. The crux of the dispute was the ownership of the suit property, which culminated in the 4th respondent instituting proceedings against her, before the Environment and Land Court at Thika.

C. LITIGATION HISTORY

i. Proceedings at the Environment and Land Court

[6] The 4th respondent instituted a suit against the appellant in ***ELC Civil Case No. 856 of 2017*** seeking the following orders:

- a. *Permanent injunction restraining the appellant from invading, trespassing, alienating or in any way howsoever interfering with the suit property.*
- b. *An order compelling the appellant to give vacant possession of the suit property to the 4th respondent and in default eviction do issue.*
- c. *Costs of the suit and interest thereon.*

[7] The 4th respondent contended that he was the lawful registered proprietor of the suit property, having validly purchased it from Edward Mbithi Kangethe and having been duly issued with a certificate of title. He asserted that he lawfully subdivided the suit property into three parcels, and that the appellant was occupying the same without his consent.

[8] Conversely, the appellant filed an amended statement of defence and counterclaim dated 6th November 2018, joining the 1st, 2nd and 3rd respondents to the suit. She pleaded that the 4th respondent was not a *bona fide* purchaser of the suit property and that the titles issued to him were obtained through fraud and misrepresentation. In the counterclaim, she contended that she had enjoyed peaceful occupation of the suit property since 1968 as a beneficiary of her late husband, John Kinuthia Mbithi, who was registered as a proprietor on 3rd August 1962 and issued with a certificate of title on 6th June 1968. She maintained that the grant issued to the late Edward Mbithi

Kangethe in respect of the Estate of Kang'ethe Mbithi (deceased), which formed the basis of his claim to the suit property, was revoked on 18th November 2003 in *Nairobi High Court Succession Cause No. 1449 of 2000*. As a result, the said Edward Mbithi Kangethe lacked the

legal capacity and valid title to transfer any interest in the suit property to the 4th respondent.

[9] She sought the following reliefs:

- a. *An order compelling the 3rd respondent to cancel the registration and transfer of the suit property in the 4th respondent's favour and any subsequent sub-division.*
- b. *An order directing the 3rd respondent to cancel the registration of entries of Kangethe Mbithi, whose entry was made on 10th December 1999, the entry of Edward Mbithi Kangethe and Margaret Njambi Kangethe and the entry of Edward Mbithi Kangethe made on 7th August 2001 on the title of the suit property.*
- c. *An order directing the 3rd respondent to cancel the entry of Edward Mbithi Kangethe and all other subsequent entries by virtue of revocation of the grant in Nairobi High Court Succession Case No. 1449 of 2000 and the registration of the administrators appointed by the court in that cause.*
- d. *An order directing the 3rd respondent to cancel all entries of transfer that have been registered on the suit property, transferring the same to the 1st respondent.*
- e. *A prohibitory order against any dealings relating to the suit property and the subsequent subdivided titles.*
- f. *A declaration that the appellant is the rightful beneficiary and/or owner of the suit property.*

g. Costs of the suit and of the counterclaim.

[10] In a Judgment delivered on 18th March 2021, the Environment and Land Court (*Mbugua, J.*), identified 3 key issues for determination, namely:

- i) *The legality of the transfer of the suit property from John Kinuthia Mbithi to Kangethe Mbithi, then to Edward Mbithi Kangethe, and ultimately to the 4th respondent and 1st respondent;*
- ii) *Whether the 4th respondent and the 1st respondent were innocent purchasers for value; and*
- iii) *Whether the appellant had legal capacity to sue and be sued.*

[11] On the *first issue*, the court held that the transfer from John Kinuthia Mbithi to Kangethe Mbithi was improperly anchored on a decree issued in *Kikuyu SRM Miscellaneous Application No. 17 of 1998*, which neither expressly authorized the removal of John Kinuthia's name from the register nor divested him of proprietary rights, and that a subsequent rectification by the Tribunal confirmed that the suit property had been purchased by John Kinuthia Mbithi. The court found that any reference to the property therein was merely *obiter dictum* and not a binding determination. Applying Section 26 of the Land Registration Act and the holding in ***Munyu Maina Vs Hiram Gathiha Maina*** [2013] KECA 94 (KLR), the trial court noted that the registration effected in 1999, long after Kangethe Mbithi's death, was unprocedural and unsupported by any lawful determination of ownership. Accordingly, it concluded that Edward Mbithi Kangethe's title was unlawfully acquired and that all subsequent dealings in the suit property were null and void.

[12] On the *second issue*, the trial court held that the 1st and 4th respondents were not innocent purchasers, having had knowledge of existing restrictions, cautions, ongoing litigation, and conflicting decrees affecting the suit property. The 4th respondent was additionally aware that the appellant was in actual possession of

the suit property at the time of purchase, thereby disentitling them of the protection accorded to *bona fide* purchasers.

[13] Regarding the *third issue*, the trial court acknowledged that the appellant acquired a grant in respect of her late husband's estate on 14th June 1983, though the same had not been confirmed. The court found that the appellant was laying claim to the suit property in a beneficial capacity and not as a legal representative of her deceased husband's estate. In the end, the court held that the appellant was the beneficial and rightful owner of the suit property. Consequently, it issued a prohibitory order restraining the 1st and 4th respondents from dealing with the suit property or its resultant subdivisions, and ordered them to bear the costs of the main suit and the counterclaim. Furthermore, the trial court directed the 3rd respondent to:

- i) *Cancel all title deeds issued in the names of Kangethe Mbithi, Edward Mbithi Kangethe, Margaret Njambi Kangethe, and the 4th respondent in respect of the suit property;*
- ii) *Cancel all entries and transfers relating to the subdivisions Kabete/Lower Kabete/3162, 3163, and 3164;*
- iii) *Cancel the subdivisions of the suit property into parcels Kabete/Lower Kabete 3162, 3163 and 3164; and for the suit property to be registered in the name of the appellant as parcel Kabete/Lower Kabete/47.*
- iv) *Restore the appellant as the rightful proprietor of the suit property.*

ii. Proceedings at the Court of Appeal

[14] Aggrieved by the decision of the Environment and Land Court, the 1st respondent filed ***Civil Appeal No. E420 of 2022*** premised on twenty-four (24) grounds, which were later condensed into four as follows:

- i) *Whether the Learned Judge erred in her conclusion that the decisions in Kikuyu SRM Miscellaneous Application No. 17 of 1998 and the allocation of the suit property in Nairobi HCSC No. 1449 of 2000 (erroneously cited by the Court of Appeal as Nairobi HCSC No. 1499 of 2000), did not determine its ownership;*
- ii) *Whether the Learned Judge erred in giving judgment for the appellant herein who sued on the basis of being a beneficiary of her husband's estate, when she did not have locus standi to do so for lack of grant of representation;*
- iii) *Whether the 1st respondent was an innocent purchaser and that the court was obligated to protect the indefeasibility of his title; and*
- iv) *Whether the appellant did not prove her counterclaim.*

[15] The 1st respondent sought the following reliefs:

- i) *The Judgment and order of the Hon. Lucy Mbugua, J. read on 18th March 2021 be set aside.*
- ii) *In substitution of the Judgment of Hon. Lucy Mbugua J. read on 18th March 2021, the appellant's case (plaintiff to the counterclaim) be dismissed with costs to the 1st respondent herein.*
- iii) *There be an order that the appellant be evicted from the suit property.*
- iv) *The costs of the appeal be borne by the appellant.*

[16] The 4th respondent supported the appeal and urged the court to allow it. He contended that the appellant lacked *locus standi*

to file the counterclaim, as the grant of letters of administration to the Estate of the late John Kinuthia Mbithi had not been confirmed. He further argued that the trial court lacked jurisdiction to determine succession matters and that its jurisdiction was exhausted once it found that the suit property belonged to the appellant's late husband. He maintained

that, in the absence of an appeal or review of the decree in *Kikuyu SRMC Misc. Application No. 17 of 1998*, the learned Judge had no jurisdiction to interfere with that decree.

[17] Furthermore, he asserted that the 1st respondent had acquired a good title to the suit property, having purchased the same from him, and that he in turn had lawfully purchased it from the late Edward Mbithi Kangethe, a beneficiary of the Estate of Francis Felix Kangethe Mbithi. He noted that Edward Mbithi Kangethe obtained a grant of letters of administration intestate in *Nairobi HCSC No. 1449 of 2000*, which was subsequently confirmed on 23rd July 2001 and that the suit property had been transmitted to him before the grant was revoked, rendering the trial court's finding to the contrary erroneous.

[18] In response, the appellant opposed the appeal, maintaining that the decree in *Kikuyu SRMC Misc. Application No. 17 of 1998* sanctioned an illegal and irregular transfer of the suit property from John Kinuthia Mbithi to Kangethe Mbithi, both deceased; that the said transfer was procured through misrepresentation and fraud, long after the death of Kangethe Mbithi on 9th July 1971. She stated that the revocation of the grant in *Nairobi HCSC No. 1449 of 2000* nullified both the grant and the purported transmission of the suit property to Edward Mbithi Kangethe, who therefore did not have a clean title to transfer to the 4th respondent and subsequently to the 1st respondent herein during the pendency of the suit.

[19] The appellant further argued that the 1st respondent failed to produce a court order authorizing the removal of the restrictions, inhibitions or caveats registered against the title of the suit property and reiterated that the learned Judge rightly concluded that the 1st and 4th respondents did not demonstrate that they were *bona fide*

purchasers from Edward Mbithi Kangethe and that the 4th respondent was part of a well-orchestrated fraudulent scheme to illegally transfer the suit property. On the issue of *locus standi*, the appellant averred that no evidence was tendered to show that the grant issued to her in respect of her late husband's estate had been

revoked, and that, in any event, Article 22 of the Constitution permits a person to institute proceedings on behalf of others.

[20] In a Judgment delivered on 8th November 2024, the Court of Appeal (*Musinga(P), Ali-Aroni & Mativo, JJ. A*) overturned the Judgment of the Environment and Land Court, allowed the appeal, struck out the amended counterclaim and directed each party to bear its own costs of the appeal. In its reasoning, the appellate court focused primarily on the jurisdictional question of whether the appellant had the legal capacity to institute the amended counterclaim. It held that, since the subject matter of the suit involved land registered in the name of her late husband, it was a legal prerequisite for the appellant to have first obtained a confirmed grant of letters of administration, or a limited grant for purposes of instituting proceedings. The appellate court noted that the record did not reflect that such a grant had been obtained or attached to the pleadings, and found that where proceedings are instituted without a valid grant of representation, they are rendered null and void for want of *locus standi*.

[21] Consequently, the Court of Appeal held that the amended counterclaim was a nullity, as the appellant lacked capacity to sue on behalf of her deceased husband's estate. Accordingly, the appellate court issued the following orders:

- i. The appeal is allowed;*
- ii. The amended counterclaim dated 6th November 2018 in Thika ELC No. 856 of 2017 is hereby struck out for want of locus standi to institute the proceedings;*
- iii. For the interests of justice and in order to have the dispute*

determined on merits, the appellant upon regularizing her locus standi is hereby granted leave to institute fresh proceedings before the Environment and Land Court;

iv. Each party shall bear its own costs of the appeal.

iii. Proceedings at the Supreme Court

[22] Dissatisfied, the appellant lodged the present Petition, but notably, did not cite the provision of the Constitution under which the appellate jurisdiction of this Court was invoked. The appellant seeks the following reliefs:

- i. A declaration that the finding by the Learned Judges of the Court of Appeal that Loise Gachiku Kinuthia (Deceased) now represented by the appellant herein, had no locus to institute a counterclaim against the defendants in the Thika ELC Case No. 865 of 2017, violated the appellant's rights as envisaged by Articles 22, 40, 50 & 258 of the Constitution of Kenya, 2010.*
- ii. The Judgment of the Court of Appeal at Nairobi in Civil Appeal No. E420 of 2022 dated 8th November 2024 be and is hereby quashed in that, Loise Gachiku Kinuthia (Deceased) (herein represented by the Appellant), had the locus standi pursuant to Articles 22 and 258 of the Constitution of Kenya, 2010 to institute a counterclaim against the defendants in the Thika ELC Case No. 865 of 2017, consequence to which, the Judgment of the Thika ELC Court Case No. 865 of 2017 be and is hereby reinstated.*
- iii. Costs for this appeal and costs in the Court of Appeal be borne by the 1st respondent.*

[23] In response, the 1st respondent filed a replying affidavit to the appeal, sworn on 18th March 2025. He contends that the appellant failed to obtain leave of the Court as required under Section 15 of the Supreme Court Act before filing his appeal and that, in any event, the

appeal raises neither constitutional issues nor questions of general public importance to justify its admission without leave under Section 15A of the Act. Consequently, he argues that the Court lacks jurisdiction to entertain the appeal. He further filed a Notice of Cross-Appeal dated 28th January 2025 pursuant to Rule 47 of the Supreme Court Rules; however, the same was

subsequently marked as withdrawn by an order of this Court issued on 25th April 2025.

[24] The 2nd and 3rd respondents, in their response dated 2nd April 2025, opposed the petition on the ground that it fails to meet the constitutional and statutory threshold for admission before this Court. In particular, they contend that it raises no question of general public importance as stipulated under Article 163(4) of the Constitution, discloses no cogent or recurring constitutional issue warranting the Court's interpretation, and presents no substantial point of law with a significant bearing on the public interest. They further argue that the appeal was prematurely instituted and urge the Court to dismiss it with costs.

[25] The 4th respondent opposed the appeal by way of a response to the petition dated 22nd May 2025, contending that it is fatally defective and falls outside the jurisdiction of the Court for non-compliance with Section 14 of the Supreme Court Act (now repealed). They argue that the appeal does not qualify as an appeal filed as of right under Section 15A of the Supreme Court Act, nor does it involve the interpretation or application of the Constitution under Article 163(4)(a); further, the issues raised fail to meet the threshold for certification as matters of general public importance. It is contended that the appellant lacks the requisite *locus standi* in relation to the subject estate. On this basis, the 4th respondent urges the Court to find the appeal incurably defective, devoid of merit, and an abuse of the appellate process, and to strike it out with costs.

D. THE PARTIES' SUBMISSIONS

i. Appellant's submissions

[26] The appellant's submissions are dated 4th July 2025 and were filed on 29th October 2025. At the outset, the appellant clarified that the petition has been filed as of right pursuant to Article 163(4) (a) of the Constitution.

[27] On *locus standi*, the appellant submits that Loise Gachiku Kinuthia (deceased) had the requisite legal capacity to file the counterclaim in *Thika ELC No. 865 of 2017*, having obtained a Grant of Letters of Administration Intestate to her late husband's Estate on 14th June 1983. He avers that the grant was duly produced in evidence before the trial court and acknowledged in its judgment. It is argued that, pursuant to Sections 79 and 82 of the Law of Succession Act, such a grant is sufficient to vest authority to sue, defend, and protect the property of a deceased person, and that there is no legal requirement for a confirmed grant to be obtained prior to instituting or defending proceedings on behalf of an Estate of a deceased person.

[28] On *whether the Court of Appeal violated the appellant's right to a fair hearing*, the appellant submits that the Court of Appeal's decision resulted in a grave violation of the right to a fair hearing as stipulated under Article 50 of the Constitution. It is submitted that Loise Gachiku Kinuthia, as the personal representative of the Estate of John Kinuthia Mbithi, had a right to respond to the claim over the suit property, as was done through a defence and counterclaim. The appellant contends that it offends the principles of natural justice to sustain a claim against a party while simultaneously striking out that party's defence and counterclaim on the basis of the alleged lack of capacity. Further, it is argued that in any legal proceeding where any of the parties lacks capacity to sustain a cause of action, then the entire proceedings are deemed *void ab initio* for all the parties.

[29] On *whether the Court of Appeal violated the appellant's right to property under Article 40 of the Constitution*, the appellant submits that Loise Gachiku Kinuthia (deceased) had a clear beneficial interest in the suit property and a proprietary interest, by dint of being an

administrator of her late husband's estate. The appellant submits that by disregarding this interest and striking out her claim, the Court of Appeal unjustly exposed the suit property to third parties whom the trial court had found to be fraudulent claimants.

[30] Additionally, the appellant faults the Court of Appeal for failing to pay due regard to the finding of the trial court, which explicitly acknowledged that a grant had been issued to her. The appellate court's insistence on a confirmed or limited grant is characterized as a misapprehension of the law, especially in light of the decision in ***Re Estate of Daudi Owino Olak (Deceased)*** [2022] KEHC 1471 (KLR), to the effect that Sections 79 and 82 of the Law of Succession Act vest a deceased's property in the personal representative, granting them the same powers over it as the legal owner would have exercised while alive.

[31] The appellant argues that the decision of the Court of Appeal directing the litigant to obtain a new grant and restart the litigation process, is oppressive, wasteful, and contrary to Article 159(2)(b) of the Constitution, which underscores the expeditious and efficient resolution of disputes. It is also submitted that the respondents acknowledged the existence of the grant during trial and only raised the issue of its confirmation after the trial court had rendered its judgment. The appellant maintains that the Court of Appeal's decision violated the appellant's constitutional rights under Articles 22, 40, 50, 159, and 258, and that such violations warrant the intervention of this Court.

ii. 1st Respondent's submissions

[32] The 1st respondent filed two sets of submissions dated 3rd April 2025 and 24th June 2025, wherein he contends that the appeal is procedurally defective, having been lodged forty-six (46) days after the delivery of the judgment of the Court of Appeal and without the requisite leave, contrary to the provisions under Rule 38 of the Supreme Court Rules. He further submits that the appellant neither

obtained the requisite certification under Article 163(4)(b) of the Constitution nor initiated the appeal as of right under Article 163(4) (a).

[33] It is urged that the matter concerns a land dispute, not a constitutional question, and that mere reference to constitutional provisions does not confer jurisdiction on the Court. Citing ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR) and

Nduttu & 6000 others Vs Kenya Breweries Ltd & another [2012] KESC 9 (KLR), the 1st respondent contends that the appeal does not also raise issues of general public importance, and urges the Court to dismiss it *in limine* with costs.

iii. 2nd and 3rd Respondents' submissions

[34] The 2nd and 3rd respondents filed submissions dated 16th June 2025 identifying six issues for determination, *to wit*, whether the appellant properly invoked the Court's jurisdiction; whether the appellant pleaded the alleged constitutional violations with the requisite precision and particularity; whether the matter is of general public importance; whether the appeal raises a substantial point of law; whether the Court should grant the reliefs sought; and who should bear the costs of the appeal?

[35] On the question of *jurisdiction*, the 2nd and 3rd respondents' challenge is two-pronged. First, they argue that the appellant failed to invoke the correct legal basis for this Court's jurisdiction under Article 163(4)(a) or (b) of the Constitution, Sections 15A and 15B of the Supreme Court Act, and Rule 36 of the Supreme Court Rules. Instead, the appellant merely cited Articles 22 and 258 of the Constitution, which cannot confer jurisdiction to this Court. Citing the landmark decisions in ***Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd*** [1989] eKLR and ***Macharia & another Vs Kenya Commercial Bank Ltd & 2 others*** [2012] KESC 8 (KLR), the 2nd and 3rd respondents submit that jurisdiction flows strictly from the Constitution or statute, and cannot be assumed or expanded by parties or by judicial innovation. Second, they submit that the doctrine of constitutional avoidance is applicable in this appeal, as the appellant has not identified any real constitutional issue that warrants

SC Petition No. E047 of 2024 Page 27 of

this Court's intervention and has neither pleaded with precision the rights allegedly violated, nor explained how they were infringed.

[36] Moreover, the 2nd and 3rd respondents contend that the issues raised in this appeal do not satisfy the threshold established in ***Steyn Vs Ruscone*** [supra] for certification as involving a matter of general public importance. Particularly, they argue that the appeal neither transcends the parties' private interests nor implicates the public interest, raises no substantial question of law and that the issues herein are neither novel nor complex and do not warrant clarification by this Court, citing ***Ngokonyo & 2 Others Vs Telkom Kenya Ltd.*** [2025] KECA 316 (KLR), ***Katiba Institute Vs Independent Electoral and Boundaries Commission*** [2017] KEHC 8555 (KLR) and ***Gakuru & another Vs Governor Kiambu County & 3 others*** [2013] KEHC 6014 (KLR), in support thereof. It is further submitted that the appeal was prematurely instituted without first exhausting the available avenues for redress.

iv. 4th Respondent's submissions

[37] The 4th respondent's submissions dated 11th July 2025 and filed on 15th July 2025, similarly challenge the jurisdiction of this Court to entertain the present appeal. At the outset, the 4th respondent contends that the appellant failed to seek and obtain leave as by law required, thereby rendering the appeal incompetent. In support, reliance is placed on ***Macharia & another Vs Kenya Commercial Bank Ltd & 2 others*** [supra], ***Ngoge Vs Kaparo & 5 others*** [2012] KESC 7 (KLR), and the *locus classicus* decision in ***Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd*** [supra].

[38] He further submits that the appeal does not meet the constitutional threshold under Article 163(4)(a) of the Constitution, as affirmed by this Court in ***Nduttu & 6000 Others Vs Kenya*** SC Petition No. E047 of 2024

Breweries Ltd & another [supra], ***Bell Vs Moi & another*** [2013] KESC 23 (KLR), and ***Munya Vs Kithinji & 2 others*** [2014] KESC 38 (KLR). It is additionally contended that the appeal fails to comply with the requirements of Section 15A of the Supreme Court Act.

[39] On whether the appeal raises any issue of general public importance as contemplated under Section 15B of the Act, the 4th respondent submits that the dispute between the parties herein, is private and does not affect the public collectively or raise any uncertainty in the law, as to warrant this Court's intervention.

[40] On the issue of *locus standi*, it is submitted that the appellant did not have the legal standing to litigate on behalf of the estate of John Kinuthia Mbithi. Citing, *inter alia*, Section 82 of the Law of Succession Act, ***Troustik Union International & another Vs Mbeyu & another*** [1993] eKLR and ***Mbae Vs Kathomi & 2 others*** [2025] KEHC 4600 (KLR), the 4th respondent asserts that a party who seeks rights over a deceased person's estate must be clothed with lawful authority. Relying on the decision in ***Satya Bhama Gandhi Vs Director of Public Prosecutions & 3 others*** [2018] KEHC 6100 (KLR), they term the appeal as an abuse of the court process. They urge the Court to uphold the 1st and 4th respondents' proprietary rights as stipulated under Article 40 of the Constitution, Section 26 of the Land Registration Act and interpreted by this Court in ***Dina Management Ltd Vs County Government of Mombasa & 5 others*** [2023] KESC 30 (KLR); and strike out the appeal in limine with costs.

E. ISSUES FOR DETERMINATION

[41] Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, and the resultant judgment of the appellate court; we find that only two issues fall for determination i.e,

- i. *Whether this Court has jurisdiction to hear and determine the*

ppeal herein, and

- ii. Whether the appellant lacked the requisite locus standi to prosecute the Counterclaim at the trial court.*

F. ANALYSIS AND DETERMINATION

i. On Jurisdiction

[42] The respondents have strenuously argued that this Court lacks jurisdiction to hear and determine the appeal. Their challenge is premised on the grounds that, first, the appellant did not seek and obtain certification before filing the appeal, as required under Article 163 (4) (b) of the Constitution and Section 15 B of the Supreme Court Act. Secondly, it is their submission that the appellant has not specifically invoked the provisions of Article 163 (4) (a) of the Constitution in order to validly raise a question of constitutional interpretation or application. They further contend that the appeal herein emanates from a private land dispute which raises no question regarding the interpretation or application of the Constitution as envisaged under Article 163 (4) (a).

[43] In response, the appellant submits that the appeal is predicated upon the provisions of Article 163 (4) (a) of the Constitution and not 163 (4) (b) thereof. He submits that the appeal raises questions of constitutional interpretation and application which implicate Articles 22, 40, 50 and 258 (2) (a) thereof.

[44] In view of the appellant's response to the respondents' jurisdictional challenge based on the provisions of Article 163 (4) (b), we do not find it necessary to address the issue of certification. That leaves us with the issue of the omission by the appellant to specifically invoke the provisions of Article 163 (4) (a), and whether such failure renders the appeal fatally defective. Depending on the answer to the foregoing question, we shall then consider whether, the appeal raises issues involving the interpretation or application of the Constitution.

[45] We have, in the past, cautioned parties about the strict need to

specifically indicate in their pleadings the specific provision pursuant to which they are invoking the Court's jurisdiction. The Court has, in a number of its decisions regarding this issue, strictly applied the reasoning that failure to cite the specific provision upon which an appeal is premised is fatal to the intended appeal. Yet in

other determinations, the Court has adopted a less rigid approach and refrained from striking out the intended appeal upfront without considering the merits.

[46] In *Warrakah & 2 others Vs Mbwana & 5 others* [2018] KESC 76 (KLR), the respondents raised a preliminary objection challenging the jurisdiction of this Court, arguing that the appeal failed to meet the criteria for admission. Particularly, the jurisdiction of this Court had not been properly invoked, as the petitioners failed to indicate under which limb the appeal was filed (either Article 163 (4) (a) or Article 163 (4) (b) of the Constitution).

[47] This Court held that a party cannot seek to invoke the Supreme Court's appellate jurisdiction without unequivocally indicating under which constitutional provision he or she seeks to move the Court. The Court rendered itself thus:

“In this appeal, what counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant is invoking the court's jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter.”

The appeal was consequently struck out for want of jurisdiction.

[48] In *Njihia Vs Kimani & another* [2015] KESC 19 (KLR), an

application had been brought under Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya), and Rules 39, 42 and 43 of the Court of Appeal Rules, 2010, seeking a review of the denial of certification. The Court stated:

“We are, indeed, cognizant of the fact that the applicant drew the application documents himself, and has

personally conducted this matter. Objections to the recourse to improper legal provisions did not come from the other parties. However, the extraordinary standing of this Court would demand that, in principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution. [Emphasis added]

[49] Despite the foregoing pronouncement, the Court adopted a less rigid pathway and proceeded to determine the application on its merits, eventually dismissing it for failing to meet the threshold for certification.

[50] In ***Wainaina & another (As Administrators of the Estate of Margaret Wanjiru Kinyara - Deceased) Vs Kinyanjui & Njenga (As Administrators of the Estate of Elizabeth Wanjiru Njenga - Deceased) & 3 others*** [2020] KESC 28 (KLR), the appellants failed to indicate under which constitutional provision they were invoking the Court's jurisdiction. In determining whether it had jurisdiction, the Court stated:

“We have on several occasions stated that a party ought to indicate which constitutional provision he or she relies on when they move this Court. It is absurd that a party can seek audience before the court without doing so, as it cannot be left to the court to speculate which provision is best suited for the Petitioner's appeal.

This was our position in Daniel Kimani Njihia v. Francis Mwangi Kimani & Another [2015] eKLR, where this Court was categorical that in preferring an appeal, “a litigant should invoke the correct constitutional or statutory provision; and

an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.” ”

The appeal was struck out for want of jurisdiction.

[51] In *Karua Vs Independent Electoral and Boundaries Commission & 3 others* [2019] KESC 26 (KLR), the appeal was filed pursuant to Rules 9 and 33 of the Supreme Court Rules, 2012 (now repealed), which did not set out the Court’s jurisdiction but provided the contents of a petition and the manner of instituting appeals, respectively. Reference to Article 163(4)(a) of the Constitution was only made in the body of the petition. The Court excused this infraction, distinguished the case from *Warrakah [supra]* and was satisfied that the infraction was not fatal. However, the Court warned that inelegant drafting would not be countenanced. It stated:

“Undoubtedly, the Rules of the court thus remain an important tool in aiding the dispensation of justice. In this case, however, rules 9 and 33 do not make reference to any particular jurisdiction of this court. Be that as it may, we acknowledge that the appeal before us, in its body, is crafted in a manner that demonstrates that the petitioner invokes this court’s jurisdiction under article 163(4)(a) of the Constitution and specific provisions of the Constitution are cited as having been violated. We have already cited articles 27, 50, 81, 86 and 87 in that regard. The Warrakah case in that context is clearly distinguishable. Inelegance in drafting is not encouraged, nonetheless.”

[52]In *Kamau Vs Karanja & another* [2024] KESC 64 (KLR), the appellant had not specified under which limb of Article 163(4) of the Constitution the appeal had been brought. It was only argued in paragraph 20 of the written submissions that the appellant had cited a case in reference to Article 163(4)(a) of the

Constitution. In the circumstances, the Court *suo motu* evaluated whether it had jurisdiction to determine the appeal. It stated:

“In view of the fact that the two avenues of this Court's appellate jurisdiction under Article 163(4)(a) and (b) of the Constitution are distinct, counsel or a litigant invoking that jurisdiction to appeal a decision of the Court of Appeal must strictly demonstrate either that the appeal is as of right under (a) of Article 163(4) or that the appeal has been certified as involving a matter of general public importance under (b) of that Article.”

[53] Notwithstanding the foregoing categorical pronouncement, the Court proceeded to evaluate whether the appeal had raised issues of interpretation and application of the Constitution to properly invoke its jurisdiction under Article 163

(4) (a) and answered in the negative.

[54] In ***National Rainbow Coalition Kenya (NARC Kenya) Vs Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Parties)*** [2022] KESC 6 (KLR), the appeal was brought pursuant to the “*Constitution, Section 15(2) of the Supreme Court Act and other enabling provisions of the law*”. It therefore, did not specify the specific provision of the Constitution upon which it was premised. In determining whether it had jurisdiction, the Court stated:

“.....The court has consistently and resolutely stated in numerous decisions, such as Suleiman Mwamlole Warrakah [supra], Nasra Ibrahim Ibren [supra], Daniel Kimani Njehia v Francis Mwangi [supra] and

**Margaret Wanjiru Wainaina & another v James Njenga
Kinyanjui & 4 others [2020] eKLR, that it is only
properly moved by**

invoking the correct constitutional or statutory provision that clothes it with jurisdiction.

.....

Given the 'specialised' nature of the jurisdiction of the Supreme Court as far as appeals from the Court of Appeal are concerned in terms of article 163(4) of the Constitution, it is of paramount importance to identify on which one of the two limbs (a) or (b) the court is being moved...."

[55] However, the Court proceeded to determine whether the appeal had raised issues of interpretation and application of the Constitution under Article 163(4)(a) thereof. In the end, it upheld the preliminary objection and dismissed the appeal.

[56] In ***Steyn Vs Ruscone (Application 4 of 2012)*** [2013] KESC 11 (KLR), the applicant moved the Court under Articles 159(2)(a), (d) & (e); 163(4)(b); and 259(1) of the Constitution; Sections 15(1) and 16(1) of the Supreme Court Act; Rule 21(1) of the Supreme Court Rules, 2011 in an application for review of certification, but failed to cite Article 163(5) of the Constitution. While determining whether its jurisdiction had been properly invoked in the circumstances, the Court stated:

"...It is unfortunate that the applicant has not cited Article 163(5) of the Constitution, as a basis for the proceedings. This is the provision of the law that clearly gives the applicant locus standi before this Court, by referring to 'review'.... The question then is, whether this omission is fatal to the applicant's case.

It is trite law that a Court of law has to be moved under the correct provisions of the law...

....

We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite Article 163(5) will not be fatal to the applicant's cause.

[Emphasis added].

[57] From the foregoing list of authorities, it is clear that, as a general rule, the Supreme Court will not admit an appeal brought under Article 163 (4) of the Constitution, unless the intending appellant has unequivocally indicated the specific limb pursuant to which the Court's jurisdiction is being invoked. Towards this end, if a litigant intends to move the Court as of right, then he must bring the appeal under Article 163 (4) (a) on grounds that the case involves the interpretation or application of the Constitution. If, on the other hand, a litigant seeks to invoke the Court's jurisdiction on grounds that the case involves a matter of general public importance, he or she must bring the appeal under Article 163 (4) (b), in which case he must first seek and obtain certification to that effect, by either the Court of Appeal or the Supreme Court.

[58] Failure by a litigant to move as above prescribed, is fatal to the intended appeal unless, the Court is persuaded, or determines on its own motion, that there exist certain reasons/circumstances as to warrant exceptional treatment of the appeal, pursuant to the provisions of Article 159 (2) (d) of the Constitution. Applying this principle to this appeal, we begin by observing at the outset that,

Counsel for the appellant indicated that the appeal had been brought as of right under Article 163 (4) (a) of the Constitution. Secondly, the pleadings disclose that the gist of the appeal is a jurisdictional question. The appellant has turned to this Court on the basis that he was wrongfully shut out of the corridors of justice by the Court of Appeal on the grounds that he lacked *locus standi* right from the

Environment and Land Court. This grievance automatically kicks in the applicability or otherwise, of the provisions of Articles 22 (2) (a), 40, and 50 of the Constitution, thus meeting the critical threshold of Article 163 (4) (a) thereof. Were we to close our eyes to the appellant's cry, and should his complaint turn out to have been legally tenable, a serious injustice would be meted to the appellant with cruel finality.

[59] Applying our reasoning in *Steyn Vs Ruscone, NARC Kenya Vs IEBC, Kamau Vs Karanja*, and *Karua Vs IEBC [Supra]*, we are of the view that this appeal discloses ample reasons to warrant the invocation of the provisions of Article 159 (2) (d) of the Constitution in favour of the appellant. Having so concluded, we now turn to consider the second issue as to whether, the Court of Appeal erred in holding that the appellant lacked the *locus standi* to file and prosecute the Counterclaim at the Environment and Land Court.

ii. On Locus Standi

[60] The Judgment of the Court of Appeal turned squarely on whether or not the respondent (represented by the appellant herein) possessed the requisite *locus standi* to file and prosecute her counterclaim at the trial court. Towards this end, the appellate court held that since the suit property comprised of land registered in the appellant's late husband's name, it was a legal pre-requisite for her to have first obtained a confirmed or limited grant of letters of administration for purposes of instituting any legal proceedings. Consequently, the court declared the amended counterclaim a nullity and dismissed it.

[61] It is this decision that triggered the appeal before us. The respondents maintain, in support of the Court of Appeal's decision, that the respondent (appellant herein) lacked *locus standi* at the trial

court for want of a confirmed or limited grant of letters of administration. The appellant, on the other hand, submits that the Court of Appeal erred by not appreciating the fact that, as the legal representative of the estate of the late John Kinuthia Mbithi, Loise Gachiku

Kinuthia (now deceased) had the *locus standi* to institute and defend any proceedings relating to the estate.

[62] The challenge of the appellant's *locus standi* first arose before the Court of Appeal, where the 1st respondent argued that the trial court had erred in entering Judgment in favour of Loise Gachiku Kinuthia (deceased), whose suit was brought on the basis of her being a beneficiary of the estate of John Kinuthia Mbithi (deceased), but without obtaining a grant of representation. The 4th respondent supported this position, contending that Loise Gachiku Kinuthia (deceased) lacked *locus standi* to file the counterclaim, as the grant of letters of administration issued to her in respect of the estate of John Kinuthia Mbithi (deceased) had not been confirmed.

[63] In response, the appellant maintains that Loise Gachiku Kinuthia (deceased) had the requisite legal capacity, having obtained a grant of letters of administration intestate to the Estate of John Kinuthia Mbithi, on 14th June 1983. The grant was produced in evidence and acknowledged by the trial court. It was the appellant's further case that, under Sections 79 and 82 of the Law of Succession Act, such a grant vests authority to sue, defend, and protect the estate, and that confirmation is not a prerequisite for instituting or defending a suit.

[64] While the Environment and Land Court, in its judgment delivered on 18th March 2021, affirmed that Loise Gachiku Kinuthia (deceased) held a valid, though unconfirmed grant, the Court of Appeal, in its impugned judgment of 8th November 2024, took a contrary view, holding that a confirmed or limited grant was necessary for purposes of instituting proceedings, and in its absence, the suit was incompetent for want of *locus standi*.

[65] *Locus standi* is a prerequisite for instituting a claim before a court of law. In ***Kinuthia (Through the Administrators of His Estate) Vs Anyanga & 6 others*** [2025] KESC 60 (KLR), this Court emphasised that only a party with *locus standi* may competently move the Court. The Law of Succession Act has

elaborately provided for standing to institute suits on succession matters. Sections 3 and 82 of the Law of Succession Act are instructive in this regard. Section 3(1) thereof, defines an administrator as “*a person to whom a grant of letters of administration has been made*”. Section 82 empowers personal representatives to enforce causes of action on behalf of the deceased, subject only to limitations contained in the grant. In ***Troustik Union International & Another Vs Mbeyu & Another*** (2008)1 KLR (GF) 730 and ***Rajesh Pravinjivan Chudasama Vs Sailesh Pranjivan Chudasama*** [2014] KECA 250 (KLR), the Court of Appeal affirmed that a person acquires *locus standi* upon obtaining a grant of representation, without more.

[66] In the instant petition, as is evident from the pleadings, it is not contested that the suit property was initially owned by John Kinuthia Mbithi (deceased), who was the husband of Loise Gachiku Kinuthia (deceased), represented by the appellant. It is further evident that Loise Gachiku Kinuthia obtained a grant of letters of administration intestate in respect of his estate on 14th June 1983. This grant forms part of the trial court record, having been introduced through a further list of documents dated 6th March 2019 pursuant to Order 7 Rule 5(d) of the Civil Procedure Rules; it also appears in the record of appeal at page 265. The said grant has not been revoked and remains valid.

[67] Section 79 of the Law of Succession Act Cap 160, with a marginal note,

‘Property of the deceased to vest in personal representatives’, provides:

“The executor or administrator to whom representation has been granted shall be the

personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

[68] Section 82 (2) sets out the *powers of personal representatives inter-alia*, as follows:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;***
- b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:***

Provided that—

- i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and***
- ii. no immovable property shall be sold before confirmation of the grant”.***

[69] Undoubtedly, under the Law of Succession Act, a confirmed grant is not a pre-requisite for conferment of *locus standi* upon a personal representative. A person to whom a grant of representation has been made, thereby acquires the legal capacity to institute legal proceedings in defence, or preservation of the deceased’s estate. A confirmed grant becomes a requirement where, the personal representative seeks to transmit, sell part, or all of the immovable property comprised in the estate. In any case, once the 4th respondent instituted proceedings against Loice Gachiku Kinuthia, with her status in mind, it was open for her to not only defend but file a counterclaim

as she did. Consequently, it is the finding of this Court that the appellant had the requisite *locus standi* to institute the counterclaim

before the Environment and Land Court. The Court of Appeal, therefore, erred in holding otherwise.

iii. What reliefs are applicable?

[70] It is not lost on us that this case has subsisted in the corridors of justice since 1989, an inordinately long period of time. Both Mr. and Mrs Kinuthia are deceased, while the dispute painfully ambles along. Having concluded that the appellate court proceeded in error by striking out the appellant's counterclaim for want of *locus standi*, we are of the opinion, that the ends of justice will be better served, if the dispute is remitted to that forum so that it can be determined on its merits. Consequently, we make the following Orders:

G. ORDERS

- (i) The Appeal dated 23rd December 2024 is hereby partially allowed in view of the finding in paragraph 69 of this Judgment.***
- (ii) The Judgment of the Court of Appeal dated 8th November 2024, is hereby set aside.***
- (iii) The case is hereby remitted to the Court of Appeal for hearing and determination on merits, on a priority basis before a differently constituted bench.***
- (iv) The Costs of this appeal shall be borne by the respondents.***
- (v) 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.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 15th Day of May 2026.

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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT
COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT
COURT

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



I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA