



REPUBLIC OF KENYA



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Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Civil Application 68 of 2019) [2022] KECA 494 (KLR) (1 April 2022) (Ruling)

Neutral citation: [2022] KECA 494 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 68 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

ARVIND SHAH 1ST APPLICANT
HARSHABEN SHAH 2ND APPLICANT
GOSRANI HOLDINGS LTD 3RD APPLICANT
COAST PROPERTIES LTD 4TH APPLICANT
COAST CLAY WORKS LTD 5TH APPLICANT
COAST MAIZE MILLERS LTD 6TH APPLICANT
SPA MILLERS NAIROBI LTD 7TH APPLICANT
HIGHWAY CENTRE LTD 8TH APPLICANT

AND

MOMBASA BRICKS & TILES LTD 1ST RESPONDENT
DINESH KUMAR ZAVERCHAND JETHA 2ND RESPONDENT
ATEET DINESH JETHA 3RD RESPONDENT
ZAVERCHAND SOJPAL JETHA HOLDINGS LTD 4TH RESPONDENT
EXON INVESTMENTS LTD 5TH RESPONDENT
EXON PLASTICS 6TH RESPONDENT

(Being an application for grant of certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution of Kenya in respect of the Judgement of the Court of Appeal at Mombasa in Mombasa Civil Appeal No. 117 of 2018 (Visram, Karanja, & Koome(as she then was), JJ.A) delivered on 4th April 2019)



RULING

1. The Notice of Motion application before this Court for consideration is dated 10th July 2019, and arises from the judgment delivered on 4th April, 2019 in Civil Appeal 117 of 2018 by this Court (Visram, Karanja, & Koome (as she then was), JJ.A). The Applicants herein were the Respondents and cross/Appellants in the said appeal, while the Respondents herein were the Appellants. In the instant application, the Applicants are seeking certification that it raises matters of general public importance and for leave to appeal against the judgment in Civil Appeal 117 of 2018 to the Supreme Court. Further, that in the event that certification and leave is granted, this Court orders a stay of execution of the orders given in the judgment delivered in Civil Appeal 117 of 2018.
2. The application is supported by an affidavit deponed on 10th July 2019 by Arvind Velji Shah also known as Ashwin Velji Shah, the 1st Applicant herein, wherein he stated that the proposed grounds of appeal raise constitutional issues whose determination is beneficial to the parties as well as the public. The main grounds for the application are that the issues of general public importance raised are the right to a fair trial where a decision made by the Court of Appeal is in violation of the law; relies on extraneous matters and not on the evidence; is biased and contradictory, and which results in the expropriation of private property from one litigant to another in violation of Article 40 of the Constitution.
3. The Respondents filed Grounds of Objection to the application dated 24th October 2019 and a replying affidavit sworn on 30th October 2019 by Dinesh Jetha, the 2nd Respondent herein, wherein it was stated that the instant application does not involve any matter of public importance; and that the dispute was confined to contested facts of written contracts entered between the parties, which are evidential questions and peculiar to the contracts in question. The Respondents in this respect detailed the particulars of the contracts and contested facts in its affidavit. Further, that the law on undue influence, deceit fraud, breach of fiduciary duties and piercing of the corporate veil is well settled. It was added that what is stated to be issues for determination before the court were not before the High Court or before the Court of Appeal. Lastly, that this Court did not have jurisdiction to grant the prayers sought, since the fourteen days for filing the application for certification had expired on 18th April 2019, and the court is *functus officio* having delivered its final judgment and cannot grant the prayer for stay of execution.
4. The background to the dispute is that various agreements were entered into between the Applicants and 1st Respondent in relation to the property known as Subdivision No. 500 /Section VI /Mainland North (hereinafter the suit property) which had a brick making plant, maize milling factory and other developments thereon, and which was initially owned by the 1st respondent who used it as security for financial facilities issued by Standard Chartered Bank. The 1st Respondent was unable to fulfil its financial obligations, and the process of statutory power of sale was set in motion leading to the suit property being advertised for sale by public auction. To salvage the situation, the 1st Applicant was approached to undertake a restructuring of the 1st Respondent, which resulted in the incorporation of companies namely the 4th to 7th Applicants, that would hold the 1st Respondent's assets.
5. The result was that a sale agreement was drawn between the 1st Respondent and the 8th Applicant to sell the suit land so as to generate money to repay the monies owed to Standard Chartered Bank, and the 4th Applicant was nominated to be registered as proprietor of the suit land. A discharge of existing charge in the suit land was consequently registered, and the 4th Applicant in turn sought a loan and overdraft facility to finance the purchase, leading to a fresh charge being registered over the suit land.



In addition, agreements were entered that assigned the brick making plant and maize milling factory on the suit land to the 5th to 7th Applicants.

6. The 1st to 4th Respondents were aggrieved with the actions of the 1st Applicant in what was termed as misrepresentation of his true intention in offering advice to the 1st Respondent; and issues arose concerning the shareholding in the companies that were incorporated to acquire the assets of the 1st Respondent. The Respondents claimed the Applicants acquired shares in the 4th – 7th Applicants without consideration, as they failed to pay the amounts agreed upon, and that the Applicants' shares were thereby held in trust for the 1st Respondent. In the result, the Respondents cumulatively filed seven suits in the High Court, which were consolidated and heard as one, being the suit in HCC No. 9 of 2011. The Applicants' in turn denied the allegations in the said suits, and filed a counterclaim in which they sought release of their share certificates in the 4th to 7th Applicant companies, payment of mesne profits until the Respondents delivered up vacant possession of the suit property, an injunction restraining the Respondents from carrying on business on the suit property, and the Respondents' eviction from the property.
7. The High Court in its judgement dated 22nd December, 2017 dismissed the Respondents' suits and declined to grant declarations that the 4th to 7th Applicants held the suit property and their shares in trust for the Respondents, and also declined the prayer that the said Applicants transfer the title and interest to the 1st Respondent. The High Court in addition partially allowed the Applicants' counterclaim, after being satisfied that the parties agreement was binding and inter alia ordered that the 4th Applicant remained the registered proprietor of the suit property; that an audit be conducted to ascertain the income generated during the period the business was in sole control of the 5th and 6th Respondents; that the space occupied by the 2nd and 3rd Respondents in the suit premises be valued by a registered valuer to ascertain the rent payable by the said Respondents; and the share certificate held by the 5th Respondent was ordered to be released to the 1st and 2nd Applicants. Each party was ordered to bear their own costs.
8. The Respondents were dissatisfied with that decision of the High Court, and appealed to this Court; with the Applicants filing a cross appeal seeking costs of the suits. This Court found that the principal issue before it was, whether the agreement(s) executed by the parties herein reflected their true intention or their consent to be bound by the terms thereunder. The Court also identified the following additional issues:
 - i. Whether the parties herein were proper parties to the suit.
 - ii. Whether the shares held by the 1st and 3rd respondents are held in trust for the 1st appellant or its nominees.
 - iii. Whether the 4th respondent holds the suit land in trust for the 1st appellant or its nominees.
 - iv. Whether the sale agreement and transfer of the suit land should be nullified.
 - v. Whether the circumstances surrounding the dispute called for lifting of the corporate veil of the concerned companies.
 - vi. Whether the imposition of payment of mesne profits on the 5th and 6th appellants was proper.
 - vii. Whether there was legal basis for directing the audit of the accounts held by the 5th and 6th appellants.
 - viii. Whether an inspector should have been appointed under Section 165 of the *Companies Act* to inspect the 5th respondent's affairs.



- ix. Whether the learned Judge erred in not granting costs to the respondents or imposing interest on the mesne profits and misappropriated funds.
9. The Court, after considering the pleadings filed by the parties, found merit in the appeal and dismissed the cross appeal. The Court consequently issued declarations that the shares held by the 1st and 3rd Applicants in the 4th to 7th Applicants are held in trust for the 1st Respondent or its nominees, and that the suit land is held in trust for the 1st Respondent or its nominees. The Court further nullified the sale and the transfer of the suit land to the 4th Applicant and ordered that the transfer of the suit land to the 1st Respondent or nominees is subject to the existing encumbrances on the title thereto; that the circumstances surrounding the dispute called for lifting of the corporate veil of the 3rd and 8th Applicant companies. It was found that there was no basis for the imposition of payment of mesne profits on the 5th and 6th Respondents; for the audit of the accounts held by the 5th and 6th Respondents and for appointment of an inspector under Section 165 of the *Companies Act*.
10. This decision is the genesis of the instant application for certification before us. When the application came up for hearing on 7th February 2022, Mr. Ngonze was present holding brief for Mr. Kinyua learned counsel for the Applicants, while learned counsel Mr. Ndegwa appeared for the Respondents. We directed the parties to argue the application by way of oral submissions, after Mr. Ngonze sought an adjournment which was opposed by Mr. Ndegwa, who pointed out that directions were given in May 2021 for the Applicants to file submissions, which had not been done.
11. 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. The issues for determination are firstly, whether the intended appeal to the Supreme Court is a matter of general public importance, and therefore eligible for certification as such to warrant leave, and secondly, whether this Court can stay execution of its own judgment pending an intended appeal to the Supreme Court.
12. Rule 40(2) of the *Court of Appeal Rules of 2010* 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 shall be made within fourteen days of the said decision. As noted earlier, the decision sought to be appealed against in Civil Appeal 117 of 2018 was delivered on 4th April, 2019, and the instant application is dated 10th July 2021 and was lodged in this Court on 2nd August 2019. The application is therefore incompetently before this Court, having been filed out of time, and the Applicants did not bring any evidence that they were granted extension of time.
13. 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.”
14. 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;
 - vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”
15. Mr. Ngonze in this respect in his submissions urged that the questions that the Applicants seek to be settled are firstly, the recourse a party has where the Court of Appeal takes its property and gives it to another party without a hearing, and secondly, whether the Court of Appeal can hear issues of ownership of property and repayment of loans that are not before it and rely on evidence not on record. Therefore, that the substantial question of law arising is the right to a fair hearing and the recourse a party has once the right is violated by the Court of Appeal. Mr. Ndegwa on his part reiterated the Respondents’ averments that the matters urged were arising from private agreements, which the doctrine of privity of contract restricted to the parties to the agreements, and that interpretation of the terms of a contract cannot be a matter of general public importance. In addition, that the constitutional right to a fair hearing was neither pleaded in the High Court or Court of Appeal and cannot be raised at this stage. On the prayer for stay of execution pending appeal, Mr. Ndegwa submitted that this Court is functus officio and has no jurisdiction to grant the prayer.
16. We have considered the pleadings and arguments made by the Applicants and Respondents. The nature of, and circumstances in which an agreement or contract may be vitiated by undue influence are explained in many texts on contract law, including those cited by the Court of Appeal in its judgment namely *Chitty on Contracts, 31st Edition*, and *Treitel on the Law of Contract, 10th Edition*; by the decisions of this Court in [*Nabro Properties Limited vs Sky Structures Limited \(Z.R. Shah \) Southfork Investments Limited*](#) [1986] eKLR and *Bank of Credit and Commerce International SA vs Aboody* [1992] 4 All ER 955; and rests on the facts of each particular case.
17. Likewise, the law on the circumstances when a resulting or constructive trust arises, including from the arrangements as to shareholding in companies, is settled by various treatises on law, and various decisions of this Court including *Gichuki vs. Gichuki* [1982] KLR 285, *Mbothu & 8 Others vs Waitimu*



Ɖ 11 Others [1986] KLR 17. and *Ɖwalib Hatayan Ɖwalib Hatayan Ɖ Anor vs Said Saggat Ahmed Al-Heidy Ɖ Others* [2015] eKLR, where it is also emphasised that the existence of a trust is proved through evidence. Lastly, the circumstances when a court may pierce the corporate veil were also extensively explained by this Court in *Riccatti Business College of East Africa Limited vs Kyanzavi Farmers Company Limited* [2016] eKLR.

18. It is notable in this respect that the issues detailed by the Applicants in Part D of its lengthy application as arising from the impugned decision of this Court, are matters on which either the law is settled as indicated hereinabove, or on which the decision of the Court turned on the evidence before it. They therefore do not in our view qualify to be substantial questions of law or matters of general public importance that are capable of transcending the dispute between the parties in a particular case. It appears to us that the Applicants are aggrieved by the findings of the Court of Appeal which they allege were not supported by the evidence before it, and seek a review of the findings through the route of certification and leave to appeal to the Supreme Court of Kenya. This route is however not available to the Applicants for the reasons we have given.
19. This brings us to the question whether this Court can stay execution of its own judgment pending an intended appeal to the Supreme Court. This issue was the subject of a detailed ruling in *Dickson Muricho Muriuki vs Timothy Kagundu Muriuki & 6 others* [2013] eKLR, where a similar issue arose before this Court, and while noting that there are no rules of procedure regulating the manner in which the application should be filed and determined, the Court 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 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.'
20. We cannot however invoke this Court's inherent jurisdiction in the instant application, having found that the application was not only incompetently filed, but does not also qualify for certification under Article 163(4) of the Constitution. We therefore adopt the position expressed in *Dickson Muricho Muriuki vs Timothy Kagundu Muriuki Ɖ 6 others* [*supra*] that once this Court has pronounced the final judgment, it is *functus officio* and in the absence of statutory authority, is prevented from re-opening a case. Further, there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted.
21. The Applicants' Notice of Motion dated 10th July 2019 is accordingly dismissed with costs to the Respondents.
22. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 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

