



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

APPLICATION NO. E009 OF 2023

– BETWEEN –

HENRY MULI MUNGUTI..... 1ST APPLICANT
HENRY MWAKE.....2ND APPLICANT
DAVID NYUNGU.....3RD APPLICANT
MICHAEL KIOKO.....4TH APPLICANT
PENINA MUMBE.....5TH APPLICANT
ALICE WANGECI.....6TH APPLICANT
GOOD HOPE REHABILITATION CENTRE.....7TH APPLICANT

-AND-

CYRUS ROBERT SALA ZIBU.....1ST RESPONDENT
DR. KLAUS-HERBERT RICHTER.....2ND RESPONDENT
STEVE MAKAU.....3RD RESPONDENT
PETER KIMEU MWANGANI.....4TH RESPONDENT
LILIAN KATUNGE MUEMA.....5TH RESPONDENT
PETER MANG'ALA.....6TH RESPONDENT
GIDEON KIOKO KIVANGULI.....7TH RESPONDENT
PETER MUSAU.....8TH RESPONDENT
JUMA OLIVER MASILA.....9TH RESPONDENT
MUTUKU KATALA.....10TH RESPONDENT
NATIONAL LAND COMMISSION.....11TH RESPONDENT

GOVERNMENT OF MAKUENI COUNTY.....12TH RESPONDENT
REGISTRAR OF SOCIETIES.....13TH RESPONDENT
HON. ATTORNEY GENERAL.....14TH RESPONDENT

(Being an application for review of the decision of the Court of Appeal (Okwengu, Ali-Aroni & Mativo, J.J.A) in Civil Application No. E260 of 2022, delivered on 3rd February 2023, denying certification to appeal to the Supreme Court against the Court of Appeal Judgment (Karanja, Murgor & Mohammed, J.J.A.) in Civil Appeal No. 260 of 2018 delivered on 8th July 2022)

Representation:

Henia Anzala & Associates for the applicants

Munyithya, Mutugi, Umara, Muzna & Co. Advocates for 1st-9th respondents

RULING OF THE COURT

[1] UPON perusing the Originating Notice of Motion dated 28th February 2023 and filed on 31st March 2023 by the applicants, pursuant to Article 163(4)(b) of the Constitution, Sections 15 and 16 of the Supreme Court Act, 2020 as well as Rule 33 of the Supreme Court Rules, 2020 seeking the review and setting aside of the Court of Appeal decision in Civil Application No. E260 of 2022 delivered on 3rd February 2023 declining leave to appeal to this Court; the grant of leave of this Court to file an appeal against the judgment of the Court of Appeal in Civil Appeal No. 260 of 2018, **Henry Muli & Others v Cyrus Robert Sala Zibu & Others** delivered on 8th July 2022; the certification of their appeal as raising matters of general public importance; and that the grant of leave do operate as a stay of execution of the entire judgment and decree of 20th June 2018 in ELC Case No. 78 of 2017; and

[2] UPON perusing the affidavit sworn by Henry Muli Munguti on 28th February 2023 in support of the motion that gives a detailed account of the circumstances that necessitated the taking out of aforesaid motion and;

[3] UPON considering the written submissions by the applicants filed on 31st March 2023, wherein they have urged that the Judges of Appeal did not analyse each of the framed issues and consider the arguments advanced for certification, to the effect that the Supreme Court needs to clarify the law; whether the doctrine of resulting trust can be imported into an express contract of sale and against express provisions of Article 40 of the Constitution on the right to own property; whether a court of law has jurisdiction to rely on a resulting trust to issue an order *in rem* to cover and bind people that are not parties to the suit; whether a court of law has jurisdiction to rely on a resulting trust to issue an order *in rem* to affect properties and assets that are not specifically mentioned in a plaint or claim; whether a court has jurisdiction to declare a resulting trust in favour of a third party who is not the source of funds subject to the resulting trust; whether a court of law has jurisdiction to declare a resulting trust with respect to positions held by officials of a Society or directors of a company; and whether the jurisdiction of the Environment and Land Court extends to documents, entities, funds and moveable property “as matters related thereto”. In other words, it is the applicants’ argument that the position relating to remedies available upon the finding of the existence of a trust is unsettled; and

[4] UPON CONSIDERING that the 1st-9th respondents in their replying affidavit of 5th April 2023 and written submissions of 13th February 2023 are opposed to the application on the grounds that the issue at the centre of the dispute before the trial court was the question of registration and control of Plot No. 3792 Mangelete Settlement Scheme; that the issue of jurisdiction of the Environment and Land Court, as framed in the instant application is an afterthought, the applicants having failed to object to the transfer of the case from the High Court to the Environment and Land Court and having fully participated in the proceedings throughout; that the issues now raised by the applicants as forming matters of general public importance are *prima facie* the same issues determined by the superior courts below; that the respondents are now the registered members of the 7th applicant

after they took over and changed the signatories of bank account relevant to these proceedings and therefore an order for stay would be an academic exercise; that the application does not meet the threshold established in the *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione*; SC Application No. 4 of 2012; [2013] eKLR case because the appeal relates to private interests over land; and as such the decision of the Court of Appeal ought to be upheld.

WE NOW THEREFORE OPINE as follows:

[5] RESTATING the principles governing applications for certification as enunciated by the Court in *Hermanus Phillipus Steyn*; that the applicant must satisfy the Court that the issue to be canvassed on appeal before the Court is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; where a point of law is raised, that such a point is a substantial one the determination of which will have a significant bearing on the public interest; the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination; that where the certification is occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty or refer the matter to the Court of Appeal with appropriate directions; that mere apprehension of miscarriage of justice is not a proper basis for granting certification and the matter must still fall under Article 163(4)(b) of the Constitution; that the applicant must identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for certification; and that determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court; and

[6] UPON APPLYING these strictures to the rival submissions; on the one hand, that the appeal raises matters of general public importance and that the Court of Appeal did not consider the arguments raised by the applicants with respect to resulting trusts, and on the other hand that the issues raised by the applicants as

forming matters of general public importance do not meet the threshold established in the *Hermanus Phillipus Steyn* case because the appeal relates to private interests over land; the single issue for consideration and determination is whether the applicants have made a case to the satisfaction of the Court to warrant us to review the decision of the Court of Appeal denying the applicants the certificate to appeal to this Court; and

[7] UPON EXAMINING the record, it is inarguably clear that at the heart of the dispute between the parties is the question of ownership of certain assets in the form of immovable properties (plot numbers 3762, 3763, and 3792), money in the bank, and control and management of the 7th applicant. The assets were allegedly acquired using donor funds from the 2nd respondent and other donors; the 2nd respondent remitted funds to the 1st applicant to register the 7th applicant as well as to purchase land with a view to setting up a children's home and drug addiction rescue and rehabilitation centre; that the first two plots were registered in the name of the 7th applicant while the latter property in the name of the 1st applicant; and

[8] UPON DETERMINATION of these issues, the Environment and Land Court held that the relationship between the 1st applicant and the 2nd respondent resulted in the creation of an implied trust; that the 1st-6th applicants, who are the officials of the 7th applicant, in the circumstances were trustees of the 2nd respondent and his donor friends in respect to the subject plot, funds in the bank, moveable and immoveable assets registered in the name of the 1st applicant, his agents, spouse, servants and or appointees; that the implied trust between the 2nd respondent and the 1st applicant graduated and became a public trust in which the respondents and the people of Makueni County were beneficiaries of; a mandatory injunction compelling the 1st applicant to register Plot No. 3792 in the name of the 7th applicant; and

[9] ON APPEAL, the Court of Appeal isolated four issues to consider; whether the 2nd respondent demonstrated that the funds sent to the 1st applicant were

sourced from the former and his friends from Germany; whether the 7th applicant received funds from other donors not connected to the 2nd respondent; whether a resulting trust was created in favour of the 2nd respondent, over all funds, movable and immovable assets respectively registered in the applicants' and the 1st applicant's names, as well in the names of 1st applicant's agents, spouse, servants or appointees and; whether the orders made were within the jurisdiction of the Environment and Land Court; and

[10] UPON CONSIDERING these issues, the appellate court found, just like the trial court, that the 1st applicant bought the three plots in question with funds remitted to him by the 2nd respondent and other donors connected to the 2nd respondent; that the 1st applicant failed to present proof that he had purchased any of the plots with funds from any other source; and that in registering one of the plots in his name automatically created a resulting or implied trust in favour of the 2nd respondent from whom the funds in the form of donations for the purchase of the plots originated; and

[11] UPON AFFIRMING further the trial court's conclusions and bearing in mind that the declaratory orders issued by that court concerned the issue of trust over the subject plot and related assets, the appellate court was satisfied that the Environment and Land Court had the jurisdiction under Article 162(2) of the Constitution to entertain the dispute and determine it; and

[12] CONSIDERING the principles enunciated in *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others*; CA No. 51 of 2014; [2015] eKLR that a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee; that a resulting trust will automatically arise in favour of the person who advances the purchase money; and whether or not the property is registered in his name or that of another, is immaterial; it is our view that the issues, as determined by the superior courts below, are settled; and

[13] FURTHER SATISFIED that the courts below, besides the Court of Appeal's decision in *Twalib Hatayan & another v Said Saggar* (supra) have, in the following cases, in a long list of others, firmly and consistently established the above principles of a resulting trust; *Peter Ndungu Njenga v Sophia Watiri Ndungu*; CA No. 2 of 2000; [2000] eKLR and *Juletabi African Adventure Limited & another v Christopher Michael Lockley*; CA No. 75 of 2016; [2017] eKLR and *N W K v J K M & another*; ELC No. 422 of 2011; [2013] eKLR; and

[14] DISTINGUISHING the instant case from this Court's decision in *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others*; SC Application No. 3 (E008) of 2022; [2022] eKLR, the issue raised by applicants in the latter was whether it was open to the court to imply and import the doctrine of trust into land sale transactions and into shareholding of a company as to disentitle the registered holder of land or shares, respectively, obtained for valuable consideration without offending the constitutional right to property under Article 40 of the Constitution and other statutory provisions. On the other hand, in the former, the 1st applicant is challenging the right to property with respect to a resulting trust having failed to present proof that he had purchased any of the plots with funds other than those from the 2nd respondent and his donor friends. Secondly, the remedy available as a result of an implied trust was never an issue before the superior courts below. A declaration of the existence of a resulting trust is itself a remedy in an action like this one; and

[15] THEREFORE PERSUADED that no instance of state of uncertainty in the law arising from contradictory precedents on the issues raised have been pointed out to us; that the questions presented in the present application do not transcend the circumstances of this particular case; and that the issues in dispute arise from a private claim between the parties that resulted in a trust. Likewise, in the specific circumstances of this case, we do not see any significant question of law that requires further input from this Court. All the applicants are asking us to do, is to

grant them another opportunity to have a "third" bite at the cherry by revisiting factual issues that have concurrently been resolved by the two courts below; and

[16] AND BEARING in mind that the two courts below us reached the conclusion that, in view of the relationship between the parties herein, an implied trust resulted; that decision being founded on pure evidence which pointed to the fact that the 1st appellant was attempting to reap where he did not sow by insisting **“to derive personal benefits from projects that were intended to benefit the less fortunate in the society”**. Being conclusions based on facts, we are precluded from attempting to reevaluate them; and

[17] IN THE CIRCUMSTANCES, we see no justification to disagree with the determination of the Court of Appeal that the application has not passed the threshold for the grant of leave to appeal to this Court pursuant to Article 163(4)(b); and

[18] THEREFORE, we dismiss this application and make the following orders:

- a. The application dated 28th February 2023 and filed on 31st March 2023 is hereby dismissed.*
- b. The decision of the Court of Appeal delivered on 3rd February 2023, declining leave to appeal to this Court is hereby affirmed.*
- c. The costs of this application shall be borne by the applicants.*

It is so Ordered.

DATED and DELIVERED at NAIROBI this 23rd day of June 2023.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA

