**Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others (Petition 45 of 2018) [2020] KESC 9 (KLR) (Civ) (23 September 2020) (Judgment)**

*Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others [2020] eKLR*

Neutral citation: [2020] KESC 9 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**CIVIL**

**PETITION 45 OF 2018**

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

**SEPTEMBER 23, 2020**

**BETWEEN**

**PAUL MUNGAI KIMANI & 20 OTHERS & 20 OTHERS & 20 OTHERS & 20 OTHERS & 20 OTHERS ..... PETITIONER**

**ON BEHALF OF THEMSELVES AND ALL MEMBERS OF KOROGOCHO OWNERS WELFARE ASSOCIATION**

**AND**

**THE ATTORNEY-GENERAL ..... 1ST RESPONDENT**

**PROVINCIAL COMMISSIONER, NAIROBI AREA ..... 2ND RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 3RD RESPONDENT**

***(Being an appeal from the Judgement and Order of the Court of Appeal sitting at Nairobi (Koome, Azangalala and Ole Kantai, JJ.A) dated 23rd day of September 2016, in Nairobi Civil Appeal No. 173 of 2013)***

**Attributes that were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution.**

Reported by Chelimo Eunice

***Jurisdiction*** *– appellate jurisdiction – appellate jurisdiction of the Supreme Court – guiding principle when interpreting law touching on the appellate jurisdiction of the Supreme Court – which appeals lay from the Court of Appeal to the Supreme Court - appellate jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution – where article 163(4)(a) of the Constitution provided that appeals lay from the Court of Appeal to the*

*Supreme Court as of right in any case involving the interpretation or application of the Constitution – components of a matter that involved application and interpretation of the Constitution - Supreme Court's discretion to determine what matter was appealable to it under article 163(4)(a) of the Constitution – what were the attributes that were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution – whether a decision that a claim was not ascertainable and could not be determined interpreted or applied the Constitution – Constitution of Kenya, 2010, article 163(4)(a).*

**Brief facts**

The petitioners claimed to be poor landless people who had been relocated to Korogocho from various parts of Nairobi. They claimed ownership of the land in Korogocho contending that they were allocated the plots in the 1970s and 1990s and had put up various structures where they resided and had even developed the plots. It was alleged that in 1986, the then President visited the area and ordered roads to be constructed and electricity installed, which directive was implemented. The petitioners averred that they had severally petitioned the Government for titles and on November 22, 2000, in a public rally (baraza), the President directed the respondents together with the City Council of Nairobi to issue them with titles.

That notwithstanding the President's directive, the Provincial Administration started interfering with the petitioners' possession of the plots. On May 11, 2001 they were informed of Government plan to pull down their houses and come up with new permanent houses. They argued that because of the promises made to them, which they believed to be true, they were entitled to be issued with the title deeds for the plots. It was on that basis that they moved to the High Court seeking various orders, including, a declaration that they were entitled to be registered as proprietors/owners of the plots on which their semi-permanent houses stood (suit land).

The High Court dismissed the petition holding, *inter alia*, that it did not disclose any cause of action, hence there was nothing for it to consider in relation to whether the petitioners were to be issued with title deeds for the suit land. Aggrieved by that decision, the petitioners appealed to the Court of Appeal. The Court of Appeal held that their claim was not supported by evidence, was not ascertainable and therefore could not be determined. It dismissed the appeal. Aggrieved, the petitioners appealed to the Supreme Court arguing, among others, that they had an automatic right of appeal under article 163(4)(a) of the Constitution as the matters involved touched on constitutional interpretation.

**Issues**

i. Which appeals lay from the Court of Appeal to the Supreme Court?
ii. What was the guiding principle when interpreting law touching on the appellate jurisdiction of the Supreme Court?
iii. What were the attributes that were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution?
iv. Whether the decision that a claim was not ascertainable and could not be determined, interpreted or applied the Constitution.

**Held**

1. The Supreme Court in exercise of jurisdiction under article 163(4)(a) of the Constitution had to await and respect the superior courts' exercise of their jurisdictions on the issue. The rationale being that the Supreme Court would only sit on appeal on matters which the other courts had already determined so that as an apex court, it benefitted from the reasoning of those other courts.
2. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle was to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, had 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, deserved the further input of the Supreme Court.

3. Article 163(4)(a) of the Constitution had to be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court.
4. The petitioners moved to the High Court under section 84 of the repealed Constitution seeking to enforce their rights under sections 71, 74, 75, 77, 81 and 82 of the repealed Constitution. At the core of the case was the question whether their right to life under section 71, and right to property under section 75 of the repealed Constitution had been infringed or threatened by the respondents. Consequently, a *prima facie* case touching on the interpretation and application of the Constitution was brought to the Supreme Court. Thus, the appeal had ably invoked the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution.
5. The invocation of the court's jurisdiction was not however a panacea for a finding that a meritorious case had been made before the court. A finding that a court had jurisdiction to hear and determine a matter was a preliminary finding that the matter before the court was one for which the court was, by law, permitted to determine.
6. For a successful and competent appeal to the Supreme Court under article 163(4)(a) of the Constitution, it was not enough for a litigant to allege that his/her case before the superior courts involved interpretation and application of the Constitution. The Supreme Court's appellate jurisdiction under article 163(4)(a) was a qualified one. The Supreme Court was not just another tier of appeal for constitutional matters. A litigant had to categorically outline the various constitutional issues of interpretation and application which were in issue from the High Court and which the Court of Appeal subsequently considered, and erred in its interpretation and application to warrant appeal to the Supreme Court. While the Supreme Court would find that its jurisdiction had been invoked under article 163(4)(a) of the Constitution, it had the discretion on what issue(s) to determine or whether the alleged issues legitimately fell within that jurisdiction.
7. The Supreme Court retained the discretion to determine what matter was appealable to it under article 163(4)(a) of the Constitution. Such a matter had to be founded on cogent issues of constitutional controversy, which issues were to be so determined by the Supreme Court itself. So that, while a litigant would file his/her appeal, it was the Supreme Court which had the sole discretion of determining whether the issues brought before it raised cogent constitutional controversies to warrant its input.
8. The appellate jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution was not just another level of appeal. Thus, even if the original suit in the High Court or lower court invoked specific constitutional provisions, that fact alone was not enough for one to invoke and sustain an appeal before the Supreme Court. A party had to steer his/her appeal in the direction of constitutional interpretation and application. A party needed to directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the court(s)'determination and the matter turned on purely factual and or statutory issues.
9. The following attributes were imperative for an appeal to the Supreme Court under article 163(4)(a) of the Constitution:
    a. The jurisdiction revered judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court had to have been first raised and determined by the High Court (trial court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.
    b. The jurisdiction was discretionary in nature at the instance of the Supreme Court. It did not guarantee a blanket route to appeal. A party had to categorically state to the satisfaction of the Supreme Court and with precision those aspects/issues of his matter, which in his opinion fell

for determination on appeal in the Supreme Court as of right. It was not enough for one to generally plead that his case involved issues of Constitution interpretation and application.

c. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involved little or nothing to do with the application or interpretation of the Constitution did not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a) of the Constitution.

d. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserved the further input of the Supreme Court under article 163(4)(a) of the Constitution.

e. Challenges of findings or conclusions on matters of fact by the trial Court of competent jurisdiction after receiving, testing and evaluation of evidence did not bring up an appeal within the ambit of article 163(4)(a) of the Constitution.

10. In dealing with an appeal, the Supreme Court's first hurdle was the delimiting of issues that legitimately fell for its determination. That was important since it was an appellate court with a very qualified jurisdiction. Not every issue that was before the superior courts was open for its determination in exercise of its appellate jurisdiction under article 163(4)(a) of the Constitution. Matters of fact that touched on evidence without any constitutional underpinning were not open for the Supreme Court's review on appeal. The same was also true of matters that purely dealt with interpretation and application of statutory provisions.

11. As regards the issues framed by the petitioners for determination, save for the Supreme Court's jurisdictional issue, no other issue lay for determination by the Supreme Court in exercise of its appellate jurisdiction under article 163(4)(a) of the Constitution.

12. Both the Court of Appeal and the High Court agreed that there was no evidence upon which the petitioners had laid their claim to the suit land. That decision was majorly an evidentiary matter. The Court of Appeal had observed that the appeal raised constitutional issues of the right to housing and it was ready to make a determination on the issue. The only hurdle was that there was no evidence by the petitioners to back their claim. On that basis, the appellate court downed its tools and upheld the High Court decision.

13. The Court of Appeal in making the conclusion that the petitioners' claim was not ascertainable and therefore could not be determined, neither interpreted nor applied the Constitution. In no way did the Court of Appeal's conclusion of lack of evidence take any constitutional trajectory that warranted the Supreme Court's intervention. Some of the issues framed for determination by the petitioners touched on matters of fact and statutes. Some issues were being raised before the Supreme Court for the first time. The petitioners were under a duty to frame the issues they considered were of a constitutional nature which the Court of Appeal erred in its interpretation or application but they failed in that duty. No cogent issue of constitutional controversy arose and/or was in issue at the Court of Appeal that warranted the Supreme Court's further input.

14. At the time of filing the matter before the High Court, the petitioners were not facing any eviction threat or order. Before determining whether any of the orders they sought warranted being granted, the petitioners had to first prove their entitlement and right to the property. As the superior courts found, no evidence was tendered hence the case was not proved. Consequently, the Supreme Court found no basis upon which to delve into the interrogation of the matter whether reliefs such as structural interdicts were available.

15. The petitioners did not marshal a satisfactory case before the Supreme Court for it to exercise its jurisdiction under article 163(4)(a) of the Constitution. The petition lacked merit.

*Petition dismissed.*

***Orders***

*No orders as to costs.*

**Citations**

**Cases**

***Kenya***

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] eKLR; [1979] KLR 254 - (Explained)
2. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR); [2014] eKLR - (Explained)
3. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012]eKLR - (Explained)
4. *Gladys Wanjiru Munyi v Diana Wanjiru Munyi* Petition 31 of 2014; [2015] KESC 9 (KLR); [2015] eKLR - (Explained)
5. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] eKLR - (Explained)
6. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] eKLR - (Explained)
7. *Joseph Letuya & 21 others v Attorney-General & 5 others* ELC Civil Suit No 821 of 2012 (OS)[2014] eKLR - (Explained)
8. *Kimani & 20 others v Attorney General & 2 others* Application 17 of 2017; [2018] KESC 12 (KLR); [2018] eKLR - (Mentioned)
9. *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another* Petition 3 of 2012 ; [2012] eKLR - (Explained)
10. *Mitu-Bell Welfare Society v Attorney General, Kenya Airports Authority & Commissioner of Lands* Petition 164 of 2011; [2013] KEHC 6337 (KLR); [2013] eKLR - (Explained)
11. *Mombasa Technical Training Institute v Agnes Nyevu Charo & 106 Others, Commissioner Of Lands & The Registrar Of Titles* Civil Appeal 282 of 2010; [2014] KECA 138 (KLR); [2014] eKLR - (Explained)
12. *Njoya & Others v. Attorney-General* Miscellaneous Civil Application 82 of 2004 (OS); [2004] eKLR; [2004] KLR 259 - (Explained)
13. *Opore v Independent Electoral and Boundaries Commission & 2 others* Petition 32 of 2018; [2018] KESC 5 (KLR); [2018] eKLR - (Explained)
14. *Paul Mungai Kimani & 20 Others v The Attorney General & 2* Civil Miscellaneous Application 1366 of 2005; [2010] KEHC 2972 (KLR); [2010] eKLR - (Mentioned)
15. *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* Petition 2 of 2012; [2012] eKLR - (Explained)
16. *Rashid Odhiambo Aloggoh & 245 others v Haco Industries* Civil Appeal No 110 of 2001 - (Explained)
17. *Royal Media Services Ltd v Commissioner of Customs & Excise* Misc Appli 383 of 1995; [2001] KEHC 47 (KLR); [2001] eKLR - (Explained)
18. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR); [2013] eKLR - (Explained)
19. *Wa'Njuguna v Republic* Miscellaneous Criminal Case 710 of 2002; [2004] eKLR; [2004] KLR 520 - (Explained)

***United Kingdom***

*Ramsden v Dyson* (1866) LR, 1HL, 129 - (Explained)

***Regional Court***

1. *Commissioner of Lands v Hussein* [1968] EA, 585 - (Explained)
2. *Ndyanabo v Attorney-General* (2001) EACA 485 - (Explained)

***Trinidad and Tobago***

*Ramanoop v Attorney-General of Trinidad & Tobago* Civil Appeal No. 52 of 2001; TT 2003 CA 19 - (Explained)

**Texts**

1. Chanan Singh (1991), *Nationalization of Property and Constitutional Clauses Relating to Expropriation and Compensation* East African Law Journal Pages 101 to 102
2. Kevin Gray and Susan Francis Gray (2009), *Elements of Land Law* Oxford University Press;5th Edn pg 825, para 7.1.13

**Statutes**

***Kenya***

1. Constitution of Kenya - (Interpreted) articles 2(4); 29; 40; 43; 62; 135; 163(4)(a); 259(1); Schedule 6
2. Constitution of Kenya (Repealed) - (Interpreted) sections 70; 71; 72; 73; 74; 75; 76; 77; 78; 79; 80; 81; 82; 84
3. Elections Act (cap 7) - (Cited) In general
4. Evidence Act (cap. 80) - (Interpreted) section 112
5. Forest Conservation And Management Act (cap 385) - (Cited) In general
6. Government Lands Act (Repealed) (cap 280) - (Cited) In general
7. Interpretation And General Provisions Act (cap 2) - (Interpreted) section 3
8. Land Act (cap 280) - (Interpreted) section 7
9. Limitation of Actions Act (cap 22) - (Interpreted) section 41
10. Supreme Court Act (cap 9B) - (Interpreted) section 15(2)
11. Supreme Court Rules, 2012 (cap 9B Sub Leg) - (Interpreted) rule 32

**Advocates**

1. Senior Counsel Kamau Kuria, who represented the Petitioners.
2. Counsel Mr. Eredi, who represented the Respondents and was from the Attorney-General's chambers.

## JUDGMENT

### A. Introduction

1. Via a ruling of this court delivered on November 20, 2018 in *Paul Mungai Kimani & 20 others v Attorney-General & 2 Others* [2018] eKLR, the Petitioners sought and were granted leave to file their appeal out of time within fourteen (14) days of the date thereof. This appeal was thus filed on December 3, 2018 under section 15(2) of the *Supreme Court Act*, 2011, rule 32 of the *Supreme Court Rules* and articles 2(4) and 163(4)(a) of the *Constitution*. It was supported by the affidavit of Agnes Wanjiru, the 18th petitioner, sworn on her own behalf and on behalf of the other petitioners on September 30, 2018.

2. The petitioners sought orders that:

    a. The petition be allowed with costs.

    b. There be substituted, for the orders of the superior court and the Court of Appeal, an order allowing the Originating summons dated September 16, 2005 as prayed.

## B. Factual And Litigation Background

### a. At the High Court

3. Through *Civil Miscellaneous Application No 1366 of 2005*, the petitioners moved the High Court seeking the following orders:

    1. A declaration that the right to live under section 71 of the *Constitution* includes the right to live in dignity and protection of one's shelter and means of a livelihood.

    2. A declaration that a semi-permanent structure is property within the meaning of S 75 of the *Constitution*.

    3. A declaration that the applicants and all other members of Korogocho Owners Welfare Association (hereinafter referred to as the 'association') are entitled to be registered as proprietors/owners of the plots on which their semi-permanent houses stand.

    4. As an alternative to 2 above, a declaration that the applicants and all other members of Korogocho Owners Welfare Association are entitled to be issued by the 3rd respondent with leases for 99 years in respect of the parcels of land on which that semi-permanent structures are constructed.

    5. An order that the 1st and 3rd respondents do forthwith issue the applicants and all other members of Korogocho Owners Welfare Association leases for 99 years over the areas on which the plots stand.

    6. A permanent injunction to restrain the 2nd respondent his servants and/or agents from interfering with the applicant's and all other members of Korogocho Owners Welfare Association possession of their respective plots on which their semi-permanent structures are situated.

    7. An order that the respondents pay the costs of the application.

4. The petitioners claimed to be poor landless people who had been relocated to Korogocho, from various parts of Nairobi, such as Highridge and Grogan. They claimed ownership of the land in Korogocho, on their own behalf and that of 2, 584 members of a society known as Korogocho Owners Welfare Association (KOWA). They contended that they were allocated the plots in the 1970s and 1990s and had put up various structures where they resided and had even developed the plots. It was alleged that in 1986, the then President, Moi visited the area and ordered roads to be constructed and electricity installed, which directive was implemented. The Petitioners averred that they had severally petitioned the Government for titles and on November 22, 2000, in a public rally (*Baraza*) the President directed the respondents, together with the City Council of Nairobi, to issue them with titles. As evidence of this presidential directive, a newspaper article was tabled in court.

5. That notwithstanding the President's directive, the Provincial Administration started interfering with the petitioners' possession of the land. On May 11, 2001 they were informed of Government plan to pull down their houses and come up with new permanent houses. They argued that because of the promises made to them, which they believed to be true, they were entitled to be issued with the title deeds for the plots. It is on this basis that they moved to the High Court under section 84 of the *repealed Constitution* seeking to enforce their rights under sections 71, 74, 75, 77, 81 and 82 of the *repealed Constitution*.

6. The Attorney-General opposed the case on grounds that the suit land was Government Land under the *Government Lands Act*, cap. 280 (Repealed) and there were no records evidencing any allotment of the land to anybody. He urged that there were no formal documents availed to the Lands Office from the President seeking the land to be allocated to the petitioners, and neither was there any record of the physical removal of the petitioners from Highridge and Grogan areas and their relocation to Korogocho. He submitted that when Government decides to upgrade a slum, the same is done formerly through projects like the Mathare and Kibera upgrading projects. The Attorney-General stated that some of the residents of Korogocho were living on power lines or under High Power voltage lines and ought to be removed but their removal had been delayed on humanitarian grounds. He however admitted that the Petitioners were living in an unplanned slum with no adequate social amenities.

7. In its Judgment delivered on March 12, 2010, the High Court delimited three issues for determination, namely:

   (i) whether the applicants can bring a representative suit;

   (ii) whether the pleadings disclose any cause of action; and

   (iii) whether the applicants' rights under Sections 71, 74, 75, 77, 81 and 82 have been breached.

   The High Court (Wendoh, J), first found that the petitioners had not placed before the Court any evidence to prove that the land on which they lived on in Korogocho slum was allocated to them by the Provincial Administration, City Council of Nairobi or any Government official. Secondly, the court held that under section 84 of the *repealed Constitution* under which the originating summons had been filed, only two classes could bring a matter to Court:

   (i) one whose rights have been, are being or are likely to be contravened, and

   (ii) a person who is detained can have somebody else file suit on his behalf.

   That the section did not envisage representative or group action, as the rights in sections 70 to 83 of the *repealed Constitution* were rights personal to each individual. Consequently, the learned Judge dismissed the representative aspect of the motion and only maintained the case of only the 21 petitioners mentioned in the court pleadings.

8. As regards whether there was a cause of action disclosed, the court emphasised that

   > " it is law that he who complains that his rights have been or are likely to be breached, shall state the provision under which he complains, the nature of the complaint, how his rights have been or are likely to be infringed and the manner in which the rights have been infringed."

   It then evaluated the petitioners' plea on all grounds and found that on each section of the *Constitution* that breach was alleged, they had not pleaded the nature of the complaint, the manner in which their rights had been infringed and the manner in which they had been infringed. Holding that there was no cause of action disclosed, the learned Judge stated thus:

   > "I find and hold that the applicants pleadings are wanting in particularity of what they complain of, under the various sections cited and the respondent would not have known how to respond to these allegations. The court therefore finds that the pleadings do not disclose a cause of action that the respondent should be called upon to respond to."

9. Particularly, as regards section 71 of the *repealed Constitution*, the court had been asked to adopt a liberal interpretation of the provision as regards the right to life so as to include right to food, shelter and education etc. The court declined to accede to the request holding that

> " Section 71 of our *Constitution* ... relates to life in the sense of ordinary human existence and must be understood in that context."

Ultimately, it dismissed the case as follows:

> " There being no cause of action there is really nothing for this court to consider in relation to whether the applicants should or should not be issued with title deeds for the plots which they occupy or be declared owners of the plots they reside on. Firstly, courts do not issue orders in vain. It is noteworthy that there is not even a map of Korogocho slums exhibited showing exactly where the applicants reside if at all and where the land to be allocated is. The respondent contended that some of the applicants have built houses on way leaves and under power lines and have to be vacated. This court would not issue such orders to give title to the applicants as that area is not set aside for allotment to the petitioners. If this court were to grant such an order for issuance of title deeds to the applicants for the plots they live on, it might be an order in futility and may be difficult to implement Korogocho is vast slum with thousands of people living there. Giving such orders as sought without establishing whether the applicants live there, where exactly in Korogocho would be futile. All those residents are landless poor people. If the 21 applicants are issued with title deeds for their plots what happens to the rest of the slum dwellers and shouldn't the issuance of titles be done once to all the slum residents"

**b. At the Court of Appeal**

10. Being aggrieved, the petitioners moved to the Court of Appeal on appeal. Their appeal was anchored on 9 grounds which the appellate court summarised as follows:

a. The learned judge failed to adopt the procedure laid down in the case of *Rashid Odhiambo Aloggoh & 245 others v Haco Industries*, Civil Appeal No 110 of 2001 that laid the procedure of applying section 84 of the *Constitution*;

b. Failing to appreciate that the applicants have a right, an interest over the suit land capable of protection under section 75 & 84 of the *Constitution*;

c. Failing to adopt a growth and purposeful interpretation of the constitutional rights, erroneously holding that section 84 of the *Constitution* did not envisage group rights;

d. Failing to recognise the same court had given the applicants leave to file a representative suit on their own behalf and on behalf of members of Korogocho Owners Welfare Association;

e. Failing to apply the principle in the case of *Annarita Karimi Njeru v Republic* [1979] KLR 254 by holding the applicants did not particularise with reasonable precision the infringement of the constitutional provisions complained about;

f. Adopting a gigantic approach and interpretation of the right to life by finding out that the right to life was not likely to be violated by the respondents; and

g. Failing to uphold the fundamental rights and freedoms as provided for in the *Constitution*.

11. The petitioners reiterated their submissions as before the High Court. While the suit in the High Court was filed during the tenure of the *repealed Constitution*, the appeal before the Court of Appeal was filed and argued during the tenure of the new *Constitution* 2010. Thus, before the appellate court, the petitioners argued that due process must be followed if they are to be relocated from the plots they occupy because article 43 of the *Constitution* 2010 recognises enforcement of social economic rights. They argued that due to their long and uninterrupted occupation of the suit land, they had acquired proprietary interests that are similar to social economic rights protected under the *Constitution* 2010. That the court had failed to apply a purposeful interpretation and legal construction of the *Constitution*, and failed to recognise that their right to life is intimately connected with the right to property. That it was thus erroneous to find that no cause of action had been ascertained.

12. The Attorney-General opposed the appeal urging that although the petitioners have a right to life and to live in dignity, they were seeking to be protected to live in Korogocho area which is an unplanned settlement with no roads or amenities. He reiterated that the suit land remains Government land that has never been alienated for settlement and was intended for future development and the Petitioners were in illegal occupation. They had not acquired any rights over the suit land. That if the Government were to upgrade the slum area, there is a process by which the Government would verify the authenticity of the Petitioners' interests. He cautioned that if the orders sought were granted, it would set a dangerous precedent and hamper Government programmes.

13. The Attorney-General submitted that while the *Constitution* provides for social economic rights, the same are to be realised progressively. In any event, he urged that the suit that gave rise to the appeal was filed before the promulgation of the *new Constitution*. Further, that the petitioners had not proved any proprietary rights over the suit land, which disputed land they had not identified or exhibited any documents to prove the proprietary rights. He urged that the land in Korogocho is vast, the size and the exact parcel of land the Petitioners are claiming cannot be determined from the pleadings.

14. In its Judgement delivered on September 23, 2016, the appellate court refrained from addressing the question of locus standi of the petitioners to file a suit seeking enforcement of fundamental rights for a group of people registered as a society and decided to focus on the substantive legal issues. It delimited 3 issues for determination, namely:

    i. whether the appellants established their rights to ownership of the property known as LR No 82-85 Korogocho;

    ii. whether the appellants' rights to occupation of the land fell within the frame of constitutional rights and if so, were those rights threatened or contravened by the respondents? And;

    iii. whether the appellants are entitled to the declaratory orders as sought in the originating summons.

15. The appellate court held that the case involved a determination of which of the two public interests was greater:

> "occupational rights by the appellants as claimed that the court should declare them owners of their respective plots, or consideration of planning needs that take into account protection from health wrought by lack of planning?"

The appellate court however found and held that the appellants claim was not supported by evidence that can lead to it making a declaration that theirs is a public interest matter that overrides the Government responsibility for future planning. While the appellate court appreciated that the appeal raised a constitutional issue of right to housing it was emphatic that the appellants had a duty

to establish that their rights, that are identifiable and determinable, had been or were likely to be contravened by the Government. Further that it must be proved that the rights of the appellants override public interest and if declared, they do not contravene other people's rights.

16. The Court of Appeal found that unfortunately, the appellants had not proved their case. It held in this regard as follows:

> " [21] We have gone through the records in this appeal; it is a matter of great regret that we find the appellants' claim is not ascertainable and therefore cannot be determined. We say so, because the appellants did not annex any document(s) to prove the existence of the land on the ground. They have also not demonstrated whether they made any efforts to obtain copies of such documents relating to the suit land either from the City Council of Nairobi (now Nairobi County Government) or the Government Lands Office. This is public land held by the Government for use by the present or future development needs. Without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it is next to impossible for a court of law to issue declaratory orders directing the Government to issue title documents to the appellants.
>
> [22] What part of the land, what size and to who should the land titles be issued? Is it the Association or to the persons listed in the suit? Who is occupying which plot and who will plan the roads and other infrastructural necessities? Supposing, some of the houses fall within road reserves and require to be demolished and the court has directed titles to be issued in respect of particular plots that fall within the road reserve or way leave for power lines, what would be the consequence? ... Needless to state a court of law cannot issue orders which are not capable of implementation and worse which can give room to confusion and thereby become a recipe for chaos instead of fostering peace and harmony between appellants and the respondents."

17. The appellate court also observed that there was no evidence of any threat to evict the appellants, or to demolish their houses that accompanied the suit. Consequently, the appellate court upheld the High Court's holding that under Section 84 of the *retired Constitution*, a person whose rights have been or are likely to be contravened, is obliged to state his/her complaint and to identify with exact clarity the manner and extent of infringement. It found that the appellants had failed to prove their case and there was no legal justification that supported granting of the orders sought before the High Court. The appeal was thus dismissed with no order as to costs.

**c. Petition before the Supreme Court**

18. Before this court, it was contended that the petitioners have an automatic right of appeal under article 163(4)(a) of the *Constitution* as the matters involved touch on constitutional interpretation. That sections 6 and 7 of the sixth schedule to the *Constitution* 2010 provides that all the rights and obligations subsisting immediately before the effective date shall continue as rights and obligations of the national Government under the 2010 *Constitution*; and further that all law in force immediately before the effective date continue to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the 2010 *Constitution*.

19. The petitioners contended at paragraph 7 of the petition that the Court of Appeal erred in holding that:

a. oral evidence was essential despite the fact that there was uncontroverted affidavit evidence on record;

b. documentary evidence of the Government land known as LR No 82-85 Korogocho, was needed despite the fact it was common ground that the petitioners and all other members of Korogocho Owners Welfare Association were occupying Government land available to them by the Government in the 1970s and 1990s;

c. the Government license/permission to a citizen to establish a home and the construction of a semi-permanent structure are not constitutional rights;

d. the rights of the petitioners were not threatened by the Government;

e. the petitioners and all other members of Korogocho Owners Welfare Association have no right to continue living in portions of Korogocho slums assigned to them in 1970s and 1990s.

20. Further at paragraph 35 of the petition, it is contended that the Court of Appeal erred in upholding the High Court decision, and holding that:

a. there was no admission of liability on the part of the Government and that it was clear from the affidavit evidence that slum upgrading was done by the Government with co-operation of occupants in a co-ordinated manner;

b. the petitioners' claim was not supported by evidence that could lead the Court of Appeal into making a declaration that theirs was a public interest matter that overrides the Government responsibility for future planning;

c. the petitioners' claim was not ascertainable and could, therefore, not be determined as the petitioners did not annex any documents to prove the existence of the land on the ground and that the petitioners had not demonstrated whether they made any efforts to obtain copies of such documents from the City council of Nairobi or the Government Lands Office;

d. without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it was impossible for the court to issue declaratory orders directing the Government to issue title documents to the petitioners;

e. there was no evidence of any threat to evict the petitioners or to demolish their houses that accompanied that suit;

f. the petitioners claim to be declared owners of the suit property was premature;

g. there was no legal justification of granting the orders sought.

21. By reaching the above conclusions, it was contended that the Court of Appeal wholly ignored the undisputed evidence showing that the Provincial Administration in 1970s and 1980s anticipated the Petitioners' social economic right under article 43(3) of the *Constitution*. Thus, the appellate court failed to provide the Petitioners with an effective remedy, being an order that they be provided with title to assure them of shelter. It ignored the transformative nature of the *Constitution* 2010 which requires that human dignity of all be respected. That the appellate court thus fell into error in not allowing the appeal and grant a structural interdict to facilitate the transformation of the petitioners' lives. That it failed in not holding that the appeal before it concerns the constitutional obligation of the Government in a constitutional democracy to ensure that every citizen has a roof over his/her head.

22. It was further contended that the Court of Appeal ignored the jurisprudence of the consequences of a respondent failing to controvert facts asserted by the other side. That it overlooked the evidence not challenged by the 1st and 2nd respondents who represented the Provincial Administration that the latter settled the Petitioners who were poor and landless in Korogocho where they were and did construct semi-permanent houses on Government land. That it erred in not holding that the right to life under section 71 of the *former Constitution*, and the right not to be subjected to inhuman or degrading treatment under section 74, protected the rights of the Petitioners to live in semi-permanent houses on Government land provided by it. Further, that it overlooked section 112 of the *Evidence Act* which places a burden of proof on a party within whose knowledge any fact is in its peculiar knowledge: in this case, the circumstances under which Korogocho slum came into existence has always been within the special knowledge of the Respondents.

23. Arguing in support of the grounds, it was urged that this court in *Lemanken Aramat v Harun Meitamei Lempaka and 2 others* [2014] eKLR held that comparative constitutional jurisprudence is to be used in interpreting the *Constitution*. Thus, the appellate court erred when it wholly ignored the interpretation of "right to life" given by the Indian Supreme Court, which was a persuasive authority. It thus erred in its interpretation of section 71 by adopting a narrow interpretation of the *Constitution*.

24. The petition was supported by an affidavit sworn by Agnes Wanjiru, the 18th petitioner, who swore the same on her own behalf and on behalf of the other petitioners. That as at the time when she swore the affidavit, the 1st, 2nd, 4th, 6th, 9th, 11th, 12th, 13th, 16th, 17th and 19th petitioners had passed on. In her affidavit she reiterates the averments of Paul Mungai Kimani, who swore the affidavit in support of the originating summons in the High Court. Further, she avers that the superior courts misapprehended of the case before them. That the Court of Appeal ignored the law governing suits tried by affidavit evidence which was not controverted. That a part of the evidence which the courts below held was missing, could only come from the provincial administration which had the burden of furnishing it under section 112 of the *Evidence Act.* That there is overwhelming evidence to prove the contravention of their rights.

25. The petitioners set out the following as the questions for determination by this court:

    a. Whether this honourable court has jurisdiction to hear and determine the appeal before it under article 163(4)(a) of the *Constitution*.

    b. Whether the petitioners herein have the right to appeal, under article 163(4)(a) of the *Constitution*, against the Judgment of the Court of Appeal dated and delivered on September 23, 2016.

    c. Whether the petitioners are entitled to the reliefs claimed in their originating summons dated September 16, 2005.

    d. Whether the 1st and 2nd respondents admitted the facts about settlement of Korogocho as explained in the affidavit of Mr Paul Mungai Kimani sworn on the September 16, 2005.

    e. Whether the Court of Appeal imposed, on the petitioners the burden of proof imposed on the 1st and 2nd respondents by section 112 of the *Evidence Act*.

**C. Parties' Submissions**

26. The matter came up for oral hearing and highlighting of submissions on the February 5, 2020. The petitioners were represented by Senior Counsel Kamau Kuria, while the respondents were represented by Counsel Mr Eredi. Since they had not filed their list and bundle of authorities, they were granted

leave to file the list of authorities they relied on at the hearing and each complied with that court's direction.

**a. The Petitioners' Submissions**

27. The petitioners' written submissions are dated December 1, 2018 and were filed on December 3, 2018. They submitted that article 163(4)(a) of the *Constitution* grants them a right of appeal and that under article 259(1), the *Constitution* shall be interpreted in a manner that:

    (a) promotes its purposes, values and principles;

    (b) advances the Rule of Law, and the human rights and fundamental freedoms in the Bill of Rights

    (c) permits the development of the law and

    (d) contributes to good governance.

    They urged that the appellate court overlooked this court's decision in *Speaker of the Senate & another v Hon Attorney-General & 3 others* [2013] eKLR, that the Constitution is a charter for transforming the country.

28. It was submitted the appellate court ignored the undisputed evidence that the Provincial Administration in 1970s anticipated the right now provided for under article 43(3) of the *Constitution*, mandating the State to provide appropriate social security to persons unable to support themselves and their dependents. They cited *Commissioner of Lands v Hussein* [1968] EA, 585 urging that Harris J, applied to the Government Land the rule in *Ramsden v Dyson* (1866) LR, 1HL, 129, with the result that the individual promised a lease and following which promise he expended labour and money was declared to be entitled to be a lessee. In this regard, it was urged that the appellate court ignored wholly that the reason for the petitioners to live in Korogocho was the State's own concern for their humanity and took them to its own land. That the respondents now wish to take away the proprietary right they have acquired to their respective portions of land.

29. That the intended State deprivation of petitioners shelters in Korogocho without provision of alternative accommodation amounts to breach of section 82 of the *repealed Constitution* and article 27 of the *new Constitution*, not to be subjected to an arbitrary and capricious exercise of State power. In support of this contention, they cited the Ruling of Rawal, J (as she then was) in *Royal Media Services Ltd v Commissioner of Customs & Excise* [2001] eKLR that, any judiciary worth its salt should grasp and uphold the letters and the spirit of the *Constitution* of its country and stand as a strong wall against any action of the officials of the Government which is either irrational, capricious or arbitrary and term the same as unconstitutional.

30. The petitioners cited an article by Justice Chanan Singh, "*Nationalization of Property and Constitutional Clauses Relating to Expropriation and Compensation*", in 1991, East African Law Journal Pages 101 to 102, in urging that the word 'property' should be defined broadly. Reference was also made to the definition of 'property' in section 3 of the *Interpretation and General Provisions Act*, cap. 2 Laws of Kenya. Also cited is an Article by Thomas Allen,

> "Commonwealth Constitutions and right not to be deprived of property", for the preposition that section 75 of the *retired Constitution* should be broadly interpreted."

31. On remedies, the petitioners urged that where a person's rights are contravened, the remedies available under section 84 of the *repealed Constitution* are those in private law like the declaration of rights,

injunction, conservatory order, an order of compensation and an order of Judicial review like certiorari, an order of prohibition and an order of *mandamus*. Cited in this regard was the Court of Appeal of Trinidad & Tobago's decision in *Ramanoop v. Attorney-General of Trinidad & Tobago* (2004), Law Reports of the Commonwealth, for the preposition that the court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. That there is no limitation in what the court can do.

32. It was thus urged that in view of the peculiar circumstances of their settlement in Korogocho slums, the case before the High Court and the Court of Appeal called for the grant of structural interdict to compel the Government to either grant the petitioners titles to the parcels of land on which their semi-permanent houses stand or provide them with a shelter over their heads. Reliance was placed on the cases of *Njoya & others v Attorney-General* (2004) 1 KLR259 where liberal principles of constitutional interpretation were amplified; and the case of *Ndyanabo v Attorney-General* (2001) EACA 485 urging for purposive interpretation of the Constitution, where in Tanzanian it was held that the Constitution is a living document having a soul and own conscience and which courts must avoid crippling through narrow or technical construction so that it can become a solid foundation of democracy.

33. As regards the right to life under section 71 of the *former Constitution*, it was submitted that this right to life has been interpreted in other jurisdictions to include not only physical life but all the limbs through which life is enjoyed, which include the right to live with basic human dignity. It was thus urged that for the State to fail to provide a shelter or roof over the head of the poor and landless in Kenya, is subjecting the individual to torture or other degrading treatment within the meaning of section 74 of the *former Constitution* whose equivalent is article 29 of the *Constitution* 2010. That the poor and landless and their families are condemned to a life uncertainty regarding the basic and elementary need of a roof over one's head.

34. The court was urged to rely on the finding of Nyamweya, J in *Joseph Letuya & 21 others v Attorney-General & 5 others* [2014] eKLR in interpretation of right to life and dignity as an anticipated Social Economic Right under articles 26, 42 and 43 of the *Constitution* in respect of the Ogiek People. That it was held that if they were to be driven away they should be given alternative place of abode. The State failure to provide shelter to a poor landless Kenyan is subjecting the individual to torture or other degrading treatment as per section 74 of the *repealed Constitution* which is equivalent to article 29 of the *current Constitution*.

35. The petitioners urge that the doctrine of proprietary estoppel and acquiescence, as stated by Kevin Gray and Susan F. Gray, *Elements of Land Law*, 5th Edition, Page 1196 was applicable to their case. This doctrine recognizes an informal creation of property rights. It is related to that of constructive trust by which certain rights in land may be created informally. As per the authors,

> " a person is prevented from insisting on his strict legal rights whether arising from contract or on his title deeds or by statutes when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."

It was thus argued that the court is given power to fashion a remedy to fit a new situation, especially in light of previous dealings between the parties herein in respect of the settlement in the slum. The respondents had allowed the petitioners to believe that they had accrued rights to the subject matter which created an assurance to them. They denied the respondents' allegations that their claim was based on doctrine of adverse possession.

36. It was submitted that section 112 of *Evidence Act* was improperly applied by the superior courts by shifting the burden of proof, and by evading the fact that the petitioners were brought from

two different places; some from Grogan and others from Westlands (Highridge), living on a private land. Others were brought in from slums in Garden Estate, City Park, Nairobi River and Kariobangi between 1970-1978 by the Provincial Administration in conjunction with the City Council. The records of implementing that Government policy to settle landless persons was thus in the possession of the 2nd respondent. That in the courts below, the burden of proving the documents and the settlements was laid on the petitioners only. All the petitioners did was once they reached Korogocho there was a Mr Wahome to give the plots for which they were now being asked to produce documents. The documents in respect of the establishment of Korogocho were there and also there was a plan and evidence for that.

37. The petitioner's counsel faulted Mr Gordon Ochieng for feigning ignorance of what the Government was doing since 1970s. The courts should have appreciated that the poor have an equal right to dignity and ought to have a place where they can live. Korogocho slums was identified as the place where these poor would live with dignity. That the State visited the slum in 1986 and 2000, with the visit in 2000 being a visit by the president. Counsel submitted that, as is evident at page 272 of the record of appeal, the petitioners applied for leave to cross examine Mr Gordon Ochieng at the High Court, but the court declined to grant leave for production of that evidence. It was thus urged that if a party is served with an affidavit and that party fails to controvert that evidence, he is deemed to have accepted the same and so the State by not replying must be taken to have accepted the facts.

38. Counsel confirmed to the court that the petitioners were seeking title to the land they occupy which they were promised by the state, to the exclusion of all others. That among the 6 prayers they sought in the originating summons, one was for them to be issued with titles or leases for the land they occupy based on the doctrine of property estoppel which applies to the Government, so as to get security of tenure. Second was an injunction so that they are not evicted. He reiterated that the courts below ignored the emerging jurisprudence on right to life and also failed to understand the nature of poverty. With these submissions, the petitioners urged that the appeal to be allowed.

**b. Respondents' Submissions**

39. The respondents did not file any reply to the petition. They only filed written submissions dated October 15, 2019 on October 16, 2019 through their Counsel Mr Eredi of the Attorney-General chambers. In their Submissions, they only addressed one issue: whether the petitioners acquired proprietary rights to the said land. Submitting that the *Constitution* 2010 has protected the Petitioners' right to life under article 26(1) and bestowed on every person the inherent dignity and the right to have that dignity respected and protected under article 28, it was urged that the bone of contention in this matter was whether the Petitioners have any claim against Government Land and whether they have proprietary rights over either by virtue of the *Constitution of Kenya* 2010 and the *Land Act*.

40. It was submitted that while article 40 of the *Constitution* 2010 provides for the right of a person to acquire and own property of any description in any part of Kenya, article 62 defined what "Public Land" is. Particularly, that article 62(1)(a) defines public land which at the effective date was un-alienated Government land as defined by an Act of Parliament in force at the effective date. On this basis, it was urged that the Petitioners do not dispute that the land in which Korogocho slum sits on is Government land. That the High Court and the Court of Appeal not only found that it was Government land but also that the slum sits on an unplanned settlement, which was not defined nor alienated for settlement as it lacked basic social amenities. That the courts went further to declare that the land was Government land which the petitioners had no proprietary rights over as they had not tendered any evidence before this court proving their case that they have proprietary rights over the

land. The only evidence tendered was in the form of a newspaper print allegedly quoting the then President Moi directing that the land in Korogocho be allocated to the residents.

41. It was submitted that section 7 of the *Land Act* provided for the procedure of acquiring land in Kenya, which position was the law even before the promulgation of the *Constitution* 2010. They urged that a presidential directive is not one of the ways the petitioners can acquire land, and the same should be regarded as a political statement with no bearing in law. That article 135 of the *Constitution* provides that a decision of the President in his performance of any function of the President shall be in writing and shall bear the seal and signature of the Republic.

    The petitioners have not adduced any evidence in form of written instructions through an Executive Order from the President directing that the said parcels of land be alienated and allocated to them. They thus urge the court to uphold the Court of Appeal decision that the petitioners' claim is unascertainable and cannot be determined for lack of evidence or any official documents.

42. Reference was made to the case of *Joseph Letuya & 21 others v Attorney-General & 5 others* [2014] eKLR where the Court was tasked with a similar set of issues. The court held as follows:

> "I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th respondents' arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interest in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the *Forest Act* that requires a process of excision of forest land before such land can be allocated. The applicants did not bring evidence of such processes of allocation of titles to land located in the Mau forest and solely relied on their long occupation of the same. In addition, under law, forest land being Government land, cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of section 75 of the *old Constitution* or article 40 of the *current Constitution*."

43. They urged that courts do not make orders in vain. That the petitioners are asking the court to legalize an illegality. That it is not in dispute that the petitioners are on Government land which at the time of commencement of this suit was not alienated for settlement. The respondents thus urge the court to consider the following critical issues, which issues the Court of Appeal also underscored, namely: what part, size and to whom will the title of the land be issued were the court to grant such orders?

44. The respondents acknowledged that under article 43(1)(b) of the *Constitution*, every person has the right to accessible and adequate housing and to reasonable standards of sanitation. They however urged that the courts have been categorical that as regards the implementation of socio-economic rights, these are progressive rights and have to be realized as time goes by. The courts have however placed a duty on the state to show steps it has taken towards realization of these rights. In this regard, they cited the High Court decision in *Mitubell Welfare Society v Attorney-General & 2 others*, Petition No 164 of 2011. This court takes judicial notice that this case was reversed on appeal to the Court of Appeal and is presently pending determination on a further appeal to this court. So, the less said the better at this stage.

45. It was urged that the Government had made tremendous progress towards realization of article 43(1)(b). That with collaboration with Un-habitat and other stakeholders, the Government had initiated the Kenya Slum Upgrading (KENSUP) in 2004, whose objective is to improve lives and livelihoods of people working and living in slums. They thus urged that the orders that were sought by the petitioners

are what the Government has done through the Korogocho Slum upgrading Programme. Thus, that as the Government endeavours on implementation of plans for upgrading Korogocho slum, the same defeats the purpose of this petition.

46. In his oral submissions, counsel for the respondents submitted that parties were in agreement that the land in contest is a Government Land and that the appellants were living on it. Counsel admitted also that under articles 258 and 22 of the *Constitution* the Petitioners have a right to bring these proceeding as a Representative Suit. That the petitioners' right to life and inherent dignity are protected under articles 26 and 28 of 2010 *Constitution*, was also not contested.

47. Counsel argued that the petitioners were contradicting themselves. They on one hand said the state has a mandate to give them shelter while on the other hand confirmed the State had given them shelter by admitting they were taken to the place where they abode and given that same land by the State. He did not see the reason they had come to court if what they were submitting was true. Counsel however, added that he was not to be taken as having admitted that the petitioners had been taken to the contested land and given plots there at as submitted, but if at all it had been done, then the State had fulfilled its obligation. When the court sought to confirm the import of that point, counsel confirmed that it was the responsibility of the state, if it indicates to its people to stay in a certain land and construct, expend money in constructing, not to be expected to remove those people unless it is providing alternative accommodation.

48. Counsel reiterated that the petitioners did not have proprietary rights because they had not been given the land. The right to land had thus not crystalized. Relying on the affidavit of Mr Ochieng deponed on behalf of the Commissioner of Lands, it was submitted that there was no record to show that the petitioners were given the land. The petitioners were consequently unlawful squatters on the land. That the Commissioner of Lands was the custodian of public land at the time. That from the affidavit, the land in contest covered sewer lines and electricity wayleaves. Counsel submitted that if the court was to give a blanket judgment that the petitioners be given the land, and it turns out there is an electricity way leave, the order will be unenforceable.

49. Counsel urged that whereas the petitioners stated that their suit was brought under common law principles, instead of proving that allegation, they sought for broader interpretation of the Constitution. He urged that the contention boiled down to property rights which was a statutory issue and argued that when there is a statute governing a particular aspect, Courts should look at that particular legislation.

50. Counsel argued that the petitioners claim was based on the doctrine of adverse possession, since their claim revolved around their occupation thereof. However, as regards the law on adverse possession on public land, Section 41 of the *Limitation of Actions Act* excludes and limits public land from the operation of adverse possession. That under the *Government's Land Act*, occupation of public land was criminalized, meaning Petitioners were in unlawful occupation, hence committing a crime. Counsel termed it as irregular for a party to occupy Government Land then go to court to convince the court to be given the land one occupies. In support counsel relied on the Court of Appeal case of *Mombasa Technical Training Institute v Agnes Nyevu Charo & 108 others* [2014] eKLR, where it was held that rights cannot flow from illegal occupation to warrant legitimate expectation over Government Land. To create a precedent that a legitimate expectation for allocation of Government Land can arise out of occupation declared illegal by statute would be opening a Pandora's box encouraging squatter invasion of Government Land, which is contrary to public policy and maintaining social order.

51. The allegation that the City Council had given plans was rejected, since it was not a party to the proceedings. No sufficient evidence had been placed before the court to support the right to that

property. That the only evidence the petitioners brought was a newspaper print of the president directing they be given titles to land in a public forum. This proclamation is not part of ways to acquire title to land under section 7 of the *Land Act*. Presidential proclamation alone is not enough. There was no allotment letter following the presidential declaration. It was a mere political statement. There was no evidence of eviction. They never availed evidence of having applied for a lease. Those requiring titles should have applied in the normal way. The court needs evidence that the 2,000 people are on the ground so that if it made an order, it applies to a specific land they claim. Without proper evidence the courts' hands are tied

52. To confirm to the court the Korogocho slum had been upgraded, Counsel Mr Eredi submitted that the 2,584 KOWA members with the Seven Villages as well as their dependents had been catered for in the upgrade because the respondents had not received complaints from them other that when they filed the application. Asked by the court to explain why the petitioners were still in court if they had been settled, his response was that petitioners were pursuing the cause for academic purposes. This was because the slum had been upgraded with committees formed in every area. That he, counsel, had participated in several of them together with the petitioners. He thus urged that the suit had been overtaken by events because the slum has been upgraded and provided with the amenities, roads, sewer lines and so forth.

53. Counsel was asked by the court to confirm whether the petitioners' prayers were mute because the slum has since been upgraded and the petitioners put in main houses. Further, he was asked to substantiate why he opined the suit was an academic pursuit yet the petition implied that on the ground status was different from what he was submitting in court. In response, Mr Eredi admitted before court that contrary to his filed submissions, there was no evidence or a document like the United Nations Habitat Program on slum upgrading project specifically tailored for the contested land herein identified. That there was no specific document with either parties identified or connected to the litigants in the case. In conclusion he urged that the above stated programs of slums upgrade beats the purpose of the petitioners suit herein and urged the appeal to be rejected and be dismissed with costs.

**D. Analysis and Determination**

54. On evaluation of this appeal, it is imperative that this court underscores its jurisprudence on the contours of its appellate jurisdiction, particularly under article 163(4)(a) of the *Constitution*. The petitioners urged that this court has jurisdiction to hear and determine this case under article 163(4)(a) of the *Constitution*: that they have appealed to this court as of right. The respondents made no submissions on the jurisdictional issue.

55. The law on invocation of article 163(4)(a) jurisdiction of this court is replete and settled in numerous decisions of this court. The jurisprudence spans from *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*, [2012] eKLR and *Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board*, [2012] eKLR where in these earlier cases, the jurisdictional hierarchy of courts was emphasized that the Supreme Court in exercise of article 163(4)(a) jurisdiction, has to await and respect the superior courts exercise of their jurisdictions on the issue. The rationale being that the Supreme Court will only sit on appeal on matters which the other courts have already determined so that as an apex court, it benefits from the reasoning of these other court. In the *Ngoge case* particularly, it was stated that:

> " [30] 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."

56. Then in *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another*, [2012] eKLR this court held:

> " 27. With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by counsel if adopted, would completely defeat the true intent of article 163(4)(a) of the *Constitution*. 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."

57. Turning to the appeal before us, the petitioners moved to the High Court under section 84 of the *repealed Constitution* seeking to enforce their rights under sections 71, 74, 75, 77, 81 and 82 of the *repealed Constitution*. At the core of the case was the question whether their right to life under section 71, and right to property under section 75 of the *repealed Constitution* had been infringed or threatened by the respondents. Consequently, we have no hesitation in finding that a *prima facie* case touching on the interpretation and application of the *Constitution* was brought to this court. Thus, the appeal has ably invoked article 163(4)(a) jurisdiction.

58. However, invocation of the court's jurisdiction is not a panacea for a finding that a meritorious case has been made before the court. A finding that a court has jurisdiction to hear and determine a matter is a preliminary finding that indeed the matter before the court is one for which the court is by law permitted to determine. Consequently, having found that the court was well moved under article 163(4)(a), we now move to dissect the specific components that entails a matter that involves application and interpretation of the *Constitution*.

59. For a successful and competent appeal to this court under article 163(4)(a), it is not enough for a litigant to allege that his/her case before the superior courts involved interpretation and application of the *Constitution*. The Supreme Court's appellate jurisdiction under article 163(4)(a) is a qualified one. The court is not just another tier of appeal for constitutional matters. Hence a litigant has to categorically outline the various constitutional issues of interpretation and application which were in issue from the High Court and which the Court of Appeal subsequently considered, and erred in its interpretation and application to warrant appeal to this court. Thus while the court may find that its jurisdiction has been invoked under article 163(4)(a) it has the discretion on what issue(s) to determine or whether the alleged issues legitimately fall within this jurisdiction. In *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others* [2014] eKLR the court thus held:

> " 52. Applying a principled reading of the *Constitution*, this court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the *Constitution* into question. However, it is to be affirmed that any appeal admissible within the terms of article 163(4)(a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this court, in furtherance of the

objects laid out under section 3 of the *Supreme Court Act*, 2011 (Act No 7 of 2011)."

60. It follows that the Supreme Court retains the discretion to determine what matter is appealable to it under article 163(4)(a). Such a matter must be founded on cogent issues of constitutional controversy; which issues are to be so determined by the court itself. So that while a litigant may file his/her appeal, it is the court which has the sole discretion of determining whether the issues brought before the court raises cogent constitutional controversies to warrant its input. This is what the court signaled in the *Gladys Wanjiru Munyi v Diana Wanjiru Munyi* [2015] eKLR when it stated that:

> "... This court has in the past, underlined the necessity of a meritorious theme involving constitutional application or interpretation (*Naomi Wangechi Gitonga & 3 others v IEBC & 4 others,* Supreme Court Civil Application No 2 of 2014; [2014] eKLR and *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd. & Another*, Supreme Court Petition No 3 of 2012; [2012] eKLR), as the basis of an appeal such as the instant one. Just the bare claim that a question of constitutional interpretation or application is involved, without more, cannot bring an appeal within the ambit of article 163(4)(a) of the *Constitution*."

61. This point was expounded more in the case of *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR. The petitioner in that case, under the impression that any election petition involved an aspect of constitutional interpretation and application since the court had held that the *Elections Act* was a constitutional derivative, did not, in his petition, set out how the Court of Appeal had misinterpreted and/or misapplied the *Constitution*. The court stated as follows:

> "55. We are, besides, of the perception that this cause does not raise any cardinal issues inviting the interpretation of any provision of the *Constitution*. And furthermore, we cannot perceive the conclusions of either superior court as having taken a trajectory of constitutional interpretation or application, in the terms of the *Munya Case*, notwithstanding the petitioner's claim.
>
> 56. We are alive, however, to the broader context of the electoral process: elections in general, draw legitimacy from the broad lines of the *Constitution*, and from the electoral laws. This generality, however, has to be crystallised into clearly-defined normative prescriptions, before the Supreme Court will take up an election appeal as a matter of course, by virtue of the terms of article 163(4)(a) of the *Constitution*.
>
> 57. Certain principles emerge from the terms of this Judgement, as follows:
>
> a. In election petitions before this court, a party may not invoke the court's jurisdiction under article 163(4)(a), where the trial court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the *Constitution*.
>
> b. The articles of the *Constitution* cited by a party as requiring interpretation or application by this court, must have required interpretation or application at the trial court, and must have been a subject of appeal at the Court of Appeal; in other words, the article in question must have remained a central theme of constitutional controversy, in the life of the cause.

c. A party seeking this court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial court.

d. As a logical consequence of the foregoing, a party must indicate to this court in specific terms, the issue requiring the interpretation or application of the *Constitution*, and must signal the perceived difficulty or impropriety with the appellate court's decision.

62. We cannot over-emphasize the specialized nature of article 163(4)(a)'s appellate jurisdiction of this court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. It could be while a matter invoked specific constitutional provisions, those provisions were never part of the court(s)'determination and the matter turned on purely factual and or statutory issues. Thus, the following attributes are imperative for an appeal to the Supreme Court under article 163(4)(a) of the *Constitution*:

i. The jurisdiction reveres judicial hierarchy and the constitutional issues raised on appeal before the Supreme Court must have been first raised and determined by the High Court (trial Court) in the first instance with a further determination on the same issues on appeal at the Court of Appeal.

ii. The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfactory of the court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of *Constitution* interpretation and application.

iii. A mere allegation(s) of constitutional violations or citation of constitutional provisions, or issues on appeal which involves little or nothing to do with the application or interpretation of the Constitution does not bring an appeal within the jurisdiction of the Supreme Court under article 163(4)(a).

iv. Only cardinal issues of constitutional law or of jurisprudential moment, and legal issues founded on cogent constitutional controversies deserve the further input of the Supreme Court under article 163(4)(a).

v. Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a).

63. It is on the foregoing basis that we evaluate the appeal before us. The first hurdle that this court has to circumvent is the delimiting of the issues that legitimately falls for its determination. This is important since as we have stated above, this is an appellate court with a very qualified jurisdiction. Not every issue that was before the superior courts is open for this court's determination in exercise of its appellate jurisdiction under article 163(4)(a). Matters of fact that touches on evidence without

any constitutional underpinning are not open for this court's review on appeal in exercise of its article 163(4)(a) jurisdiction. The same is also true of matters that purely dealt with interpretation and application of statutory provisions.

64. The issues framed for determination in the Petition, are:

a. Whether this honourable court has jurisdiction to hear and determine the appeal before it under article 163(4)(a) of the *Constitution*.

b. Whether the petitioners herein have the right to appeal, under article 163(4)(a) of the *Constitution*, against the Judgment of the Court of Appeal dated and delivered on September 23, 2016.

c. Whether the petitioners are entitled to the reliefs claimed in their originating summons dated September 16, 2005.

d. Whether the 1st and 2nd respondents admitted the facts about settlement of Korogocho as explained in the affidavit of Mr Paul Mungai Kimani sworn on the September 16, 2005.

e. Whether the Court of Appeal imposed, on the petitioners the burden of proof imposed on the 1st and 2nd respondents by section 112 of the *Evidence Act*.

65. We have already determined issues (a) and (b) and found that the petition correctly invokes this court's jurisdiction. Issue (c) on reliefs is a consequential issue that may only be determined once a finding is made that the petitioners have proved their case and are entitled to a remedy. As regards issue (d), it deals with a factual aspect based on affidavit evidence and how the same was handled. It does not raise a constitutional matter and this court has no basis of interrogating it. Lastly, issue (e), the question of the burden of proof and the import of section 112 of the *Evidence Act* is purely a matter dealing with interpretation and application of a statutory provision. The petitioners have not shown how the same is or was transmuted to a constitutional issue by either the Court of Appeal or the High Court. That is, no allegation has been made that the Section was interpreted contrary to the *Constitution* or its interpretation infringed on a constitutional provision. The upshot is that as regards the issues framed by the petitioners for determination, save for this court's jurisdictional issue, no other issue lies for determination by this court in exercise of its appellate jurisdiction under article 163(4)(a) of the *Constitution*.

66. Be that as it may, at the High Court, three (3) issues were framed for determination, namely: whether the applicants can bring a representative suit; whether the pleadings disclose any cause of action; and whether the applicants rights under sections 71, 74, 75, 77, 81 and 82 have been breached. The High Court found that under Section 84 of the repealed Constitution, the petitioners could not maintain a representative suit and only sustained the suit for the listed petitioners. Clearly, this was a constitutional interpretation and application question, the issue being the interpretation of Section 84 of the *repealed Constitution*. Another finding of the High Court was on the question of interpretation of section 71 of the *repealed Constitution*. The court had been asked to adopt a liberal interpretation of the provision as regards the right to life so as to include right to food, shelter and education etc. It declined to accede to the request holding that

> "S 71 of our *Constitution* ... relates to life in the sense of ordinary human existence and must be understood in that context."

Again this is an issue that touched on the interpretation of the Constitution. Turning to the main question on the infringement of the petitioners' various constitutional rights, the High Court evaluated the allegations on each section of the *repealed Constitution* and found that there was no

sufficient evidence and particulars to support the same. The case was thus dismissed on the ground that it did not disclose a cause of action.

67. Moving to the Court of Appeal, the appellate court framed three issues for determination, namely: whether the appellants established their rights to ownership of the property known as LR No 82-85 Korogocho; whether the appellants' rights to occupation of the land fell within the frame of constitutional rights and if so, were those rights threatened or contravened by the respondents? and whether the appellants are entitled to the declaratory orders as sought in the originating summons. Before delving into the determination of these issues, the Court of Appeal addressed the issue of locus particularly the High Court's finding that the petitioners had no locus to file a representative suit. Rather than interrogate the issue the court opted for substantive justice stating:

> " The Judge found the appellants lacked *locus standi* to file a suit seeking enforcement of fundamental rights for a group of people registered as a society. In this appeal, we are inclined to take a different approach and address substantively the legal issues that arose because we are aware that overriding objectives in the administration of justice that requires us to always take a broad and purposeful view in interpreting matters before courts"

68. Thus, one of the constitutional issues that had been determined by the High Court was not expressly determined by the Court of Appeal. The appellate court opted for substantive justice. Did this prejudice the petitioners' appeal? We do not think so. This must be the reason the issue has not been raised in the appeal before us. In any event, the appellate court must have been cognizant of the fact that the question of *locus standi* in representative suit for enforcement of rights under the Bill of Rights is now settled under article 22 of *Constitution* which provides:

22.

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

    a. a person acting on behalf of another person who cannot act in their own name;

    b. a person acting as a member of, or in the interest of, a group or class or persons;

    c. a person acting in the public interest; or

    d. an association acting in the interest of one or more of its members.

69. The appellate court then dealt with the approach to be adopted in determining matters that deal with enforcement of rights under the Bill of Rights under the *repealed Constitution*. It cited the cases of *Wa'Njuguna v. Republic* (2004) KLR 520, and *Njoya & 6 Others v. Attorney-General & 3 Others* (2004) KLR for the jurisprudence that the *Constitution* is to be interpreted broadly and liberally. Thereafter, the appellate court turned to the determination of the issue at hand which it stated as follows:

> " 18. This case involves a determination of rights of a large number of appellants who live in an informal settlement on a piece of land belonging to the Government. They are claiming, rightly so in our view, that they are entitled to protection by the Government. On the other hand, and rightly so too, the Government is contending that it has a duty of ensuring area planning and

provision of infrastructure services such as roads, water and other amenities for the present and future generations."

70. Having stated the issue as above, the appellate court was now set to delve into the determination of the issue which it framed as

> " the question of which public interest is greater here, occupational rights by the appellants as claimed that the court should declare them owners of their respective plots or consideration of planning needs that take into account protection from health hazards wrought by lack of planning?"

Unfortunately, the Court of Appeal could not delve further into the issue. For it to have done the balancing of the two interest, it had to first establish the petitioners' claim and entitlement to the suit land. This is the point where the appellate court fell into a dead end. We would like to capture the Court of Appeal's findings at length in this regard. It states:

> " (20) This appeal raises constitutional issues of right to housing which counsel for the appellants very ably connected to right to life because if one has no roof over their head, their life cannot be guaranteed. The standard of proof even for a constitutional matter is on a balance of probabilities. The appellants have a duty to establish that their rights that are identifiable and determinable have been or are likely to be contravened by the Government. Secondly, it must be proved that the rights of the appellants' override public interest and if declared, they do not contravene other people's rights. So have the appellants' rights to occupation of the suit land been contravened?
>
> (21) We have gone through the records in this appeal; it is a matter of great regret that we find the appellants' claim is not ascertainable and therefore cannot be determined. We say so, because the appellants did not annex any document(s) to prove the existence of the land on the ground. They have also not demonstrated whether they made any efforts to obtain copies of such documents relating to the suit land either from the City Council of Nairobi (now Nairobi County Government) or the Government Lands Office. This is public land held by the Government for use by the present or future development needs. Without any official documents such as area maps, survey plans, letters of allotment or any evidence of ownership, it is next to impossible for a court of law to issue declaratory orders directing the Government to issue title documents to the appellants.
>
> (22) What part of the land, what size and to who should the land titles be issued? Is it the association or to the persons listed in the suit? Who is occupying which plot and who will plan the roads and other infrastructural necessities? Supposing, some of the houses fall within road reserves and require to be demolished and the court has directed titles to be issued in respect of particular plots that fall within the road reserve or way leave for power lines, what would be the consequence? ...
>
> Needless to state a court of law cannot issue orders which are not capable of implementation and worse which can give room to confusion and thereby become a recipe for chaos instead of fostering peace and harmony between appellants and the respondents.

(23) What compounds the instant matter even further is the fact that there is no evidence of any threat to evict the appellants, or to demolish their houses that accompanied this suit apart from a letter dated June 6, 2006, addressed to Miss Koch, ABC Church and Tenants. The said letter requested the aforementioned parties to remove structures in the Chief's compound to give room for construction of the Aps houses. Surely the Administration Police need to be housed so as to provide security in the area. It should nonetheless be noted that this suit was filed in May 2005, before the said threat. It is also not clear whether Miss Koch and the ABC Church with their tenants are members of the appellants Association as their names do not seem to be part of the list of members annexed to the suit nor did they swear any affidavit.

(24) For the aforesaid reasons, we agree with the trial judge's observation that under S 84 of the *retired Constitution*, a person whose rights have been or are likely to be contravened, is obliged to state his or her complaint and to identify with exact clarity the manner and extent of infringement."

71. With the foregoing finding, the appellate court agreed with the High Court that there was no evidence upon which the petitioners had laid their claim to the suit land. We find that the Court of Appeal decision was majorly an evidentiary matter. The appellate court had observed that the appeal raised constitutional issues of the right to housing. It was indeed ready to make a determination on the issue. The only hurdle was that there was no evidence by the petitioners to back their claim. On that basis, needless to say, the appellate court downed its tools and upheld the High Court decision.

72. Did the Court of Appeal in making this conclusion that the Petitioners' claim was not ascertainable and therefore cannot be determined, either interpret or apply the *Constitution*? The answer is an emphatic nay. Equally, in no way did the appellate court conclusion of lack of evidence take any constitutional trajectory so as to warrant this court's intervention. We have already stated that some of the issues framed for determination by the Petitioners touch on matters of fact and statutes. We also note that some issues are being raised before this court for the first time. For instance, section 112 of the *Evidence Act* was never an issue before the Court of Appeal. The Petitioners were under a duty to frame the issues they considered were of a constitutional nature which the Court of Appeal erred in its interpretation or application but they failed in that duty. We find no cogent issue of constitutional controversy arose and/or was in issue at the Court of Appeal that warrants this court's further input.

73. Evaluating the record, it is worth noting that at the time of filing this matter before the High Court, the petitioners were not facing any eviction threat or order: a fact acknowledged by the two superior courts. They sought: declaratory orders of their rights under section 71 and 75 of the *repealed Constitution*; declaration that they are owners of the suit property; and/or in the alternative be granted leases for 99 years, and the respondents be restrained from any way interfering with their occupation. Before any of these orders could be determined if they warrant being granted, the petitioners had to first prove their entitlement and right to the property. As the two superior courts found, no evidence was tendered hence the case was not proved. Consequently, this court finds no basis upon which to delve into the interrogation of the matter whether reliefs such as structural interdict were available.

74. The upshot is that we find that the petitioners have not marshalled a satisfactory case before this court for it to exercise its jurisdiction under article 163(4)(a) of the *Constitution*. The petition lacks merit and the same is for dismissal. We would make no orders as to costs.

75. Consequently, we make the following orders:

(a) The petition of appeal dated November 30, 2018 and filed in this Court on December 3, 2018 is hereby dismissed for lack of merit.

(b) Each party to bear its costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2020.**

**.....**

**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**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**