IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & ODEK, JJ.A)

CIVIL APPLICATION No. SUP. 5 Of 2019 (UR. 4/2019)

BETWEEN

LANGATA DEVELOPMENT CO. LIMITED.....APPLICANT

AND

MARY WANJIRU DAMES.....RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Nairobi (Ouko, Kiage & Murgor, JJ.A) dated 26th February, 2019 and also being an application for stay and preservation of the suit property

in

Civil Appeal No. 283 of 2016)

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RULING OF THE COURT

1. At all material times in this matter, the respondent, ***Mary Wanjiru Dames***, was the registered proprietor of all that parcel of land known as I.R. 57550 - LR 7540/23 which was measuring 1062 acres. By a sale agreement dated 6th February, 1989, the respondent agreed to sell and the applicant, ***Langata Development Co. Limited***, agreed to purchase 672 acres of the land. The respondent divided the land into four portions namely:

(a) Portion A – 27 acres

(b) Portion B – 62 acres

(c) Portion C – 672 acres (and which portion was sold to the applicant)

(d) Portion D – 300 acres.

2. Survey was done on the property to divide it into the four portions. It later emerged that the surveyors had given the applicant 757.3 acres of land instead of 672 acres. This was an extra 85.3 acres. An instrument of transfer was executed which transferred 757.3 acres to the applicant. Upon discovery of the extra land transferred to the applicant, the respondent sought an order for re-transfer of the excess 85.3 acres of land.

3. By a judgment dated 26th February, 2019, this Court made an order that the transfer and registration of the extra 85.3 acres to the applicant is null and void and that the said 85.3 acres should be re-transferred to the respondent forthwith. By settlement of terms made by this Court

on 26th February, 2019, an order was issued to evict the applicant, its agents/servants or tenants from the extra 85.3 acres' portion of land.

4. Aggrieved with the judgment, the applicant has filed a Notice of Motion dated

12th March, 2019 seeking *inter alia* the following prayers namely:

> *"(a) That this Court be pleased to certify that an intended appeal to the Supreme Court raises questions of general public importance and to grant leave to appeal to the Supreme Court.*
>
> *(b) That this Court certify that the applicant may lodge an appeal to the Supreme Court against the judgment and orders of this Court issued in Nairobi Civil Appeal No. 283 of 2016.*
>
> *(c) That this Court be pleased to issue directions as to the period of time within which the applicant should lodge the intended appeal and serve the Memorandum of Appeal to the Supreme Court.*
>
> *(d) That this Court be pleased to issue an order of preservation of the suit property in respect of the judgment and decree of this Court issued in Civil Appeal No. 283 of 2016 pending the hearing and determination of the intended appeal at the Supreme Court."*

5. The instant application for certification and leave to appeal to the Supreme Court is supported by an affidavit sworn by ***Mr. Eliud A. Kariuki***. The grounds in support thereof are stated to be *inter alia* that the intended appeal raises substantive questions of general public importance namely:

> *(a) A question has arisen as to the sanctity of a duly issued certificate of title under* ***Section 23 of the Registration of Titles Act*** *(now repealed by the Land Registration Act No. 3 of 2013.*
>
> *(b) Whether the Court of Appeal can legally ignore the fact that the contentious 85.3 acres is currently owned and occupied by third parties who have an overriding interest thereon.*
>
> *(c) Whether the Court of Appeal can ignore that the third parties now occupying the extra 85.3 acres are innocent purchasers for value without notice.*
>
> *(d) That the Court of Appeal erroneously ignored that the third party innocent purchasers for value stand the risk of being evicted from the suit property.*
>
> *(e) That the respondent is in the process of extracting the decree delivered in Civil Appeal No. 283 of 2016 and has threatened to commence execution which orders are subject to the issues of general public importance to be raised in the intended appeal at the Supreme Court.*

6. The respondent filed Grounds of Opposition and a Replying Affidavit opposing the instant application.

7. At the hearing of this application, learned counsel ***Mr. Wilfred Lusi*** and ***Ms. Carol Rono*** appeared for the applicant while learned counsel Mr. Gitau Mwara appeared for the respondent. The applicant filed a list of authorities in support of the application.

APPLICANT'S SUBMISSIONS

8. Counsel for the applicant concentrated on three issues in support of the application. First, he made submissions for leave to deem the Notice of Appeal dated 13th March, 2019 as duly filed and served; second he urged the grounds in support of certification and lastly he urged this Court to grant an order preserving the suit property.

9. On the issue of the Notice of Appeal, the applicant urged us to make an order that the Notice of Appeal dated 13th March, 2019 attached to the face of the instant application be deemed as duly filed and served. In support, counsel cited the decision of Supreme Court in **Sundowner Lodge Limited -v-Kenya Tourist Development Corporation [2019] eKLR** where it was held that ignorance on filing a notice of appeal on the part of counsel is an innocent mistake and a delay of four (4) months is not inordinate.

10. On the merits of the application for certification, counsel rehashed the background facts leading to the dispute between the parties. It was submitted that the 85.3 acres of land which this Court ordered to be re-transferred to the respondent was sold to third parties who are innocent purchasers for value. That the third parties have individual titles over their respective portions. That this Court erred in failing to observe the provisions of ***Section 23*** of the **Registration of Titles Act (RTA)** which upholds sanctity of title. That this Court having ordered re-transfer of the 85.3 acres of land ignored the provisions of ***Section 23*** of the **RTA.** That the intended appeal to the Supreme Court raises a matter of general public importance on the proper interpretation and application of ***Section 23*** of the **RTA**. That this Court ignored the fact that the applicant had engaged professional surveyors to survey the land; that the conveyance documents were drawn by professional advocates; that the judgment of this Court delivered on 28th February, 2018 is *per incuriam;* that this Court vide its judgment wholesomely ignored the doctrine of *lis pendens* without considering the legal overriding interest of the third party bona fide purchasers for value.

11. More specifically, the applicant asserts that the decision of this Court is *per incuriam* the judgment delivered in **Dr. Joseph N. K. Arap Ngok -v- Justice Moijo Ole Keiuwa & Others, Nairobi Civil Application No.60 of 1997,** where it was held

that:

> **"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all the alleged equitable right of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in Jeopardy"**

12. In its supporting affidavit, the applicant avers it intends the Supreme Court to answer *inter alia* the following abridged questions as a matter of general public importance:

> *(a) Whether it is available to a court of law to effectively cancel a certificate of title issued under the Registration of Titles Act in absence of cogent and plausible evidence on fraud or misrepresentation.*
>
> *(b) Whether it is available in law for a court to ascribe and apportion liability and culpability, if at all, of the professional unsupervised actions of professionals regulated by law in a transaction for the sale and transfer of land as against the instructing party.*
>
> *(c) What is the legal process for the transfer and acquisition of title over un-surveyed land?*
>
> *(d) What is the remedy in the instance of transfer of land undertaken pursuant to a mutual mistake?*
>
> *(e) Under what circumstances can a court legally override, subsume and disregard the overriding interest of innocent purchasers for value without notice who are in actual occupation of the suit property.*

RESPONDENT'S SUBMISSIONS

13. The respondent raised various grounds of opposition to the instant application. It was submitted that the present application is time bared as no Notice of Appeal has been filed in the matter as required by ***Rule 31*** of the **Supreme Court Rules.** It was submitted that as at the date of the hearing of the instant application, there was no Notice of Appeal that had been filed and lodged either at the Court of Appeal Registry or the Supreme Court Registry in relation to Civil Appeal No. 283 of 2016; that the purported Notice of Appeal that has been filed in this matter and dated 12th March, 2019 was filed over 5 months out of the statutory period of fourteen (14) days and should be struck off. That no Notice of Appeal has been served upon the respondent within seven (7) days as provided for under ***Rule 32*** of the **Supreme Court Rules.**

14. The respondent further submitted that the present application is time barred under ***Rule 40*** of the **Rules** of this Court which provides that an application for leave to appeal to the Supreme Court must be filed within fourteen (14) days of the date of the filing of a proper Notice of Appeal at the Supreme Court.

15. On the merits of the application it was submitted that both the applicant and respondent are private citizens and hence the land grievances of a private citizen against the private land rights of another private citizen cannot give rise to any issue of general public importance or a matter of public interest to justify leave and certification to appeal to the Supreme Court. Counsel stressed that the applicant is neither a public corporation, public school nor a public company to raise any issue of general public importance. It was also submitted the applicant has not particularized any constitutional issue that needs to be considered by the Supreme Court.

16. In urging us to dismiss the application, the respondent stated the substratum of the intended appeal no longer exists. That subsequent to delivery of the judgment of this Court, the Land Registry on 15th March, 2019 entered details of the judgment in the Register and the suit property IR No. 57550 LR No. 75/23 has been expunged and does not exist. That a new survey map for 85.3 acres was prepared and effected on 29th April, 2019 and there is nothing to reverse or preserve through any preservation order as the substratum in form of the original suit property has ceased to exist. For the foregoing reasons, the respondent urged us to dismiss the instant application with costs.

ANALYSIS and DETERMINATION

17. We have considered the instant Notice of Motion, the grounds in support thereof as stated on its face and in the supporting affidavit. We have also considered the grounds of opposition and the replying affidavit as well as the authorities cited in the matter.

18. We shall consider the instant application at three levels. First, the issue of Notice of Appeal. Second, the application for certification and leave to appeal and third, the prayer seeking preservation orders.

19. We have examined the contents, annextures and all the documents filed in support of the application. There is no Notice of Appeal on record in this matter. Attached to and on the face of the instant application is a "Notice of Appeal" dated 13th March, 2019. This "Notice of Appeal" has never been lodged and filed at the Court of Appeal. There is no lodgment or endorsement of the said Notice of Appeal as having been filed at the Court of Appeal in relation to Civil Appeal No. 283 of 2016. Incidentally, the said "Notice of Appeal" is addressed to the Supreme Court. It has never been filed and lodged at the Supreme Court.

20. At the hearing of this application we took the liberty to seek clarification from counsel for the applicant as to whether a valid Notice of

Appeal has been filed at the Court of Appeal or Supreme Court in relation to this matter. Counsel conceded that no Notice of Appeal had been filed either at the Supreme Court or Court of Appeal. Counsel urged us to exercise our inherent jurisdiction to deem as filed and served the "Notice of Appeal" dated 13th March, 2019 that is on the face of the instant application.

21. We further note that no payment has been made for the filing of a Notice of Appeal and there is no application for leave to extend time to lodge and file a Notice of Appeal out of time.

22. The Supreme Court stated in **Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR,** stated thus:

> **"A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106,**
>
> **113 stated inter alia:**
>
> **"As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all."'** [Emphasis added].

23. The Supreme Court also in **Independent Electoral & Boundaries Commission -v - Jane Cheperenger & 2 Others [2015] eKLR,** emphasized that without filing a notice of appeal, there can be no expressed intention to appeal.

24. In the instant application, the applicant has never filed and lodged a Notice of Appeal either before the Supreme Court or this Court. In the absence of a Notice of Appeal on record, we find we have no jurisdiction to entertain the instant application for leave and certification to appeal to the Supreme Court. In **Owners of the Motor Vessel "Lillian S" -v- Caltex Oil (Kenya) Ltd**

[1989] KLR 1, Nyarangi , JA expressed himself as follows:

> *'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".* (Emphasis supplied)

25. Having found that there is no Notice of Appeal to give us jurisdiction to entertain the instant application, the dicta in **Owners of the Motor Vessel "Lillian S" -v- Caltex Oil (Kenya) Ltd [1989] KLR 1** enjoin us to down our tools and say no more in this matter. However, in the event we are wrong on the jurisdiction question (which we doubt), we are obliged to consider the merits of the instant application for certification and leave to appeal to the Supreme Court.

26. The principles applicable in an application for leave and certification to appeal to the Supreme Court are well settled and enunciated in numerous cases. The Supreme Court gave the test for granting certification and leave to appeal to the Court in **Hermanus Phillipus Steyn -v- Giovanni Gnecchi – Ruscone, Supreme Court application No.4 of 2012.**The Court held that the meaning of "matter of general public importance" may vary depending on the context. The Court considered ***Article 163 (4) (b)*** of the Constitution and stated at paragraph 58 that:

> **"…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."**

27. This Court in **Kenya Plantation and Agricultural Workers Union -v- Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau) represented by Its Promoters David Benedict Omulama & 9 others [2018] eKLR** stated as follows:

"The principles set out in Hermanus Phillipus Steyn -v- Giovanni Gnecchi-Ruscone, (**supra) to determine whether a matter is of general public importance included:**

> ***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."**

28. In the instant application, it is our duty to consider and appraise if the foregoing principles enunciated for certification and leave to appeal have been fulfilled. At the risk of repetition, the applicant has raised several questions and issues alleged to be matters of general public importance for consideration and determination by the Supreme Court. Some of the questions are:

viii. Whether it is available to a court of law to effectively cancel a certificate of title issued under the Registration of Titles Act in absence of cogent and plausible evidence on fraud or misrepresentation.

ix. Whether it is available in law for a court to ascribe and apportion liability and culpability, if at all, of the professional unsupervised actions of professionals regulated by law in a transaction for the sale and transfer of land as against the instructing party.

x. What is the legal process for the transfer and acquisition of title over un-surveyed land?

xi. What is the remedy in the instance of transfer of land undertaken pursuant to a mutual mistake?

xii. Under what circumstances can a court legally override, subsume and disregard the overriding interest of innocent purchasers for value without notice who are in actual occupation of the suit property.

29. We have considered the questions alleged to raise issues of general public importance. It is trite law, as the Supreme Court stated in **Hermanus Phillipus Steyn -v - Giovanni Gnecchi-Ruscone** (supra) (Par. 60), that to succeed in an application for certification under ***Article 163(4)(b)*** of the Constitution, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance;

"the determination of 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." (Emphasis supplied)

30. In this matter, the issues and questions identified and posited by the applicant are targeted at impugning the judgment of this Court delivered in Civil Appeal No. 283 of 2016. The law on the issues and questions posited by the applicant is well settled. In **Malcolm Bell - v- Hon. Daniel Toroitich arap Moi & Another, S.C. Application No. 1 of 2013** the Supreme Court held, (at

paragraph 46,) that:

"It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law."

31. Some of the issues identified by the applicant as intended for consideration by the Supreme Court are well settled in law. For instance, we are convinced it is not a matter of general public importance for the Supreme Court to consider and determine what is the legal process for transfer and acquisition of title over an un-surveyed land. The procedure for allotment, allocation and survey of land is regulated by statute. It is not within the jurisdiction of the Supreme Court to advise parties (or Kenyans for that matter) on the procedure to be followed to obtain title for un-surveyed parcel of land. The Supreme Court is neither the Commissioner of Lands nor the Director of Survey or a consultant and advisor on real property transactions.

32. The applicant posited the question that the Supreme Court should consider and determine what is the remedy in the instance of transfer of land undertaken pursuant to a mutual mistake. The law on this question is well settled in contract law. Comparative jurisprudence succinctly illuminates the issue. In the Australian case of **Lukacs vs. Wood (1978) 19 SASR 520**, the intent of the vendor was to transfer three vacant parcels of land to the defendant. There was a misdescription in the contract that saw the defendant receive title to two vacant blocks of land, plus a third title, on which was built an apartment dwelling. It was some two years post settlement that the mistake was realized. The vendors sought to correct the mistake and the defendant responded that indefeasibility of title allowed him to retain title to the land on which the apartments stood. The Supreme Court of South Australia held in favour of the vendors. There was a mistake in the conveyancing process, a total failure of consideration and this rendered the contract void.

33. In **Tutt vs. Doyle (1997) 42 NSWLR 10,** because of a mistake in the transfer process, Tutt received a block of land larger than what was intended. He was aware that a mistake had been made. The New South Wales Court of Appeal saw the question quite simply — was it unconscionable for one party to take advantage of another's mistake. The answer was yes. The transfer was held to be null and void on account of mistake.

34. On the other issues and questions identified by the applicant, it has not been demonstrated to our satisfaction that there is a substantial point or question to be urged in the intended appeal the determination of which will have a significant bearing on the public interest. Further, the questions and issues identified by the applicant for the intended appeal to the Supreme Court cannot be said to be of any special jurisprudential moment. (See Ruling of the Supreme Court in **Prof. Olive Mugenda -v- Dr.Wilfred Itolondo & Others Supreme Court Civil Application No. 21 of 2015).**

35. At this juncture, we find it apposite to comment on the respondent's submission that since the applicant and respondent are both private citizens, no matter of general public importance or public interest may arise. This is a misconception of the concept matter of general public importance. A matter does not become or cease to be of general public importance or to involve public interest simply because an applicant or respondent is a private citizen and not a public entity.

36. In penultimate, one of the prayers sought in the instant application is an order for preservation of the suit property. In this regard, we re-affirm the decision of this Court in **Dickson Muricho Muriuki -v -Timothy Kagondu Muruiki & 6 others [2013] eKLR** where it was held:

> **"On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made…...**
>
> **It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court.**

37. Persuaded by the sound reasoning in ***Dickson Muricho Muriuki vs.Timothy Kagondu Muruiki*** (supra), the applicant has not given us good reasons to depart from it. If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court. Accordingly, we decline to grant a preservation order as prayed and we re-affirm this Court is *functus officio* after pronouncement and delivery of its judgment. Any application for stay of the judgment of this Court or a preservation order pending the hearing of an intended appeal to the Supreme Court should be made before the Supreme Court.

38. In totality, having scrutinized the issues and questions posited by the applicant, we find that no matter of general public importance has been identified that would justify us to grant leave and certification to appeal to the Supreme Court. The upshot of our consideration is that the Notice of Motion dated 12th March 2019 has no merit and is hereby dismissed with costs. The final orders of this Court are as follows:

> ***a) We decline to grant leave and certification to appeal to the Supreme Court.***
>
> ***b) No preservation or stay order is granted.***
>
> ***c) The applicant to bear the costs of this application.***

Dated and delivered at Nairobi this 19th day of July, 2019

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR