



Kuwinda Rurinja Company Limited v Kuwinda Holdings & 13 others (Civil Application Sup 7 of 2019) [2024] KECA 1397 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1397 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION SUP 7 OF 2019
DK MUSINGA, SG KAIRU & M NGUGI, JJA
OCTOBER 11, 2024**

BETWEEN

KUWINDA RURINJA COMPANY LIMITED APPLICANT

AND

KUWINDA HOLDINGS 1ST RESPONDENT
COLIN DAVIES 2ND RESPONDENT
JOINT LIQUIDATORS OF NDUMBERI FARMERS COMPANY LIMITED (IN LIQUIDATION) 3RD RESPONDENT
SIMON KIMANI 4TH RESPONDENT
NYAWIRA KARIUKI 5TH RESPONDENT
SAMUEL MUCHOKI 6TH RESPONDENT
CULUMBANIS MLURE NGUGI 7TH RESPONDENT
DAVID KUGURU 8TH RESPONDENT
WAIRIMU KARIUKI 9TH RESPONDENT
MWAURA WAMUTI MUTHEE 10TH RESPONDENT
MBUGU NGIGI 11TH RESPONDENT
FRANCIS NDUNG’U 12TH RESPONDENT
NJERI MBUGUA 13TH RESPONDENT
GR MUTHURI 14TH RESPONDENT

(Being an application for grant of leave to appeal to the Supreme Court from the judgment of the Court of Appeal at Nairobi (Warsame, Murgor & Odek, JJ.A.) dated 22nd March 2019 in Civil Appeal No. 8 of 2003)



RULING

1. In the application dated 15th April 2019, the applicant, Kuwinda Rurinja Co. Ltd, seeks leave to appeal to the Supreme Court against the judgment of this Court dated 22nd March, 2019. The applicant further seeks orders restraining the 1st and 2nd respondent from transferring, charging, sub- dividing or selling LR No. 10262, I.R 17163 and LR No. 11694, I.R. 21143 ('the suit property') pending lodging, hearing and determination of the applicant's intended appeal to the Supreme Court. The application is brought under rule 24 of the Supreme Court Rules, Article 163(4)(b) of the Constitution, section 3A and B of the Appellate Jurisdiction Act and rules 1(2) and 43 of the Court of Appeal Rules.
2. The application is based on the grounds set out on its face and is supported by an affidavit sworn on 15th April 2019 and a further affidavit sworn on 26th August 2020 by Beatrice Wanjiku Thuo, the personal representative of Simon Kimani, the deceased 4th respondent, who was the majority shareholder in the applicant. Ms. Thuo avers that the applicant, the appellant in Nairobi Civil Appeal No. 8 of 2003 which was dismissed with costs by this Court in the judgment dated 22nd March 2019, was dissatisfied with the said decision and seeks certification to appeal to the Supreme Court. It is averred that the applicant's appeal to the Supreme Court is arguable for various reasons, *inter alia*: that this Court misapprehended the limits of the authority of an advocate to commit a client when he has no authority whatsoever from such client; misapprehended the law governing consent orders; misapprehended the difference between tested and untested evidence; and failed to take into account and evaluate the additional evidence admitted under rule 29 of this Court's Rules.
3. The applicant avers further that a matter of general public importance is involved in the appeal in that through the impugned judgment, this Court watered down the stated law that the authority of an advocate cannot be upheld where he acts without authority or exercises such authority in a manner that is diametrically opposed to express instructions by a client; undermined the country's company law by wrongly acting on *obiter dicta* from England and South Africa which state that those who deal with a company, even in a court of law, are entitled to benefit from a consent order made by an advocate who has not been appointed by a company; that the impugned judgment has held that an advocate who has not been appointed by a company's Board of Directors or majority shareholders can enter into a consent judgment on behalf of such a company; that the impugned judgement was based on preference of some affidavits over others without the benefit of cross examination, ignoring the evidence as had been resolved by the trial court; and watered down the right to a fair trial as well as the right to property embodied in a decree in favour of the appellant issued on 8th December 1993.
4. The 1st and 2nd respondent have opposed the application through a replying affidavit sworn by Colin Davies on 30th May 2019. Mr. Davies avers that the present application is devoid of merit since it does not disclose any matter of general public importance; that while the impugned decision was in regard to an appeal challenging a ruling by the High Court declining to review its decision, the applicant has now shifted goal posts and made the matter of public importance to be about the consent order itself; and that the learned judges of appeal considered all the evidence presented before the Court by the parties and correctly pronounced themselves in the impugned decision.
5. It is his averment further that neither the application nor the affidavit in support has disclosed circumstances that warrant grant of the injunctive order sought; further, that since the consent order was made in 1996, there has been no injunction issued as the matter progressed through the courts. In any event, according to Mr. Davies, the matter of issuing injunctive relief is res judicata as a similar application was made on 10th December 2010 and declined. In the 1st and 2nd respondent's view, the



present application is without merit and there is no basis for granting leave to appeal to the Supreme Court.

6. Before we consider the merit of the application, it is useful to set out briefly the background to the matter. The appeal before this Court related to a ruling made by the late Ole Keiuwa, J., sitting in the High Court, dated 5th December 1997 in Nairobi HCCC No. 5261 of 1988. In his ruling, the learned judge declined to set aside a consent order entered into on 2nd October 1996 on behalf of the parties. The applicant had sought to have the consent set aside on the basis that the advocate who signed the consent order on its behalf did so without authority.
7. The consent at issue related to ownership of the suit properties known as LR No. 10262 (IR. 17163) and LR No. 11694 (IR 21143). The two parcels of land were initially owned by one Ms. Sarah Fosdic, who, in the late 1960s, desirous of leaving Kenya, decided to sell them. She gave her workers the first option to purchase the land, but she also wanted to give them 2.5 acres out of the bigger parcel, LR No. 10262 (IR. 17163), which was the portion of the land that they physically occupied. Under the leadership of the 4th respondent, Simon Kimani (deceased), the workers organized themselves into a partnership under the name and style of Kuwinda Rurinja Company. A letter of offer dated 23rd February 1985 was made to the partnership, but it was unable to pay any deposit or purchase price for the two parcels of land, and no sale agreement was entered into.
8. Meanwhile, Simon Kimani and 4 others incorporated Kuwinda Rurinja Company Limited, the applicant herein, with the intention of purchasing the two parcels of land. The company, however, was also unable to pay any deposit towards purchase of the suit properties. Eventually, the two parcels of land were purchased by Ndumberi Farmers Company Limited, the 3rd respondent. After the 3rd respondent went into voluntary liquidation, the liquidators decided to sell the two parcels of land, and an advertisement was placed in the local dailies. The 1st respondent, Kuwinda Holdings Limited, in which the 2ⁿ respondent, Mr. Collin Davies, is a director, was the successful bidder. A sale agreement in respect of the two properties dated 31st October 1988 was entered into between the 3rd respondent and the 1st and 2nd respondent.
9. Following the sale, three different suits were filed at the High Court in respect of the suit properties. These were: HCCC No. 5261 of 1988-Kuwinda Rurinja Co. Limited) v. Joint Liquidators of Ndumberi Farmers Co. Ltd in which the plaintiff, the present applicant, sought specific performance on the basis of a letter of offer accepted on 23rd February 1985; HCCC No. 5262 of 1988-Simon Kimani & 9 others Kuwinda Rurinja Company v. Joint Liquidators of Ndumberi Farmers Co. Limited (In Liquidation) which pitted the workers, who had formed a partnership, against the 3rd respondent herein, claiming adverse possession of 2.5 acres out of the suit property; and HCCC No. 3070 of 1989-Collin Davies & Kuwinda Holdings Limited v. Joint Liquidators of Ndumberi Farmers Co. Limited in which the plaintiffs, the 1st and 2nd respondents in this application, sought specific performance of the sale agreement dated 31st October 1988 and removal of caveats lodged against the suit properties.
10. The record indicates that thereafter, three consents were entered into, culminating in the consent dated 2nd October 1996. The first was a consent letter dated 22nd October 1993 filed in court on 25th October 1993 in HCCC No. 5261 of 1988 under the letter head of Muriithi & Co. Advocates. The consent was signed by the firm of Muriithi & Co. Advocates for Kuwinda Rurinja Co. Limited and Kaai Mugambi & Co Advocates for Ndumberi Farmers Co. Limited. The terms of the consent were that the 3rd respondent herein, the defendant in the matter, would transfer the suit property to the plaintiff, the present applicant, or its nominee, less a portion of 2.5 acres on LR. 10262; and secondly, that the balance of the purchase price amounting to Ksh. 7,380,000 be paid to the defendant's advocates.



11. The second consent order was filed in settlement of HCCC No. 3070 of 1989 between the 1st, 2nd and the 3rd respondents. Briefly, the terms of the consent were, inter alia, to settle the suit between the 1st, 2nd and 3rd respondent through a consent order for specific performance of the agreement for sale between the parties, and for registration of the transfer of the suit properties from the 3rd respondent to the 1st and 2nd respondents to proceed without encumbrances.
12. This consent order was followed by a third consent order, filed on 2nd October 1996 in relation to all the three suits. It was signed by three firms of advocates: Messrs. A. F. Gross for Collin Davies and Kuwinda Holdings Limited, the 1st and 2nd respondents; Messrs. Kaai Mugambi & Co. Advocates for Ndumberi Famers Company Limited, the 3rd respondent; and Messrs. Muthuri & Co. Advocates for the applicant, Kuwinda Rurinja Company, and Simon Kimani & 9 Others. This consent order, among other things, consolidated all the three suits for the purposes of the consent; ordered specific performance of the agreement for sale dated 31st October 1988 between the 1st and 2nd respondents as purchasers and the 3rd respondent as the seller, and ordered that the transfer of the suit properties by the 3rd respondent to the 1st respondent, duly stamped and dated 14th November 1988, do proceed to registrations. It further ordered the Registrar of Titles to raise all the encumbrances, caveats and restraining orders, registered against the titles, more particularly IR No. 17163 (LR 10262) up to the date of the consent.
13. This latter consent order should have settled the matter relating to the suit properties, which had entered its second decade, but it did not. The applicant filed an application before the High Court seeking review and setting aside of the consent order dated 2nd October 1996. The basis of the application was that the firm of Muthuri & Co. Advocates, which signed the consent order on its behalf, had no authority to act for the applicant or to record the consent order; and that the consent had no basis and was fraudulently obtained. The application was heard by Ole Keuwia, J. who dismissed it in the ruling that was the subject of appeal before this Court.
14. In its appeal before this Court, the applicant impugned the decision of the trial court on some fifteen grounds, inter alia, that the trial court misapprehended the nature of the jurisdiction to review a consent judgment and erred in applying the procedure for setting aside consent judgments; and in not requiring Mr. Muthuri advocate, to confirm to court whom he represented when signing the impugned consent order. It was its case further that the trial court erred in declining to review its decision on the grounds that for an application for review to succeed, there must be discovery of new and important matter or evidence which was not within the knowledge of the applicant, its contention being that review of a consent order is governed by a different set of principles.
15. In its decision, this Court identified the issue before it as being whether the learned judge erred in law and fact in declining to review and set aside the consent order recorded on 2nd October 1996, or, put differently, whether there was sufficient evidence on record establishing grounds for setting aside the consent order.
16. This Court considered the principles applicable in setting aside a consent order and the question whether the firm of Muthuri & Co. Advocates had authority to act for the applicant. The applicant had contended that the instructions to the said firm to enter into the consent had been issued by Ms. Bibiana Nyawira, a person who was not properly in office as a director. In rejecting this argument, this



Courts cited the decision of the Supreme Court of *South Africa in Stand 242 Hendrik Potgieter Road Ruimsig Pty v. GÖbel* (No.246/10) [2011] ZASCA105 (June 2011) in which the Court stated:

“The rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities.”

17. The Court further relied on the *English case of Moboney v. East Holyford Mining Co* [1875] LR. 7 HL 869 in which it was stated:

“when there are persons conducting affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.”

18. Persuaded by the reasoning in these decisions, this Court held that the applicant had not demonstrated to its satisfaction that the trial judge erred in finding that Ms. Bibiana Nyawira had authority to appoint and instruct the firm of Muthuri & Co. Advocates; or in accepting the averments of Mr. Stephen Kaai Advocate that he had negotiated and signed the consent with the advocates for all the parties. The Court held that while the applicant had faulted the trial court for relying on the evidence of Kaai Mugambi, it had not demonstrated to what extent the judge had erred in so doing. In the end, this Court found no reason to fault the trial court’s decision; that no grounds had been placed before the trial court for setting aside a consent judgment; the allegation that the consent was procured by fraud remained mere allegations; and the contention that the advocates who signed the consent order had no instructions had not been proved to the Court’s satisfaction. It found no merit in the appeal and dismissed it with costs to the 1st and 2nd respondent.
19. The applicant and the 1st and 2nd respondents filed submissions supporting their respective positions on the application. No responses or submissions were filed by the 3rd to 14th respondents. At the hearing of the application, Dr. Kamau Kuria, SC, appeared for the applicant. The 1st and 2nd respondents were represented by learned counsel, Mr. Nderitu, while learned counsel, Ms. Wambua, appeared for the 3rd respondent. Dr. Kuria and Mr. Nderitu highlighted their respective clients’ submissions, while Ms. Wambua indicated that the 3rd respondent supported the application.
20. In the submissions dated 22nd December 2023, the applicant traces the background to the application, which we have set out above. The applicant submits that the impugned consent order was fraudulently procured by the respondents, who acted with a few shareholders of the applicant, and that the majority shareholder was not involved in the appointment of the advocate who signed the consent. The applicant refers to the case of *Marshall’s Valvegear Company Ltd. -v- Maning Wadle* {1909}1. CH 267 to submit that it is only the majority shareholder(s) who can act in the name or on behalf of the company. It further contends that the shareholder who purported to terminate the appointment of Muriithi and Co. Advocates and appoint the firm of Muthuri and Co Advocates had no legal capacity to do so.
21. Its submission is that this important principle of company law was overlooked by this Court, leading to a miscarriage of justice, and that this Court has permitted a departure from the known company law principles and created great uncertainties in the country’s company law. The applicant submits that it wishes to bring to the Supreme Court the jurisprudence of other common law systems which do not “allow the majority shareholders to act in the name of company” (sic); that this Court’s decision rejects the settled decision of *Foss v Harbottle* which is the authority for the proposition that the minority can only act in the name of the company if they bring themselves within the exceptions. It is submitted that this Court ignored the evidence that the respondents selected the shareholders who should appoint



- advocates, and that the majority shareholder, Beatrice Wanjiku, did not appoint the firm of advocates which entered into the fraudulent consent.
22. The applicant further submits that the intended appeal raises a second legal issue regarding the nature of the authority of an advocate to act for a client. It contends that the respondents decided to have the lawful advocate replaced with an advocate of their choice; that they purported to pass special resolutions through which they terminated the appointment of the firm of Muriithi & Co Advocates, who acted for the applicant, and appointed the firm of Muthuri & Co Advocates, which used the fraudulent appointment and a consent order to secure a transfer of the suit properties to the 1st respondent.
 23. The applicant submits that this Court, through its impugned judgment, held that an advocate, who has not been appointed by a company's Board of Directors or the majority shareholders, can enter into a consent judgment on behalf of that company; that settlement of disputes through consent orders is one of the principal ways in which disputes are resolved; and the effect of the decision is to put companies and their assets at risk.
 24. The applicant submits further that its appeal was one in which the superior court based its decision on preference of some affidavits over others without the benefit of cross examination; that this Court ignored that evidence; and its decision, like that of the High Court, was arbitrary.
 25. The applicant further complains that this Court ignored the evidence it had allowed under rule 29 of this Court's Rules; preferred untested affidavit evidence to tested evidence through cross-examination in the Chief Magistrates' Court; watered down the right to a fair trial under Article 50 of the Constitution; and that its appeal therefore raises issues of great public importance touching on company law and the authority of advocates.
 26. The applicant submits that it has met the requirement for certification and leave to appeal to the Supreme Court as set out in the case of Steyn v Ruscone (Application 4 of 2012) [2013] KESC 11 (KLR) (23 May 2013) (Ruling). It submits that its case is a matter of great public importance and further cites the case of Murai v Wainaina on the public importance touching on the subject of land rights that not only affect the parties to the appeal but a large number of original land owners.
 27. The applicant submits that this Court has jurisdiction to grant the restraining order that it seeks against the 1st and 2nd respondent. It cites the case of Equity Bank Ltd -v- West Link MBO Ltd Civil Application No. 78 of 2011 and the decision of the Supreme Court in Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell [2013] eKLR to submit that this Court has inherent jurisdiction to make interim orders pending the hearing and determination of the intended appeal to the Supreme Court, and to preserve the subject matter.
 28. In submissions dated 18th December 2023 highlighted by their learned counsel, Mr. Nderitu, the 1st and 2nd respondent submit that the present application does not satisfy the requirements for certification to the Supreme Court or grant of injunctive orders. They rely on the holding of the Supreme Court in Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 Others, SC Petition No. 2 of 2012 [2012] eKLR for the proposition that

“only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court”, with all matters turning on the technical complexity of the law left to the resolution of the hierarchy of courts below.
 29. It is their submission that the applicant has failed to satisfy the requirements for certification for leave to appeal to the Supreme Court under Article 163(4) (b) of the Constitution; that the High Court



- and this Court, which are competent courts, have both found that the applicant did not satisfy the grounds for setting aside a consent order; that these findings cannot be said to raise matters of general public importance whose complexity the two levels of courts could not grasp; that the grounds for setting aside a consent judgment have been long settled; and that a finding by the High Court and this Court that a party has failed to persuade them is not a cardinal issue of law requiring the input of the Supreme Court.
30. The 1st and 2nd respondent submit that the applicant has tried, in its submissions, to salvage its application for certification by alleging that the matter of public importance is on subject land rights that not only affect the parties to the appeal but a large number of original land owners. They submit that this is a gross misrepresentation of facts as the appeal before this Court was against a ruling of the High Court declining to review and set aside a consent order; that this Court found that the High Court rightly exercised its discretion in declining the review; and that the applicant cannot talk of land rights that it never had.
 31. It is their submission further that this Court did not deviate from any settled company law nor did it find that an advocate who had not been appointed by the company's board or the majority shareholders can enter into a consent judgment on behalf of that company. They submit that this application relates to private land, raises no matter of public importance, and fails to meet the definition of 'a matter of general public importance' set out in *Steyn v Ruscone* [supra].
 32. With respect to the applicant's second prayer, the 1st and 2nd respondent submit that the applicant has not satisfied the principles for grant of an injunction, their submission being that the applicant has not satisfied the triple requirements outlined by this Court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. Their submission is that the applicant seeks an injunction in respect to a property over which it has no legal rights; that it alleges that it entered into a sale agreement with the then registered proprietor on 23rd February 1985 but has never produced any sale agreement or proof of payment; further, that whereas the 1st respondent could have legally dealt with the land in any manner it wished over the last 36 years since there was no order stopping it, the applicant has not disclosed circumstances to show that the 1st respondent intends to transfer, charge or sell the property. They ask this Court to dismiss the application with costs.
 33. We have considered the application and the affidavits in support and opposition thereto. We have also considered the respective submissions of the parties. The first issue for our consideration is whether the applicant has satisfied the requirements for certification of a matter as raising issues of general public importance for determination by the Supreme Court. The factors to be considered in such an application were enunciated by the Supreme Court in *Steyn v. Ruscone* (supra) as being: that the issues that the applicant intends to raise transcend the circumstances of the particular case or the litigation interest of the parties, and have a significant bearing on the public interest; that the point(s) of law involved are substantial and their determination will have a significant bearing on the public interest; that mere apprehension of a miscarriage of justice is not sufficient reason for certification; and that determination of contested facts between the parties is also not a sufficient basis for certification.
 34. A further requirement set by the *Steyn v. Roscone* decision is that the applicant must also identify and concisely set out the specific elements of 'general public importance' that are attributed to the matter for which certification is sought. Finally, as was held in the decision of the Supreme Court in *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* (supra), only cardinal issues of law or of jurisprudential moment deserve further input from the Supreme Court.
 35. As emerges from the applicant's averments and submissions, it is its contention that a matter of general public importance is involved in this matter, for three main reasons: first, that this Court, through the



impugned judgment, watered down the stated law that the authority of an advocate cannot be upheld where he acts without authority or exercises such authority in a manner that is diametrically opposed to express instructions by a client; secondly, that it undermined the country's company law by wrongly acting on obiter dicta from England and South Africa which state that those who deal with a company, even in a court of law, are entitled to benefit from a consent order made by an advocate who has not been appointed by a company; thirdly, that the impugned judgment held that an advocate who has not been appointed by a company's Board of Directors or majority shareholders can enter into a consent judgment on behalf of such a company.

36. Three further reasons are advanced to convince us that the matter is deserving of certification: that the impugned judgment was based on preference of some affidavits over others without the benefit of cross examination; that it watered down the right to a fair trial; and that it watered down the right to property, not just for the applicant but for others who had an interest in the suit property.
37. Do these matters transcend the circumstances of the dispute between the parties or their litigation interests? Do they have a significant bearing on the public interest? What points of law involved are substantial, and whose determination will have a significant bearing on the public interest? Put differently, do these contentions by the applicant satisfy the test in *Steyn v Ruscone*?
38. In responding to this question, we begin by considering the crux of the appeal before this Court that the applicant seeks to escalate to the Supreme Court. In the High Court, the applicant unsuccessfully sought review of a consent order entered into on 2nd October 1996. Its contention before the High Court was that the firm of advocates which signed the consent on its behalf was appointed by a director who was not the majority shareholder. Upon considering the application, the High Court declined to review the consent order. The applicant's appeal to this Court, premised on the argument that the High Court erred in declining to review the consent order, was unsuccessful.
39. It appears to us that what the applicant is aggrieved by is the determination of contested facts by the High Court with respect to the appointment of the advocates who signed the impugned consent: whether such authorisation should have been by the 4th respondent, alleged to be the majority shareholder, or the 5th respondent, a minority shareholder. The argument that the decision of this Court watered down the stated law that the authority of an advocate cannot be upheld where, among other things, he acts without authority; undermined the country's company law by wrongly acting on *obiter dicta* from England and South Africa which state that those who deal with a company are entitled to benefit from a consent order made by an advocate who has not been appointed by a company are not matters that arose for determination before this Court. What was before the Court was the question whether the High Court properly exercised its discretion in declining to review the consent order between the parties, and upon considering the evidence before it, came to the conclusion that there was no basis for interfering with the High Court's decision.
40. The applicant has also argued that there is an issue of general public importance in that the decision of this Court not only affects the parties to the appeal but a large number of original land owners. It is not clear who these 'original land owners' are, but this is, in any event, an argument that appears only in the applicant's submissions, and cannot form the basis for certification as contemplated in *Steyn v Ruscone*.
41. In the end, we find that the applicant has not satisfied the test for certification of its appeal as raising matters of general public importance meriting consideration by the Supreme Court.
42. The applicant has also sought an order restraining the respondents from dealing with the suit land pending appeal to the Supreme Court. This prayer is predicated on the outcome of the prayer for



certification, which we have found to be without merit. In any event, this Court does not have the jurisdiction to consider an application for injunctive orders pending appeal to the Supreme Court.

43. Accordingly, we find no merit in the application dated April 15, 2019. It is hereby dismissed with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

