

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: ASIKE-MAKHANDIA, KANTAI & NGENYE,

JJ.A.) CIVIL APPLICATION NO. SUP. E010 OF 2024

BETWEEN

JUDITH WANJIRU NJENGA.....APPLICANT

AND

MASTO HOLDINGS LIMITED.....1ST

RESPONDENT P.M.

NG'ANG'A.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD

RESPONDENT

THE ATTORNEY GENERAL.....4TH

RESPONDENT THE NATIONAL LANDS

COMMISSION.....5TH RESPONDENT

THE COOPERATIVE BANK OF KENYA.....6TH

RESPONDENT

(Being an application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal of Kenya at Nairobi (Tuiyott, Achode & Gachoka, JJ.A.) dated 26th April 2024

in

Civil Appeal No. 632 of 2019)

***** RULING OF THE**

COURT

[1] Before us is an application dated 17th May 2024 underpinned by

Articles 22, 47, 48, 50, 163(4)(b) and 165(5) of the Constitution;
Sections 3A and 3B of the Appellate Jurisdiction Act; **Rules 1(2),**
5(2)(b), 41, 42, 43, 44, 45, 47 and 49 of the Court of Appeal Rules,
Section 15

of the Supreme Court Act, 2011 and **Rule 33** of the Supreme Court Rules, 2020 (as revised in 2022), together with all other enabling provisions of the law.

[2] The Applicant, Judith Wanjiru Njenga, in the main, seeks stay of execution of the judgment of this Court delivered on 26th April 2024 and leave to appeal to the Supreme Court of Kenya against the said judgment. However, at the plenary hearing of the application, and being persuaded by this Court that having delivered the impugned judgment, this Court became *functus officio* and therefore had no jurisdiction to grant the prayer for stay of execution sought, counsel for the applicant graciously agreed to abandon the said prayer. Accordingly, this ruling is in respect of the prayer for leave and certification to the Supreme Court of Kenya only.

[3] The facts preceding this application are that, on 8th August 2019, the Environment and Land Court “the ELC” (Kossy Bor, J.) rendered a judgment and decree in favour of the applicant in ELC Case No. 226 of 2016, which concerned the ownership of all that piece or parcel of land known as L.R No. 209/522/2- “the suit property”. The dispute arose from the exercise of a statutory power of sale by the 6th respondent, Co- operative Bank of Kenya Ltd. Upon the 6th respondent

successfully

carrying out the exercise and the 1st respondent Masto Holdings Limited, emerging as the highest and successful bidder, the 6th respondent transferred the suit property to it. The applicant successfully challenged the validity of the charge, the exercise of the statutory power of sale and subsequent transfer before Kossy Bor, J, asserting that the process was irregular and unlawful.

[4] On appeal, this Court (Tuiyott, Achode, and Gachoka, JJ.A.) overturned the ELC'S decision by holding that the 1st respondent had acquired proprietary rights through the statutory power of sale and ordered the annulment of the applicant's title documents, rectification of the land register to cancel entries in her favour, her eviction therefrom with the Officer Commanding Station, Central Police Station being directed to enforce possession in favour of the 1st respondent.

[5] Dissatisfied with the outcome, the applicant wishes to move to the Supreme Court of Kenya for a third opinion. However, she cannot do so as of right since under **Article 163(4)(b)** of the Constitution, leave of this Court is mandatory, hence, the instant application.

[6] In support thereof, the applicant contends she is now aged over 80 years and has since 1974 occupied the suit property as her matrimonial home. That execution of this Court's judgment would

occasion her

irreparable harm and render her intended appeal to the Supreme Court of Kenya nugatory. She further argues that this Court's decision is in direct conflict with established jurisprudence of both the Supreme Court and this Court, particularly on the doctrines of indefeasibility of title, *bona fide* purchaser for value, and the hierarchy of courts under *stare decisis* doctrine. Reliance was placed on **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, which held that a title obtained through an unlawful process cannot be deemed indefeasible; **Samuel Kamere v Land Registrar, Kajiado [2015] eKLR**, which emphasized due diligence in establishing valid title; and **Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR)**, which required a registered proprietor to prove legality of acquisition when root title is challenged.

[7] The Applicant therefore seeks certification that her intended appeal raises matters of general public importance under **Article 163(4)(b)** of the Constitution, specifically whether protection under **Section 23(1)** of the Registration of Titles Act extends to titles acquired without due process, whether **Section 69B(2)** of the Indian Transfer of Property Act affords absolute protection to purchasers despite flaws in the exercise of statutory

power of sale, and clarification on the proper application of *stare decisis*

where courts of concurrent jurisdiction issue conflicting decisions.

[8] The application was opposed by the 1st respondent, through its Director Martha Gathoni Mwema, who swore a replying Affidavit on 28th May 2024. In essence, the 1st Respondent deposed that the substratum of this Court's judgment of 26th April 2024 was founded on clear factual findings. These include the fact that the applicant's late husband had charged the suit property to secure a loan of Kshs.10,000,000 in 2001; that he defaulted in repayment, leading to the lawful exercise of the 6th respondent's statutory power of sale; that the applicant misrepresented the loss of the original title and obtained provisional and substantive titles on that basis; and that there existed multiple previous judgments and orders in its favour and against the applicant. The respondent contended that the applicant had deliberately suppressed these facts in her application, and that they are peculiar to the specific dispute, revolving around her personal interest in the suit property, and cannot therefore be elevated to matters of general public importance under **Article 163(4)(b)** of the Constitution.

[9] It was further argued that the application is merely an attempt to

perpetuate the applicant's continued illegal and unjustified occupation
of

the suit property for over two decades now, despite numerous judgments against her and in favour of the 1st respondent. She maintained that mere dissatisfaction or grievance with the judgment does not meet the constitutional threshold for certification to the Supreme Court of Kenya. The alleged uncertainty in the law is unfounded, as the precedents cited by the applicant were distinguishable and irrelevant to the present dispute. The 1st respondent emphasized that no court had ever found that the 6th respondent followed a flawed process in exercising its statutory power of sale. It was also argued that the doctrine of *res judicata* bars re-litigation of issues already conclusively determined in favour of the 1st respondent. The 1st respondent therefore urged this Court to dismiss the application with costs, terming it a ploy to advance the applicant's personal interests under the guise of raising matters of public importance.

[10] The 6th respondent's opposition to the application was contained in the replying affidavit sworn by Florence W. Njuguna, its Legal Manager, dated 30th May 2024. She deposed that the applicant's late husband, together with a business partner, obtained a loan facility of Kshs.10,000,000 secured by a legal charge over the suit property.

Upon default, the 6th respondent lawfully exercised its statutory power of sale, culminating in the transfer of the suit property to the 1st respondent. She

deposed that the applicant never challenged the existence of the charge during trial. Indeed, she even admitted it in her pleadings.

[11] She maintained that the issue of whether the statutory sale was conducted lawfully had already been settled in earlier proceedings, including **Judith Wanjiru Njenga v Attorney General & 5 Others [2012] eKLR** where the court upheld the validity of the sale. She further contended that the authorities relied upon by the applicant, were distinguishable and inapplicable to the present case, as there had been no finding of fraud or misrepresentation in the acquisition of the suit property by the 1st respondent. She argued that the applicant's reliance on alleged conflicts in precedent is misconceived, and that the intended appeal did not raise matters of general public importance but, rather, seeks to protect her personal interest in remaining in occupation of the suit property albeit illegally. Hence, the 6th respondent urged this Court to dismiss the application with costs.

[12] There were no filings by the other respondents either in support of, or in opposition to, the application though all were served with the application.

[13] The application was heard by way of written submissions with limited oral highlights. When called out for hearing Mr. **Bichire**,

learned counsel

appeared for the applicant, Mr. **Regeru**, teaming up with **Dr. Muthomi Thiankolu**, learned counsel appeared for the 1st respondent, while **Mr. Muthee**, learned counsel appeared for the 6th respondent. Again, there was no representation by the other respondents during the plenary hearing of the application though once more served with the hearing notice for the day.

[14] Counsel for the applicant, submitted this Court erred in overturning the High Court's judgment and decree by disregarding the validity of the charge document that gave rise to the statutory power of sale. He submitted that the appellate court's decision conflicted with established jurisprudence of both the Supreme Court and the Court of Appeal, particularly on the doctrines of indefeasibility of title, *bona fide* purchaser for value, and the proper application of *stare decisis*. He contended that the legality of the instrument of charge was never interrogated, contrary to the Supreme Court's dicta in

Dina Management Limited v County

Government of Mombasa & Others (supra). He further relied on **Samuel**

Kamere v Land Registrar, Kajiado (supra) and **Munyu Maina v Hiram**

Gathiha Maina (supra) to argue that a registered proprietor must

go beyond the instrument of title and prove the legality of acquisition when the root of title is challenged. He therefore urged the Court to certify that

the applicant's intended appeal to the Supreme Court of Kenya raised matters of general public importance under **Article 163(4)(b)** of the Constitution.

[15] On the other hand, counsel for the 1st Respondent submitted that the application was fatally defective and incapable of meeting the constitutional threshold for certification under **Article 163(4)(b)**. He submitted that the application was premised merely on the applicant's dissatisfaction with the Court's judgment, which in itself is not a ground for certification to the Supreme Court of Kenya. He further argued that the applicant had failed to identify any substantial point of law with a significant bearing on public interest, and that the dispute was a narrow *inter-partes* contest concerning ownership of the suit property. He emphasized that the precedents cited by the applicant in **Dina Management, Samuel Kamere** and **Munyu Maina (all supra)**, were irrelevant and distinguishable, as none of them dealt with the lawful exercise of a statutory power of sale by a chargee. He added that no court had ever found the 6th respondent's exercise of statutory power of sale flawed, and that multiple previous judgments had already settled the matter in favour of the 1st and 6th respondents respectively.

[16] Counsel for the 6th respondent in opposition to the application, emphasized that the Civil Procedure Rules, including Order 42 Rule 6, did not apply to this Court, citing **Rafiki Enterprises Limited v Kingsway**

Tyres & Automart Limited [1996] eKLR and **Patel v Lagat [2022] KECA 509 (KLR)** in support of the proposition.

[17] On certification, counsel submitted that the applicant had failed to demonstrate that her intended appeal raises matters of general public importance under **Article 163(4)(b)**. Relying on **Hermanus Phillipus**

Steyn v Giovanni Gneccchi-Ruscione [2013] KESC 11 (KLR) and subsequent Supreme Court decisions on the subject, counsel submitted that the issues proposed by the applicant do not transcend her private interest in the suit property and have not evolved through the judicial hierarchy.

[18] He contended that the applicant was attempting to introduce new issues at this stage, which were neither considered nor determined by the ELC or the Court of Appeal, and which would improperly require the Supreme Court to determine them in the first instance. He further submitted that the authorities cited by the applicant, including **Dina**

Management, Samuel Kamere, and Munyu Maina, (all supra)
were all distinguishable and wholly inapplicable, stressing that there
had been no

finding of fraud or misrepresentation in the acquisition of the suit property by the 1st respondent, and that the sale was conducted under the lawful exercise of the statutory power of sale by the 6th respondent. In the ultimate, counsel urged this Court to dismiss the application with costs.

[19] In our view, the only issue for determination in this application is whether it meets the threshold for certification to the Supreme Court of Kenya.

[20] The principles governing certification under **Article 163(4) (b)** of the Constitution were established in **Hermanus Phillipus Steyn v Giovanni**

Gnecchi-Ruscone (**supra**) and subsequent Supreme Court decisions. The applicant must demonstrate that the intended appeal raises matters of general public importance, transcends personal interest of the parties, raises substantial questions of law, and has significant bearing on public interest. In the present application, the dispute revolves around the applicant's continued occupation of the suit property despite the same having been sold by the 6th respondent to the 1st respondent through the former in exercise of its statutory power of sale. That exercise of the statutory power of sale has never

been impugned by both the trial court in several rulings and indeed the 1st appellate court. While the applicant

invokes doctrines of indefeasibility of title and *bona fide* purchaser, these issues have already been settled in multiple decisions, including

Judith

Wanjiru Njenga v Attorney General & 5 Others [2012] eKLR,

which upheld the validity of the sale.

[21]The authorities cited by the Applicant are distinguishable. In **Dina**

Management Ltd v County Government of Mombasa & 5

Others (supra), the Supreme Court was concerned with the validity

of titles arising from allocation of public land and emphasized that a

title obtained through an unlawful process cannot be deemed

indefeasible. That case involved constitutional principles of public land

management and allocation, which are materially different from the

present dispute involving a private charge and the exercise of

statutory power of sale under the Indian Transfer of Property Act.

Similarly, **Samuel Kamere v Land Registrar, Kajiado (supra)**

dealt with the requirements for a *bona fide* purchaser for value

without notice, particularly in the context of fraudulent transfers which

again was not the case here! And **Munyu**

Maina v Hiram Gathiha Maina (supra) concerned challenges to

root title where fraud was alleged, and the Court of Appeal held that a

registered proprietor must prove legality of acquisition when root title is impugned

[22] In the instant application, there was no finding of fraud or misrepresentation in the exercise of the statutory power of sale by the 1st or 6th respondents. All in all, the factual matrix in those cases involved allegations of fraud and irregular acquisition, which are absent in the present case where the charge was duly registered and the statutory power of sale lawfully exercised.

[23] The current position of law, as consistently affirmed by both this Court and the Supreme Court, is that once a charge is validly registered and the statutory power of sale is exercised upon default, the purchaser acquires good title, and the doctrine of indefeasibility under **Section 23(1)** of the Registration of Titles Act attaches. The only remedy available to an aggrieved chargor lies in damages against the chargee if the process is alleged to have been irregular, but the validity of the purchaser's title is not impeached absent fraud. This principle has been reinforced in a long line of authorities, and no uncertainty in the law has been demonstrated that would warrant escalation of the issue to the Supreme Court.

[24] We are unable to discern where this Court ignored, overlooked or departed from the above principles to warrant the accusations by the applicant that it ignored the doctrine of *stare decisis*. Much as counsel

raised the issue of conflicting decisions of this Court and Supreme Court

and the place of *stare decisis*, however counsel was unable to point out to our satisfaction any such conflicting decisions or where the doctrine of *stare decisis* was breached. Counsel merely made references to various dictums of the Supreme Court and this Court on the issue of indefeasibility of title, the place of an innocent purchaser for value without notice but did not point out how the Court of Appeal had in its judgment had deviated from those dictums. If anything, the Court of Appeal was beholden to and bore true allegiance to those doctrines.

[25] We are further persuaded by the 1st and 6th respondents' submissions that the issues raised are narrow, fact-specific, and do not transcend the private interests of the parties to the dispute. The applicant's grievance is essentially dissatisfaction with the outcome of her appeal, which does not meet the constitutional threshold for certification under **Article 163(4)(b)**. Additionally, and in the premises, no issue of public interest has been raised to warrant such certification.

[26] In the result, we are satisfied that the applicant has failed to demonstrate that her intended appeal raises matters of general public importance under **Article 163(4)(b)** of the Constitution. Accordingly,

the application dated 17th May 2024 is hereby dismissed with costs to the 1st and 6th respondents.

[27]As a parting shot, however, we need to point out that this was a fairly simple and straightforward application which should not have taken us this long to craft and deliver this ruling. However, it was one of those applications that fell through the cracks and could not be retrieved in good time. It only became apparent when the Court was undertaking a physical audit of the pending rulings and judgments that the ruling had not been delivered. Otherwise, sincere apologies to all the parties for the delay, which may have caused them inconvenience and prejudice.

Dated and delivered at Nairobi this 6th day of March, 2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

G.W. NGENYE

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR