



REPUBLIC OF KENYA



**Munguti & 6 others v Richter & 10 others (Civil Application
E260 of 2022) [2023] KECA 146 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 146 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E260 OF 2022
HM OKWENGU, A ALI-ARONI & JM MATIVO, JJA
FEBRUARY 3, 2023**

BETWEEN

**HENRY MULI MUNGUTI 1ST APPLICANT
HENRY MWAKE 2ND APPLICANT
DAVID NYUNGU 3RD APPLICANT
MICHAEL KIOKO 4TH APPLICANT
PENINA MUMBE 5TH APPLICANT
ALICE WANGECI 6TH APPLICANT
GOOD HOPE REHABILITATION CENTRE 7TH APPLICANT**

AND

**DR. KLAUS-HERBERT RICHTER 1ST RESPONDENT
STEVE MAKAU 2ND RESPONDENT
PETER KIMEU MWANGANI 3RD RESPONDENT
LILIAN KATUNGE MUEMA 4TH RESPONDENT
CYRUS ROBERT SALA ZIBU 5TH RESPONDENT
PETER MANGÁLA 6TH RESPONDENT
GIDEON KIOKO KIVANGULI 7TH RESPONDENT
PETER MUSAU 8TH RESPONDENT
JUMA OLIVER MUSILA 9TH RESPONDENT
MUTUKU KATALA 10TH RESPONDENT
NATIONAL LAND COMMISSION 11TH RESPONDENT**



(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Nairobi (Karanja, Murgor & J. Mohamed, JJ. A) delivered on 8th July, 2022 in Civil Appeal No. 260 of 2018)

RULING

1. The record indicates that the 2nd respondent a retired flying doctor turned philanthropist while visiting Kenya in 1991, nurtured a vision of bringing together volunteers who were willing to help the community and with whom he could engage likeminded donors to fund projects that would eradicate poverty, look into the welfare of children & rehabilitation of drug addicts. In the same year the 2nd respondent met the 1st applicant and engaged him as a driver and guide, when in the process they struck a friendship, and the 2nd respondent shared his vision with 1st applicant leading to the 2nd respondent between 1997 to 2003 setting up a small business for the 1st applicant, assisting him build a house where the rehabilitation center was initially housed and thereafter the 2nd respondent looked for donors towards funding of the projects.
2. On the basis of trust the 2nd respondent sent money to the 1st applicant from himself and other donors where the following properties were acquired towards establishing the said projects;-
 - i. Unsurvey plot from one Mr Peter Mwau Kyama which land was later surveyed as Plot No 3792, and registered in the 1st applicant's name.
 - ii. Unsurvey Plot from Mr Peter Mwau Kyama which was later registered in the name of the 7th applicant as Plot No 3763.
 - iii. Unsurvey plot from Timothy Mutuku Matenge (now deceased) which was later registered in the 7th appellant's name and where the children's home is constructed and later came to be known as Plot No 3762.
3. Towards 2013, one of the donors brought in by the 2nd applicant; the International Federation of Blue Cross(IFBC) required the restructuring of the management of the 7th Applicant and separation of the children's home from the 7th applicant, establishment of management committees, opening of accounts with reputable banks, and regular auditing including proper registration of the 7th applicant.
4. At the request from the donor, an audit carried revealed malpractices on the donor remittances and the donor demanded refund of all unaccounted monies and the prosecution of the 1st applicant and other parties involved. The donor at the same time suspended donations.
5. The 2nd respondent on his part demanded for the registration documents of the 7th applicant and on failing to get the documents he applied for another certificate, but the file for the first registration could not be traced. However, on receipt of the new certificate the file for the first registration resurfaced. The dispute caused a fall out in the committee of the 7th applicant with some members siding with the 1st applicant and others with the 2nd respondent.
6. In the ensuing scenario the 1st applicant seized control of the 7th applicant and even denied the 2nd respondent access to the children's home. The 2nd respondent as a founder of the 7th applicant and the children's home was of the opinion that there existed an implied trust between him and the 1st applicant all along and being aggrieved by the action of the 1st applicant, the 2nd Respondent together with others



preferred a case in the Environment and Land Court being Case No 78 of 2017 Makueni(formerly Machakos Civil Case No 13 of 2014) where they sought for:

- a. A declaration that the relationship between the 2nd respondent and the 1st applicant starting from the year 1991 up to 2013 resulted in the creation of an implied trust.
 - b. A declaration that the 1st, 2nd, 3rd, 4th, 5th and 6th applicants are trustees of the 2nd respondent and the donor friends of the 2nd respondent for all set-ups, systems, documents, entities, funds, movable and immovable assets now registered in the name of the 1st applicant, the, 1st applicant's agents, spouse, servants and/ or appointees of the 7th applicant.
 - c. A declaration that all accounts currently operated in the name of the 7th respondent and the funds therein are assets of the trust of the 2nd respondent and the donors.
 - d. A declaration that the implied trust between the 2nd respondent and the 1st applicant graduated to and became a public trust in which the respondents and the people of Makueni County are 'the beneficiaries' thereof.
 - e. A declaration that the existing society known as Good Hope Rehabilitation Centre registration Number xxxx is an asset/ entity of the respondents and the current officials hold such office as trustees.
 - f. A mandatory injunction compelling the defendant (the Registrar of Societies) to substitute the current officials of the 7th applicant within a period of thirty (30) days with officials appointed by the respondents.
 - g. A mandatory injunction compelling the 1st, 2nd, 3rd, 4th, 5th and 6th applicants by themselves, their agents and/or servants to surrender all bank accounts and the deposits therein, movable and immovable assets in his custody and/or currently in the name of the 7th applicant to the respondents,
 - h. A mandatory injunction compelling the 1st applicant to register the subject plot in the name of the 7th applicant,
 - i. A perpetual injunction restraining the 1st, 2nd, 3rd, 4th, 5th and 6th applicants by themselves their servants and/ or agents from interfering with the operations of the 7th applicants
7. The trial court upon hearing the matter returned a verdict in favour of the respondents. The learned judge was satisfied that the oral and documentary evidence proved that the monies remitted to the 1st applicant by the 2nd respondent was for the purchase of three properties for the benefit of the community, as a consequence of which, an implied trust was established between the 2nd respondent and the 1st applicant, with respect to the plot which was registered in the 1st applicant's name; he held the same in trust for the 2nd respondent.
8. The applicants were dissatisfied with the trial court's judgement and moved this court on appeal on grounds that
- i. The trial court failed to evaluate and analyse the parties' evidence;
 - ii. That the court wrongly stated that the 1st applicant had admitted that the subject plot ought to have been registered in the name of Good Hope Rehabilitation Centre when he did not make such admission, and that the court was biased in finding that a resulting trust was created when no such evidence was produced or conditions for reaching such a finding were established;



- iii. The learned judge erred in failing to interpret the provisions of the Law of Contract in relation to the subject plot and
 - iv. The learned judge erred in failing to appreciate that the 1st applicant was entitled to the acquired property;
 - v. The learned judge erred in failing to appreciate the 1st applicant's evidence that the 2nd respondent did not donate his own money, but sourced for funds from third parties and that the 1st applicant had other donors not related to the 2nd respondent;
 - vi. The learned judge erred in finding that the 1st to 6th applicants were trustees of the 2nd respondent for all funds, moveable and immovable assets registered in the names of the 1st applicant's agents, spouses, servants and or appointees of the 7th appellant; and
 - vii. The learned judge erred in determining issues that do not fall within the remit of the Environment and Land Court,
9. In its determination this court found as the trial court did that the 1st applicant bought the 3 plots in questions with funds remitted to him by the 2nd respondent and donors connected to him for purposes of establishing a children's home and a rehabilitation center. And that two plots were registered in the name of the 7th applicant namely plot nos 3762 and 3763, however plot no 3792 was registered in the name of the 1st applicant. Further the court formed the opinion that evidence before court did not demonstrate that the 1st applicant had purchased any of the plots with funds from any other source. This court had this to say on the matter; -
- ' What the evidence does point to was that, the plots, including the subject plot were purchased with funds remitted by the 2nd respondent, to the 1st appellant. And instead of registering the subject plot in the 7th Appellant's name the 1st appellant wrongly registered the same in his own name. This in effect would mean that its registration in the 1st Appellant's name, automatically, created a resulting trust in favour of the 2nd respondent from whom the remitted donations for the purchase of the plots originated. We are therefore satisfied that, the learned judge rightly concluded that a resulting or implied trust was created over the subject plot, and that the consequence, the 1st appellant in whose name the subject plot is registered holds it in trust for the 2nd respondent, and the community at large.'
10. This court further agreed with the trial court on its granting of prayers (b) & (d) of the prayers sought as the same were declaratory in nature and were concerned with the trust over the subject plot and related assets, since Article 162 (2) of the Constitution vests the Environment and Land Court with jurisdiction to hear matters relating to the use and occupation of land. The court agreeing with the applicants declined to grant prayer (c) of the prayers sought.
11. It is against this background which we have relayed at length that the applicants have moved this court in a notice of motion dated July 21, 2022 pursuant to Article 163(4) of the Constitution of Kenya 2010 and rule 40 of this court's rules seeking; -
- i. That the applicants be granted leave to file an Appeal to the Supreme Court against the Judgment of this court in this matter that was delivered on July 8, 2022;
 - ii. The Court be pleased to certify the following questions as involving general public importance:



- a. Whether the Environment and Land Court has jurisdiction under Article 162 of the Constitution to issue orders relating to registered entities (societies and Companies), movable assets,
 - b. Whether the doctrine of a resulting trust can be imported into an express contract of sale and against express provisions of Article 40 of the Constitution on the right town property and whether such importation, entirely disentitles the trustee from their own separate property.
 - c. Whether a Court of law has jurisdiction to issue an Order in rem to cover and bind people that are not parties to a suit.
 - d. Whether a Court of law has jurisdiction to issue an Order in rem to cover properties and assets that are not specifically mentioned in a Plaintiff or claim.
 - e. Whether a Court has jurisdiction to declare a resulting trust in favour of a third party who is not the source of funds subject to the resulting trust,
 - f. Whether a Court of law has jurisdiction to declare a resulting Trust with respect to positions held by officials of a registered Society or directors of a company, otherwise governed by Statute.
- iii. They also seek for a grant of stay of the high court judgement and decree
 - iv. And costs of the application.
12. Article 163(4) (b) of the Constitution provides that:
- 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).

13. In giving effect to the above provision of the Constitution it is now settled law that in an application such as the one before us, for consideration is not whether this court was wrong in arriving at its determination but rather whether the issues raised are of general public importance

In the case of Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2012] eKLR which was subsequently upheld by the Supreme Court this court stated thus; -

' The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate court-for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course. In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.'



14. Equally this court in the case of *Town Council of Awendo v Nelson Oduor Onyango & 13 others [2014] eKLR* stated: -

' The guiding principles for determining whether a matter is one of general public importance under Article 163(4)(b) of the *Constitution* were outlined by the Supreme Court in *Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscione*, Sup Ct Appl No 4 of 2012 where it stated.

'The applicant is required to satisfy us that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case and has significant bearing on public interest; where a point of law is raised, that such a point is a substantial one the determination of which will have a significant bearing on the public interest; the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination; that where the certification is occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty or refer the matter to this Court for determination; that mere apprehension of miscarriage of justice is not a proper basis for granting certification and the matter must still fall under Article 163(4)(b) of the *Constitution*; that the applicant must 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; and that determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.'

15. We have considered the issues intended to be raised by the applicant for appeal in the Supreme Court but we are not satisfied that the issues are matters of general public importance that transcends beyond the interest of the parties herein nor have the applicants identified with any precision any matters of public importance that will have any significant bearing on the public. In addition the applicants have not demonstrated that the decision of this court relating to the issues in question has unsettled or is in conflict with known decisions creating uncertainty and requiring clarification or settlement of the law by the apex court.

16. Clearly from the grounds and submissions by counsel for the applicants they are simply dissatisfied with the decision of this court and want to have a 'third' bite at the cherry. In the case of *Malcolm Bell vs. Daniel Toroitich Arap Moi & another (2013) e KLR* expressed in its own words the Supreme Court stated-

' It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the *Constitution* and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law'.

17. As regards the prayer for stay of execution of the trial court's judgement and decree, this court ceased to have jurisdiction as soon as it pronounced itself on the appeal and cannot therefore grant the order sought. We align ourselves with the holding in *Dickson Muricho Muriuki vs. Timothy Kagundu Muriuki & 6 others [2013] eKLR* that;-

' 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. It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court.'

18. For the above reasons we have come to the conclusion that the application is not merited and the same is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

