Milly Glass Works Limited v Kenya Railways Corporation & another (Civil Application E131 of 2024) [2025] KECA 1136 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1136 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E131 OF 2024

KI LAIBUTA, GWN MACHARIA & AK MURGOR, JJA

JUNE 20, 2025

BETWEEN

MILLY GLASS WORKS LIMITED ..... APPLICANT

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

PAMELA JOY OUKO T/A SADIQUE ENTERPRISES AUCTIONEERS .... 2ND RESPONDENT

(Being an application for Certification and leave to appeal to the Supreme Court of Kenya from part of the Judgment of the Court of Appeal at Mombasa (Murgor, Laibuta & Odunga, JJ.A) delivered on 25th October 2024 in Civil Appeal No. E083 of 2022)

RULING

1. The brief background of this application is that the applicant, Milly Glass Works Limited, sued the 1st respondent, Kenya Railways Corporation, and the 2nd respondent, Pamela Joy Ouko t/a Sadique Enterprises Auctioneers, in Mombasa HCCC No. 135 of 2012, which was subsequently transferred to the Environment and Land Court at Mombasa and registered as Mombasa ELC No. 135 of 2012.

2. The suit between the applicant and the respondents related to a tenancy relationship between the applicant and the 1st respondent in respect of the 1st respondent's parcel of land known as Title No. Mombasa/Block XLVIII/134 (the suit property) pursuant to a lease dated 16th January 1980 for a term of 81 years, and on the terms and conditions therein agreed.

3. A dispute having arisen over and concerning the contested rent increments, the applicant instituted the suit aforesaid praying for judgment against the respondents jointly and severally for, inter alia: a declaration that the 1st respondent had no right under the terms of the lease to raise the annual rent payable in respect of the suit property until 1stJanuary 2037; a declaration that the revision of

the annual rent complained of was unlawful, null and void; a permanent injunction to restrain the respondents, their servants or agents from interfering in any manner with the applicant's quiet and peaceful possession of the suit property and, in particular, from charging the applicant an annual rent higher than Kshs. 146,000.00 until 1st January 2037, and from levying distress or taking any other action for the recovery of such higher amount; and costs of an incidental to the suit.

4. In its defence, the 1st respondent pleaded that it had the right under clause 2 of the lease to raise the rent after every 30 years to an amount equivalent to 1/20th part of the unimproved value of the suit property as at the date of review; that the ELC had no jurisdiction to entertain the applicant's suit; and that, in any event, the applicant's suit was statute barred.

5. In its judgment dated 4th November 2021, the ELC (M. Sila, J.) found that it had jurisdiction to hear and determine the applicant's suit, which concerned the interpretation of a contract of lease. In addition, the trial court faulted the 1st respondent for revising the rent at the time and in the manner complained of, and for demanding payment by the applicant of Kshs. 10,000,000. Accordingly, it ordered refund of the sums paid over and above the amounts due on account, together with interest thereon.

6. Subsequently, the applicant moved to recover the amount due and payable to it under the decree by way of garnishee proceedings, which were successfully opposed and dismissed by a ruling dated 1st November 2022 on the ground that the application offended the provisions of section 88 of the *Kenya Railways Corporation Act*, which restricts execution or attachment against the 1st appellant and its properties, including moneys held in its bank accounts.

7. The judgment and decree of the trial court dated 4th November 2021 and the ruling dated 1st November 2022 prompted the consolidated appeals, namely Civil Appeal No. E083 OF 2022 from the judgment and decree aforesaid; and Civil Appeal No. E035 of 2023 arising from the said ruling. The precis of the two appeals is the respondents' disaffection with: the trial court's holding that it had the jurisdiction to entertain the applicant's suit and garnishee proceedings; the trial court's decision in the applicant's favour in respect of the disputed rent increment despite lack of quantification to ascertain the actual sums recoverable under the decree; the court's interpretation of the terms of lease with regard to the dates on which rent increments were permissible; its finding on the legality of the 1st respondent's notice to increase rent; and the court's view on the plea that the applicant's suit in the trial court was statute barred.

8. In determination of the consolidated appeals, we reached the conclusion that:

    i. even if any sums were found due and payable by the 1st respondent to the applicant, the 1st respondent was not liable to execution by attachment of its assets or of its bank deposits by way of garnishee proceedings in light of the statute bar imposed by section 88(a) of the *Kenya Railways Corporation Act*;

    ii. the learned Judge was not at fault in dismissing the 1st respondent's preliminary objection or in finding that he had jurisdiction to hear and determine the dispute;

    iii. the 1st respondent revised the annual rent on 1st January 1994, but the unscheduled revision did not amount to a variation of the terms of the lease agreement with regard to the two 30 years' anniversaries on which rent was revisable on the basis of the unimproved value of the suit property pursuant to clause 2(a) of the lease agreement;

    iv. even though the rent revision undertaken in 1994 was not contemplated under the lease agreement, the applicant acquiesced thereto and waived its right of claim thereon, or otherwise

failed to raise any claim within the period of limitation prescribed in section 4(1) of the Limitation of Action Act (Cap. 22) and, as a consequence, was statute barred from raising such claim;

v. the increment aforesaid was not conditional to variation of the terms of the lease with regard to the contractual date on which such increment was scheduled to be undertaken, to wit, 16th January 2010;

vi. the subsequent rent revision with effect from 1st January 2012 was valid and in accord with clause 2(a) of the lease agreement, and was undertaken in exercise of the 1st respondent's right under the lease agreement;

vii. the 1st respondent had the right to review the annual rent for the suit property after 1st January 2007 and, more specifically, after 16th January 2010, which was 30 years after execution of the lease agreement;

viii. the belated valuation of the suit property as at 30th September 2010, the subsequent revision of rent notified on 30th September 2011, and the demand therefor with effect from 1st January 2012, were by no means in breach of contract; and

ix. as the applicant did not pray for or specifically plead and strictly proved the claim for the alleged unjust enrichment and/or liquidated damages in the form of a refund for rent paid on account of the impugned variation of rent, the trial court had no jurisdiction to pronounce itself on matters not pleaded nor prayed for.

9. In our judgment dated 25th October 2024, we allowed the respondents' consolidated appeals and set aside the above- mentioned judgment and decree as well as the ruling of the ELC with which decision the applicant now takes issue.

10. Aggrieved by this Court's decision, the applicant filed a Notice of Motion dated 22nd November 2024 and filed on 23rd November 2024 pursuant to rules 41(2) and 44 of the Court of Appeal Rules, 2022 seeking certification that the intended appeal involves matters of general public importance by reason of which it prays for leave to appeal to the Supreme Court for determination of two main questions, namely: (i) whether a premature but unchallenged revision of rent in a lease with a periodic rent review clause precludes the lessor from a further review until the expiry of the review period from the date of the premature review; and (ii) whether a trial court is empowered, as a consequential order, to order a refund of amounts demanded and received despite a court order barring that demand, or whether a fresh suit must be filed for such recovery.

11. The applicant's Motion is supported by the annexed affidavit of its Managing Director, Mohamed Rashid, sworn on 22nd November 2024 essentially deposing to the grounds on which its Motion is anchored, namely: that the issues sought to be argued in the intended appeal are of general public importance and transcend the private interests of the parties hereto because:

> " a. Periodic rent review clauses are a common feature. In fact, going by the decisions cited in the judgment, it is an issue that has engaged the 1st Respondent on many occasions.
>
> b. While such clauses empower a lessor to review the rent at the agreed intervals, there is no jurisprudence on what happens when there is a rent review before the agreed date which is accepted and acted upon by the lessee. Does that

review extinguish the power until the next review date or is the review power unaffected by any premature review?

c. This is a question which arises directly from the facts of this case but will certainly affect the many other lessors and lessees who may have prematurely reviewed the rent

d. This Court (Murgor, Laibuta & Odunga, JJ.A) has held that such a premature review is akin to an oral variation which is not binding on the parties and which, if not challenged within time, is inconsequential.

e. Noteworthy, however, is that this Court (748 Air Services Limited v Theuri Munyi [2017] KECA 419 (KLR) has held in the context of an employment contract, that such oral variations followed by conduct are valid. This Court (Kamau James Gitutho & 3 Others v Multiple ICD (K) Limited & Multiple Hauliers (E.A) Limited [2019] KECA 379 (KLR) has also held in the context of a construction contract that oral variations followed by conduct are valid.

f. It is therefore arguable that a premature review of the rent followed by consistent payment by the lessee amounts to a lawful variation that then precludes any further review before the agreed review period.

g. There is consistency and unanimity that any act done in violation of a court order is invalid. Here, the demand for the review rent was a breach of the court order. The ELC held that considering the court order, the refund could be ordered even without a specific relief sought in that regard. This Court has held that there must be a specific relief sought to that end.

h. While there are countless decisions that support the grant only of specific reliefs that are pleaded, there is a dearth of local jurisprudence that deals with the question of whether there is an exception when the relief sought is a refund of funds received contrary to a court order.

i. The Applicant relied on foreign jurisprudence which persuaded the ELC. This Court has impliedly rejected the foreign jurisprudence. There is need for the Supreme Court to weigh these conflicting views and determine whether the law should be developed as advocated for by the ELC."

12. In support of its Motion, The applicant filed written submissions and a List of Authorities dated 29th January 2025 filed by M/s Gikandi & Company, Citing three judicial authorities, namely: Kwanza Estates Limited v Jomo Kenyatta University of Agriculture & Technology [2023] KECA 1516 (KLR); and Stanbic Bank of Kenya Limited v Santowels Railways Corporation & Another [2023] KECA 1283 (KLR) where this Court reiterated that for one to succeed in an application of this nature, they must satisfy the principles in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR; and Simba Corporation Limited v Kenya Railways Corporation & Another [2023] KECA 1283 (KLR), arguing that the specific question to be argued on appeal, of what happens when there is a rent review before the agreed date, and the same is accepted and acted upon by the lessee, arose in the latter cited matter, but was not determined as the Court held that there was no evidence that there had been a premature rent review.

13. Opposing the Motion, the 1st respondent filed a Replying Affidavit sworn by Anley Gitari, its Acting General Manager, Legal Services and Corporation Secretary on 17th January 2025 essentially deposing

to the Grounds of Opposition of even date, and on which the Motion is opposed, and which are comprehensively addressed in their submissions.

14. The respondents oppose the applicant's Motion on the grounds that the two questions sought to be argued do not meet the required threshold for an appeal to the Supreme Court; that the first question does not transcend the litigation interests of the parties herein, falls outside the jurisdiction of the Supreme Court, and does not raise a substantial point of law; that, as for the second question, there is no lacuna in law on whether courts have power to grant reliefs that are not pleaded where it is alleged that the actions or omissions of a party are contrary to a court order; and that the alleged disobedience of court orders cannot be introduced at this stage of certification for appeal to the Supreme Court in view of the fact that parties are bound by their pleadings.

15. In addition, the respondents filed written submissions and a List of Authorities both dated 11th February 2025 filed by M/s Ndegwa, Sitonik & Karina, Citing four judicial authorities,namely: Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone [2013] eKLR, submitting that the two questions proposed by the applicant for determination do not meet the threshold set by the Supreme Court; Paul Mungai Kimani & 20 Others v Attorney General [2020] eKLR; and Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others [2021] eKLR for the proposition that the questions as framed, concern matters of fact, whereas the Supreme Court does not have the jurisdiction to revisit matters of fact; and IEBC & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, submitting that there is no lacuna in law with regards to the second question proposed by the applicant for determination by the Supreme Court since the jurisprudence on the reliefs that a court may grant are well settled in law.

16. To our mind, the right of appeal from a superior court to the Supreme Court is not absolute. The exercise of that right must be in accord with Article 163(4) (b) of *the Constitution* and rule 40 of the Court of Appeal Rules. Article 163(4) (b) of *the Constitution* Provides:

> "(4) Appeals shall lie from the Court of Appeal to the Supreme Court-
>
> a. ....
>
> 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)" [which makes provision for power of the Supreme Court to review, affirm, vary or overturn a certificate given in this regard by the Court of Appeal].

17. Rule 40 of the Court of Appeal Rules sets out the procedure and the criteria for determination by this Court of applications for certification and leave to appeal to the Supreme Court. The rule reads:

> "40. 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—
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> 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 ...".

18. Having carefully considered the applicant's Motion, the grounds on which it is made, the affidavit in support thereof, the provisions of Article 163(4) (b) of *the Constitution* and rule 40 of this Court's Rules, we form the considered view that the same stands or falls on three main issues: first, whether the applicant's 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.

19. 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 Gnecchi-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."

20. The description above cannot be said to be the case in the applicant's intended appeal. While the intended appeal may be said to raise points of law, those points are, in our considered view, of no general public importance. They relate to purely private claims under the terms of a lease agreement in which the public as a whole has no stake. Neither do the findings of this Court on the statute bar of execution of a decree against the 1st respondent (whether by garnishee proceedings or otherwise); or the limitation of the applicant's claim for an account or recovery of any sums allegedly due on account of the unscheduled rent increment complained of, raise substantial and novel points of law of general public importance. To our mind, the issues intended to be escalated to the Supreme Court have no bearing on general public welfare that calls for protection beyond the scope of the law of contract.

21. 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."

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

> " 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 Gnecchi - Ruscone 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 parti es 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 applicant's intended appeal raises no points of law of general public importance. That settles the first and second requirements for certification, which leaves us with the third requirement relating to the time within which an application for certification under Article 163(4)(b) of *the Constitution* and rule 40 of this Court's Rules should be made.

25. It would be remiss of us not to mention albeit in passing that rule 41(2) requires that such an application be made within 30 days of the impugned decision of the Court of Appeal. This Court's judgment subject to the intended appeal was delivered on 25th October 2024. The applicant's Motion dated 22nd and filed on 23rd November 2024 was in good time.

26. Having carefully considered the applicant's Motion, the grounds on which it is anchored, the constitutional and other statutory requirements for certification and leave to appeal to the Supreme Court, we find that the applicant's Notice of Motion dated 22nd November 2024 fails and is hereby dismissed with costs to the respondents. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 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