



Intercountries Importers and Exporters Limited v Telposta Pension Scheme Registered Trustees & 5 others (Civil Appeal (Application) 293 of 2016) [2025] KECA 1367 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KECA 1367 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 293 OF 2016
DK MUSINGA, P NYAMWEYA & GV ODUNGA, JJA
JULY 25, 2025**

BETWEEN

INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED .. APPLICANT

AND

**TELPOSTA PENSION SCHEME REGISTERED TRUSTEES .. 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
JUBILEE INSURANCE COMPANY LIMITED 4TH RESPONDENT
PARK AVENUE INVESTMENTS LIMITED 5TH RESPONDENT
TRUST BANK LIMITED (IN LIQUIDATION) 6TH RESPONDENT**

(Being an application for a certification that matters of general public importance are involved, warranting the grant of leave to appeal against the Judgement and orders of the Court of Appeal (Okwengu, Mativo & Ngenye, JJA) dated 12th July 2024 in an appeal against the Judgment and order of the High Court of Kenya (R.E. Ougo, J.) delivered on the 27th July, 2016 in HCCC No. 1400 of 2004)

RULING

1. On 12th July 2024, this Court (Okwengu, Mativo and Ngenye, JJ.A.) delivered a judgement in an appeal lodged by the 1st respondent, Telposta Pension Scheme Registered Trustees (hereinafter “Telposta”) against the judgment and decree of the High Court at Nairobi (Ougo, J.) delivered on 27th July 2018 in HCCC No. 1400 of 2004. The High Court found in favour of the appellant, Intercountries Importers and Exporters Limited (herein Intercountries Limited) and declared it the lawful owner of



land reference No. 209/13238 (originally LR 209/2397) (the suit property), and ordered Telposta to vacate the suit premises.

2. The suit in the High Court had been filed by Telposta claiming that the suit property was fraudulently and illegally alienated by the Commissioner of Lands to Park Avenue Investments Limited. Park Avenue Investments then charged the suit property to Trust Bank Limited in liquidation (“the Bank”) as security for a loan facility of Kshs 40 Million but defaulted in the loan repayment, after which the Bank, in exercise of its statutory power of sale, sold the suit property to Intercountries Limited, for a consideration of Kshs. 28,000,000. Thereafter, Telposta demanded vacant possession of the suit property, and it was this demand that provoked Telposta into filing the suit against Intercountries limited, Commissioner of Lands, The Attorney General, Jubilee Insurance Company Limited (Jubilee), Park Investments and the Bank.
3. In that suit, Telposta sought, inter alia, a declaration: that the Commissioner of Lands acted ultra-virus and in violation of procedural requirements, in alienating the suit property to Park Investments, while being fully aware that the property belonged to Telposta and or its predecessor; that the purported alienation of the suit property to Park Investments, and the subsequent charge to the Bank, were all fraudulent, illegal, null and void; that it was the lawful owner of the suit property; and that the Commissioner of Lands acted fraudulently and in collusion with Park Investments, in issuing the title in the latter’s name, and attempting to dispose of the suit property to third parties in order to defeat Telposta’s claim.
4. Telposta therefore sought, inter alia, an order for cancellation of the grant issued in favour of Park Investments, and the issuance of a new grant in its favour, or in the alternative, an order that the Commissioner of Lands compensates it, by paying to it a sum equivalent to the market value of the suit property as at the time of the High Court judgment.
5. All the respondents, apart from Park Investments, filed defences to the suit contending that Intercountries Limited was the legal owner of the suit property, having legally purchased the suit property from the Bank, as a bona fide purchaser for value without notice, and therefore it had an indefeasible title. Intercountries Limited also filed a counterclaim in which it maintained that Telposta had no cause of action against it and claimed loss of revenue from Telposta. Park Investments, on its part, filed a defence and counterclaim, in which it denied Telposta’s claim and pleaded that that it was at the material time the lawfully registered owner of the suit property. It denied being involved in any fraud as alleged by Telposta. In regard to the counterclaim, Park Investments, while admitting having charged the suit property to the Bank, contended that the Bank which was in liquidation, had secretly, irregularly, fraudulently and without its knowledge purported to sell and transfer the suit property to Intercountries Limited. It prayed for a declaration that the sale and purported transfer of the suit property to Intercountries Limited by the Bank is illegal, null and void, and an order directing the Commissioner of Lands and or the Registrar of Lands to cancel any purported registration of Telposta and Intercountries Limited as owners of the suit property, reinstate Park Investments’ title to the suit property and award it damages for fraud and trespass.
6. The Bank maintained that it had a lawful charge in regard to the suit property, having advanced a substantial amount to Park Investment on the security of the suit property and that following default, it exercised all due diligence in the sale and endeavoured to find the best possible price in order to recover the outstanding amount of Kshs. 155,309,993.35.
7. In her judgment, the learned Judge found: that the suit property, having already been allocated to a private entity, was not one of the assets available for transfer by the Minister to KPTC and its successor, Telposta, at the time the vesting order was made in 2001; that at the time of allotment of



the suit property to Park Investments by the Commissioner of Lands, no registration of title to the suit property had been made in favour of Telposta or its predecessor, and that the first registration of the suit property was therefore to Park Investments; that there was no evidence that the suit property was fraudulently acquired by Park Investments; that Intercountries Limited was a bona fide purchaser for value without notice and was therefore the lawful proprietor of the suit property. Consequently, the court issued an order for Telposta to vacate the suit property within 60 days from the date of the judgment.

8. Telposta being aggrieved by the judgment of the High Court, lodged an appeal to this Court faulting the learned Judge of the High Court for, inter alia: narrowing down the issues in dispute to two, and ignoring several other important issues; holding that the appellant did not prove the allegation of fraud; holding that the title to Intercountries Limited was valid without considering the alienation process with respect to the suit property; finding that Intercountries Limited was a bona fide purchaser for value; failing to find that the suit property was vested on Telposta for pension funds for its members; failing to consider the provision of the guarantee and indemnity between Intercountries Limited and the Bank; and failing to address an alternative prayer pleaded by Telposta for an alternative property of similar market value to be allocated to it to raise pension funds for its members.
9. Intercountries Limited opposed Telposta's appeal but also filed a cross appeal against the judgment of the High Court, challenging the finding that mesne profits had not been proved by it, and in failing to assess and award mesne profits to it.
10. This Court identified the main issues for determination in the appeal as: whether the vesting orders made through Gazette Notices of 1988 and 2001 conferred any ownership rights to KPTC and its successor Telposta respectively, in regard to the suit property; whether the suit property was available for alienation, and if so, whether the allotment of the suit property to Park Investments by the Commissioner of Lands vide the letter of allotment dated 30th April, 1996, and subsequent registration of Park Investments as registered proprietor on 23rd May, 1996, was a first registration protected under Section 23 of the repealed Registration of Titles Act; whether the suit property was properly charged to the Bank, and whether the Bank regularly and procedurally exercised its statutory power of sale in regard to the suit property; and whether Intercountries Limited was a bona fide purchaser for value without notice of any defect, and whether its title to the suit property is indefeasible.
11. It also identified the issues arising from the cross appeal as:
whether Intercountries Limited was entitled to mesne profits,
whether the counterclaim by Park Investments was properly before the court, and whether the Bank was liable to Park Investment for irregular and fraudulent sale of the suit property to Intercountries Limited.
12. In its judgement delivered on 12th July 2024, this Court relied on *Said Bin Seif v Shariff Mohammed Shatry*, (1940) 191 KLR 9, *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, *Funzi Island Development Ltd & 2 others v County Council of Kwale & 2 others* [2014] eKLR, *Chemey Investment Limited vs Attorney General & 2 others* [2018] eKLR, *Embakasi Properties Limited & Anor. v Commissioner of Lands & Anor* [2019] eKLR and *Dina Management Limited v Mombasa County Government & 5 others* [2023] KESC 30 KLR and held: that the suit property was not unalienated land available for allocation to Park Investments in 1996; that the Commissioner of Lands had no right to cause the suit property to be resurveyed or allocated as un-alienated land, and the allotment of the suit property to Park Investments by the Commissioner of Lands and subsequent registration of Park Investments as the registered proprietor was irregular and unprocedural; that although there was no title issued, the suit property was under the use and control of E.A. Extelcoms



and that it was vested on KPTC and Telposta; that the Commissioner of Lands could not ignore the unregistered interest of KPTC and Telposta more so, since the suit property had buildings and was not vacant; and that Park Investments was the one which initiated the process by applying to the Commissioner for allocation of the suit property, it was upon it to confirm the history of the suit property, and confirm that the property was indeed “public land” by establishing, given its history, that the suit property had been surrendered back to the government, which it failed to do; that Park Investment’s registration as proprietor of the suit property was fraudulent as the property was not available for allocation; and that since Park Investment had no valid title to the suit property that it could charge to the Bank, the purported exercise of the statutory powers of sale by the Bank in selling the suit property to Intercountries Limited was a nullity.?

13. Intercountries Limited is aggrieved by the said decision and intends to appeal to the Supreme Court. It accordingly lodged an application dated 8th August 2024 in this Court, in which it seeks certification that its intended appeal to the Supreme Court involves matters of public importance, and that leave be granted to appeal to the Supreme Court of Kenya against the said judgment. The applicant also prayed that the leave, if granted, do operate as stay of the judgement sought to be appealed against to the Supreme Court. This application is the subject of this ruling.
14. The application was heard on this Court’s virtual platform on 2nd July 2025 when learned counsel Mr. Mosota, who appeared with Mr Brian Nyuguti and Ms Faith Cherop, held brief for Mr Ombati Omwanza for the applicant, learned counsel, Mr Allan Kamau appeared for the 3rd respondent, and there was no appearance for the rest of the parties, despite due service of the hearing notice. Mr. Mosota and Mr Kamau highlighted their respective written submissions.
15. The application is brought pursuant to the provisions of Article 163(4) of the Constitution which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution; and in any other case where the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved. According to the applicant, the application falls under the latter circumstances.
16. The issue for determination in this application therefore is whether the intended appeal to the Supreme Court raises a matter of general public importance. The Supreme Court identified the principles governing the determination of a matter as one of general public importance in the case of *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* (2013) eKLR as follows:
 - 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 on 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 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. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”
17. Mr. Mosota submitted that the applicant has singled out the following general matters of public interest issues for the determination of the Supreme Court:
- i. What is the place of the statutory protections availed to Purchasers upon the exercise of Chargees’ statutory powers of sale?
 - ii. Whether the provisions of the Land Act can be read into the repealed land statutes in their construction.
 - iii. Does Dina Management Ltd apply strictu sensu to persons deriving title from Chargees’ power of sale? If so, does it qualify; in any way, section 99 (3) of the Land Act?
 - iv. What interpretation/ construction is to be accorded to the term ‘constructive notice’? under section 99 (3) of the Land Act?
 - v. How can the conflicting decisions on the above matters be reconciled?
18. According to the applicant, based on misapplication of the ratio of the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), the judgement sought to be appealed from strips a purchaser statutorily protection under section 99(3) of the Land Act; that Dina Management (supra) did not invalidate/ annul, or in any way qualify the statutory protections under the said provision; that whereas the Land Act exempts from statutory protection, purchasers who had actual or constructive notice of dishonesty, fraud or misrepresentation on the part of the chargee, the judgement extends this to include dishonesty, fraud or misrepresentation on the part of the chargor, and applies the wrong test of ‘constructive knowledge’; and that the judgement applies the provisions of the Land Act, 2012 and reads them into the repealed Registration of Titles Act that was applicable in this case, to impeach the applicant’s title on an additional ground not contained in the governing statute (RTA).
19. It was submitted: that the issues identified demonstrably transcend the interests of the instant parties and affect the entire lending/financing sector in so far as charges constitute one of the most commercially viable securities owing to the availability of the chargee’s power of sale; and that from the judgments of the High Court and this Court, it is clear that the issues posed by the applicant were live before the trial Court and the Court of Appeal, hence the application is validly before us.
20. At the plenary hearing, Mr. Mosota and Mr. Nyuguti posed the issue whether Dina Management Case (supra) applies to persons who derive titles from the exercise of statutory power of sale and how far such persons should go in investigating the root of title. The application was supported by Mr Kamau who, while reiterating the grounds set out by the applicant, cited the Supreme Court’s decision in



Town Council of Awendo v Nelson Oduor Onyango & 13 others [2015] eKLR in urging us to grant stay of execution.

21. We have considered the submissions made by learned counsel in support of the instant application. The Supreme Court's guidance is that matters of general public importance are those that inter alia, raise a substantial point of law, or occasion a state of uncertainty in the law or arise from contradictory precedents, or will affect a considerable number of persons in general, or as litigants. In arriving at our determination, we must be careful not to wade into the merits of the intended appeal to the Supreme Court as was appreciated by this Court in *Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation* [2023] KECA 660 (KLR) where it was held that:

“ This Court has the duty to ensure that the case does not involve a mere question of law, but a substantial question of law. Hence, an applicant must satisfy this test to assume jurisdiction under Article 164 (4) of the *Constitution*. (See Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* 1962 AIR 1314, 1962 SCR Supl. (3) 549).

71. To qualify as a question of law arising from the case, there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by the court so as to make it necessary to determine that question of law and arrive at a just and proper decision. If the question is settled by the highest court, or if the general principles to be applied in determining the question are well settled, and there remains the question as to the application of those principles, or that the plea raised is palpably absurd, the question ought not to be viewed as a substantial question of law.”

22. In this case we have considered the issues that the applicant intends to raise before the Supreme Court such as the application of the provisions of the *Land Act* to transactions that were governed the repealed statutes; the application of the Dina Management Case (supra) to persons acquiring titles from the chargee's exercise of statutory power of sale and the extent of the application of the doctrine of bona fide purchaser to those transactions. In our view, these are substantial issues of law, which arise both from the trial court's judgement and this Court's decision and require determination by the Supreme Court. They are matters which, in our view, affect or are likely to affect a substantial number of members of the public and in particular those who obtain titles to land as a result of the exercise of statutory powers of sale by financial institutions. It will also clarify the issue of the extent to which such a purchaser ought to go in investigating the root of the title.
23. It is therefore our view that this application meets the test set out in *Hermanus Phillipus Steyn v Giovanni Gnecci- Ruscone* (supra) and warrants certification.
24. As regards the second prayer of stay pending the intended appeal to the Supreme Court, it is settled that this Court has no jurisdiction to grant such a prayer. While rule 5(2)(b) of the Court's Rules confers power to this Court to hear interlocutory applications for stay of execution, stay of proceedings or injunctions pending the hearing and determination of the main appeal before it, it does not confer power to this Court to entertain any such application post judgment. That was the position in *Dickson Dickson Muriuki Muriuki v Timothy Kagundu Muriuki & 6 Others* (2013) eKLR where this Court explained as follows:

- “ 20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme



Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.”

25. We are in agreement with the above holdings, and find that we are functus officio in so far as applications seeking conservatory or preservative orders in this appeal are concerned.
26. We accordingly find the application dated 8th August 2024 merited only to the extent that the intended appeal by Intercountries Importers and Exporters Limited is certified as raising matters of general public importance, and we accordingly grant it leave to appeal to the Supreme Court against the judgment of this Court (Okwengu, Mativo and Ngenye, JJ.A.) delivered 12th July 2024. The prayer for stay of execution of the said judgment is however declined. Each party shall bear their respective costs of the application.
27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

