



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO, (P), KARANJA & MUSINGA, JJ. A.)**

**CIVIL APPLICATION SUP NO. 1 OF 2019**

**BETWEEN**

**MBURU MUCHINA & 154 OTHERS.....APPLICANTS**

**AND**

**JOSEPH KAMAU MUSA & 4 OTHERS.....1ST RESPONDENTS**

**IRERI COMPANY LTD & COMMISSIONER OF LANDS & 3 OTHERS.....2ND RESPONDENT**

**COMMISSIONER FOR LANDS & 154 OTHERS.....3RD RESPONDENT**

(Being an application for Certification to the Supreme Court against the decision made by the Court of Appeal (Nambuye, Kiage & Murgor, JJ.A.) delivered on 9th November 2018 and for certification that a matter of public

importance as well as violation of Fundamental Rights under the Constitution is involved in the

intended appeal *in Civil Appeal No. 172 of 2006.*)

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**RULING OF THE COURT**

1. This is an application brought by the applicants under *Article 163 (3)(b), (4) of the Constitution of Kenya, 2010, rules 24 and 26 of the Supreme Court Rules and rule 40 of the Court of Appeal Rules.* The applicants pray for orders: -

**“That the Honourable Court be pleased to grant the Applicants certification to lodge their appeal against the judgment of this Honourable Court delivered on the 9th November, 2018 at the Supreme Court on the grounds that it raises a point of law of general public importance with regard to the Applicant’s violation of their rights to lawful expectation and right to protection of property in the face of the right to lawful expectation as well as protection of right to property as provided by Articles 40 and 64 of the Constitution.”**

2. The application is anchored on grounds that: -

**“a. The Court’s findings and judgment were not supported by the law.**

**b. The Court’s findings and judgment were not based on sound legal provisions as set out at Articles 21, 23, 24, 40, 43, 60 and 64 of the Constitution.**

**c. The Court’s findings and judgment are grounded on presumptions and individual opinion of the judges and relates to a matter of public interest in so far as protection of right to property is concerned in line with Articles 40 and 61 of the Constitution is concerned. (Sic)**

**d. The Court’s findings and judgment are unconstitutional and a violation of the Applicant’s rights.”**

3. This application arises from the judgment of this Court in *Civil Appeal No. 172 of 2006 (Nambuye, Kiage & Murgor, J.J.A.)* in respect of three related High Court decisions. Two of those matters, *HCCC No. 3746 of 1998* and *HCCC No. 3200 of 1990* had been consolidated and heard together. In the first suit, three shareholders of *Ileri Company Limited*, the 2nd respondent, filed a suit against the Company and some other nine other persons who were described as servants and agents of the Company. The plaintiffs therein sought to injunct the Company from distributing or disposing of two of its parcels of land known as *L.R 8022/R* and *L.R 8022/1 Longonot*. They also sought a declaration that the only lawful bonafide members of the Company were those contained in the register filed with the Registrar of Companies on 10th May 1983.

4. In the second suit, *HCCC No. 3200 of 1990*, three shareholders of the same Company sued the Company and its named nine agents/directors and sought, *inter alia*, an injunction to restrain the respondents therein from selling, leasing, allocating, charging or subdividing the Company's land.

5. The High Court (*Mbito, J.*) in a consolidated judgment dismissed the suits, holding that the applicants had no right in law to bring actions against the Company on the principle propounded in *Foss v Harbottle [1943] 67 ER 189* that a Company is a separate and distinct entity from its shareholders; that its assets do not belong to shareholders and only the Company can sue in respect of any claim over its assets.

6. This Court's judgment also disposed of the third related matter arising from *Judicial Review Case No. 76 of 2011 (Omondi, J.)* in which the Company sought an order of *certiorari* to quash a decision of the Chief Land Registrar contained in a letter dated 15th June 2011 that declared title deed issued for land allegedly excised from *LR 8622 in Langata, LR 7255/1* and *LR 10712 in Nanyuki*; and an order of *mandamus* to compel the Commissioner of Lands, the Chief Land Registrar and the Land Registrars of Naivasha and Nanyuki to cancel the said title deeds. The High Court declined to grant the orders sought, holding that the letter in question was not a decision capable of being quashed by an order of *certiorari*; and that the respondents did not have a public duty to cancel titles.

7. On the first two consolidated matters, this Court in upholding the judgment of *Mbito, J.* stated, *inter alia*: -

**“We think that the suit as presented was a non-starter for going against the principle in *FOSS v. HARBOTTLE*. The rule therein is a logical consequence of the juristic personality of a corporation with capacity for self-regulation. Had the suits before *Mbito, J.* been presented as derivative suits as exception to the *FOSS v. HARBOTTLE* principle, it would have been another matter but they were not. In the result, we are unable to accept that the learned Judge was wrong to arrive at the conclusion that he did.”**

8. Regarding the judicial review matter, this Court observed that in the letter dated 11th June 2011, the author indicated that some head titles that had been earlier surrendered to the office of the Chief Land Registrar to facilitate registration of surrenders with the aim of converting the titles into RLA titles had been released to one James Kariuki Muchiri who represented himself as the Company's Secretary, which was not the case and therefore unprocedural.

9. The said letter therefore requested urgent surrender of those mother titles to enable the Chief Registrar complete the exercise of conversion. The letter concluded with the words: -

**“Any member/party still interested with nullification of the already issued title deeds under RLA should seek redress from the court. On receipt of valid court orders, the issued title deeds will be cancelled but in the meantime they remain as valid as issued.”**

Those are the words that the appellants sought to quash, contending that they wrongly validated the titles issued under RLA.

10. The High Court judge held that the letter was not a decision validating the titles and could not attract an order of *certiorari*. This Court upheld the High Court decision. In effect, the entire appeal was dismissed with costs.

11. The appellants, being aggrieved by this Court's decision, intend to appeal against it to the Supreme Court. The Draft Petition raises 14 grounds of appeal. We deem it necessary to reproduce them since the appellants contend that the intended appeal raises a point of law of general public importance. The grounds are as follows: -

**“1. That the Learned Appeal Judges erred in law in finding and holding that because the increase in shares had taken place albeit illegally the subject lands in dispute be subdivided and sold to third parties and therefore the Appellants claim had been overtaken by events.**

**2. That the Learned Appeal Judges erred in law and in fact in violating and/or breaching the Appellants' accrued rights under Articles 21, 24, 40, 60 and 64 of the Constitution that provides for their lawful expectation by denying the Appellants the protection of their rights to property.**

**3. That the Learned Appeal Judges erred by misapprehending the Application of accrued rights under a shareholding and/or membership of the land buying Company being the 2nd Respondent herein.**

**4. That the Learned Appeal Judges erred in law and in fact in making a finding to the effect that the suits giving rise to the Civil Appeal before the Court of Appeal were wrongly filed.**

**5. That the Learned Appeal Judges erred in law and in fact in disregarding the finding that the Directors of the Company**

irregularly and illegally increased the shareholding in the Company was unbacked by evidence when the record showed the contrary.

6. That the learned Appeal Judges erred in law and in fact in assuming and holding that the suits giving rise to the civil appeal before the Court of Appeal were not derivative suits.

7. That the Learned Appeal Judges erred in law and in fact in finding and holding that it was fallacious for shareholders of a company to equate its property as their own in actual fact they have no propriety (sic) rights thereto apart from the shares they own.

8. That the Learned Appeal Judges erred in law and in fact in finding that there was no deficiency in the reasoning and conclusions of the Learned Judge on the aspect of the case.

9. That the Learned Appeal Judges erred in law in finding that there was no letter, or any decision affecting the rights or interests of the Appellants that was arrived at by a process that was unfair to them or otherwise tainted by illegality, irrationality abuse of process or want of jurisdiction.

10. That the Learned Appeal Judges erred in law in fact in finding that there was no decision to quash or uproot by way of certiorari.

11. That the learned Appeal Judges erred in law and in fact in holding that the trial judge in the Judicial Review proceedings fully appreciated the principles of law which she applied in her decision.

12. That the Learned Appeal Judges erred in law and in fact in holding that the Judge found correctly in their view that far from complicit in any wrong doing the third party purchasers named as Interested Parties before her in actual fact had Sale Agreements after due diligence and were properly registered as proprietors without being in any way encumbered.

13. That the Learned Appeal Judges erred in holding and finding that the Trial Judge approached the issue in a pragmatic manner and evinced fidelity to the principles that govern the issuance or denial of judicial review remedies without justification and/or basis for so doing.

14. That the Learned Appeal Judges erred in holding and finding that the trial Judge exercised (sic) in a judicious manner without assigning any reasons for so doing.”

12. The 1st respondents opposed the application. They stated, *inter alia*, that the allegations raised in the application include violation of **Articles 21, 23, 24, 40, 43, 60 and 61** of the **Constitution** which were not issues for trial in the High Court suits and in the appeal and therefore cannot suffice as grounds for setting aside this Court’s judgment; that the issues in dispute were properly determined on merit; and that the threshold for grant of certification under **Article 163 (4)(b)** of the **Constitution** as laid down in ***Hermanus Phillipus Steyn v Giovanni Gnechhi Ruscone [2013] eKLR*** has not been attained by the applicants. They therefore urged this Court to dismiss the application.

13. 8 Interested Parties namely, ***Jessel Ranching Co. Ltd, Billy Arnold Blackbeard, Mary Eida Blackbeard, John Carpenter Hiuhu, Sammy Jessel, North Tetu Farmers Co. Ltd and Naromoru Farmers Co. Ltd***, through M/S J. M. Njengo & Co. Advocates also opposed the application and raised similar grounds as those raised by the 1st respondents.

14. The Attorney General, who did not specify whether he was acting for the Commissioner of Lands, supported the application. The other parties did not file any papers.

15. We have carefully perused the application and considered the affidavits, submissions, and the digest of authorities on record. The Court directed that this application be disposed of by way of written submissions in view of the Covid-19 pandemic that has affected the Court’s normal operations.

16. The single issue for our determination is whether the intended appeal involves a matter of general public importance as required under **Article 163 (4) (b)** of the **Constitution**. What constitutes a matter of general public importance and the factors that this Court takes into consideration in determining an application of this nature is now well settled. The principles are set out in ***Hermanus Phillipus Steyn v Giovanni Gnechhi-Ruscone (supra)*** and are 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 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. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

17. In our view, the intended appeal does not raise a substantial point of law that has never been addressed by the Court before, and neither is there any uncertainty in the relevant law to require the intervention of the Supreme Court.

18. There is a plethora of authorities on the principle in *Foss v Harbottle* (supra) and judicial review orders of *certiorari* and *mandamus*. The applicants did not also satisfy us that the determination of the issues intended to be canvassed in the proposed appeal transcend the circumstances of their case and have a significant bearing on public interest.

19. The applicants did not identify and concisely set out the specific elements of general public importance which they attribute to their matter. Besides, the issues of alleged violation of *Articles 21, 23, 24, 40, 60, 61 and 64* of the *Constitution* did not arise either before the High Court or this Court.

20. For all these reasons, we find no merit in this application and dismiss it with costs to the 1st respondents and the 8 Interested Parties who were represented by M/s J.M. Njengo & Co. Advocates.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**