



**Kibutiri (Suing as the Legal Representative of the Estate of Loise Wanja Kibutiri) v Njoro, Kibutiri & Kibutiri (Sued as the Legal Representatives of the Estate of James Njoro Kibutiri) & another (Application E017 of 2024) [2024] KESC 70 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KESC 70 (KLR)

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**  
**APPLICATION E017 OF 2024**  
**MK KOOME, CJ, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**  
**NOVEMBER 22, 2024**

**BETWEEN**

**DAVID MUTHEE KIBUTIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LOISE WANJA KIBUTIRI) ..... APPLICANT**

**AND**

**THOMAS KIBUTIRI NJORO, GEORGE KAMAU KIBUTIRI & ROBERT NDUNGI KIBUTIRI (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES NJORO KIBUTIRI) ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KIBUTIRI NJAU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for review of the decision of the Court of Appeal (Musinga, Kantai & Gachoka, JJ.A) delivered on 26th April 2024 denying certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution)*

**The striking out of an application is procedurally distinct from a dismissal based on the merits**

*The applicant sought review of a Court of Appeal decision that struck out his application for certification to appeal to the Supreme Court, under article 163(4)(b) of the Constitution, on the basis that it was filed out of time. He argued that the intended appeal raised substantial questions of general public importance relating to the doctrine of resulting trusts. The Supreme Court dismissed the application, holding that the appellate court did not decline certification on merit, but struck out the motion for being incompetent due to lateness. No costs were awarded, as there was no opposition.*

Reported by John Ribia

**Civil Practice and Procedure** – striking out of an application – striking out vis-à-vis dismissal on merits – effects on a review application - whether the striking out of an application for certification to appeal to the Supreme



*Court on the ground that the the application was filed out of time was tantamount to a substantive dismissal of the application for lacking merit.*

### **Brief facts**

The applicant sought review of a decision of the Court of Appeal. The Court of Appeal had struck out his application for certification to appeal to the Supreme Court under article 163(4)(b), on grounds that it was filed 41 days after the delivery of the judgment which was the subject of the intended appeal, without a prior extension of time.

The underlying appeal concerned property disputes within the Kibutiri family. The applicant contended that the intended appeal raised critical questions of general public importance regarding the legal doctrine of resulting trusts—specifically, issues relating to intention, ownership, and equity in property contributed to or held in another’s name.

### **Issues**

Whether the striking out of an application for certification to appeal to the Supreme Court on the ground of being filed out of time was tantamount to a substantive dismissal of the application for lacking merit.

### **Held**

1. The Court of Appeal dismissed the application for certification upon finding that the same was filed out of time. The Court of Appeal found that forty-one (41) days after delivery of the impugned judgment. No extension of time was granted by the court prior to the filing of the application. The appellate court did not decline to certify the appeal as one involving a matter of general public importance. What the court did was to strike out the application on grounds that the same was incompetent, having been filed out of time.

*Application dismissed; no order as to costs as there was no opposition by the respondents.*

### **Citations**

#### **Cases**

1. Bell v Moi & another Application 1 of 2013; [2013] KESC 23 (KLR) — (Applied)
2. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others Application 3 (E008) of 2022; [2022] KESC 25 (KLR) — (Followed)
3. Steyn v Ruscone Application 4 of 2012; [2013] KESC 11 (KLR) — (Applied)

#### **United Kingdom**

1. Pettitt v Pettitt ([1969] 2 All ER 385) — (Explained)
2. Re Golcar Sick and Funeral Society of St. Johns Sunday School [1972] 2 All ER 439 — (Explained)
3. Westdeutsche Landesbank Girozentrale v Islington LBC [1996] 2 All ER 961-(Explained)
4. Pettitt v Pettitt [1969] 2 All ER 38 — (Explained)
5. Kerr v Baranow and Vanasse v Sequeine [2011] AC 10 — (Explained)

#### **Texts & Journals**

Snell,EHT., et al (Eds) (1973) Snell’s Principles of Equity London: Sweet& Maxwell 27 Edn p179

#### **Statutes**

1. Constitution of Kenya, 2010 — article 163(4)(b)(5) — (Interpreted)
2. Supreme Court Act (cap 9B) — section 15;15B
3. Supreme Court Rules, 2020 (cap 9B Sub Leg (Repealed) — rule 33 — (Interpreted)

#### **Advocates**

None mentioned



## RULING

1. Upon perusing the originating motion by the applicant dated May 9, 2024 and filed on 13 May 2024 pursuant to article 163(4)(b) of the Constitution, section 15 of the Supreme Court Act, cap 9B, and rules 33 of the Supreme Court Rules, 2020 seeking: review of the ruling of Court of Appeal (Musinga, Kantai & Gachoka, J.J A) dated 26 April 2024 denying certification of the intended appeal as one involving matters of general public importance; and certification of the intended appeal (against the judgment of the Court of Appeal (Ouko (P) (as he then was), Okwengu & Makhandia, JJA) delivered on 25 September 2020 in Civil Appeal No 156 of 2019, David Muthee Kibutiri (suing as the legal representative of the estate of Loise Wanja Kibutiri) v Thomas Kibutiri Njoro & others as consolidated with Civil Appeal No 192 of 2019, *David Kibutiri Njau (suing as the legal representative of the estate of Loise Wanja Kibutiri) v David Muthee Kibutiri & others*; and
2. Upon perusing the grounds on the face of the application, the affidavit in support sworn by David Muthee Kibutiri on 9 May 2024, wherein it is urged that the intended appeal raises the following questions of general public importance: what is the nature of a resulting trust?; whether a resulting trust is essentially a property concept; whether, under the resulting trust doctrine, a person can be taken to have made a gift of his/her money without saying so; whether the underlying principle of a resulting trust is that it is, the intention of the guarantor or contributor alone that counts; whether, according to the doctrine of a resulting trust, ownership vests when the purchase takes place and cannot be extinguished or suspended; and whether the resulting trust doctrine is of general interest to the present and other generations of Kenyans; and
3. Upon considering the applicant's submissions dated May 9, 2024 and filed on 13 May 2024, wherein he restates his arguments for certification, and in addition, urges that the application meets the requirements for certification as restated by this court in *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others* (Application 3 (E008) of 2022) [2022] KESC 25 (KLR). Furthermore, the applicant contends that the appellate court misapplied and misapprehended the nature of the doctrine of a resulting trust as described in the 27th Edition of *Snell's Principles of Equity* on page 179 and illuminated in the cases of *Re Golcar Sick and Funeral Society of St Johns Sunday School* [1972] 2 All ER 439, *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961, *Pettitt v Pettitt* [1969] 2 All ER 385, *Kerr v Baranow and Vanasse v Sequeine* [2011] AC 10; and
4. Noting that the respondents did not file any response to the application; and
5. Bearing in mind the provisions of article 163(5) of the Constitution, section 15B of the Supreme Court Act and rule 33(1) and (2) of the Supreme Court Rules 2020, and this court's guiding principles on certification of a matter as one involving general public importance set out in *Hermanus Phillipus Steyn v Giovanni Ruscone*, SC Application No 4 of 2013 [2013] eKLR and *Malcolm Bell v Daniel Toroitich Arap Moi & another*, SC Application No 1 of 2013; [2013] eKLR;
6. We now opine as follows:
  - i. The Court of Appeal dismissed the application for certification upon finding that the same was filed out of time. In its determination, the appellate court pronounced itself as follows;

We note that this application was filed on November 5, 2020, forty-one (41) days after delivery of the impugned judgment. No extension of time was granted by the court prior to the filing of the application. We note that this is an anomaly that renders the entire application incompetent. The rule is clear on the timelines and



if the applicant had good reasons to explain the delay it ought to have invoked the relevant provisions for the extension of time. In view of this glaring anomaly, we cannot take any other step.”

- ii. From the foregoing, it cannot be said that the appellate court declined to certify the appeal as one involving a matter of general public importance. What the court did was to strike out the application on grounds that the same was incompetent, having been filed out of time. As such, we have no basis upon which to interfere with Court of Appeal’s invocation of its rules to strike out an incompetent motion.

7. Consequently, and for the reasons aforesaid, we make the following orders:

- i. The originating motion dated 9 May 2024 and filed on 13 May 2024 is hereby dismissed.
- ii. We make no order as to costs there having been no opposition by the respondents.

It is so Ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

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**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT\*\***

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

