



Muthee (Administrator of the Estate of Karl Jacobs Ruedin - Deceased) & 2 others v Ochieng & 10 others (Suing on their behalf and on behalf of 367 Employees of African Safari Club Limited); African Safari Club Limited (In Liq) & 3 others (Interested Parties) (Civil Appeal (Application) E263 of 2022) [2025] KECA 293 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 293 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E263 OF 2022
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

**SHEILA NKATHA MUTHEE (ADMINISTRATOR OF THE ESTATE OF KARL JACOBS RUEDIN - DECEASED) 1ST APPLICANT
HANSPETER RUEDIN 2ND APPLICANT
ROLAND RUEDIN 3RD APPLICANT**

AND

**MICHAEL ONYANGO OCHIENG 1ST RESPONDENT
ALPHONSE MWANGEMI MUNGA 2ND RESPONDENT
PETER MAKAU 3RD RESPONDENT
CHIVATSI KATAMA 4TH RESPONDENT
MARICOS NYAMWANGA OKONGO 5TH RESPONDENT
PETER MUCHIRI MURIUNGI 6TH RESPONDENT
STEPHEN NZIOKA KASINA 7TH RESPONDENT
SHADRACK C LEWA 8TH RESPONDENT
BENEDICT ORWARU 9TH RESPONDENT
NICHOLAS MUOKI 10TH RESPONDENT
JAMES KINGELE 11TH RESPONDENT
SUING ON THEIR BEHALF AND ON BEHALF OF 367 EMPLOYEES OF
AFRICAN SAFARI CLUB LIMITED**



AND

AFRICAN SAFARI CLUB LIMITED (IN LIQ) INTERESTED PARTY
ERDEMANN PROPERTY LIMITED INTERESTED PARTY
STEPHEN KIMANI KARUU (T/A KIRIIYU MERCHANTS
AUCTIONEERS) INTERESTED PARTY
FRANK NEUGEBAUER INTERESTED PARTY

(Being an application for review and certification to appeal to the Supreme Court from the Judgment and Decree of the Court of Appeal of Kenya at Mombasa (Murgor, Laibuta & Odunga, JJ.A.) delivered on 12th July 2024 in Civil Appeal No. E263 of 2022)

RULING

1. Before us is the 2nd and 3rd applicants' Notice of Motion dated 10th August 2024 filed pursuant to rules 1(2), 37, and 41(2) of the Court of Appeal Rules, 2022 and in which Hanspeter Ruedin and Roland Ruedin (the applicants) pray that:
 - “(a) (spent);
 - b. the Court be pleased to exercise its jurisdiction to correct the following errors on the judgment dated and delivered on 12th July 2024:
 - “i. Deleting the words “dismissed for want of prosecution” in line 2 of paragraph 37 on page 33 and replacing them with the words “struck out”
 - ii. Deleting the words “Mombasa Petition No. 24 of 2014” in line 3 of paragraph 44 of page 38 and replacing them with the words “Succession Cause No. 305 of 2013”
 - iii. Deleting the words “Omollo J.” in line 1 on page 49 and replacing them with the words M. Onyango J.”;
 - c. this Court be pleased to certify that the judgment dated and delivered on 12th July 2024 involves matters of general public importance to enable the 2nd and 3rd applicants to appeal to the Supreme Court of Kenya against that judgment on a whopping fourteen (14) issues, namely:
 1. Whether the Court of Appeal has jurisdiction to expand the application of the doctrine of res judicata beyond the boundaries set by the Supreme Court.
 2. Whether an application challenging any specific order in any proceedings is an application challenging all orders in those proceedings.
 3. Whether a plea of res judicata improperly invoked and accepted by the Court is an infringement of the right to a fair trial, access to justice and the right to a fair hearing.



4. Whether decisions of the Court of Appeal made against decisions of the Supreme Court of Kenya are valid.
5. Whether it is now time for the Supreme Court to re-examine the test for certification under Article 163(4)(b) to accommodate violations occurring at the Court of Appeal and not arising or litigated upon in Superior Courts.
6. Whether the Court of Appeal has any jurisdiction to remit any proceedings to Superior Courts and whether orders remitting proceedings to Superior Courts are ultra vires and violation of Sections 3, 3A, 3B and 5 of the *Appellate Jurisdiction Act*.
7. Whether orders of the Court of Appeal remitting proceedings to Superior Courts instead of determining appeals conclusively is a violation of Articles 25(c), 48, 50(1) and 159(2)(b) of *the Constitution* of Kenya therefore null and void.
8. Whether the Court of Appeal may elect to determine appeals partially and remit other parts of appeals to Superior Courts and whether remitting proceedings to Superior Courts constitutes delegation of its duties and functions and the sharing of jurisdiction with Superior Courts.
9. Whether remitting proceedings to superior courts constitute supervision of Superior Courts by the Court of Appeal.
10. Whether *the Constitution* and Parliament established the Court of Appeal with appellate jurisdiction to correct errors and reverse miscarriage of justice on the part of Superior Courts or whether the intention in establishing the Court of Appeal was to give superior courts further opportunities to determine disputes with a view to reaching different determinations.
11. Whether the Court of Appeal has jurisdiction to make an order not sought by any party and whether, in doing so, the Court of Appeal must first invite and receive the views of the parties before making such order.
12. Whether avoiding the determination of an issue raised by any party in any appeal being an issue that can be resolved by reference to decisions of the Supreme Court constitutes refusal to be bound by those decisions.
13. Whether the right to a fair trial under Article 25(c) of *the Constitution* is absolute or whether it is dependent upon the discretion of the Court.
14. Whether the Court of Appeal, in applying the National Values and Principles of Governance in Article 10 of *the Constitution*, may close its eyes to obvious fraud and violations of *the Constitution* on procedural or other technicalities; and



- d. that the costs of the application be provided for.”
2. We need to point out right at the outset that the 1st applicant was allowed to resign from the administration of the estate of Karl Jacob Ruedin (Deceased) by her consent and that of the respondents sometime in July 2024.
 3. The applicants’ Motion was supported by the annexed affidavit of their counsel, Mr. F. Kinyua Kamundi sworn on 10th August 2024 essentially deposing to the grounds on which the application is made. Relevant among them are: that the impugned judgment contains mistakes that require correction under the slip rule; that the Court expanded the plea of res judicata to mean that an application challenging any order in any proceedings is one challenging all orders in those proceedings; that the current conditions for certification under Article 163(4) (b) of *the Constitution* do not accommodate certification where violations occur at the Court of Appeal, and not having been litigated in the superior court; and that the Court remitted “part of the appeal to the ELRC without any jurisdiction and in violation of Articles 25(c), 48, 50(1) and 159(2)
 - (b) of *the Constitution*.” The remaining 3 grounds merely reiterate albeit in different words, the complaint relating to this Court’s jurisdiction to remit part of the dispute to the ELRC for determination on evidence.
 4. Even though Mr. Kamundi alludes to a replying affidavit of Mr. Kurauka, counsel for the respondents, and to which he purports to reply in his further affidavit sworn on 25th October 2024, the record as put to us does not contain such an affidavit in reply to the applicants’ Motion.
 5. In addition to his affidavits, counsel filed two sets of submissions dated 24th and 26th October 2024 in support of the Motion, but citing no judicial authorities. The second set was in reply to the written submissions of counsel for the respondents to which we will shortly return. All in all, the applicants’ case as deposed to and submitted by their counsel is, inter alia: that remitting proceedings to superior courts violates Article 159(2) (a) and (e) of *the Constitution*, which provides that, in exercising judicial authority, justice shall not be delayed, and that the purpose and principles of *the Constitution* shall be promoted and protected; that it also violates sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, which mandate the Court to hear and determine appeals with the objective of just, expeditious, proportionate and affordable resolution of appeals; that “it is clear to [counsel] that the Court misconstrued rule 33(b) of the Court of Appeal Rules,” and that “there is no provision in those Rules conferring jurisdiction upon the Court to remit proceedings to superior courts”; that “the current decisions of the Court of Appeal and of the Supreme Court on certification do not accommodate violations of fundamental rights and freedoms occurring or caused by the Court of Appeal;” that, “while the issue of res judicata is settled by the Supreme Court, the Supreme Court should decide whether the Court of Appeal may elect not to be bound by decisions of the Supreme Court;” that “the Supreme Court will be asked to determine whether remitting proceedings to superior courts constitutes sharing of jurisdiction;” that “remitting proceedings to superior courts is a direct violation of the functus officio doctrine because it does nothing more than asking the same or different Judge of a superior court to re-hear the dispute and change their decision;” and that, “directing that proceedings remitted to superior courts should be determined by a different Judge means that the Court of Appeal has no faith in the ability of the first Judge to determine the issue.”
 6. Opposing the applicants’ Motion, learned counsel for the respondents, M/s. Kurauka & Co., filed written submissions dated 23rd October 2024. Counsel cited the cases of *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscon* [2013] eKLR, submitting that the application does not pass the test of “a matter of general public importance” or how “the issues “transcend the interests of the parties”;



Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited [1989] eKLR, submitting that this Court cannot hear and determine all issues raised in the applicants’ Motion having allowed the interlocutory appeal in part and remitted the remaining substantive issues for determination by the ELRC on evidence; and John Florence Maritime Services Ltd & Another v CS Transport and Infrastructure & 3 Others [2021] KESC 39 (KLR) where the Supreme Court pronounced itself on the plea of res judicata thus:

“ 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action.”

7. In rejoinder to Mr. Kurauka’s submissions and replying affidavit aforesaid (which is not on record), and in furtherance of the applicants’ case as articulated in their counsel’s second set of submissions dated 26th October 2024, we hasten to observe that the same constitute an invitation to this Court to re-examine and reconsider its decision on its merits. With tremendous respect to learned counsel for the applicants, we cannot sit on appeal from our own decision.
8. On their part, the 1st Interested Party filed a replying affidavit sworn on 23rd October 2024 by its Managing Director, Zeyun Yang, deposing, inter alia, that “the issues revolving around the 1st Interested Party’s lawful purchase of the suit property at the sale auction is not a novel legal issue that relates to a private dispute that does not transcend the litigation interests of the parties nor does it raise any issues of public importance”; and that “this Court has the requisite powers and jurisdiction under rule 33 of its Rules to remit [for] rehearing of the allegations relating to the conduct of the sale auction of the suit property as it did in its judgment of 12th July 2024”.
9. Counsel for the 1st Interested Party filed written submissions, a list and bundle of authorities dated 23rd October 2024 citing 8 judicial authorities, the relevant ones of which include: Isaak Aden Mahad & Others v Westend Butchery Limited [2022] KECA 611 (KLR) where this Court addressed itself to the question as to what constitutes a matter of general public importance; Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscon (supra), inviting the Court to concur with the test for certification of the matter as one of general public importance as laid down by the Supreme Court; and John Florence Maritime Services Ltd & Another v CS Transport and Infrastructure & 3 Others (supra), submitting that this decision has not been shown to be bad law nor can it be reasonably construed as being an expansion of the doctrine of res judicata.
10. It is noteworthy that the 2nd Interested Party was deceased; that the 3rd Interested Party did not participate in the proceedings before the ELRC; and that the 4th Interested Party was in liquidation, and was not represented at the hearing of the instant Motion.
11. The only two issues that fall to be determined are whether the impugned judgment contains the alleged mistakes deserving correction under the slip rule; and whether the applicants’ case satisfies the threefold conditions for certification to the Supreme Court pursuant to Article 163(4) (b) of *the Constitution* and rule 42 of the Court of Appeal Rules.
12. It is noteworthy that neither the respondents nor the 1st Interested Party took issue with the proposed corrections in prayer (b) of the applicants’ Motion. The 1st of the three proposed corrections is in paragraph 37 of the impugned judgment where the Court observed that “ELC Petition No. 17 of 2017 ... was dismissed for want of prosecution”. The correct position drawn from the ruling of the ELRC dated 19th November 2021 is that, in paragraph 13(iv) of the ruling culminating in the impugned judgment, the ELRC stated that “... Petition No. 17 of 2017 was dismissed on 27th September 2019



- by the court for want of jurisdiction”. The applicants wish is to have this statement corrected in our decision to read that the petition was “... struck out”. We agree with the applicants that the ELRC ought to have used the words “struck out” and, accordingly, make the necessary correction to reflect the said petition as having been struck out for want of jurisdiction.
13. Turning to the 2nd proposed correction, the applicants wish to have paragraph 44 of our judgment corrected by deleting the words “Mombasa Petition No. 24 of 2014” and substituting therefor the words “Succession Cause No. 305 of 2013”. Having perused the record, we agree with the applicants and direct that the correction be effected accordingly.
 14. Finally, the 3rd correction is to the effect that the learned Judge’s name in paragraph 55 of our judgment be corrected to read “M. Onyango, in place of “Omollo, J.” We agree and hereby direct that the proposed correction be effected accordingly.
 15. We now turn to the 2nd issue as to whether the applicants’ Motion for certification that a point of law of general public importance is involved in the intended appeal to the Supreme Court. Having carefully considered the applicants’ Motion, the grounds on which it is made, the affidavits in support thereof and in reply thereto, and the provisions of Article 163(4) (b) of *the Constitution* and rule 42 of this Court’s Rules, we are of the considered view that the same stands or falls on three main issues: first, whether the applicants’ intended appeal involves a point or points of law; secondly, whether the point or points of law in issue are of general public importance; and, thirdly, whether the application has been made within 14 days of the impugned decision of this Court.
 16. It is common ground that the intended appeal raises points of law and that the Motion was filed within the time prescribed under rule 42(b) of the Rules of this Court. The only issue falling to be determined is whether the intended appeal raises points of law that transcend the interests of the parties, and whether the dispute is a matter of general public importance
 17. On the question as to the nature of the dispute the subject of the judgment of this Court, and whether it raises points of law of general public importance, we hasten to observe that the dispute between the applicants and the respondents in the ELRC, which led to the ruling the subject of the impugned judgment was purely a labour dispute in which the respondents sought to recover unpaid salaries and terminal dues; that the respondents, having succeeded in their respective claims under and by virtue of a consent judgment and decree (whose propriety has been challenged by the applicants), moved to execute their decree by attachment and sale of certain properties belonging to the applicants; that the applicants moved the ELRC vide a Motion on notice dated 27th February 2020 seeking, inter alia, to have the consent judgment aforesaid declared null and void and set aside, and that the attachment, sale, transfer and registration of the suit properties in favour of the 1st Interested Party be declared null and void; that the application dated 27th February 2020 was declared res judicata vide a ruling dated 19th November 2021; that similar issues had been raised between the parties and determined in Nairobi Civil Appeal No. 314 of 2014, whose record has not been placed before us; that ELRC cause No. 133N of 2008 remains alive; and that it is to this cause that we directed the labour dispute between the parties to be remitted for hearing and determination on evidence by a Judge other than M. Onyango, J.
 18. Article 163(4) of *the Constitution* succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of *the Constitution*, and in any matter where it is certified that the appeal involves a matter of general public importance. The main question before us is whether the applicants’ intended appeal merits certification as such. To our mind, the nature of the dispute between the parties is purely contractual, private in nature, and does not by any means raise points of law that transcend their interests. Neither is it a matter of general public importance to warrant certification pursuant to rule 42 of the Court of Appeal Rules, 2022.



19. Rule 42 of the Rules of this Court stipulates the procedure and sets out the criteria for determination by this Court of applications for leave to appeal to the Supreme Court. The Rule reads:

42. Application for certificate that point of law of general public importance involved

Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made—

- a. informally, at the time when the decision against which it is desired to appeal is given; or
- b. by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision

20. The Black's Law Dictionary defines "Point of Law" as "a discrete legal proposition at issue in a case." The question as to what constitutes a point or points of law of general public importance was enunciated in the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR where the Supreme Court explained that:

"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."

21. That cannot be said of the applicants' intended appeal. While their intended appeal may be said to raise points of law, those points are, in our considered view, not of general public importance. They relate to purely private/personal claims by the respondents in a labour dispute in which the general public has no stake. The Black's Law Dictionary links "general importance" to "public interest". It defines public interest as "... the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation." [Emphasis added]

22. Madan, JA. (as he then was) observed in *Murai v Wainaina* [1982] KLR p.38 at p.49 para 1 that:

"A question of general public importance is a question which takes into account the well-being of a society in just proportions."

23. The principles set out in the afore-cited case of *Hermanus Phillipus Steyn v Giovanni Gneccchi - Ruscone* (supra) to determine whether a matter is of general public importance include:

- (a) 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;
- b. 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;



- c. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
 - d. 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;
 - e. 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*;
 - f. 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;
 - g. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
24. In view of the foregoing, we find that the applicants’ intended appeal raises no points of law of general public importance, which settles the remaining limb of the threefold conditions for certification under rule 42 of the Rules of this Court.
25. That said, we are nonetheless obligated to pay due attention to the remaining issues advanced by the applicants, which we consider to be settled matters of law and procedure in superior courts, namely: (i) Whether this Court has the jurisdiction to expand the application of the doctrine of res judicata; (ii) whether this Court’s decisions made against decisions of the Supreme Court of Kenya are valid; (iii) whether this Court has jurisdiction to remit any proceedings to superior courts, and to make orders not sought (to wit, orders to remit the suit); (iv) whether the right to a fair trial under Article 25(c) of *the Constitution* is absolute; and (v) “Whether the Court of Appeal in applying the National Values and Principles of Governance in Article 10 of *the Constitution* may close its eyes to obvious fraud and violations of *the Constitution* on procedural or other technicalities.”
26. Mindful of the fact that it is not our mandate to pronounce ourselves on the law and practice of superior courts on issues not litigated in the court below, suffice it to observe that a cursory look at them leads to the conclusion that they do not raise any novel issue to be determined by the Supreme Court whether or not in relation to this Court’s decision in determination of the interlocutory appeal arising from the proceedings in the ELRC. Furthermore, the Court having ordered that the dispute be remitted to the ELRC for hearing and determination on evidence, there is only so much that we can say to avoid pre-empting or embarrassing the trial court with regard to such matters as to whether any of the issues in contention are res judicata. Suffice it for the moment to observe that issue Nos. (i) and (ii) are well settled in law and the Rules of procedure governing this Court (see sections 6 and 7 of the Civil Procedure Rules, 2010 and rule 33(b) of the Court of Appeal Rules, 2022).
27. As for the ante-penultimate and penultimate grounds (iii) and (iv) advanced for certification, we need not overemphasise the fact that the answers thereto are expressly stipulated in law and in the Rules of procedure with which the applicants may do well to acquaint themselves. To our mind, they do not constitute novel points of law that require interpretation by the Supreme Court. The same applies to the final ground (v) on which we reserve our comment.



28. Finally, the applicants alluded to our presumed lack of confidence in the learned Judge whose ruling came on appeal to us merely because we directed that the suit be heard and determined on its merits by a different Judge. Once again, nothing turns on this misperceived proposition. The possibility of being conflicted in a matter in which a Judge had formed an opinion is real and does not require a decision of the Supreme Court to pronounce itself on what is an age-old practice designed to guarantee impartiality and fair trial (see rule 33(b) of the Rules of this Court). All said and done, the foregoing are by no means novel points of law relating to the dispute between the parties that beg the judicial attention of the apex Court.

29. For the avoidance of doubt, a “novel issue” was defined by this Court in Mohamed v Diamond Trust Bank Kenya Limited & another [2023] KECA 1511 (KLR) thus:

“9. ... a novel issue that has arisen in Kenyan Courts for the first time needing to be resolved by the Supreme Court to avert possibility of divergent decisions of the Court of Appeal in the future.”

30. Having carefully considered the applicants’ Motion, the grounds on which it is anchored, the constitutional and other statutory requirements for certification cum leave to appeal to the Supreme Court, we find that the applicants’ Notice of Motion dated 10th August 2024 fails and is hereby dismissed with costs to the respondents and to the 1st Interested Party. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

