



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

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

#### APPLICATION NO. E026 OF 2024

-BETWEEN-

**MOMBASA CEMENT LIMITED..... APPLICANT**

**VERSUS**

**HARISH RAMJI .....1<sup>ST</sup> RESPONDENT**

**BHARAT RAMJI ..... 2<sup>ND</sup> RESPONDENT**

**ASHVIN RAMJI ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND.....4<sup>TH</sup> RESPONDENT**

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*(An application for certification and leave to appeal to the Supreme Court of Kenya after review of the Ruling of the Court of Appeal delivered on the 20<sup>th</sup> September 2024 at Nairobi (Kiage, M'Inoti & Tuiyot JJ.A) declining to grant certification to the Applicant to file a Petition and Appeal in the Supreme Court on grounds of matters of general public importance on a substantial miscarriage of justice in Nairobi Court of Appeal Civil Application No. SUP E001 of 2024)*

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#### Representation:

Mr. Sanjeev Khagram for the Applicant  
(A.B. Patel & Patel LLP Advocates)

Mr. Issa Mansur for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents  
(Issa & Company Advocates)

No appearance for the 4<sup>th</sup> Respondent

### RULING OF THE COURT

**[1] UPON** perusing the Originating Motion dated 4<sup>th</sup> October, 2024 and filed on 9<sup>th</sup> October, 2024, pursuant to Article 163(4)(b) & (5) of the Constitution,

Sections 3, 15, 15B, 23(2B) & 24 of the Supreme Court Act and Rules 3, 32, 33, 36 & 37 of the Supreme Court Rules, 2022 seeking a review of the decision of the Court of Appeal made on 20<sup>th</sup> September 2024 declining to certify the intended appeal against the judgment of the Court of Appeal in Nairobi Civil Appeal No.590 of 2019 (**Harish Ramji, Bharat Ramji & Ashwin Ramji vs Mombasa Cement Limited & National Social Security Fund**) as raising matters of general public importance as well as to avoid a gross and substantial miscarriage being occasioned; and

**[2] UPON** perusing the grounds on the face of the application, the supporting affidavit by the applicant's Manager, EVANS FRANCIS MUIGAI sworn on 4<sup>th</sup> October 2024 including the annexures thereon and the written submissions dated 23<sup>rd</sup> October 2024 and filed on 29<sup>th</sup> October 2024 incorporating the applicant's legal arguments that: the Court of Appeal's Judgment dated 15<sup>th</sup> December 2023 and the reasoning adopted in its ruling of 20<sup>th</sup> September 2024 on the validity of the title to the suit property (LR No.11895/50) contradicts this Court's decision in **Dina Management Limited v County Government of Mombasa & 5 others** (Petition No.8 (E010) of 2021 [2023] KESC 30 (KLR)) (**Dina Management Case**); the Court of Appeal's judgment is in direct conflict and at cross-purposes with its own previous decision in **Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others** [2018]eKLR, **Munya Maina vs Hiram Gathitha Maina & Moses Okatch Owuor & Anor vs Attorney General & Anor** [2017]eKLR; the Court of Appeal, on the certification application, conveniently and deliberately ignored the application dated 14<sup>th</sup> June 2023 relating to the fresh evidence of fraud and illegality which it had already considered as urgent and was pending determination thereby infringing on the applicant's constitutional right to fair hearing under Article 50 and infringing Article 159(3) of the Constitution in rendering a decision that is repugnant to justice and morality; and

**[3] MINDFUL** of the applicant's submission that it is a matter of general public importance for the Court to determine, as a matter of law, whether a valid title to property can issue or any proprietary rights can ensue over a particular parcel of land where the operative part of the Transfer Deed refers to a different parcel of

land. That, if allowed to stand, the general public will likely interpret the decision as one condoning illegality resulting in issuance of a valid indefeasible title for land referred to only in the preamble of the transfer document. The applicant on that point refers the Court to the settled principles of law on certification in ***Steyn v Ruscone*** (Application 4 of 2012) [2013] KESC 11 (KLR) (***Hermanus Phillipus Steyn case***), ***Githiga & 5 others v Kiru Tea Factory Company Limited*** (Petition 13 of 2019) [2023]KESC 41 on the question of procedural fairness, right to a fair hearing and the requirement of all Courts to adhere to the principles of natural justice and in ***Deynes Muriithi & 4 others v. Law Society of Kenya & another***; SC Application No 12 of 2015, [2016] eKLR on the Court's jurisdiction to correct the injustice occasioned by a contravention of the Constitution; and

[4] **COGNISANT** of the applicant's additional submission that a further issue of general public interest relates to the conflict in interpretation of the applicable law as to the status of a decree arising out of a consent order of the court as the decision by the Court of Appeal created a conflict as pertains the applicability of section 3(3) of the Law of Contract Act where there has been substantial part-performance as decided by the Court of Appeal in ***Peter Mbiru Michuki v Samuel Mugo Michuki*** [2014] eKLR where it was held that an oral contract for sale of land can be enforced if it is coupled with part performance; and

[5] **UPON** reading the affidavit by BHARAT RAMJI, the 2<sup>nd</sup> respondent herein sworn on 26<sup>th</sup> November 2024 and filed on 28<sup>th</sup> November 2024 on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> respondents wherein they oppose the application on the grounds broadly summarized as that; the application does not meet the threshold for certification as the issues raised neither formed part of the issues for determination by the superior courts below nor do they transcend the specific circumstances of the parties; that some of the issues raised in the application for certification before the Court of Appeal did not flow from the pleadings for determination; that the applicant is trying to advance a completely new claim in this application for review of the Court of Appeal's ruling; that the issue of fraud was already determined and found to be unsubstantiated; the allegations of fraud being introduced through an affidavit post judgment were not pleaded before either the

Environment and Land Court or the Court of Appeal; that the applicant filed two independent applications before the Court of Appeal dated 11<sup>th</sup> January 2024 and 14<sup>th</sup> June 2024, that the two applications are separate and distinct from one another and were considered and determined separately, with the respondent having filed grounds of opposition to both of them; and

**[6] CONSIDERING** the respondents' written submissions dated 26<sup>th</sup> November 2024 and filed on 28<sup>th</sup> November 2024 in which they delineate two issues for determination being: whether the Court of Appeal correctly exercised its jurisdiction in declining to certify the intended appeal as a matter of general public importance and whether there are any grounds for review of that decision; and whether the proposed issues raise any matters of general public importance warranting certification and grant of leave by this Court. The respondents in that context conclude against allowing the application on both grounds adding that the Court of Appeal rightly noted that the principles in *Dina Management Case* are already settled; no conflict was created regarding the provisions of section 3(3) of the Law of Contract Act; and the judgment of the Court of Appeal was consistent with the holding in *Peter Mbiru Michuki case* and distinguishable from the Court of Appeal cases cited by the applicant being *Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others [2018]eKLR*; *Munya Maina vs Hiram Gathiha Maina [2013] KECA 94 (KLR)* and *Moses Okatch Owuor & Another vs Attorney General & Another [2017]eKLR*;

**[7] APPRECIATING** that the 4<sup>th</sup> respondent neither appeared nor filed any response to the application; and

**[8] NOTING** that the dispute between the parties relates to a property known as LR No.11895/50 which the applicant avers was fraudulently registered in the 1<sup>st</sup> to 3<sup>rd</sup> respondents' names despite the applicant having paid for it and being in occupation since the year 2010 if not earlier. Moreover, the impugned judgment by the Court of Appeal set aside the judgment that had been issued in favour of the applicant's counterclaim by the Environment and Land Court in which the applicant claimed that it had acquired a legal and beneficial interest in the suit

property accruing from LR No.11895/11 (part). On its part, the 1<sup>st</sup> to 3<sup>rd</sup> respondents averred that they are the registered owners of the suit property purchased from the 4<sup>th</sup> respondent and the applicant had trespassed therein prompting the filing of the suit before the Environment and Land Court; and

**[9] TAKING INTO ACCOUNT** this Court's guiding principles for certifying a matter as that involving general public importance set out in ***Hermanus Phillipus Steyn case*** and having considered the application, affidavits and submissions filed, we **NOW OPINE** as follows:

- (i) The dispute relates to the ownership of a parcel of land accruing from the 4<sup>th</sup> respondent. The 1<sup>st</sup> to 3<sup>rd</sup> respondents moved to assert their ownership in LR No.11895/50 (the suit property) by filing ***ELC Case No.365 of 2010 Harish Ramji & 2 others v Mombasa Cement Limited & Another*** seeking an injunction against the applicant from trespassing on the same. The said respondents traced their ownership from an offer letter dated 20<sup>th</sup> December 2006 in which the suit property was to be excised out of LR No.11895/24 but the sale was stopped by a consent entered into in ***HCCC No.22 of 2007, Harp Investco Limited v NSSF, the Commissioner of Lands, the Registrar of Titles and Golden Terrace on 16<sup>th</sup> June 2010.***
- (ii) The applicant filed a counterclaim asserting that the suit property had been fraudulently registered to the 1<sup>st</sup> to 3<sup>rd</sup> respondents. This was on the basis that the applicant was registered as proprietor of LR No.11895/25 (a sub-division of LR No.11895/24) and that on 26<sup>th</sup> November 2006, NSSF offered to sell to the applicant a portion thereof; and the applicant succeeded in its counterclaim before the Environment and Land Court prompting the appeal by the 1<sup>st</sup> to 3<sup>rd</sup> respondents, resulting to the Court of Appeal overturning the decision of the Environment and Land Court.
- (iii) The applicant takes issue with the Court of Appeal's failure to make a finding of fraud and instead making an allegedly speculative and erroneous assumption to the effect that there seemed a rather obvious clerical error in the Transfer Deed; this was despite the self-evident fraud manifested in the transfer deed given that the operative part of the

Transfer Deed which transferred LR No.11895/48 (and not LR No. 11895/50) appeared on the execution page that had been sealed and executed by the parties whilst none of the other pages that referred to LR No.11895/50 had been signed, initialed or sealed to confirm their authenticity; and

- (iv) The issues for determination in the substantive appeal before the Court of Appeal revolved around the validity of the title to the suit property. In addressing the appeal, the court interrogated whether the 1<sup>st</sup> to 3<sup>rd</sup> respondents acquired a valid title to the suit property; whether the applicant has any proprietary interest over the suit property and whether the counterclaim by the applicant was meritorious.
- (v) In its application before the Court of Appeal, the applicant framed a total of seven questions as raising issues of general public importance. These issues coalesce around fraud in relation to indefeasibility of title. The applicant submits that the Court of Appeal failed to consider a manifest fraud on the transfer deed by instead finding that the discrepancy noted on the transfer deed was a “clerical error”. In our view, this is a factual determination about a specific property. It is our finding that fraud is a factual question to be determined on the basis of evidence adduced in a matter before a court from time to time. Beyond a general statement, no evidence was produced to demonstrate how this issue transcends the present parties. As the judges of appeal rightly noted, this Court has in ***Dina Management Case*** settled the issue. We add that the applicant is not asking the Court to reconsider the settled position but seems aggrieved by the finding of the Court of Appeal. It is well established that questions of fraud require to be not only pleaded but also particularized with sufficient specificity.
- (vi) It is also noted that the applicant has made an attempt to substantiate the allegation of fraud by filing an application before the Court of Appeal introducing the additional evidence in its possession. We have to agree that the application is separate and distinct from the application for certification and it is to be handled to its own conclusion. However, we note that in the said application, the applicant had applied to stay the

delivery of the ruling on certification pending the determination of the said application to adduce additional evidence. This in our view was not the correct approach as it would have required the bench dealing with the application for certification to not only review the decision of the Court of Appeal sought to be appealed from but also consider certifying an appeal on the basis of information not contained in the judgment sought to be appealed against.

- (vii) On the violation of the applicant's rights under Articles 25(c) and 28 of the Constitution, the extent of the rights violated remains a factual issue with circumstances specific to the parties. In any event, matters surrounding the interpretation and application of the constitution follow a definite appellate path so as to invoke our jurisdiction under Article 163(4)(a) of the Constitution.
- (viii) We reiterate, as we have done previously, that a mere apprehension of a miscarriage of justice, as is echoed by the applicant, is a matter most apt for resolution in the superior courts below. It is not a proper basis for granting certification for an appeal to the Supreme Court as elucidated in the *Hermanus Phillipus Steyn case*. The intended appeal must squarely fall within Article 163 (4)(b) of the Constitution for it to attract our attention;
- (ix) The upshot of our finding is that we affirm that the Court of Appeal was correct in its decision declining to certify the questions raised by the applicant as substantial questions of law of general public importance that would necessitate the exercise of this Court's jurisdiction under Article 163(4)(b) of the Constitution. As for costs, we see no reason to burden any party with costs and each party should bear its own costs.

**[10] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) ***The Originating Motion dated 4<sup>th</sup> October, 2024 and filed on 9<sup>th</sup> October, 2024 be and is hereby dismissed; and***
- (ii) ***Each party to bear its own costs.***

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of March, 2025.**

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

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

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**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**