



**Attorney General & another v Uasin Gishu Memorial Hospital Limited & another
(Petition 20 of 2019) [2021] KESC 57 (KLR) (24 March 2021) (Judgment)**

Attorney General & another v Uasin Gishu Memorial Hospital Limited & another [2021] eKLR

Neutral citation: [2021] KESC 57 (KLR)

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

PETITION 20 OF 2019

PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MARCH 24, 2021

BETWEEN

ATTORNEY GENERAL 1ST APPELLANT

MINISTER FOR HEALTH 2ND APPELLANT

AND

UASIN GISHU MEMORIAL HOSPITAL LIMITED 1ST RESPONDENT

MOI TEACHING AND REFERRAL HOSPITAL BOARD 2ND RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(Makhandia, Onko & Murgor, JJA) delivered on the 6th October 2017 in Nairobi)*

Supreme Court refers hospital property ownership dispute to the Environment and Land Court

Reported by Beryl Ikamari

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals as of right in any case involving the interpretation or application of the Constitution - what were the requirements for a party to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution - Constitution of Kenya 2010, article 163(4)(a).

Jurisdiction - jurisdiction of the High Court - unlimited and original jurisdiction and jurisdiction to enforce the Bill of Rights - whether the High Court had jurisdiction to entertain a dispute about the ownership of a hospital and its assets and liabilities - Constitution of Kenya 2010, article 165.

Jurisdiction - jurisdiction of the Court of Appeal - appellate jurisdiction - whether the Court of Appeal had jurisdiction to make determinations about the ownership of a hospital and its assets and liabilities where the High Court had not heard and determined the dispute on its merits.



Brief facts

Legal Notice Number 78 of 1998 established the 2nd respondent as a State corporation and appointed a board to take over the 1st respondent's hospital and properties including rights, duties, obligations, assets and liabilities. Pursuant to the legal notice, the appellants and the 2nd respondent, without following due process, compulsorily acquired the 1st respondent hospital and suit properties by ordering that its assets, rights and interests be transferred and managed by 2nd respondent under the provisions of the State Corporations Act.

The 1st respondent filed HCCC No 123 of 1998 seeking temporary orders to restrain the 2nd respondent from interfering with the hospital and its properties and the orders were granted. After publishing Gazette Notice No 6623 of August 20, 2004, expressing the intent to dissolve a number of companies, the Registrar of Companies published Gazette Notice No 815 of February 4, 2005 through which the 1st respondent was dissolved and struck off the register. On March 11, 2001, the 2nd respondent forcefully entered and took over possession of the hospital and its property. The 2nd respondent also successfully applied for HCCC no 123 of 1998 to be struck out on grounds that the 1st respondent was no longer a legal entity.

Later, the 1st respondent filed Miscellaneous Cause No. 350 of 2005, and it obtained orders for its reinstatement on the companies register. The 1st respondent then filed HC Constitutional & Judicial Review Misc. Civil Case No. 12A of 2006 (OS). In that matter it sought various reliefs including declaratory reliefs to the effect that Legal Notice No 78 of 1998 which led to the transfer of its assets and liabilities to the 2nd respondent was illegal and that its rights to property had been violated. The High Court found that the originating summons raised a property ownership dispute whose determination required *viva voce* evidence and not affidavit evidence. The originating summons was dismissed by the High Court which cited lack of jurisdiction to determine who the real owner of the suit property was or the nature of the 1st respondent's interest.

On appeal, the Court of Appeal found that the originating summons was competent as it raised allegations of violations of property rights. It also found that the 1st respondent was the lawful owner of the disputed property and that the High Court should have made determinations on the alleged violation of property rights and the legality of the legal notice. The Court of Appeal found that the impugned legal notice (Legal Notice No. 78 of 1998) violated the 1st respondent's rights to property and was illegal and unconstitutional. An appeal against the Court of Appeal's decision was lodged at the Supreme Court.

A cross-appeal was also filed at the Supreme Court by the 2nd respondent. Amongst the contentions of the 2nd respondent were that the suit premises comprised of public land acquired by the Government in 1961 and the Government made capital investments on the land in 1998. The 2nd respondent claimed that the 1st respondent had no interest or investment in the land. The 2nd respondent contended that the Court of Appeal had awarded a wrong-doer as the 1st respondent had fraudulently alleged that its title deed was lost and converted the land registration regime from the Registration of Titles Act to the Registered Land Act. The 2nd respondent also stated that the Court of Appeal, after finding that the originating summons was competent, should have referred the matter to the High Court to exercise its original jurisdiction.

Issues

- i. What were the requirements for a party to appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.
- ii. Whether the High Court had jurisdiction to entertain a suit about the ownership of a hospital and its assets and liabilities.
- iii. Whether the Court of Appeal had jurisdiction to make determinations about the ownership of a hospital and its assets and liabilities where the High Court did not hear and determine the dispute on its merits.

Held

1. The appeal was filed under article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution) as one that lay as of right as it involved the interpretation or application of the Constitution. For



- the Supreme Court to entertain the appeal, it had to raise matters of constitutional interpretation and application and those matters should have been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach the Supreme Court. Considering the issues raised at the High Court and the Court of Appeal, the matter fell within the ambit of article 163(4)(a) and the court had jurisdiction to hear and determine it.
2. The High Court's jurisdiction under article 165 of the Constitution included unlimited original jurisdiction in criminal and civil matters and jurisdiction to enforce the Bill of Rights. Under section 60(1) of the repealed Constitution, provision was made for the High Court's unlimited original jurisdiction in civil and criminal matters. The High Court had an obligation to determine the issues raised by the parties and in failing to do so, the High Court failed to fulfil its constitutional mandate.
 3. The property ownership dispute was highly contested and the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it. The Court of Appeal had determined substantive issues that had not been exhaustively determined by the High Court. That act denied the parties the opportunity to be heard and effectively and exhaustively address the contested issues.
 4. The High Court and Court of Appeal denied the parties their right to be heard as provided for in article 25 and 50 of the Constitution. The Court of Appeal ought to have referred the matter back to the High Court for determination of contested issues. Consequently, the Court of Appeal erred in determining the matter as it did.
 5. The High Court erred in not exercising its original jurisdiction on the issues before it. The Court of Appeal erred in exhaustively determining issues before it without having them effectively and exhaustively determined by the High Court. In addition, the Court of Appeal erred in failing to accord the parties an opportunity to test the evidence presented by affidavit.
 6. Pursuant to article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act, it was appropriate for the matter to be heard afresh before the Environment and Land Court. The Environment and Land Court would have to address the following issues: -
 - a. Who was the owner of Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? How was the land acquired?
 - b. Who owned the investment on Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? By what means were the investments made?
 - c. Was the Hospital on the suit land? Was it a public or a private hospital? If it was a private hospital when was it licensed to operate as such? If it was public, did it have a license to operate as such? When was the license given? How had the hospital been running?
 - d. Who was the 1st respondent? Was it a public body or a private entity? Had the 1st respondent been paying taxes? If not, why?
 - e. Who had been the board members of the 1st respondent? Had they ever changed? If yes, why and when did they change?
 - f. Who was the board? Why did the District Commissioner significantly chair the affairs of the 1st respondent over the years? On whose authority did District Commissioner chair?
 - g. How did the directorship of the 1st respondent move to the Government?
 - h. If the 1st respondent were to be found to be entitled to compensation and could claim compensation, what mechanism should be used to quantify the compensation?
 - i. What was Legal Notice No. 78 of 1998? What was its legal status?
 - j. What was the legal status of Gazette Notice No. 6623 of August 20, 2004, published by the Registrar of Companies giving a notice of intended dissolution of a number of companies, including the 1st respondent?
 - k. What was the legality of Gazette Notice No. 815 of February 4, 2005 by which the 1st respondent was dissolved?



7. Costs follow the event, and a Judge had the discretion to award costs. It was the High Court that failed to exercise its constitutional mandate in the matter before it and further, the Court of Appeal exercised jurisdiction that it ought not to have exercised. In addition, since the matter was being sent to the Environment and Land Court for determination of the specified issues, there shall be no order as to costs.

Appeal and cross-appeal allowed.

Orders

- i. *The Petition of Appeal dated May 28, 2019 and filed on an even date and the cross-appeal dated and filed on June 7, 2020 were allowed in the following specific terms: -*
 - a. *The judgment and order of the Court of Appeal dated October 6, 2017 was set aside.*
 - b. *The judgment of the High Court dated March 19, 2010 was set aside.*
 - c. *For the avoidance of doubt, the judgment of the High Court was null and void.*
 - d. *The matter was remitted to the Environment and Land Court for determination of specified issues.*
- ii. *Each party was to bear its own costs.*

Citations

Cases

Kenya

1. *Five Forty Aviation Limited v Erwan Lanoe* Civil Appeal 55 of 2016; [2019] KECA 763 (KLR) - (Followed)
2. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)
3. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Followed)
4. *Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others* Civil Appeal 181 of 2004; [2008] KECA 334 (KLR); [2008] KLR 61 - (Followed)
5. *Kiguoya, Joseph Kamau v Rose Wambui Muthike* Environment & Land Case 203 of 2016; [2017] KEELC 571 (KLR) - (Followed)
6. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR); [2014] 3 KLR 36 - (Explained)
7. *Narok County Government & another v Ntutu & 4 others* Petition 3 of 2015; [2018] KESC 11 (KLR) - (Followed)
8. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
9. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR); [2012] 2 KLR 419 - (Explained)
10. *Njogu & Company Advocates v National Bank of Kenya Limited* Civil Appeal 165 of 2007; [2016] KECA 85 (KLR) - (Followed)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Followed)
12. *Tinkol, Masek Ole & 3 others v Kenya Grain Growers Limited & 2 others* Civil Case 272 of 2015; [2018] KEELC 2818 (KLR) - (Followed)

United Kingdom

1. *Attorney General of Gambia v Jobe* [1985] LRC (Const) 556 - (Followed)
2. *Attorney General v Ramanoop* [2005] UKPC 15 - (Followed)
3. *Gairy v Attorney General of Grenada* [2001] UKPC 30 - (Followed)
4. *Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 - (Followed)
5. *Merson v Cartwright* [2006] 3 LRC 264; [2005] UKPC 38 - (Followed)
6. *Ramlogan v The Mayor, Aldermen & Burgesses of San Fernando* [1986] LRC (Const) 377 - (Followed)



7. *Salmon v Salmon Co* [1897] AC 22 - (Followed)

India

N Nagendra Rao and Co v The State of AP 1994 AIR 2663; 1994 SCC (6) 205 - (Followed)

Regional Court

1. *Attorney general v Lawrence* [1985] LRC (Const) 921 - (Followed)
2. *Kuria Greens Limited v Registrar of Titles & another* [2013] 1 EA 162 - (Followed)
3. *Windward Properties Limited & another v Williams & another* [1988] LRC (Const) 406 - (Followed)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3(2) - (Interpreted)
2. Companies Act (cap 486) In general - (Cited)
3. Constitution of Kenya articles 25, 40, 50, 163(4)(a); 165- (Interpreted)
4. Constitution of Kenya (Repealed) sections 70(a); 75; 84- (Interpreted)
5. Environment and Land Court Act (cap 8D) section 13 - (Interpreted)
6. Land Acquisition Act (Repealed) (cap 295) In general- (Cited)
7. Registered Land Act (Repealed) (cap 300) sections 26, 27- (Interpreted)
8. Registration of Titles Act (cap 281) In general- (Cited)
9. State Corporations Act (cap 446) In general- (Cited)
10. Supreme Court Act (cap 9B) sections 15(2); 17 - (Interpreted)
11. Supreme Court Rules, 2012 (Repealed) (cap 9B Sub Leg) rules 32, 33 - (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Background

1. The instant appeal is dated and filed on May 28, 2019. The appellants seek this court to overturn the Judgment of the Court of Appeal (Makhandia, Ouko & Murgor, JJA) delivered on 6th October 2017 in Nairobi Civil Appeal No 184 of 2012 which decision allowed an appeal against the decision of the High Court in HC Constitutional & Judicial Review Misc Civil Case No 12A of 2006 (OS).

(i) Proceedings at the High Court

2. This matter can be traced to a Legal Notice Number 78 of 1998 published on June 12, 1998 (the Legal Notice), when retired President of Kenya, Daniel Arap Moi by an order known as “The Moi Teaching and Referral Hospital Board Order, 1998” established the 2nd respondent as a State Corporation, and appointed its Board to take over the 1st respondent’s hospital, and properties including rights, duties, obligations, assets and liabilities. Following the promulgation of the Legal Notice, the appellants and the 2nd respondent, without following the due process of the law, compulsorily acquired the 1st respondent hospital and the suit properties by ordering that its assets, rights and interests be transferred and managed by 2nd respondent under the provisions of the State Corporations Act, cap 446.
3. Subsequently, the 1st respondent filed HCCC No 123 of 1998 and sought temporary orders to restrain the 2nd respondent from interfering with the Hospital and the suit properties, which orders were obtained on 17th July 1998. By gazette notice No 6623 of 20th August 2004, the Registrar of Companies published a notice of intended dissolution of a number of companies, including the 1st



respondent. This was followed by Gazette Notice No 815 of 4th February 2005 through which the 1st respondent was dissolved and struck off the Register. On 11th March 2001, the 2nd respondent forcefully entered the 1st respondent's premises and took over possession of the Hospital and the suit properties. Thereafter, the 2nd respondent filed an application to have HCC No 123 of 1998, struck out on the basis that the 1st respondent ceased to exist as a legal entity. HCCC No 123 of 1998 was subsequently dismissed on this basis on 15th June 2005.

4. Subsequently, the 1st respondent filed in the High Court, Miscellaneous Cause No 350 of 2005, seeking reinstatement on the Companies Register, which orders were obtained on 25th November 2005, paving way for the filing of HC Constitutional & Judicial Review Misc Civil Case No 12A of 2006 (OS). The 1st respondent sought both declaratory and conservatory orders against the appellants and the 2nd respondent. The declaratory prayers sought were as follows: (a) a declaration that Legal Notice No 78 of 1998 in so far as it purported to vest the rights, duties, obligations, assets and liabilities of the 1st respondent and the suit properties in the 2nd respondent was in breach of the 1st respondent's fundamental right to ownership of property hence, illegal, unconstitutional, null and void; (b) a declaration that its fundamental rights as protected and guaranteed by sections 70 (a) and (c) and 75 of the repealed Constitution were contravened; (c) a declaration that there was no lawful basis upon which the appellants deprived the 1st respondent of the right to the ownership and/or proprietorship over its assets; and (d) a declaration that the appellants were not entitled to deprive the 1st respondent of the rights over its assets inclusive of cash, bank accounts, business and leasehold interest in the suit properties. The 1st respondent further sought Conservatory Orders restraining the 2nd respondent from interfering with its management and from proceeding any further with the implementation of the Legal Notice pending the determination of the Originating Summons. Also sought was a Conservatory Order to safeguard the suit properties.
5. On March 19, 2010, having considered the pleadings and the parties' submissions, the learned Judges, (Wendoh and Dulu, JJ) listed the following as issues for determination: whether the issues determined as preliminary points of law could be revisited; whether there was non-disclosure of material facts; the effect of other related cases; whether the originating summons disclosed any constitutional issue or cause of action; and the costs of the proceedings.
6. On the first issue, the learned Judges found that they could not reopen or review the decision of a single Judge for two reasons that is, there was no application for review of the judge's decision and secondly, because the order or decision made by the court for which reasons were given could only be challenged on appeal to the Court of Appeal. On the second issue, the trial Court found that the 1st respondent was not guilty of non-disclosure of material facts, and that the facts and particulars disclosed were adequate to invoke the jurisdiction of the Court. On the effect of other related cases, the Court found that there was a pending appeal in HC Misc. Case No 350 of 2005. The court found that the Court of Appeal's decision in the said appeal could only be consequential, that is, either confirm their decision or vary it to the extent to which the Court of Appeal would decide. Finally, on the fourth issue, whether the Originating summons disclosed a constitutional issue or cause of action, the learned Judges found that whereas the real issue was whether or not the fundamental rights of the Plaintiff were breached and whereas the 1st respondent claimed that the land and other assets belongs to it, the appellants claimed that the Land was government land. Consequently, the Learned Judges came to the conclusion that the Originating Summons raised a dispute as to who really is the owner of the disputed land and other assets, and that required *viva voce* evidence not affidavit evidence. Consequently, the court dismissed the Originating Summons for the reasons that the dispute existed between the 1st respondent and appellants as to the ownership of the hospital and the suit properties, and that the court was not clothed with jurisdiction to determine who the real owner of the suit properties was or the nature of the 1st respondent's interest.



ii. Proceedings at the Court of Appeal

7. Aggrieved by the decision of the High Court, the 1st respondent filed an appeal, Nairobi Civil Appeal No 184 of 2012. In considering the appeal, the appellate judges listed five issues for determination namely: Whether the Originating Summons was competent? Whether the 1st respondent was a public or private entity; Whether the Hospital and suit properties belonged to the appellants or the 1st respondent; Whether the Legal Notice led to a violation of the 1st respondent's constitutional rights, and if so, whether its rights were violated; and, Whether the 1st respondent was entitled to the reliefs sought.
8. On the issue as to whether the Originating Summons was competent, the Court of Appeal found that the infringements alleged under sections 70(a) and (c) and 75 of the repealed Constitution were adequately defined, and that the elements essential to a valid constitutional petition were present. To that extent, they found the originating summons to be competent.
9. The court also found, on the issue concerning the violation of the 1st respondent's constitutional rights by its inclusion in the Legal Notice, and whether it was entitled to the reliefs sought, that the 1st respondent was neither a government entity nor a state corporation or a local authority but a legal entity registered under the Companies Act under the control and direction of its own directors and members, and capable of owning its own assets, rights and interest. The appellate court also found that the suit properties were registered in the 1st respondent's name and belonged to them as at the time the impugned Legal Notice was published. Furthermore, the learned judges found that it was incumbent upon the High Court to determine whether or not a violation of rights had occurred due to the Legal Notice and in failing to reach a finding on a matter that was central to the dispute, the court failed to fulfill its constitutional mandate, and in so doing, misdirected itself. The Court of Appeal found the Legal Notice unconstitutional, illegal, null and void.
10. Consequently, the appellate court declared that, to the extent the 1st respondent was included in the Legal Notice that purported to vest or transfer its rights, duties obligation, assets and liabilities of the hospital and the suit properties to the 2nd respondent, such inclusion was in violation of the 1st respondent's fundamental right to ownership of property under section 70(a) and (c) and 75 of the Constitution, and is therefore unconstitutional, illegal, null and void. Likewise, the Court ordered the appellants to compensate the 1st respondent for deprivation of the suit properties, the hospital and related facilities.

(iii) Proceedings before the Supreme Court

11. Aggrieved by the finding of the Court of Appeal, the Hon. Attorney General and the Minister for Health have filed this appeal pursuant to articles 163(4)(a) of the Constitution and section 15(2) of the Supreme Court Act and rule 32 of the Supreme Court Rules, 2012 (now repealed).
12. The appellants have advanced several grounds in support of their appeal. They urge that the learned judges of appeal erred in law and in fact in:
 - i. Holding that the 1st respondent's Constitutional rights over the suit land and the hospital had crystallized when they declared that the 1st respondent's constitutional rights had been violated and found that they were entitled to compensation without any formal hearing or trial to determine compensation payable and to whom and why and therefore denied the appellants the right to a fair hearing.



- ii. Finding that Legal Notice No 78 of 1998 was a violation of the 1st respondent's fundamental rights to ownership of property as per section 75 of the Repealed Constitution.
 - iii. In holding that the 1st respondent was a private company and that it owned the suit properties when there was evidence that the 1st respondent was a public property whose Board members illegally took the suit properties.
 - iv. Failing to establish that the 1st respondent had not established any basis for its claim for deprivation or seizure of the Uasin Gishu Memorial Hospital when the said Hospital belonged to the Government.
 - v. Failing to find that the suit properties were developed by the Governments since 1924 and that the 1st respondent committed fraud by fraudulently transferring the land to itself purportedly as a private property.
 - vi. In finding that the suit properties were compulsorily acquired under section 75(2) of the repealed Constitution and that it was not a must for the same to have been done under the Land Acquisition Act for it to be deemed to have been compulsorily acquired.
 - vii. When they treated a private property ownership dispute, which should have been litigated in a civil suit, as a constitutional suit.
 - viii. Failing to appreciate that the 1st respondent had no legal standing to claim the public hospital while a suit regarding ownership of the public hospital was pending in Eldoret HCCC No 78 of 2005.
 - ix. Failing to appreciate the uncontested fact that the purported Board of Directors were strangers to the 1st respondent, were not legally appointed, but had attempted to convert a public hospital into a private hospital.
 - x. Failing to hold that the Government was managing Uasin Gishu Memorial Hospital through Uasin Gishu Memorial Hospital Company, but the Government continued to hold absolute interest in the suit properties.
 - xi. Failing to find that Legal Notice No 78 of 1998 merging Uasin Gishu Memorial Hospital Limited with Eldoret District Hospital was merely formalizing a relationship which was effected in 1988 when the two hospitals were merged.
 - xii. In finding that the 1st respondent's constitutional rights to the suit properties had been violated when there was no basis, proof or justification to make such a finding.
13. Consequently, the appellants seek this court to allow the appeal, set aside the Court of Appeal's judgement and uphold the Judgment of the High Court.

B. Parties Respective Submissions

(a) The appellants submissions

- 14. In their written submissions and oral arguments, the appellants outlined six issues for determination namely, jurisdiction, compensation to the 1st respondent, Legal Notice No 78 of 1998, replacement of lost titles, originating summons and replacement of lost titles.
- 15. On the issue of jurisdiction, it's the appellants' case that the appeal is properly filed under articles 40 and 163(4)(a) of the *Constitution*, section 15(2) and 17 of the *Supreme Court Act* and rule 33



of the [Supreme Court Rules, 2012](#) (now repealed). The appellants submitted that the appeal raises questions on the interpretation and application of article 40 of the [Constitution](#) as read together with section 75 of the retired [Constitution](#) on compulsory acquisition of land and on whether the Court of Appeal's decision vis a vis the respondent's claim was proper to the extent that it satisfies the mandatory Constitutional criteria. To support their submissions, they relied on this Court's decision in [Narok County Government v Livingstone Kunini Ntutu & 2 others](#), SC Pet No 3 of 2015; [2018] eKLR (the County Government of Narok Case).

16. Further on the question of jurisdiction, the appellants submitted that the Court of Appeal ordered for compensation on reliance of section 75 of the retired [Constitution](#) hence, there is a dispute on interpretation of the Constitution; its retrospective application, and the public interest in the suit properties.
17. Concerning compensation, learned counsel for the appellants submitted that the appellate court erred in law and in fact, when it misapplied the Provisions of section 75 of the retired [Constitution](#) to the extent that the 1st respondent was entitled to compulsory acquisition of the suit properties when it never owned it and that the learned judges ignored the fact that suit properties were indeed public property developed by the government since 1962.
18. Counsel for the appellants submitted further that there is no instrument of transfer of the suit properties to the 1st respondent and that they never filed annual returns between 1982 to 2004. Instead, the appellants argued that the suit properties were donated by white settlers to Wareng County Council, then under the Ministry of Local Government at a consideration of KES 10. The appellants maintained that the 1st respondent is a company limited by guarantee with trustee whose sole purpose was to manage the hospital and not to convert the suit land to a private property. They maintain that there is no instrument of transfer of ownership to the alleged directors. The appellants faulted the learned Judges of Appeal for failing to consider that the government has been deploying staff to the facility as it remained a public facility.
19. It was also the appellants' submissions that the appellate court failed to appreciate that the titles to the suit property were never lost but kept by the District Commissioner since he was the one chairing government institution boards. They added that the government has constructed staff houses and student hostels.
20. Regarding Legal Notice No 78 of 1998, the appellants urged that the same was promulgated on June 12, 1998 through a special issue of the Kenya Gazette Supplement No 34, signed and issued under the [State Corporation Act](#) by former President Daniel Moi, thereby creating Moi Teaching and Referral Hospital merging it with Uasin Gishu Memorial Hospital with all assets and liabilities.
21. Concerning replacement of lost titles, the appellants submitted that the Affidavit of Dr Fatma Faraj sworn on January 12, 1994 supporting the application for replacement of lost title was fake, misleading and a misrepresentation that the company was a public company yet the same was a company limited by guarantee and was a trustee of the government of Kenya. The appellants urged that the suit titles were misplaced at the District Commissioner's Office who was then the chair of the District Development Committee and the custodian of the title which had been handed over by Wareng County Council.
22. Pertaining the Originating Summons, it was submitted by the appellants that the learned judges of Appeal ignored pendency of other suits and that the dispute was one that ought to have been heard via *viva voce* evidence. They urged that the Court of Appeal ought to have referred the matter to the Environment and Land Court. They submitted that the Court of Appeal denied other parties an opportunity to make their case and summarily concluded the dispute without granting them a hearing. They cited the [County Government of Narok](#) case to support their case.



23. Consequently, they urged us to allow the appeal, and set aside the finding and orders of the Court of Appeal.

(b) The 2nd respondent's Submissions on the Cross appeal and appeal

24. The 2nd respondent filed its cross-appeal on June 7, 2019. In support of the appellants' petition, the appellants submitted that the suit properties and all developments therein are public land and public investments. It stated that even if the 1st respondent acquired the parcels of land in 1961, further capital investments were done by the Government in 1998; that the 1st respondent did not do any subsequent expenditure on the suit properties; that the 1st respondent has no interest and has no investment in the land parcels that would entitle it to neither the land nor the developments therein; and that the initial suit should either be dismissed or referred back to the High Court for oral trial on title. The 2nd respondent relied on the case of *Masek Ole Tinkol & 3 others v Kenya Grain Growers Limited & 2 others* [2018] eKLR in support of its submissions.
25. Learned counsel for the 2nd respondent also submitted that all parties, including the 1st respondent had always understood that the land, the investments and developments in the suit property were publicly owned and that the mere fact that the 1st respondent is not a body corporate does not automatically make it entitled to publicly funded land and developments in which they have not invested.
26. Counsel also urged that deeming the 1st respondent as owner of land and the developments therein might amount to rewarding a wrong-doer considering that the 1st respondent committed acts of fraud in alleging that the title was lost, converting the land regime, from *Registration of Titles Act* to Registered Land Act, sub-dividing the land among other contested issues. In support of this assertion, it cited the cases of *Joseph Kamau Kiguoya v Rose Wambui Muthike* [2016] eKLR, *DN Njogu & Co advocates v National Bank of Kenya* [2009] eKLR and *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR.
27. The 2nd respondent submitted that awarding the 1st respondent with a return on land and developments or compensation would first, amount to unjust enrichment since it has not expended anything on the suit premises except KES. 10.00 consideration paid by its predecessors in 1961; second, it has already earned and made income and benefits from a wholly and exclusive Government land and investments; and third, it cannot account for itself transparently as a public company. In that regard, the second respondent cited the case of *Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others* [2008] eKLR.
28. The 2nd respondents submitted further that the Court of Appeal, having found the Originating Summons competent (and therefore that the High Court's decision to decline jurisdiction was erroneous), ought to have referred the matter back to the High Court to exercise its original jurisdiction.
29. It was the 2nd respondent's further argument that the dispute in this case requires a decision on multiple factual issues that cannot be decided on affidavits as was done by the Court of Appeal. It supported the High Court's decision that the case ought to have been determined by oral evidence.
30. As to whether the originating summons at the High Court, should have awaited determination of a suit filed earlier in August 2005, the 2nd respondent submitted in the affirmative adding that the issues in dispute in HCCC No 123 of 1998 were similar to those in the instant appeal.



31. Additionally, the 2nd respondent submitted that the compensation award given by the Court of Appeal was not pleaded and should not have been granted and that all parties should have been given a chance to comment on the purposed option of compensation.
32. Finally, the 2nd respondent submitted that the whole suit related to a complaint that the 1st respondent's land and assets were taken away by the 2nd respondent at the instance of the appellants, and that the claim is one for private law for restitution and/or compensation. Consequently, the 2nd respondent urged this court to grant the prayers sought in the appeal and cross-appeal.

(c) The 1st respondent's Case

33. The 1st respondent has opposed the petition through its replying affidavit sworn on July 3, 2019 by its Director and Company Secretary, Charles Arap Kesse. In making its submissions, the 1st respondent identified eight issues for determination by the Court.
34. On the first issue, whether the 1st respondent is a private company or a public entity or a State Corporation, Learned Counsel for the 1st respondent submitted that the same is a company limited by guarantee incorporated as such in 1961, under Certificate of Incorporation No C 7/61, and that it has never been a public entity nor a state corporation within the meaning of section 2 of the State Corporations Act. Counsel contended that the mere fact that the Government stepped in to bail out the 1st respondent, did not render it a State Corporation. Counsel relied on the case of *Salmon v Salmon Co.* [1897] AC 22 to support this point.
35. On the second issue, whether or not there were several cases pending in relation to the ownership of the suit premises at the time the Court of Appeal delivered its decision, counsel for the 1st respondents urged that there were no suits pending in other courts concerning the suit premises as at the time the Court of Appeal made its determination. In that context, he submitted that Eldoret HCCC No 123 of 1998 was struck out on June 15, 2005; Eldoret HCCC No 78 of 2005 involves a suit against its Directors and not the 1st respondent and that the same has never been set down for hearing; and HC Misc Civil Cause No 350 of 2005 was determined on November 30, 2005.
36. On the third issue, whether or not the issue of the ownership of the suit properties by the 1st respondent was so disputed as to require a trial by way of discovery, adducing of evidence and cross-examination of the parties, the 1st respondent submitted that this ground cannot justify the setting aside of the Judgment of the Court of Appeal, adding that the superior courts made a finding that the 1st respondent's certificate of Title has never been challenged or cancelled and remain valid to date. Additionally, that the High Court Judgment was never challenged by way of a cross-appeal. It contended that the Hospital premises and buildings which have been serving as a hospital have been operated on the suit properties, not by the Government but by a Private Company Limited by Guarantee.
37. On the fourth issue, whether the 1st respondent is the owner of the Hospital known as Uasin Gishu Memorial Hospital and the suit properties, the 1st respondent submitted that the appellants have expressly admitted the 1st respondent's ownership of the suit properties. Moreover, the 1st respondent urged that the suit properties were at the time of their acquisition by the appellants and the 2nd respondent protected by the provisions of section 27 and 28 of the Registered Lands Act (now repealed) and now section 25 and 26 of the Land Registration Act. Learned Counsel cited the case of *Kuria Greens Limited v Registrar of Titles & another* [2013] 1 EA 162, to support the 1st respondent's argument. The respondent reiterated that the appellants have never challenged the High Court's finding on the ownership of the suit properties.



38. On the fifth issue, as to whether the Court of Appeal was right in holding that Legal Notice No 78 of 1998 was a violation of the 1st respondent's Fundamental Rights to ownership of property under s 75 of the repealed *Constitution*, while citing section 26 and 27 of the *Registered Land Act*, section 70(a) & (c), 75 and 84 of the retired *Constitution* and the *Land Acquisition Act*, the 1st respondent supported the Court of Appeal's finding that its fundamental right to ownership of property was violated. It maintained that having its suit premises acquired without compensation amounted to a violation of its rights to ownership of property.
39. On the sixth issue concerning the Court of Appeal's finding directing that the 1st respondent be paid compensation for the compulsory acquisition of its Hospital and suit properties, the 1st respondent submitted that even though it did not plead to be compensated, the Constitution mandates the court to make an award where it finds that a right has been violated. The 1st respondent cited the following cases in support of its submissions: *Gairy v Attorney General of Grenada* [2001] UKPC 30; *Merson v Cartwright* [2006] 3LRC 264, 272-3, *Attorney General v Ramanoop* [2005] UKPC 15; and *Attorney General of Gambia v Jobe* [1985] LRC (Const) 556. The 1st respondent added that the issue of compensation was settled in Misc Cause No 350 of 2005 in the Judgment dated November 25, 2005 and that the appellants are now estopped from raising the same in this appeal.
40. On the seventh issue, questioning the manner in which the appellate judges exercised their jurisdiction in setting aside the trial court's judgment, the 1st respondent submitted that the Court of Appeal did not exceed its jurisdiction by adjudicating a constitutional issue as the same is provided for by section 3 of the Appellate Jurisdiction Act. The 1st respondent cited the following cases in support of its argument: *Windward Properties Limited & another v Williams & another* [1988] LRC (Const) 406, *Attorney general v Lawrence* [1985] LRC (Const) 921, *Attorney General of the Gambia v Jobe* [1985] LRC (Const) 556 and *N Nagendra Rao and Co v the State of AP*. AIR (1994) SC.
41. On the eighth issue, whether the dispute was a private law matter or a public law one, the 1st respondent, while citing S 84(1) of the retired Constitution submitted that the matter was not a private law dispute but a public law one. The 1st respondent cited the case of *Peter M Kariuki v Attorney General* [2014] eKLR, *Ramlogan v The Mayor, Aldermen & Burgesses of San Fernando* [1986] LRC (Const) 377 and *Maharaj v Attorney General of Trinidad and Tobago* (No2) [1978] 2 All ER 670. Learned counsel further submitted that the appellants did not appeal a ruling issued on October 13, 2006 where the issue was determined.
42. As to whether the dispute was res judicata in the light of the decision in HCCC No 123 of 1998, the 1st respondent submitted that the said suit was never determined on merit since the same was struck out on June 15, 2005 on the basis that the 1st respondent had been struck out off the Register as a company had thereby ceased to exist as a legal entity. The 1st respondents also urged that the same argument had been raised by the appellants in a Preliminary Objection which was dismissed on October 13, 2006 in Misc Civil Appl 12A of 2006, and that they never appealed the said ruling. The 1st respondent concluded its submissions by urging us to dismiss the appeal and cross-appeal with costs.

D. Issues for Determination

43. From the pleadings filed, the respective parties' submissions, list and bundle of authorities, the following issues crystallize for determination:
- (i) Whether the appeal before this court meets the constitutional threshold under article 163(4) (a) of the *Constitution*?
 - (ii) Whether the High Court had jurisdiction to entertain the suit before it?



- (iii) Whether the Court of Appeal had jurisdiction to entertain the appeal before it?
- (iv) What reliefs should the court offer?

E. Analysis and Determination

(i) Whether the appeal before this Court meets the constitutional threshold under article 163(4)(a) of the Constitution?

44. The appellants submitted that the present appeal is proper before us as it raises questions on the interpretation and application of article 40 of the *Constitution* as read together with section 75 of the repealed *Constitution* on the protection of the right to property. Additionally, the appellants submitted that the Court needs to make a finding on the Court of Appeal's retrospective application of section 75 of the retired *Constitution* in awarding compensation to the 1st respondent. The 1st and 2nd respondent did not submit on this court's jurisdiction to entertain the instant appeal.

45. The Supreme Court's appellate jurisdiction is set out in article 163(4) of the *Constitution* of Kenya which states as follows:

- “(4) Appeals shall lie from the Court of Appeal to the Supreme Court –
 - a. As of right in any case involving the interpretation or application of this Constitution; and
 - b. In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).
- (5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”

46. section 15(1) of the *Supreme Court Act* also provides that appeals to this court shall be heard only with the leave of the court. section (15)(2) of the same *Act* on the other hand provides that Sub-section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

47. Apart from the aforementioned constitutional and legal provisions, this court has also stipulated the limits of its jurisdiction under article 163(4)(a) of the *Constitution* in its decisions, which decisions are still applicable. In the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Pet No 3 of 2012; [2012] eKLR, a two-Judge Bench of this Court (Tunoi and Wanjala SCJJ) set the guiding principles as follows:

- [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).”



48. Further, in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, SC Pet No 10 of 2013 this court observed as follows:

[37]: “In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has 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].

49. This court reiterated the same principle in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, SC App No 5 of 2014; [2014] eKLR (Munya 1) where we stated thus:

[69]: “The import of the court’s statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

50. So then, does the present appeal raise issues of Constitutional interpretation and application and have the same issues been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this court by way of an appeal? Having perused the Record before us (Volume IV at page 909), we note that at the High Court, the Learned Judges listed the following as issues for determination namely: whether the issues determined as preliminary points of law should be revisited; whether there was non-disclosure of material facts; the effect of other related cases; whether the originating summons discloses any constitutional issue or cause of action; and who bears the costs of the proceedings. We note that despite determining the first three issues, the High Court did not conclusively determine the fourth issue namely, whether the originating summons discloses any constitutional issue or cause of action? The learned Judges found that whereas the real issue was whether or not the fundamental rights of the Plaintiff were breached and whereas the 1st respondent claimed that the land and other assets belongs to it, the appellants claimed that the Land was government land. Consequently, the Learned Judges came to the conclusion that the Originating Summons raised a dispute as to who really is the owner of the disputed land and other assets, and that required viva voce evidence not affidavit evidence. Instead, the Court dismissed the originating summons for lack of jurisdiction.

51. A further perusal of the Record (Volume IV at page 1064) disclose the following as the issues listed for determinations by the Learned Judges of the Court of Appeal: Whether the Originating Summons was competent? Whether the 1st respondent was a public or private entity; Whether the Hospital and suit properties belonged to the appellants or the 1st respondent; Whether the Legal Notice led to a violation of the 1st respondent’s constitutional rights, and if so whether its rights were violated; and whether the 1st respondent was entitled to the reliefs sought. In addressing the question as to whether the Originating Summons was competent before the High Court, the Learned Judges found that the Originating Summons was proper before the High Court. It also found that it was incumbent upon the High Court to determine whether or not a violation of rights had occurred due to the Legal Notice and in failing to reach a finding on a matter that was central to the dispute, the court failed to fulfill its constitutional mandate, and in so doing, misdirected itself. Instead of referring the matter back to the High Court, the Court of Appeal took it upon itself to determine the issues before it.



52. This Court has in previous decisions emphasized the significance of respecting the hierarchy of the judicial system. In *Peter Oduor Ngoge v Francis Ole Kaparo & others*, SC Petition No 2 of 2012; [2012] eKLR at Par [30], we stated:

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”

53. Taking all the above matters in context, we hold that this appeal, indeed, falls within the ambit of article 163(4) (a) of the *Constitution* and is rightly before us.

(ii) Whether the High Court had jurisdiction to entertain the appeal?

54. The High Court is established as such under article 165 of the *Constitution* with unlimited original jurisdiction in criminal and civil matters and with jurisdiction to determine questions on denial, violation, infringement or threats to rights or fundamental freedoms. The article provides as follows:

“article 165(1) There is established the High Court of Kenya, which-

....

(3) Subject to clause (5), the High Court shall have-

- (a) Unlimited original jurisdiction in criminal and civil matters;
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) ...”

55. We are aware that the decision herein was rendered before the *Constitution 2010* was promulgated. Even so, the retired Constitution did make provision for the High Court’s unlimited original jurisdiction in civil and criminal matters at section 60(1) and therefore, there was no excuse for the High Court’s failure to address the issues in dispute. We therefore agree with the Court of Appeal’s finding to the extent that the High Court had a constitutional obligation to determine the issues before it and in failing to do so, the learned judges failed to fulfil their constitutional mandate.

(iii) Whether the Court of Appeal had jurisdiction to entertain the claim before it?

56. Having found that the High Court failed to execute its constitutional mandate, the learned Judges of Appeal proceeded to address the substantive issues before them. In doing so, the appellate court relied on affidavit evidence, without giving parties the opportunity to present and examine evidence. We are aware that the learned judges of Appeal may have invoked section 3(2) of the *Appellate Jurisdiction Act*. Ordinarily, this would have been proper had all the facts and law been well presented at the trial court. It is not contested in the superior courts and even before this Court that the question of ownership of the suit premises, the legal status of the 1st respondent and compensation (if any) upon acquisition of the suit premises by the appellants and vesting the same upon the 2nd respondent are highly contested. We do agree with the High Court on its finding only to the extent that the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it. Consequently,



we fault the Court of Appeal for determining the substantive issues before it, which issues had not been exhaustively determined by the High Court. This act denied the parties the opportunity to be heard and effectively and exhaustively address the contested issues. For this reason, we find that both superior courts denied the parties their right to be heard as provided for in article 25 and 50 of the Constitution. We do agree with the appellants' and the 2nd respondent's argument that the Court of Appeal ought to have referred the matter back to the High Court for determination of contested issues. Consequently, we find error on the part of the Court of Appeal in determining the matter as it did.

iv What reliefs should the Court offer?

57. The appellants sought that: (a) this appeal be allowed with costs; (b) the judgment of the Court of Appeal be set aside; and (c) the judgment of the High Court be affirmed. It is our finding that the High Court erred in not exercising its original jurisdiction on the issues before it and that the Court of Appeal erred in exhaustively determining issues before it without having them effectively and exhaustively determined by the High Court, and without affording the parties an opportunity to test the evidence presented by affidavit. Based on our findings above, we will allow the petition of appeal and cross-appeal but subject to the matter being heard afresh before the Environment and Land Court which, pursuant to article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act No 19 of 2011, has exclusive jurisdiction to, among others, hear and determine disputes relating to title, tenure, compulsory acquisition of land, public, private and community land. Furthermore, the Court has the requisite jurisdiction under section 13(7) of the Act to make any order and grant any relief as it deems fit and just including: interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.
58. Cognizant of the period in which it has taken for this matter to be prosecuted, the expiry date of the lease pertaining the suit premises, and in order to do justice for all the parties involved herein, we direct that the Environment and Land Court hears and determines this matter on a priority basis. Towards that end, we specifically direct the Environment and Land Court to address the following issues:
- (i) Who is the owner of Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? How was the land acquired?
 - (ii) Who owns the investment on Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126? By what means were the investments made?
 - (iii) Is the Hospital on the suit land? Is it a public or a private hospital? If it is a private Hospital when was it licensed to operate as such? If it is public, does it have a license to operate as such? When was the license given? How has the hospital been running?
 - (iv) Who is the 1st respondent? Is it a public body or a private entity? Has the 1st respondent been paying taxes? If not, why?
 - (v) Who have been the Board Members of the 1st respondent? Have they ever changed? If yes, why and when did they change?
 - (vi) Who is the Board? Why did the District Commissioner significantly chair the affairs of the 1st respondent over the years? On whose authority did District Commissioner chair?
 - (vii) How did the Directorship of the 1st respondent move to the Government?
 - (viii) If the 1st respondent were to be found to be entitled to compensation and can claim the same, what mechanism should be used to quantify the same?



- (ix) What is Legal Notice No 78 of 1998? What is its legal status?
- (x) What is the legal status of Gazette Notice No 6623 of 20th August 2004, published by the Registrar of Companies giving a notice of intended dissolution of a number of companies, including the 1st respondent?
- (xi) What is the legality of Gazette Notice No 815 of 4th February 2005 by which the 1st respondent was dissolved?
59. As to the questions of costs in this matter, this court has previously settled the law on award of costs: that costs follow the event, and that a judge has the discretion in awarding costs. This was the decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No 4 of 2012: [2014] eKLR. Considering our findings above, that it is the High Court that failed to exercise its constitutional mandate in the matter before it and further that the Court of Appeal exercised jurisdiction that it ought not to have exercised, and further that now we are sending the matter to the Environment and Land Court for determination of the specified issues, we find that there should be no order as to costs.
60. Consequently, we make the following orders:
- (i) The Petition of Appeal dated May 28, 2019 and filed on an even date and the Cross-appeal dated and filed on June 7, 2020 be and is hereby allowed in the following specific terms:
- (a) The Judgment and order of the Court of Appeal dated October 6, 2017 be and is hereby set aside.
- (b) The Judgement of the High Court dated March 19, 2010 be and is hereby set aside.
- (c) For the avoidance of doubt, the Judgment of the High Court is null and void.
- (d) The matter is hereby remitted to the Environment and Land Court for determination of the issues specified herein.
- (ii) Each party shall bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021.

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P. M. MWILU

Ag. CHIEF JUSTICE & Ag. 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

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

