Frann Investments Limited v Kenya Anti Corruption Commission & 6 others (Civil Application E077 of 2024) [2025] KECA 1707 (KLR) (24 October 2025) (Ruling)

Neutral citation: [2025] KECA 1707 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E077 OF 2024

P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

OCTOBER 24, 2025

BETWEEN

FRANN INVESTMENTS LIMITED ..... APPLICANT

AND

KENYA ANTI CORRUPTION COMMISSION ..... 1ST RESPONDENT

FRANCIS GITHUI WAHOME ..... 2ND RESPONDENT

ANNE GATHONI ..... 3RD RESPONDENT

VICTOR WAHOME ..... 4TH RESPONDENT

EDWARD KAGUME ..... 5TH RESPONDENT

DAVID MWANGI ..... 6TH RESPONDENT

WILSON GACANJA ..... 7TH RESPONDENT

(Being an application for a certification that this matter is of general public importance pursuant to Article 153 (4) (b) of the Constitution 2010 with respect to the proposed appeal from the Judgement of the Court of Appeal at Mombasa (Nyamweya, Laibuta & Odunga, JJ.A.) dated 21st June 2024inCivil Appeal No. E038 of 2021)

RULING

1. The subject matter in dispute arose from consolidated suits filed by the 1st respondent, Kenya Anti-Corruption Commission, against the applicant, Frann Investments Limited, the 2nd respondent, Francis Githui Wahome, the 3rd respondent, Ann Gathoni, the 4th respondent, Victor Wahome, the 5th respondent, Edward Kagume, the 6th respondent, David Mwangi, and the 7th respondent, Wilson Gacanja.

2. The 1st respondent's case was that L.R. No. MN/III/293 (the suit property) was illegally allocated to a Mr. Kenny Mohammed Sheikh Ali on 8th February 1995 while it was not available for allocation since it belonged to the Department of Customs, now Kenya Revenue Authority. The 1st respondent contended that the 2nd - 7th respondents fraudulently and illegally caused resurvey and change of the original suit property to L.R. No. MN/III/2974 resulting into 10 new plots, being L.R. Nos. 11N/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658 and 3659.

3. The 1st respondent stated that, on or about 19th April 2007, the 2nd respondent purportedly transferred L.R. No. MN/III/3657 to the applicant for a consideration of Kshs.300,000; that the 2nd respondent, being an employee of the Customs Department, ought to have known that the suit property used to be a customs outpost/watch tower, hence was not available for alienation; that, therefore, the applicant was not a bona fide purchaser for value; and that the sale by the 2nd respondent was tainted with fraud and was against the express provisions of the law.

4. In their respective defences, the 2nd - 6th respondents stated that they were honest purchasers for value having purchased L.R. 293/III/MN (later L.R. 2974/III/MN) in good faith through a sale agreement with Mr. Kenny Mohammed Sheikh Ali as the original allotee, and for valuable consideration without notice of any defect of title.

5. The 7th respondent was sued in his official capacity as the former Commissioner of Lands. His defence was that his powers were delegated by the President. He sought leave to join the Attorney General as a party to the suit. He contended that the 1st respondent's powers to file and prosecute the suit was taken away by dint of Sections 8 and 130 of the Government Lands Act (now repealed).

6. The learned Judge (Munyao Sila, J.), in a judgement delivered on 12th November 2020, found that the suit property was already assigned for use by the Government and was therefore not available for allocation to a private individual. The attempts by the applicant and the 2nd respondent to sanitise their title as innocent purchasers for value was rejected by the trial court. The Judge found that Mr. Kenny Mohammed Sheikh Ali had nothing to transfer to the 2nd respondent.

7. In the end, the trial court granted the prayers sought by the 1st respondent and ordered the 7th respondent to pay general damages in the sum of Kshs.1,000,000; that costs of the suit be paid jointly and severally by the applicant and the 2nd to 7th respondents; that the 2nd to 7th respondents do surrender vacant possession of the suit properties and remove the developments erected thereon within 30 days; and that in default, the 1st respondent or other public entity who will seize the suit property be at liberty to remove the developments at the 2nd to 7th respondents' costs.

8. Aggrieved, the applicant filed an appeal to this Court. The applicant raised three issues, namely: that the 1st respondent's suit was time barred by dint of Section 42(1) (d) of the *Limitation of Actions Act*, Cap 22; the propriety of the finding that the suit premises were not available for allocation and alienation; and whether the applicant was an innocent purchaser for value.

9. This Court (Nyamweya, Laibuta & Odunga, JJ.A.), in its decision dated and delivered on 21st June 2024, opined that the pertinent question which needed to be answered was whether the 1st respondent discharged the burden of proving that the allocation of the land was illegal and irregular.

10. This Court was satisfied that the evidence tendered by the 1st respondent before the trial court demonstrated that the suit property was already surveyed, planned and reserved for use as a Customs House as at the time of its allocation to Mr. Kenny Mohammed Sheikh Ali; and that, even if the suit property was available for allocation, the specific and mandatory procedure required to be followed under Section 9 of the Government Lands Act (repealed) in allocating the land was not followed.

11. It was also held that under Section 10 of the repealed Government Lands Act with respect to town plots, a lease may not be granted for a term exceeding 100 years, and that Section 12 requires that the said leases, unless ordered by the President, are to be sold through auction; that such procedure was not followed by the applicant, and no evidence was adduced to show that there was a lease issued to Mr. Kenny Mohammed Sheikh Ali capable of being transferred to the 2nd respondent and thereafter to the applicant; that the title held by the applicant was not indefeasible as the process followed prior to its issuance did not comply with the law; and that the applicant could not claim to be an innocent purchaser for value. Accordingly, the appeal was dismissed with no order as to costs as the nature of the suit was one of public interest.

12. The applicant is further aggrieved by the decision of this Court, which precipitated the filing of the instant application by way of a Notice of Motion dated 5th July 2024. The Motion is brought under the provisions of Article 163(4) (b) of *the Constitution*, section 15B of the *Supreme Court Act* and all other enabling provisions of law, seeking the following orders:

    i. That the Court be pleased to certify that Mombasa Civil Appeal No. E038 of 2021 - Frann Investment Limited vs. Kenya Anti-Corruption Commission & 6 Others filed in the Court of Appeal at Mombasa is a matter that raises issues of general public importance and that the intended appeal against the Judgment issued by the Court of Appeal in Mombasa Civil Appeal No. E038 of 2021 Frann Investment Limited vs. Kenya Anti-Corruption Commission & 6 Others be certified as fit and proper to be heard by the Supreme Court of Kenya.

    ii. That costs of this application be in the cause.

13 In support of its application, the applicant, through Edward Kagume, one of its directors, deposed and reiterated that it acquired the suit property from the 2nd and 3rd respondents, who had acquired it from Mr. Kenny Mohammed Sheikh Ali; that it paid the government all the revenues demanded in form of stamp premium, county rates, building approvals and change of user; and that the government approved the development of a four-storey building thereon currently valued at Kshs.47,500,000.

14. The applicant deposed that the intended appeal to the Supreme Court raises matters of general public importance, and that it should be allowed on three grounds: firstly, that this Court failed to make a determination on limitation of actions in a matter where the government is a claimant, thus raising the issue of the interplay of section 42(1) (d) of the Limitations of Actions Act vis a vis Articles 48 and 27 of *the Constitution*; secondly, that the issue of indefeasibility of title to land being challenged by the government impacts the whole country since it is the government which issues those titles; thirdly, by virtue of the fact that the said Mr. Kenny Mohammed Sheikh Ali was not a party to the suit despite several allegations being made against him, it means that the judgement of this Court cannot stand against a party who was condemned unheard.

15. Opposing the application, the 1st respondent filed a replying affidavit sworn on 1st April 2025 by its advocate, one Ben Murei.). Counsel deposed that the issues set out by the applicant do not meet the governing principles for consideration of a matter meriting certification as one of general public importance for the reasons that: the issues do not transcend the parties in the dispute; the applicant seeks to advance a private interest as opposed to a public one; and the question of whether one arm of the government can challenge the integrity of title after another arm of government received revenue and approved developments is not a matter of general public importance since it touches on issues already determined by the Supreme Court in Dina Management Limited vs. County Government of Mombasa & 5 Others (2023) KESC 30 (KLR).

16. On the limitation of actions, it was deposed that the same was not raised as an issue for determination both before the trial and appellate courts; that section 42 of the *Limitation of Actions Act* with respect to its application as appertains to public property is unambiguous, and, as such, it does not require the Supreme Court's interpretation; the issue as to whether Kenny Mohammed Sheikh Ali should have been joined as a party is not a matter of public importance, since his estate has not complained of being condemned unheard as contended by the applicant; and consequently, the intended appeal does not meet the constitutional threshold to warrant this Court's leave to appeal to the Supreme Court.

17. At the virtual hearing of this application on 8th April 2025, learned counsel Mr. Gikandi appeared for the applicant while learned counsel Mr. Murei appeared for the 1st respondent. Learned counsel for the 2nd-6th respondents and 7th respondent did not appear despite being served with a hearing notice. We also note that the said respondents did not participate in the appeal. Counsel present relied on their respective parties' written submissions which they highlighted. Those of the applicant are dated 3rd April 2025 while those of the 1st respondent are dated 4th April 2025.

18. Mr. Gikandi submitted that the suit property was allocated to Mr. Kenny Mohammed Sheikh Ali, who then sold it to the 2nd respondent before he transferred it to the applicant; that the question the applicant will be urging before the Supreme Court is what happens 'now that he is required to vacate the property and leave the said property to be enjoyed by Government yet it has not been shown that he committed any act of irregularity or illegality in the acquisition of the property hence, ... who has the responsibility of compensating him for the said loss?.' Accordingly, that the matter transcends beyond the parties in the dispute.

19. Counsel submitted that it would be an injustice for the applicant's title which was issued over 40 years ago to be upset and termed as irregularly allocated, and the applicant be expected to vacate the suit property without being compensated for the development carried out thereon; and that it is important that the Supreme Court addresses itself to this issue pursuant to Article 258 of *the Constitution*. To buttress its submissions, the applicant further relied on the Supreme Court case of Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone (2013) KESC 11 (KLR) and this Court's decisions of Stanbic Bank Kenya Limited vs. Santowels Limited (2023) KECA 188 (KLR) and Kwanza Estates Limited vs. Jomo Kenyatta University of Agriculture & Technology (2023) KECA 1516 (KLR).

20. On his part, Mr. Murei submitted that what the applicant intends to raise was not a subject of determination in the proceedings in both the High Court and the Court of Appeal, being the issue as to what was paid as a consideration to acquire the title which is the stand premium and the ground rent; and that, since there was no counterclaim for the claim of Kshs.47,000,000 as the development cost, the same cannot give rise to an application for certification for appeal to the Supreme Court.

21. Counsel submitted that both the trial court and this Court established that the applicant was not an innocent purchaser for value without notice; that the applicant obtained the title from the 2nd respondent whom the court found must have known that the suit property belonged to his employer, now the Kenya Revenue Authority; that the question of who an innocent purchaser is for value was settled by the Supreme Court in the decisions of Dina Management (supra) and Torino Enterprises Limited vs. Attorney General (2023) KESC 79 (KLR), which guided this Court in arriving at its impugned determination; that what is at stake is whether there exists settled law or jurisprudence on the subject matter; that there is no point of law raised by the applicant that is of jurisprudential novelty and significance that requires the further input of the Supreme Court as was held by the Court (ruling) in Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 others [2012] eKLR; that justice demands that litigation should come to an end; and that bearing in mind that the matter has been active since 2009, the judgment of this Court suffices to bring it to an end.

22. We have considered the application, the response, the submissions in support thereof and in opposition thereto, and the law. In our considered view, the question that falls for determination is whether the applicant has raised matters of general public importance worth of certification for appeal to the Supreme Court.

23. This Court in determining what constitutes a matter of general public importance, rendered itself in the case of Memphis Limited vs. Kenya Ports Authority [2022] KECA 105 (KLR) thus:

> " 18. ... For leave to appeal to be granted, the applicant needs to demonstrate that the points of law are 'of general importance the determination of which will substantially affect the rights of one or more of the parties.'
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> 19. The Act does not however provide direction on what may be considered to be 'of general importance'. We think what the Supreme Court of Kenya stated in Hermanus Phillipus Steyn vs. Giovanni Gnecchi- Ruscone [2013] eKLR though in the context of certification under Article 163(4) (b) of *the Constitution*, does provide guidance in interpreting the words 'of general importance' under Section 39(3) (b) of the Act. In that case, the Supreme Court stated thus:
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> > 'Before this Court, "a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.'"

24. The litmus test in determining whether a matter passes muster as one which raises issues of general public importance is now well settled by the Supreme Court in the case of Hermanus Phillipus Steyn (supra) as follows:

> " i. 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 on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
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> ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
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> iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
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> iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

25. The obligation to satisfy this Court that the intended appeal raises substantial issues of law of general public interest rests on the applicant. This Court in Peter Kamau Ikigu vs. Barclays Bank of Kenya Limited & Peterson Ogino Ongaro (2015) KECA 149 (KLR) made reference to its own decision in Joseph Amisi Omukanda vs. The Independent Elections & Boundaries Commission & 2 Others – Civil Application No. Nai. 114 of 2014 (UR) which held:

> "The applicant is therefore obliged to satisfy us that the issue intended to be canvassed before the Supreme Court transcends the circumstances of the case and has a significant bearing on the public interest and that where the issue involved is a point of law, it is a substantial one, the determination of which will have a significant bearing on the public interest."

26. Flowing from the decision of Hermanus Phillipus Steyn (supra), a matter of public importance is one which: transcends the interest of the parties to invoke a significant bearing on public interest; the question or questions of law must have been a subject of judicial determination; and the applicant has the duty to concisely identify the matters of public importance and/or there has to be an occasion where there is a state of uncertainty in the law or arise from contradictory precedents. In the broad sense, the intended appeal which the applicant intends to raise should not be a camouflage as a moment for a party to relitigate its case in a different forum. The matters which are proposed to be considered before the Supreme Court should be those which will affect a significant number of persons in general.

27. Our understanding of the questions posed by the applicant to be determined by the Supreme Court can be zeroed in to be: what is the recourse for a party who incurs costs after purchasing property from a buyer who did not have a good title. We understand that the applicant wants the question as to the root of the title to the suit property to be addressed afresh, and the consequences that follow where the original title was found to have been illegally acquired.

28. In our view, we find that there are no novel issues that can be raised on the legality of a subsequent owner of a title whose root was tainted with illegality. We say so because the Supreme Court has sufficiently addressed itself in this respect in the case of Dina Management (supra). The Supreme Court held that if a party contends that it is a bona fide purchaser for value, it must first go to the root of the title, right from the first allotment. It is not sufficient to dangle a title as proof of ownership. It certainly goes beyond that.

29. To ask the Supreme Court to revisit the evidence, would be tantamount to urging the Court to reconsider a matter already settled within the purview of its mandate upon certification under

Article 163(4) (a) and (b) of *the Constitution*. As was held by this Court in Koinange Investment & Development Ltd vs. Robert Nelson Ngethe (2013) KECA 380 (KLR), with which we fully concur:

> "...the jurisdiction of the Supreme Court being the apex court, a court of last resort, must not be invoked in a routine fashion. It was never intended to be a regular court of appeal against all and sundry orders passed by this Court."

30. Finally, it is trite that a question of law or fact which was not addressed at the trial and before the appellate court cannot be discussed before the Supreme Court.

31. From the foregoing discourse, we arrive at the inescapable conclusion that the application before us for certification and leave to appeal to the Supreme Court pursuant to Article 163 (4)(b) of *the Constitution* and section 15B of the *Supreme Court Act* does not meet the required threshold as enunciated in the case of Phillipus Steyn (supra). Consequently, the Notice of Motion dated 5th July 2024 fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER, 2025.

P. NYAMWEYA

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. JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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. JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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. JUDGE OF APPEAL

I certify that this is the true copy of the original

SIGNED DEPUTY REGISTRAR