



REPUBLIC OF KENYA



**KENYA LAW**  
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**Janmohamed S.C (Suing as the Executrix of the Estate of the Late H.E. Daniel  
Toroitich Arap Moi) & another v Lagat & 4 others (Petition 17 (E021) & 24  
(E027) of 2022 (Consolidated)) [2023] KESC 85 (KLR) (Civ) (6 October 2023) (Ruling)**

Neutral citation: [2023] KESC 85 (KLR)

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

**PETITION 17 (E021) & 24 (E027) OF 2022 (CONSOLIDATED)**

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM,  
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**OCTOBER 6, 2023**

**BETWEEN**

**ZEHRABANU JANMOHAMED S.C (SUING AS THE EXECUTRIX OF  
THE ESTATE OF THE LATE H.E. DANIEL TOROITICH ARAP  
MOI) ..... 1<sup>ST</sup> APPELLANT  
RAI PLYWOOD (K) LTD ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NATHANIEL K. LAGAT ..... 1<sup>ST</sup> RESPONDENT  
SUSAN CHERUBET CHELUGUI & DAVID K. CHELUGUI (SUING AS THE  
ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY  
CHELUGUI) ..... 2<sup>ND</sup> RESPONDENT  
DISTRICT LAND REGISTRAR UASIN GISHU ..... 3<sup>RD</sup> RESPONDENT  
THE REGISTRAR OF TITLES ..... 4<sup>TH</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

*(Being an application to strike out Petition No 17(E021) of  
2022 as consolidated with Petition No. 24(E027) of 2022)*

**Application challenging the Supreme Court's jurisdiction on its ruling**

*In an application that contested the Supreme Court's jurisdiction and sought to get the advocates of the petitioners sanctioned for filing a frivolous and vexatious petition, the Supreme Court held that it had already conclusively determined the issue of jurisdiction in a previous ruling. The Supreme Court held that the other issues raised by the*



*applicant were misguided, held that the application was frivolous, vexatious, and an abuse of the process of court. The court dismissed the application with costs.*

Reported by John Ribia

**Jurisdiction** – jurisdiction of the Supreme Court – where the Supreme Court had already ruled that it had jurisdiction to determine a matter - whether the Supreme Court could determine on an application contesting its jurisdiction where it had already rule that it had jurisdiction in a previous ruling – article 163(4)(a)

### **Brief facts**

The 2<sup>nd</sup> respondent filed an application contending that the appeal raised no issues of constitutional interpretation. The applicant sought for the application to be struck out and for the firms that filed the petition to be sanctioned for filing frivolous and vexatious petitions.

### **Issues**

Whether the Supreme Court could determine on an application contesting its jurisdiction where it had already ruled that it had jurisdiction in a previous ruling.

### **Held**

1. In a ruling dated October 28, 2022, the Supreme Court had previously ruled that it had the jurisdiction to entertain the instant matter. The issue of jurisdiction was conclusively determined in the ruling. All other issues raised by the applicant were misguided and did not require the Supreme Court’s attention. The instant application was frivolous, vexatious, and an abuse of the process of court.

*Application dismissed.*

### **Orders**

*Costs to be borne by the applicant.*

### **Citations**

#### **Cases**

1. Kiluwa Limited & another v Business Liaison Company Limited & 3 others (Petition 14 of 2017; [2021] KESC 37 (KLR)) — Explained
2. Macharia v Kenya Commercial Bank (Application 2 of 2011; [2012]eKLR; [2012] 3 KLR) — Explained
3. Republic v Ahmad Abolfathi Mohammed & Sayed Mansour Mousavi (Petition 39 of 2018; [2019] KESC 48 (KLR)) — Explained

#### **Statutes**

1. Constitution of Kenya, 2010 — section 24, 40, 163(4)(a), 259(1) — Interpreted
2. Limitation of Actions Act (Cap 22) — In general — Cited
3. Supreme Court Act, 2011 (Act No 7 of 2011) — section 12, 15, 21(2) — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 3(4)(5), 31(6), 40(1) — Interpreted

#### **Advocates**

*Mr. Julius Kemboy*

*Mr. Kibe Muigai*

*Mr. Ahmednasir M. Abdullahi SC*

*Mr. Odongo, State Counsel*

*Ms. Niuster, Advocate*

## **RULING**

### **Representation:**



Mr. Julius Kemboy..... for the 1st appellant  
(Kemboy Law Advocates)

Mr. Kibe Muigai..... for the 2nd appellant  
(Kinoti & Kibe Company Advocates)

Mr. Ahmednasir M. Abdullahi SC..... for the 2nd respondent/applicant  
(Ahmednasir Abdullahi Advocates LLP)

Mr. Odongo, State Counsel..... for the 3rd and 4th respondents  
(Office of the Attorney General)

Ms. Niuster, Advocate..... for the 5th respondent  
(National Land Commission)

1. Upon considering the motion by the 2<sup>nd</sup> respondent dated June 14, 2023, and lodged on June 15, 2023, pursuant to article 163(4)(a) of the Constitution, sections 12, 15, 21(2) of the Supreme Court Act, No 7 of 2011 and rules 3(4) and (5), 31(6), 40(1) of the Supreme Court Rules 2020, seeking orders, to;

"Stay the determination of the application dated January 13, 2023 for leave to adduce additional evidence; strike out Petition No 17 (E021) of 2022 (as consolidated with Petition No 24 (E027) of 2022); alternatively, in relation to Petition No 17 (E021) of 2022, expunge grounds of appeal pleaded at paragraph 22 (a) to (g) of the petition, with the exception of paragraph 22(d), paragraphs 23 to 59, 71 to 75 setting skeletal arguments in support of the appeal, and paragraphs 76(a),(b),(c),(e) and (f) with the exception of (d) delimitating issues for determination by the Court; sanction and punish the firms of Kinoti Kibe & Company Advocates and Kemboy Law Advocates for filing a frivolous and vexatious petition outside the purview of article 163(4)(a) of the Constitution; and any further orders the court deems fit to grant; and

2. Upon examining the grounds on the face of the application, supporting affidavit sworn by Mr David K Chelugui on June 14, 2023, and the applicant's written submissions dated June 14, 2023, wherein it is argued that; the appeal raises no issues of constitutional interpretation or application; of the five issues delimited by the appellate court for determination, the only constitutional issue is on retrospective application of the Constitution, which was only addressed from a theoretical perspective and did not constitute the *ratio decidendi* of the impugned judgment; the 1<sup>st</sup> appellant's arguments at paragraphs 22(a) to (g) and 27 of Petition No 17 (E021) of 2022 are a unilateral construct of constitutional provisions and not questions addressed or determined by the Court of Appeal; and the issue of retroactive application of the Constitution has not transmuted through the hierarchy of courts, but was raised for the first time before the Court of Appeal; and
3. Further, noting the 1<sup>st</sup> appellant's replying affidavit sworn by Zehrabanu Janmohamed SC on June 29, 2023 and submissions dated June 30, 2023 in opposition, on grounds *inter alia* that; the applicant's prayer seeking stay of the determination of the application dated January 13, 2023 has been overtaken by events in view of the ruling delivered on June 16, 2023; that the court's jurisdiction to entertain the appeal was settled in the affirmative in the ruling of this court delivered on October 28, 2022; and the applicant's advocate on record, Mr Ahmednasir Abdullahi SC has made unfounded and disparaging remarks against this court, the Deputy Registrar, the disputing parties, and advocates *en masse*, once again evincing conduct deprecated and admonished by this court in the case of Republic v Ahmad Abolfathi Mohammed & another KESC Petition No 39 of 2018 [2019] eKLR; and



4. Upon considering the 2<sup>nd</sup> appellant's replying affidavit sworn by Jaswant Singh Rai on July 27, 2023 and submissions of even date, to the effect that; the consolidated appeal involves the interpretation and application of the Constitution, thus falls squarely within the ambit of article 163(4)(a) of the Constitution; the proceedings at both the Eldoret Environment and Land Court in Petition No 9 of 2014 and the Court of Appeal in Kisumu Civil Appeal No 159 of 2019 as consolidated with Kisumu Civil Appeal No 254 of 2019, involves interpretation of articles 24, 40 and 259(1) of the Constitution, particularly, the application of the Limitation of Actions Act to the enforcement of fundamental rights and freedoms protected under the bill of rights; and, the question of retrospective application of the Constitution was raised before the trial court in the replying affidavit of Philip Vargese dated November 25, 2014, and ground 4 of the grounds of opposition dated November 25, 2022 but no determination was made; and
5. Upon noting the applicant's rejoinder to the 1<sup>st</sup> appellant's submissions dated July 18, 2023, and response to the 2<sup>nd</sup> appellant's submissions dated August 3, 2023, wherein the applicant faults the 1<sup>st</sup> appellant's counsel for making unwarranted remarks against its advocate on record; reiterates that article 24 of the Constitution was not cited, interpreted or applied in the determinative portion of the Court of Appeal's judgment; and that the Court of Appeal did not interpret or apply article 40 of the Constitution, but only adhered to precedent set by the Supreme Court in the cases of Kiluwa Limited & another v Business Liaison Company Limited & 3 others (Petition 14 of 2017) [2021] KESC 37 (KLR) (6 August 2021) (Judgment); and Samuel Kamau Macharia v Kenya Commercial Bank SC Application No 2 of 2011 [2012]eKLR; and
6. Noting this court's ruling dated October 28, 2022, on the question of its jurisdiction to determine this appeal, wherein we pronounced ourselves thus:

"[14] .... It is evident that the appeal raises issues involving the interpretation or application of the Constitution, therefore, in keeping with this court's decision in *Lawrence Nduttu*, we find that we have the jurisdiction to entertain the appeal and application before us."

7. We now determine as follows:

"Having carefully considered the application, responses thereto, and rival submissions by the parties, and guided by this court's ruling dated October 28, 2022, in this same appeal; we find that the issue as to whether the court has jurisdiction under article 163(4)(a) was conclusively determined in the ruling aforesaid. All other issues raised by the applicant are in the circumstances completely misguided and do not require our attention at all. Consequently, and without saying more, we deem the application before us frivolous, vexatious, and an abuse of the process of court. '

8. We therefore, make the following orders:

- i. The notice of motion dated June 14, 2023 and lodged on June 15, 2023, is hereby dismissed;
- ii. The costs of this application shall be borne by the applicant.

It is so ordered.

**Dated and Delivered at Nairobi This 6<sup>th</sup> day of October, 2023.**

.....  
**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**



.....

**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**

.....

**NJOKI NDUNGU**

**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**

