

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. 3 (E008) OF 2022

BETWEEN

- 1. ARVIND SHAH**
- 2. HARHABEN SHAH**
- 3. GOSHRANI HOLDINGS LTD**
- 4. COAST PROPERTIES LTD**
- 5. COAST CLAY WORKS LTD**
- 6. COAST MAIZE MILLERS LTD**
- 7. SPA MILLERS NAIROBI LTD**
- 8. HIGHWAY CENTRE LTD..... APPLICANTS**

VERSUS

- 1. MOMBASA BRICKS & TILES LTD**
- 2. DINESH KUMAR ZAVERCHAND JETHA**
- 3. ATEET DINESH JETHA**
- 4. ZAVERCHAND SOJPAL JETHA HOLDINGS LTD**
- 5. EXON INVESTMENTS LTD**
- 6. EXON PLASTICS LIMITED.....RESPONDENTS**

(Being an application for review of the Court of Appeal decision refusing grant of certification and leave to appeal in the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution, the ruling itself delivered on 1st April 2022 in Mombasa Civil Application No.69 of 2019)

RULING

[1] UPON perusing the Originating Motion application by the applicants dated and filed on 19th April 2022 pursuant to Rule 33 of the Supreme Court Rules, sections 15 and 16 of the Supreme Court Act and Article 163(4)(b) of the Constitution and inherent powers of the Court:

- i) The Supreme Court does review and set aside the decision of the Court of Appeal in Mombasa Civil Application No.68 of 2019 declining to certify the questions as raising matters of general public importance.*
- ii) The Supreme Court does review and set aside the said decision rejecting the request for certification on the grounds that it had not been filed within the prescribed timelines.*
- iii) The Supreme Court does review the said ruling and declare that the Court of Appeal erred in law in failing to certify the matters herein as raising questions of general public importance deserving to be considered by the Supreme Court on appeal.*
- iv) The Supreme Court does grant leave to the applicants to appeal against the decision of the Court of Appeal in Mombasa Civil Appeal No.117 of 2018.*
- v) The Supreme Court does order that leave so granted operate as stay of execution of the orders resulting from the impugned judgment.*
- vi) Costs of this application to be provided for.*

[2] UPON perusing the questions for determination on the face of the application, the supporting affidavit of Arvind Shah and the written submissions dated and filed on 19th April 2022 accompanying the application in which the applicants raise fifteen questions that they deem as being of general public importance, such issues including:

- a) the Court of Appeal introducing and relying on new facts and evidence;
- b) need to clarify right to property under Article 40 of the Constitution and doctrines of trust in particular constructive trust and importing trust into

- an express contract of sale of land and into express provisions of Articles of Association of a Company;
- c) the decision of the Court of Appeal conflicting with sections 30, 93, 104 and 105 of the Companies Act;
 - d) application of the Law of Contract Act and laws relating to disposal of rights in land by committing an error and sanctioning unilateral amendments by unwritten contested oral facts and the precedence resulting therefrom;
 - e) whether a court has judicial authority to declare that in a company, shares that have been allotted but not fully paid for are held in trust for the other shareholders and whether in such circumstances the common remedy for calling up for the payment for the value of such unpaid shares should not apply;
 - f) whether a court has jurisdiction to impose a shareholders' agreement in the incorporation of companies so as to give shares in those companies to third parties or to direct that a shareholder holds such shares in trust for a third party;
 - g) whether a supposed trustee is under obligation to use own resources for the benefit of the beneficiaries under the trust arrangement and not be entitled to an equitable claim in a property thereby invested;
 - h) whether the Court of Appeal erred in law and misconstrued Article 163(4)(b) of the Constitution by restricting the time within which an application for certification of appeal could be submitted and the need for Supreme Court to clarify timelines for filing a request for certification under its jurisdiction to entertain an appeal and clarify the law and principles considering that the Court of Appeal having taken note of the delay in filing nevertheless proceeded to determine the application on merit;
 - i) the need for the Court to clarify that a party to litigation should not lose his rights simply because of excusable mistakes by their advocates.

[3] UPON FURTHER considering the applicants' argument that they meet the test of general public importance as set out in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No.3 of 2012 [2012]eKLR and *Hermanus Phillipus Steyn v Giovanni Gnechi – Ruscone* SC Application No. 4 of 2012 [2013]eKLR and the Court of Appeal decision in the case of *Murai v Wainaina (No.4)* Civil Application No. NAI 9/1978 and the Supreme Court's jurisprudence in *Kenya Railways Corporation & 2 others v Okoiti & 3 others* (Petition 13 & 18 of 2020 (Consolidated)) [2022] KESC 2 (KLR) (10 February 2022) (Ruling) on the court's enlargement of time on its own motion.

[4] COGNISANT of the Notice of Preliminary Objection dated 28th April 2022 and filed on 4th May 2022 on the grounds that:

- a) The Court lacks jurisdiction as the application was filed out of the time limited by Rule 33(2) as read with Rules 10(3), 12(1), 14 and 15 of the Supreme Court Rules, 2020 in that the application, despite the physical copies having been stamped as received by the registry on 19th April 2022 having been filed electronically on 19th April 2022 with the time between uploading and payment of court fees having occurred between 1708 hours and 1720 hours by which time it was beyond working hours; written submissions having been uploaded on 20th April 2022 at 1252 hours on 20th April 2022 and payment receipt generated at 1306 hours; that the precedent set in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* SC Application No. 16 of 2014 [2014]eKLR and *County Executive of Kisumu v County Government of Kisumu* [2017]eKLR does not permit jurisdiction over documents filed out of time rendering the application a nullity;
- b) The applicants have not demonstrated that they filed or served Notice of Appeal against the judgment on 4th April 2019 within 14 days as required under Rule 36(1) of the Supreme Court Rules;

c) The application does not fall within the purview of review, the substance of the questions raised before the Court of Appeal being different from those being raised in the present application; that the questions raised before the court of appeal raised over 200 questions in which counsel focused on the right to fair trial and the recourse for such while the questions raised in the present application purport to turn upon the jurisdiction of the courts to declare constructive trusts.

AND the affidavit verifying the facts in the preliminary objection sworn on 28th April 2022 by Michael M. Mutinda, a licensed process server employed by, M/s Ndegwa & Sitonik Advocates, the firm on record for the 1st to 4th respondents, following his perusal of the judiciary e-filing online portal; the Supplementary preliminary objection dated and filed on 20th May 2022 on the grounds that the court lacks jurisdiction to determine prayer (e) of the Originating Motion seeking stay of execution because:

- a) Rule 31(2) of the Supreme Court Rules prohibits parties from originating an interlocutory application before a petition of appeal is filed;
- b) The applicants have not filed the petition of appeal and the application for review is not a reference.

[5] TAKING INTO ACCOUNT the submissions by the 1st to 4th respondents dated and filed on 20th May 2022 on the preliminary objection and supplementary preliminary objection in which the respondents reiterate the objections and rely on the case of *Kenya Hotel Properties Limited v Attorney general & 5 others* [2021]eKLR in which the Court held that the effect of Rule 12(1) of the Rules is that filing is not complete until the party submits both the printed and electronic form and *George Boniface Mbugua v Mohammed Jawayd Iqbal (personal representative of the Estate of the late Ghulam Rasool Jammohamed)* SC Misc. Application No.7 (E011) of 2021 [2021] eKLR where the Court held that an

interlocutory application must be based on an existing petition without which it had no foundation and was a nullity *ab initio*.

[6] FURTHER TAKING INTO ACCOUNT the grounds of objection dated 28th April 2022 and filed on 4th May 2022 and Replying Affidavit by Dinesh Jetha, the 2nd respondent herein, director of the 1st respondent, father to the 3rd respondent and duly authorized to swear the affidavit by the co-respondents,

[7] BEARING IN MIND the applicants' rejoinder affidavits to the preliminary objections filed on 16th May 2022 by William Okaalo an Advocate in the firm on record for the applicants who depones that they were at the Court's registry on 19th April 2022 being the first working day after the Easter holiday with the complete set of the physical documents by 4:15pm having called the registry earlier to be guided on the filing modalities; that there were system downtime challenges that occasioned the online filing which they only managed to do within 20 minutes after 5PM and should therefore not be punished for the system downtime, no prejudice having been occasioned on the respondents. On the submissions, counsel depones that they were waiting for further directions from the registry as the Rules do not require filing of submissions together with the present application, though the submissions were among the physical documents availed at the Court's registry on 19th April 2022, and it was only on 20th April 2022 that the same was uploaded on the online filing portal.

[8] On his part, Arvind Shah in his affidavit also sworn on 16th May 2022 reiterates his earlier affidavit and adds that the current application is limited to review of certification and not factual contestations which is a preserve of the appeal itself and that the respondents conceded that subject matter of the dispute among others concerns issues of trust of property and creation of constructive trust presenting the Supreme Court with the first opportunity to clarify the principles as a matter of general public importance. He further depones that the grounds for the application for review themselves speak of

the basis for staying execution of an erroneous decision of the Court of Appeal that has the effect of enabling the respondents to benefit from a misapplication of principles of law.

[9] FROM THE FOREGOING, we opine that following our decision in *Telkom Kenya Limited v John Ochanda & 996 others*, SC Application No.17 of 2014 [2015] eKLR and *Teachers Service Commission v Simon P. Kamau & 19 others*, SC Application No.38 of 2014 [2015] eKLR, Rule 36(4) of the Supreme Court Rules makes it optional to file a notice of appeal either before or after certification in a matter of general public importance. Accordingly, the present application for review of denial of certification cannot be held to be incompetent merely because it was not preceded by the filing of a notice of appeal.

[10] WE FURTHER OPINE that Rule 12(1) of the Supreme Court Rules, 2020 does not prescribe the order in which physical and electronic documents are to be filed. Rule 14(1) mandates the parties to file the physical documents at the Court's registry during working hours specified as 8.30 a.m. to 5.00 p.m. by Rule 10(3). Counsel for the applicants has demonstrated that he was in the registry within the timelines with a view to concluding the filing processes and he presented the physical documents which were stamped. We are persuaded that counsel made best efforts to comply with the registration timelines and that there was system downtime which was beyond the control of the parties. The applicants should not therefore be punished for the delay in electronic filing on account of system downtime between uploading and electronic payment of fees that delayed the process for about 20 minutes beyond the working hours, through no fault of theirs.

[11] As to whether the applicants meet the threshold for certification, the principles as appreciated by the parties and the Court of Appeal are set out in *Hermanus Phillipus Steyn* case. The main ground as noted in the impugned ruling was captured by the Court of Appeal as follows:

“2. . . . The main grounds for the application are that the issues of general public importance raised are the right to a fair trial where a decision made by the Court of Appeal is in violation of the law; relies on extraneous matters and not on the evidence; is biased and contradictory, and which results in the expropriation of private property from one litigant to another in violation of Article 40 of the Constitution.”

[12] In declining certification, the Court of Appeal summed up the issues as those involving the nature of, and circumstances in which an agreement or contract may be vitiated by undue influence; the law on circumstances when a resulting or constructive trust arises, including from the arrangements as to shareholding in companies; and the circumstances when a court may pierce the corporate veil. The appellate court proceeded to note that these are issues explained in many texts, treatises of law and decisions of that court, some of which were sighted by the Court of Appeal in its judgment. In addition, the issues raised rest on the facts of each particular case. For that reason, the appellate court was not persuaded that the route for certification and leave to appeal to this Court is available to the applicants.

[13] In reviewing the decision of the Court of Appeal, we have critically evaluated the pleadings and arguments by the parties. It is evident that the applicants were aggrieved by the right to fair trial with the ultimate bearing on the right to own private property among the litigants. We think that the dispute did not end with the vitiation of contracts or the law on the circumstances of resulting or constructive trusts and the lifting of the corporate veil which we agree are settled issues. The crux of the applicants’ case in their fifteen grounds, as we understand it, is the ultimate recourse granted by the courts under such instances in view of the existing constitutional and statutory provisions. In particular, the applicants challenge whether it is 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 a registered holder of land or

shares, respectively, obtained for valuable consideration without offending the constitutional right to property under Article 40 and other statutory provisions.

[14] In our view, this is an issue that requires our intervention and input, as it transcends the applicants, amounts to a substantial point of law determination of which has a significant bearing on the public interest. There is need for this Court to settle the surrounding jurisprudence as mandated by the Constitution and the Supreme Court Act. We are therefore inclined to review the decision of the Court of Appeal albeit on this limited aspect.

[15] With regard to the second prayer relating to adherence to the procedural timelines before the Court of Appeal, that is a matter for the Court of Appeal's consideration in exercise of its jurisdiction and not for this Court's consideration and determination.

[16] As for the prayer seeking that leave so granted operate as stay of execution of the orders resulting from the impugned judgment, we rehash the position in **Republic v Ahmad Abolfathi Mohammed & another** SC Criminal Application No. 2 of 2018 [2018] eKLR and **Town Council of Awendo v Nelson Oduor Onyango & 13 others** SC Misc. Application No. 49 of 2014 [2015] eKLR wherein we granted similar reliefs with the aim of preserving the subject matter. We add that unlike in **George Boniface Mbugua case** where it was unclear under which of the Court's jurisdiction the applicant approached the Court, that is not the position at present. As already stated, the court reserves its discretion to grant conservatory relief bearing in mind the obtaining circumstances. Rule 31 (2) of the Court's Rules refers to interlocutory application, the present application for review of certification not being such an interlocutory application as contemplated by the said rule.

[17] Before we conclude, it was brought to our attention that the applicants filed a Notice of Motion application on 16th June 2022 under certificate of urgency seeking leave to file a Supplementary Affidavit enclosing a Notice of Appeal filed at the Court of Appeal on 18th April 2019. The application was

placed before the duty Judge (*Ibrahim SCJ*) who directed that the same be placed before the presiding Judge of the present bench already constituted to determine the application. We have perused the application and are of the view that nothing turns on the said application in light of our ultimate decision in this ruling.

[18] IT FOLLOWS THAT, the applicants have largely succeeded in their application. In the end, we find that:

- i. The Originating Motion Application dated and filed on 19th April 2022 be and is allowed to the extent that:***
 - a) The ruling of the Court of Appeal declining to certify this matter as one of general public importance is hereby set aside.***
 - b) The applicants are granted leave to appeal to the supreme court limited to the following issues which are certified as involving general public importance:***
 - a. Whether a constructive trust can be imported into a land sale agreement to defeat a registered title resulting therefrom; and***
 - b. Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.***
- ii. All activities based on previous Orders, that interfere with the status of the suit properties, as identified and as were in issue at the High Court and the Court Appeal, are hereby stayed, pending the hearing and determination of the proposed appeal.***
- iii. The applicants to file and serve their appeal within 21 days of this ruling.***
- iv. Once filed the appeal shall be disposed off on priority basis.***

