IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION SUP. 131 OF 2019

BETWEEN

RICHARD KIPKEMEI LIMO...APPLICANT

AND

HASSAN KIPKEMBOI NGENY...........................1ST RESPONDENT

LAND REGISTRAR –UASIN GISHU.................2ND RESPONDENT

CHIEF LAND REGISTRAR.................................3RD RESPONDENT

ELDORET MUNICIPAL COUNCIL...................4TH RESPONDENT

ATTORNEY GENERAL..5TH RESPONDENT

(An application for leave to appeal to the Supreme Court against the judgment of the Court of

Appeal at Eldoret (Makhandia, Kiage & Odek, JJ. A) dated 25th July, 2019 **in Civil Appeal 55 of 2018)**

****

RULING OF THE COURT

Background

1. **Richard Kipkemei Limo** (the applicant) has approached this Court under ***Article 163(4) of the Constitution, Section 19 of the Supreme Court Act, Rules 24 & 26 of the Supreme Court Rules*** and ***Rules 5(2) & 40 of the Court of Appeal Rules*** seeking:

> · ***THAT pending the hearing and determination of the intended appeal the Honourable Court be pleased to stay execution of the decree arising from the judgment delivered on 9th February, 2018 by Honourable Justice Ombwayo.***
>
> · ***THAT the Honourable Court be pleased to certify the intended appeal as a matter of general public importance and accordingly, grant leave to the applicant to prefer an appeal to the Supreme Court of Kenya against the judgment of this Court in Civil Appeal No. 55 of 2018-Richard Kipkemei Limo vs. Hassan Kipkemboi Ngeny & 5 others.***

The application is premised on the ground that the intended appeal to the Supreme Court raises issues of general public importance which ought to be considered by the apex court.

2. The dispute which culminated in the impugned judgment of this Court related to competing interests between the applicant and **Hassan Kipkemboi Ngeny** (the 1st respondent) over **Eldoret Municipality Block 7/178** (the suit property). On one hand, the applicant claimed to have purchased the suit property sometime in December, 2003 from the then registered proprietor. Subsequently, he was issued with the title over the suit property in February, 2004 and about mid - July, 2012 he came to learn that the 1st respondent had been issued with a title over the suit property. He contended that the 1st respondent had fraudulently obtained the title to the suit property. Consequently, by an amended Petition filed in the High Court on 10th December, 2013, the applicant sought *inter alia* a declaration that his title to the suit property was valid while that of the 1st respondent was illegal and a nullity.

3. On the other hand, the 1st respondent denied the applicant's allegations and contended that it was his title to the suit property as opposed to that of the applicant which was valid. His case was to the effect that the applicant did not purchase the suit property from the registered proprietor. Rather, the sale agreement that the applicant relied on was executed by himself as the purchaser and one **Patrick Ngumba Mweni (Patrick)** as the vendor. The sale agreement described **Patrick** as the proprietor whereas the suit property was registered at the time of the purported sale in the name of **Rhoda Chelagat Kandie (Rhoda).** As such, **Patrick** had no legal proprietary interest in the suit property to pass to the applicant.

4. The 1st respondent's version of how he obtained title was that by a letter dated 29th April, 1982, he applied to the President of the Republic of Kenya for allocation of the suit property which was then described as 'Plot 21'. His request was accepted vide a letter dated 13th August, 1982 under the hand of the Commissioner of Lands. Upon paying the requisite outgoings he was issued with a letter of allotment over the suit property on 27th January, 1983. Ultimately, he was issued with a title to the suit property on 16th April, 2012.

5. Faced with the above, the High Court (**Ombwayo, J.**) by a judgment dated 9th February, 2018 dismissed the applicant's Petition. In his own words the learned Judge expressed as follows:-

> ***"I have gone through the pleadings and evidence on record and do find that the certificate of lease produced by the 1st respondent was properly and legally acquired as due process was followed. The certificate of lease produced by the petitioner was not procedurally obtained as the alleged vendor of the property was not the registered proprietor and therefore could not transfer non-existent rights to the petitioner.***
>
> ***…***
>
> ***The upshot of the above is that the petitioner has failed to demonstrate that he acquired the suit property regularly and procedurally and that he is the legal owner of the suit property and therefore I do dismiss the petition with costs and do hereby nullify the certificate of lease issued to the petitioner and 6th respondent and for avoidance of doubt, I do find that the 1st respondent obtained his title legally and therefore he is the lawfully registered proprietor…"***

6. Aggrieved with the High Court's decision, the applicant filed an appeal in this Court being **Civil Appeal No. 55 of 2018** challenging the same on a number of grounds. The principal grounds of appeal were that the learned Judge erred: by finding that the applicant's title was irregularly acquired yet the same was acquired for valuable consideration; upholding the 1st respondent's title despite the fact that he had obtained the same 12 years after the applicant's title which was first in time; failing to take into account the effect of limitation on the 1st respondent's claim under the ***Limitations of Actions Act*** and the ***Government Land Act (repealed)***; basing his findings on unpleaded issues; and failing to appreciate that the effect of cancellation of the applicant's title would be that the title would revert back to **Rhoda**. This Court after addressing its mind to the rival arguments as against the law upheld the High Court's decision and dismissed the appeal by a judgment dated 25th July, 2019.

7. It is that decision that the applicant is intent on challenging in the Supreme Court. In his view, the intended appeal raises issues of general public importance namely:-

a) Whether the impugned judgment created uncertainty in law with regard to the obligations of a purchaser for value under the **Registered Land Act** (***RLA)*** (repealed) and the application of ***Section 39*** thereunder.

b) Whether the impugned judgment also gave rise to uncertainty and ambiguity as far as the interpretation and application of ***Articles 23,24,47 & 50*** of the ***Constitution*** was concerned.

c) Whether in upholding the 1st respondent's title in the absence of a Cross Petition to that effect, this Court based its findings on an unpleaded issue.

d) Whether in upholding the 1st respondent's title this Court infringed on the applicant's right to property contrary to ***Article 40*** of the ***Constitution***.

e) Whether this Court misapprehended the law regarding limitation which is a jurisdictional issue.

f) Whether this Court disregarded its jurisdiction under ***Rule 29*** of the ***Court of Appeal Rules***.

8. Strenuously opposing the application, the 1st respondent filed a replying affidavit. He deposed that the intended appeal did not raise any issue of general public importance. As far as he was concerned, the application was based on the false and misleading assumption that the applicant had purchased the suit property from the proprietor hence he was subject to the protection under ***Section 39*** of the ***RLA.*** However, the sale agreement produced by the applicant was quite clear that he had purportedly purchased the same from **Patrick** who was not the proprietor.

9. The 1st respondent deposed that despite the applicant claiming that he had purchased the suit property from **Rhoda** there was no evidence to suggest that he did so. Moreover, there were more questions than answers as to how **Rhoda** was registered as the proprietor. The applicant fell short of proving that he had purchased the suit property from the legal proprietor. The 1st respondent also deposed that the applicant had not demonstrated that the intended appeal would be rendered nugatory if the stay sought is not granted and the intended appeal succeeds.

10. None of the other parties filed a response to the application. The application was prosecuted by way of written submissions filed on behalf of the applicant, the 1st and 4th respondents.

Submissions

11. Setting the stage for his case, the applicant cited the English case of ***Smith vs. Cosworth Casting Processes Ltd.** [1997] 4 ALL ER 840* and argued that all an applicant is required to establish in an application for certification that an intended appeal raises an issue of general public importance, is a *prima facie* arguable case even if the same, as he put it, has no chance of success. He also relied on the Supreme Court's decision in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi- Ruscone** [2013] eKLR* (***Hermanus Steyn case***) which set out the applicable principles of determining what constitutes a matter of general public importance.

12. As far as the applicant was concerned, his intended appeal met the criteria set out in the ***Hermanus Steyn Case*** [supra]. He submitted that the intended appeal proposed to raise four issues of general public importance. The first issue was with regard to the Court's finding that the applicant had failed to prove the root of the title held by **Rhoda**. In the applicant's view, by finding that there was no evidence to establish the procedural validity and lawfulness through which **Rhoda Chelgat Kandie** obtained title over the suit property, this Court departed from its earlier holding in ***Pashito Holdings Limited & Another vs. Paul Nderitu Ndungu** [1997] eKLR (Pashito Holdings Ltd. case)* contrary to the doctrine of *stare decisis*. In the aforementioned case, as per the applicant, this Court guided by ***Section 39*** of the ***RLA*** held that purchasers in a land transaction have no obligation to ascertain the circumstances under which the proprietor or any previous proprietor was registered as such.

13. The applicant went on to argue that the very essence of ***Section 39*** of the ***RLA*** was that it conferred legitimate expectation on a purchaser that he/she need not conduct a historical search since title issued under the said Act by itself served as a record of rights accruing against the title. He submitted that this Court not only contradicted its earlier decisions but also exceeded its mandate by amending the then ***Section 39*** of the ***RLA***. As a result, the applicant posited, the findings of this Court resulted in uncertainty in the interpretation and application of the law relating to ***Section 39*** of the ***RLA*** which ought to be resolved by the Supreme Court.

14. The applicant contended that his Petition was premised on ***Article 40*** of the ***Constitution***. More specifically, called for the determination of the question of whether the Lands Registrar could register a second title over the suit property without cancellation of the title issued first in time. It was the applicant's contention that the impugned judgment has the effect of sanitizing the illegal action of issuance of multiple titles over the same parcel of land. According to the applicant, this Court failed to reconsider the evidence tendered at the trial court and arrive at its own conclusion as required under ***Rule 29*** of the ***Court of Appeal Rules***. As a result, this Court upheld the cancellation of the applicant's title hence affecting his right to property under ***Article 40*** of the ***Constitution***.

15. The second issue raised by the applicant related to the right to be heard and fair administrative action as enshrined under ***Articles 47 & 50*** of the ***Constitution*** respectively. Towards that end, the applicant submitted that this Court in upholding the trial court's decision to annul the certificate of title in favour of **Rhoda** who was not a party to the suit disregarded her right to be heard and fair administrative action. In the applicant's opinion, it is imperative for the Supreme Court to intervene and interpret the criteria of limiting rights under ***Article 24*** of the ***Constitution***.

16. Thirdly, the applicant contended that despite the issue of limitation being raised for the first time at the appellate stage, this Court should have rendered itself on that issue. This is because not only does the issue of limitation go to jurisdiction but it is also a point of law which can be raised at any stage of the proceedings. The applicant argued that the question of limitation qualified as a matter of general public importance simply because it is an issue that occurs in the general course of litigation.

17. Fourthly, the applicant submitted that there was need for the Supreme Court to render itself on the application and interpretation of a court's mandate under ***Article 23(3)*** of the ***Constitution***. The position taken by the applicant was informed by his conviction that in upholding the 1st respondent's title in the absence of a Cross Petition or a prayer in that regard, this Court acted beyond its mandate under ***Article 23(3)*** of the ***Constitution***.

18. Last but not least, the applicant contended that he had satisfied the twin principles which warrant the grant of stay of execution under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules***. In support of that proposition, he relied on this Court's decision in ***Keter & 6 others vs. Kiplagat & 2 others** [2004] 2 KLR 159*. He submitted that the issues which he had outlined as constituting matters of general public importance demonstrated that the intended appeal was arguable. Further, he argued that should his title to the suit property be cancelled, the intended appeal would be rendered nugatory if it succeeds since the ensuing injury would be irreversible.

19. The 1st respondent submitted that it was not in dispute that the issue of limitation was neither pleaded by the applicant in his Petition nor raised before the trial court. Equally, the trial court did not address its mind on the same. Consequently, this Court declined and rightly so, to entertain the question of limitation since it had been raised for the first time on appeal.

According to the 1st respondent, the alleged clarification that the applicant intends to seek from the Supreme Court, on whether an issue of limitation of action is capable of being raised at any stage even at the appeal stage, does not meet the threshold of being escalated to the apex court. This is simply because the issue of limitation did not arise in the trial court hence it was not a subject of judicial determination. To buttress that line of argument, reference was made to the Supreme Court decisions in ***Coast Professional Freighters Limited vs. Welsa Bange Oganda & 2 others** [2019] eKLR & **Malcom Bell vs. Daniel Toroitich Arap Moi & Another** [2013] eKLR (Malcom Bell case)*.

20. As regards the uncertainty arising out of the alleged conflicting decisions pertaining to the interpretation and application of ***Section 39*** of the ***RLA***, the 1st respondent contended that the application of the section in question had been settled by this Court in a number of decisions including ***Denis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge & Another** [2018] eKLR and **Pashito Holdings Ltd. Case*** [supra]. Besides, ***Section 39*** of the ***RLA*** contemplated that for a purchaser to enjoy the protection thereunder he/she has to have dealt with the proprietor of the land in issue. It was incumbent on the part of a litigant desiring to rely on the protection to adduce evidence that he/she dealt with the proprietor reflected in the register. It was the 1st respondent's submission that the

impugned judgment did not in any way depart or contradict the above mentioned settled position. In the case at hand, the 1st respondent asserted that the evidence on record made it abundantly clear that the applicant dealt with **Patrick** who was not the proprietor of the suit property.

21. Further, the certificate of official search relied on by the applicant suggested that the registered proprietor was **Rhoda** (as administrator of the estate of **Aaron Kimosop Kandie)** while the green card which he also relied on contradicted that position by suggesting that the registered proprietor was **Rhoda.** As far as the 1st respondent was concerned, the late **Aaron Kimosop Kandie** & **Rhoda** are different persons. It followed therefore that a question would arise as to how both of them separately attained registration over the suit property and were issued with titles on the same date that is 20th November, 2003.

22. Nonetheless, the 1st respondent submitted that even if it was to be assumed that **Rhoda** was the administrator of the estate of **Aaron Kimosop Kandie**, how was it possible for an administrator to sell the suit property let alone be registered as an administrator before the issuance of letters of administration over the deceased's estate on 9th November, 2004? The 1st respondent postulated that Gazette Notice No. 773 of 2004 as well as the **High Court Succession Cause No. 991 of 2003** relating to the estate of **Aaron Kimosop Kandie** indicate that the said estate had four administrators. As such, it was inconceivable how only one of the administrators, **Rhoda Chelagat Kandie**, was registered as the proprietor of the suit property. All in all, the applicant failed to demonstrate that **Rhoda Chelagat Kandie** was the proprietor of the suit property as contemplated under ***Section 39*** of the ***RLA***.

23. The 1st respondent went on to argue that the question of whether a litigant who asserts proprietary rights over land on account of purchase must prove the legality of the title held by the vendor, was a straight forward issue which lends itself to resolution on the basis of a review of both facts and decisions of the courts. Equally, taking into account the circumstances of the case at hand, the said issue was neither substantial nor had a significant bearing on public interest.

24. The 1st respondent submitted that the right to property as protected under **Article 40** of the ***Constitution*** extended to property which had been lawfully acquired. Therefore, the burden lay with the applicant to show that he had acquired the suit property legally which he failed to do. Consequently, by virtue of ***Article 40(6)*** the applicant could not claim that his right to property had been infringed.

25. On the contention that the Supreme Court should determine whether this Court erred in upholding the annulment of the applicant's title without affording **Rhoda** an opportunity to be heard, the 1st respondent urged us to pay regard to the substratum of the petition before the trial court. In his view, the applicant's case was that he had purchased the suit property from the previous proprietor, that is, **Rhoda**, which position was vehemently opposed. Consequently, one of the issues that fell for consideration was whether **Rhoda** owned the suit property. By virtue of ***Section 107*** of the ***Evidence Act*** the burden was on the applicant to prove his case which he failed to do. As such, the question of whether Rhoda should have been heard prior to the cancellation of the applicant's title is not material. To suggest otherwise, as per the 1st respondent, would have been tantamount to calling upon the Court to fill in the gaps in the applicant's evidence.

26. In addition, the 1st respondent sought to distinguish this Court's findings in the ***Pashito Holdings Ltd. Case*** [supra] by submitting that in the aforementioned case, the plaintiffs therein were seeking substantive reliefs against the Commissioner of Lands who was not a party to the suit. It is for that reason that this Court held that the Commissioner of Lands ought to have been joined as a party. On the other hand, as per the 1st respondent, it was the applicant who filed the petition and sought substantive orders against the respondents. In any event, the applicant had the option of either joining **Rhoda Chelagat Kandie** as a party or calling her as a witness which he did not.

27. In conclusion, the 1st respondent implored this Court not to accede to the applicant's request to invoke the jurisdiction of the Supreme Court on the basis of perceived errors or inconsistencies in the decisions of this Court. He asserted that if certification is granted the same would lead to unnecessary protraction of the matter and injustice. The 1st respondent, also urged this Court to direct the Registrar of this Court to forward the record herein to the Directorate of Criminal Investigations and Director of Public Prosecution with recommendations for an inquiry into the circumstances under which the certificate of official search dated 20th November, 2003 relied on by the applicant, reflected **Rhoda Chelagat Kandie** (administrator of the estate of the late **Aaron Kimosop Kandie)** as the proprietor yet the letters of administration in respect of the estate of **Aaron Kimosop Kandie** were issued to four administrators on 9th November, 2004.

28. The 4th respondent also opposed the application and associated itself with the replying affidavit filed by the 1st respondent. Submitting on the rationale behind certification of matters as of general public importance, the 4th respondent stated that it was a filtering process aimed at preventing the Supreme Court from hearing all and sundry appeals from this Court. Towards that end, the 4th respondent relied on the Supreme Court's decision in ***Koinange Investment & Development Ltd vs. Robert Nelson Ngethe [2013] eKLR.***

29. The 4th respondent contended that the case herein was an ordinary dispute over the suit property which was devoid of any matter of general public importance. In point of fact, it was argued that the applicant had failed to concisely identify the specific elements of general public importance. Rather, the applicant had set out determinations of facts in contest between the parties which cannot be the basis of certification. Furthermore, the 4th respondent argued that findings of this Court with respect to acquisition of title under the ***RLA*** were based on the peculiar facts of the case and had no bearing on public interest.

Determination

30. We have considered the application, the rival arguments by the parties, the authorities cited and the law. It is common ground that an appeal to the Supreme Court can arise via two avenues, that is, as of right where the issue involves the interpretation and application of the ***Constitution***; and with leave either by this Court or the Supreme Court itself where a matter of general public importance is involved. See ***Article 163(4)*** of the ***Constitution***. As such, issues raised by the applicant concerning interpretation and application of the ***Constitution*** do not fall within the ambit of our jurisdiction to grant leave to appeal to the Supreme Court. Nevertheless, we shall proceed to consider whether the other issues identified by the applicant constitute matters of general public importance.

31. A broad criteria of gauging whether an issue is of general public importance has been set out by the Supreme Court in the ***Malcom Bell***

case [supra] 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 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 [at earlier levels of the] 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 [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;***
>
> ***viii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become "matters of general public importance", so as to be a basis for appeal to the Supreme Court;***
>
> ***ix. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;***
>
> ***x. questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;***
>
> ***xi. questions with a bearing on the proper conduct of the administration of justice, may become "matters of general public importance," justifying final appeal in the Supreme Court."***

32. Applying the above criteria to the application at hand, does the intended appeal involve matters of general importance? We do not think so. Firstly, the burden lay with the applicant to demonstrate a lacunae or uncertainty in the law as pertains the interpretation and application of ***Section 39*** of the ***RLA***. See the ***Koinange Investment & Development Ltd. case***. Did he discharge that burden? ***Section 39*** of the ***RLA*** provided as

follows:-

> ***"39.***
>
> ***1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-***
>
> ***a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered; or***
>
> ***b) to see to the application of any consideration or any part thereof; or***
>
> ***c) to search any register kept under the Land Registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act.***
>
> ***2) Where the proprietor of land, a lease or a charge is a trustee, he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust."***

33. It is not in dispute that the said provision was aimed at protecting persons dealing with land registered under the land regime in question. In other words, it went to the defence of an innocent or *bona fide* purchaser for value. Nonetheless, from the wording of the said section it was available to a purchaser who dealt with the proprietor of the land in issue. This position was appreciated by courts of this country. A case in point is ***Nyangilo Ochieng & Another vs. Fanuel B. Ochieng & 2 Others [1996] eKLR*** where this Court's sentiments were expressed as follows:-

"With respect Section 39 does not help her. <u>That</u> <u>section assists all who deal directly with the proprietor of the land</u>. Such a person is not obliged to find out how the proprietor obtained his title if he has a registered title."*[Emphasis supplied].*

34. We understood the applicant to have relied on the provision to bolster his contention that the title he held to the suit property was indefeasible. It was therefore crucial for the applicant to demonstrate that he had purchased the suit property from the proprietor. This is what led this Court to delve into the sale agreement he produced in the trial court which clearly indicated that the agreement was between the applicant and one **Patrick** who was not the proprietor of the suit property. Despite the contents of the sale agreement, the applicant contended that he had purchased the suit property from **Rhoda** who was the proprietor at the time. Similarly, this Court looked into whether the said **Rhoda** was the proprietor. Like the trial court, this Court noted anomalies in the manner in which she was registered as the proprietor. Ultimately, this Court found that the applicant had not established that **Rhoda** was the legal proprietor of the suit property.

35. Besides, from the pleadings, the main dispute was the validity of the titles held by the applicant and the 1st respondent. Consequently, the issue of proof of the root of the rival titles was inevitable to resolve the dispute. Based on our observations herein above, we find that the applicant has not established any contradiction or uncertainty in law arising from the impugned judgment with respect to the interpretation and application of Section 39 of the RLA.

36. The other aspect of the alleged uncertainty in law was that the impugned judgment was in total contradiction to this Court's judgment in the ***Pashito Holdings Ltd. case***. The applicant's complaint in this regard was that prior to cancellation of his title, this Court ought to have heard **Rhoda**. Further, the applicant contended that in upholding the 1st respondent's title after cancellation of his title instead of reverting the title to **Rhoda Chelagat Kandie**, this Court condemned **Rhoda Chelagat Kandie** without affording her an opportunity to be heard.

37. In the ***Pashito Holdings Ltd. case***, the respondent therein filed the suit seeking *inter alia* a declaration that the Commissioner of Lands had no power to alienate public land to the appellants. The respondent never joined the Commissioner of Lands as a party. It is for that reason that this Court, in that case, expressed itself as herein under:-

> ***"The gravamen of the respondent's suit is that the Commissioner had no right to alienate a public land to any person for any use other than that for which it has been reserved. The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice.***
>
> **…**
>
> ***With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondent's case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief."***

38. In the instant case, as correctly appreciated by the 1st respondent, it was the applicant who instituted the suit and sought orders against the respondents herein. In any event, it was before this Court that the applicant sought for a retrial to enable **Rhoda Chelagat Kandie** and **Patrick Ngumba Mweni** be heard. In response, this Court stated:

> ***"We have considered this submission in light of the prayers in the memorandum of appeal. The memorandum of appeal as filed contains no prayer for re-hearing or retrial of the suit. This Court in Abdul Shakoor Sheikh -v- Abdul Najib Sheikh and 2 others, Civil Appeal No 161 of 1991 held that as a general rule, a party is not entitled to reliefs which he has not specified.***
>
> **…**
>
> ***Further, in the instant matter, the appellant as the petitioner before the trial court was duty bound to call any witnesses that were relevant and crucial to his case. A re-hearing is not a proper remedy to enable a party to fill gaps or bolster its case. It is not the duty of a judge to call any witness or to direct a party to call a particular witness. A court makes a determination based on the evidence tendered by the parties. That is the essence of the adversarial justice. The appellant has not pointed to us any law that allows us to order a re-hearing to enable a party to summon or call more witnesses with a view to fill gaps in its case. We find the prayer for re-hearing has no merit."***

Consequently, we are unable to see how the impugned judgment contradicted the ***Pashito Holdings Ltd. case*** or created uncertainty in law as to deserve consideration by the Supreme Court.

39. Secondly, in as much as the issue of limitation is a jurisdictional question, we are guided by the Supreme Court in the ***Hermanus Steyn case*** that-

> ***"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; …"***

It is not in dispute that the issue of limitation was raised for the first time before this Court and was never considered by the trial court. For that reason, it cannot constitute a matter of general public importance.

40. Thirdly, we note that apart from the applicant imploring us to grant the leave sought on the grounds that the Supreme Court should

determine whether this Court erred in basing its findings on unpleaded issues; and whether it acted out of the bounds of its jurisdiction under ***Rule 29*** of the ***Court of Appeal Rules***, he failed to demonstrate how those perceived issues were matters of general public importance.

41. In the end, we find that the issues raised by the applicant in the intended appeal to the Supreme Court are no more than facts which were in contest between the parties and do not in any way transcend the circumstances of the case. As such, the applicant has not made out a case to warrant the certification sought hence the application is devoid of merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

R. N. NAMBUYE

...

JUDGE OF APPEAL

HANNAH OKWENGU

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR