REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. E026 OF 2023

— BETWEEN —

EVERTON COAL ENTERPRISES LIMITED.....APPLICANT

-AND-

ROSE WAKANYI KARANJA.....1ST RESPONDENT

GRACE WANGARI KARANJA..... 2ND RESPONDENT

KENNETH NDICHU KARANJA.....3RD RESPONDENT

WILLIAM MUIGAI KARANJA.....4TH RESPONDENT

GEOFFREY CHEGE KIRUNDI.....5TH RESPONDENT

LUCY WAMAITHA CHEGE.....6TH RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal at Nairobi (Okwengu, Achode & Mativo, JJ. A) dated 7th July 2023 in Civil Appeal (Application) No. 172 of 2010 denying certification to appeal to the Supreme Court against the Court of Appeal Judgment (Warsame, Mwilu (as she then was) & Sichale JJ. A) in Civil Appeal No. 172 of 2010 dated 29th July 2016)

Representation:

Muma & Kanjama Advocates for the Applicant

Onesmus Githinji & Company Advocates for the 1st to 4th Respondents

Gatheru Gathemia & Company Advocates for the 5th Respondent

James T. Makori Advocate for the 6th Respondent

RULING OF THE COURT

[1] UPON reading the Originating Motion taken out by the Applicant dated 21st July, 2023 and filed on 4th August, 2023 pursuant to Articles 10, 20(3), 25(c), 40, 48, 50, 60(1)(b) and (d), 159(2)(a) and (d), 163(4)(b) and 259(1) of the Constitution, Sections 15, 15B(1)(b) and (2) of the Supreme Court Act 2011 and Rules 13, 33 and 36 of the Supreme Court Rules 2020 for orders that;

i) This Court be pleased to extend the time and grant the applicant leave to file a Notice of Appeal against the judgment of the Court of Appeal at Nairobi (Warsame, Mwilu (as she then was) & Sichale JJ. A) in Civil Appeal No. 172 of 2010 delivered on 29th July 2016.

ii) This Court be pleased to review the refusal to grant certification, by the Court of Appeal at Nairobi (Okwengu, Achode & Mativo, JJ. A) in Civil Appeal (Application) No. 172 of 2010 delivered on 7th July 2023.

iii) This Court be pleased to certify the intended appeal to the Supreme Court against the judgment of the Court of Appeal at Nairobi (Warsame, Mwilu (as she then was) & Sichale JJ. A) in Civil Appeal No. 172 of 2010 delivered on 29th July 2016 as a matter of general public importance.

iv) This Court be pleased to grant the applicant leave to appeal against the judgment of the Court of Appeal at Nairobi (Warsame, Mwilu (as she then was) & Sichale JJ. A) in Civil Appeal No. 172 of 2010 delivered on 29th July 2016.

v) The costs of this application be in the intended appeal; and

[2] UPON perusing the grounds on the face of the application, the supporting affidavit of Patrick Karanja Ngugi, the applicant's director, and the submissions

filed on its behalf on 4th August 2023, in which the following five issues are considered to involve matters of general public importance:

a) *Whether the grant of Land Control Board (LCB) consent to transfer property validates the transfer of a property to innocent third parties from the premise historically reinforced by the Court that the lack of LCB's consent invalidates any transfer of title to property, where such consent is a legal requirement for the transfer.*
b) *Whether Section 46 of the Advocates Act is an absolute bar to transactions between advocates and their clients which overrides freedom of contract, privity of contract vis a vis other formalities laid down by the Law of Contract Act and the constitutional right to acquire or hold property under Article 40 in light of the principles of land policy under Article 60(1)(b) and (d).*
c) *Whether a party having conscientiously entered a contract may rely on courts of law to defeat the obligations undertaken under such contract and the import of the principle of freedom to treat under the Law of Contract Act in land sale transactions.*
d) *Whether the rights of a bona fide purchaser for value may be defeated by prior transactions in the subject property in the absence of fraud or misrepresentation on the part of the bona fide purchaser.*
e) *Whether an interested party joined in the proceedings in the Court of Appeal, without being a party in the original cause and after judgment in the High Court and Court of Appeal, can apply for certification in the Supreme Court in light of Rule 33(5)(a) of the Supreme Court Rules 2020;* and

[3] BEARING in mind the following facts which precipitated this dispute in which the primary parties were the 1st to 4th respondents on one hand and the 5th and 6th respondents on the other hand. The 5th respondent, Geoffrey Chege Kirundi is an advocate of many years standing and the 6th respondent, Lucy Wamaitha is

his wife. The 5th respondent represented Walter Karanja Muigai in ***HCCC No. 3398 of 1988*** in which Mr. and Mrs. Mugo Kirika had sued the former for breach of a sale agreement over LR No. 10090/23, the suit property, situated in Juja within Thika Municipality comprising approximately 47 acres which is also at the heart of this dispute.

[4] FURTHER, we note that the agreed purchase price was Kshs.35,000 per acre of all the 47 acres comprised in the suit property. Walter Karanja Muigai, the vendor who subsequently passed away and is represented in these proceedings by his legal representatives, the 1st to 4th respondents, received part payment, but the Kirikas failed to pay the balance even after the completion period was extended, prompting the deceased to rescind the sale. The Kirikas instituted ***HCCC No.3398 of 1988*** against the deceased who was represented by the 5th respondent. The action was determined in favour of the deceased on 28th October 1993, with an order directing him to refund the sum of Kshs.405,000 being part payment received. The Kirikas' appeal to the Court of Appeal, was on 21st January 2000 dismissed, bringing to an end the legal tussle between the deceased and the Kirikas. A few years after the determination of the dispute between the Kirikas and the deceased, the deceased died.

[5] RECALLING that a fresh dispute erupted between the estate of the deceased and the 5th and 6th respondents, in which the latter alleged that on 26th October 1990, the deceased executed a sale agreement in their favour for the sale of the suit property for a consideration of Kshs.2,500,000, payable in three installments; that the sale agreement was executed in the presence of the deceased and 10 members of his family who consented to it; and that the sale and transfer to the 5th and 6th respondents was intended to bail out the deceased after the Kirikas defaulted to complete the sale transaction exposing the deceased to imminent foreclosure by Kenya Commercial Bank, which he owed money.

[6] UPON the death of the deceased the 1st to 4th respondents filed ***HC Succession Cause No.3608 of 2002*** for appointment as the legal

representatives of the deceased. They annexed to the petition for letters of administration an affidavit in support to the effect that the deceased had no liabilities. This prompted the 5th and 6th respondents, as creditors of the deceased, to lodge a claim over LR No. 10090/23; and

[7] BEARING in mind that even after the petition for letters of administration was subsequently amended to include the suit property as one of the deceased's assets, the 5th and 6th respondents once again protested, insisting that the suit property ought to have been included, not as part of the deceased's assets but as part of his liability; and

[8] UPON CONSIDERING that, the 5th and 6th respondents then moved the High Court in ***HC Misc Cause 1277 of 2004 (OS)*** seeking *inter alia* orders that the period for the Land Control Board consent issued on 16th December 1993 in respect of the suit property be extended and validated. In addition, they filed ***HC Misc. Case No. 1401 of 2004 (OS)*** against the 1st to 4th respondents, as the administrators, for orders directing them to include the suit property as part of the deceased's liabilities and accordingly to execute a fresh transfer of the suit property to them and in default thereof, the Deputy Registrar to execute the transfer documents in their favour. All three applications, ***HC Succession Cause No.3608 of 2002***, ***HC Misc. Appl. No. 1277 of 2004*** and ***HC Misc. Case No. 1401 of 2004*** were consolidated and heard together; and

[9] UPON evaluating the consolidated applications, the High Court (*Rawal, J. as she then was*), found that the 5th and 6th respondents had legally acquired title to the suit property; the 1st to 4th respondents were directed to execute fresh transfer documents in favour of the 5th and 6th respondents and in default the Deputy Registrar of the court do so in their place; that the 5th and 6th respondents were to pay the balance of the purchase price found to be due; and that the 1st to 4th respondents were directed to remove the suit property from the list of assets of the estate of the deceased; and

[10] DISSATISFIED with this outcome the 1st to 4th respondents challenged it and the appellate court *(Warsame, Mwilu (as she then was) & Sichale JJ. A),* in allowing the appeal, revoked the transfer of the suit property to the 5th and 6th respondents and ordered the ownership to revert to the estate of the deceased, for the following three main reasons; one, that 5th respondent, an advocate having represented the deceased in an action brought by the Kirikas over the suit property, it was contrary to Section 46 of the Advocates Act for the former to purport to purchase it from the deceased; two, the agreement between the deceased and the 5th and 6th respondents having been entered into during the subsistence of ***HCCC No. 3398 of 1998***, the transaction offended Section 52 of the Transfer of Property Act which forbids any dealing on immovable property during the pendency of a suit touching on the property, unless with the consent of the court, the doctrine of *lis pendens;* and three, the suit property being agricultural land, no valid consent of the Land Control Board was obtained; and

[11] UPON NOTING that the court, in passing, rejected the 5th and 6th respondents' contention that the suit property had since changed hands, as this statement was merely made from the Bar, the question not having been canvassed before the High Court or even before it. The court also wondered how the transfer was possible when the dispute in respect of the very property was pending in court. With that, the appeal was allowed with costs to the 1st to 4th respondents; and

[12] ACKNOWLEDGING that the applicant was not a party to the proceedings before the two superior courts below and especially in the Court of Appeal in which the above adverse order was made affecting its title to the suit property; that because of those orders, the applicant filed an omnibus application in the Court of Appeal after judgment seeking four reliefs: to be joined in the proceedings as an interested party; an order reviewing the aforesaid judgment; or in the alternative, that it be granted leave to appeal to the Supreme Court; and that an order be issued to stay the execution of the impugned judgment.

[13] NOTING from the record that the prayer to join the applicant as an interested party was allowed in a separate Ruling by the Court of Appeal *(M.K. Koome (as she then was), Asike- Makhandia & J. Mohammed, JJ. A)* in which the court appreciated that the application was made post- judgment but justified the course taken of joining the applicant after the judgment on the ground that it was necessary to enable the applicant to apply for the review of the judgment and in the alternative to seek certification to appeal to the Supreme Court; and

[14] UPON perusing the second ruling of 7th July 2023 (*Okwengu, Achode & Mativo, JJ. A*) which has given rise to this application, we note that in answering the three remaining issues raised in the omnibus application, the court concluded, in respect of the prayer for stay of execution, that there is no procedure in that court for it to stay its own judgment. Regarding the prayer for review, the court noted that the primary parties before the High Court and Court of Appeal were the 1st to 4th respondents on the one hand and the 5th to 6th respondents on the other hand, with the issues being whether the 5th and 6th respondents legally acquired the suit property. To the court's mind, the applicant was so intrinsically connected to the 5th respondent, that it could only be a decoy; and that the application does not fall within the exceptional circumstances, for that court to invoke its residual jurisdiction to review its judgment.

[15] FURTHERMORE, regarding certification to the Supreme Court under Article 163(4)(b) of the Constitution, the court found that the questions sought to be answered in the intended appeal are not novel; that the constitutionality of Section 6 of the Land Control Act, (on consent of that Board); Section 46 of the Advocate's Act *vis-à-vis* Articles 40 and 60 of the Constitution; and the doctrine of *lis pendens* are well settled in law, and therefore do not meet the threshold in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi- Ruscone***, [2013] eKLR; and

[16] UPON reading the applicant's submissions and its explanation for delay for which it seeks extension of time to file a Notice of Appeal: that the impugned

judgment against which it intends to appeal was delivered in its absence as it was not a party to the proceedings; that consequently, its application was partially allowed and it was joined to the proceedings as an interested party; that it had to wait for the second Ruling which was finally delivered on 7th July 2023 dismissing the prayers for review and certification; and that the instant application has been made promptly, in good faith and that the explanation for the delay is plausible in terms of the principles laid down in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** [2014] eKLR; and

[17] FURTHER considering the applicant's arguments that the issues arising from the questions proposed for the intended appeal which we have set out in paragraph 2 above transcend the circumstances of this matter and have a significant bearing on the public interest regarding the applicability of the Land Control Board consent, Section 46 of the Advocates Act, the rights to property of a bona fide purchaser and the right to a fair hearing of a party who did not participate in the original proceedings. Specifically, the applicant submits that the question of the said Board's consent is unsettled and requires this Court's input. It cites the case of ***Aliaza v. Saul,*** Civil Appeal No. 134 of 2017; [2022] KECA 583 (KLR) where it was held that failure to obtain the necessary consent from the Board within the required period of 6 months did not render the transaction void. In addition, the applicant contends that other critical points of law will also be raised, such as the doctrine of *lis pendens*, freedom to contract, privity of contract and indefeasibility of title which if determined, the result shall have a significant bearing on public interest; and that all the aforementioned questions meet the test of general public importance as set out in ***Hermanus*** (supra); and

[18] UPON considering the replying affidavits of Geoffrey Chege Kirundi and Lucy Wamaitha Chege, the 5th and 6th respondents and the submissions filed on their behalf in support of the application, to the effect that; the matter involves a myriad of issues of general public importance which call for a consideration of the

interpretation of statutes and general principles in relation to transactions in land, including Section 6 of the Land Control Act, the doctrine of *lis pendens* and Section 46 of the Advocates Act; that the case presents an opportunity for a modern and progressive way to define and grow jurisprudence on women's constitutional proprietary rights in terms of joint ownership or tenancy in common and whether those proprietary rights are protected under the Constitution; that these are questions of general public importance affecting all women particularly those joined in matrimonial union as it affects their ownership and ability to assert and enforce their rights under contract or property ownership; and that these highlighted issues arise from the pleadings all the way from the High Court to the Court of Appeal and were the subject of the decisions in the two courts; and

[19] BEARING in mind the contents of the 1st to 4th respondents' replying affidavit sworn on their behalf by William Muigai Karanja, the 4th respondent as one of the administrators of the estate of the deceased, and their submissions dated 24th August 2023 wherein the 1st to 4th respondents oppose the application for reasons that; the application is fatally defective *ab initio* as it offends Rule 33(5) of the Supreme Court Rules 2020 since the applicant was not a party to the suit in the High Court and in the appeal before the Court of Appeal; that the Court of Appeal answered the main question before it by declaring that the 5th and 6th respondents did not legally acquire the suit property and therefore by necessary implication could not transfer a good title to the applicant or any third party; that the court also found that there was demonstrable evidence that the applicant, and the 5th and 6th respondents engaged in corruption, fraud and deceit to subvert the course of justice; that contrary to Rule 33(2), the instant application was filed 8 days after the lapse of the requisite 14 days; that in any event, the 5 issues the applicant claims as being of general public importance do not demonstrate how the general public or any other person is impacted by those issues; the application does not raise any novel issues or the existence of conflicting decisions arising from similar situations which would require to be addressed by the Supreme Court; and that the issues raised were not canvassed before both superior courts below; and

[20] IN VIEW of the applicant's averments in response to the foregoing that it has the *locus standi* to file the instant application by virtue of having been joined in the proceedings before the Court of Appeal despite not being an original party to the cause; and considering its invitation of the Court to determine the constitutionality of Rule 33(5)(a) for the reason that it limits access to the Court under Article 163(4)(b) of the Constitution only to original parties; and

HAVING considered the application, affidavits, and rival arguments by both parties, **WE NOW OPINE** as follows:

[21] COGNIZANT of the fact that, although the applicant was not a party to the suit before both the High Court and the appeal in the Court of Appeal, it was joined as an interested party post-judgment stage. The main question that follows is whether the applicant is competent to approach this Court in the manner that it has done. Or framed differently, whether the Court has jurisdiction to entertain an application for review brought by a party who did not participate in the proceedings that culminated in the impugned judgment of the Court of Appeal.

[22] ACKNOWLEDGING that jurisdiction is everything and that without it, a court has no power to take one more step; and that a court's jurisdiction flows from either the Constitution or legislation or both. See ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others***, SC Application No. 2 of 2011: [2012] eKLR. It follows that we must, *in limine*, be satisfied that the applicant has properly invoked the jurisdiction of this Court. In respect of this application, the Court is guided by Article 163(5) of the Constitution, Section 15B of the Supreme Court Act, Rule 33 of the Supreme Court Rules, 2020 and past decisions of the Court on the subject. Specifically, where the Court of Appeal certifies or declines to certify a matter as one of general public importance, Rule 33 aforesaid grants an aggrieved party the right to apply to this Court for review. Such application must be made within fourteen days.

[23] FURTHER, by Rule 33 (5) an **"application for certification shall only be limited to the parties in the original cause",** which this Court in ***Francis***

Karioki Muruatetu & another v. Republic & 5 others [2016] eKLR, interpreted to mean that;

> **"...any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court....Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court".**

[24] GUIDED by the following passage in our decision in ***Law Society of Kenya v. Communications Authority of Kenya***, SC Petition No. 8 of 2020 [2023] eKLR, where we underscored the significance of a party having *locus standi* in a matter:

> **"Therefore, flowing from the constitutional provisions on the jurisdiction of this Court, the definition of 'a person' seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court.**
>
> **The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate Court to approach this Court. <u>This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the Superior Courts. A person in this context should therefore be a party with *locus standi* in the matter</u>."** [our emphasis].

[25] STRICTLY SPEAKING, though joined, the applicant was not a party to "the proceedings" in the Court of Appeal having been joined post-judgment, yet a joinder contemplates a situation where proceedings are still pending before the court and in terms of Rule 5 (d) (ii) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) which is in *pari materia* with Order 1 Rule 10(2) of the Civil Procedure Rules, a party will only be added to on-going proceedings in order to enable the court adjudicate fully upon and settle all the questions involved in the particular proceedings before it.

[26] NOTING that the original dispute between the 1st to 4th respondents and the 5th and 6th respondents having been settled in a judgment rendered on 29th July 2016, there were no proceedings to which the applicant could properly join four years later on 5th June 2020, when the ruling by the first bench of the Court of Appeal was rendered. This question has been settled in a long thread of past decisions. For example, in ***JM K v M W M & Another*** [2015] eKLR, the Court stressed that;

> **"...an application for joinder of parties can be filed only in pending proceedings; that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable".**

See also the Court of Appeal judgment in ***Kenya Airport Authority v. Mitu-Bell Welfare Society & 2 others*** [2016] eKLR on the finality of a judgment as a decision of a court resolving all the contested issues and settling the rights and liabilities of the parties before it and our decision in ***University of Eldoret & another v. Hosea Sitienei & 3 others,*** SC Application No. 8 of 2020; [2020] eKLR emphasizing the finality of the litigation process. Similarly, this Court has

pronounced itself in the case of ***Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others,*** [2014] eKLR, relying on ***Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*** [2015] eKLR on the place of an interested party in any proceedings.

[27] CONVINCED that the issues the applicant wishes to raise before the Supreme Court were not those determined by the courts below, where the sole issue was always whether the 5th and 6th respondents legally acquired title to the suit property. Whether or not the applicant was an innocent purchaser for value, was never pleaded, canvassed or determined. Indeed, from the record, the issue was raised, according to the Court of Appeal, from the Bar, without any evidence in support. At that point, the court had no opportunity or material from which to determine the question. Issues like the proprietary rights of women were never the subject of determination before both superior courts below.

[28] WE restate, on the authority of ***Hermanus Phillips Steyn v. Giovanni Gnecchi-Ruscone*** (supra) that the applicant has not satisfied the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case and has a significant bearing on the public interest. All we see, like the appellate court did see, is a spirited attempt by the 5th and 6th respondents through the applicant to have a second bite at the cherry. The grounds listed for consideration in the intended appeal, are those that would have only aggrieved the parties before the Court of Appeal. We also reiterate as we did in ***University of Eldoret & another v. Hosea Sitienei & 3 others*** (supra) that a party must only elect one avenue; either to seek a review or lodge an appeal, they cannot seek both as this defeats the essence of the finality of litigation.

[29] CONSEQUENTLY, and for the reasons given, we find that the applicant lacks the *locus standi* and is not competent to seek certification before this Court. As a corollary, this Court lacks the jurisdiction to determine this application for certification.

[30] ACCORDINGLY, we make the following orders:

i) The originating motion dated 21st July 2023 and filed on 4th August 2023 is hereby dismissed.

ii) The decision of the Court of Appeal delivered on 7th July 2023 denying leave to appeal to this Court is hereby affirmed.

iii) The costs of this application shall be borne by the applicant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **10th** Day of **November 2023.**

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA