



**Masoud (A member of the Tawheed Muslim Association) v Salim & 2 others
(As Trustees of the Tawheed Girls Secondary School Trust) (Civil Application
Sup E001 of 2021) [2022] KECA 377 (KLR) (21 January 2022) (Ruling)**

Neutral citation: [2022] KECA 377 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION SUP E001 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 21, 2022**

BETWEEN

**MUNIR ABUBAKAR MASOUD (A MEMBER OF THE TAWHEED MUSLIM
ASSOCIATION) APPLICANT**

AND

ALI ABDALLAH SALIM 1ST RESPONDENT

ALI YISLAM ALI BASHAMKH 2ND RESPONDENT

MOHAMMED SALIM AHMED 3RD RESPONDENT

AS TRUSTEES OF THE TAWHEED GIRLS SECONDARY SCHOOL TRUST

(An application brought under Rule 40 and 42 of the Court of Appeal Rules, 2010 and Rule 24 and 26 of the Supreme Court Rules, 2012 for leave to appeal to the Supreme Court of the Judgment of this Court delivered on 14th March 2019 in COA Civil Appeal No. 15 of 2018)

RULING

1. The Applicant herein, Munir Abubakar Masoud, and his deceased father, were sued by the Respondents herein in the Environment and Land Court (ELC) in respect of the ownership LR No. 8604 (the suit property), and the trusteeship and management of Tawheed Girls Secondary School that is located thereon. The Applicant and his father, who were members of the Tawheed Muslim Association, also filed a counterclaim in the ELC, whereupon the trial Judge found that the Respondents were the legitimate Trustees of Tawheed Girls Secondary School and were holding the suit property as trustees of and on behalf of the said school, and further restrained the Applicant and his father from interfering with the management of the school.



2. Aggrieved, the Applicant appealed to this Court, which upheld the decision of the ELC after finding that the Applicant's allegation that the title deed to the suit property was obtained fraudulently by the Respondents was neither specifically pleaded nor proved, and after analysing the evidence on the trusteeship of the school and on the allotment of the suit property to the Respondents.
3. The Applicant has now filed an application by way of a notice of Motion dated 24th February 2021 seeking certification of his intended appeal to the Supreme Court as raising questions of general public importance, and leave to appeal to the Supreme Court against the judgment of this Court delivered and orders issued in Malindi Civil Appeal No. 15 of 2018. The said application is supported by an affidavit sworn on the same date by the Applicant, and it is contended therein that the judgments of the ELC and of this Court were not supported by law, as they approved the allocation and registration of land to an entity that did not apply for it, and denied the allocation to an entity that applied and awarded the land by the mandated institution. Further, that the decisions have the effect of enabling trustees who are not appointed a party who applied for allocation of land, being registered as owners of land at the expense of the bona fide applicant.
4. The Applicant contended that they applied for the suit property and were allocated the same by Malindi Municipal Council under the Trust Land Act, however that the Commissioner of Lands failed to do so and instead allocated the land to the Respondents, Further, that the Courts misinterpreted and misapplied Article 19 of the Constitution by holding that the Applicant did not plead the particulars of fraud, while ignoring that the pleadings were initiated by Originating Summons, and that he nevertheless pleaded and gave instances of fraud in the affidavit in reply thereto..
5. The advocates for 1st to 3rd Respondents filed Grounds of Opposition dated 22nd October 2021 as follows:
 - a. The application does not meet the threshold set out in Article 163 (4)(b) of the Constitution to warrant the grant of relief sought.
 - b. The intended appeal to Supreme Court does not raise any matter of general public importance the determination of which transcends the facts of the individual case.
 - c. There is no substantial point being raised, the determination of which will have a significant bearing on the public interest.
 - d. There is no findings made by the Court of Appeal or court below in the matter occasioned by any state of uncertainty in law, arising from contradictory precedents that the Supreme Court is to be called upon to resolve/ clarify, so as to enable the courts to administer the law, not only in the instant case, but also in future cases.
6. The learned counsel for the Applicant, Mr. Aboubakar, and the learned counsel for the Respondents, Mr. Mogaka urged their respective positions at a hearing held on 26th October 2021, in which they highlighted their written submissions dated 22nd October 2021 and 25th October 2021 respectively.
7. This application is brought arising from the provisions of Article 163(4) of the Constitution 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. Rule 40 of the Court of Appeal Rules in this respect requires that an application by motion for certification that a point of law of general public importance is involved in an intended appeal against the decision of



this Court to shall be made within fourteen days of a decision of this Court. The decision sought to be appealed against in Malindi Civil Appeal No. 15 of 2018 was delivered on 29th January 2021, and the instant application although dated 2th February 2021 was filed on 2nd March 2021. The application is therefore incompetently before this Court, having been filed out of time, and the Applicant having failed to seek extension of time.

8. In addition, the criteria for certification of a matter as one of general importance was laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi Ruscone*, [2013] eKLR:

...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.

9. The Supreme Court further enunciated the principles for determining whether a matter of general public importance 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;
- vi. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

10. According to Mr. Aboubakar, the ELC and this Court raised and answered the wrong issues, and the real issue was who applied for and was allocated the suit property, which according to the Applicant was the Tawheed Muslim Association, but which property was instead issued to a trust which did not



apply for it. Mr. Aboubakar framed the question of general importance as whether land can be issued or allocated to a person who has not applied for it at the expense of the applicant, at the discretion of the Commissioner of Land without legal basis? The learned counsel submitted that this question transcends the circumstances of this particular case, and has a significant bearing on the public interest. Lastly, it was reiterated by the counsel for the Applicant that since the proceedings in ELC were commenced way of an Originating Summons, fraud could only be stated in the affidavit in support of the Summons from which fraud or illegality was established.

11. Mr. Mogaka was of a contrary view, and submitted that the trust applied for and was allocated the suit property and the law that fraud must be specifically pleaded and particulars stated on the face of the pleading, the burden of proof and that the standard of proof is higher than that of balance of probability is well settled through numerous decided cases which were cited by this Court. According to the learned counsel, the Applicant's appeal was decided on the basis of specific facts as presented by the Applicant and Respondents regarding private interests that only affects the suit parties' proprietary rights. Therefore that the issue is not one whose impact and consequences transcend the interest of the Applicant and the Respondents as litigants, and does not meet the threshold for certification as a matter of general public interest.

12. We have considered the pleadings and submissions made in this application, and it is notable that the dispute in the ELC and before this Court on appeal was essentially one between two purported allottees of land, which is not only a matter of private interests, and involved contested facts, but also one on which the law to be followed in alienating public, trust land or government land is set out in the Constitution, applicable land laws and land registration acts in determining the proper and legal allottee is settled. It is notable in this respect that the issue of contravention of the applicable laws was not raised nor canvassed by the Applicant in the ELC and Court of Appeal, and in its judgment, the Court of Appeal observed as follows:

In his memorandum of appeal, the appellant raised grounds questioning the propriety of the allotment of the suit property to the school trust including the fact that the allotment was in contravention of land laws, the education laws, Article 40(1) & (6), and Article 62(2) of the Constitution. These were no (sic) grounds that were raised or argued before the trial court. It is not therefore open to this Court to address them at this stage.

13. For the same reason, these are not grounds that can also be raised in the Supreme Court, which has consistently held that the question of law that an applicant seeks to take to the Supreme Court must have arisen in the High Court or court of equal status, and in this Court, and must have been the subject of judicial determination. In *Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board*, [2012] eKLR the Supreme Court of Kenya held that:

[13A] In our opinion, a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a Court, parties raise a question of interpretation or application of the Constitution that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court.

14. Likewise, in *Peter Oduour Ngoge vs Hon. Francis Ole Kaparo*, (2012) eKLR the Supreme Court stated as follows:



- [29] We draw analogies with the plurality of autonomous structures created by the *Constitution of Kenya, 2010*, which represents a progressive new trend of governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.
- [30] In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.
15. Lastly, the law on pleading and proof of fraud in civil cases is well settled, including on the issue raised by the Applicant that Article 159 of the Constitution frowns upon technicalities in this regard. Order 2 rule 4(1) of the *Civil Procedure Rules* provides as follows: -
4. A party shall in any pleading subsequent to a plaint plead specifically any
(1) matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - a. which he alleges makes any claim or Defence of the opposite party not maintainable;
 - b. which, if not specifically pleaded, might take the opposite party by surprise; or
 - c. which raises issues of fact not arising out of the preceding pleading.
16. This Court confirmed this position in *Vijay Morjaria v Nansingh Madbusingh Darbar & Another* [2000] eKLR as follows:
- It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
17. Also see the decision of this Court in *Kinyanjui Kamau vs George Kamau* [2015] eKLR. The rationale for pleadings fraud, and in particular in relation to the provisions of Article 159 of the Constitution is also settled, and was explained by this Court in *Emfil Ltd vs Registrar of Titles Mombasa & 2 Ors* (2014) eKLR as follows:
- Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.
18. In *John Mbogua Getao vs Simon Parkoyiet Mokare & 4 others* [2017] eKLR, this Court held that allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person’s right to liberty hence the insistence that fraud ought to be specifically pleaded,



with particulars thereof, and proved. Further, that it would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural.

19. 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.
20. The Applicant's Notice of Motion dated 24th February 2021 is accordingly dismissed with costs to the 1st to 3rd Respondents.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

