



**Janmohammed (Suing as the Executrix of the Estate of the Late H.E Daniel
Toroitich Arap Moi) v Raiply Wood (K) Limited & 5 others (Application
8 (E014) of 2022) [2022] KESC 67 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KESC 67 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 8 (E014) OF 2022
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ
OCTOBER 28, 2022**

BETWEEN

**ZEHRABANU JANMOHAMMED, SC APPLICANT
SUING AS THE EXECUTRIX OF THE ESTATE OF THE LATE H.E DANIEL
TOROITICH ARAP MOI**

AND

**RAIPLY WOOD (K) LIMITED 1ST RESPONDENT
NATHANIEL K LAGAT 2ND RESPONDENT
SUSAN CHEREBET CHELUGUI & DAVID K CHELUGUI (SUING AS THE
ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY
CHELUGUI) 3RD RESPONDENT
DISTRICT LAND REGISTRAR, UASIN GISHU 4TH RESPONDENT
REGISTRAR OF TITLES 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT**

*(Being an application for stay of execution of the Judgment and Order of the Court of
Appeal at Kisumu (Kiage, M'noti & Mumbi Ngugi, JJ. A) delivered on the 22nd July,
2022 in Civil Appeal No. 159 of 2019 as consolidated with Civil Appeal No. 254 of 2019)*

**Supreme Court certifies an appeal as one involving the interpretation or application of the
Constitution.**

*An appeal on the applicability of the Limitations of Actions Act on claims of violation of rights and freedoms,
and on the retrospective application of the Constitution, met the jurisdictional threshold of the Supreme Court to
determine an appeal as of right in any case involving the interpretation or application of the Constitution.*



Reported by John Ribia

Jurisdiction – *jurisdiction of the Supreme Court – appellate jurisdiction of the supreme court – jurisdiction to determine an appeal as of right in any case involving the interpretation or application of the Constitution - whether an appeal on the applicability of the Limitation of Actions Act was applicable on claims of violation of rights and freedoms; and on the retrospective application of the Constitution met the jurisdictional threshold of the Supreme Court to determine an appeal as of right in any case involving the interpretation or application of the Constitution –*

Civil Practice and Procedure – *execution of judgments – stay of execution – application for a conditional stay of execution – threshold to be met by parties in an application for conditional stay of execution - whether the applicants had met the conditions necessary to warrant the grant of conditional stay.*

Brief facts

The appellant challenged the judgment and orders of the Court of Appeal delivered in Civil Appeal No 159 of 2019 (consolidated with Civil Appeal No 254 of 2019). The applicant sought for the Supreme Court to stay the execution of the Court of Appeal judgment pending the hearing and determination of the appeal.

The 3rd respondent raised a preliminary objection challenging the jurisdiction of the Supreme Court to determine the appeal and the application for stay of execution.

Issues

- i. Whether an appeal on the applicability of the Limitation of Actions Act was applicable on claims of violation of fundamental rights and freedoms; and on the retrospective application of the Constitution met the jurisdictional threshold of the Supreme Court to determine an appeal as of right in any case involving the interpretation or application of the Constitution.
- ii. Whether the applicants had met the conditions necessary to warrant the grant of conditional stay.

Held

1. Not all intended appeals from the Court of Appeal could be lodged at the Supreme Court. Only appeals arising from cases involving the interpretation or application of the Constitution; or those of general public importance could be entertained by the Supreme Court.
2. The case before the Environment and Land Court revolved around the protection of his right in the suit property under article 40 of the Constitution. The Court of Appeal considered the question as to whether claims of violation of rights and freedoms guaranteed under the Constitution were subject to the Limitations of Actions Act; and whether the provisions of the Constitution could apply retrospectively. The appeal raised issues involving the interpretation or application of the Constitution. The Supreme Court had the jurisdiction to entertain the instant appeal. The appellant had demonstrated that the appeal was arguable, and that unless a stay was granted, it would be rendered nugatory.
3. The only assertion to support the application to grant stay and to have the applicant deposit the entire decretal sum in an interest earning account was that there had been perceived inter-meddling in the Estate and that it would also be in the interest of justice to do so. The respondents had not sufficiently substantiated those allegations to warrant the grant of conditional stay.
4. In any event, the Executrix of the Estate was a party to the instant proceedings and was under a legal obligation to among other things collect, and preserve the estate for purposes of satisfying any resultant decree, awarded by the Supreme Court.

Application allowed.

Orders

- i. *The notice of motion dated July 28, 2022 and filed on August 1, 2022 was allowed.*



- ii. *Execution of the Judgment and order of the Court of Appeal at Kisumu (Kiage, M'inoti & Mumbi Ngugi, JJ A) delivered on the July 22, 2022 in Civil Appeal No 159 of 2019 as consolidated with Civil Appeal No 254 of 2019 was to rest in abeyance pending the hearing and determination of the appeal.*
- iii. *The costs of the application were to abide the court's decision in the appeal.*

Citations

Cases

1. Abdallah, Yusuf Gitau v Building Centre (K) Ltd & 4 others (Petition 27 of 2014) — Mentioned
2. Board of Governors, Moi High School, Kabarak & another v Malcom Bell (Civil Application 12 & 13 of 2012; [2013] KECA 13 (KLR)) — Explained
3. Gatirau, Peter Munya v Dickson Mwenda Kithinji & 2 Others (Application 5 of 2014) — Mentioned
4. Joho, Hassan Ali & Another v. Suleiman Said Shahbal & 2 Others (Petition 10 of 2013) — Explained
5. Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012) — Explained
6. Sheikh, Mohamed Ali v Abdiwahab Sheikh Osman Hathe & 3 others (Election Appeal 38 of 2018; [2019] KESC 31 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — Article 24, 40, 163(4)(a); 259 (1) — Interpreted
2. Limitation of Actions Act (CAP. 22) — Section 7 — Interpreted
3. Supreme Court Act (No. 7 of 2011) — Section 15 — Interpreted
4. Supreme Court Rules, 2020 (No. 7 of 2011 Sub Leg) — Rule 3(5); 31; 31(2); 39 — Interpreted

Advocates

None mentioned

RULING

1. Upon considering the petition dated July 28, 2022 and filed on August 1, 2022, which is brought pursuant to article 163(4)(a) of the Constitution, section 15 of the Supreme Court Act, 2011, and rules 3(5), 31 and 39 of the Supreme Court Rules, 2020, in which the appellant challenges the entire Judgment and orders of the Court of Appeal delivered on the July 22, 2022 in Civil Appeal No 159 of 2019 (Consolidated with Civil Appeal No 254 of 2019); and
2. Upon perusing the notice of motion dated July 28, 2022 and filed on August 1, 2022, which is brought pursuant to article 163(4)(a) of the Constitution, sections 21 (1)
 - (a) and 24(1) of the Supreme Court Act, 2011 and rules 3(5), 31 and 32 of the Supreme Court Rules, 2020, wherein the applicant seeks a stay of execution of the said Judgment and orders of the Court of Appeal pending the hearing and determination of the application and appeal; and
3. Upon reading the supporting affidavit and further affidavit in support of the motion sworn by Zehrabanu Janmohammed (SC) on July 28, 2022 and August 5, 2022, respectively and considering the grounds in support therein, mainly that the applicant has met the threshold for grant of stay; and
4. Upon reading the 1st respondent's replying affidavit sworn by Jaswant Singh Rai on August 4, 2022 and submissions dated August 4, 2022 in support of the application, wherein it is urged that the 1st respondent is equally aggrieved by the said Judgment and is in the process of filing an appeal before this court; and
5. Upon considering the 3rd respondent's replying affidavit and supplementary affidavit in opposition to the motion sworn by David K Chelugui on August 5, 2022 and August 31, 2022, respectively; raising a preliminary objection challenging the jurisdiction of this court to hear and determine the appeal and



- present motion; for the reasons that, no constitutional provisions of relevance or controversy were canvassed before the High Court or the Court of Appeal, and if any, that the two superior courts efficiently pronounced themselves upon them; and
6. Upon considering the 6th respondent's replying affidavit sworn by Brian Ikol on August 3, 2022 and submissions dated August 8, 2022, to the effect that no cause of action has been disclosed against it and that for this reason, the applicant should be condemned to bear its costs; and
 7. Further, Upon considering the written submissions by the applicant dated July 28, 2022 and further submissions dated August 8, 2022 to the effect that; the applicant is apprehensive that the 3rd respondent will commence execution of the decretal sum of Kshs 1,060,000,000 to the prejudice of the applicant's estate, who in the event the court finds in its favour would bear an unreasonable burden recovering the decretal sum; and that the appeal is arguable and unless stay is granted, will be rendered nugatory. It is also urged that the court's jurisdiction under article 163(4)(a) of the *Constitution* has been properly invoked as the appeal challenges the interpretation and application of articles 24 and 40 of the *Constitution* by both the High Court and Court of Appeal; and that in any event, by a letter dated August 2, 2022, the 3rd respondent unconditionally conceded the applicant had an automatic right of appeal; and
 8. Upon considering the 4th and 5th respondents' submissions dated August 5, 2022 in support of the motion. Similarly, considering their contention that in order to protect the parties' competing interests and to ensure justice is done to all the parties; the decretal sum herein be deposited in an interest earning account managed by counsel for the applicant and 1st and 2nd respondent; in the alternative, that the applicant be ordered to deposit in court any other security of equal value; or to issue a professional undertaking for the performance of the decree; or a prohibitory order be directed against the suit property herein; and
 9. Upon considering the written submissions by the 3rd respondent dated August 5, 2022, to the effect that the application is premature and frivolous for reasons that; there is no threat of execution against the estate of the late Daniel Toroitich Arap Moi; and that the applicant has failed to meet the threshold for grant of stay. Further, that the 3rd respondent is apprehensive that, if a stay is granted, the decree will be defeated. Consequently, it is his prayer that in the event the court is minded to grant a stay, it should simultaneously order the applicant to deposit the entire decretal sum with his advocates on record or to provide a bank guarantee from a licensed bank securing due performance of the decree; and
 10. Noting that the applicant has filed Petition No E021 of 2022 as is required by rule 31(2) of the *Supreme Court Rules, 2020* and directed by this court in *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others* SC Petition No 27 of 2014; [2014] eKLR, and *Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others*, Election Petition No 38 of 2018; [2019] eKLR.

We Now Opine as Follows:

11. We have carefully considered the reasoned arguments and submission by all parties in this matter. Regarding the issue as to whether the court has jurisdiction to entertain the appeal, we are guided by the provisions of article 163(4)(a) of the *Constitution* and our interpretation thereof. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR (*Lawrence Nduttu* case), we stated the true intent of article 163(4)(a) of the *Constitution* as follows:

“This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the



Supreme Court Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”

...

The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *the Constitution*....” [Emphasis added].

12. We consequently emphasized in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, Petition No 10 of 2013; [2014] eKLR, that in order to transmute itself into the provisions of article 163(4)(a), the constitutional issue must have “been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under article 163(4)(a) of the *Constitution*....” [Emphasis added].
13. In this matter, the 3rd respondent’s case before the Environment and Land Court revolved around the protection of his right in the suit property under article 40 of the *Constitution*. The applicant on the other hand, contended that article 40 as invoked could not be applied retrospectively. Similarly, before the Court of Appeal, the applicant faulted the trial court for retrospectively applying the provisions of the *Constitution, 2010* and for failing to find that the cause of action was barred by section 7 of the *Limitation of Actions Act*.
14. In its Judgment, the Court of Appeal considered the question as to whether, claims of violation of rights and freedoms guaranteed under the *Constitution*, were subject to the *Limitations of Actions Act*, and secondly, whether the provisions of the *Constitution of Kenya, 2010* could apply retrospectively. It consequently interpreted and applied the provisions of articles 24, 40 and 259(1) and dismissed the appeal for being unmeritorious. 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.
15. On the substantive issue, the applicant’s Executrix has urged that she is apprehensive that the 3rd respondent will commence execution of the colossal decretal sum of Kshs 1,060,000,000, which would render her appeal nugatory. Having determined that we have jurisdiction, we also find that the appellant has demonstrated that the appeal is arguable, and that unless a stay is granted, it will be rendered nugatory. The application thus meets the principles set out in the *Board of Governors, Moi High School, Kabarak & another v Malcom Bell* SC Petition No 6 & 7 of 2013, [2013] eKLR as affirmed in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Application No 5 of 2014, [2014] eKLR on the threshold for grant of stay of execution.
16. The 3rd, 4th and 5th respondents have also submitted that should the court deem it fit to grant stay, it should further direct the applicant to deposit the entire decretal sum in an interest earning account managed by counsel for the applicant and 1st and 2nd respondent or to provide a bank guarantee from a licensed bank securing the payment of the full Decree sum. The only ground advanced to support this assertion is that there has been perceived intermeddling in the Estate of the late Moi aforesaid and that it would also be in the interest of justice to do so. We find that the respondents have not sufficiently substantiated this allegation to warrant grant of conditional stay.
17. In any event, the executrix of the estate/ of the late Moi/applicant is a party to these proceedings and is under a legal obligation to among other things collect, and preserve the estate for purposes of satisfying any resultant decree, awarded by this court.
18. Accordingly, we make the following orders:



- i. The Notice of Motion dated July 28, 2022 and filed on August 1, 2022 be and is hereby allowed;
- ii. Execution of the Judgment and order of the Court of Appeal at Kisumu (Kiage, M’noti & Mumbi Ngugi, JJA) delivered on the July 22, 2022 in Civil Appeal No 159 of 2019 as consolidated with Civil Appeal No 254 of 2019 shall rest in abeyance pending the hearing and determination of the appeal.
- iii. The costs of this application shall abide the court’s decision in the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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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

