



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

APPLICATION NO. E017 OF 2024

– BETWEEN –

DAVID MUTHEE KIBUTIRI

(suing as the legal representative of the estate of

LOISE WANJA KIBUTIRI).....APPLICANT

– AND –

THOMAS KIBUTIRI NJORO

GEORGE KAMAU KIBUTIRI

ROBERT NDUNGI KIBUTIRI

(sued as the legal representatives of the estate of

JAMES NJORO KIBUTIRI).....1ST RESPONDENT

DAVID KIBUTIRI NJAU.....2ND RESPONDENT

*(Being an application for review of the decision of the Court of Appeal
(Musinga, Kantai & Gachoka, JJ.A) delivered on 26th April 2024 denying
certification and leave to appeal to the Supreme Court on grounds of general
public importance under Article 163(4)(b) of the Constitution)*

Representation:

Mr. Karanja Munyori for the Applicant
(Kamau Kuria & Co. Advocates)

No appearance for the Respondents

RULING OF THE COURT

[1] UPON PERUSING the Originating Motion by the applicant dated 9th May 2024 and filed on 13th May 2024 pursuant to Article 163(4)(b) of the Constitution, Section 15 of the Supreme Court Act, Cap 9B, and Rules 33 of the Supreme Court Rules, 2020 seeking: *review of the Ruling of Court of Appeal (Musinga, Kantai & Gachoka, J.J A) dated 26th April 2024 denying certification of the intended appeal as one involving matters of general public importance; and certification of the intended appeal (against the judgment of the Court of Appeal (Ouko (P) (as he then was), Okwengu & Makhandia, JJ. A) delivered on 25th September 2020 in Civil Appeal No. 156 of 2019, **David Muthee Kibutiri (suing as the legal representative of the estate of Loise Wanja Kibutiri) vs. Thomas Kibutiri Njoro & Others** as consolidated with Civil Appeal No. 192 of 2019, **David Kibutiri Njau (suing as the legal representative of the estate of Loise Wanja Kibutiri) vs. David Muthee Kibutiri & Others**; and*

[2] UPON PERUSING the grounds on the face of the application, the affidavit in support sworn by *David Muthee Kibutiri* on 9th May 2024, wherein it is urged that the intended appeal raises the following questions of general public importance: *what is the nature of a resulting trust?; whether a resulting trust is essentially a property concept; whether, under the resulting trust doctrine, a person can be taken to have made a gift of his/her money without saying so; whether the underlying principle of a resulting trust is that it is, the intention of the guarantor or contributor alone that counts; whether, according to the doctrine of a resulting trust, ownership vests when the purchase takes place and*

cannot be extinguished or suspended; and whether the resulting trust doctrine is of general interest to the present and other generations of Kenyans; and

[3] UPON CONSIDERING the applicant's submissions dated 9th May 2024 and filed on 13th May 2024, wherein he restates his arguments for certification, and in addition, urges that the application meets the requirements for certification as restated by this Court in ***Shah & 7 Others vs. Mombasa Bricks & Tiles Ltd & 5 Others*** (Application 3 (E008) of 2022) [2022] KESC 25 (KLR). Furthermore, the applicant contends that the appellate court misapplied and misapprehended the nature of the doctrine of a resulting trust as described in the ***27th Edition of Snell's Principles of Equity*** on page 179 and illuminated in the cases of ***Re Golcar Sick and Funeral Society of St. Johns Sunday School*** [1972] 2 All ER 439, ***Westdeutsche Landesbank Girozentrale vs. Islington LBC*** [1996] 2 All ER 961, ***Pettitt vs. Pettitt*** [1969] 2 All ER 385, ***Kerr vs. Baranow*** and ***Vanasse vs. Sequeine*** [2011] AC 10; and

[4] NOTING that the respondents did not file any response to the application; and

[5] BEARING IN MIND the provisions of Article 163 (5) of the Constitution, Section 15B of the Supreme Court Act and Rule 33 (1) and (2) of the Supreme Court Rules 2020, and this Court's guiding principles on certification of a matter as one involving general public importance set out in ***Hermanus Phillipus Steyn vs. Giovanni Ruscone***, SC Application No. 4 of 2013 [2013] eKLR and ***Malcolm Bell vs. Daniel Toroitich Arap Moi & Another***, SC Application No. 1 of 2013; [2013] eKLR;

[6] WE NOW OPINE as follows:

- i. The Court of Appeal dismissed the application for certification upon finding that the same was filed out of time. In its determination, the appellate court pronounced itself as follows;

“We note that this application was filed on 5th November 2020, forty-one (41) days after delivery of the impugned judgment. No extension of time was granted by the Court prior to the filing of the application. We note that this is an anomaly that renders the entire application incompetent. The rule is clear on the timelines and if the applicant had good reasons to explain the delay it ought to have invoked the relevant provisions for the extension of time. In view of this glaring anomaly, we cannot take any other step.”

- ii. From the foregoing, it cannot be said that the appellate court declined to certify the appeal as one involving a matter of general public importance. What the Court did was to strike out the application on grounds that the same was incompetent, having been filed out of time. As such, we have no basis upon which to interfere with Court of Appeal’s invocation of its Rules to strike out an incompetent Motion.

[7] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- (i) *The Originating Motion dated 9th May 2024 and filed on 13th May 2024 is hereby dismissed.***
- (ii) *We make no order as to costs there having been no opposition by the respondents.***

It is so Ordered.

