Everton Coal Enterprises Limited v Kirundi & 5 others; Limited (Interested Party) (Civil Appeal (Application) 172 of 2010) [2023] KECA 838 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 838 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 172 OF 2010

HM OKWENGU, LA ACHODE & JM MATIVO, JJA

JULY 7, 2023

BETWEEN

EVERTON COAL ENTERPRISES LIMITED ..... APPLICANT

AND

GEOFFREY CHEGE KIRUNDI ..... 1ST RESPONDENT

LUCY WAMAITHA CHEGE ..... 2ND RESPONDENT

ROSE WAKANYI KARANJA ..... 3RD RESPONDENT

GRACE WANGARI KARANJA ..... 4TH RESPONDENT

KENNETH NDICHU KARANJA ..... 5TH RESPONDENT

WILLIAM MUIGAI KARANJA ..... 6TH RESPONDENT

AND

LIMITED ..... INTERESTED PARTY

(An application for review of the judgment and leave to appeal to the Supreme Court from the judgment of this Court (Warsame, P.M. Mwilu & F. Sichale, JJ. A) dated 29th July, 2016 In)

RULING

1. Everton Coal Enterprises Limited, the applicant herein, filed a Notice of Motion dated 23rd September, 2016 brought under a myriad of constitutional and statutory provisions being; Articles 10, 20 (3), 25 (c), 40, 48, 50, 60 (1) (b) (d), 159 (2) (a)(d), 163 (4) (b) and 259 (1) of the *Constitution*; sections 3A and 3B of the *Appellate Jurisdiction Act*; and Rules 1(2), 42, 43 and 77(1) of the *Court of Appeal Rules*, 2010. In the Notice of Motion, the applicant seeks the following orders:

    a. ..... spent

b. That Everton Coal Enterprises Limited be joined in these proceedings as Interested party;

c. That this Honourable Court be pleased to recall, review and/or set aside the decision of this Court contained in this Court's judgment delivered on the 29th of July, 2016 in Nairobi Civil Appeal No. 172 of 2010 and dismiss the Appeal therein;

d. That in the alternative, leave be granted to the proposed interested party to lodge an appeal in the Supreme Court against this Court's said judgment delivered on 29th July 2016 in Nairobi Civil Appeal No.172 of 2010;

e. That this honourable Court grants stay of execution of the judgment of this honourable Court dated 29th July, 2016 pending hearing and determination of this application for review and/or leave to appeal to the Supreme Court of Kenya on the said judgement;

f. That the court be at liberty to make any other orders in the interest of justice

g. That the costs be awarded to the applicant.

Geoffery Chege Kirundi and Lucy Wamaitha Chege are the1st and 2nd respondents, Rose Wakanyi Karanja, Grace Wangari Karanja, Kenneth Ndichu Karanja and William Muigai Karanja are the 3rd -6th respondents in this application.

2. Prayer (b) above having been granted vide this Court's ruling dated 5th June, 2020, the applicant is now before this Court seeking orders for the remaining prayers.

3. The backdrop of this case is that 1st and 2nd respondents sued the 3rd,4th,5th and 6th respondents in Nairobi HCCC No. 1401 of 2004 (OS) as consolidated with Nairobi Succession Cause No.3608 of 2003. Judgment was delivered on 31st March, 2009 which led to an appeal that resulted in the judgment of this Court subject of the present application. The High Court judgement ordered transfer of the suit property, LR No. 10090/23, situated in Juja within Thika Municipality comprising of 20.85 ha, to the 1st and 2nd respondents. A transfer to that effect was executed on 24th April, 2009.

4. Consequently, the applicant got into a sale agreement dated 5th May, 2009 with the 1st respondent to purchase the suit property for a consideration of Kshs. 100 million. Transfer of the suit property was registered on 11th May, 2009 in favour of the applicant and the applicant took possession.

5. The 3rd, 4th, 5th and 6th respondents appealed against the judgement of the High in this Court and the appeal was allowed. The effect of the judgment of this Court allowing the appeal was to revoke the transfer of the suit property to the applicant. Unfortunately, the applicant was not a party to the said appeal, in which an adverse order affecting it was made without it being accorded a right to be heard. As a result, the applicant filed the instant application.

6. This application is premised on the grounds on its face and the supporting affidavit of the applicant's Managing Director Patrick Karanja Ngugi sworn on the 23rd September, 2016.

7. The grounds in support of the stay of execution are that the review and or, leave to appeal to the Supreme Court, will be rendered nugatory in the event that such stay is not granted. That the applicant will suffer substantial loss that cannot be remedied by an award of damages if the stay is not granted and there is no substantial prejudice to be occasioned on the respondents if the stay is granted.

8. The grounds in support of Review are that the Court overlooked key facts in its judgment, which shall occasion injustice and prejudice to the applicant if the said judgment is not reviewed. It is stated that for example, the Court overlooked the fact that the suit property had been transferred to a third party,

a bona fide purchaser for value of the suit property being the applicant. That it also overlooked the evidence that the 3rd – 6th respondents had actually and in writing, consented to the sale by the 1st and 2nd respondents of the suit property and therefore, they are estopped by law from denying such consent.

9. The grounds in support of certification for appeal to the Supreme Court are that the intended appeal involves matters of general public importance, and raises important questions of law such as:

   i. Whether the statutory requirement for grant of Land Control Board (LCB) consent within 6 months of the agreement for sale of a property, limits constitutional rights under Article 40 of the *Constitution*;

   ii. Whether the rights of a bona fide purchaser for value may be defeated by prior transactions in the subject property in the absence of fraud or misrepresentation on the part of the bona fide purchaser;

   iii. Whether the LCB in the conduct of their public functions, are bound by national values in Article 10 of the *Constitution* and principles of land administration in Article 60(1)(b) and (d) of the *Constitution*, in carrying out functions that touch on constitutionally guaranteed individual rights, in particular, under Article 40 of the *Constitution*;

   iv. Whether the prohibition under section 46 of the *Advocates' Act* can be employed to override the constitutional right to acquire/hold property under Article 40 of the *Constitution* in the light of the principles of land policy under Article 60 (1) (b) and (d) and

   v. Whether the section applied in the circumstances of this suit; and

   vi. Whether the failure to evaluate the facts and law lead to a breach of Article 50 of the *Constitution* in that it deprived the applicant of a fair trial under Article 50 and right to acquire and hold property under Article 40 of the *Constitution* of Kenya.

10. In opposition the 1st and 2nd respondents did not file a response to the application. The 3rd to -6th respondents filed a replying affidavit sworn by the 4th respondent William Muigai Karanja on 14th March, 2017 and averred that the applicant has not raised any issue of general public importance and as such does not merit to be granted leave to appeal to the Supreme Court of Kenya. That the dispute revolves around competing interests between private parties, over a private property being the suit property, which the Court of Appeal in rendering itself reverted ownership to the Estate of the deceased.

11. It is deposed that the applicant is not of clean hands and that the 3rd -6th respondents have unraveled a concealed conspiracy by the applicant to pervert and subvert the course of justice. Further that the Managing Director of the applicant, Peter Karanja Ngugi and Geoffrey Chege Kirundi, the 1st respondent herein, executed a trust deed on 13th May, 2009, wherein the said Managing Director declared that he held all shares in the applicant purely and entirely in trust for the said Geoffrey Chege Kirundi for a consideration of kshs.100,000,000/=.

12. The 3rd to 6th respondents aver that the decree from the judgment of the Superior Court was extracted on Friday 17th April, 2009 and inter alia, ordered them to, within 10 days, execute transfer of the suit property to the 1st and 2nd respondents. However, although it is alleged that the Principal Deputy Registrar of the High Court executed the transfer in favour of the 1st and 2nd respondents on Monday, 20th April, 2009, neither the court record, nor the Lands Office, nor the applicant have a copy of the purported transfer executed by the said Principal Deputy Registrar.

13. It is averred that in an interesting series of events, the purported transfer of the suit property to the 1st and 2nd respondents, was registered on 24th April, 2009 and on 28th April, 2009 the said respondents requested the Land Control Board for consent to transfer the property to the applicant herein, for a consideration of Kshs. 15,000,000. On 5th May, 2009 the Land Control Board gave Consent and on the same day, the 1st and 2nd respondents entered into an agreement with the applicant, wherein the applicant was to pay the said respondents Kshs.100,000,000, ninety days after transfer of the suit property to the applicant.

14. The suit property was transferred to the applicant and on the 13th May, 2009 the 1st respondent Geoffrey Chege Kirundi and the Managing Director of the applicant, Peter Karanja Ngugi executed a Declaration of Trust, solemnly declaring and expressing that the latter held all the shares in the applicant purely and entirely on behalf of the 1st respondent.

15. It is asserted that the 3rd to 6th respondents have always enjoyed possession of the suit property and at no time did the 1st respondent ever enjoy possession. Further that the draft petition of appeal by the applicant does not raise any constitutional issue of great importance, that transcends beyond the private interest of the parties herein.

16. For rejoinder, the applicant filed a further affidavit, sworn by Patrick Karanja Ngugi on 16th December, 2017 and averred that the applicant is a title holder of the suit property against which this Court made orders in its judgment of 29th July, 2016. That it was not given an opportunity to be heard despite the issue of transfer of ownership being raised during the hearing of the appeal. Further that the Declaration of Trust Deed dated 13th May, 2009 and annexed to the respondent's affidavit is an attempt by the 3rd to 6th respondents to adduce additional evidence for consideration without obtaining leave of this Court. Moreover, that the said Declaration of Trust Deed is contested.

17. This application was canvassed by way of written submissions that were orally highlighted during plenary in the virtual hearing. M/s Muma & Kanjama Advocates filed submissions dated 9th November, 2017 on behalf of the applicant and during plenary learned counsel Mr Kanjama appeared with learned counsel M/S Owano. Mr Muite, learned counsel (SC), appeared together with learned counsel Mr Gatheru Gathemia for the 1st and 2nd respondents. They did not file any affidavit in reply to the application, nor did they file written submissions. They however, associated themselves wholly with the Applicant's application and submissions. M/S Onesmas Githinji & Co. Advocates filed submissions for the 3rd -6th respondents dated 19th March, 2019.

18. The applicant submitted that this Court has the jurisdiction to grant stay of execution of the impugned judgment under Rule 5 (2) (b) of this Court's Rules. That as this Court is seized of the application for review, it has power to grant stay to ensure its eventual orders will not be in vain. Further, that the applicant has an arguable review and/ or appeal. That the subject of the review sought goes to the question whether the title of an innocent purchaser for value may be defeated by purported defects in the rights of a seller of property. That the review seeks that the Court restates and preserves the natural law rule that entitles a party not to be condemned unheard. It is submitted that an arguable appeal or review as the case may be, is one which as stated by the Court in Civil Application 133 of 2015: *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* eKLR, is not frivolous.

19. On review, the applicant submits that there were factors that were overlooked by the Court which warrant determination by the Court, failure of which grievous injustice and prejudice shall be occasioned to the applicant. It is contended that the key issue they seek to protect by review is the historically acknowledged indefeasible interest of an innocent purchaser for value.

20. The applicant has placed reliance on this Court's decision in *Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited* (2014) eKLR, where the Court concluded that it had review jurisdiction in cases where no appeal was allowed to the Supreme Court and such jurisdiction would be to correct errors of law that have occasioned real injustice, or failure, or miscarriage of justice, thus eroding public confidence in the administration of justice.

21. The applicant argues that inasmuch as this Court in its judgment noted that the suit property had been transferred to a third party, the determination did not consider the third- party interest and legal title. As such the judgment should be reviewed.

22. On Certification for appeal to the Supreme Court, the applicant urges that the matter herein, raises an issue relating to the interpretation of the Constitution since the applicant obtained a valid title to the suit property, from the 1st and 2nd respondents. They submit that having complied with all the laid down statutory requirements for the acquisition of the property, it would be unjust and against the Constitution to deprive them of their right to enjoy title to the suit property due to the judgment of this Court on appeal, more so without being heard.

23. The applicant adds that, subject to Article 163 (4) (b) of the *Constitution*, there are matters of great public importance that arise from the instant matter, and qualify the matter for certification for appeal to the Supreme Court. In accordance with the principles laid down in *Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone* 2013 eKLR, the applicant identifies the following as matters of public importance:

    i. The question of whether the grant of Land Control Board (LCB) Consent to transfer property validates the Transfer of property to innocent third-parties from the premise historically reinforced by the court that the lack of LCB Consent invalidates any transfer of title to property, where such Consent is the legal requirement for transfer.

    ii. The question of whether section 46 of the *Advocates Act* is an absolute bar to transactions between advocates and their clients which overrides freedom to contract; privity of contract vis-à-vis other formalities laid down by the *Law of Contract Act* and the constitutional right to acquire/hold property under Article 40 in light of the principles of land policy under Article 60 (1)(b) and (d).

    iii. The question whether a party having conscientiously entered into a contract may rely on courts of law to defeat the obligations undertaken under such contract and the import of the principle of freedom to treat under the *Law of Contract Act* in land sale transactions.

    iv. The question whether the rights of a bona fide purchaser for value may be defeated by prior transactions in the subject property in the absence of fraud or misrepresentation on the part of the bona fide purchaser.

24. The applicant asserts that the question of Land Control Board (LCB) consent affects numerous transactions and the powers of Court with respect to the time of grant of the consent and the resulting validity or invalidity of the transfer, and this is a matter of great significance to the general public as they engage in land transactions.

25. Lastly, it is urged that the non-joinder of the applicant despite the information presented to the Court about the transfer of the suit property was extremely prejudicial to the applicant. That therefore, the Court lacked authority to make a decision that would affect the applicant in its absence, and as such the said decision, should be deemed to be void for departure from the essential principles of natural justice.

26. In opposition, the 3rd to 6th respondents submit that the Court of Appeal in Kenya does not have jurisdiction to stay and/or review its own judgment. They rely on *Nguruman Limited v Shompole Group Ranch & Another* (2014) eKLR.

27. They also refer to the decision of this Court in *Member Episcopal Conference in Eastern Africa (AMECEA) v Alfred Romani T/A Romani Architects & 3 Others* (2002) eKLR, which relied on *MACFOY vs United Africa Co. Ltd*. (1961) EA 1172, for the proposition that if an act is void, it is in law a nullity and everything that flows from it is a nullity and nothing can stand on nullity. The respondents argue that this Court, after nullifying the purported transfer of the suit property to the 1st and 2nd respondents all transactions relating to the suit property in favour of the 1st and 2nd respondents were rendered null and void ab initio, as they had no capacity in the first instance to confer good title to any party.

28. On Certification to the Supreme Court, the 3rd to 6th respondents rely on the Supreme Court decision in *Malcolm Bell vs Daniel Torotich Arap Moi & another* (2013) eKLR, where in overturning this Court's certification of the matter as appropriate for appeal, noted inter alia that the doctrine of adverse possession which was in issue, has been adjudicated in numerous instances in the Court of Appeal. The 3rd to 6th respondents urge that the above decision is applicable to the issues raised by the applicant herein as matters of public importance.

29. In addition, it is argued by the 3rd to 6th respondents that the applicant has failed to avail any inconsistent judgment/decision, rendered by this Court with respect to the issues in the impugned judgment. They therefore urge this Court to find that the impugned judgment is not inconsistent with any other decision touching on the Land Control Board Consent; doctrine of *Lis Pendens*; and section 46 of the *Advocates Act*. They assert that the impugned judgment conforms to what is already trite law.

30. In conclusion, the 3rd to 6th respondent submit that in any case, neither in the High Court, nor in the Court of Appeal, was any constitutional issue canvassed or in dispute.

31. We have considered the application, the response thereto, the rival submissions and the law applicable. We are of the view that the issues that fall for our determination are:

    a. whether this Court has jurisdiction to stay execution of its judgment under Rule 5(2)(b) of the *Court of Appeal Rules*.

    b. Whether this Court has the jurisdiction to review its decision, and if so, whether the impugned judgment falls under the decisions that can be reviewed.

    c. Whether this matter qualifies for Certification to the Supreme Court.

32. The applicant argues that this Court has the jurisdiction to stay its judgment under Rule 5 (2) (b) of its *Rules*. The 3rd to 6th respondents on the other hand maintain that the Court does not have such jurisdiction.

33. This application was brought before the new Rules of this Court came into being and is therefore governed by the *Court of Appeal Rules*, 2010, Rule 5 (2) (b) which provides that:

> " in any civil proceedings where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just"

34. In *Mukesh Kumar Kantilal Patel v Charles Langat* [2021] eKLR this Court held that:

> " It is trite that an application for stay by dint of Rule 5(2)(b) of the C*ourt of Appeal Rules* gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order to ensure its just and effective determination. This relief was strictly to apply to matters that are yet to be heard and determined with finality by this Court. It was not envisioned to apply once this Court has issued its final orders. Hence this Court has no jurisdiction to issue orders staying its final decision delivered on 3rd October 2019. This position was well articulated by the Court in *Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & Another* [2014] eKLR;
>
> > " An application under Rule 5(2)(b) presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under Rule 75 and is pending in this Court. The application under Rule 5(2)(b) contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes functus officio."

35. From the foregoing, and having in mind the principle of finality that hinges on public interest and the need to have conclusiveness in litigation, it is apparent that the application does not fall under Rule 5(2)(b) of the *Court of Appeal Rules*. Consequently, we have no jurisdiction to stay execution of the judgment of the Court. The applicant has not demonstrated to our satisfaction, any extraordinary circumstances that would warrant this Court departing from the clear trodden path and clothe itself with jurisdiction, to stay its own final decision.

36. On the issue of review, the applicant asserts that this Court overlooked its indefeasible interest as an innocent purchaser for value and for that reason, the judgment should be reviewed to correct errors of law that have occasioned real injustice to the applicant. To buttress this point, the applicant relies on the decision of this Court in *Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited* [2014] eKLR. On the other hand, the 3rd to 6th respondents contend that this Court has no jurisdiction to review its judgment as was held in *Nguruman Limited v Shompole Group Ranch & Another (*2014) eKLR.

37. The jurisdiction of the Court of Appeal is stipulated in Article 164 (3) of the *Constitution* as follows:

> " the Court of Appeal has jurisdiction to hear appeals from
>
> a. the High Court, and
>
> b. any other court or tribunal as prescribed by an Act of Parliament"

38. Further, section 3 of the *Appellate Jurisdiction Act* provides as follows on the jurisdiction of the Court:

> " 3
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.
>
> (2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition

to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

39. In both the Constitution and the statute this Court's jurisdiction is limited to hearing appeals from the High Court, other superior courts and tribunals. The jurisdiction of this Court to review its decisions is as prescribed under Rule 37 of the *Court of Appeal Rules* and is very limited.

40. According to case law, review jurisdiction may be exercised only in exceptional circumstances. In *Benjoh Amalgamated Ltd vs. Kenya Commercial Bank Limited* [2014] eKLR relied on by the applicant, this Court after looking at various comparative jurisdictions of the court of last resort such as: High Court of Australia, US Supreme Court, Singapore Court of Appeal and English Court of Appeal, held thus on the powers of review:

> " The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."

41. Also, in *Mukesh Kumar Kantilal Patel supra* this Court held:

> " the jurisdiction of this Court to review, vary or rescind its decisions is residual in nature and not hinged on any written law or rules. It is Judge made law and is to be exercised cautiously only in exceptional circumstances, indeed compelling circumstances to avoid injustice, where it will serve to promote the public interest and enhance public confidence in the system of justice"

42. It is the applicant's assertion that the judgment it seeks to be reviewed falls under exceptional circumstances. This Court is asked to find that its judgment adversely affects the applicant while it was not given an opportunity to canvass its case in the appeal proceedings.

43. It is common ground that the matter in the High Court and Court of Appeal was between the 1st and 2nd respondents on one hand and the 3rd to 6th respondent on the other hand. The applicant was not a party in the High court or in the appeal. It is also not disputed that the issues that were before the High Court and later on appealed in this Court, revolved around whether the 1st and 2ndrespondents acquired the suit property legally. The High Court found that they had, but on appeal, this Court in overturning the High Court decision, found that the title in the suit property had not legally passed to the 1st and 2nd respondents.

44. In its judgment, this Court held as follows:

> " We have therefore, come to the conclusion that the consent obtained on the 16th December, 1993 was not valid and the purported validation of a consent obtained outside the stipulated period is without the force of law. The upshot of the above is that the sale of the suit property being agricultural land became null and void on expiry of six months from the date of agreement i.e 26th October, 1990"

In regard to the applicant the same Court held that:

> " The respondents contended that the suit property had since changed hands. This was a statement from the bar as this issue was not canvassed in the suit in the High Court and we shall say no more on this, save to wonder how the transfer to a third party could have been possible when dispute over the suit property was still pending in court (lis pendens). We are also at a loss as to who may have caused the transfer bearing in mind that the respondents' complaint was that the appellants had failed and/ or neglected to transfer the suit property to them. Indeed, one of the respondent's prayers in HCC No. 1401 of 2004(O. S) was that the appellants to jointly "... execute fresh Transfer Document of LR No. 1009/23...in favour of .... Geoffrey Chege Kirudi And Lucy Wamaitha Chege..."

45. It is not disputed that whereas the Court of Appeal judgment adversely affects the applicant as a third party, it was not given an opportunity to canvass its case in the appeal proceedings in the Court of Appeal. Be that as it may, we have analyzed the record to establish whether the circumstances of this case fall under those exceptional instances, in which this Court ought to invoke its residual jurisdiction to review its judgement.

46. The residual jurisdiction of this Court to review its decisions is not to be confused with the powers of this Court under rule 37 to correct clerical or arithmetical mistakes in the judgment of the Court. Before us is not a plea under rule 31 but a substantive plea beseeching this Court to review or vary its final orders.

47. An analysis of the record before us reveals some facts that are peculiar to this case and are worthy of note as set out below.

48. Firstly, the issue of the suit property having been transferred to a third party, was not canvassed in the High Court, the agreement of sale and transfer having occurred after the High Court judgement. When the issue was raised on appeal, this Court dismissed it as a statement from the bar and declined to entertain it. In our view, the introduction of this new issue at the appeal stage was an attempt to reconstruct and expand the issues beyond what was before the High court for determination and this Court could not consider issues that the High court had not rendered itself on.

49. Secondly, the applicant and the 1st and 2nd Respondents are connected in a manner that leaves no doubt that they are reading from the same script and operating in concert. This is evinced by the fact that the purported transfer of the suit property to the 1st and 2nd respondents was registered on 24th April, 2009 and on 28th April, 2009 the said respondents requested the Land Control Board for consent to transfer the suit property to the applicant for a consideration of Kshs.15,000,000.

50. A week later on 5th May, 2009 the Land Control Board gave Consent and on the same day, the 1st and 2nd respondents entered into an agreement with the applicant, wherein the applicant was to pay the said respondents Kshs.100,000,000, ninety days after transfer of the suit property to the applicant. However, two weeks later on 13th May, 2009 the 1st respondent Geoffrey Chege Kirundi and the

Managing Director of the applicant, Peter Karanja Ngugi executed a Declaration of Trust, solemnly declaring and expressing that Peter Karanja Ngugi held all the shares in the applicant, purely and entirely on behalf of the 1st respondent. These transactions lead to the conclusion that the applicant was not genuinely an innocent purchaser for value but simply a decoy to protect the 1st and 2nd respondent's interest.

51. Thirdly, the more important question is how the suit property was transferred to the third party who is the applicant, when the suit was pending in court, (lis pendens). This Court did state in its judgement that it was at a loss as to who would have caused the transfer, in view of the 1st and 2nd respondent's complaint, that the 3rd to 6th respondents had failed to transfer it. They were seeking orders to compel the 3rd to 6th respondents to "...execute fresh transfer document."

52. The decree from the judgment of the High Court extracted on Friday 17th April, 2009, inter alia, ordered the 3rd to 6th respondents to within 10 days, execute transfer of the suit property to the 1st and 2nd respondents. According to the 3rd to 6th respondents, although it is alleged that the Principal Deputy Registrar of the High Court executed the transfer in favour of the 1st and 2nd respondents on Monday, 20th April, 2009, neither the court record, nor the Lands Office, nor the applicant have a copy of the purported transfer executed by the said Principal Deputy Registrar. This was not disputed by the applicant.

53. For the foregoing reasons we find that, in as much as the Applicant was not heard in the appeal proceedings, the innocence of the Applicant as an innocent purchaser for value without notice has not been demonstrated. To the contrary, if the applicant's Managing Director was holding all the shares in the applicant company on behalf of the 1st respondent, it is clear that the applicant's interests were synonymous with the interests of the 1st respondent. The 1st respondent participated effectively in the appeal and therefore, the applicant through its Managing Director was privy to what was going on

54. For these reasons we are not persuaded that this matter falls within the exceptional circumstances, in which this Court ought to invoke its residual jurisdiction to review its judgement.

55. On the issue of certification of this matter to the Supreme Court, the jurisdiction of this Court to determine whether a matter seeking certification to the Supreme Court is of general public importance is derived from Article 163(4)(b) of the *Constitution*. The said Article provides that:

> "Appeals shall lie from the Court of Appeal to the Supreme Court, 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)".

56. The issues that the applicant seeks to pursue on appeal in the Supreme Court include the interpretation of Section 6 of the *Land Control Act*, Section 46 of the *Advocates Act*, and the doctrine of *Lis Pendens* vis-à-vis Article 40 and 60 (1) (b) and (d) of the *Constitution* and the *Contract Act*. It is the applicant's assertion that these provisions are not clear and they are matters of general public importance. In opposition, the 3rd to 6th respondents' position is that the law on the provisions set out above is well settled.

57. The principles governing what constitutes matters of 'general public importance' were set out by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone* as follows:

    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 Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the *Constitution*;

vi. the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

58. The constitutionality of section 6 of the *Land Control Act* has been a topic of deliberation in a number of this Court's decisions. Over the years it has evolved from the rigid position of yester years. In *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR in respect of section 6 of the *Land Control Act*, this Court pronounced its self thus:

> " Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board."

59. Also, in *Aliaza v Saul (*Civil Appeal 134 of 2017) (2022) KECA 583 (KLR), this Court discussed the constitutionality of section 6 of the *Land Control Act*, and the *Land Control Act* inC general. Mumbi Ngugi JA in the leading judgment rendered herself thus:

> " The views expressed by Apaloo JA thirty-five years ago encapsulate, in my view, the proper interpretation of the provisions of the *Land Control Act*, its harshness ameliorated by considerations of equity and fairness. Unhappily for the Learned Judge then, statute and binding judicial precedent hobbled his ability to deal fairly and render justice to a party who had clearly been taken advantage of by the seller, using legislation as his shield in an unfair situation. Happily, for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the supreme law of the land, which renders any legislation inconsistent with the Constitution null and void. Under the new *Constitution*, the *Land Control Act* must be read in a manner that does not give succor

to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser"

60. Section 46 of the *Advocates Act* provides as follows:

> " Nothing in this Act shall give validity to any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceeding"

61. This Court in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR defined "suit" and "continuous contentious proceedings" as follows:

> " We have noted that both the words "suit" or "contentious proceedings" have not been defined by the provision of section 46 (a) of the *Advocates Act* (Supra). The word "suit" is however defined in the *Civil Procedure Act* Cap 21 laws of Kenya as means "all Civil Proceedings commenced in any manner prescribed." "Contentious proceedings" or "proceedings" perse has not been defined. Our interpretation of this provision, (section 46(a) of the *Advocates Act* (Supra) when read in conjunction with the definition of "suit" in the *Civil Procedure Act* (*supra*) is that, it means that in order for the caveat in section 46(a) to hold to defeat the intention of the parties in the agreement of 4th March,1996, the said agreement ought to have been made during the pendence of a "suit" in which the amount on the basis of which the said agreement was made formed the subject claim"

62. Further, in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, this Court pronounced itself in respect to *Lis Pendens* thus:

> " The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act."

The Court went on to say:

> " Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the *Judicature Act* Cap 8 stipulates that,
>
> "The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-
>
> a. the *Constitution*;
>
> b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
>
> c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

63. From the foregoing, the issues of the constitutionality of Section 6 of the *Land Control Act*, Section 46 of the Ad*vocate's Act* (the doctrine of *Lis Pendens*) vis-à-vis Article 40 and Article 60 (1) (b) and (d) of the *Constitution* are well settled in law. Neither do they transcend the litigation interests of the parties, nor raise any issues of public importance. They do not therefore, meet the threshold set by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi- Ruscone*. Moreover, these were not issues that were canvassed in the High Court, or in the Court of Appeal proceedings for this Court to be invited to render itself in that regard.

64. The upshot of our analysis is that upon subjecting each of the three prayers to wit; the prayer for stay of this court's judgment, the prayer for review of this Court's judgement and the prayer for certification to the Supreme Court, to the principles and the law applicable, none of them passed the litmus test as they have no merit. Accordingly, the Notice of Motion dated 23rd September, 2016 is disallowed in its entirety.

65. Costs of the application are awarded to the 3rd to 6th respondents.

66. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023

HANNAH OKWENGU

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR