



**Maalim v Registered Trustees of the Agricultural Society of Kenya & 33 others  
(Civil Appeal 129 of 2018) [2021] KECA 338 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 338 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 129 OF 2018  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**MOHAMED A. MAALIM ..... APPLICANT**

**AND**

**REGISTERED TRUSTES OF THE AGRICULTURAL SOCIETY OF KENYA & 33  
OTHERS ..... RESPONDENT**

*(An application under Rule 24 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. 129 of 2018)*

**RULING**

1. In the application before us dated 21<sup>st</sup> May 2019 made under Article 163(4)(b) of the *Constitution*, Section 3(e) of the *Supreme Court Act, 2011* and Rules 3 and 24 of the *Supreme Court Rules, 2012*, the applicant, Mohamed A. Maalim, has sought leave to appeal to the Supreme Court against the judgment of this Court delivered on 14<sup>th</sup> March 2019. It is contended that the intended appeal raises issues of general public importance touching on the scope of judicial review.
2. The background in brief is that, the applicant was disqualified from participating in elections that were scheduled to take place on 17<sup>th</sup> March 2017 to fill various posts within the 1<sup>st</sup> respondent on grounds that he was not qualified to vie and was not in good standing. The applicant was interested in vying for three elective posts. Dissatisfied with the disqualification, he appealed to the 1<sup>st</sup> respondent by letter of 20<sup>th</sup> March 2017. That appeal was dismissed on 18<sup>th</sup> April 2017. Aggrieved, the applicant commenced judicial review proceedings before the High Court with a view to quashing the decision to disqualify him from contesting the posts he aspired for. He sought orders of mandamus: to call for fresh elections of the Coast branch to elect



- members of the Coast Branch Committee; and to compel the respondents to clear him to contest the posts of Committee member, council member and branch chairman of the Coast Branch.
2. Upon hearing, the judicial review application was dismissed by the High Court (Ogola, J.) in a ruling dated 11<sup>th</sup> July 2018. Still dissatisfied, the appellant instituted Civil Appeal No. 129 of 2018 before this Court. In its judgment, this Court saw no reason to interfere with the exercise of discretion by the learned Judge of the High Court and dismissed the appeal in a judgment delivered on 14<sup>th</sup> March 2019. It is against that judgment that the applicant intends to appeal to the Supreme Court, hence the present application.
  4. We heard the application on 18<sup>th</sup> October 2021. Mr. Oluga, learned counsel for the applicant, urged through his written and oral submissions that in its judgment, this Court erred by failing to adopt the “now developing jurisprudence” that “judicial review court has jurisdiction to delve into the merits of the decision”; that there is conflict in decisions of this Court and uncertainty of the correct legal position by contradictory determinations by differently constituted benches of this Court on whether judicial review extends to the merits of an impugned decision; that it is necessary and in public interest for the Supreme Court to settle the matter. In support of the contention that there are conflicting decisions of this Court on the matter, reference was made to the following decisions: *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others* [2016] eKLR; *Rentco East Africa Limited & others vs. Public Procurement Administrative Review Board & another* [2017] eKLR; *Judith Anyango Elizabeth Oyugi vs. IEBC & 3 others* [2017] eKLR; and *Super Nova Properties Limited & another vs. District Land Registrar Mombasa & 2 others and Kenya Anti-Corruption Commission & 2 others (interested parties)* [2018] eKLR. Those decisions, according to counsel for the applicant represent the school of thought of this Court that the scope of judicial review extends to merit review.
  5. On the other hand, counsel argued, the other decisions of this Court that express the position that the scope of judicial review is limited to process and procedure, include *Bhangra Limited vs Land Registrar Mombasa & 2 others*, Mbsa C.A. No. 58 of 2016 and the case of *Kenya Revenue Authority & 2 others vs. Darasa Investments Limited* [2018] eKLR.
  6. Mr. Aziz, learned counsel for the 10<sup>th</sup> to 23<sup>rd</sup> respondents, though not having filed any submissions, supported the application.
  7. Opposing the application, learned counsel for 1<sup>st</sup> to 8<sup>th</sup> respondents Mr. Milimo, referred to a replying affidavit by Chief Executive Officer of the 1<sup>st</sup> respondent and to his written submissions and submitted that there is no inconsistency in the decisions of this Court to warrant involvement of the Supreme Court in the matter; that it is settled, and all decisions are consistent that a judicial review court does not sit as an appellate body over the decision of the impugned decision maker; that portions of judgment cited by counsel for the applicant to support the contention that there are inconsistencies in decisions of this Court are cited out of context and are based on a misunderstanding of those decisions.
  8. We have considered the application, the submissions and the authorities cited. As the Supreme Court stated in *Hermanus Phillipus Steyn vs. Giovanni Gnechchi Ruscone*, Supreme Court application No.4 of 2012:

“...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. In the same case, the Supreme Court 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.”
10. See also the decision of this Court in [\*Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union \(KEFHAU\) represented by Its Promoters David Benedict Omulama & 9 others\*](#) [2018] eKLR.
11. The question therefore is whether those requirements are met in present case. According to the applicant, there is uncertainty as to the legal position as to whether a judicial review court has jurisdiction to delve into the merits of the decision being challenged. In case of [\*Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others\*](#) (above) a judgment of this Court (Kooame, Sichale & Otieno-Odek, JJ.A) delivered on 4<sup>th</sup> March 2016, this Court expressed that the general principles of common law and the rules of natural justice continue to apply in review of administrative actions. In the same case, the Court referred to the English decisions in *Council of Civil Service Unions vs. Minister for the Civil Service* [1985] AC 374 and *Associated Provincial Picture Houses Ltd vs. Wednesbury Corp.* [1948] 1 K.B. 223 and stated that the common law principles on judicial review of administrative action under the heads of illegality, irrationality, procedure impropriety and proportionality are relevant and applicable in Kenya. It went on to state that an analysis of Article 47 of the [\*Constitution\*](#) as read with the [\*Fair Administrative Action Act\*](#) “reveals the implicit shift of judicial review to include aspects of merit review of administrative action.”



12. Subsequently on 14<sup>th</sup> December 2017, the Court (Visram, Karanja & Koome, JJ.A) delivered judgment in *Bhangra Limited vs Land Registrar Mombasa & 2 others* (above) and expressed that “the essence of judicial review is to set right any decisions fraught with impropriety, illegality, abuse of power, arbitrariness” but went on to caution that “the function of the High Court sitting in judicial review proceedings is not to determine issues as if it is an appeal court nor is it to consider the merits of the decision by a public body but rather it is to undertake a consideration of the procedure and processes adopted to arrive at the decision in issue so as to rule out any traits of allegations of procedural malpractices, lack of fair hearing, unreasonableness or other illegalities.” In that case, the Court then went on to state that “this jurisdiction as has been noted severally by this Court is like a straitjacket and is not amenable to expansion. It has very limited scope and application” and that all a party needs to demonstrate in order to succeed in an application for judicial review is that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. In that case, the Court did not make reference to the 4<sup>th</sup> March 2016 judgment of the Court in case of *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others* (above).
13. In *Kenya Revenue Authority & 2 others vs. Darasa Investments Limited* a judgment of the Court (Visram, Karanja, Koome, JJ.A) delivered on 11<sup>th</sup> April 2018 the Court stated, with specific reference to that case, that the dispute in that case
- “rightly fell within the scope of judicial review which is concerned with the decision making process rather than the merit consideration of the decision in issue” and went on to state that “judicial review does not avail parties court room processes to thrash out disputed matters.”
14. Subsequently, on 19<sup>th</sup> April 2018, the same bench of the Court (Visram, Karanja & Koome, JJ.A) in the case of *Super Nova Properties Limited & another vs. District Land Registrar Mombasa & 2 others and Kenya Anti-Corruption Commission & 2 others (interested parties)* stated thus:
- “Suffice it to state that within the context of expansion of principles to bring to bear in a judicial review matters, we agree each case must be reviewed bearing in mind the Constitution, the law and its own peculiar facts. There is no longer one size for all as was held by the Court of Appeal in the case of Suchan Investments Ltd...”
15. Any doubt that may have been created by the Court in *Bhangra Limited vs Land Registrar Mombasa & 2 others* (above) and *Kenya Revenue Authority & 2 others vs. Darasa Investments Limited* as regards the expanded scope of judicial review was therefore clarified in that decision. Subsequent decisions of this Court have been consistent in that regard.
15. Having examined the circumstances of this case against the principles established in *Hermanus Phillipus Steyn vs. Giovanni Gnechi Ruscone* we are not persuaded that the intended appeal raises an issue of general public importance, the determination of which, in the words of the Supreme Court:
- “which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ...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....; 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.”

In the result, we decline to grant leave.



17. The application fails and is hereby dismissed with costs to the 1<sup>st</sup> to 8<sup>th</sup> respondents only.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2021.**

**S. GATEMBU KAIRU, FCIArb**

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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**

