



**Kenya National Highways Authority v Five Star Agencies Limited & another (Petition (Application) E021 of 2024) [2024] KESC 62 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KESC 62 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION (APPLICATION) E021 OF 2024  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ  
OCTOBER 25, 2024**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT**

**AND**

**FIVE STAR AGENCIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application to strike out the Petition of Appeal dated 16th May 2024)*

**Jurisdiction of the Supreme Court in matters involving the interpretation or application of the Constitution**

*The application sought, inter alia, the striking out of the petition of appeal filed under article 163(4)(a) of the Constitution as of right in matters involving the interpretation or application of the Constitution. The court found that no cogent questions of constitutional interpretation or application arose for determination by the superior courts below to warrant the exercise of the court's jurisdiction under article 163(4)(a) of the Constitution.*

Reported by Kakai Toili

**Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeals as of right in cases involving interpretation or application of the Constitution – whether issues not litigated before the superior courts below could be appealed to the Supreme Court as of right in cases involving interpretation or application of the Constitution – Constitution of Kenya, article 163(4)(a).

**Brief facts**

The application sought, *inter alia*, the striking out of the petition of appeal filed under article 163(4)(a) of the Constitution. The applicant contended that: the appeal did not raise issues of constitutional interpretation or application; likewise, no constitutional issue was raised by the respondent before the superior courts below; and, that the respondent was misleading the court by attempting to transmute issues regarding the practice of garnishee proceedings into constitutional issues. The applicant claimed that the appellant had feigned



constitutional issues so as to bring the appeal within article 163(4)(a) since it did not surmount the certification criteria under article 163(4)(b).

### **Issues**

Whether issues not litigated before the superior courts below could be appealed to the Supreme Court as of right in cases involving interpretation or application of the Constitution.

### **Held**

1. The court was constrained to decline admission of an appeal by a party who had filed an appeal as of right, when it did not litigate the issues in question before the superior courts below. The appellant lacked the requisite *locus standi* to invoke the court's jurisdiction.
2. No cogent questions of constitutional interpretation or application arose for determination by the superior courts below to warrant the exercise of the court's jurisdiction under article 163(4)(a) of the Constitution. The court lacked jurisdiction to entertain the petition of appeal.

*Application allowed; petition of appeal struck out for want of jurisdiction.*

### **Orders**

- i. *The court directed that the sum of Kshs. 6,000 deposited as security for costs in the appeal therein be refunded to the appellant.*
- ii. *No order as to costs.*

### **Citations**

#### **Cases**

##### **Kenya**

1. *Ibren v Independent Electoral and Boundaries Commission & 2 others* Petition 19 of 2018; [2018] KESC 75 (KLR) - (Explained)
2. *Law Society of Kenya v Communications Authority of Kenya & 10 others* Petition 8 of 2020; [2023] KESC 27 (KLR) - (Explained)
3. *Munya v Dickson Mwenda Kithinji, Independent Electoral and Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County* Application No. 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
4. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
5. *Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & Mohammed Omar Musa & 5378 others v J Namada Simoni t/a Namada & Co Advocates, Michael Kimonyi & 596 others, J Harrison Kinyanjui t/a J Harrison Kinyanjui & Co Advocates, Lourence Kyalo Nduttu & 124 others, Kaplan & Stratton Advocates & Kenya Breweries Limited* Petition 13 of 2013; [2014] KESC 8 (KLR) - (Explained)
6. *Sirma v Independent Electoral and Boundaries Commission & 2 others* Petition 13 of 2018; [2019] KESC 64 (KLR) - (Explained)

### **Statutes**

##### **Kenya**

1. Civil Procedure Rules (cap 21 Sub Leg) order 23; rule 1 - (Interpreted)
2. Constitution of Kenya articles 40, 47, 50, 163(4)(a)(b) - (Interpreted)
3. Government Proceedings Act (cap 40) In general - (Cited)
4. Land Act (cap 280) sections 107, 111(1A); 113 - (Interpreted)
5. Supreme Court Act (cap 9B) sections 12, 15, 21(2) - (Interpreted)
6. Supreme Court Rules (cap 9B subleg) rules 3(4), (5); 31(6); 40(1) - (Interpreted)

### **Advocates**

1. Mr Ochieng h/b for Prof Albert Mumma for the appellant
2. Mr Fredrick Ngatia Senior Counsel for the 1st respondent/applicant



3. Mr Austin Odoyo for the 2nd respondent

## RULING

### Representation:

Mr Ochieng holding brief for Prof Albert Mumma for the appellant

(Prof Albert Mumma & Co Advocates)

Mr Fredrick Ngatia SC for the 1st respondent/applicant

(Ngatia & Associates Advocates)

Mr Austin Odoyo for the 2nd respondent

(Kipkenda & Company Advocates)

1. Upon perusing the notice of motion dated June 18, 2024 and lodged on June 20, 2024, pursuant to article 163(4)(a) of the Constitution, sections 12, 15 and 21(2) of the Supreme Court Act cap 9B, and rules 3(4) and (5); 31(6) and 40(1) of the Supreme Court Rules 2020, seeking *inter alia*, striking out of the Petition of Appeal dated May 16, 2024 filed under article 163(4)(a) of the Constitution and costs; and
2. Upon reading the grounds on the face of the application and the supporting affidavit sworn by the applicant's Director, Abdulsalam Shariff Abdulahi on June 18, 2024, wherein he contends that: the appeal raises no issue of constitutional interpretation or application; likewise, no constitutional issue was raised by the appellant before the superior courts below; and, the appellant is misleading the court by attempting to transmute issues regarding the practice of garnishee proceedings into constitutional issues. It is urged that the same were determined by the Court of Appeal on the basis of the Government Proceedings Act, the Land Act and the Civil Procedure Rules. Further, that the appellant has feigned constitutional issues so as to bring the appeal within article 163(4)(a) since it does not surmount the certification criteria under article 163(4)(b) of the Constitution; and
3. Further considering the applicant's submissions dated June 18, 2024, and filed on June 20, 2024, restating the applicant's challenge to this court's jurisdiction to determine the appeal for failing to meet the jurisdictional threshold settled in Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 Others; SC Petition No 19 of 2018; [2018] eKLR and Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 Others v J Namada Simoni t/a Namada & Co Advocates & 725 Others; SC Petition No 13 of 2013; [2014] eKLR. Moreover, it is urged that the appellant did not participate in or seek to be joined to the proceedings before the trial court in which the compensation award in respect of the compulsorily acquired suit property was enhanced from Kshs 87,803,255 to Kshs 413,192,500. Further, that the appellant only sought joinder post-judgment during garnishee proceedings, in respect of the main suit which had been concluded years earlier. Consequently, the applicant submits that since no constitutional question formed an integral part in the court of first instance as well as the first appellate court, the appeal is wrongly founded on article 163(4)(a) of the Constitution; and
4. Upon perusing the appellant's replying affidavit in opposition sworn by the appellant's Assistant Director, Survey Mapping, Survey Department, Directorate of Highway Design and Safety, Milcah Muendo, on July 15, 2024, wherein it is contended that this court is clothed with the requisite jurisdiction to determine the appeal; in particular, it is the appellant's case that the appeal is properly



lodged under article 163(4)(a) of the Constitution as it encapsulates the constitutional provisions and principles argued by the parties, which were reflected in the decisions of the superior courts below. For emphasis, it is urged that the grounds of appeal directly involve the interpretation and application of the Constitution on issues of just compensation and access to court under articles 40, 47 and 50 thereof; and

5. Upon considering the appellant's submissions dated July 15, 2024 and filed on July 26, 2024, wherein the appellant urges that it has moved the court in its capacity as an acquiring entity, to interpret constitutional principles of access to court in the compulsory acquisition process, and the extent of its participation in the determination of compensation to be paid as contemplated under article 40(3)(b) (ii) of the Constitution. Consequently, it is argued that the appeal meets the jurisdictional threshold established in Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another, SC Petition No 3 of 2012; [2012] eKLR, and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others; SC Application No 5 of 2014 [2014] eKLR; and
6. Upon considering the applicant's submissions in response dated July 31, 2024 and filed on even date, wherein it reiterates that the issues determined by the trial court regarding quantum of compensation are distinct from the issues that arose for determination before the Court of Appeal, whose judgment on the trial court's ruling in respect of execution by way of garnishee proceedings is the subject of the instant appeal. It cautions that contrary to the appellant's argument, the first appellate court did not interpret article 40(3)(b) of the Constitution, but merely made reference to it. Therefore, it is urged that the said reference did not elevate the dispute between the parties to one concerning questions of constitutional interpretation and application. To buttress its assertion, the applicant cites the case of Sirma v. Independent Electoral & Boundaries Commission & 2 Others (Petition 13 of 2018) [2019] KESC 64 (KLR); and
7. Noting that in the proceedings before the Deputy Registrar on July 19, 2024, the 2<sup>nd</sup> respondent associated itself with the position of the applicant; and
8. Considering that in their decisions, the superior courts below confined themselves to the following issues, whether execution proceedings against the 2<sup>nd</sup> respondent could proceed by way of garnishee proceedings; whether the appellant was a necessary party to the proceedings before the trial court; whether the appellant had the requisite locus standi to file applications seeking review and setting aside of the trial court's garnishee nisi orders, and the judgment enhancing the compensation award, and the appellant's joinder to the proceedings; and
9. Appreciating that this court settled with finality the question of its jurisdiction to hear and determine appeals as of right under article 163(4)(a) of the Constitution in the Lawrence Nduttu case (*supra*), wherein it was held 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).”



10. Further appreciating that in the case of *Law Society of Kenya v. Communications Authority of Kenya & 10 Others* (Petition 8 of 2020) [2023] KESC 27 (KLR); regarding the question as to who qualifies to file an Appeal, this court pronounced itself thus:

“(35) Therefore, flowing from the constitutional provisions on the jurisdiction of this court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate court to approach this court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”

11. We now determine as follows:

- i. Examining the record, judgment and ruling of the superior courts below, it is clear that the central issue before the Environment and Land Court was whether the National Land Commission was analogous to the government, and therefore not subject to execution in the manner provided for under order 23 rule 1 of the *Civil Procedure Rules*. As regards the appellant’s position, the preliminary question determined by the court was whether the appellant had the requisite *locus standi* to file applications in respect of the proceedings;
- ii. Similarly, in its judgment, the Court of Appeal interrogated the issue, whether the appellant was a proper and necessary party to the case, a question it answered in the negative. The appellate court affirmed the trial court in its finding that the appellant lacked the requisite *locus standi*, and applied sections 107, 111(1A) and 113 of the *Land Act* to clarify the roles of the appellant as an acquiring entity and the National Land Commission, as the agency legally mandated to carry out compulsory acquisition on its behalf;
- iii. Likewise, this court is constrained to decline admission of an appeal by a party who has filed an appeal as of right, when it did not litigate the issues in question before the superior courts below;
- iv. Flowing from the above, we are convinced that the appellant lacks the requisite locus standi to invoke this court’s jurisdiction. Similarly, we find that no cogent questions of constitutional interpretation or application arose for determination by the superior courts below to warrant the exercise of this court’s jurisdiction under article 163(4)(a) of the *Constitution*;
- v. Consequently, guided by our findings in *Lawrence Nduttu and Law Society of Kenya (supra)*, we hold that this court lacks jurisdiction to entertain the petition of appeal dated May 16, 2024 and filed on May 30, 2024;

12. Consequently, and for the reasons aforesaid, we make the following Orders:

- i. The applicant’s notice of motion dated June 18, 2024 and filed on June 20, 2024 is hereby allowed;
- ii. The Petition of Appeal No E021 of 2024 dated May 16, 2024 and filed on May 30, 2024 is hereby struck out for want of jurisdiction;



- iii. We hereby direct that the sum of Kshs 6000 deposited as security for costs in the appeal herein be refunded to the appellant; and
- iv. There shall be no order as to costs.

It is so Ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024.**

.....

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

.....

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

.....

**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**

