



**Clerk, Nairobi City County Assembly v Speaker, Nairobi City County Assembly & another  
(Civil Application E003 of 2022) [2023] KECA 1004 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1004 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E003 OF 2022  
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA  
JULY 28, 2023**

**BETWEEN**

**THE CLERK, NAIROBI CITY COUNTY ASSEMBLY ..... APPLICANT**

**AND**

**THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY, ASSEMBLY SERVICE**

**BOARD ..... 2<sup>ND</sup> 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 (Nambuye, Mbogholi & Laibuta, JJA.) delivered on 1st April 2022 in Civil Appeal No. E255 of 2021.)*

**RULING**

1. Before this Court is a Notice of Motion dated May 24, 2022 brought by the applicant under the provisions of Article 163(4) (b) of the Constitution of Kenya, rules 24 and 26 of the Supreme Court Rules, and rule 40 of the Court of Appeal Rules, 2010 and all other enabling provisions of the law. The applicant seeks, inter alia, orders of certification that his intended appeal to the Supreme Court raises issues of general public importance; that leave be granted to appeal to the Supreme Court against the decision of this Court (Nambuye, Mbogholi & Laibuta, JJA) in Civil Appeal No E255 of 2021; and that this Court be pleased to issue directions as to the period of time within which the applicant should lodge the intended appeal to the Supreme Court.
2. The background of this application relates to the appointment of the applicant as the Clerk, Nairobi City County Assembly. The applicant states that sometime in the year 2013, the now defunct Transitional Authority appointed him as the first Clerk of the Assembly following a secondment by the



- Parliamentary Service Commission. This appointment was approved by the 2<sup>nd</sup> respondent on June 10, 2014.
3. In a previous suit that had been filed by the applicant, viz, ELRC Cause No 2108 of 2014, parties recorded a consent which was adopted as an order of the court on July 20, 2017 to the effect that the applicant had been duly appointed as the Clerk of the Assembly under section 13 of the [County Governments Act](#).
  4. However, the applicant contends that in the year 2017, the Hon. Beatrice Elachi assumed the Office of Speaker, Nairobi City County Assembly, and hatched a plan to remove him from office, necessitating the filing of ELRC Petition No 194 of 2019 against the two respondents herein and the County Assembly of Nairobi. In the petition, the applicant sought, inter alia, orders to restrain the respondents from illegally and irregularly removing him from office.
  5. It is the applicant's argument that upon the resignation of Hon. Beatrice Elachi as Speaker of the Assembly on 11<sup>th</sup> August 2020, her successor directed the respondents' advocates to compromise the petition in a way that would enable the applicant to resume work immediately. Parties prepared a consent, but the trial court declined to have it adopted on grounds that it had not included the parties in a different suit, to wit, ELRC Petition No 71 of 2020 touching on the same subject matter.
  6. The trial court would thereafter render judgment in Petition No 194 of 2019 on October 16, 2020. The trial court held, *inter alia*, that the Nairobi City County Assembly had never approved the applicant's appointment as the Clerk of the Assembly; the applicant had been irregularly and unlawfully confirmed as the Clerk of the Assembly; the applicant was ineligible for confirmation to the position of the Clerk of the Assembly; the actions by the Speaker of the Assembly had not caused any harm and loss to the applicant; even though some of the actions by the Speaker of the Assembly may have been ill intended, they did not breach the applicant's constitutional rights.
  7. According to the applicant, the trial court invalidated his appointment and employment as the Clerk of the Assembly; declared the appointment of Mr. Edward Gichana as Clerk of the Assembly void; and dismissed Petition No 194 of 2019.
  8. The applicant contended that the version of the trial court's judgment read in open court was materially different in content from the version which was released to parties. In particular, the paragraph of the judgment that declared the appointment of Mr. Edward Gichana as Clerk of the Assembly void had been deleted in the version of the judgment released to the parties a few days later. It was the applicant's contention that the deletion of the missing paragraphs was fraudulently done ex- post on the advice of the respondents to pave way for Mr. Edward Gichana's assumption of office as Clerk of the Assembly.
  9. Being dissatisfied with the decision of the trial court, the applicant filed an appeal before this Court, to wit, Civil Appeal No E255 of 2021. The grounds cited in the memorandum of appeal were, inter alia, that the judgment of the trial court was tainted by collusion, ex-post alteration, fraud, dishonesty, irregularity, bias and other fundamental infirmities that went to the integrity of the system of administration of justice in that the content of the judgment read in open court by the learned judge on October 16, 2020 was materially different from the version of the typed judgment released to the parties via the judiciary's e-

filing platform. The applicant further argued that the learned judge erred in law and in fact by making findings in favour of the respondents based on unpleaded matters and granting reliefs not sought in the pleadings; invalidating the applicant's appointment as Clerk of the Assembly absent any pleading (in the form of a cross-petition) from the respondents;



adopting as a response to the Petition, averments made by the 2<sup>nd</sup> respondent in its Replying Affidavit filed in opposition to the applicant's Notice of Motion that had been settled by way of a Consent Order on October 30, 2019.

10. This Court (Nambuye, Mbogholi & Laibuta JJA) vide a comprehensive judgment delivered on April 1, 2022, held, inter alia, that the applicant had never been appointed and approved as Clerk of the Assembly in accordance with the mandatory provisions of section 13(1) of the [County Governments Act, 2012](#) and section 18(1) and (2) of the [County Assembly Services Act, 2017](#). The Court accordingly dismissed the appeal and upheld the trial court's judgment delivered on October 16, 2020. It is that decision which the applicant intends to appeal against at the Supreme Court.
11. The applicant contends that the impugned judgment risks disrupting the orderly functioning of various county assemblies which retained the services of clerks seconded to them by the now defunct Transition Authority; has exposed various acts of clerks of county assemblies initially seconded to the county assemblies by the Transition Authority to judicial challenge; has sanctioned and upheld the decision of the Employment and Labour Relations Court in ELRC Petition No 194 of 2019, which decision is vitiated by ex-post alteration and other fundamental infirmities that call into question the integrity of the system of administration of justice; affects the rights and interests of clerks of various county assemblies who were not parties to the proceedings before the trial court and the appellate court; and has created judicial inconsistency in the law regarding the manner and mode of a county assembly's approval of the appointment its clerk.
12. He contends that the issues intended to be raised before the Supreme Court transcend the employment dispute between himself and the 2<sup>nd</sup> respondent, and have a significant bearing on the public interest. It is averred that the said issues touch on the proper administration of justice; the conduct of judicial officers in dispensing justice; the employer's responsibility of securing post-employment approvals in the public sector; the need for consistency in the law regarding the appointment and approval of the various clerks seconded to work for the county assemblies following the establishment of the devolved system of governance.
13. According to the applicant, there exists a state of uncertainty in the law resulting from contradictory precedents, both at the Employment and Labour Relations Court and this Court, regarding the appointment and approval of clerks seconded to various county assemblies by the Transition Authority upon the establishment of the devolved system of government. Therefore, it is necessary that he be granted leave to lodge an appeal at the apex court to obtain clarity and achieve a resolution of the uncertainty.
14. He has identified several issues of general public importance which deserves the intervention and determination of the Supreme Court. They include whether courts can make definitive findings on unpleaded matters or grant reliefs not sought by a party in the pleadings; whether an employee can be blamed and punished for an employer's failure to secure the requisite post-employment approvals; whether an appellate court can uphold a decision of a trial court that is admittedly vitiated by collusion and ex post alteration; whether a court's decision tainted with fundamental infirmities that go to the root of administration of justice can be allowed to stand; whether a county assembly could be deemed to have approved the appointment of its clerk; whether a court can, suo moto, set aside consent orders made by a court of co-ordinate jurisdiction in proceedings not challenging such orders; whether a court can ignore the terms of a valid consent settlement and make findings diametrically opposed to such consent.



15. The issues to be canvassed in the intended appeal are said to be weighty, touching on good governance, good employment practices and the proper administration of justice and that they traverse the interests of the applicant and the respondents in that they affect the public at large.
16. The applicant further argues that if leave is declined and decision of this Court allowed to stand, it will unnecessarily burden employees in the public sector with compliance tasks reserved for their employers; gravely undermine the rule of law and, specifically, the credibility, integrity and sanctity of the judicial process; permanently and irreversibly deprive the clerks seconded to the various county assemblies by the Transition Authority of their employment; and expose to judicial challenge the clerks who were seconded to various county assemblies by the Transition Authority.
17. The application is opposed by Benson Mutura, the 1<sup>st</sup> respondent, through his replying affidavit sworn on June 16, 2022. He notes from the onset that the office of Clerk, Nairobi City County Assembly has a substantive holder, one Edward Ombwori Gichana, who was appointed on July 23, 2020 vide Gazette Notice Vol. CXXII- No 143 dated July 24, 2020 upon termination of the applicant's engagement as Clerk. The applicant's termination was pursuant to a report of an ad-hoc committee which had been established to investigate the applicant's employment.
18. He contends that the decision to terminate the applicant's employment was affirmed by the trial court and by this Court, and that through the instant application, the applicant is mischievously seeking to expand the scope of the appeal by whipping the Court's emotions by misleading it that the judgment of April 1, 2022, is likely to affect other Clerks to the various County Assemblies who had been seconded by the Transition Authority from their various initial employers, averments that are entirely incorrect. In this connection, the 1<sup>st</sup> respondent avers that the applicant's case is distinguishable from the rest of the Clerks who were seconded to the various County Assemblies whose employment was not in issue in Civil Appeal No E255 of 2021, and in any case their employment was equally saved by the decision of Employment and Labour Relations Court in *Silas Kipruto & Another vs. County Government of Baringo & Another* [2014] eKLR which decision has not been appealed against.
19. It is further contended that the applicant has not satisfied the principles in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* [2013] eKLR which requires him to satisfy this 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.
20. The jurisdiction of this Court is also brought into question. It is contended that there was no notice of appeal filed and lodged either at this Court's Registry or the Supreme Court Registry in relation to Civil Appeal No 255 of 2022. The 1<sup>st</sup> respondent avers that the filing of a timely notice of appeal is a jurisdictional prerequisite and that unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.
21. The 2<sup>nd</sup> respondent also opposes the instant application through a replying affidavit sworn on its behalf by Edward Ombwori Gichana, the Clerk of the Assembly. He depones that he is the substantive Clerk of the Assembly, having been duly appointed on July 23, 2020.
22. He contends that the application is incompetent for non-compliance with rules 36 and 37 of the *Supreme Court Rules, 2020*. He further argues that a person who intends to make an appeal to the Supreme Court must file a notice of appeal within fourteen days from the date of judgment which is the subject of appeal and serve parties with the notice of appeal within seven days of lodging it. Just like the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent contends that the filing of a timely notice of appeal is a jurisdictional



- prerequisite and cites the decision of the Supreme Court in *Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR in support of this argument.
23. It is further deponed that the application does not satisfy the principles set out in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* (*supra*). It is the position of the 2<sup>nd</sup> respondent that the issues that the applicant has litigated on have all along been personal issues and the orders he has sought before the trial court and this Court were orders in personam which would not have had effect on any other person apart from the applicant; there are no substantive points of law to be raised on appeal; and that the issues to be raised in the intended appeal do not transcend the circumstances of this case nor do they have a significant bearing on the public interest.
  24. At the hearing of this application, learned counsel Mr. Oloo was present for the applicant while learned counsel Mr. Okebe and Mr. Ashioya appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
  25. Mr. Oloo urged us to find that the principles laid down in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* (*supra*) had been satisfied. He contended that the applicant had specified elements of general public importance in the intended appeal such as the ex-post fraudulent alteration of the trial court's judgment. He submitted that the Supreme Court should be allowed to determine on appeal, the issue whether a court can decide a matter on issues that are not pleaded and whether a court can set aside a consent order without any prayer to that effect. It was submitted that there is no consensus on the issues raised in the instant application and hence the need for the Supreme Court to pronounce itself thereon.
  26. Mr. Okebe submitted that the trial court's judgment was not changed. He stated that it is only after a judgment is shared with the general public that it can be regarded as a judgment of the court and that every judgment is subject to the doctrine of perfection of judgment. He further submitted that the trial court was right in failing to adopt the consent for reasons that it was executed by persons who did not have any authority to execute it. It was also submitted that the principles in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* (*supra*) had not been satisfied and that 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.
  27. On his part, Mr. Ashioya urged us to find that the applicant was not raising any issues of general public importance but personal issues. He submitted that the principles in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* (*supra*) had not been satisfied.
  28. We have duly considered the application, the submissions by learned counsel, the authorities cited and the applicable 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 delving into the merits of the application, we deem it necessary to address the jurisdictional issue raised by the respondents in their replying affidavits. It is contended that the applicant did not file a notice of appeal within the 14 days' period contemplated under rule 36(1) of the Supreme Court Rules and if he did, then he did not serve it on all parties within 7 days of filing it as per the requirements of rule 37 of the same Court's Rules. Although the applicant did not challenge this allegation in his written and/or oral submissions, we note that one of the annexures to his affidavit in support of the



application is a notice of appeal dated April 13, 2022 which evinces his intention to appeal against the decision of this Court dated 1<sup>st</sup> April 2022.

30. The applicant contends at paragraph 44 of his affidavit that his advocates lodged the notice of appeal on 14<sup>th</sup> April 2022 and requested for certified copies of typed proceedings on the same date. The decision of this Court having been delivered on 1<sup>st</sup> April 2022 means that the notice of appeal lodged in this Court on 14<sup>th</sup> April 2022 was filed within the 14 days' period contemplated under rule 36(1) of the Supreme Court Rules and is therefore properly on record.
31. Turning to the merits of the application, it is trite law as stated in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione* (*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 an 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 (Kefbau); 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.”

1. The issues raised herein by the applicant do not, in our view, transcend the applicant’s personal interests. We have looked at the pleadings filed before the trial court and the orders sought by the applicant in the trial court and in this Court and fully agree with the respondents that they are related to the applicant in personal capacity. They were in personam and could only have affected the applicant to the exclusion of other persons. The contention that the impugned judgment is likely to affect Clerks who were seconded to the various County Assemblies by the Transitional Authority was rebutted by the 1<sup>st</sup> respondent. It was contended that their employment was saved by the decision of Employment and Labour Relations Court in *Silas Kipruto & Another vs. County Government of Baringo & Another* (supra) which has never been appealed against. The impugned decision is therefore not likely to have any prejudicial impact on the Clerks as alleged by the applicant.

2. The applicant is not raising any novel issues for determination by the Supreme Court. The issues he is raising in his application have been raised and determined by various courts before and are, in our view, well settled. The issues raised 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 jurisprudential value in having the Supreme Court address itself to the issues identified by the applicants.

35. In the circumstances, the present application is without merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY JULY, 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ALI - ARONI**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

