



Pamba & 7 others (Suing as the Administrator of the Estate of Hannington Ouma Pamba - Deceased) v Makaka & 3 others (Civil Application E076 of 2024) [2025] KECA 635 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KECA 635 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E076 OF 2024
HA OMONDI, F TUIYOTT & LK KIMARU, JJA
APRIL 4, 2025**

BETWEEN

**LUCILE NAMBO PAMBA 1ST APPLICANT
NABWIRE PAMBA 2ND APPLICANT
GEOFREY JOHN PAMBA 3RD APPLICANT
HUMPHREY MALOBA PAMBA 4TH APPLICANT
WILBERFORCE ONYANGO PAMBA 5TH APPLICANT
JOSEPHAT WANYAMA PAMBA 6TH APPLICANT
PATRICK OBOTE PAMBA 7TH APPLICANT
JUFITH NAKOCHI PAMBA 8TH APPLICANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF HANNINGTON
OUMA PAMBA - DECEASED**

AND

**ODINGA MAKAKA 1ST RESPONDENT
ROSE WERE 2ND RESPONDENT
ROBERT MAKAKA 3RD RESPONDENT
HESBORN MAKAKA 4TH RESPONDENT**

(An Application from the Judgment and order of this Court (Kiage, Mumbi Ngugi & Tuiyott, JJA) Dated 26th May, 2023 in C.A. No. 65 of 2018)



RULING

1. The applicants moved this Court in a notice of motion made pursuant to article 164(4)(b) of *the Constitution* and Rule 40 of the Court of Appeal Rules seeking an order from this Court to certify that their intended appeal to the Supreme Court raises questions of general public importance and therefore qualify for this Court to grant leave to appeal to the Supreme Court. In addition, the applicants asked the Court to grant them orders staying the execution of this Court's Judgment and decree pending the hearing of the intended appeal to the Supreme Court.
2. The grounds in support of the application are on face of the application. They can be summarized thus: the applicants were aggrieved that this Court had allowed an appeal based on a claim of trust in respect of a deceased person whose estate had not been sued; allowing the appeal against a deceased person's estate when letters of administration had not been taken; the applicants desire the Supreme court to render a decision in regard to whether a claim of trust can override a right to property as enshrined under Article 40 of *the Constitution*; whether a party can claim a right arising out of trust on behalf of a deceased person's estate when letters of administration had not been taken; and whether a transfer of interest in land by a deceased person can be reversed after his death without proof of fraud, illegality, and/or misrepresentation.
3. The applicants contend that the issues that they will to raise in their intended appeal to the Supreme court "has utmost impact on the public right to access justice which will affect numerous decisions on trust against estates of deceased persons and the public interest requires the Supreme court consideration to set an enduring jurisprudence on the delicate issue in contention." In essence, the applicants are saying that the issues they intend to raise in the intended appeal transcends the issues in dispute between the parties in the appeal that was determined by this Court. The application is supported by the annexed affidavit of Geoffrey John Pamba dated 7th December, 2023.
4. Hesborn Makaka swore a replying affidavit in opposition to the application. He deponed the applicants had filed a similar application in Civil Appeal No. 65 of 2018 dated 7th December, 2023 which they withdrew when the said application was listed for hearing on 16th May, 2024. The respondents complained that the current application was not served upon them. Nevertheless, he urged the Court to consider the replying affidavit that he had filed in Court in the previous application. In the said replying affidavit, it was the respondents' contention that the application had been filed hopelessly out of time without the requisite leave of court. They were of the view that the application was an afterthought. The respondents contend that no cogent reasons were advanced by the applicants to justify this Court's exercise of its discretion to certify the intended appeal as raising issues of public interest and importance. The respondents urged that the finding made by this Court in the judgment was not an issue that is fit to be considered by the Supreme court in light of the applicants' "deceitful" practice, or "willful device" and "fraudulent" conduct. The respondents urged this Court to dismiss the application as it lacks merit.
5. Both the applicants and the respondents filed their written submissions prior to the plenary hearing of the application. Mr. Omondi learned counsel for the applicants and Mr. J.V. Juma learned counsel for the respondents made brief highlights. Mr. Omondi submitted that the issue in dispute related to a claim of trust between the sons and step sons of the deceased. He urged the Court to certify the intended appeal as suitable to be heard by the Supreme Court as the issues intended to be raised in the appeal were weighty and were of public importance deserving consideration by the Supreme court.



6. On his part, Mr. Juma, submitted that the issue in dispute was fraud which was committed by the applicants. He pointed out that the judgment and the decree of this Court had already been given effect to and the fraudulent titles cancelled and the name in the register restored to the name of the deceased pending further appropriate proceedings before the Court. He urged the Court to dismiss the application as it lacks merit.
7. We have carefully considered the rival submissions, both oral and written made by the parties herein. We have also considered the application, the supporting affidavit and the replying affidavit filed by the parties to this application. The jurisdiction of this Court to certify whether an intended appeal is suitable for consideration by the Supreme Court is provided under Article 163(4) of the Constitution which reads:

“ Appeals shall lie from the Court of Appeal to the Supreme Court-

 - a. As of right in any case involving the interpretation or application of this constitution; and
 - b. In any other case in which the Supreme court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
8. The Supreme court in Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscone [2012] eKLR held thus:

“7.4. The importance of the matter must be public in nature and must transcend the circumstances of this particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of Law. as Madan JA (as he then was) said in *Murai v Wainaina* [1982] KLR 38 at page 49 para 1:
“A question of general public importance is a question which takes into account the wellbeing of a society in just proportions.”
9. In the present application, the applicants assert that the intended appeal will raise weighty and pertinent issues of public importance that deserves consideration by the Supreme court.

Although the applicants did not annex a copy of the draft memorandum of appeal that they intend to appeal before the Supreme court, they, nevertheless, point to the issues they assert require consideration by the apex court in the intended appeal in the grounds in support of the application. In essence, the applicants raise two broad issues which, in their view, are issues of public importance that require consideration by the Supreme Court. The applicants contend that the court made judgment against the estate of a deceased person where no grant of letters of administration had been issued in respect to that estate. Corollary to that, the applicants were aggrieved that this Court found the existence of trust in respect of an estate of the deceased’s estate where a grant of letters of administration had not been issued. In the applicants’ view, these are serious issues of public importance that require consideration by the Supreme court. It is in that regard that the applicants seek certification by this Court.
10. As can be expected in the circumstances, the respondents are of a contrary view. They support the finding reached by this Court and further assert that the issue in dispute was fraud and not the issues that the applicants have framed for consideration by this Court tin this application.



11. As was held by the Supreme Court in the case of Hermanus Phillipus Steyn(supra), for the applicants to persuade this Court that their case raises an issue or issues of public importance, they must also satisfy the court that the issues raise transcends their case and raise points of fact or law that will assist the public when the Supreme Court clarifies the law where there is uncertainty or where there exist conflicting decisions of this Court.
12. Have the applicants met this threshold? We think not. This Court (differently constituted) (Mumbi Ngugi, JA) held thus in *Eliud Odinga Makaka & 3 others v Lucile Nambo Pamba & others* Court of Appeal Civil Appeal No. 65 of 2018 (Kisumu) (the subject of this application):

“28 Having considered the judgment of the trial court, the proceedings and documents provided before it, and the submissions made before us, I believe that the main issue for determination in this matter is whether the trial court erred in failing to find that Edward Pamba, the deceased, was holding the suit property in trust for the appellant, the children of his deceased brothers. In considering this issue, I would also need to address the question whether the appellants were bound, in lodging their claim against the respondents to have done so in a representative capacity on behalf of their deceased fathers, and were therefore required to produce before the trial court letters of administration intestate. A corollary to this issue is whether the appellants were required to show that the respondents were the personal representatives of the estate of Edward Pamba before filing the claim against them.”
13. Upon re-evaluating the evidence, the grounds of appeal, the applicable law and the submissions made by the parties, the Court, inter alia, held thus:

“40. The land at issue belonged to the grandfather of the appellants and the respondents. Their fathers were brothers. The appellants’ father Rasto Makaka who died in 1972, and Francis Opala who died in 1971 predeceased the father of the respondents, Edward Pamba, who was then registered as the proprietor of the land in 1980. The evidence indicates that this was family land, and the appellants were entitled to a share in it. Edward Pamba, in my view, was registered as proprietor in trust for the entire family of Bwongi. Where the land was transferred to any other person without taking into account this trust, such other person, on the authority of the Supreme Court decision in *Isack M’Inanga Kiebia*, hold the said land subject to the customary trust in favour of the appellants.”
14. It is evident that the core issue that this Court determined was whether the suit land was held under customary trust and not whether a specific person’s registration thereof resulted in any legal proprietary rights being created or abridged, whether it a deceased’s estate or not. We are of the considered view that the issues that the applicants have put forth in their bid to secure this Court’s leave to appeal to the Supreme Court do not transcend the narrow issues related to the dispute between the applicants and the respondents. They are not issues of public importance or novel issues of the law that would require interpretation by the Supreme Court to clarify the law.
15. The issue of whether a court can make a finding in regard to the existence of customary trust in land disputes is a well-trodden path that, it may well be said, in the circumstances, that the law is settled. Indeed, what constitutes customary trust has already been settled by the Supreme Court in the case of *Isack M’Inanga Kiabia v. Isaaya Theuri M’lintari & another* [2018] eKLR.
16. In the premises therefore, we decline to grant leave. The application lacks merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.



H.A. OMONDI

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

F. TUIYOTT

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

L. KIMARU

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

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

Signed **DEPUTY REGISTRAR.**

