Caroget Investment Limited v Aster Holdings Limited & 4 others (Civil Appeal (Application) 82 of 2018) [2023] KECA 1559 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1559 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 82 OF 2018

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

NOVEMBER 24, 2023

BETWEEN

CAROGET INVESTMENT LIMITED ..... APPLICANT

AND

THE CITY COUNCIL OF NAIROBI ..... 1ST RESPONDENT

ASTER HOLDINGS LIMITED ..... 2ND RESPONDENT

THE COMMISSIONER OF LANDS ..... 3RD RESPONDENT

THE REGISTRAR OF TITLES ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

(Judgment of the Environment and Land Court (Obaga, J.) delivered on October 31, 2017)

RULING

1. The protracted litigation between the parties herein which culminated in the application dated December 1, 2021, the subject of this ruling involving a parcel of land known as LR No 1870/V/6 (the suit property), which was originally adjacent to LR No 1870/V/3/1 before the two parcels were amalgamated. According to the 1st respondent, it purchased both parcels from Nairobi Housing Development Limited at a consideration of Kes 6,500,000/= and Kes 4,500,000/= respectively; that it applied for and was granted change of user from residential to residential hotel and apartment; and also, it was granted permission to amalgamate the two parcels, after which a new title, being LR No 1870/V/247 was issued in its name in 1999.

2. It was the 1st respondent's case that in August 2007, the applicant forcefully invaded the suit property, which had already been amalgamated, that the invasion was reported to the police who offered no help prompting the 1st respondent to institute ELC No 175 of 2015 against the applicant herein. The City

Council of Nairobi, the Commissioner of Lands, the Registrar of Titles and the Attorney General seeking, *inter alia*, a declaration that it was the lawful registered proprietor of the suit property; vacant possession of the suit property; and a declaration that the applicant was a trespasser in the suit property.

3. On the part of the applicant, its director, one hon. William Kabogo Gitau deposed that it applied for allocation of the suit property in 2007 from the 2nd respondent and its application was accepted and the 2nd respondent granted it a lease for 99 years. However, in a judgment delivered on October 31, 2007 the learned Judge of the High Court entered judgement in favour of the 1st respondent against the applicant and the rest of the respondents.

   Furthermore, the court declared that the applicant was a trespasser in the suit property and ordered it to pay Kshs.100,000,000/= as damages for trespass.

4. Aggrieved by the said decision, the applicant and the 3rd respondent lodged an appeal and a cross-appeal respectively in this court, being Civil Appeal No. 82 of 2018. In a judgment dated December 6, 2019, this Court (Ouko, Sichale & Kantai, JJ.A.)dismissed both the appeal and the cross-appeal and upheld the Environment and Land Court decision.

5. The applicant has now filed the application dated December 1, 2021 before us seeking three substantive orders from this court. First, that the court issues an order of stay of the judgment of this court delivered on October 3, 2019; secondly, that this court certifies the matter as fit for appeal to the Supreme Court from the said decision and grants the applicant leave to file an appeal to the said court; and thirdly, that this court extends time within which to file an appeal to the Supreme court against the said decision.

6. The application is brought under article 163(4) of the *Constitution*, sections 15 and 16(2) of the *Supreme Court Act*, rule 33(1) of the *Supreme Court Rules, 2020* and rules 4, 39, 40 & 47 of the *Court of Appeal Rules*. It is premised on the grounds, *inter alia*, that in the Judgment delivered on December 6, 2019 this court dismissed the applicant's appeal and upheld the judgment of the Environment and Land Court (Obaga, J.) delivered on October 31, 2017 wherein the 1st respondent's title was upheld and the applicant's title for LR. No. 1870/v/6 was cancelled. Further, the applicant was ordered to pay Kshs.100,000,000/= to the 1st respondent as damages for trespass.

7. It is the applicant's case that the timelines within which the applicant ought to have filed the instant application and an appeal to the Supreme Court has lapsed. However, the applicant states that the delay in filing the motion is explainable since the applicant's erstwhile advocate M/s Havi & Company Advocates advised the applicant it had no further legal recourse against the judgment of this court. However, it was agreed that a notice of appeal be filed, but upon obtaining fresh legal advice, the applicant now seeks leave and certification to lodge an appeal to the Supreme Court. However, it has learnt that its erstwhile advocate did not lodge the notice of appeal against the judgment of this court delivered on December 6, 2019 and timelines within which to lodge a notice of appeal has since lapsed.

8. On certification, the applicant averred that its intended appeal raises points of law of general public importance, *inter alia*, that this court has made conflicting and contradictory positions in law to the effect that views expressed by a court in a ruling delivered at an interlocutory stage are not binding on the trial court; that the judge of this court has created an erroneous precedence to the effect that it is in order to have a property registered under two distinct regimes of land registration.

9. The applicant also avers that the Environment and Land Court *vide* a ruling delivered on April 3, 2019 lifted the applicant's corporate veil and directed the decree to be executed against the applicant's directors personally. Furthermore, the 1st respondent taxed its bill of costs at Kes 30,532,513.33 and *vide* a letter dated October 19, 2021 the 1st respondent wrote to the applicant threatening execution,

therefore, there is threat of execution which will render the intended appeal to the Supreme Court nugatory.

10. The 2nd respondent supported the application by a replying affidavit sworn on March 15, 2022 by one Hans Oichoe, its advocate. The salient points are: (a) Rule 4 of this *Court's Rules* grants this court the discretion to grant the leave sought; (b) the reasons for delay in filing a notice of appeal have been explained satisfactorily; (c) the intended appeal to the Supreme Court is arguable and it raises matters with a bearing on public interest;

    (d) it would be wrong to shut the applicant out of the court by denying it the right of appeal.

11. The 1st respondent opposed the application through an undated affidavit filed on March 4, 2022 and sworn by Rohan Patel, its director. He deposed that: (a) the application is an abuse of court process since the applicant seeks mirage of prayers which lack legal basis; (b) that the applicant took more than two years to challenge this court's judgment and thus slept on its rights; (c) the 1st respondent will be prejudiced if the extension of time is granted since the 1st respondent is yet to obtain any recourse from the applicant; (d) the inordinate delay in applying for extension of time has not been explained and there are no extenuating circumstances to warrant the exercise of this court's discretion in favour of the applicant; (e) no evidence has been tendered to show why a notice of appeal was never filed for close to two (2) years; (f) that the applicant's appeal is not arguable nor does it raise substantial issues of public interest or matters of general public importance and it does not meet the threshold and requirement under article 163 (4) (b) of the *Constitution*; and, (g) the suit between the parties involves a dispute over a private property between two individuals and does not therefore raise any issues of general public importance.

12. During the hearing, Mr. Otieno representing the applicant relied on his written submissions dated May 20, 2022 and January 13, 2023. He submitted that the applicant has an arguable appeal because the impugned judgment created bad law which directly conflicts and contradicts settled law on jurisdiction as set out in *Owners of the Motor Vessle "Lillian S" v Caltex Oil (K) Ltd* [1989] KLR by entertaining an appeal without first determining the jurisdictional challenge raised by the applicant that the 1st respondent's claim before the Environment and Land Court was statutory barred. He submitted that the intended appeal would be rendered nugatory if the stay sought is refused because *vide* a letter dated October 19, 2021, the 1st respondent wrote to the applicant's erstwhile counsel threatening to commence execution proceedings against the applicant and its directors together with bankruptcy proceedings.

13. On the prayer for leave to file an appeal out of time, Mr. Otieno relied on this Court's decision in *Michugi Kiragu v James Michugi Kiragu and another* CA Nairobi, No 356 of 19996 (UR) in which it was stated:

> "the discretion under rule 4 of the *CA Rules* to extend time for lodging an appeal is well known that it is unfettered with the only fetter being that it is subject to it being granted on terms as the court, may think fit. That within that context the court, had on several occasions granted extension of time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court, and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it."

14. Mr. Otieno also submitted that the applicant is an innocent litigant who relied on the advice of its previous advocate and the consequence is that the instant application was filed on December 1, 2021.

He urged this Court to consider the finding in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] limited* [2020] eKLR and grant the applicant leave to file a notice of appeal out of time.

15. On certification, counsel reiterated the contents of the affidavit in support of the application and submitted that the issues for determination in the intended appeal transcend the circumstances of this case and have a bearing on public interest and consequently, it is proper and in the interest of justice for the Supreme Court to render itself on the points of law raised with finality in order for there to be certainty.

16. On behalf of the 2nd respondent, Mr. Rene adopted submissions dated May 27, 2022. He submitted that the applicant met the two principles for the grant of orders of stay of execution pending appeal to the Supreme Court and that it is in the interest of justice that the order of stay of execution be granted.

17. The 1st respondent filed written submissions dated March 4, 2022 which were highlighted by its counsel, Mr. Amanya who held brief for Mr. Ahmednassir Senior Counsel. He submitted that the applicant has disguised its application for stay of execution as an application for leave to file an appeal to the Supreme Court. He argued that the applicant has not met the tests for certification and leave to appeal to the Supreme Court as set in *Hermanus Phillipus Seyn v Giovanni Gnecchi-Ruscone*, Supreme Court Application No. 4 of 2012, since the dispute is a private dispute with no general public importance.

18. Lastly, counsel submitted that the 1st respondent has been kept off its property for more than a decade and therefore, it is time for it to enjoy the fruits of its judgment and in the interest of justice, the application ought to be disallowed.

19. Upon considering the application, the responses thereto, and the parties' submissions, we find that three issues fall for determination. First, whether this Court has jurisdiction to grant orders of stay of execution pending appeal to the Supreme Court; secondly, whether this Court has jurisdiction to extend time to file an appeal to the Supreme Court; and thirdly, whether the applicant has satisfied the criteria for certification to appeal to the Supreme Court under article 163(4).

20. First, we will address the plea for stay pending appeal to the Supreme Court. The crucial query here is whether this court has jurisdiction to stay its own decisions pending appeal to the Supreme Court. We hasten to re-affirm the decision of this Court in *Dickson Muricho Muriuki v Timothy Kagondu Muriuki & 6 others* [2013] eKLR that:

> "On the issue of whether this court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this court from re-opening a case where a final decision and judgment has been made.....
>
> It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court."

21. The above position was restated by this court in *Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & another* [2014] eKLR that once a final judgment has been delivered in respect of any substantive appeal, this court becomes *functus officio*. Based on the foregoing, we find that this court has no power to issue an order of stay of execution once it has passed judgment. The court can only exercise the restricted jurisdiction of considering applications for leave to appeal to the Supreme Court as provided

under article 163 (4) (b) of the *Constitution*. This jurisdiction is restricted to certification of matters that ought to proceed on appeal to the Supreme Court. For the foregoing reasons, we find and hold that we have no jurisdiction to issue orders staying this court's final decision delivered on December 6, 2019 since this court is now *functus officio*, its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter ceases.

22. Next, we will address the plea for extension of time to file the intended appeal to the Supreme Court. The applicant relies on rule 33(1) of the *Supreme Court Rules, 2020* and rule 4 of the *Court of Appeal Rules*, which grants to this court the power to extend time to file appeals to this Court.

23. Before the *Supreme Court Rules, 2012* came into force, there existed *Supreme Court Rules, 2011*. Rule 30 of the 2011 Rules provided as follows:

> "(1) A person who intends to appeal to the court shall file a notice of appeal, in Form B set out in the first schedule, with the registrar of the court or tribunal against whose decision it is desired to appeal.
>
> (2) Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal.
>
> (3) A notice under sub-rule (1) shall be lodged within fourteen days of the decision appealed from and under sub-rule (2), as the court may direct."

24. Rule 31 of the *2012 Rules* departs from rule 30 of the *2011 Rules*: while in the *2011 Rules*, where a matter is one that had to be certified as involving matters of general public importance, one had to get that certification first before filing a notice of appeal, under the *2012 Rules*, that has changed, and rule 31(2) now provides:

> "31.
>
> (1) A person who intends to appeal to the court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the first schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.
>
> (2) Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal.

25. This Court rendered its judgment on December 6, 2019 and the applicant failed to observe the timelines; which necessitated an application for extension of time to file a belated notice of appeal. Therefore, the applicable *Supreme Court Rules* was rule 31 of the *Supreme Court Rules, 2012* which were revoked by Legal Notice 6 of 2020 on February 21, 2020. Nevertheless, as regards the fact that the application before us is seeking extension of time to belatedly file a notice of appeal, we hold that on that score, too, the applicant has come before the wrong forum. It cites rule 4 of this *Court's Rules* which provides thus;

> "The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court or of a Superior Court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act, and a

reference in these rules to any such time shall be construed as a reference to that time as extended."

26. Rule 4 clearly can be of no assistance to the applicant for the simple reason that the filing of a notice of appeal before the Supreme Court and the timelines for it is not a matter provided for by the *Court of Appeal Rules*. As such, even if we were inclined to extend time, it is not within our province. Consequently, it is apparent from what we have said so far that this application is doomed to fail.

27. The remaining issue is whether the application satisfies the requirements of article 163(4) of the *Constitution*. Relevant to the issue before us is article 163 (4) (b) of thre *Constitution* which provides:

28. The applicant has invoked the above article in seeking leave to appeal to the Supreme Court. Therefore, what we are being called upon to determine in considering the application is whether the intended appeal raises issue(s) of general public importance.

29. The test for granting leave to appeal to the Supreme Court is different from the test for granting leave to appeal to this Court. (See this Court's decision in *Gauku Mohamed v Gitonga Mohamed* - Civil Application Sup No 18 of 2012). In *Hermanus Philipus Styen v Giovanni Gnecchi- Ruscone* - Civil Application No Nai Sup 4 of 2012, this Court held:

> " The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for granting leave to appeal to an intermediate court - for example, from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course. (See *Machira t/a Machira & Company advocates v Mwangi & ano* (2002) 2 KLR 391 and *The Iran Nabuvat* (1990) 3 ALL ER 9)... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court. The role of a Supreme Court was succinctly stated by the House of Lords in *R v Secretary of State Exp Eastaway* (Lord Bingham) (2001) 1 ALL ER 27."

30. The full range of governing principles were stated by the Supreme Court in *Malcolm Bell v hon Daniel Torotich arap Moi and another*, Supreme Court Application No 1 of 2013, para 53 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 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 (at earlier levels of the) 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. Determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;

viii. Issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis for appeal to the Supreme Court;

ix. Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

x. Questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

xi. Questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance', justifying final appeal in the Supreme Court."

31. In the instant application, it is our duty to consider and evaluate if the foregoing principles enunciated for certification and leave to appeal have been fulfilled. We shall also consider the applicant 's' submission that there are conflicting and contradictory positions in law from that set out by this court in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR and *Julia Moracha Matundura & another v Sarah Moraa Moracha & another* [2016] eKLR to the effect that the views expressed by a court in a ruling delivered at an interlocutory stage are not binding on the trial court. We shall also consider whether this court's judgment created bad law in direct conflict and contradiction with settled law on jurisdiction by entertaining an appeal without first determining proper jurisdictional challenge raised by the appellant that the 1st respondent's claims before the ELC were statute barred. We shall finally consider whether on the question of ownership of the suit property this court created bad law in sanctifying the 1st respondent's title which was allegedly created by a fusion of two properties under a different regime of land registration which was admitted by the land registrar to be an impossibility. We shall also consider whether this Court's Judgment created bad law in relying on the 2nd respondent's approbations and reprobation on the question of ownership of the suit property contrary to settled decisions by the very same court in *Behan & Okero Advocates v National Bank of Kenya* [2007] eKLR. Ultimately, we shall determine if the applicant has set out specific elements of general public importance which it attributes to the questions to be urged before the Supreme Court in the intended appeal.

32. We have considered the applicant's grounds in support of certification. It is clear that its contestation is that views expressed by a court in a ruling delivered at an interlocutory stage are not binding on the trial court. According to the applicant, this court sitting on appeal ought to have faulted the learned trial judge for failing to consider the issue of jurisdiction in his judgement having determined the same in a ruling at the interlocutory stage, the said issue ought to have also been determined during trial.

33. This court while upholding the trial court's finding held as follows:

> "It is firmly settled that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. An objection to the jurisdiction of the court, or a plea in limitation are some of the examples. See *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696. Because a preliminary objection may dispose of the suit, if argued successfully, it cannot be, as suggested by the appellant, that a successful determination at the interlocutory stage may be subject to further consideration at the trial.
>
> The object of the doctrine of *res judicata*, which is legislated in section 7 of the *Civil Procedure Act* is based on the need to give finality to judicial decisions; that there should be an end to litigation; that parties cannot be allowed to litigate on the same issue which has been determined by a court of competent jurisdiction; and that courts must ensure that a party is not vexed twice for the same cause."

34. From the above extract, it's discernible that the court upheld the decision of the trial court on the premise that it had decided the issue of jurisdiction which was a point of law preliminarily and the said issue once determined it became *res judicata*, and courts must ensure that a party is not vexed twice for the same cause. We find that the applicant's argument is distinguishable from *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* (*supra*) and *Julia Moracha Matundura & another v Sarah Moraa Moracha & another* (*supra*), since in the two cases, the gravamen of the dispute related to views on interlocutory rulings on injunction under order 42 rule 6 where courts at the interlocutory stage are normally not required to go into the merits of a case since that is the preserve of the trial court. Therefore, the view/ruling of a court at the interlocutory stage is usually on the establishment of a *prima facie* case. Bearing in mind that it is often anticipated that during trial, a court will get an opportunity to consider all the evidence before it on merit, then the view/ruling made at an interlocutory stage may be departed from by the court after a full hearing as rightfully held in *Uhuru Highway Development Limited* (*supra*) and *Julia Moracha Matundura* (*supra*). However, as we concluded herein above, the circumstance and principles applicable in the instant case are distinguishable. It is evident from the above discourse that the applicant has failed to demonstrate to our satisfaction that there is uncertainty in the law on interlocutory rulings on injunctions not binding a trial court.

35. Regarding the question whether the judgment of this court being bad in law in relying on the 2nd respondent's approbations and re- probations on the question of ownership of the suit property contrary to settled decisions by the very same court in *Behan & Okero Advocates v National Bank of Kenya* [2007] eKLR, we note that the Supreme Court, in Hermanus and Malcolm Bell set out the guiding principles for ascertaining that a matter is one "of general public importance". One such principle is that, "such question or questions of law must have arisen in the court or courts below,

and must have been the subject of judicial determination." In *Malcolm Bell* (*supra*), this Court stated (para 48):

> " Such a position is consistent with this court's holding in the *Hermanus Steyn* case, that "the question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination" – for them to become a "matter of general public importance" meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial- focus, or a clear consideration of facts in the other Courts, will often be found to fall outside the proper appeal cause in the Supreme Court."

36. We have perused the grounds of appeal. It is plain to us that the said issue claimed to be of general public importance by the applicant has not been the subject of judicial determination by the Superior Courts, and it does not therefore fall for determination in the Apex Court. The only place that issue appears is in applicant's submission captured at paragraph 31 of the judgment by the Environment and Land Court. It is noteworthy that the said issue was not isolated by the Environment and Land Court as an issue for determination and furthermore, this court did not address the said issue at all, and the applicant has also failed to demonstrate how the determination of the said issue will have a significant bearing on public interest as was held in *Glencore Energy (UK) Ltd v Kenya Pipeline Company Ltd* [2018] eKLR where the Supreme Court stated:

> " If the applicant's appeal is based on a point of law, he "must demonstrate that such point is a substantial one, the determination of which will have a significant bearing on the public interest."

37. To be substantial, a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way. In *State Bank of India & others vs S N Goyal*, AIR 2008 SC 2594, the Supreme Court of India explained the terms "substantial question of law" as follows:

> " The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case."

38. This Court has the duty to ensure that the case does not involve a mere question of law but a substantial question of law. Hence, an applicant must satisfy this test to acquire jurisdiction under article 164 (4) of the *Constitution*. As was held by the constitutional bench of the Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* 1962 AIR 1314, 1962 SCR Supl. (3) 549:

> " The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views."

39. To be a question of law involving in the case there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by court so that it becomes necessary to decide that question of law so as to arrive at a just and proper decision. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question ought not to be a substantial question of law.

40. On identification of specific elements of general public importance, the mere enumeration of issues as matters of general public importance does not suffice; there must be cogent demonstration that the issues identified are within the ambit and definition of matters of general public importance. In *Strouds Judicial Dictionary*, Volume 4 (IV Edition), 'public interest' is defined thus:

> "Public interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

41. In *Black's Law Dictionary* (sixth edition), "public interest" is defined as follows:

> "Public Interest is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national government."

42. We have set out earlier in this ruling the issues that the applicant avers it wishes to raise before the Supreme Court. While an attempt has been made to couch them in language that gives them the guise of matters that rise beyond the private dispute between the applicant and the respondents, they remain what they are: ordinary mundane issues arising out of a private dispute over ownership of a property. They do not transcend the litigation interests of the parties, nor do they raise any issues of public importance. For example, the applicant seeks intervention to affirm its constitutional rights under article 40 of the *Constitution*. Also, the applicant claims that the Environment and Land Court lifted the corporate veil exposing its members to execution. It also seeks to safeguard sanctity of titles. To our mind, the above issues are purely private rights as opposed to matters of general public interest. The applicant has not identified and concisely set out the specific elements of general public importance. All the applicant has done is to enumerate issues without concise demonstration on how the issues are matters of general public importance.

43. In the circumstances, we find and hold that the applicant's application is devoid of merit. Accordingly, we decline to grant any of the orders sought. Therefore, the application dated December 1, 2021 is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR