



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ashmi Investment Limited v Riakina Limited & another (Petition  
(Application) E014 of 2023) [2023] KESC 66 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KESC 66 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION (APPLICATION) E014 OF 2023  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ  
AUGUST 4, 2023**

**BETWEEN**

**ASHMI INVESTMENT LIMITED ..... APPELLANT**

**AND**

**RIAKINA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

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

*(Being an application for Conservatory Order)*

**Land ownership dispute as a bona fide allottee and the court's application of the doctrine of lis pendens warrants an appeal to the Supreme Court on grounds of constitutional interpretation.**

*In an application to appeal to the Supreme Court on grounds of constitutional interpretation the court held that a dispute on the ownership of land as a bona fide allottee, and the court's application of the doctrine of lis pendens warranted an appeal to the Supreme Court on grounds of constitutional interpretation.*

Reported by John Ribia

***Civil Practice and Procedure*** – appeals – appeals to the Supreme Court – appeal on ground of constitutional interpretation - whether a dispute on the ownership of land as a bona fide allottee, and the court's application of the doctrine of lis pendens warranted an appeal to the Supreme Court on grounds of constitutional interpretation - article 163(4)(a)

***Civil Practice and Procedure*** – appeals – appeals before the Supreme Court – conservatory orders pending hearing and determination of an appeal – conditions precedent - what factors did the Supreme Court consider before granting conservatory relief pending the hearing and determination of an appeal

***Civil Practice and Procedure*** – appeals – appeals to the Supreme Court – notice of appeal – requirement to file notice of appeal within 14 days of the determination by the Court of Appeal – notice of appeal filed 15 days later owing to a national holiday - Whether the notice of appeal was filed in time -, section 57(b);, rule 36(1)



## Brief facts

The applicant contended that they were the registered owner of the suit properties as allocated to it having paid the allotment fees. The Court of Appeal affirmed its judgment upheld the High Court decision cancelling the applicant's survey, deed plan and the resultant titles to the suit properties. Aggrieved the applicant filed the instant appeal on grounds that the decisions were reached without any cogent proof of illegality or fraud tendered by the 1<sup>st</sup> respondent; and that it did not violate the doctrine of *lis pendens* as the titles issued during the pendency of the trial were a culmination of the registration process.

The respondent filed a preliminary objection on grounds that the appeal was frivolous as the Supreme Court lacked jurisdiction as moved by the appellant and that the notice of appeal was filed out of time contrary to rule 36 (1) of the Supreme Court Rules.

## Issues

- i. Whether a dispute on the ownership of land as a bona fide allottee, and the court's application of the doctrine of *lis pendens* warranted an appeal to the Supreme Court on grounds of constitutional interpretation.
- ii. What factors did the Supreme Court consider before granting conservatory relief pending the hearing and determination of an appeal?
- iii. Whether a notice of appeal that was filed 15 days after the decision of the Court of Appeal was rendered owing to a national holiday being gazetted within the 15 days, was filed in time

## Held

1. Under rule 36(1) of , a notice of appeal ought to be filed within 14 days from the date of judgment or ruling which was the subject of appeal. Rule 36(2)(b) thereof stipulated that the filing of the notice of appeal was, at the first instance, with the Registrar of the court from which the appeal originated. The ruling subject of appeal in was delivered on April 14, 2023. The applicant lodged the Notice of Appeal to the Court of Appeal, through its online virtual platform on April 28, 2023. Under section 57(b) of the , public holidays were excluded in computing time. Since April 21, 2023 was gazetted as a public holiday vide Gazette Notice No. 5045 dated April 19, 2023, the applicant filed the Notice of Appeal within the fourteen-day window, expiring on April 29, 2023.
2. In line with direction 8(3) of the issued by the Court of Appeal, filings before the Court of Appeal were entirely virtual. The date of filing effectively coincided with the date of lodging through the virtual platform. The electronic notice of appeal was properly on record.
3. Jurisdiction of a court flowed from either or legislation or both. Only appeals that arose from cases involving interpretation or application of could be entertained by the Supreme Court. The appeal must originate from the Court of Appeal case where issues of contestation revolved around interpretation or application of . The interpretation or application of had formed the basis for determinations at the superior courts below and the same issue progressed through the normal appellate mechanism to reach the Supreme Court.
4. The Supreme Court was not just another layer of appeal. The jurisdiction of the Supreme Court under article 163(4)(a) of did not permit the court to adjudicate factual contestations unless they could fit the narrow prism of constitutional interpretation and application.
5. The dispute as to the ownership of land as a bona fide allottee under the circumstances and the court's application of the doctrine of *lis pendens* bearing in mind the appellant's argument surrounding this court's advisory opinion concerning the dispute between the National Land Commission and the Ministry of Lands were issues that involved the interpretation and application of article 40 of . The issues surrounding the inference of fraud and the attendant evidence did not fall for the Supreme Court's determination as they were fully ventilated before the superior courts below. It was necessary to allow the appellant to ventilate its appeal under the strict confines of article 163(4)(a) of .



6. The Supreme Court’s jurisdiction to grant interim relief was hinged on sections 21 and 24 of the . The objective of the interim relief was to protect the substratum of the appeal.
7. The appeal satisfied the three tests of arguability; the appeal would be rendered nugatory if the court did not intervene and public interest in the sense that it was important for the constitutional right to own property, the exercise of authority by public bodies resulting to double allocations of titles to land and the misapplication of the doctrine of lis pendens which was a legal argument that went to jurisdiction.

*Preliminary objection partially allowed.*

### **Orders**

- i. *The preliminary objection partly succeeded to the extent that the applicant would restrict its appeal to the following issues:*
  1. *whether the applicant was a bona fide owner of the suit properties within the provisions of article 40 of ; and,*
  2. *whether the Court of Appeal misapplied the doctrine of lis pendens and thereby denying the applicant a right to property.*
- ii. *Notice of Motion dated May 4, 2023 and filed on May 19, 2023 was hereby allowed.*
- iii. *Conservatory orders were issued staying the execution of the ruling dated April 14, 2023 in Civil Appeal No. 384 of 2019, Ashmi Investment Limited versus Riakina Limited and National Land Commission pending the hearing and determination of the Appeal*
- iv. *Conservatory orders issued staying the execution of the Judgment dated November 19, 2021 in Civil Appeal No. 384 of 2019, Ashmi Investment Limited versus Riakina Limited and National Land Commission, pending the hearing and determination of the Appeal.*
- v. *A temporary injunction was issued restraining the 1<sup>st</sup> respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property pending the hearing and determination of the appeal.*
- vi. *The costs of the application were to abide the outcome of the appeal.*

### **Citations**

#### **Cases**

1. Bookpoint Limited v Guardian Bank Limited & another (Application No. 4 (E006) of 2021; [2021] eKLR) — Explained
2. Daniel Kimani Njihia v Francis Mwangi Kimani & another (Civil Application No. 3 of 2014 [2015] eKLR) — Explained
3. Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021; [2022] KESC 24 (KLR)) — Explained
4. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (Application No.5 of 2014; [2014] eKLR) — Explained
5. Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others (Petition No. 4 of 2012; [2014] eKLR) — Explained
6. Kenya Hotel Properties Limited v. Attorney General & 5 others (Application No. 2 of 2021 (E004 of 2021); [2021] eKLR) — Explained
7. Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General, Provincial Commissioner, Nairobi Area & Commissioner of Lands (Petition 45 of 2018; [2020] KESC 9 (KLR)) — Explained
8. Samuel Kamau Macharia & another v. Kenya Commercial Bank & 2 others (Application No. 2 of 2021 (E004 of 2021); [2021] eKLR) — Mentioned

#### **Statutes**

1. Constitution of Kenya, 2010 (Const2010) — article 40, 68, 163(4)(a) — Interpreted
2. Interpretation And General Provisions Act (CAP. 2) — section 57(b) — Interpreted



3. Land Registration Act (No. 3 of 2012) — section 26 — Interpreted
4. Supreme Court Act 7 of 2011 — section 21(1)(a); 24(1) — Interpreted

**Advocates**

*Ms Misiati* for the Appellant/Applicant

*Mr. Onyango* for the 1st Respondent

**RULING**

**Representation:**

Ms Misiati for the appellant/applicant (Prof Tom Ojienda & Associates)

Mr Onyango for the 1st respondent (AI Onyango & Company Advocates)

No appearance for the 2nd respondent

1. Upon perusing the applicant's notice of motion dated May 4, 2023 and filed on May 19, 2023 pursuant to article 163(4)(a) of the Constitution 2010; sections 21(1)(a), 24 (1) of the Supreme Court Act No 7 of 2011; rules 3(5), 31 & 32 of the Supreme Court Rules, 2020 seeking the following orders:
  1. Spent;
  2. Spent;
  3. That the honourable court be pleased to issue conservatory orders staying the execution of the ruling dated April 14, 2023 in Civil Appeal No 384 of 2019, *Ashmi Investment Limited v Riakina Limited and National Land Commission* pending the hearing and determination of this petition of appeal;
  4. Spent;
  5. That the honourable court be pleased to issue conservatory orders staying the execution of the Judgment dated November 19, 2021 in Civil Appeal No 384 of 2019, *Ashmi Investment Limited v Riakina Limited and National Land Commission*, pending the hearing and determination of this petition of appeal;
  6. Spent;
  7. That this honourable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property pending the hearing and determination of this petition of appeal;
  8. That this honourable court be pleased to grant such other appropriate relief as it may deem fit, to give effect to the orders sought herein; and
  9. That the costs of this application be provided for; and
2. Upon perusing the grounds on the face of the application; the supporting affidavit sworn on May 4, 2023 by Abdirahman Mohamed Elmi, and written submissions dated May 4, 2023 and filed on May 19, 2023 wherein the applicant contends that it is the registered owner of LR Nos 29957 and 29955 (hereinafter the suit properties) as allocated to it having paid the allotment fees; that the Court of Appeal in its ruling dated April 14, 2023 affirmed its judgment dated 1November 9, 2021 where



- it upheld the High Court decision cancelling the applicant's survey, deed plan and the resultant titles to the suit properties; that this decision was reached without any cogent proof of illegality or fraud tendered by the 1<sup>st</sup> respondent; and that it did not violate the doctrine of lis pendens as the titles issued during the pendency of the trial was a culmination of the registration process; and
3. Upon considering the applicant's further argument that it has met the test laid down by this court in *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others* SC Application No 5 of 2014; [2014] eKLR by demonstrating that it has an arguable appeal based on the aforementioned grounds; that the appeal would be rendered nugatory if the subject matter is not preserved since the 1<sup>st</sup> respondent during the pendency of the Court of Appeal proceedings invaded the suit properties, erected a perimeter wall and installed a security person who has made it impossible for the applicant to go anywhere near the suit properties; and that public interest rests in favour of allowing the application as pertinent questions have been raised including the place of the court to infer fraud where it is not specifically pleaded and no evidence has been led to prove the same to the required standard; as well as dispossession of a legitimate allottee of property in the absence of proof of fraud and illegality; and
  4. Upon perusing the 1<sup>st</sup> respondent's notice of preliminary objection dated May 30, 2023 and filed on June 13, 2023, opposing the application and petition of appeal on the grounds that the appeal is frivolous for this court lacks jurisdiction as moved by the appellant; and that the notice of appeal was filed/lodged out of time contrary to rule 36(1) of the Supreme Court Rules; and
  5. Upon considering the applicant's written submissions dated May 9, 2023 in opposition to the preliminary objection wherein the applicant asserts that this court has jurisdiction because, from the onset, its claim was anchored on its right to own the suit properties as the bona fide allottee; and thus, the question before the court was whether the applicant or 1<sup>st</sup> respondent had acquired a right to the suit properties under article 40 of the *Constitution*. Hence, the appeal has attributes of constitutional interpretation and/or application that arise from the main suit and require it to be heard and determined by the superior courts below which this court has discretion to assess as was held by the court in *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others* Sup Ct Petition No 45 of 2018 [2020] eKLR. Furthermore, the applicant contends that section 26 of the *Land Registration Act*, legislation derived from article 68 of the *Constitution*, calls Upon the superior court to question whether the applicant has a legitimate title of the suit properties under article 40, and whether the 1<sup>st</sup> respondent violated the same in anyway; and
  6. Additionally, the applicant argues that the notice of appeal was lodged within the prescribed timeline considering that April 21, 2023 was a holiday and is excluded under rule 36(1) of the Supreme Court Rules, section 57 of the *Interpretation and General Provisions Act* and as determined by this court in *Bookpoint Limited v Guardian Bank Limited & another*; SC Application No 4 (E006) of 2021, [2021] eKLR; and
  7. Having taken into account the entirety of the application, the preliminary objection, responses and submissions put forth, we opine as hereunder:
  8. A preliminary objection challenging our jurisdiction having been raised in response to the application and appeal, the same has to be addressed in limine. The crux of the preliminary objection is two pronged. First, that the notice of appeal was filed out of time contrary to rule 36(1) of the Supreme Court Rules, 2020 and secondly, that the appeal does not meet the threshold of article 163(4)(a) of the *Constitution*.



9. On the first objection we note that under rule 36(1) of the *Supreme Court Rules*, a notice of appeal ought to be filed within fourteen (14) days from the date of judgment or ruling which is the subject of appeal. Rule 36(2)(b) thereof stipulates that the filing of the notice of appeal is, at the first instance, with the registrar of the court from which the appeal originates. The ruling subject of appeal in this instance was delivered on April 14, 2023. It is uncontroverted that the applicant lodged the notice of appeal to the Court of Appeal, through its online virtual platform on April 28, 2023. As indicated under section 57(b) of the *Interpretation and General Provisions Act*, public holidays are excluded in computing time. Since April 21, 2023 was gazetted as a public holiday vide Gazette Notice No 5045 dated April 19, 2023, we find that the applicant filed the notice of appeal within the fourteen-day window, expiring on April 29, 2023.
10. We appreciate that in line with the Covid-19 Practice Directions on Electronic Case Management issued by the Court of Appeal and in particular Direction 8(3) thereof, filings before the Court of Appeal are entirely virtual. Thus, the date of filing effectively coincides with the date of lodging through the virtual platform. The court has previously exercised its discretion to excuse the confusion arising out of the transition between the Court of Appeal filing process and the filing before the Supreme Court in relation to the notice of appeal. In *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2022] KESC] 24 (KLR) (Civ) (19 May 2022) (ruling), we held as follows:

“We are Satisfied therefore that the electronic notice of appeal was timeously lodged in the Court of Appeal strictly in accordance with Direction 8(3) aforesaid and subsequently filed in this court within the time set, we find that it is properly on record and reject the objection by the 1st respondent, being satisfied that it was electronically served on June 17, 2021 which was the same day that the notice of appeal was filed.”
11. This was in response to a similar objection regarding the electronic lodging of the notice of appeal before the Court of Appeal and the transmission of the hard copy to this court in line with rule 12 of this court’s rules as explained in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others*; SC Application No 2 of 2021 (E004 of 2021); [2021] eKLR; We are therefore satisfied that just like in the cited cases, the objections concerning non-compliance with rule 36(1) of this court’s rule cannot stand.
12. On the second limb of the objection, both parties appreciate the parameters of our jurisdiction. We need not re-emphasize that jurisdiction of a court flows from either the *Constitution* or legislation or both. And, jurisdiction is everything. (See *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others*, SC Application No 2 of 2011; [2012] eKLR). Only those appeals arising from cases involving interpretation or application of the *Constitution* can be entertained by the Supreme Court. The appeal must originate from the Court of Appeal case where issues of contestation revolved around interpretation or application of the *Constitution*. That the interpretation or application has formed the basis for determinations at the superior courts below and the same issue progressed through the normal appellate mechanism to reach this court.
13. The gist of the applicant’s case from the onset before the superior courts focused on determining the ownership of the suit properties between the applicant and the 1<sup>st</sup> respondent. This is readily discerned from paragraph 13 of the plaint filed before the High Court and the prayer seeking a declaration as a bona fide owner of the suit properties. In doing so, the applicant invoked the doctrine of bona fide owner in the wake of double allotment of the suit properties. In the appeal before us, which stems from that before the Court of Appeal, the applicant raised grievances on the court’s application of the



doctrine of *lis pendens* and the findings of fraud as against the evidence adduced at the trial including the affidavit introduced at the Court of Appeal sworn by one Zacharia Ndege.

14. We caution, as we did in [Daniel Kimani Njibia v Francis Mwangi Kimani & another](#) Sup Ct Civil Application No 3 of 2014 [2015] eKLR, that the Supreme Court is not just another layer of appeal. Our circumscribed jurisdiction under article 163(4)(a) of the [Constitution](#) does not permit the court to adjudicate factual contestations unless they can fit the narrow prism of constitutional interpretation and application. From our careful perusal of the record, we are satisfied that the dispute as to the ownership of land as a *bona fide* allottee under the circumstances and the court's application of the doctrine of *lis pendens* bearing in mind the appellant's argument surrounding this court's advisory opinion concerning the dispute between the National Land Commission and the Ministry of Lands are issues that involve the interpretation and application of article 40 of the [Constitution](#). The issues surrounding the inference of fraud and the attendant evidence do not fall for our determination as they were fully ventilated before the superior courts below. The objection therefore partially succeeds and is to that extent only allowed.
15. In saying so, we think it is necessary to allow the appellant to ventilate its appeal under the strict confines of article 163(4)(a) of the [Constitution](#). The court recently entertained a similar dispute involving contested ownership of land in [Dina Management Limited v County Government of Mombasa & 5 others](#) (Petition 8 (E010) of 2021) [2022] KESC] 30 (KLR) (21 April 2023) (Judgment) as of right.
16. With our finding on the preliminary objection, we now turn to consider the prayers for conservatory relief. We note that the application is uncontroverted as the respondent fully relied Upon the objection in response to the same. Nevertheless, it is not lost to us that the applicant still has to satisfy the court that it is deserving of the said orders. The court's jurisdiction to grant interim relief is hinged on sections 21 and 24 of the [Supreme Court Act](#). The objective of the interim relief is to protect the substratum of the appeal.
17. As set out in [Gatirau Peter Munya](#) case, it is evident to us that the appeal satisfies the three tests of arguability, in view of the self-evident arguments raised in the appeal, the appeal would be rendered nugatory if the court does not intervene and public interest in the sense that it is important for the constitutional right to own property, the exercise of authority by public bodies resulting to double allocations of titles to land and the misapplication of the doctrine of *lis pendens* which is a legal argument that goes to jurisdiction.
18. On costs, award of the same is discretionary and follows the principle set out by this court in [Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others](#) SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. However, as the appeal is yet to be determined, it is only prudent that the costs abide the outcome of the appeal.
19. Consequently, we make the following orders:
  - a. The preliminary objection partly succeeds to the extent that the applicant will restrict its appeal to the following issues:
    - i. Whether the applicant was a *bona fide* owner of the suit properties within the provisions of article 40 of the [Constitution](#);
    - ii. Whether the Court of Appeal misapplied the doctrine of *lis pendens* and thereby denying the applicant a right to property.



- b. Notice of motion dated May 4, 2023 and filed on May 19, 2023 be and is hereby allowed.
- c. Conservatory orders be and are hereby issued staying the execution of the ruling dated April 14, 2023 in Civil Appeal No 384 of 2019, *Ashmi Investment Limited v Riakina Limited and National Land Commission* pending the hearing and determination of the appeal;
- d. Conservatory orders staying the execution of the Judgment dated November 19, 2021 in Civil Appeal No 384 of 2019, *Ashmi Investment Limited v Riakina Limited and National Land Commission*, pending the hearing and determination of this appeal.
- e. A temporary injunction be and is hereby issued restraining the 1<sup>st</sup> respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property pending the hearing and determination of this appeal.
- f. The costs of the application to abide the outcome of the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**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**

