Milly Glass Works Limited v Kenya Railways Corporation & another (Petition E041 of 2024) [2025] KESC 26 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KESC 26 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION E041 OF 2024

MK KOOME, CJ & P, PM MWILU, DCJ & VP,
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MAY 16, 2025

BETWEEN

MILLY GLASS WORKS LIMITED ..... APPELLANT

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

PAMELA JOYOUKO T/A SADIQUE ENTERPRISES AUCTIONEERS .... 2ND RESPONDENT

(Being an appeal from part of the Judgment and Order of the Court of Appeal of Kenya at Mombasa (Murgor, Laibuta & Odunga JJ.A) dated 25th October 2024 in Mombasa Civil Appeal No. E038 of 2022 consolidated with Civil Appeal No. Eo35 of 2023)

JUDGMENT

Representation:

Mr. Gikandi for the Appellant (Gikandi & Company Advocates)

Mr. Ndegwa for the Respondents (Ndegwa, Sitonik & Karina Advocates)

A. Introduction

1. Before this Court is an appeal dated 27th November 2024, lodged on 4th December 2024 and premised on rule 29 of the *Supreme Court Rules* 2020.

   The appellant has expressly stated in his Petition that the appeal is brought as of right under Article 163 (4) (a) of the *Constitution*.

2. The appeal seeks to impugn a portion of the Judgment and Orders rendered by the Court of Appeal (Murgor, Laibuta & Odunga JJ.A) on 25th October 2024 in *Mombasa Civil Appeal No. E038 of 2022*

consolidated with Civil Appeal No. E035 of 2023 that set aside the Ruling by the Environment and Land Court (ELC) finding that, pursuant to Section 88 of the *Kenya Railways Corporation (KRC) Act*, garnishee proceedings could not be instituted against the 1st respondent.

B. Background

3. The genesis of this dispute can be traced to a lease agreement (the lease) dated 16th January 1980, through which the 1st respondent, Kenya Railways Corporation (KRC), leased Mombasa/Block XL VIII/134 (the Suit Property) to Kenya Glass Works Ltd for a term of 81 years, commencing on 1st January 1977, at an annual rent of Kshs. 22,000/-. On 26th April 1993, Kenya Glass Works transferred the lease to the appellant, Milly Glass Works Limited, then known as Bawazir Glass Works Limited and a certificate of lease was issued on 6th October 2000.

4. Notably, Clause 2 of the lease vested the 1st respondent with the prerogative to increase the annual rent upon the expiry of 30 years. That notwithstanding, on 1st January 1994, the 1st respondent increased the annual rent to Kshs. 146,000/-, which the appellant allegedly paid without objection. Matters took a contentious turn when, by a letter dated 30th September 2011, the 1st respondent sought to further increase the rent from Kshs. 146,000/- to Kshs. 10,200,000/- effective 1st January 2012.

5. Despite the appellant's objection, on 4th July 2012, the 1st respondent appointed the 2nd respondent, Pamela Joy Ouko t/a Sadique Enterprises Auctioneers, to levy distress for the unpaid revised rent. In response, the appellant sought redress by instituting proceedings before the ELC challenging the validity of the rent increment on the basis that a proper interpretation of the lease did not confer upon the 1st respondent the authority to impose the claimed rent increase.

C. Litigation History

i. Proceedings before the Environment and Land Court (ELC)

6. The appellant instituted Mombasa ELC No. 135 of 2012 against the respondents seeking the following reliefs from the court:

    a. A declaration that the 1st respondent had no right under the terms of the lease dated 16th January 1980 to raise the annual rent payable in respect of the suit property until 1st January 2037.

    b. A declaration that the revision of the annual rent for the suit property from Kshs. 146,000/- to Kshs. 10, 200,000/- was unlawful, null and void and of no effect.

    c. An order for a permanent injunction against the respondents, their servants, employees, officers and/or agents restraining them from interfering in any manner whatsoever with the appellant's quiet and peaceful possession of the suit property and, in particular, restraining them from charging the appellant an annual rent higher than Kshs. 146,000/- until 1st January 2037, and for levying distress or taking any other action for the recovery of such higher amount.

    d. Costs incidental to the suit.

    e. Any other or further relief that the Honorable Court may deem fit to award.

7. The appellant advanced the argument that under the terms of the lease, the 1st respondent had the right to increase the annual rent at the expiration of 30 years to an amount equivalent to 1/20th part of the unimproved value of the land as at the date of revision. Even so, contrary to contractual stipulations, the 1st respondent on 1st January 1994 increased the annual rent from Kshs. 22,000/- to Kshs.146,000/-

a sum the appellant continued to pay until December 2011, despite harboring the belief that it was unlawful.

8. Further buttressing its case, the appellant contended that since the lease commenced in 1977, the next revision of rent ought to have been on 1st January 2007. Conversely, that the 1st respondent did not exercise its right of revision at the time, and by continuing to demand and accept rent at the prevailing rate beyond the 30th year, the 1st respondent had in effect waived or forfeited its right to adjust the rent. The appellant thus maintained that the next permissible rent review could only occur in 2037, following the lapse of another 30-year period from 2007. It is against this backdrop that the appellant declared that the 1st respondent's attempt to revise rent from Kshs. 146,000/- to Kshs. 10,200,000/- effective from 1st January 2012 was contrary to the terms of the lease.

9. In its defence, the 1st respondent refuted the claim that its right to increase rent had been waived or extinguished. It pleaded that upon the expiration of the initial 30-year period, it retained the discretion to revise the rent at any time thereafter. Furthermore, it raised a jurisdictional objection, contending that the court had no jurisdiction as per the provisions of Section 83 of the *Kenya Railways Corporation (KRC) Act*, Cap 397 Laws of Kenya to hear and determine the dispute.

10. Upon hearing the parties, the ELC (Munyao Sila J) rendered its judgment on 4th November 2021. On jurisdiction, the court observed that Section 83 of the *KRC Act* was confined to claims for compensation arising from acts or omissions of the 1st respondent, primarily in tort. Since the dispute before the court revolved around the interpretation of a lease agreement, the learned Judge found that the trial court had jurisdiction to entertain the matter.

11. As to the legality of the 1st respondent's notice to increase rent, issued on 30th September 2011, to the sum of Kshs. 10,200,000/- the court acknowledged that under Clause 2 (a) of the lease , the 1st respondent had the right to increase the rent once 30 years had lapsed. That said, certain ambiguities required clarification as set out herebelow.

12. First, the court considered when the 30-year period should begin-whether from 1st January 1977, when the 81-year lease term commenced or from 16th January 1980, when the lease was signed. The ELC in that regard held that contracts take effect from the date of execution, unless otherwise specified. Consequently, the court found that the lease commenced from 16th January 1980, the date it was signed, making the correct rent review date as 16th January 2010 or after.

13. Second, on what happens when the right to review rent was not exercised at the end of the 30-year period, the court held that once the 30 years had lapsed, the lessee, that is the appellant, should anticipate a rent increase; and a delay in exercising this right by the 1st respondent did not extinguish it, as the right remained active.

14. Third, concerning what happens when rent is increased before the 30-year period has lapsed, the learned Judge held that if the lessee failed to object to such an increment, it would be deemed to have waived its right to contest the increase, though such an increase would still constitute a breach of the lease. If no objection was raised within the six (6) year limitation period, the increased rent then becomes the payable amount, resetting the 30-year period from the date of the increase. Therefore, since rent was increased from Kshs. 22,000/- to Kshs. 146,000/- on 1st January 1994, the next permissible increment could only occur after 30 years, that is January 2024.

15. With regards to the manner in which the 1/20th of the value of the land was to be determined, the court found that there was a lacuna in the lease. The court concluded that an uncontested valuation by the lessor would prevail, but if contested, a dispute resolution mechanism would be necessary.

16. Based on the foregoing ratiocinations, the court concluded that the 1st respondent had no right to demand a further increment of Kshs. 10,200,000/- in 2011, as the 30-year period had not elapsed since 1994. Furthermore, that the 1st respondent had coerced the appellant to pay the sum of Kshs. 10,200,000/- in breach of the court's order issued on 14th March 2013, made pursuant to a consent between the parties that the appellant should continue paying the undisputed rent pending the hearing and determination of the suit. Resultantly, the ELC ordered the 1st respondent to refund to the appellant all sums paid in excess beyond the rent amount of Kshs. 146,000/- per year; with each installment accruing interest at court rates from the date of payment until full settlement; and costs to the appellant payable by the 1st respondent, given that the 2nd respondent was only an agent of the 1st respondent.

17. In an effort to execute the judgment, the appellant instituted garnishee proceedings through a Notice of Motion dated 6th September 2022 seeking an order to compel the garnishee (Kenya Commercial Bank Ltd) to release Kshs. 127,464,047.67/- or any sums held in the 1st respondent's account No. [particulars withheld], to satisfy the decree issued on 4th December 2021.

18. The application was premised on the grounds that: the decretal sum had been ascertained at Kshs. 127,464,047.67/-, attracting interest at the rate of 12% per annum from 1st July 2022, and the appellant's taxed party-to-party bill of costs standing at Kshs. 2,576,046.67/-; given the 1st respondent's failure to respond to a payment demand on 8th July 2012 and there being no offer as to how it intended to settle the matter, the appellant was apprehensive that the 1st respondent would never settle the amount; hence, the need to attach the monies held by the garnishee bank.

19. In opposition, the 1st respondent raised a preliminary objection contending that execution against it by way of garnishee proceedings offended Section 88 of the *KRC Act* which prohibited any form of execution or attachment of any nature against the 1st respondent or any of its properties for any judgment or order obtained against it. Additionally, the 1st respondent asserted that the decree lacked a quantified sum, precluding enforcement through garnishee proceedings.

20. On its part, the garnishee aligned itself with the 1st respondent's stance. It argued that the execution should proceed through judicial review, by applying for an order of mandamus against the 1st respondent's Managing Director. Nonetheless, if the court found otherwise, the 1st respondent's bank account held a balance of Kshs. 21,314,179.69/- as at 21st September 2022, which was insufficient to settle the entire decretal sum as demanded. Likewise, the garnishee was ready and willing to comply with any court orders, subject however to payment of the garnishee costs of Kshs. 50,000/-.

21. In the Ruling delivered on 1st November 2022, the ELC (Munyao Sila, J.) allowed the application, addressing two key issues: first, on whether the property could be attached, given the provisions of Section 88 of the *KRC Act*, the learned Judge examined contradicting authorities on whether garnishee proceedings should be allowed where statute restricts attachment. While some precedents upheld such restrictions, others recognized the need to interpret the law in a manner that promotes access to justice under the *Constitution*.

22. In the event, the court found that while Section 88 imposed a restriction on attachment, it also placed an obligation on the Managing Director to promptly settle a judgment sum. Equally, under Section 88 (b), the Managing Director had power to permit seizure of some of the property of the 1st respondent to satisfy the decree if revenue was insufficient. Subsequently, the court held that the 1st respondent's property could be attached, but only with prior written permission of the Managing Director. Moreover, the court recognized that since the *KRC Act* was silent on the consequences of the

Managing Director's failure to act as contemplated, an aggrieved party had the right to seek recourse in court.

23. What is more, the trial court found that requiring a decree holder to institute separate proceedings for mandamus would contravene Section 34(1) of the *Civil Procedure Act* and would be antithetical to the right of access to justice under Article 48 of the *Constitution*. It would also be a mockery of the principle enshrined in Article 159(2)(b) of the *Constitution* which prescribes that justice should not be delayed. Axiomatically, the court upheld the attachment sought.

24. On the second issue, whether the amount due to the appellant could not be ascertained, the court held that it had ordered the refund of the excess rent paid beyond Kshs. 146,000/- and not damages that required quantification. In any case, since the 1st respondent had neither challenged the sum nor sought an order for accounts to be taken, it had no basis to dispute the amount claimed by the appellant.

25. Under those circumstances, the court directed the 1st respondent's Managing Director to refund the excess rent paid, together with interest at court rates from the time the same was paid, and within the same time also ensure that the appellant was paid the taxed costs; in default, the garnishee bank was ordered to release the available funds in account No. [particulars withheld], but not exceeding the amount claimed; and that there be no withdrawals from the said account pending compliance with the court's previous orders. As for the garnishee's claim for Kshs. 50,000/- in costs, the court declined to award the sum, noting that the garnishee contested the application as if its life depended on it, yet it was not its monies. In the end, the garnishee was to pay its own costs, and the 1st respondent to pay costs of the garnishee application to the appellant.

ii. Proceedings before the Court of Appeal

26. Dissatisfied with the outcome, the respondents sought appellate recourse, instituting two separate appeals before the Court of Appeal: Civil Appeal No. E083 of 2022, challenging the judgment and decree of the ELC delivered on 4th November 2021; and Civil Appeal No. E035 of 2023 arising from the Ruling of the ELC dated 1st February 2023.

27. In its Judgment delivered on 25th October 2024, the Court of Appeal (Murgor, Laibuta & Odunga JJ.A) adjudicated both appeals. For procedural clarity, the appellate court systematically addressed each appeal, in turn, a method we shall likewise adopt in summarizing the appellate court's findings.

a. Civil Appeal No. E083 of 2022

28. This Appeal was lodged against the judgment and decree of the ELC dated 4th November 2021 anchored on twelve (12) grounds. The respondents, through their counsel prudently consolidated these grounds into five (5) distinct issues for determination which the court acknowledged, namely:

    i. Whether the court lacked jurisdiction to hear and determine the dispute;

    ii. Whether there was any evidence that the 1st respondent increased the annual rent on 1st January 1994 from Kshs. 22,000/- to Kshs. 146,000/;

    iii. Whether the review/increment of rent on 1st January 2012 vide the notice dated 30th September 2011 to Kshs. 10,200,000/- was a valid increment under the lease;

    iv. Whether the appellant had pleaded and/or strictly proved the claim for unjust enrichment and/or liquidated damages in the form of a refund for rent reviewed; and

v. Whether the learned Judge erred in failing to quantify the amount to be refunded to the appellant, and in failing to award interest on the said amount from either the date of filing the suit or the date of the judgment.

29. In addressing jurisdiction, the Court of Appeal held that a disputed increment of rent could not be construed as falling within the scope of the 1st respondent's discharge of its statutory functions under the *KRC Act*, nor did it constitute 'damage' as contemplated under Section 83 (1) of the *KRC Act*. The appellate court therefore concurred with the trial court's interpretation that the 'damage' referenced in Section 83 (1) pertained to tortious liability, unrelated to the disputed rent review.

30. On whether there was evidence that the 1st respondent increased the annual rent on 1st January 1994 from Kshs.22,000/- to Kshs.146,000/-, the Court of Appeal found that, by virtue of Order 2 Rule 11 (3) of the *Civil Procedure Rules*, the 1st respondent's failure to specifically deny the allegation amounted to an admission. The appellate court also found that, in the absence of contrary evidence, the trial Judge was justified in concluding that rent was revised on 1st January 1994, as pleaded in the plaint.

31. With regard to whether the revision in 1994 was valid under the lease agreement, and if the answer was in the affirmative, whether the revision complained of conferred upon the appellant any right of claim in the suit property to justify the impugned judgment in that regard, the Court of Appeal determined that the revision fell outside the express terms of the lease which the appellant neither contested nor resisted. The court further found that the appellant's continued payment of the revised rent without objection constituted acquiescence and that, while the revision was unscheduled, it did not affect the scheduled rent revision on the lease's 30th anniversary under Clause 2 (a) of the lease agreement. Moreover, that since no legal challenge was initiated within the six (6) year limitation period prescribed under the *Limitations of Actions Act*, a suit filed 17 years later was statute barred, thereby negating any claim for a refund.

32. Turning to whether the review/increment of rent on 1st January 2012 vide the notice dated 30th September 2011 to Kshs. 10,200,000/- was valid under the lease agreement, the Court of Appeal found that the trial court misinterpreted Clause 2 (a) of the lease. It was the appellate court's finding instead that the 1994 rent revision did not alter or reset the lease's timeline for future revisions since there was no evidence on record to suggest that the parties had mutually agreed to reschedule the next rent review to 1st January 2024, and if such an intention existed, nothing would have been easier than to expressly say so. Thus, the court concluded that the parties did not intend to have an early rent revision to reset the 30-year period. Rather, the intention was to grant the 1st respondent an unimpeded right to revise the annual rent only after the 30th and 60th anniversaries of the lease.

33. By the same token, since the lease did not specify a reference date for computing when the 1st respondent's right to revise the rent accrued, the appellate court held that the correct reference point was 1st January 1977, when the lease commenced. Accordingly, the first review date contemplated under Clause 2 (a) should have been 1st January 2007. Based on this finding, the appellate Judges concluded that the 1st respondent had the right to revise the rent on any date after 1st January 2007. Subsequently, they held that the rent review notice dated 30th September 2011 was valid to the extent that the 1st respondent was invoking its contractual right. They further affirmed that the valuation of the suit property as at 30th September 2010, the subsequent revision of rent notified on 30th September 2011, and the demand for payment effective 1st January 2012 were by no means in breach of the lease.

34. On whether the appellant specifically pleaded or strictly proved the claim for the alleged unjust enrichment and/or liquidated damages in the form of a refund for rent paid on account of the variation, the Court of Appeal held that the appellant had not specifically pleaded or strictly proved the

amounts overpaid in excess of Kshs. 146,000/-. Notably, no express prayer for a refund had been made in the plaint and as a result, the trial court had no jurisdiction to sanction recovery of such unquantified sums in the nature of special damages or otherwise falling outside the realm of general damages. In that regard, the appellate court found that appellant's attempt to recover sums paid under the revised rent structure was untenable.

35. In the end, Civil Appeal No. E083 of 2022 was allowed, setting aside the ELC's judgment in favor of the appellant.

(b) Civil Appeal No. E035 of 2023

36. Aggrieved by the Ruling of the ELC dated 1st February 2023, the respondents lodged the above appeal, advancing five (5) grounds of challenge. The gravamen of their grievance was that the learned Judge erred in;

    i. failing to appreciate that any form of execution against the 1st appellant by way of garnishee proceedings or otherwise was expressly barred by the provisions of Section 88 (a) of the *KRC Act*;

    ii. holding that the 1st respondent's property could be attached with the permission of the Managing Director despite the provisions of Section 88 (a) of the *KRC Act*;

    iii. failing to find that the appellant was not entitled to the sum of Kshs. 127,464,047.67/- as claimed since the quantum was not judicially determined in the judgment or decree; and

    iv. holding that there was a lacuna in the *KRC Act* where the Managing Director does not act as contemplated, and yet the lawful remedy was for the decree holder to file judicial review proceedings for an order of mandamus to compel the Managing Director to perform his public duty to pay.

37. Upon hearing the appeal, the Court of Appeal proceeded to determine the central issue- whether the 1st respondent was liable to execution by attachment of its assets or of its bank deposits by way of garnishee proceedings. The Court of Appeal drawing guidance from precedent, including in *Hezron Ossorey Jura v Kenya Railways Corporation & another* [2013] eKLR, *Ernest Morara Mokua v Kenya Railways Corporation* [2022] eKLR, and *Postal Corporation of Kenya v Ndarua & 4 others* [2022] KEHC 13281, bolstered the legal position that Section 88 of the *KRC Act* puts the 1st respondent's assets beyond reach from execution or garnishment in satisfaction of any court decree or order. As a result, it held that Section 88 prohibited execution by garnishment upon the 1st respondent's bank deposits or the attachment and sale of its property. In effect, the Court of Appeal found merit in the appeal, setting aside the Ruling and Orders of the ELC dated 1st November 2022.

D. Proceedings Before the Supreme Court

38. Disgruntled by the aforementioned Judgment, the appellant now exercises its right to appeal, as of right, with respect to the portion of the impugned judgment that relates to Civil Appeal No. E035 of 2023, which is the appeal that emanated from the ELC Ruling dated 1st November 2022 on the garnishee proceedings.

39. It is pertinent to note that the appellant is also discontented with part of the impugned judgment in Civil Appeal No. 83 of 2022. The appellant asserts in that regard that, since that appeal does not implicate the interpretation or application of the *Constitution*, it has filed Msa Court of Appeal Civil Application N0. 131 of 2024 seeking leave to appeal before this court under Article 163(4)(b) of the

Constitution for certification that the matter raises issues of general public importance. Based on the parties' pleadings and the record before us, the application appears to be pending.

40. Turning to the present appeal, the appellant challenges the Court of Appeal decision on grounds that it: violated its rights under Articles 48 and 50 of the *Constitution*; erroneously concluded that Section 88 of *KRC Act* constitutes a complete bar to any form of execution against the 1st respondent; and wrongfully relied on justifications available to the government to uphold Section 88, thereby equating the 1st respondent to the government and endorsing an unjustified blanket prohibition on execution under Section 88.

41. Accordingly, the appellant prays for the following reliefs:

    i. The Petition of Appeal be allowed.

    ii. A declaration that the Court of Appeal erred in finding that Section 88 of the *KRC Act* provides a complete bar to execution against the 1st respondent.

    iii. A declaration that, considering Articles 2, 10, 24, 27, 48, 50, 159 & 259 of the *Constitution*, Section 88 of the *KRC Act* does not preclude the execution by way of garnishee proceedings commenced by the appellant against the 1st respondent.

    iv. In the alternative to (ii) above, a declaration that Section 88 of the *KRC Act* violates Articles 2, 10, 24, 27, 48, 50, 159, & 259 of the *Constitution* and is therefore invalid.

    v. Consequent to (i), (ii) & (iii) or (iv) above, there be an order setting aside the judgment and decree of the Court of Appeal delivered on 25th October 2024 in so far as it allowed Mombasa Court of Appeal Civil Appeal No. E035 of 2023.

    vi. Costs for the Petition be awarded to the appellant as against the 1st and 2nd respondents, jointly and severally.

42. In opposition to the appeal, the respondents have filed a Notice of Preliminary Objection dated 27th November 2024 and the replying affidavit of Stanley Gitari, Ag. GM, Legal Services and Corporation Secretary of the 1st respondent, sworn on 5th February 2025.

43. The respondents profess that the appeal is not one as of right under Article 163 (4) (a) of the *Constitution*, for it does not involve the interpretation or application of the *Constitution*, nor did it traverse the hierarchy of superior courts on any such issue. They further assert that the dispute involves private rights relating to the enforcement of a decree arising from the interpretation of a lease agreement, rather than constitutional issues. They furthermore emphasize that the garnishee application did not raise any constitutional questions, nor did the ELC Ruling or Court of Appeal make any findings on such questions.

44. Moreover, the respondents argue that the constitutional validity or legality of Section 88 of the *KRC Act* was not raised before the superior courts, cannot therefore be introduced at this stage. They maintain that such matters fall within the exclusive jurisdiction of the High Court under Article 165(3)(d) of the *Constitution*. Ultimately, they accentuate that this issue has been overtaken by events since the superior courts have already affirmed in many other decisions that Section 88 bars any form of execution against the 1st respondent. On that account, the issues tabled before this Court are res-judicata and concern alleged errors of facts committed by the Court of Appeal. Similarly, the respondents assert that the action against the 2nd respondent is invalid, as the 2nd respondent acted as a disclosed agent of the 1st respondent and, therefore, cannot be lawfully sued alongside its principal.

E. Parties Submissions

i. Appellant's Case

45. In its submissions dated 10th March 2025, the appellant has identified three issues for determination:

    (a) whether the appeal lies as of right;

    (b) whether the appeal is otherwise moot; and

    (c) whether the Court of Appeal erred in failing to declare Section 88 of *KRC Act* as unconstitutional or to read the section to conform to the *Constitution*.

46. In relation to whether the appeal lies of right, the appellant submits that the ELC interpreted or applied various constitutional provisions in its Ruling, reason being its counsel had invited the court to find Section 88 of the *KRC Act* unlawful as it constituted an unjustifiable limitation to its rights. In response, the trial Judge addressed multiple constitutional provisions, including Articles 20 (3), 48 and 40 in resolving the dispute. While the Judge did not explicitly declare Section 88 unconstitutional, the appellant submits that such a declaration was unnecessary since the Judge interpreted the provision in a manner that was aligned with the *Constitution*, as mandated by Article 2 and the Sixth Schedule thereto.

47. Meanwhile, the appellant proffered that the Court of Appeal failed to consider the submissions made before it regarding the constitutionality or otherwise of Section 88 and did not apply any relevant constitutional provisions in its determination. Despite this omission, the appellant argues that this does not preclude the matter from the realm of constitutional application or interpretation. In buttressing this position, the appellant relies on the decision of *Gichuru v Package Insurance Brokers Ltd* (Petition (Application) 36 of 2019) [2020] KESC 29 (KLR) (Gichuru Case).

48. On the second issue, whether the appeal is moot, the appellant disagrees with the respondents' argument that the appeal is academic, by reason that the decree being executed was set aside. The appellant posits instead that the decree could potentially be revived if leave is granted by the Court of Appeal in Civil Application No. E131 of 2024. Even if the matter were deemed moot, the appellant asserts that this Court retains the discretion to hear the appeal, referencing *Institute for Social Accountability & Another v National Assembly & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR). Furthermore, the appellant underscores the point that the interpretation of Section 88, and similar statutory provisions, has led to conflicting decisions in the courts below, necessitating this Court's guidance for the benefit of future litigants raising similar issues.

49. Lastly, on whether the Court of Appeal erred in failing to declare Section 88 of *KRC Act* as unconstitutional or to read the section to conform to the *Constitution*, the appellant submits that the central issue was whether Section 88, on its face, precludes execution, thus rendering it constitutionally invalid. Had the Court of Appeal framed the issue correctly, it would have reached the same conclusion as the trial Judge. Instead, it claims that the appellate court upheld Section 88, erroneously equating the 1st respondent to the government, thereby justifying the provision's existence. The appellant, in addition, argues that although Section 88 predates the *Constitution*, it cannot be construed as intended to shackle the advances and gains made by the *Constitution*, and is indeed antithetical to the *Constitution* and provisions such as these have no place in the current constitutional dispensation.

50. Further, the appellant draws parallels with the Court of Appeal's reasoning in *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2015] KECA 181 (KLR) where it found Section 87 of the *KRC Act* unconstitutional for imposing restrictions on access to justice. The appellant avers

that similar restrictions at the execution stage, such as those imposed by Section 88, should also be deemed unconstitutional, as they effectively prevent successful litigants from realizing the fruits of their judgments.

51. Additionally, the appellant cites *Five Star Agencies Limited & another v National Land Commission & 2 others* (Civil Appeal E290 & 328 of 2023 (Consolidated)) [2024] KECA 439 (KLR) where the Court of Appeal addressed issues surrounding execution against the National Land Commission. While recognizing that insulating the government from execution may be justifiable due to its distinct governmental functions, the appellant propounds that such immunity should not extend to statutory bodies like the 1st respondent, which operates primarily in a commercial capacity on behalf of the government.

52. In conclusion, the appellant claims that the ELC decision sought to strike a balance between declaring Section 88 invalid, which would open state corporations to immediate execution, and the need to ensure that decrees against such state corporations are satisfied within reasonable periods. However, the appellant asserts that if this Court finds it impossible to maintain this balance without violating the *Constitution*, it would have no objection to an order striking down Section 88 for violating the *Constitution*.

ii. Respondents' Case

53. The respondents raise three issues for the Court's consideration in their submissions dated 18th March 2025. First, on the question of this Court's jurisdiction, the respondents reiterate its earlier arguments, emphasizing that the various constitutional provisions referenced in the impugned Ruling were mere obiter dicta. They contend that the ELC neither made determinations regarding the constitutionality or otherwise of Section 88 (a) of the *KRC Act*, nor did it interpret or apply Articles 48 and 159 (2) of the *Constitution*. Furthermore, the respondents argue that the Court of Appeal did not assess the validity, constitutionality, or legality of Section 88, nor did it make any findings establishing that the 1st respondent falls within the definition of government under Section 21 of the *Government Proceedings Act*. In distinguishing the appellant's reliance on the *Gichuru Case*, the respondents highlight that, unlike the present matter, the *Gichuru Case* involved express allegations of constitutional violations, specifically discrimination, which were central to the dispute. Consequently, the respondents maintain that the constitutional question regarding Section 88 has not properly arisen through the hierarchy of superior courts, as required, for this Court's jurisdiction to be operationalised.

54. Second, as to whether Section 88 of the *KRC Act* impedes access to justice or is otherwise unconstitutional, the respondents submit that the provision does not impede on the right to access to justice and or a fair trial as alleged. They state that the legal framework provides effective alternative mechanisms for enforcing decrees, such as the option of filing applications in the same suit as prescribed under Section 34 of the *Civil Procedure Act*, as well as seeking innovate pleadings and prayers that compel the Managing Director to fulfill statutory obligations under Section 88. In addition to that, the respondents contend that the 1st respondent, as a State Corporation responsible for providing a coordinated and integrated railway system in Kenya, is not merely a commercial entity through which the government conducts business. They thus dispute the appellant's argument that the 1st respondent is undeserving of protection from execution.

55. Third, on whether the dispute in this matter is moot, the respondents emphasize that the appeal is based on mere speculation that the intended appeal, that is pegged on the certification application pending before the Court of Appeal, against the decision setting aside the decree will succeed. They contend therefore that there is no live controversy concerning the execution of the decree, as the decree, subject of execution has already been set aside. Relying on this Court's decision of *Dande & 3 others v*

Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), the respondents argue that this Court cannot make decisions based on conjecture about the possible outcome of the appeal before the Court of Appeal. Besides, they point out that the decree in question did not specify the amount of money due, thus further supporting their claim that the matter is moot. For these reasons, the respondents urge the Court to dismiss the Petition with costs.

F. Analysis and Determination

56. Having carefully examined the pleadings, the determinations rendered by the two superior courts below, and the submissions advanced by the parties, who simultaneously addressed us on both the Preliminary Objection and the substantive appeal, we find it prudent, in limine, to pronounce ourselves on the question of jurisdiction as raised by the respondents before delving into the merits of the appeal.

57. Our approach is guided by the principle we reaffirmed in *In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR), wherein this Court endorsed the reasoning in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR), emphasizing that jurisdiction is the foundational pillar upon which judicial authority rests and must be determined at the outset, as expressed by Nyarangi, JA as follows:

> ... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction."

58. Jurisdiction is therefore not a mere procedural technicality; it is a fundamental prerequisite to the exercise of judicial authority. As we underscored in *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR), a court's jurisdiction is not an open- ended discretion. It is conferred by the *Constitution*, legislation or both. Certainly, no court can arrogate unto itself jurisdiction that exceeds boundaries prescribed by law.

59. In that vein, Article 163 of the *Constitution* comprehensively delineates the jurisdiction of the Supreme Court in unequivocal terms. The appellate jurisdiction of this Court is conferred under Article 163 (4) which provides that:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court -
>
> a. as of right in any case involving the interpretation or application of this Constitution; and
>
> b. in any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

60. The constitutional architecture of appellate jurisdiction under Article 163(4) is clear-a party must elect whether to approach this Court as of right under Article 163(4)(a) or to seek certification under Article 163(4)(b). The two avenues are not mutually inclusive but operate independently, each with distinct procedural thresholds. An appellant cannot also simultaneously invoke both jurisdictions within the same appeal, nor can they seek to circumvent the established procedural hierarchy. This principle

has been consistently avowed in our jurisprudence including in *Ibren v Independent Electoral and Boundaries Commission & 2 others* (Petition 19 of 2018) [2018] KESC 75 (KLR) where we emphasized that:

> " Article 163(4) of the *Constitution* clearly demarcates a two prong appellate jurisdiction of this court from decisions of the Court of Appeal. These two jurisdictional avenues are not mutually inclusive but are independent of each other and there is need for a party that comes before this court to clearly state which one she/he invokes."

61. Although not expressly pleaded by the respondents, their counsel, during oral submissions before this Court, contended that the appellant improperly seeks to invoke both limbs of this Court's jurisdiction under Article 163 (4) of the *Constitution* in challenging a single judgment of the Court of Appeal, an approach that is legally untenable. Counsel emphasized that this Court has, on multiple occasions, pronounced itself on the inadmissibility of such an approach, reiterating that a party cannot simultaneously invoke appellate jurisdiction as of right under Article 163(4)(a) while also seeking certification under Article 163(4)(b) in respect of the same decision.

62. We reiterate that a plain reading of Article 163(4) of the *Constitution* reveals that the Supreme Court's appellate jurisdiction is bifurcated, comprising distinct and independent pathways through which a party may seek recourse. Given the differing procedural requirements for each avenue, they are not mutually inclusive, and a party must unequivocally specify the jurisdictional basis upon which they are invoking this Court's authority. It follows, therefore, that a party cannot concurrently rely on both limbs of jurisdiction within the same appeal, as such an approach would undermine the procedural hierarchy established under the *Constitution*.

63. In the present case, the appellant challenges one aspect of the impugned judgment under Article 163(4)(a) while separately seeking certification before the Court of Appeal regarding the other portion of the same judgment. The appellant merely brought the issue of the pending application before the Court of Appeal for leave to appeal to the Supreme Court without arguing the merits. This procedural course is materially distinct from improperly invoking both limbs of jurisdiction within the same appeal, as alleged by the respondents. Contrary to the respondent's assertions therefore, the appellant has confined this appeal strictly to Article 163(4)(a), making it clear that this is not a case of concurrent invocation of both appellate pathways, dispelling any suggestion of procedural impropriety. This Court previously provided authoritative guidance on this issue in *Twaha v Abdalla & 2 others* (Civil Application 35 of 2014) [2015] KESC 20 (KLR) where it held:

> " Thus, a litigant is under forensic obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Supreme Court. The pathway thus identified, is for pursuit. And where it is perceived that an appeal raises both categories of issues, the course of merit is to comply with the requirements of both: file an appeal "as of right" on the constitutional issues; and seek leave as regards "matters of general public importance". As regards the latter, the relevant appeal is to be filed only after grant of leave. It is then left to the Supreme Court in its exercise of discretion, whether the two causes should be consolidated and resolved as one."

It is evident and it is our finding that the present appeal emanates from a distinct decision made in Civil Appeal No.E035 of 2023 while the pending application for leave to appeal under Article 163(4)(b) of the *Constitution* is made against the Court of Appeal judgment in Civil Appeal No.E083 of 2022.

64. Turning back to the substantive issue, once a litigant chooses the appellate path, the Court subjects it to the applicable jurisdictional threshold. Where a party invokes this Court's jurisdiction under Article

163(4)(a), as the appellant has done, such an appeal must be premised on a genuine constitutional controversy, one that directly shaped the outcome at the Court of Appeal. Mere allusions to constitutional provisions or the incidental mention of constitutional principles are insufficient. As we observed in a myriad of decisions, including *Nduttu & 6000 others v Kenya Breweries Ltd & another* (Petition 3 of 2012) [2012] KESC 9 (KLR), this Court pronounced that:

> "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) ..."

65. The foregoing position was further reinforced with greater clarity in *Munya v Kithinji & 2 others* (Application 5 of 2014) [2014] KESC 30 (KLR) and *Joho & another v Shahbal & 2 others* (Petition 10 of 2013) [2014] KESC 34 (KLR).

In these cases, the Court enunciated the position that, for an issue to be appealable under Article 163(4)(a) of the *Constitution*, the lower court's determination must have involved a substantive trajectory of constitutional interpretation or application. Consequently, an appeal under this provision must be premised on clear and compelling constitutional contestation. A litigant must also demonstrate that the interpretation or application of the *Constitution* was the central basis upon which the appellate court's decision rested.

66. In *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) we further refined requisite attributes that are imperative for an appeal to the Supreme Court under Article 163(4)(a) of the *Constitution* as follows:

i. The jurisdiction reveres 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 fall 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 constitutional 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).

67. Accordingly, the test for determining whether this Court is properly seized of jurisdiction demands a meticulous examination of the trajectory of the dispute in the courts below. As articulated in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* (Petition 2 of 2016) [2018] KESC 27 (KLR) three fundamental questions must be answered:

1. What was the question in issue at the High Court and the Court of Appeal?

2. Did the superior Courts below dispose of the matter after interpreting or applying the *Constitution*?

3. Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?

68. In the above context, we note that this appeal arises from a post judgment application wherein the appellant sought to garnish the 1st respondent's bank account in execution of a court decree. In its submissions before the ELC, the appellant framed two key issues for determination as reflected on page 116 of the Record of Appeal (Volume 3): "whether the Garnishee application dated 06th September 2022 offends the mandatory statutory application of Section 88 of the *Kenya Railways Corporation Act*" and "If no, whether the Garnishee application dated 06th September 2022 should be allowed and to what extent."

69. In disposing of these issues, the ELC (Sila Munyao J) made reference to a number of decisions from the courts of equal status, evaluating contrasting authorities on whether garnishee proceedings could be allowed where a statute restricts attachment. While some decisions upheld the statutory restrictions, others highlighted that such limitations could impede access to justice under the *Constitution*, accenting the need to interpret the law in a manner that promotes the realization of the Bill of Rights. The court ultimately interpreted the provisions of Section 88 of the *KRC Act* in the manner set out above, which was subsequently the subject of further determination by the Court of Appeal.

70. While the ELC cited constitutional provisions in its decision, the Court of Appeal did not focus on the constitutionality of Section 88 of the *KRC Act*. Instead, the court concentrated on the applicability of Section 88 within the context of garnishee proceedings. Reading the decisions of both superior courts, it becomes clear that their determinations were confined to the statutory application of Section 88, rather than an examination of its constitutional validity. Based on those findings, the appellant now argues that the Supreme Court should intervene because the appellate court adopted a restrictive interpretation of the *Constitution* in assessing Section 88. However, this argument does not, in and of itself, present a constitutional controversy that justifies the exercise of this court's jurisdiction. We reiterate in stating so that the fundamental question before the superior courts below was not the constitutional validity of Section 88, but rather its applicability in garnishee proceedings.

71. The mere mention of constitutional principles in a judgment does not, by itself, elevate the dispute to one of constitutional interpretation or application within the meaning of Article 163(4)(a). This Court has consistently held that, to properly invoke jurisdiction under Article 163(4)(a), an appellant must demonstrate that the determination of the case at the Court of Appeal hinged on the interpretation or application of the *Constitution*. An appeal must also center on a constitutional issue, with the main controversy revolving around the interpretation or application of the *Constitution*. Moreover, an appellant must specifically challenge the constitutional reasoning adopted by the lower court. A

simple reference to constitutional principles or a claim of constitutional infringement is insufficient to meet this threshold.

72. The issue as framed before the courts below in the present case was not a constitutional challenge to the statutory provision, but rather an inquiry into whether its application barred garnishee proceedings. The appellant in now urging this Court to intervene on the premise that the appellate court failed to apply broad constitutional lens in interpreting Section 88 of the *KRC Act* is in effect, an attempt to transform an issue of statutory interpretation into a constitutional question.

73. This Court has previously cautioned against such jurisdictional overreach. In *Njuguna & 46 Others v Spire Properties (K) Limited & 12 Others*, (Petition 28 (E030) of 2022) [2023] KESC 37 (KLR), we declined jurisdiction where a party sought to invoke Article 163(4)(a) on grounds that a statutory provision had been applied in a manner that allegedly curtailed constitutional rights. We reaffirmed that where the constitutional validity of a provision was not in issue before the lower courts, this court cannot assume jurisdiction merely because a party alleges that the provision was applied in a manner inconsistent with constitutional principles.

74. Applying this reasoning to the present matter, it is evident that the appellant is not challenging a constitutional interpretation rendered by the Court of Appeal but rather the manner in which the court applied a statutory provision. The jurisdiction of this Court cannot be invoked simply because an appellant is dissatisfied with a lower court's interpretation of legislation. For this reason, to properly invoke this Court's jurisdiction under Article 163 (4) (a), an appellant must establish a constitutional controversy that warrants the exercise of this Court's jurisdiction. Since the present appeal fails to meet this constitutional threshold, we find that the Court lacks jurisdiction to entertain the appeal and the merits thereof. In the absence of jurisdiction, we can only down our tools and strike out the appeal, which we hereby do.

75. As for costs, this Court in *Rai & 3 other v Rai & 4 others* (Petition 4 of 2012) [2014] KESC 31 (KLR) articulated the governing principles that guide the grant of costs and enunciated that generally; that costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. We note that the dispute relates to the extent of statutory provisions relating to the 1st respondent in the context of a lease between the parties. Having duly considered the totality of the circumstances attendant to the present appeal, the appellant shall bear the costs thereof.

G. Orders

76. In light of the above, we order that:

    i. The Notice of Preliminary Objection dated 10th January 2025 and filed on 17th January 2025 be and is hereby allowed;

    ii. The Petition of Appeal dated 27th November 2024 and filed on 4th December 2024 be and is hereby struck out;

    iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs herein be refunded to the appellant; and

    iv. The appellant shall bear the costs.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2025.

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA