



**National Land Commission v Tom Ojienda & Associates & 2 others
(Application E051 of 2023) [2024] KESC 16 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KESC 16 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION E051 OF 2023

MK KOOME, CJ & P, PM MWILU, DCJ & VP, SC WANJALA, I LENAOLA & W OUKO, SCJJ

APRIL 26, 2024

BETWEEN

NATIONAL LAND COMMISSION APPLICANT

AND

PROF TOM OJIENDA & ASSOCIATES 1ST RESPONDENT

NATIONAL BANK OF KENYA 2ND RESPONDENT

CENTRAL BANK OF KENYA 3RD RESPONDENT

(Being applications for stay of execution; application to strike out the Petition of Appeal; and Preliminary Objection)

Requirement to file a Petition of Appeal with the Supreme Court before originating an interlocutory application

The main issue that arose was whether the Supreme Court had jurisdiction to determine an appeal despite the alleged absence of a petition of appeal within a litigant’s record of appeal. The court found that there being an application pending certification before the Court of Appeal, it was not for the Supreme Court to, at that juncture, express itself on a jurisdiction that had not been invoked. Since there was no appeal on record, it would become an exercise in futility and an unnecessary waste of scarce judicial time and resources to interrogate and determine whether the Court had jurisdiction to determine the appeal.

Reported by Robai Nasike

Civil practice and procedure – appeals – appeals to the Supreme Court – proper procedure for filing of appeals – where a petition of appeal was not attached – whether the Supreme Court could determine a matter where the litigant failed to include a petition of appeal in its pleadings – whether the Supreme Court had jurisdiction to determine an appeal despite the alleged absence of a petition of appeal within a litigant’s record of appeal.

Brief facts

The applicant instructed the 1st respondent to represent it in a suit wherein the petitioners therein sought compensation for alleged loss of their land and mesne profits. Upon conclusion of the matter, the applicant



declined to pay the 1st respondent's legal fees prompting the filing of the Bill of Costs which was subsequently taxed and a Certificate of Costs. Upon delivery of the Ruling on the Bill of Costs, the applicant neither filed a Notice of Objection nor a Reference against the Ruling on Taxation. In a Ruling dated June 21, 2017, the application to enter judgment based on the Certificate of Taxation was allowed and the 1st respondent extracted the decree accordingly.

The applicant failed to take any step to pay the decretal amount, necessitating the institution of garnishee proceedings by the 1st respondent. The High Court rendered a Ruling on the 1st respondent's application issuing a garnishee order absolute against the applicant's bank accounts held by the 2nd respondent (1st Garnishee) and the 3rd respondent (2nd Garnishee) as enough to satisfy the decretal amount as per a Certificate of Order Against the National Land Commission. The applicant was granted a stay for 7 days upon an oral application, and subsequently filed a Notice of Appeal, however, that was done before obtaining leave to appeal to the Court of Appeal as was the procedure under Order 43 of the Civil Procedure Rules, 2020 as read with Rule 11 of the Advocates Remuneration Order. Pursuant to a Ruling, the Court of Appeal ordered the applicant to pay the 1st respondent the sum of Kshs.100,000,000.00 in default of which the order for stay would lapse.

Contemporaneously, the applicant filed an application for stay of the orders in High Court and sought leave to appeal to the Court of Appeal, which application was granted. The applicant's Record of Appeal was however filed at the Court of Appeal before leave to appeal was obtained from the trial court. Subsequently, the 1st respondent filed an application seeking to strike out the Record of Appeal on the grounds, *inter alia*, that it was filed without leave of the trial court contrary to Order 43 of the Civil Procedure Rules 2020 and Rule 11 of the Advocates Remuneration Order. Thus, the Court of Appeal struck out the entire Record of Appeal for want of jurisdiction for having been filed without obtaining leave in violation of the provisions of the law. That was the decision that had prompted the applicant to approach the Supreme Court. The applicant (National Land Commission) sought a stay of execution of the order made by the High Court. The 1st respondent filed a preliminary objection challenging the Supreme Court's jurisdiction to hear and determine the applicant's application. Similarly, the 1st respondent filed an application to strike out the Petition of Appeal.

Issues

Whether the Supreme Court had jurisdiction to determine an appeal despite the absence of a petition of appeal within a litigant's record of appeal.

Held

1. The Supreme Court Act and Rules provide for the filing of appeals and applications for conservatory orders. Section 23A of the Supreme Court Act mandated the court to only entertain an application for conservatory orders, such as the instant one, after the filing of a petition of appeal before court. That position was reinforced by Rule 31(2) of the Supreme Court Rules, 2020 which provided that an interlocutory application shall not be originated before a petition of appeal was filed with the Court. Thus, a petition of appeal was filed in the context of an appeal.
2. Rule 39 set out the requirements for instituting an appeal to include a petition of appeal, a record of appeal and the prescribed fee. There were statutory timelines that had to be adhered to including the filing and transmission of the Notice of Appeal as a condition precedent to the filing of the appeal. Accordingly, in practice, litigants filed the appeal on the court's online portal from which a number was allocated upon payment of the requisite fees or waiver in the case of public institutions such as the applicant. It was within that appeal that an application for conservatory relief was filed and not the other way round.
3. The applicant deployed quite an unusual approach. The impugned ruling having been delivered on December 8, 2023, the applicant was expected to file, transmit and serve a Notice of Appeal as soon as possible thereafter to signal its intention to appeal. While parties transmit the Notice of Appeal manually, the applicant lodged the same at the Court of Appeal and served it upon parties before



- uploading the same on the Court’s portal. On the same day of the uploading, the applicant filed, as an application, the instant Motion for conservatory orders and among the documents uploaded was the petition of appeal which was filed as a “Notice of Motion within the Petition”. It was therefore unsurprising that no payment of fees could be made on it nor a petition number generated. When that discrepancy was brought to the attention of the applicant’s representative, he, instead of regularizing the position, resorted to invoking non-existent “administrative” powers of the Registrar, through correspondence, seeking an allocation of a case reference number, itself obviously an exercise in futility. That was a grave inadvertence on the part of the applicant that could not be condoned.
4. It was incumbent upon any litigant, prior to approaching the Court, to familiarize themselves with requisite procedural requirements to assuage any likely confusion that may arise out of the interpretation of the provisions of the Supreme Court Act and the Supreme Court Rules. There was no petition of appeal on record before the Supreme Court.
 5. The Supreme Court’s appellate jurisdiction was circumscribed in article 163(4) of the Constitution of Kenya. The jurisdiction was as of right in any case involving the interpretation or application of the Constitution; and in any other case in which the Supreme Court, or Court of Appeal, certified that a matter of general public importance was involved. Article 163(5) of the Constitution of Kenya empowered the Court to review and either affirm, vary or overturn a certification decision by the Court of Appeal. That jurisdiction was transcribed in sections 15A and 15B of the Supreme Court Act, setting out the appellate jurisdiction of the Court as of right and upon certification, respectively. In relation to the appeal upon certification, section 15B (2) of the Supreme Court Rules required that an application for certification shall be filed before, and determined by the Court of Appeal in the first instance.
 6. The applicant had filed an application for certification before the Court of Appeal at Kisumu. That application was annexed to the 1st respondent’s replying affidavit in response to the applicant’s Notice of Motion. An application for leave, as a matter of good practice, should originate in the Court of Appeal, which would be better placed to certify whether a matter of general public importance was involved. If the applicant was dissatisfied with the decision in that regard, the party would be at liberty to seek a review under article 163 (5) of the Constitution. That requirement was further encapsulated in section 15B (2) of the Supreme Court Act.
 7. There being an application pending certification before the Court of Appeal, it was not for the Supreme Court to, at that juncture, express itself on a jurisdiction that had not been invoked. Since there was no appeal on record, it would become an exercise in futility and an unnecessary waste of scarce judicial time and resources to interrogate and determine whether the Court has jurisdiction to determine the appeal.

Preliminary objection allowed and the petition of appeal was dismissed.

Citations

Cases

Kenya

1. *Dande & 3 others v Director of Public Prosecutions & 2 others* Petition 4 (E005) of 2022; [2022] KESC 23 (KLR) - (Followed)
2. *Fahim Yasin Twaha v Timamy Issa Abdalla, Independent Electoral And Boundaries Commission & Silvano Buko Bonaya* Civil Application 35 of 2014; [2015] KESC 20 (KLR) - (Followed)
3. *Five Star Agencies Limited v National Land Commission* Environment & Land Case 445 of 2014; [2021] KEELC 3513 (KLR) - (Followed)
4. *Hassan Ali Joho & Anor v Suleiman Said Shabbal & 2 others* Petition 10 of 2013 (Petition 10 of 2013) [2014] KESC 34 (KLR) (4 February 2014) - (Followed)
5. *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* Civil Application 23 of 2014; [2014] KESC 5 (KLR) - (Followed)



6. *Hassan Nyanje Charo v Khatib Mwashetani, Independent Electoral and Boundaries Commission, Juma Musa & Gideon Mwangangi Wambua* Civil Application 23 of 2014; [2014] KESC 5 (KLR) - (Followed)
7. *Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & others* Civil Appeal No E326 of 2022 - (Followed)
8. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)
9. *Malcolm Bell v Daniel Toroitich Arap Moi & Board Of Governors Moi High School Kabarak* Application 1 of 2013; [2013] KESC 23 (KLR) - (Followed)
10. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Followed)
11. *Okiya Omtatah Okoiti & another v Attorney General & 7 others* Petition No 446 of 2013; [2013] KEHC 6016 (KLR) - (Followed)
12. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Followed)
13. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Followed)
14. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Followed)
15. *Wagana, Francis Karongo v National Union of Water & Sewerage Employees; Nyeri Water & Sanitation Company Ltd & 4 others (Garnishee)* Cause 18 of 2015; [2020] KEELRC 48 (KLR) - (Followed)
16. *Wamae & 97 others v Barclays Bank of Kenya Limited* Petition 19 (E022) of 2020; [2021] KESC 5 (KLR) - (Followed)

Statutes

Kenya

1. Advocates Remuneration Order (cap 16 Sub Leg) - (Interpreted) rule 11
2. Civil Procedure Rules (cap 21 Sub Leg) order 23 rule 4; order 29 rule 2; order 43 - (Interpreted)
3. Constitution of Kenya articles 48, 50(1), 159, 163(4)(a) - (Interpreted)
4. Land Act (cap 280) section 115 - (Interpreted)
5. Supreme Court Act (cap 9B) sections 15; 15B(2); 23 - (Interpreted)
6. Supreme Court Rules (cap 9B Sub Leg) rules 12(1); 31; 32; 33; 39 - (Interpreted)

Advocates

Mr. Brian Ikol & Mr. Kamunde for the applicant

Prof. Tom Ojienda & Ms. Awuor for the 1st respondent

Mr. Mwangi & Mr. Kipkogei for the 2nd respondent

Mr. Chege for the 3rd the respondent

RULING

A. Introduction

1. Before this court for determination are two notices of motion and a preliminary objection. In order to save on precious judicial time, this Ruling will dispose of all the three, as they are related and are based on the same set of facts. The first motion, filed by the applicant, National Land Commission, seeks a stay of execution of the order made by the High Court on August 2, 2022. The preliminary objection, is filed by the 1st respondent in response to the application for stay of execution, and challenges this court's jurisdiction to hear and determine the applicant's notice of motion aforesaid. Similarly, the 1st respondent filed an application to strike out the petition of appeal dated December 18, 2023 on the same grounds as set out in its preliminary objection.



B. Background

2. The applicant instructed the 1st respondent to represent it in Petition No 1 of 2013, *Nathan Tirop Koech & others vs The Commissioner for Lands (now the applicant) & 5 others*, wherein the petitioners therein sought the sum of Kshs 7,871,012,707.72 as compensation for alleged loss of their land and Kshs 500,000,000.00 as mesne profits. Upon conclusion of the matter, the applicant declined to pay the 1st respondent's legal fees prompting the filing of the Bill of Costs in Misc Application No 29B of 2016. The Bill of Costs was subsequently taxed and a Certificate of Costs issued for the sum of Kshs 220,735,840.88.
3. Upon delivery of the ruling on the Bill of Costs on September 20, 2016, the applicant neither filed a notice of objection nor a reference against the ruling on Taxation. In a ruling dated June 21, 2017 Ogembo J., allowed the application to enter judgment based on the Certificate of Taxation and the 1st respondent extracted the decree accordingly.
4. The applicant failed to take any step to pay the decretal amount, necessitating the institution of garnishee proceedings by the 1st respondent. On August 2, 2022, the High Court (Ogola J) rendered a ruling on the 1st respondent's application dated July 14, 2022, issuing a garnishee order absolute against the applicant's bank accounts held by the 2nd respondent (1st Garnishee) and the 3rd respondent (2nd Garnishee) as enough to satisfy the decretal amount of Kshs 397,300,323.32 as per a Certificate of Order Against the National Land Commission dated June 15, 2022. The applicant was granted a stay for 7 days upon an oral application, and subsequently filed a notice of appeal dated August 5, 2022. This was, however, done before obtaining leave to appeal to the court of Appeal as is the procedure under order 43 of the [Civil Procedure Rules, 2020](#) as read with rule 11 of the [Advocates Remuneration Order](#). Pursuant to a ruling issued on October 7, 2022, the Court of Appeal ordered the applicant to pay the 1st respondent the sum of Kshs 100,000,000.00 in default of which the order for stay would lapse.
5. Contemporaneously, following the ruling of August 2, 2022, the applicant filed an application for stay of the orders in High Court in Misc. 29B of 2016 and sought leave to appeal to the court of Appeal, which application was granted in a Ruling dated November 29, 2022. The applicant's Record of Appeal in Civil Appeal No E247 of 2022 was however filed on November 3, 2022 at the court of Appeal before leave to appeal was obtained from the trial court.
6. Subsequently, the 1st respondent filed an application dated April 27, 2023 seeking to strike out the record of appeal on the grounds, *inter alia*, that it was filed without leave of the trial court contrary to order 43 of the [Civil Procedure Rules 2020](#) and rule 11 of the [Advocates Remuneration Order](#). Thus, the Court of Appeal in a judgment dated December 8, 2023 struck out the entire record of appeal for want of jurisdiction for having been filed without obtaining leave in violation of the provisions aforesaid. This is the decision that has prompted the applicant to approach this court.

a. Notice of Motion dated December 18, 2023

7. The applicant's notice of motion dated December 18, 2023 is filed pursuant to the provisions of articles 48, 50(1), 159, and 163(4)(a) of the [Constitution](#), section 23 of the [Supreme Court Act](#), and those of rule 32 of the [Supreme Court Rules](#). It seeks the following orders:
 1. Spent.
 2. That pending hearing and determination of this application, the honourable court be pleased to stay execution of the orders of the superior court made on August 2, 2022 by Ogola, J.



3. That pending the hearing and determination of the petition of appeal, the honourable court be pleased to stay execution of the orders of the superior court made on August 2, 2022 by Ogola J.
4. Costs of and incidental to this application do abide the outcome of the main appeal.
5. Any other orders that the honourable court may deem fit to grant.
8. The application is supported by the affidavit of Brian Ikol, the applicant's Director, Legal Affairs and Dispute Resolution, sworn on December 18, 2023 and the written submissions of even date.
9. The applicant's contention is that: it is a government entity, and subject to order 29 rule 2 of the *Civil Procedure Rules* and should not therefore be subject to garnishee proceedings; its right to fair hearing pursuant to article 50(1) and 159 of the *Constitution* were violated as the appeal was not heard on merit; the 1st respondent's Bill of Costs ought to have been filed before the Environment and Land Court (ELC) which heard and determined the main suit pursuant to article 165(5)(b) of the *Constitution*, and not the High Court; the accounts held by the 1st and 2nd Garnishees (herein 2nd and 3rd respondents) are special compensation accounts contemplated under section 115 of the *Land Act, 2012* and therefore belong to third parties.
10. The applicant additionally contends that the 1st respondent has demanded that the 2nd respondent do pay the decretal amount, failure to which it would commence contempt proceedings; that unless the stay of execution is granted, the funds held by the applicant shall be transferred to the 1st respondent causing its operations to be grounded to a halt; and no prejudice will be suffered by the 1st respondent if the orders sought are granted.
11. The applicant submits that this court has jurisdiction to determine the appeal pursuant to article 163(4)(a) of the *Constitution* as it raises issues of interpretation and application of the Constitution, specifically on whether a state organ can be subject to garnishee proceedings. It is its case that the appeal also raises matters of general public importance as the applicant holds funds in trust for other state agencies for purposes of compensation upon compulsory acquisition of private land. The applicant adds that the court of Appeal breached its right to a fair hearing under article 50(1) as read with article 25(c) and article 159 of the *Constitution*, thus its appeal is arguable.
12. To buttress its averments, the applicant relies on this court's decisions in *Board of Governors, Moi High School Kabarak & anor v Malcom Bell* SC Petition No 6 & 7 of 2013 [2013] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Appl No 5 of 2014 [2014] eKLR. It also cites the decisions in *Okiya Omtatah Okiiti & anor v Attorney General & 7 others* Petition No 446 of 2013 [2013] eKLR, *Five Star Agencies Ltd v National Land Commission* ELC No 445 of 2014 [2014] eKLR, and *Francis Karongo Wagana v National Union of Water & Sewerage Employees; Nyeri Water & Sanitation Company Ltd & 4 others (Garnishee)* ELRC Cause No 18 of 2015 [2020] eKLR.
13. In response and opposition to the applicant's notice of motion, the 1st respondent filed a replying affidavit sworn by Prof Tom Ojienda SC, on January 11, 2024 and submissions dated January 29, 2024. The 1st respondent contends that this court does not have jurisdiction to hear and determine the application as the applicant has not obtained certification to appeal to this court. The 1st respondent avers that the applicant's application for certification filed under article 163(4)(b) of the *Constitution*, and dated December 18, 2023, in Civil Application (Appeal) No E247 of 2022 is yet to be heard and determined by the Court of Appeal. To support its above arguments, it cites this court's decisions in *Wamae & 97 others v Barclays Bank of Kenya Limited*, Petition 19 (E022) of 2020 [2021] KESC



5 (KLR)(8th October 2021) (Ruling), and [*Hassan Nyanje Charo v Khatib Mwashetani & 3 others*](#) Application No 14 of 2014 [2014] eKLR.

14. The 1st respondent further contends that the application is riddled with material misrepresentation and non-disclosure of material facts. It adds that the substratum of the appeal has been overtaken by events as the garnishee absolute order dated August 2, 2022 has already been executed and the outstanding judgment debt of Kshs 297,300,323.32 paid out on December 19, 2023. It cites the court of Appeal decision in Civil Appeal No E326 of 2022 [*Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & Others*](#) where the court held that since the matter had been spent, it could not be a subject of an appeal. It adds that this court does not have jurisdiction to hear the appeal as to do so would mean that the court is staying the decision of the High Court, citing this court's decision in [*Edwin Dande & others v Director of Public Prosecutions & others*](#) Petition No 4 (E005) of 2022. It urges therefore that the applicant has not met the threshold for grant of conservatory orders as there is no arguable appeal that can be rendered nugatory should the application not be allowed.
15. In response to the applicant's motion, the 2nd respondent (1st Garnishee) filed a replying affidavit and a supplementary affidavit sworn by Chrispus Maithya, its Head of Legal, Commercial Transactions and Litigation on January 9, 2023 and January 31, 2024, respectively. The 2nd respondent additionally filed submissions dated January 12, 2024 and supplementary submissions dated February 13, 2024.
16. It is the 2nd respondent's averment that, following the decision of the court of Appeal of December 8, 2023, the 1st respondent wrote to it demanding remittance of the sum of Kshs 297,300,323.32, failure to which its senior officials would be cited for contempt of court. Subsequently, the 1st respondent lodged an application for contempt dated December 18, 2023. He avers that there being no orders of stay from any court, the 2nd respondent complied with the garnishee order absolute and on December 19, 2023 the balance of the decretal sum was paid into the 1st respondent's account. He adds that the payment having been made pursuant to a court Order, it was not irregular. Further, pursuant to the provisions of order 23 rule 4 of the [*Civil Procedure Rules*](#), the payment had to be made to avert liability from attaching to the 2nd respondent in addition to arrest and committal to civil jail of its senior officers for contempt of court.

b. Preliminary Objection dated 11th January, 2024

17. In addition to the replying affidavit, the 1st respondent filed a preliminary objection in response to the applicant's notice of motion and submissions dated January 29, 2024. The preliminary objection is premised on the grounds that this court does not have jurisdiction to hear and determine the application for the reasons that, firstly, the applicant has not obtained certification to appeal to the Supreme Court contrary to the demands of article 163(4)(b) of the [*Constitution*](#), sections 15 and 15B of the [*Supreme Court Act*](#) and rule 33 of the [*Supreme Court Rules, 2020*](#). The 1st respondent also avers that, the applicant's certification application dated December 18, 2023 is yet to be heard and determined by the Court of Appeal. Secondly, the 1st respondent challenges the court's jurisdiction on the grounds that the application has been overtaken by events as the garnishee absolute Order dated August 2, 2022 has already been executed, and the outstanding judgment debt of Kshs 297,300,323.32 paid to the 1st respondent on December 19, 2023.
18. In response to the 1st respondent's preliminary objection and replying affidavit, the applicant filed a supplementary affidavit sworn on January 24, 2024 by Brian Ikol reiterating its averments in its application, and added that: this court has jurisdiction to hear and determine its application; the payments made to the 1st respondent were irregularly and unprocedurally done, and without the consent of the applicant; and that the application and petition have not been overtaken by events as



the matter concerns determination of the jurisdiction of the Court of Appeal to hear and determine Appeals from the High Court under article 164 of the Constitution, as well as the jurisdiction of the High Court and the ELC under article 165(5)(b) of the Constitution. He adds that if the court finds that the High Court did not have jurisdiction to entertain execution proceedings of a matter that was before the ELC, the effect would be to nullify the entire Taxation proceedings of the High Court. This, according to the applicant, would make the irregular payments to the 1st respondent inconsequential as the Bill of Costs would have to be taxed afresh by the ELC.

c. Notice of Motion dated 1st February, 2024

19. The 1st respondent's notice of motion is filed pursuant to the provisions of section 15B(2) of the Supreme Court Act, and rules 31 and 33 of the Supreme Court Rules, 2020. It seeks the following orders:
 - i. The petition of appeal dated December 18, 2023 be dismissed and/or struck out for want of jurisdiction as the petitioner is yet to obtain certification to file this petition of appeal under article 163(4)(b) of the Constitution from the Court of Appeal.
 - ii. The Petition of Appeal dated December 18, 2023 be struck out for having been overtaken by events as the Garnishee Order of August 2, 2022 involving the payment of the decretal sum of Kshs. 397,300,323.32 that is the subject of this petition of appeal has been fully executed.
20. The grounds set out therein are similar to those set out in its preliminary objection dated January 11, 2024, which we shall not repeat. The application is supported by the affidavit of Prof Tom Ojienda SC sworn on February 1, 2024 and submissions of even date, which reiterate its submissions filed in support of its preliminary objection. The 1st respondent additionally filed a supplementary affidavit sworn on February 19, 2024.
21. The 1st respondent adds that the petition of appeal does not fall under article 163(4)(a) of the Constitution as the taxation proceedings and the ultimate execution proceedings did not involve the application and interpretation of the Constitution. It urges that the petition does not fall under the purview of article 163(4)(b) of the Constitution as its certification application is yet to be heard and determined by the Court of Appeal. It adds that the petition of appeal is not founded on any statutory right of claim as the impugned garnishee absolute Order of August 2, 2022 issued by the trial court has been fully executed, therefore there is nothing to litigate over. As such, it contends, there is no substratum of appeal rendering the petition of appeal a mere academic exercise. It therefore urges that the petition of appeal dated December 18, 2023 being incompetent, defective and ought to be dismissed with costs for want of jurisdiction.
22. The 1st respondent additionally urges that the petition of appeal was never lodged, and therefore no petition of appeal exists before this court. It adds that the document that was served upon it is an annexure to the applicant's notice of motion dated December 18, 2023 and cannot properly be termed a petition of appeal.
23. In response to the 1st respondent's application, the applicant filed the replying affidavit of Brian Ikol sworn on February 7, 2024 and submissions dated February 7, 2024. The applicant avers that the petition of appeal raises questions for interpretation and application of the Constitution specifically on: whether a Commission, established pursuant to articles 67 and 248 of the Constitution can be subject to garnishee proceedings under order 23 of the Civil Procedure Rules, 2010; the High Court's jurisdiction to tax a matter that was before the ELC pursuant to article 165(5)(b) and 162(2) of the Constitution; and whether the appellate court deprived it its right to fair hearing under article 50(1) as read with article 25(c) of the Constitution. Moreover, it adds that the question of interpretation and application of the Constitution did arise at the High Court in Eldoret Misc Application No 29B of



2016 and before the Court of Appeal where it argued that it is protected against garnishee proceedings, and that the High Court's jurisdiction was ousted by virtue of article 162(2) of the Constitution. To support its averments, the applicant relies on this court's decision in *Hassan Ali Joho & Anor v Suleiman Said Shabbal & 2 others* Petition No. 10 of 2013 [2014] eKLR and *Republic v Karisa Chengo & 2 others* [2017] eKLR.

24. We note that the 3rd respondent/ 2nd Garnishee did not file any responses or submissions, and indicated before the Hon Deputy Registrar their wish not to do so, as they are not affected by the proceedings.

C. Issues For Determination

25. Upon considering the two notices of motion, preliminary objection, the responses and submissions filed by the parties, it is our considered view that the main issue for determination is whether there is a petition of appeal on record. It is only upon answering this foundational issue that there is indeed a petition of appeal that we could proceed to address the other issues being, whether this court has jurisdiction to hear and determine the petition of appeal and whether the petition of appeal has been overtaken by events. In the end we shall consider the appropriate reliefs to the parties.

D. Analysis and Determination

i. Whether there is a petition of appeal on record

26. As mentioned earlier, it is imperative to first establish whether indeed there is a petition of appeal on record as it is the existence of the appeal that forms the basis of any subsequent determination of the applications. When the matter came up for mention before the Hon Deputy Registrar on February 2, 2024 it was pointed out to the applicant that there is no petition of appeal filed on the e-filing portal. On its part, the applicant maintained that it filed both the application and the petition of appeal on the e-filing portal, but could not verify the petition number it was allocated.
27. Subsequently, the applicant, through Mr Brian Ikol, Advocate, wrote to the Registrar of this court vide the letter dated February 9, 2024 informing the court that the applicant filed both the petition of appeal and the notice of motion on the e-filing portal and provided to the court eight hard copies of the same. The applicant however states that the "application was given Number E051 of 2023, but the registry inadvertently did not allocate a number to the filed Petition. A situation that is disconcerting to us." The applicant thus sought the indulgence of the Hon. Registrar to regularize the filing and issue a number for the petition of appeal.
28. It is worth noting that pursuant to the *Supreme Court Act*, cap 9B and the *Supreme Court Rules, 2020*, the Hon Registrar of the court has no powers to administratively insert a Petition Number to a petition electronically filed as the same is autogenerated through the e-filing platform. This was rightly indicated to the applicant's counsel by the Hon Deputy Registrar when the matter came up for Mention on February 16, 2024.
29. Rule 12(1) of the *Supreme Court Rules* provides that pleadings of any document filed in the court shall be both in printed and electronic form. We note that the applicant electronically filed its notice of motion dated December 18, 2023 on December 19, 2023. Additionally, on the e-filing portal on the section for applications, the applicant uploaded the petition of appeal dated December 18, 2023. Having been filed under applications, together with the notice of motion, the e-filing portal could not generate a Petition Number. We further note that the applicant provided at the court's Registry, printed and physical copies of the petition of appeal alongside the documents associated with the application.



30. The *Supreme Court Act* and *Rules* provide for the filing of appeals and applications for conservatory orders. Section 23A of the *Supreme Court Act* mandates the court to only entertain an application for conservatory orders, such as the present one, after the filing of a petition of appeal before court. This position is reinforced by rule 31(2) of the *Supreme Court Rules, 2020* which provides that an interlocutory application shall not be originated before a petition of appeal is filed with the court. Thus, a petition of appeal is filed in the context of an appeal. Rule 39 sets out the requirements for instituting an appeal to include a petition of appeal, a record of appeal and the prescribed fee. Needless to add, there are statutory timelines that must be adhered to including the filing and transmission of the notice of appeal as a condition precedent to the filing of the appeal. Accordingly, in practice, litigants file the appeal on the court's online portal from which a number is allocated upon payment of the requisite fees or waiver in the case of public institutions such as the applicant. It is within the said appeal that an application for conservatory relief is filed and not the other way round.
31. In the matter at hand, we note that the applicant deployed quite an unusual approach. The impugned ruling having been delivered on December 8, 2023, the applicant was expected to file, transmit and serve a Notice of Appeal as soon as possible thereafter to signal its intention to appeal. While parties transmit the notice of appeal manually, the applicant lodged the same at the Court of Appeal and served it upon parties before uploading the same on the court's portal. On the same day of this uploading, the applicant filed, as an application, the present motion for conservatory orders and among the documents uploaded was the petition of appeal which was filed as a "notice of motion within the petition". It is therefore unsurprising that no payment of fees could be made on it nor a petition number generated. When this discrepancy was brought to the attention of the applicant's representative, he, instead of regularizing the position, resorted to invoking non-existent "administrative" powers of the Registrar, through correspondence, seeking an allocation of a case reference number, itself obviously an exercise in futility.
32. We reiterate that this was a grave inadvertence on the part of the applicant that cannot be condoned. As we have stated before, it is incumbent upon any litigant, prior to approaching the court, to familiarize themselves with requisite procedural requirements to assuage any likely confusion that may arise out of the interpretation of the above provision of the *Supreme Court Act* and the *Supreme Court Rules*. In the premises, our irrefutable conclusion is that there is no petition of appeal on record before us as correctly argued by Prof Ojienda, SC.

ii. Whether this court has jurisdiction to hear and determine the appeal

33. In opposition to the application for stay of execution, the 1st respondent, in its preliminary objection, challenges our jurisdiction to hear and determine the applicant's notice of motion. This challenge is replicated in the 1st respondent's application. We have held in several decisions that jurisdiction is a preliminary issue and ought to be dealt with at the onset, given that without jurisdiction, a court is obligated to down its tools. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* SC Application No 2 of 2011 [2012] eKLR we noted as follows:
- “(68) A court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”
34. The 1st respondent's challenge to the jurisdiction of this court is two-pronged. First, that the applicant's application for certification at the Court of Appeal, is yet to be heard and determined, and that the petition of appeal does not revolve around the interpretation and application of the *Constitution* for



- the court to have jurisdiction under article 163(4)(a) Or (b). Secondly, it urges that the substratum of the appeal has been overtaken by events as the balance of the decretal amount being Kshs 297,300,323.32 was paid by the 2nd respondent/1st Garnishee on December 19, 2023.
35. The Supreme Court’s appellate jurisdiction is circumscribed in article 163(4) of the [Constitution of Kenya](#). This jurisdiction is as of right in any case involving the interpretation or application of the Constitution; and in any other case in which the Supreme Court, or Court of Appeal, certify that a matter of general public importance is involved. Article 163(5) of the [Constitution](#) of Kenya empowers the court to review and either affirm, vary or overturn a certification decision by the court of Appeal. This jurisdiction is transcribed in sections 15A and 15B of the [Supreme Court Act](#), setting out the appellate jurisdiction of this court as of right and upon certification, respectively. In relation to the appeal upon certification, Section 15B(2) of the [Supreme Court Rules](#) requires that an application for certification shall be filed before, and determined by the court of Appeal in the first instance.
36. Concerning this court’s jurisdiction pursuant to article 163(4)(b), it is not disputed that the applicant has filed an application for certification before the court of Appeal at Kisumu in Civil Application (Appeal) No E247 of 2022. This application which is dated December 18, 2023 is annexed to the 1st respondent’s replying affidavit in response to the applicant’s notice of motion. Further, during the Mention before the Hon Deputy Registrar on February 16, 2024, counsel for the applicant, Mr Kamunde, confirmed that indeed the applicant filed an application for certification which is pending hearing and determination before the Court of Appeal.
37. this court has in several of its decisions including in [Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone](#) Appl 4 of 2012 [2013] eKLR, [Fabim Yasin Twaha v Timamy Issa Abdalla & 2 others](#) Appl No 35 of 2014 [2015] eKLR, and [Hassan Nyanje Charo v Khatib Mwashetani & 3 others](#) Appl No 14 of 2014 [2014] eKLR held that an application for leave, as a matter of good practice, should originate in the Court of Appeal, which would be better placed to certify whether a matter of general public importance is involved. If the applicant is dissatisfied with the decision in that regard, the party would be at liberty to seek a review under article 163(5) of the [Constitution](#). This requirement is further encapsulated in section 15B(2) of the [Supreme Court Act](#), as noted above.
38. There being an application pending certification before the Court of Appeal, it is not for this court to, at this juncture, express itself on a jurisdiction that has not been invoked. With our finding that there is no appeal on record, it becomes an exercise in futility and unnecessary waste of scarce judicial time and resources to interrogate and determine whether the court has jurisdiction to determine the appeal. We think we have said enough as to our jurisdiction.
39. Having established that there is no appeal, it is superfluous to apply our judicial minds on whether the appeal is overtaken by events. In the same breadth, where a court has no jurisdiction, as we have herein found, it would be remiss of us to make any pronouncement on this issue.

iii Whether the parties are entitled to the reliefs sought.

40. With our finding that there is no appeal coupled with lack of jurisdiction, the applications are for striking out. This leaves the lone issue of costs for determination.
41. The guiding principles for the grant of costs were established in [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#), Petition No 4 of 2012 [2014] eKLR, holding that costs follow the event. However, this should not be used to punish the losing party, but to compensate a successful party. Additionally, this is not an invariable rule. The ultimate factor on the award of costs is left to judicial discretion. Noting that there was no petition of appeal that could have proceeded for hearing, we order that each party should bear its own costs of the proceedings before this court.



Orders:

- 42. Consequently, for reasons aforesaid, we make the following orders:
 - i. The preliminary objection dated January 11, 2024 is hereby allowed;
 - ii. The notice of motion dated February 1, 2024 is hereby allowed to the extent that the petition of appeal dated December 18, 2023 be and is hereby struck out for want of jurisdiction;
 - iii. The notice of motion dated December 18, 2023 is hereby struck out;
 - iv. The petition of appeal dated December 18, 2023 is hereby struck out; and
 - v. Each party shall bear its costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

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

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

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

