Salim v Muhaji & another (Civil Application E033 of 2024)
[2025] KECA 1294 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1294 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E033 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

MOHAMED OMAR SALIM ..... APPLICANT

AND

AMINA SHEYUMBE MUHAJI ..... 1ST RESPONDENT

MOHAMED MAHFUDH ..... 2ND RESPONDENT

(An application for certification pursuant to Article 163 (4)(b) of the Constitution of Kenya, 2010 that matters of general public importance are involved with respect to the intended appeal against the Ruling and Orders of the Court of Appeal at Mombasa (Asike-Mahandia, Dr. K. I. Laibuta, G.V. Odunga JJ.A.) on 22nd March 2024 in Civil Appeal No. E037 of 2023)

RULING

1. The Applicant, Mohamed Omar Salim, has brought a Notice of Motion dated 5th April 2024 pursuant to Articles 163 (4)(b) and 163 (5) of *the Constitution*, 2010; Section 15 of the *Supreme Court Act*, 2011; Rule 33 (1) of the Supreme Court Rules, 2020 and Rules 2, 33, 42, 44, 45 and 49 of the Court of Appeal Rules, 2022 seeking, inter alia, orders that this Court: i) do certify the intended appeal and proposed grounds of appeal to the Supreme Court arising from the Ruling of this Court dated 22nd March 2024 for the reason that it raises matters of general public importance which transcend the circumstances of this case, and is of significant public interest ripe for interrogation and determination by the Supreme Court of Kenya; ii) do grant leave to appeal to the Supreme Court against the Ruling of this Court dated 22nd March 2024; iii) do grant a temporary injunction pending appeal; that a temporary order do issue to restrain the Respondents from dealing with the subject matter of the intended appeal being all that property known as Plot No. 2923 (Original 1365/2) Section Mn. Cr No. 21868) (Plot No. 2923) in any manner whatsoever, and iv) and that the costs of this application.

2. In the Motion, the Applicant contended that, pursuant to a Sale Agreement dated 13th November 2009, the Applicant purchased a portion of a parcel of land known as Plot No. 2923 comprising 0.5 Acres from the 1st Respondent, Amina Sheyumbe Muhaji, for Kshs. 10,000,000. In order to secure and advertise his interest over Plot No. 2923, the Applicant applied for and registered a caveat over Plot No. 2923 on 18th December 2009; that, by a Deed of Variation dated 8th April 2010, the Applicant and the 1st Respondent agreed that the deposit on the purchase price be increased by a further Kshs. 300,000 from the initial Kshs. 400,000 bringing the total deposit to Kshs. 700,000, and for the area of the plot to be increased from 0.5 acres to 1 acre; and that the mother title (provisional title) be deposited with the Applicant to assist with subdivision and as security for the deposit paid on 10th October 2016.

3. The Applicant further contended that the 1st Respondent and her advocates, Balala & Abed, took steps to secure the Applicant's interest over Plot No. 2923 by handing over the executed Transfer in the Applicant's favour together with the original title and all other requisite completion documents, particularly as the 1st Respondent was paid Kshs. 8,000,000; that, upon compiling the completion documents for presentation and registration, the Applicant learnt that the 2nd Respondent also registered a caveat on 21st April 2015 (6 years after the Applicant's caveat) also alleging a purchaser's interest; that, unbeknown to the Applicant, the 1st Respondent had entered into a separate agreement with the 2nd Respondent after she sold the plot to the Applicant; that, by a third agreement dated 3rd December 2012, the 1st Respondent again sold Plot No. 2923 to the 3rd Respondent, who ought to have been aware of the Applicant interest as evidenced by the Applicant's registered caveat.

4. It was further contended that, by a letter dated 15th June 2016, the Registrar of Titles confirmed the registration of both caveats, and of the 1st Respondent's intention to uplift them; that the efforts by the Registrar to resolve the claims did not bear any fruits, thereby prompting the parties to file different suit; that the 1st and 2nd Respondents filed suit in ELC Case No. 246 Of 2016: Mohamed Mahfudh Versus Amina Sheyumbe Muhaji on 29th August 2016, but omitted to include the Applicant as a party. soon thereafter, The Respondents filed a Consent Order for Judgment to be entered granting ownership of the Plot No. 2923 to the 2nd Respondent; that, by an application dated 5th March 2018, the Applicant sought to set aside the Consent, and enjoin himself in the Respondents' suit and consolidate it with ELC No. 363 Of 2016: Mohamed Omar Salim Versus Amina Sheyumbe Mohaji & 2 Others; that, in a ruling of 5th April 2019, the Environment and Land Court (Omollo, J.) set aside the Consent Order and consolidated the two suits, effectively joined the Applicant to the proceedings. The court further issued orders restraining the transfer of the property by the 1st Respondent.

5. The Applicant averred that, during the proceedings, the 1st Respondent passed away on 5th March 2020 and the trial court (Munyao Sila, J.) marked the suit as having abated on 9th June 2021; that, in the intervening period, the Applicant sought to resolve the dispute with the 1st Respondent's heirs, who subsequently acquired letters of administration ad litem to enable them to be joined in the suit; and that, thereafter, the Applicant was informed vide a letter dated 4th April, 2022 that, pursuant to Kadhi's Court Succession Petition No, E046 OF 2022: In the Matter of the Estate of Amina Sheyumbe Muhaji, the Kadhi's Court had entered Judgment in favour of the 1st Respondent's beneficiaries, granting them ownership over Plot No 2923. The Applicant was also requested to return the original title to Plot No. 2923, whereupon, the Applicant sought to revive the suit which was opposed by the 2nd Respondent by way of Grounds of Opposition; that, on 20th June 2022, the application was dismissed for failure of the Applicant to prosecute the application. Subsequently, an application to reinstate the suit was also dismissed on 1st February 2023 by the trial court.

6. The Applicant contended that he appealed against that decision to this Court in Civil Appeal No. E037 Of 2023: Mohamed Omar Salim Versus Amina Sheyumbe Muhaji & Mohamed Mahfudh under Rule 5(2)(b) of the Court of Appeal Rules; and that, on 22nd March 2024 this Court (Asike-Mahandia, Dr. I. Laibuta and G.V. Odunga, JJ.A) delivered a Ruling striking out the application for the reason that it was incompetent, having been founded on a non-existent appeal since the consolidated suits in the Environment and Land Court had abated. Being dissatisfied with the Ruling, the Applicant now seeks to appeal to the Supreme Court of Kenya having already filed a Notice of Appeal pursuant to Rule 36 (4) of the Supreme Court Rules, 2020.

7. The application premised under Article 163 (4) (a) of *the Constitution* was brought on grounds that: in the impugned Ruling, this Court overreached itself by predetermining the substantive appeal and arriving at a final outcome of the appeal without hearing the substantive appeal, given that the appeal was not what was before them. The Applicant contended that the intended appeal is a matter of public importance and transcended the circumstances of the case; that the Supreme Court will be required to determine: whether it is lawful for this Court to dismiss a substantive appeal without having had sight of the Record of appeal; whether this Court can pronounce itself conclusively on the subject of the substantive appeal whilst hearing an interlocutory application, even though the appeal was not before them; whether a court can issue an order that results in a suit being declared as having abated, so that no appeal can lie as against such a decision, and that an appeal cannot arise from any decision; whether this Court can dismiss a substantive appeal which seeks to challenge an order refusing reinstatement of an application for revival of a suit on the grounds that such an appeal is bad in law; and whether failure to canvass an application filed in court and supported by an affidavit renders it dismissed without consideration.

8. Finally, it was contended that Order 24 of the Civil Procedure Rules was unconstitutional for reasons that failure, refusal and/or neglect by an estate or the heirs, or representatives thereof, to substitute a deceased party condemns parties who are not responsible for such failure, refusal and or neglect and, instead, subjects them to collective punishment by termination of their just cause of action by reason of mandatory abatement of the suit in question; and that, further, abatement results in infringement of fundamental rights in the Bill of Rights, in particular, the right to access justice.

9. It was the Applicant's contention that, by declining to grant the orders sought, the Applicant will be deprived of his property without adequate compensation contrary to the guarantees of Article 40 of *the Constitution* and the right to fair hearing of his suit as guaranteed by Articles 48 and 50(1) of the Constitution, and that the application and that the intended appeal will be rendered nugatory. The motion is supported by the affidavit of Mohamed Omar Salim in which he reiterates the grounds set out in the motion.

10. In response, the 2nd Respondent filed a Replying affidavit in which he deposed that the motion failed to meet the conditions necessary for certification and grant of leave to appeal to the Supreme Court for reasons that: the issues proposed to be raised in the appeal to the Supreme Court do not raise any matters of general public importance, but are confined to the parties' private contractual and personal rights in this particular dispute; the dismissed application merely sought orders for a temporary injunction pending the outcome of its purported appeal, and did not delve into or raise any constitutional or matters of public interest; that there is no gap in the law concerning abatement of suits or the superior court's exercise of discretion, nor any question relating to this Court's powers or jurisdiction to deal with such matters, or requiring further consideration, clarification or elucidation by the Supreme Court, and that no challenge whatsoever was raised by the Applicant concerning any breach, violation or unconstitutionality of any provision in *the Constitution*, either in the Environment and Land Court or before this Court; that the Applicant has failed to appreciate that the pending

appeal before this Court is incompetent following abatement of the suit in the Environment and Land Court, which has yet to be revived and that, therefore, this Court had no basis on which to entertain the dismissed motion; that, furthermore, this Court has no jurisdiction to entertain an application for certification or grant of leave to appeal to the Supreme Court in the absence of a valid appeal pending before it; and that, finally, the Applicant's assertion that the proposed appeal to the Supreme Court raises matters that transcend the circumstances of this case and impact on the public interest is not supported either by the facts of this matter or the applicable law.

11. Both parties filed written submissions, which learned counsel Mr. Taib, SC appearing with Ms. Gathoni for the Applicant, and Mr. Inamdar holding brief for Ms. Moolraj who appeared for the 2nd Respondent briefly highlighted on a virtual platform during the hearing. There was no appearance by counsel for the 1st Respondent despite having been served with the hearing notice.

12. It was Mr. Taib's submission that the essence of the Applicant's motion for certification was that the Applicant has never had an opportunity to be heard by any court since the suit had abated because the 1st Respondent was not substituted, with the result that the cases against the 1st Respondent were dismissed; and that, further, this Court was wrong in reaching the conclusion that there was no appeal before it as no Record of appeal has been filed.

13. Counsel went on to submit that abatement is a creature of the civil procedure, which cannot take precedence over the right to fair administrative action, and that the Applicant's right to be heard cannot be superseded by the abatement of the suit.

14. Regarding certification to the Supreme Court, counsel cited the case of Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone [2013] eKLR where the Supreme Court set out matters considered to be of general public importance and therefore eligible to be placed before the court for determination. It was further argued that, in this case, the Respondents have sold the plot twice over, while the Applicant continues to hold onto the title, and that the 2nd Respondent is intent on disposing of the plot to the National Land Commission. Counsel argued that if abatement depends on the estate, the question is whether failure to substitute the deceased can lead to a denial of justice.

15. On his part, Mr. Inamdar argued that none of the grounds advanced by the Applicant were of general public importance. Counsel submitted that the suit in the Environment and Land Court abated following the demise of the 1st Respondent, and that the suit had ceased to exist by operation of law; that, as a consequence, no appeal lies to this Court. The case of Said Sweilem Gheithan Saarum vs Commissioner of Lands & others [2015] eKLR was cited in support of this proposition. Counsel further submitted that, following the abatement, the suit has not been revived as the Applicant has not moved the court by way of an application to revive the suit.

16. Regarding the leave sought for certification, counsel submitted that there was nothing of any jurisprudential importance placed before the Court that would warrant allowing appeal to the Supreme Court. As concerns the alleged fraud and the unconstitutionality of Order 24 of the Civil Procedure Rules, counsel submitted that the issue not having been raised in the trial court, it could not be raised at this stage. Finally, counsel submitted that the allegations of miscarriage of justice or denial of fair trial were unfounded, and that there was nothing of general public importance worthy of being placed before the Supreme Court for determination.

17. After consideration of the application for certification, the responses, the rival submissions and the applicable law, we find that the issues which fall for determination are: i) whether the matters complained of are fit for certification to the Supreme Court; and ii) whether this Court should stay

execution of the Ruling of 22nd March 2024 that struck out the Applicant's motion dated 6th May 2023 and declined to grant the injunctive orders that were sought therein.

18. The law that applies to this case as correctly cited by the Applicant and the 2nd respondent is Article 163(4)(b) 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.

19. In the case of Hermanus Phillip Steyn vs Giovanni Gnecchi-Ruscone(supra), the Supreme Court identified the principles governing the determination of a matter as one of general public importance in the following terms:

    (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 one 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."

    These principles were reiterated in the case of Malcolm Bell vs Hon.DanielTorotich arap Moi and Another, Supreme Court Application No. 1 of 2013

    thus:

    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;

        i. 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 significant bearing on the public interest;

ii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iii. 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;

iv. Mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] 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*;

v. 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;

vi. Determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;

vii. Issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis for appeal to the Supreme Court;

viii. Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

ix. Questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

x. Questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance', justifying final appeal in the Supreme Court."

20. In a nutshell, 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.

21. On what amounts to substantial question of law, this Court in Mwambeja Ranching Company Ltd & another vs Kenya National CapitalCorporation[2023] KECA 660 (KLR) 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).
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> 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. See also Kenya Plantation and Agricultural Workers' Union vs KenyaExport Floriculture, Horticulture and Allied Workers' Union (Kefhau);represented by its Promoters, David Benedict Omulama & 9 others[2018] eKLR.

23. The question for our determination is whether a substantial issue of law has arisen in this case so as to qualify the intended appeal for determination by the Supreme Court. The Applicant's application emanates from this Court's Ruling that struck out the Applicant's application seeking injunctive orders under rule 5(2) (b) of the Court's Rules for the reason that the suit in the trial court had abated due to the demise of the 1st Respondent who had yet to be substituted. The Applicant seeks a determination from the Supreme Court on the questions as to whether this Court overreached and pre- determined the substantive appeal and arrived at a conclusive and final outcome of the appeal without the appeal being heard; whether it is lawful for this Court to dismiss a substantive appeal without having had sight of the Record of Appeal; whether this Court can pronounce itself conclusively on the subject matter of the substantive appeal whilst hearing an interlocutory application, even though the appeal was not before them; whether a court can issue an order that results in a suit being declared as having abated, so that no appeal can lie following such decision; whether this Court can dismiss a substantive appeal which seeks to challenge an order refusing reinstatement of an application for revival of a suit on the grounds that such an appeal is bad in law; and whether failure to canvass an application filed in court and supported by an affidavit renders it dismissed without consideration.

24. Put another way, at the core of the Applicant's complaint is that this Court determined the Applicant's substantive appeal and arrived at a conclusive and final outcome of the appeal because the suit against the 1st Respondent was adjudged to have abated in the Environment and Land Court so that no appeal can lie to this Court.

25. Whether or not we should certify the Applicant's intended appeal turns on whether the questions sought to be determined by the Supreme Court are matters of general public importance. We begin by observing that the record before us did not include the impugned Ruling of this Court so as to enable us discern the gravamen of the Applicant's grievance. That said, what comes out of the pleadings is that, in the Applicant's Notice of Motion dated 6th May 2023 filed in this Court under rule 5(2) (b) of the Court's Rules, the Applicant sought an injunction to restrain the 1st and 2nd Respondents from dealing with Plot No. 2923 pending hearing and determination of the appeal to this Court against the ruling and orders dated 1st February 2023 issued by the Environment and Land Court at Mombasa. In the impugned Ruling, this Court struck out the Applicant's Motion for the reason that it was incompetent owing to the non-existence of the suits as they had abated. The inference here was that, the suits in the trial court having been marked as abated, there was nothing upon which to ground or effect the injunctive orders issued by this Court were such orders to be granted.

26. In the motion for certification, the matters of general public importance of which the Applicant seeks determination by the Supreme Court are, inter alia:

    "i) Is it proper and or lawful for the Court of Appeal to dismiss a substantive appeal even without having had sight of the record of appeal itself ?

    ii. Is it proper and or lawful for the Court of Appeal to dismiss a substantive appeal even without having listed the same for hearing and without having heard the parties to the substantive appeal itself?

iii. Is it proper and lawful for the Court of Appeal when hearing an interlocutory 5 (2) (b) Application or any interlocutory application to determine and pronounce itself conclusively on the subject of the substantive appeal itself even though the same was not before them?

iv. Is it the position of the law that when a court makes an order that causes or results in a suit being declared as abated, that no appeal can therefore lie as against such a decision and that an appeal cannot arise from any decision made or founded on a decision made in a suit that has abated?

v. Can the Court of Appeal dismiss an entire substantive Appeal which seeks to challenge an order refusing reinstatement of an application for revival of a suit on the grounds that such an Appeal is bad in law (such finding would suggest that even on appeal challenging the dismissal for an application for reinstatement of a suit or setting aside the dismissal suit could also be deemed as non-existent? vi) "

27. However, it is of significance to point out at this juncture that, when the issues raised for determination in the Applicant's motion are analysed against the decision in the impugned Ruling of 22nd March 2024, a definite disparity between them becomes apparent. Essentially, the impugned Ruling giving rise to the application for certification merely struck out the Applicant's motion seeking injunctive orders, yet the issues the Applicant has raised for determination by the Supreme Court infer that the Ruling struck out the Applicant's appeal, which was not the case. In point of fact, we are unable to discern how the Ruling striking out the motion seeking injunctive relief suddenly morphed or transformed into a Ruling striking out the Applicant's appeal. In view of this misnomer in the Applicant's motion in relation to the impugned Ruling, it cannot be said that the matters the Applicant seeks to raise in the Supreme Court are based on the decision arising from this Court. In reality, the issues raised bear no relationship or relevance to the impugned decision, but concern extraneous allegations contrary to the guidelines enumerated for certification to the Supreme Court that, "...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..." (emphasis ours)

(See Malcolm Bell vs Hon.DanielToroticharap Moi and Another (supra). Given that the impugned Ruling concerning an interlocutory application for injunctive orders had nothing to do with the dismissal of the Applicant's appeal, it cannot be said that the matters identified for consideration by the Supreme Court are founded on a "...decision or judicial determination", with the result that the threshold for granting certification has clearly not been met. In the end, the Applicant has not satisfied us that the intended appeal involves matter(s) of general public importance so as to warrant certification to the Supreme Court.

28. As to whether this Court should grant a temporary injunction pending appeal and a temporary order to restrain the Respondents from dealing with Plot No. 2923, having declined to certify the Applicant's appeal to the Supreme Court, the application for temporary relief is rendered superfluous. In sum, the application seeking certification to the Supreme Court and issuance of a temporary injunction lacks merit and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 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