



**Njowamu Construction Company Ltd & another v Kiarie (Civil Application
Sup 20 of 2019) [2023] KECA 425 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 425 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION SUP 20 OF 2019
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
APRIL 14, 2023**

BETWEEN

NJOWAMU CONSTRUCTION COMPANY LTD 1ST APPLICANT

STEPHEN NJOROGE MUHINJA 2ND APPLICANT

AND

SAMUEL NGIGE KIARIE RESPONDENT

(Being an application for certification that a matter of general public importance is involved in the applicant's intended appeal to the Supreme Court against the decision of this Court (E. M. Githinji, Asike-Makhandia & Kiage, JJ.A.) dated and delivered on 21st June 2019 in Civil Appeal No. 61 of 2016.)

RULING

1. Before this Court is a notice of motion application dated 30th September 2019 brought by the applicants under the provisions of Article 163(4) (b) of the *Constitution*, rule 24 of the Supreme Court Rules, 2012, rules 5, 40 & 41 of the Court of Appeal Rules, 2010 and all other enabling provisions of the law. The applicants seek an injunction to restrain the respondent from dealing with the property known as LR No. 76/784, Thindigua, Kiambu District, pending the hearing and determination of an intended appeal; and certification that a matter of general public importance is involved in the applicants' intended appeal to the Supreme Court against the judgment of this Court (E. M. Githinji, Asike-Makhandia & Kiage, JJ.A.) dated and delivered on 21st June 2019 in Civil Appeal No. 61 of 2016.
2. The origin of the dispute between the parties traces to an agreement for sale entered into between the parties herein on 8th June 2007. The subject matter of the agreement for sale was a property known as L.R. No. 76/784 Thindigua, Kiambu District, together with developments thereon (hereinafter referred to as "the suit property"). The respondent was the vendor whereas the 1st applicant was the purchaser.



3. The agreed purchase price for the suit property was Kshs.9,000,000/-. As at the time of execution of the agreement for sale, the respondent acknowledged receipt of a deposit of Kshs.4,000,000/-. The balance of Kshs.5,000,000/- was to be paid in two equal instalments of Kshs.2,500,000/-each, with the 1st installment being paid on or before 30th June 2007 and the last instalment on or before 30th August 2007. Other than payment of the purchase price, the 1st applicant would also pay monthly rent of Kshs.20,000/- in advance until August 2007, and any late payment thereof would attract a penalty of Kshs.25,000/- per month until payment in full.
4. It was also a term under the agreement that in case of default which would frustrate completion of the transaction, the defaulting party would pay the other a sum equivalent to 10% of the purchase price.
5. The applicants, vide a plaint dated 11th August 2008, instituted suit to wit, Nairobi ELC No. 382 of 2008, against the respondent. The applicants stated that whereas they had paid a total of Kshs.4,500,000/- towards the purchase price and were continuing to pay monthly rents to the respondent as agreed, the respondent had, by a letter dated 28th September 2007, informed them that he intended to offer the suit property to another buyer, alleging breach of the terms of the agreement on their part, and, vide the same letter, purported to review the monthly rent upward to Kshs.50,000/-. The respondent would later on vide a letter dated 7th April 2008 require the applicants to deliver vacant possession of the suit property on the ground that he had purportedly terminated the agreement for sale.
6. The applicants in their plaint contended that they were at all times ready and willing to complete the sale and severally offered the balance of the purchase price to the respondent, who failed or refused to avail the completion documents to the applicants. They further contended that the respondent had wrongfully levied distress for rent against their motor vehicle registration no. KAZ 745B and took away the said motor vehicle, which they never saw again. They stated that they had been deprived of its use.
7. The applicants prayed for judgment against the respondent for specific performance of the agreement for sale, or, in the alternative, refund of the Kshs.4,500,000/- deposit paid to the respondent with interest thereon; general damages for breach of contract; Kshs.2,015,904/- being the value of the motor vehicle registration no. KAZ 745B together with interest thereon from 11th June 2008 until payment in full; general damages for the loss of use of the said motor vehicle; general damages for conversion; exemplary and/or aggravated damages; costs and interest.
8. In his defence, the respondent denied privity of contract between himself and the 2nd applicant, who was a director of the 1st applicant. He contended that the 1st applicant breached an initial agreement entered into between the parties on 1st September 2006, which breach led to the parties entering into a fresh agreement on 8th June 2007 which was the subject of the proceedings before the court. He stated that the 1st applicant also breached the agreement dated 8th June 2007 by failing to pay the balance of the purchase price as agreed; and that after the said breach the monthly rent payable was enhanced from Kshs.20,000/- to Kshs.45,000/- per month by consent of both parties.
9. The respondent contended that, long after the completion period had lapsed, the 1st applicant made no effort to perform its part of the agreement, and that, on 4th March 2008, the respondent issued the 1st applicant with 21 days' notice within which to complete its part of the agreement. The 1st applicant was stated to have ignored or refused to respond to, or honour the notice, and the agreement was duly terminated upon expiry of the notice; that the 1st applicant also failed to pay Kshs.225,000/- monthly rent despite demand, forcing the respondent to instruct auctioneers to levy distress for rent, which distress was legally carried out.



10. The respondent also filed a counterclaim contending that the 1st applicant breached the agreement, and that, despite notice, it failed to complete its part; that the 1st applicant had lodged an illegal caveat against the suit property; and that he was ready to refund the money paid by the 1st applicant less 10% as stipulated in the agreement. He prayed for vacant possession of the suit property, failing which eviction to issue; general damages for breach of contract; general damages for illegal caveat against the title of the suit property; mesne profits at market rate from 1st September 2006 until the date of vacant possession; removal of the caveat against the suit property; and costs.
11. In a judgment delivered on 30th September 2014, Gacheru, J. held that there was a valid sale agreement between the parties; that the respondent acknowledged receipt of Kshs.4,000,000/- from the applicants; that the balance was to be paid in two instalments before 30th June and 30th August 2007; and that Clause 3 of the agreement provided that should the purchaser be late in paying the balance as set out, the same was to attract a penalty of Kshs.25,000/- per month until full payment. There was no indication of when the payment in full would be achieved and therefore the clause was open ended.
12. The learned judge further held that the applicants failed to pay the balance of the purchase price, but continued to pay the penalty, and that the sale agreement did not stipulate that time was of the essence and was also not subject to the LSK Conditions of Sale. According to the learned judge, the respondent had allowed the applicants to take over possession of the suit property, and they were therefore not trespassers; that the respondent accepted the penalty payment and could not turn around and allege breach of the agreement.
13. The learned judge was of the view that none of the parties had adhered to the full terms of the agreement as the respondent terminated the agreement contrary to the terms therein, and the applicants had failed to pay the balance of the purchase price by 30th August 2007. None of the parties was therefore entitled to damages for breach of the sale agreement.
14. On the issue of specific performance, the learned judge held that the applicants had already deposited the balance of the purchase price as earlier ordered by the Court; that by the respondent putting the applicants in possession and receiving rent and penalties, a constructive trust was created in favour of the applicants over the property. In addition, that the respondent was not entitled to vacant possession and that the applicants were right in lodging a caveat over the parcel to protect its interests as a purchaser and tenant. The court therefore held that specific performance would be the best remedy.
15. In sum, the learned judge reached a finding that the applicants had proved their case on a balance of probabilities. She therefore dismissed the respondent's counter-claim, and ordered that the balance deposited be released to the respondent, who was ordered to transfer the suit property to the applicants upon receipt of the same.
16. Aggrieved by that judgment, the respondent preferred an appeal to this Court, to wit, Civil Appeal No. 61 of 2016. The learned judge was faulted for, inter alia, holding that Clause 3 acted as a saving clause; holding that the sale agreement was not legally terminated despite the appellant having served a 21 days' notice and, as a result, the 1st respondent was entitled to lodge a caveat; finding that the appellant was not entitled to vacant possession because he allowed the respondents to remain on the suit land after the completion date and continued receiving the monthly rent thereafter; failing to award the appellant damages since he failed to adhere to the full terms of the agreement; ordering for specific performance; and for dismissing the appellant's counterclaim.
17. This Court, vide its judgment dated 21st June 2019, made, inter alia, the following key findings:



- i. “That a penalty clause cannot be considered as a saving clause since the non-payment of the full purchase price as stipulated in a contract automatically renders the agreement immediately voidable and accordingly terminable at the instance of the innocent party, and cannot be said to remain valid on the strength of payment of penalties because penalties are not part of the purchase price.
 - ii. The intent of the parties was that failure to pay the purchase price would lead to the termination of the agreement. Such termination was not affected by continuity of payment of penalties or the lack of payment of the monthly rent; the termination of the agreement was tied to the default of payment of the full purchase price; the learned judge misconstrued the meaning and intent of the parties by concluding that clause 2 was a saving clause; it cannot be the case that as long as the 1st applicant continued to pay the rent and the penalties accruing, the agreement survived automatic termination and remained perpetually open, free of timelines; the intent of the parties is paramount in the interpretation of provisions of an agreement as courts must be faithful to give them effect.
 - iii. On the issue of termination of the agreement, the first notice sent by the respondent to the applicants issuing a 21 days’ notice was dated 4th March 2008, six months after the lapse of the completion date; the respondent gave the applicants another 21 days’ notice demanding vacant possession of the suit property; that the 6 months lapse after the completion date constituted an unreasonable delay, and the two letters served on the applicants were sufficient notice, thus the agreement for sale was legally terminated after the lapse of the 21 days’ notice and therefore the respondent was entitled to vacant possession.
 - iv. The learned judge erred in finding that a constructive trust was created in favor of the applicants, and relied on a case whose facts were easily distinguishable from the case herein.
 - v. The learned judge erred in finding that the agreement did not legally terminate and that the applicants were always willing and able to meet their end of the bargain. The applicants were neither able nor willing to pay the purchase price prior to coming to court because they were equally unable to meet the timelines set by the court for the deposit of the balance of the purchase price.
 - vi. The 1st applicant had no right to register the caveat as his rights over the suit land had ceased at the point of termination of the contract. The applicants did not sufficiently demonstrate that they were deserving of an order of specific performance as they had not satisfied their obligation as per the agreement, which was full payment of the purchase price.”
18. This Court therefore found the appeal to be merited and allowed the same. The judgment of the trial court was set aside in its entirety. The Court also ordered that the caveat registered against the suit property be lifted.
19. The applicants are dissatisfied with the decision of this Court and intend to lodge and appeal to the Supreme Court. They sought certification that a matter of general public importance is involved in their intended appeal to the Supreme Court. The application is supported by the affidavit sworn by the 2nd applicant on 30th September 2019.
20. On the limb of certification, the applicants state that this is a matter deserving admission to the Supreme Court due to the grave injustice that will be occasioned by the decree of this Court. It is argued that this Court through the impugned judgment dispossessed the 2nd applicant of his matrimonial home despite the fact that he paid the full purchase price thereof, improved the house, and complied



with all obligations of the sale agreement and the directions issued by the trial court. It is contended that, in the impugned decision, this Court did not direct whether the applicants should get back the purchase price already fully paid to the respondent, and thus the applicant is left in a limbo and at a risk of double injustice of losing the suit property and the purchase price unless the Supreme Court intervenes; that the respondent had indicated during trial that he did not need the house back, yet this Court proceeded to grant him the house; and, lastly, that this Court did not consider the principles governing orders for specific performance, thus it is necessary for the Supreme Court to address itself on this issue which will have general public implications to transactions involving property.

21. With regard to the prayer for stay of execution, the applicants state that they have an arguable appeal as laid down in a draft petition of appeal which is annexed to the supporting affidavit sworn by the 2nd applicant. The applicants argue that the learned judges of this Court erred in law and in fact by, inter alia, finding that the applicants had not sufficiently demonstrated that they were deserving of an order of specific performance despite the weighty evidence presented; failing to give a rationale and/or principle relied on in setting aside the judgment of the trial court; failing to recognize the grave injustice that will be caused to the 2nd applicant by failing to give any direction on the refund or otherwise of the full amount paid and of the property and improvements made on the property; failing to appreciate the law regarding specific performance; and it is thus important for the matter to be put before the Supreme Court to set a precedent on matters of specific performance and which shall have an effect to the general public; and for failing to read in totality the submissions by the applicants and the evidence presented before it, thus violating the applicants' right to fair trial.
22. On the nugatory aspect, the applicants state that the suit property is the 2nd applicant's sole matrimonial home where he has lived for the last 12 years, and that, unless stay is granted, he is likely to be evicted from the house and the property sold, leaving him destitute.
23. At the hearing of this application, learned counsel Mr. Mereka was present for the applicants. Learned counsel Ms. Muturi held brief for Mr. Macharia for the respondent. Highlighting the applicants' written submissions dated 27th January 2023, Mr. Mereka contended that the Supreme Court ought to be given an opportunity to set a precedent and principles with regard to orders for specific performance which will foster proper administration of justice. With regard to saving clauses in an agreement for sale, it was his submission that the Supreme Court should be given an opportunity to lay down principles of general application in future litigation by determining the question whether penalty clauses in Law of Contract qualify to be saving clauses. Counsel contended that the instant application had satisfied the principles laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone*, Supreme Court Application No. 4 of 2012.
24. Learned counsel argued that unless the issues raised in the application proceed to the Supreme Court for determination, grave injustice will be occasioned to the applicants. He submitted that the applicants' right to property as provided for under Article 40 of *the Constitution* has been infringed. Counsel invited this Court to be guided by the decision of the Supreme Court in *Deynes Muriithi & 4 Others vs. Law Society of Kenya & Another* [2016] eKLR where the apex court was said to have held that where orders issued by a court are destined to occasion grave injustice, the Supreme Court as an ultimate custodian of constitutional integrity may not turn a blind eye to such a decision where it stands in conflict with express provisions of *the Constitution*.
25. On her part, learned counsel Ms. Muturi, indicated that the respondent would be relying entirely on his written submissions dated 30th January 2023 without any oral highlights. In the written submissions, it is contended that the instant application is time barred under rule 40 of the rules of this Court, which



provides that an application for leave to appeal to the Supreme Court must be filed within fourteen days of the date of filing of a proper Notice of Appeal at the Supreme Court.

26. With regard to the prayer for certification, it is submitted that the applicants have not satisfied the principles laid down in *Hermanus Phillipus Steyn* case (*supra*). According to the respondent, grievances of a private citizen against the private land rights of another private citizen, cannot give rise to any issue of general public importance to justify leave and certification to appeal to the Supreme Court. It is contended further that the issues identified by the applicants cannot be said to be of any jurisprudential moment as was sated in the case of *Prof. Olive Mugenda vs. Dr. Wilfred Itolondo & 11 Others*, Supreme Court Civil Application No. 21 of 2015.
27. As regards the prayer for stay, it is contended that this Court is *functus officio* and cannot grant such a prayer. The decision of this Court in *Dickson Muricho Muriuki vs. Timothy Kagandu Muriuki & 6 Others* [2013] KLR is cited in support of this argument.
28. We have duly considered the application, the submissions by learned counsel, the authorities cited and the law. Article 163(4) of *the Constitution* stipulates that appeals lie from this Court to the Supreme Court:
- “(a) as of right in any case involving the interpretation or application of this Constitution; and
 - (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.”
29. Before determining whether the instant application has met the threshold for certification that a matter of general public importance is involved, the preliminary issue we must determine is whether the application is competent. The respondent through his written submissions contends that the instant application is time barred pursuant to the provisions of rule 40 of the Court of Appeal Rules. The application herein was filed in the year 2019. The applicable rules as of then were the Court of Appeal Rules, 2010. Rule 40 relied on by the respondent states as follows:
- “40. Application for certificate that point of law of general public importance involved Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made-
 - a. informally, at the time when the decision against which it is desired to appeal is given; or
 - b. by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision.” [Emphasis supplied]
30. The decision of this Court sought to be appealed against was delivered on 21st June 2019. The instant application although dated 30th September 2019 was in fact filed on 11th October 2019. There is a period of about 113 days between the date of this Court’s decision and the date of filing of this application. It is evident that the application was not filed within 14 days of this Court’s decision as contemplated under the provisions of Rule 40. The delay has not been explained by the applicants either in the application itself or through their written and/or oral submissions. Worth mentioning is that the applicants have not moved the Court to enlarge the timeline provided for under rule 40. The instant application is, therefore, in our view, incompetent having been filed outside the timeline



provided for under rule 40 of the Court of Appeal Rules, 2010. However, in the event we are wrong on the competency question (which we doubt), we are obliged to consider the merits of the instant application for certification that a matter of general public importance is involved in the applicant's intended appeal.

31. It is trite law as stated in *Hermanus Phillipus Steyn* case (*supra*) that to succeed in an application for certification under Article 163(4)(b) of *the Constitution*, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance. A 'matter of general public importance' was defined in the said decision thus:

“...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

32. This Court in *Kenya Plantation and Agricultural Workers' Union vs. Kenya Export Floriculture, Horticulture and Allied Workers' Union (Kefhau); represented by its Promoters; David Benedict Omulama & 9 Others* [2018] eKLR stated as follows:

“The principles set out in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione*, (*supra*) to determine whether a matter is of general public importance included:

- 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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

33. The applicant argues that the intended appeal to the Supreme Court will give the apex court an opportunity to set a precedent and principles with regard to orders of specific performance and the purpose of saving clauses in contracts law with a view of setting general application in future litigation. We have looked at the issues raised by the applicants in this application and are of the view that the issues do not rise beyond the private dispute between the applicants and the respondent. They are ordinary and/or conventional issues arising out of a transaction of the sale of a property. They do not transcend the litigation interests of the parties herein, nor do they raise any issues of general public importance. From the circumstances of this case, it is our considered view that there will be no any jurisprudential value in having the Supreme Court address itself to the issues identified by the applicants.
34. With regards to the prayer for stay of execution, we agree with the argument advanced by the respondent that, this Court having pronounced the final judgment, it is now functus officio and must down its tools. See the decision of this Court in Dickson Muricho Muriuki (supra).
35. In the circumstances, it is our finding that the present application is without merit, and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

