IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A)

CIVIL APPLICATION NO. 10 OF 2014

BETWEEN

PATI LIMITED……...……..…..…..APPLICANT

AND

FUNZI ISLAND DEVELOPMENT LIMITED…....……..…..1ST RESPONDENT

J.B HAVELOCK……..…….……....2ND RESPONDENT

M.E HAVELOCK……..……...……..……..3RD RESPONDENT

THE COUNTY OF KWALE……...……...…….4TH RESPONDENT

COMMISSIONER OF LANDS……...……..……...5TH RESPONDENT

(*Being an application seeking leave to appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal in Civil Appeal No. 252 of 2005 delivered at Mombasa on 27th February 2014.)*

RULING OF THE COURT

[1] Litigation giving rise to the matter before us was precipitated by an allotment letter dated 27th July 1994 through which ***The Commissioner of Lands***, who is now the 5th respondent (*hereinafter referred to as* ***the Commissioner***), for and on behalf of ***The County Council of Kwale*** who is the 4th respondent (*hereinafter referred to as* ***the County Council***), allocated a piece of land situated at the shores of Indian Ocean in Msambweni, Funzi Island, in the then Kwale District, now Kwale County, known as L.R No. 20247 and comprised in the Grant registered as CR. No. 106 (*hereinafter referred to as "****the suit land****")*, to the applicant herein ***Pati Limited***.

[2]***Funzi Island Development Limited*** (*the 1st respondent*) owns a piece of land on the main Funzi Island, upon which it has developed a luxurious tented camp. The suit land was immediately in front of the 1st respondent's development and the 1st respondent and its directors ***J.B Havelock*** and ***M.E Havelock*** (the 2nd and 3rd respondents) were concerned that any development on the suit land would impede the 1st respondent's access to the open sea and adversely affect its tourist business.

[3] The 1st, 2nd and 3rd respondents therefore filed ***Judicial Review Miscellaneous Application No. 272***

of 1994, in which it sought orders of *certiorari* to quash: ***Gazette Notice No. 3831*** of 24th June 1994 by which the County Council had set apart the suit property for allocation; the letter of allotment dated 27th July 1994, by which the Commissioner had (for and on behalf of the Council), allocated the suit land to the applicant; and Grant No. C.R. 106 issued to the applicant in respect of the suit land. The respondent also prayed for an order of prohibition against the applicant, its servants or agents from having any dealings whatsoever or carrying out any developments on the suit land.

[4] In support of the application for Judicial Review, the 1st, 2nd and 3rd respondents contended *inter alia*: that the suit property was not trust land but a mangrove forest declared by proclamation No. 44 of 1932 to be a protected area and therefore neither the Commissioner nor the County Council had authority to alienate the suit land. Further, that any development on the suit land would adversely affect the local population including the fishermen's access to the open sea.

[5] The applicant opposed the application for Judicial review maintaining that the suit land was trust land which was vested in the County Council and as such, the County Council had authority to allocate it to anybody for purposes beneficial to itself and the local public; that the suit land was originally allocated to ***Hon. K. B. Mwamzandi***, the area Member of Parliament who was also an assistant minister for Public Works and Housing, who had applied to the council for the setting apart and allocation of 0.7 hectares of the strip of land in question for use as a boat landing base; that the suit land was regularly and legally allocated to the applicant under the Trust Land Act and the former Constitution, and the applicant had acquired an absolute and indefeasible title under ***section 23*** of the Registration of Titles Act, Cap 281 (now repealed).

[6] The Judicial Review application was heard and dismissed by the High Court (***Khaminwa, J.)*** who held that the legal requirements for setting apart the suit land under the Trust Land Act were complied with; that there was no evidence that the suit land was reserved for public use; that there was no conclusive evidence to show that the suit land was forest land and that the 1st, 2nd and 3rd respondents had no *locus standi* to bring an action for Judicial Review as their property was 200 meters away from the suit land, and that the authority in charge of forests was the right party to bring the suit to preserve the forest land. The 1st, 2nd and 3rd respondents being dissatisfied with the said findings appealed to this Court against the ruling of the learned Judge in ***Civil Appeal No. 252 of 2005 (Mombasa***).

[7] In a judgment delivered on 27th February 2014, this Court (differently constituted) sitting in Mombasa unanimously allowed the respondents' appeal and issued orders quashing Gazette Notice No. 3831 dated 24th June, 1994, setting apart the suit land and Grant no. CRN 106 in respect of the suit land. The applicant is dissatisfied with the judgment of the Court and now seeks to invoke the appellate jurisdiction of the Supreme Court. By a Notice of Motion dated 13th May 2014 said to be brought under **Article 159 (2)(a)**,**(d)** & **(e)**; **Article 163(4)** of the Constitution, ***section 3A*** & ***3B*** of the Appellate Jurisdiction Act; ***Rule 42*** and ***43(1)*** of the Court of Appeal Rules 2010, the applicant seeks orders as follows:

> "*1.* ***THAT the Honourable Court do certify that the intendedappeal involves matters of general public interest.***
>
> ***2. THAT this Honourable Court be pleased to grant leave to the Applicant to Appeal against the judgement of the Court of Appeal delivered on 27th February, 2014 in Civil Appeal No. 252 of 2005 at Mombasa in Funzi Island Development Limited and 2 Others-Vs-The County Council of Kwale and 2 Others and certify that the same raises and involves issues of general public importance.***
>
> 3. ***THAT costs of and incidentals to this application abide the result of the intended appeal."***

[8] The notice of Motion which was argued before us on 26th November 2014, is the subject of this ruling. The motion was supported by the affidavit of ***Allesandro Torriani*** (*Torriani*), the applicant's Managing Director. In the affidavit, Torriani depones *inter alia* that the applicant intends to appeal against the judgment of the Court of Appeal on both constitutional and public interest grounds; that the

applicant has business investments, buildings and structures on the suit land and stands to suffer loss in excess of Kshs.240,000,000/- if the judgment of the Court of Appeal is executed; that the intended appeal has excellent chances of success and therefore the applicant should be given an opportunity to ventilate it in the Supreme Court as the final arbiter.

[9] The applicant's motion is also supported by grounds stated on the motion as follows:

a. ***The intended appeal raises Constitutional issues which require interpretation and determination by the Supreme Court of Kenya.***
b. ***The intended appeal involves matters of general public importance which were the subject of judicial determination in the High Court and in the Court of Appeal.***
c. ***The questions that flow from the judgment and which form the issues intended to be argued in the Supreme Court transcends the facts of this case.***
d. ***The points of the law the Applicant intends to raise in the Supreme Court are not only important and substantial, but will also have a significant bearing on the public interest.***
e. ***A substantial miscarriage of justice will occur unless the intended appeal is heard.***
f. ***The findings of the Court of Appeal will cause wide spread and significant uncertainty on important and substantial points of law that arise regularly in the Courts.***
g. ***The Respondents are in the process of implementing execution proceedings. The Applicant stands to suffer substantial loss if its title is revoked and it will incur irreversible loss.***

[10] In arguing the motion, the applicant was represented by ***Mr. Fredrick Ngatia*** who was assisted by ***Mr. Benjamin Njoroge***. Mr. Ngatia submitted that the certification application was brought under ***Article 163(4)(b)*** of the Constitution on the basis that the matters to be raised transcends the suit before the court, and goes to the realm of general public interest; that the controversy is on a matter daily litigated in the Courts by a large segment of litigants, and its determination will have a bearing on general public interest; that the judgment sought to be appealed against has created uncertainty and it is necessary for the Supreme Court to give guidance.

[11] Mr. Ngatia pointed out that the Judicial Review application as amended by the Notice of Motion dated 30th June 1999, sought orders of *certiorari* in regard to a Grant and the setting apart of land that had taken place in 1994. That is five years before the amended notice of motion was filed. That application was dismissed by the High Court on 14th October, 2004 giving rise to the respondents appeal to the Court of Appeal against the High Court judgment. Mr. Ngatia argued that the appeal against the judgment of the Court of Appeal was appropriate for certification, as the judgment was unclear and lacked unanimity with regard to whether the suit land was trust land or forest land which was not available for alienation, or whether it was a foreshore. There was also an issue whether Judicial Review proceedings are a suitable mode for litigating alienation of land and a suit seeking revocation of title. Further, there was a corollary issue with regard to whether an amendment to a Notice of Motion is permissible in law where the period would extend beyond the six months set under ***section 9(3)*** of the Law Reform Act.

[12] Mr. Ngatia reiterated that all the issues identified transcends private interests and have a public interest element. In support of his submissions, Mr. Ngatia relied on ***Hermanus Phillipus Steyn v Giovanni Gnecchi Ruscone [2013] eKLR*** *(Hermanus decision)* in which the Supreme Court set out the principle for the grant of certification and leave to appeal to the Supreme Court as follows:

> ***" 60 …***
>
> ***(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 the 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 the 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."

[13] Counsel further relied on the case of ***Muiri Coffee Estate v Kenya Commercial Bank & Another [2014] eKLR***, where this Court held missing court records to be a matter of public interest, and also stated that the categories of what could constitute matters of general public importance as set out in the **Hermanus** case (supra) should be read disjunctively and not conjunctively, such that a matter could qualify for certification if it possessed one or a combination of the categories. Mr. Ngatia also cited the case of ***Akaba Invetment Ltd v Kenya Ports Authority Civil Appeal N0. 255 of 2003*** *(*unreported*)* to buttress the position that Judicial Review was not the appropriate mode in pursuing the redress sought by the respondents. Counsel asserted that the suit was trust land set apart for purposes of alienation and the issue being the setting apart of trust land, ***section 12*** of the Trust Land Act provided that a suit should be filed in the High Court and there was therefore a statutory procedure to be followed.

[14] Mr. Ngatia reiterated that the suit land was trust land set apart for purposes of alienation and the controversy being the setting apart of that land, ***section 12*** of the Trust Land Act was applicable. Mr. Ngatia contended that, the judgment of the Court intended to be appealed against had created uncertainty and therefore the certification should be issued to enable the Supreme Court resolve the issue.

[15] The 1st, 2nd and 3rd respondents were represented by learned counsel ***Mr. Ushwin Khanna***. In response to the application, the respondents relied on an affidavit sworn by ***Anthony Duckworth*** *(Duckworth)* the managing director of the 1st respondent. In effect Duckworth deponed to matters of law which were reiterated by the respondents counsel in his submissions. Briefly, Mr. Khanna maintained that the intended appeal was wholly incompetent and that leave to appeal should be denied. Mr. Khanna argued that the Court had made a finding that ***Gazette Notice No. 3831*** setting apart the suit land and the subsequent allotment were illegal; that the right to property under ***Article 40*** of the Constitution did not extend to property that had been unlawfully acquired; that since the grant was unlawfully acquired, the proposed appeal could not be in the interest of justice and leave should therefore be denied; that the judgment delivered in ***Civil Appeal No. 252 of 2005*** did not raise any issues of general public importance or public interest, nor did they raise any issues which required interpretation and determination by the Supreme Court as contended by the applicant.

[16] Mr. Khanna further submitted that the allegations that the Grant had been obtained through fraud, was not controverted as the applicant did not address the issue in its supplementary affidavit; that the applicant had not framed any issues of general public importance either in the body of the application or in its submissions; that the intended appeal did not raise any issues of constitutional interpretation nor did it make any reference to the current Constitution; that the issue of Judicial Review proceedings and their appropriateness were dealt with by the Court of Appeal; that the Court made a finding that ***section 12*** of the Trust Land Act was not applicable to the suit land as it was not trust land and that ***Githinji & Maraga,***

JJA. had found that the suit land was partly a public beach and partly a protected mangrove forest; that there was no uncertainty in the judgment of the Court of Appeal as issues of fraud and misrepresentation were addressed.

[17] Regarding the issue of interpretation of the Constitution, it was pointed out that there was no reference to ***Article 40*** of the Constitution in the judgment and that if the judgment involved a constitutional issue then no certification was required as an appeal from the judgment of the Court of Appeal would lie as a matter of right. It was submitted that the learned Judges of the Court of Appeal properly addressed the issues before them including the Judicial Review procedure. Regarding ground 5, it was submitted that the same was an entirely new ground and it was never raised in the Superior Court. Further that matters of *certiorari* were only limited to a decree or order and does not therefore touch on the cancellation of titles. The Court was therefore urged not to certify the matter as appropriate for the appellate jurisdiction of the Supreme Court.

[18] ***Mr. Eredi*** Senior Principal Litigation Counsel who appeared for Commissioner submitted that the suit land which was in dispute had not been fully described as there was an issue whether the land was forest land or a foreshore; that the description of the land was material in determining the Judicial Review. Mr. Eredi noted that the suit land was allotted under the former Constitution. He faulted the Court of Appeal for addressing the merits of the allocation rather than the process of allocation thereby expanding the scope of Judicial Review, and that this was a matter of general public importance that calls for guidance from the Supreme Court on the validity of titles.

[19] In response to the respondents' submissions, Mr. Ngatia noted that the public interest could not only arise at the instance of the respondents; that there were allegations of misrepresentation against persons who were not party to the suit, that there was lack of unanimity on whether the suit land was forest land or trust land. Further that the Law Reform Act prescribes a period of six months; finally that the appellant did not have to justify its intended grounds of appeal as the certification process was not an opportunity to review the decision of the Court of Appeal.

[20] The Supreme Court derives its appellate jurisdiction from ***Article 163(4)*** of the Constitution that provides as follows*:*

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> a. ***As of right in any case involving the interpretation or***
>
> ***application of this Constitution; and***
>
> b. ***In any other case in which the Supreme Court, or the Court***
>
> ***of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).***
>
> 5. ***A certification by the Court of Appeal under clause 4(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."***

[21] In the prayers sought in the applicant's motion which prayers have been reproduced at paragraph 7 (supra), the applicant is seeking certification that the intended appeal involves a matter of general public importance. That brings its application under ***Article 163(4)(b)*** of the Constitution. However, the applicant has also pleaded in the grounds stated on the face of the motion (reproduced at paragraph 9 - supra), that the intended appeal raises constitutional issues that requires interpretation and determination by the Supreme Court of Kenya. If that be so, then the application would fall under ***Article 163(4)(a)*** of the Constitution which would then mean that the applicant has a right of appeal as of right and would not therefore require certification. Such a position would then make the application before us a mere academic exercise.

[22] Worthy of note is that the applicant has not specified in the grounds stated in the motion the constitutional issue which requires interpretation and determination by the Supreme Court. The draft petition that was annexed to the supporting affidavit sworn by Torriani sheds light on this aspect of the applicant's contention. At paragraph B (1) & (2) of the draft petition, the applicant indicates the following grounds of appeal:

> ***"1. The learned Judges erred in law misinterpreted and***
>
> ***misapplied** Article 40 **of the Constitution when they revoked the applicant's title known as LR No. 20247 Funzi Island Kwale District.***
>
> ***2. The learned judges erred in law misinterpreted and***
>
> ***misapplied** Article 62(1)(1) **in holding that the applicant's land was a foreshore and or beach – public land."***

[23] We do not find it necessary to consider the propriety of these ground as our jurisdiction only arises under ***Article 163(4)(b)*** of the Constitution, where the intended appeal involves a matter of general public importance. In the case of ***Muiri Coffee Estate v Kenya Commercial Bank & Another*** (supra) the Court of Appeal considering a similar application pronounced itself as follows;

> *"**…what we must decide is whether it satisfies the constitutional threshold of a matter of general public importance being involved. This the applicant must satisfy, because the Supreme Court has held that it is only those matters requiring the further input that should be escalated to it by way of appeal since other tier courts beginning from this Court and those below it, do have the professional competence to deal with technical points of law, no matter how complex.**"*

[24] The challenge that the applicant has to meet before us therefore is, to demonstrate that the case involves a matter of general public importance. The general guidelines in determining whether a matter is of general public importance are now clear having been laid down by the Supreme Court in the ***Hermanus*** decision (supra) quoted at paragraph 12 (supra).

[25] It is clear that for the applicant to succeed in its application, the burden is upon it to establish that the intended appeal to the Supreme Court raises issues of general public importance. In doing so, the applicant must demonstrate that the matter intended to be canvassed is one that goes beyond the circumstances of its case, and has a significant bearing on the public interest. In this regard, the following observation by the Supreme Court at paragraph 59 of the decision is instructive:

> ***"…It is clear that the matter of general public interest may take different forms: as instances an environmental phenomenon involving the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of people in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance or the court's scope for dispensing redress, or the mode of discharge of duty by public officers."***

[26] Thus, it was necessary as a starting point for the applicant to identify and concisely set out the elements of general public importance which it attributes to the matter for certification. However, in the grounds upon which the application was premised, which grounds are set out at paragraph 9 (supra), the applicant has not specifically identified any matter of general public importance, or points of law that are important and substantial or have a significant bearing on public interest or any question that flows from the judgment that forms issues that transcends the facts of the case.

[27] In the grounds of appeal set out in the applicant's draft petition, apart from the allegations relating to misinterpretation of constitutional provisions, the applicant has only complained about the Judges' erring

in revoking the applicant's title in Judicial Review proceedings, and in failing to appreciate that the prayer for certiorari was made after the statutory period. In our view, the grounds as set out do not raise any issue that can be said to be of general public importance or interest. We are fortified in this position by the affidavit sworn on 13th May 2014 by ***Kiarie Kariuki*** *(Kariuki*), an advocate from the firm representing the applicant. Kariuki depones as follows:

"3. the applicant is aggrieved by the decision of the Court of Appeal regarding the following issues, inter alia; which are produced verbatim:

a. ***Whether or not the Appellants have locus standi in this matter;***
b. ***Whether or not the suit land was initially Trust Land, a public beach or a mangrove forest protected under the Forests Act;***

c. ***If it was Trust Land, whether or not the Council had authority to and did properly and regularly alienate it to Hon. Mwamzandi at whose request it later re-allocated it to the applicant herein;***

4. ***That regarding the aforesaid issues identified at paragraph 3 above, the Appellate Court made findings that the suit land was and is still forest land which was not available for alienation;***

5. ***That the Appellate Court further made findings that suit land was neither trust land nor was it properly allocated and the Applicant was not protected by Sections 23 of the Registration of Titles Act, Cap 281 Laws of Kenya.***
6. ***That I have again perused the said judgment and noted that the Appellate Court made findings that the Applicants land fell between the high and low water mark and was therefore public land as stipulated under Article 62 of the Constitution of Kenya, 2010.***

7. ***That it is clear from the aforesaid decision that the findings are not only of general public importance but also transcends the facts of this case for the reason that the Appellate Court revoked the Applicant's title on the basis of the findings...***

[28] It is clear from this affidavit that the issues raised were specific to the matters that were before the learned Judges and there is nothing of general public importance or interest. The applicant appears to be aggrieved by the decision of the Court contending that the Judges erred. However, that cannot be a reason for certifying the matter as appropriate for the Supreme Court's intervention. As the Supreme Court stated in ***Peter Ngoge v Francis Ole Kaparo & 5 Others [2012] eKLR***:

> *"…**the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of jurisprudential moment, will deserve the further input of the Supreme Court.**"*

[29] Learned counsel Mr. Ngatia submitted that the intended appeal was appropriate for certification as the judgment of the Court of Appeal was unclear and lacked unanimity with regard to whether the suit land was trust land or forest land or whether it was a foreshore; and that there was an issue with regard to whether Judicial Review proceedings are appropriate for litigating alienation of land; and finally whether an amendment to a notice of motion is permissible where the period would extend beyond the six months period set under ***section 9(3)*** of the Law Reform Act. Without going into an analysis of the judgment, the following findings in the judgment of the learned Judges demonstrate the nature of the key issues that arose. At paragraph 16 of his judgment, ***Githinji, JA.*** stated as follows:

> ***"…it is indeed a part of the foreshore and is a sandy breach (sic) as this Court observed when it visited the land. As section 102 of the Crown Lands Ordinance, Chapter 155 of Laws of Kenya, 1948, and as*** *section 82* ***of Government Lands Act (Cap 280) similarly stipulate, the foreshore is reserved and a conveyance, lease or licence does not confer***

> ***any right to the foreshore. The foreshore is State land and*** *Article 62(1)(c)* ***of the Constitution of Kenya 2010 now clarifies that all land between high and low water marks (foreshore) is public land. Moreover, the land is a part of the mangrove swamp forest reserve as described in the*** *Proclamation No. 44 of 1932****. It follows that the appellants proved to the required standard that the land was not Trust land vested in the council and the learned Judge erred in holding to the contrary. In setting apart land which was not Trust land vested in it and gazetting the setting apart and granting of lease, the council and the Commissioner of Lands acted illegally and ultra vires and the resultant Grant of lease is a nullity."***

[30] On his part, ***Maraga, JA.*** rendered himself at paragraph 45 of his judgment as follows:-

"45. The inescapable conclusion from the above analysis is that

> ***the suit land was, at the material time not trust land. It was, and still is, partly forest and partly beach land not available for alienation. I find that the allocation of the suit land in this case to Hon. Mwamzandi and later to the 3rd respondent was in fraud of the public interest and the contention of the indefeasibility of title cannot avail the 3rd respondent in this case. In the circumstances, I find that the learned Judge erred in rejecting the appellant's prayer for an order of certiorari to quash its allocation to the 3rd respondent."***

[31] ***Karanja, JA*** concurring with the judgment of ***Githinji*** and ***Maraga, JJA.*** stated at page 3 of her judgment as follows:

> ***"… I am in agreement with my brother Judges that as the property in question was not Trust land, then the 1st respondent lacked the requisite jurisdiction to set it aside for allocation to anybody. Having set it aside for allocation illegally, the 2nd respondent went further to issue the Grant*** *No. C.R. No. 106 under the R.T.A****., which again was in blatant contravention of*** *section 2(d) of the RLA* ***which clearly stipulated that all land set aside under*** *sections 117 or section 118* ***of the Constitution i.e. Trust land was supposed to be registered under that statute. Issuing the Grant herein under R.T.A was in itself an act in excess of jurisdiction and squarely within the ambit of the Judicial Review process.***

[32] The above extracts confirm that the issues addressed were specific to the suit and the appeal which was before the Honourable Judges. Moreover, it is evident that the three Judges were unanimous that the suit land was not trust land and that the process of allocation of the land was an irregular act done in excess of jurisdiction. In our view, the reference to fraud of public interest in the allocation, did not necessarily make the matter one of general public importance as the Court was specifically addressing the propriety of the process of allocation of the particular suit land.

[33] Further, it was submitted that the judgment of the Court of Appeal has created a state of uncertainty in the law. In the *Hermanus* decision (supra), the Supreme Court had this to say at paragraph 60 in regard to a matter of law of general public importance:-

> ***"… it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions…"***

[34] In this case, although it is alleged that there is uncertainty in the law, arising from contradictory

precedents in regard to the application of Judicial Review remedy, no contradictory precedents have been drawn to our attention. To the contrary, the Judges were in agreement that the remedy of Judicial Review was applicable to the circumstances of the matter before them. What appears to be causing concern is the *obiter dictum* from the judgment of ***Karanja, JA***. in regard to the suitability of the Judicial Review process where there are conflicting facts, or serious and weighty issues. In our view, it is the *ratio decidendi* that creates binding precedent and no uncertainty has been alleged in regard to the *ratio decidendi* of the judgment intended to be appealed against.

[35] We come to the conclusion that this application must fail as the applicant has not satisfied the principles for the grant of certification under ***Article 163(4)(b)*** of the Constitution. It is accordingly dismissed with costs.

Dated and delivered at Malindi this 20th day of March, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR