



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram; Koome (CJ &P), Mwilu (DCJ & VP), Ibrahim, Wanjala, & Ouko SCJJ)*

**APPLICATION NO. E005 OF 2024**

**-BETWEEN-**

**EMFIL LIMITED..... APPLICANT**

**-AND-**

**THE ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT**

**GAZI BAY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUMA SHEE MWAMWINDINI ..... 3<sup>RD</sup> RESPONDENT**

**SHEE HAMISI MWAMWINDI ..... 4<sup>TH</sup> RESPONDENT**

**NSHEE HUSSEIN KENYA ..... 5<sup>TH</sup> RESPONDENT**

**JUMA OMARI MWADZIROHO ..... 6<sup>TH</sup> RESPONDENT**

**NASSORO ABDALLA MWACHIBULO ..... 7<sup>TH</sup> RESPONDENT**

**NZURI MAHALI LIMITED ..... 8<sup>TH</sup> RESPONDENT**

**SABA MWANGA LIMITED ..... 9<sup>TH</sup> RESPONDENT**

**MAISHA MEMA LIMITED ..... 10<sup>TH</sup> RESPONDENT**

**MAFANIKO LIMITED ..... 11<sup>TH</sup> RESPONDENT**

**TAMU NDOTO LIMITED ..... 12<sup>TH</sup> RESPONDENT**

**GAZI BAY LIMITED ..... 13<sup>TH</sup> RESPONDENT**

**CLIFF VIEW COMPANY LIMITED ..... 14<sup>TH</sup> RESPONDENT**

**MWABUNGU BAY LIMITED ..... 15<sup>TH</sup> RESPONDENT**

**JOTINDER KAUR MWATHARU ..... 16<sup>TH</sup> RESPONDENT**  
**DIANI BAY PARCELS LIMITED ..... 17<sup>TH</sup> RESPONDENT**  
**KINONDO BAY LIMITED ..... 18<sup>TH</sup> RESPONDENT**  
**UKUNDA BAY LIMITED ..... 19<sup>TH</sup> RESPONDENT**  
**JUA MAISHA LIMITED ..... 20<sup>TH</sup> RESPONDENT**

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*(Being an application for review of the Court of Appeal Ruling in Mombasa Civil Application No. E032 of 2023 delivered on 25<sup>th</sup> January 2024, denying grant of certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution)*

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**Representation:**

Mr. Owuor Thatcher for the applicant  
*(LJA Associates LLP)*

Ms. Lang'at for the 1<sup>st</sup> respondent  
*(State Law Office)*

Mr. Asige for the 4<sup>th</sup> to 7<sup>th</sup> respondents  
*(Asige Keverenge & Anyanzwa Advocates)*

Mr. Apollo for the 8<sup>th</sup> to 13<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> to 20<sup>th</sup> respondents  
*(Apollo Muinde & Partners Advocates)*

No representation for the 2<sup>nd</sup>, 3<sup>rd</sup>, 14<sup>th</sup> and 16<sup>th</sup> respondents

**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion dated 7<sup>th</sup> February 2024 and filed on 8<sup>th</sup> February 2024, pursuant to Article 163(4)(b) of the Constitution, Sections 3A, 15, 15B and 21 of the Supreme Court Act and Rule 33(2) and (3) of the Supreme Court Rules; seeking *review and setting aside of the Ruling of the Court of Appeal (Nyamweya, Lesiit & Odunga, JJ.A) delivered on 25<sup>th</sup> January 2024 in Mombasa Civil Application No. E032 of 2023, declining certification of the*

*intended appeal as one raising matters of general public importance; certification of the intended appeal against the Judgment of the Court of Appeal (Gatembu, Nyamweya & Lesiit, J.J.A) delivered on 14<sup>th</sup> April 2023 in Mombasa Civil Appeal No. 37 of 2020; certification so granted to operate as stay of execution; and costs; and*

**[2] UPON CONSIDERING** the applicant's grounds on the face of the application and affidavit sworn by **Andrew Mukite Musangi** on 7<sup>th</sup> February 2024, wherein it is contended that, the Court of Appeal erred in law, in; reinstating defences of parties who had waived their right of appeal; allowing the Attorney General to lodge an appeal on behalf of parties with independent representation and who had not filed notices of appeal; failing to consider that the applicant's ownership of the suit property had been determined and affirmed by the High Court and Court of Appeal in *HCCC No. 181 of 2007* and *CA No. 312 of 2012* respectively; failing to take into account that the suit property was not available for allocation to the squatters; and finding that reliance on a replying affidavit filed in a concluded matter to urge a subsequent matter was *res judicata*, in contravention of Order 2 Rule 15 of the Civil Procedure Rules; and

**[3] UPON FURTHER CONSIDERING** the questions of general public importance proffered by the applicant, to wit; *whether the striking out of parties pleadings has a bearing on public interest; whether the Court of Appeal erroneously applied the provisions of Order 2 Rule 15(2) of the Civil Procedure Rules; whether the Attorney General could represent parties who had expressly waived their right of appeal; what is the ambit of the role of the Attorney General in defending public interest; whether ownership rights conferred by a court of competent jurisdiction can be subject to re-litigation; whether a replying affidavit in a former suit can be relied on in subsequent causes to prove that the matter is res judicata; whether an outright misapplication of the law by a court raises an issue of public importance; whether competing titles to property can be*

*issued under different registration regimes; and whether conflicting decision of a court raises an issue of public importance; and*

**[4] UPON CONSIDERING** the applicant's submissions dated 7<sup>th</sup> February 2024 and filed on 9<sup>th</sup> February 2024, restating the grounds set out above and in addition urging that, the application meets the principles for grant of certification established in ***Hermanus Phillipus v. Giovanni Gnechi -Roscone***, SC Application No. 4 of 2012 [2013] eKLR (***Hermanus Case***), and the issues raised therein transcend the litigation interests of the parties in the suit. Moreover, that the issues raised are of repeated occurrence, bearing proper conduct in the administration of justice, and are destined to continually engage the working of judicial organs. To support this assertion, the applicant relies on this Court's decision in ***Kenya Civil Aviation v. African Commuter Services Ltd & another***, SC Application No. 7 of 2015; [2018] eKLR; and

**[5] HAVING READ and CONSIDERED** the 1<sup>st</sup> respondent's submissions dated 22<sup>nd</sup> February 2024, wherein the 1<sup>st</sup> respondent urges that the application fails to meet the yardstick for grant of certification settled in the ***Hermanus Case***, in that it has not concisely identified the elements of general public importance peculiar to the intended appeal. Furthermore, the Attorney General contends that the dispute pending before the trial court pertains to private land ownership between the applicant and the respondents; the only issue determined by the appellate court involved the striking out of parties' defences by the trial court; and the just determination of the substantive dispute calls for the evaluation and consideration of the contested facts between the parties by the trial court as directed by the Court of Appeal; and

**[6] UPON NOTING** the 4<sup>th</sup> and 7<sup>th</sup> respondents' replying affidavit sworn on 13<sup>th</sup> March 2024 and filed on 19<sup>th</sup> March 2024, wherein the respondents join issues with the 1<sup>st</sup> respondent and also aver that the intended appeal discloses no matters of general public importance transcending the circumstances of this matter; and

**[7] UPON CONSIDERING** the 4<sup>th</sup> and 7<sup>th</sup> respondents' submissions dated 13<sup>th</sup> March 2024 and filed on 19<sup>th</sup> March 2024, restating their grounds of opposition and reiterating that the application fails to meet the principles for certification settled in the ***Hermanus Case***. They emphasize that the Court of Appeal was only called upon to determine whether the trial court had judiciously exercised its discretion in striking out defences by the respondents; and therefore, the applicant cannot invite this Court to determine substantive issues pending before the trial court, disguised as matters of public interest; and

**[8] UPON FURTHER CONSIDERING** the 8<sup>th</sup> to 13<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> to 20<sup>th</sup> respondents' replying affidavit sworn on 28<sup>th</sup> February 2024 and filed on 4<sup>th</sup> March 2024 adopting the arguments in opposition by the other respondents as earlier summarized. Further noting the said respondents' submissions dated 29<sup>th</sup> February 2024 and filed on 4<sup>th</sup> March 2024, to the effect that none of the matters raised by the applicant pass the test for certification laid down in the ***Hermanus Case*** but are instead mere contests between the parties; and

**[9] UPON READING** the applicant's submissions in rejoinder dated 7<sup>th</sup> March 2024 and filed on 11<sup>th</sup> March 2024, restating its arguments in support and further urging that the 1<sup>st</sup> respondent's submissions were not accompanied by a replying affidavit and were therefore defective. The upshot, according to the applicant, being that the application is unopposed by the 1<sup>st</sup> respondent as well as the 2<sup>nd</sup>, 3<sup>rd</sup>, 14<sup>th</sup> and 16<sup>th</sup> respondents who had neither filed their responses nor written submissions; and

**[10] COGNISANT OF THE FACT** that this Court has already established the guidelines upon which an intended appeal may be certified as one involving a matter of general public importance in ***Hermanus Phillipus Steyn v. Giovanni Gnechi Ruscone*** [*supra*]; to the effect that:

***“...for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy 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...”***

**[11] WE NOW OPINE** as follows:

- i. Having considered the pleadings and submissions by the parties herein, and guided by the principles established in the ***Hermanus Case***, we find that the Motion lacks merit as the applicant has not concisely and satisfactorily identified any issue, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal’s ruling denying certification;
- ii. Neither has the applicant raised any substantial question of law, the determination of which, would have a significant bearing on the public interest;
- iii. The Court of Appeal only determined the justification for striking out the respondents’ defences by the Environment and Land Court, partially allowed the appeal, and remitted the matter to the trial court for determination on merit; and
- iv. Therefore, the applicant is mistakenly inviting this Court to determine facts in a contest between the parties, which by itself, is not a basis for granting certification to appeal to the Supreme Court.

**[12] CONSEQUENTLY**, and for reasons aforesaid, we make the following **ORDERS**:

- (i) The Notice of Motion dated 7<sup>th</sup> February 2024 and filed on 9<sup>th</sup> February 2024 is hereby dismissed.**
- (ii) The Costs of this application shall be borne by the applicant.**

It is so Ordered.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of July 2024.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT**

.....  
**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**

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

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

**REGISTRAR,**  
**SUPREME COURT OF KENYA**