



**Sombo & Others & 4 others (Suing on behalf of 15,000 individuals of the Amwezi and Mirima Clans of the Duruma Community) v Nyari Investments (1996) Ltd & 5 others (Civil Appeal (Application) E050 of 2023) [2023] KECA 1435 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1435 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E050 OF 2023  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**JOSEPH SOMBO & OTHERS ..... 1<sup>ST</sup> APPELLANT  
MWANDURI MERI ..... 2<sup>ND</sup> APPELLANT  
BAHRU MWAGUNDU ..... 3<sup>RD</sup> APPELLANT  
MWAHUI MWAJIRAMBA ..... 4<sup>TH</sup> APPELLANT  
KAZUNGU KARISA ..... 5<sup>TH</sup> APPELLANT  
SUING ON BEHALF OF 15,000 INDIVIDUALS OF THE AMWEZI AND  
MIRIMA CLANS OF THE DURUMA COMMUNITY**

**AND**

**NYARI INVESTMENTS (1996) LTD ..... 1<sup>ST</sup> RESPONDENT  
MOCASH PROCESSERS (K) LTD ..... 2<sup>ND</sup> RESPONDENT  
COUNTY COUNCIL OF KWALE ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT  
DISTRICT COMMISSIONER, KINANGO ..... 5<sup>TH</sup> RESPONDENT  
ZEINABU JAN MOHAMMED (SUED AS LEGAL REPRESENTATIVE OF  
DANIEL TOROITICH ARAP MOI) ..... 6<sup>TH</sup> RESPONDENT**

*(An Application for Certification that a matter of general public importance is involved in the Applicant's intended Appeal to the Supreme Court and leave to Appeal against the Judgment and Orders of the Court of Appeal at Mombasa (S. Gatembu, P. Nyamweya & J. Lesiit, JJ.A.) dated 14th April 2023.)*



## RULING

1. Joseph Sombo & 4 Others, the applicants herein, suing on behalf of 15,000 individuals of the Amwezi and Mirima Clans of the Duruma Community, have filed the Notice of Motion application dated 23<sup>rd</sup> May 2023, brought pursuant to article 163 (4)(b) of the [Constitution of Kenya](#), 2010, rule 40 of the [Court of Appeal Rules](#), 2010, and rule 33(1) of the [Supreme Court](#), 2010. They seek six orders as follows:
  1. Moot;
  2. That pending the lodging, hearing and determination of the intended appeal this Hon. Court be pleased to issue an order of stay of execution of the judgment and decree issued by this Hon. Court on 14<sup>th</sup> April 2023 in Mombasa Civil Appeal no 23 of 2018, [Joseph Sombo & Others v Nyari Investment \(1998\) ltd & 5 others](#);
  3. That leave be granted to the applicants to appeal to the Supreme Court of Kenya against the said judgment and order of the Court of Appeal (P. Nyamweya & J. Lesiit JJ.A. with Gatembu J. A dissenting), delivered on 14<sup>th</sup> April 2023, in respect to Mombasa Civil Appeal No. 23 of 2018, [Joseph Sombo & Others v Nyari Investment \(1998\) ltd & 5 others](#);
  4. That this Honourable Court be pleased to grant a certificate under Article 163(4) (b) of the [Constitution](#) to the effect that the applicant's intended Appeal to the Supreme Court of Kenya, is a matter of general public importance;
  5. That the Hon. Court be pleased to issue any other order as it may deem just and appropriate to grant in the circumstances; and,
  6. That the costs of this application be provided for.
2. The applicants are apprehensive that if the stay sought is not granted there is immense risk of dissipation of the suit property and that it will subject the applicants and the wider general public to irreparable harm, and render the intended appeal nugatory. The grounds for the application are that the intended appeal meets the threshold envisaged under Article 163(4) of the [Constitution](#) for reasons that the appeal seeks an interpretation:
  1. Whether the setting apart of trust land accorded with the constitutional provision and mandate;
  2. Whether the Trust Land had properly been set aside and allocated to the 2<sup>nd</sup> Respondent, a private developer; and,
  3. Whether the Respondent who has been unable to demonstrate that the setting apart accorded with the constitutional provision under section 118 (2) of the [retired Constitutional](#) can, as a matter of general public importance, reason and equity be entitled to the suit property.
3. The applicants in the supporting affidavit sworn on their behalf, on 23<sup>rd</sup> May 2023 by Maina Njanga, advocate, deposed that vide a majority decision (P. Nyamweya & J. Lesiit, JJ.A. with Gatembu J.A dissenting) delivered by this Honourable Court on 14<sup>th</sup> April 2023 in Mombasa Civil Appeal no 23



of 2018, *Joseph Sombo & Others v Nyari Investment (1998) Ltd & 5 others*, the learned appellate Judges made the following orders:

“That the trial Court did not err in finding that the Appellants had not met the requirements of the law as regards representative suits. The sum if my finding is that this appeal is not merited and is hereby dismissed except on the finding on costs. In this regard, since the suit and appeal concerned the setting apart and allocation of trust land, I order that each party bears their costs of the suit in the High Court and of the Appeal.”

4. The applicants being dissatisfied with the said judgment intend to appeal the decision to the Supreme Court, and urge that they have filed the requisite Notice of Appeal.
5. The application was heard through this Court’s virtual platform on the 5<sup>th</sup> July 2023. Present for the parties were learned Counsels: Mr. Maina Njanga for the applicants, Mr. Chacha Odera and Ms. Lilian Oluoch for the 2<sup>nd</sup> respondent, Mr. Njoroge Mwangi for the 3<sup>rd</sup> respondent and Mr. Koome for the 6<sup>th</sup> respondent. There was no appearance for the 1<sup>st</sup> and the 4<sup>th</sup> respondents despite service of the hearing notice upon their counsel on the 26<sup>th</sup> June 2023.
6. Mr. Njanga for the applicants relied on his submissions dated 13<sup>th</sup> June 2023. He urged that the main issue for determination was whether the application meets the threshold to be certified as a matter of general public importance. Quoting Article 163(4) of the *Constitution*, counsel urged that as regards jurisdiction of the Supreme Court, an appeal lies to the Supreme Court:
  - a. As of right in any case involving the interpretation or application of the *Constitution*,
  - b. In any 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).”
7. Counsel urged that under Article 163(4) (b), the appeal must be certified as involving a matter of public importance, either by the Supreme Court or by the Court of Appeal. For that proposition, he relied on the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Limited and Another* [2012] eKLR. Counsel relied on the Supreme Court decision in *Sum Model Industries Limited v Industrial and Commercial Developers Limited* [2011] eKLR for the proposition that certification to the Supreme Court should originate in the Court of Appeal as the best placed to certify whether a matter of public importance is involved. He relied on *Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone*, [2013] eKLR on the criteria of determining whether a matter was one of general public importance. Mr. Njanga submitted that land in Kenya being sensitive, scarce and an emotive issue the protection of landowners from unlawful, illegal, unconstitutional and un-procedural deprivations of the same is a matter of general public interest. That a determination on the issues raised will go beyond the parties and that once fully and finally decided there will be peace and stability within the family, community and the Country at large. He urged that it is one determination, which transcends the circumstances of the particular case and has significance bearing on public interest. That ultimately, it is demonstrable that the intended appeal by the applicants to the Supreme Court raises issues of general public importance on points of law that have been differently determined by different courts therefore, requiring and craving the interpretation and determination of the Supreme Court.
8. Mr. Odera for the 2<sup>nd</sup> Respondent opposed the application. Counsel relied on the Replying Affidavit sworn 22<sup>nd</sup> June 2023 by Swaleh Awadh Swaleh. He also relied on their written submissions and case digest dated 23<sup>rd</sup> June 2023. Counsel urged two issues on jurisdiction. One that this Court had no jurisdiction to grant the orders as the application was not filed within the prescribed period, pursuant



- to Rule 42 of the [Court of Appeal Rules](#). He cited the Rules and submitted that they prescribe that an application for certification could either be made informally at the time the decision is made, or formally within 14 days of the decision. The second issue on jurisdiction was that this Court could not grant the order of stay sought in prayer 2 of the Application as the Court was rendered functus officio when it determined the appeal.
9. While placing reliance on the Supreme Court decisions in [Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone](#), (*supra*), and [Malcom Bell v Hon. Daniel Toroitich Arap Moi](#) [2013] eKLR, he urged that the applicants did not demonstrate they met the set criteria. Counsel urged that the applicants had the duty to show that the legal issues they intended to raise in the intended appeal relate to an uncertain area of law emanating from contradictory precedents, and that it failed to do so. It was counsel’s submission that the majority judgment of the Court was sound.
  10. Mr. Njoroge Mwangi for the 3<sup>rd</sup> Respondent on their part relied on their Replying affidavit sworn on 23<sup>rd</sup> June 2023 by Kwisu Mohamed Koja, the County Solicitor, County Government of Kwale. He also relied on their written submissions, list of authorities and digest dated 23<sup>rd</sup> June 2023. Counsel urged that his client supported the application for certification to the Supreme Court, urging that there were issues of great public importance that required to be settled by the Supreme Court.
  11. We have considered this application. What falls for our determination are three issues. The first is whether the instant application is competently filed; the second is whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave; and the third is whether stay of execution of the judgment should be granted. The law that applies to this case as correctly cited by the applicants and the 2<sup>nd</sup> respondent is Article 163(4) of the [Constitution](#), which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this Constitution; and in any other case where the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved.
  12. Turning to the first issue, it was Mr. Odera’s contention that the application was incompetent for non-compliance with timelines set under Rule 42 of the [Court of Appeal Rules](#). Rule 42 of the [Court of Appeal Rules](#), 2022 provides as follows:
    - a. “Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, an application for such a certificate may be made-
      - a. informally, at the time when the decision against which it is desired to appeal is given; or
      - b. by motion or chamber summons according to the practice of the superior court, within fourteen days after that decision.”
  13. The decision sought to be appealed was delivered by this Court on the 14<sup>th</sup> April 2023. The application is dated 23<sup>rd</sup> May 2023, which was way beyond the prescribed period to formerly seek certification. The application is therefore incompetent, having been filed out of time, and the applicants having failed to apply for extension of time under Rule 4 of this [Court’s Rules](#).
  14. Regarding the second issue whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave, the criteria for certification of a matter as one of general importance was laid down by the Supreme Court, which



also enunciated the principles applicable in *Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone*, (*supra*) where the Court delivered itself 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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern....”

15. And the criteria to determine whether a matter of public importance was disclosed set thus:

- 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.”

16. The issues that the appellants intend to take to the Supreme Court were three according to the grounds in support of the application which were:

1. Whether the setting apart of trust land accorded with the constitutional provision and mandate;
2. Whether the Trust Land had properly been set aside and allocated to the 2<sup>nd</sup> Respondent, a private developer; and,



3. Whether the Respondent who has been unable to demonstrate that the setting apart accorded with the constitutional provision under section 118 (2) of the *retired Constitution* can, as a matter of general public importance, reason and equity be entitled to the suit property.
17. The issue that was before the ELC, and before this Court on appeal, was the validity of the action taken by the 6<sup>th</sup> respondent to exercise powers under section 118 of the *retired Constitution of Kenya*, and section 7 of the repealed *Trust Land Act*, to set apart the suit property from trust land, and to allocate the same to the 1<sup>st</sup> respondent, on the basis that the said company was a company in which shares were held on behalf of the Government of Kenya. It was a pertinent issue whether the 1<sup>st</sup> respondent was a company in which shares were held on behalf of the Government of Kenya. This Court found that the applicants failed to discharge the legal burden of proof and the evidential burden of proof, when they failed to disclose who the shareholders or directors of the 1<sup>st</sup> respondent were. In addition, this Court found that the procedural law was complied with as evidence on record demonstrated that a notice was issued by the President of the setting apart as required by section 118 of the *repealed Constitution*; and that the allegations of fraud and misrepresentation were not proved to the required standard to support a finding that the said notice was irregular. Further, that the suit property was already demarcated by the time the notice of setting apart was given by the 6<sup>th</sup> respondent.
18. In order to satisfy the criteria of certification of this matter to the Supreme Court, the applicants needed to demonstrate that there was uncertainty in the law or case law on the issues involving the setting aside of trust land for public use by the President in exercise of powers under section 118 of the *retired Constitution of Kenya*. To put it in another way, the applicants had the duty to show that the legal issues they intended to raise in the intended appeal relate to an uncertain area of law emanating from contradictory precedents. The applicants did not cite a single case in support of this criteria. It has therefore failed to demonstrate that there are conflicting decisions emanating from contradictory interpretations of relevant law that requires the Supreme Court to bring clarity.
19. In addition, the applicants could only raise issues that were before the ELC and this Court, and must have been the subject of judicial determination. In that regard, the Supreme Court decision in *Tbika Coffee Mills v Rwama Farmers Co- Operative Society Limited* [2020] eKLR held:

“(22) It becomes critical for us to draw the line between the matter being one of general public importance and addressing a specific litigant’s disagreement with a decision of the Court, and in this case the Court of Appeal. We reiterate our caution in our judgment in *Dhanjal Investments Limited v Kenindia Insurance Company Limited* Sup Ct. Petition No. 7 of 2016 thus:

“ [67] Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this Court. To frame certain issues as being of great public importance at the point of certification under Article 163(4)(b) of the *Constitution* and then submit on issues that are specific to the parties at hand with no public element exhibited is an abuse of Court process and may lead to the dismissal of an appeal.”

See also the decision of the Supreme Court of Kenya in *Peter Oduour Ngoge v Hon. Francis Ole Kaparo*, [2012] eKLR.



20. Mr. Njanga submitted for the applicants that land in Kenya being sensitive, scarce and an emotive issue, the protection of landowners from unlawful, illegal, unconstitutional and un-procedural deprivations of the same is a matter of general public interest. The applicants had faulted the ELC of failing to realise that the suit raised issues of public interest. This Court found that the issue of public interest never arose in the trial before the ELC, and on appeal before this Court, and that the same was not canvassed before both Courts. In addition, this Court held the finding of the ELC that the applicants had not complied with procedural requirements in bringing the suit as a representative suit as prescribed under order 1 rule 13 of the Civil Procedure Rules. They did not demonstrate that they had the authority of the alleged 15, 000 members of the Anmwezi and Mrima clans, the existence of the group itself, and the authority given to them to act for the group. That failure too had a bearing on this whole issue of public interest.
21. Arising from the foregoing reasons, we are not persuaded that the intended appeal raises an issue of general public importance, which transcends the circumstances of the particular case and has a significant bearing on the public interest, nor that it raises any substantial point of law which will have a significant bearing on the public interest. In the result, the requested certification and/or leave is declined.
22. The third issue is whether stay of execution of the judgment should be granted. This Court in the decision in Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 Others [2013] eKLR, while noting that there are no rules of procedure regulating the manner in which such an application should be filed and determined, held as follows:
- “
- “17. Rule 5(2)(b) confers power to this Court to hear interlocutory applications before the main appeal that is pending before the Court is heard and determined. The Rule does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment. The jurisdiction of this Court to entertain any application after its final judgment is granted by the article 163(4)(b) of the Constitution and such jurisdiction is restricted to certification of matters that ought to proceed on appeal to the Supreme Court.
18. The applicant urged us in the alternative to invoke our inherent jurisdiction and grant the order sought. It is the settled principle of law that this Court has inherent power to ensure that justice is done. rule 1(2) of the rules provides:  
Nothing in these Rules shall be deemed to limit or otherwise be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
23. In view of the conclusions we have made on the demerits of this application, we are *functus officio* and resist exercising the inherent power of this Court to grant stay. It will serve no purpose. The application is for disallowing. In order to bring closure to these proceedings spanning over four decades and owing to our finding on certification, we see no reason to burden the applicant with meeting the costs of the respondent. Each party to bear its own costs.
24. Consequently, we make the following orders:
1. The application dated 23<sup>rd</sup> May 2023 is dismissed.



2. Each party to bear its own costs of this application.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2023**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

