



Samaki Industries (K) Ltd v Kenya Ports Authority (Civil Application E093 of 2024) [2025] KECA 1870 (KLR) (7 November 2025) (Ruling)

Neutral citation: [2025] KECA 1870 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E093 OF 2024
P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
NOVEMBER 7, 2025**

BETWEEN

SAMAKI INDUSTRIES (K) LTD APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(An application for certification and leave to appeal to the Supreme Court of Kenya from the Judgment of this Court at Mombasa (Gatembu, Murgor & Laibuta, JJ. A) delivered on 12th July 2024 in Mombasa Civil Appeal No. E104 of 2021)

RULING

1. This ruling is on an application dated 26th July 2024 lodged by the applicant, Samaki Industries (K) Ltd, and arises from the judgment delivered by this Court (Gatembu, Murgor & Laibuta, JJ.A.) on 12th July 2024 in Mombasa Civil Appeal No. E104 of 2021. The applicant, who was the appellant in the said appeal, is seeking leave to appeal from the said judgment to the Supreme Court, and certification that its intended appeal to the Supreme Court involves matters of general public importance.
2. The application is supported by an affidavit deposed to on even date and a further affidavit sworn on 28th March 2025 by Salim Verjee, who has filed the application describing himself as “the applicant in person”. In summary, the applicant’s case is that it is dissatisfied with the decision of this Court on the ground that it did not address the legal issues craved in the appeal, and the main question of law that the applicant wishes to pursue in the Supreme Court of Kenya is on the interpretation of Order 7 Rule 5 (a) of the Civil Procedure Rules, 2010, since this Court did not address legal question on whether the trial Court had the legal mandate to grant a counter-claim that was not supported by a verifying affidavit.
3. The applicant averred that this matter is of public importance due to the fact that the mandatory requirement that a counterclaim must be accompanied by a verifying affidavit has been complicated



by conflicting judgments from various courts; including the trial Court, the Environment and Land Court (ELC) and this Court in the matter giving rise to the intended appeal, thereby creating a 'state of uncertainty' which requires settlement in the Supreme Court. Further, that unless the orders sought are granted, the applicant would suffer great prejudice and injustice, and the people of Kenya will lose confidence in courts as rules of Court enacted by the Acts of Parliament should be strictly adhered to so as to provide a fair trial to parties.

4. The applicant filed written submission dated 7th November 2024 in which it reiterated these averments and detailed the injustices it allegedly suffered arising from the impugned judgment of this Court and, in particular, that the learned judges did not consider his submissions and authorities; that they erred in finding that his amended memorandum of appeal had 26 grounds and offended rule 88(1) of the Court of Appeal Rules 2022 when it had only 8 grounds; and that they were in error in finding that there was no renewal of the subject lease and dismissed his appeal despite there being evidence on record.
5. The respondent opposed the application by way of a replying affidavit sworn on 27th November 2024 by Lillian M. Kamau, its Senior Legal Officer, who deponed that the applicant had not demonstrated to the Court that the matter was one of general public importance and had significant bearing on public interest. Additionally, the applicant had not provided any contradictory decision on the application of Order 7 Rule 5(a) of the Civil Procedure Rules to justify the need for determination by the Supreme Court to resolve the 'state of uncertainty'. Further, the issue of the application of Order 7 Rule 5 (a) was not a question or objection that was addressed by the applicant in its pleadings in the trial Court and, thus, it could not be raised at any appellate stage or at this stage.
6. The respondent's advocates on record filed submissions dated 27th April 2025 and urged that both the trial court and the appellate Courts found that the applicant did not plead this issue at the trial, and could not raise the same at the appellate Courts, and that, therefore, did not address the issue of Order 7 Rule 5 (a) of the Civil Procedure Rules. Therefore, that the authorities cited by the applicant did not permit the grant of leave given the circumstances of this case. Additionally, there was no degree of uncertainty or substantial issue of legal construction of the Civil Procedure Rules as alleged by the applicant, and no significant legal point had been raised that would impact public interest.
7. The above averments and submissions were reiterated at a hearing held on this Court's virtual platform on 29th April 2025 by Mr. Salim Verjee and Mr. Sanjeev Khagram, learned counsel for the respondents. The background to the instant application is that the applicant instituted Mombasa Civil Case No 307 of 2023 in the Chief Magistrate's Court at Mombasa (the trial court) against the respondent based on a lease agreement the parties had entered into, and seeking orders of injunction to restrain the respondent from evicting them or levying distress or in any way interfering with its quiet possession of plot No. Mombasa Block XXXI 3 (the suit premises); an order that the lease over the suit premises be extended; a declaration that the applicant should rightfully and legally occupy the suit premises; and damages.
8. The respondent filed a defence and counterclaim against the applicant and claimed that the applicant had acknowledged and accepted revised rent set by the respondent and had breached the lease agreement by refusing and or neglecting to pay quarterly rent as it became due. The respondent therefore sought rent arrears; vacant possession of the suit premises; and mesne profits from 1st April 2001 to the date of delivery of vacant possession together with interest at court rates.
9. The applicant's suit was dismissed and the respondent's counterclaim allowed in a judgment dated 28th November 2019 delivered by Hon. E. Makori CM (as he then was), who found that the lease agreement between the parties determined on 31st March 2001, and that the applicant was thereby illegally in possession of the suit premises as a trespasser. The trial court accordingly directed the appellant to yield vacant possession of the suit premises to the respondent; to pay rent arrears due and payable up to the



month of March 2003; and to pay to the respondent Kshs. 84,600 per month from April 2003 and on every succeeding month until payment in full together with interest thereon at court rates.

10. The applicant, being aggrieved with the decision of the trial court, appealed to the ELC in Mombasa ELC Case No. 33 of 2020, and Yano, J. upheld the findings by the trial court and dismissed the appeal in a judgment dated 27th September 2021. The applicant consequently filed a second appeal in the Court of Appeal in Mombasa Civil Appeal No. E104 of 2021, which was likewise dismissed, and which decision the applicant now seeks leave to appeal to the Supreme Court.
11. It is in this context that we consider the issue before us, namely whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave to appeal pursuant to Article 163(4) of *akn ke act 2010 constitution the Constitution*. The criteria for certification of a matter as one of general importance was laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gnechi Ruscone (2013) eKLR* as follows:

“...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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”
12. The Supreme Court further enunciated the principles for determining whether a matter of general public importance arises thus:
 - 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 one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
 - 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;
 - 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;
 - 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 *akn ke act 2010 constitution 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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”



13. The question of law that is sought to be certified by the applicant as of being of public importance for determination by the Supreme Court is whether the trial court had the legal mandate to grant a counter-claim that was not supported by a verifying affidavit. It is notable in this respect that the ELC found as follows on this question:

"21 ... The Appellant in ground 2 of the Memorandum of Appeal averred that the Respondent's counterclaim was unaccompanied by a verifying affidavit. I have perused the Appellant's Reply to Defence and Counterclaim and note that the Appellant did not address this issue. In my view, a reply to defence and counterclaim should also address any anomalies that a Plaintiff finds in a counterclaim. The Court will only reconsider issues that were pleaded by the parties in their pleadings. I find no basis as an appellate court to reopen trial proceedings and consider an issue that was not raised in the trial court."

14. Similarly, the Court of Appeal noted as follows in the impugned judgment:

" 13. We need to point out at the outset that most of the grounds were not pleaded, raised or considered at the trial or on First Appeal to the ELC. The new grounds sought to be introduced this late in the day are not for us to determine. "

15. In effect, there is no contradictory decision on the question of law raised by the applicant made by the trial court, the ELC and the Court of Appeal as alleged, since the applicant does not controvert the averments and findings that it did not raise the issue of the respondent's counterclaim not having been supported by a verifying affidavit in the trial court. This issue could not therefore be raised on appeal either in the ELC or in the Court of Appeal and, for the same reason, cannot be raised as a question of law for determination by the Supreme Court as clarified in *Hermanus Phillipus Steyn vs. Giovanni Gniecchi Ruscone*, (supra) . In addition, the applicant's other grievances arise from the facts and evidence adduced in his case and appeals, and are therefore not capable of transcending the dispute between the parties.

16. The application dated 26th July 2024 is accordingly found not to have merit and is hereby dismissed with costs to the respondent.

17. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER, 2025.

P. NYAMWEYA

..... **JUDGE OF APPEAL**

Dr. K. I. LAIBUTA CArb, FCIArb.

..... **JUDGE OF APPEAL**

G.W. NGENYE-MACHARIA

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

..... **JUDGE OF APPEAL**

