



REPUBLIC OF KENYA



**Munguti & 6 others v Zibu & 13 others (Application  
E009 of 2023) [2023] KESC 49 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KESC 49 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**APPLICATION E009 OF 2023**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ**

**JUNE 23, 2023**

**BETWEEN**

**HENRY MULI MUNGUTI ..... 1<sup>ST</sup> APPLICANT**

**HENRY MWAKE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID NYUNGU ..... APPELLANT**

**AND**

**MICHAEL KIOKO ..... 1<sup>ST</sup> APPLICANT**

**PENINA MUMBE ..... 2<sup>ND</sup> APPLICANT**

**ALICE WANGECI ..... 3<sup>RD</sup> APPLICANT**

**GOOD HOPE REHABILITATION CENTRE ..... 4<sup>TH</sup> APPLICANT**

**AND**

**CYRUS ROBERT SALA ZIBU ..... 1<sup>ST</sup> RESPONDENT**

**DR. KLAUS-HERBERT RICHTER ..... 2<sup>ND</sup> RESPONDENT**

**STEVE MAKAU ..... 3<sup>RD</sup> RESPONDENT**

**PETER KIMEU MWANGANI ..... 4<sup>TH</sup> RESPONDENT**

**LILIAN KATUNGE MUEMA ..... 5<sup>TH</sup> RESPONDENT**

**PETER MANG'ALA ..... 6<sup>TH</sup> RESPONDENT**

**GIDEON KIOKO KIVANGULI ..... 7<sup>TH</sup> RESPONDENT**

**PETER MUSAU ..... 8<sup>TH</sup> RESPONDENT**

**JUMA OLIVER MASILA ..... 9<sup>TH</sup> RESPONDENT**



MUTUKU KATALA .....	10 <sup>TH</sup> RESPONDENT
NATIONAL LAND COMMISSION .....	11 <sup>TH</sup> RESPONDENT
GOVERNMENT OF MAKUENI COUNTY .....	12 <sup>TH</sup> RESPONDENT
REGISTRAR OF SOCIETIES .....	13 <sup>TH</sup> RESPONDENT
HON. ATTORNEY GENERAL .....	14 <sup>TH</sup> RESPONDENT

*(Being an application for review of the decision of the Court of Appeal (Okwengu, Ali-Aroni & Mativo, JJ.A) in Civil Application No. E260 of 2022, delivered on 3rd February 2023, denying certification to appeal to the Supreme Court against the Court of Appeal Judgment (Karanja, Murgor & Mohammed, JJ.A.) in Civil Appeal No. 260 of 2018 delivered on 8th July 2022)*

### **Principles to be considered in an application for certification of a matter as one of general public importance warranting an appeal to the Supreme Court**

*The application sought among others the review and setting aside of the Court of Appeal decision declining leave to appeal to the instant court. The instant court highlighted the principles governing applications for certification of matters as being of general public importance capable of appeal to the Supreme Court as enunciated by the court in Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone. The court also explained the nature of a resulting trust.*

Reported by Kakai Toili

**Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeals certified as involving matters being of general public importance - what were the principles to be considered in an application for certification of a matter as one of general public importance warranting an appeal to the Supreme Court - of Kenya, 2010, article 163(4)(b)

**Land Law** – trusts – resulting trusts - what was the nature of a resulting trust.

#### **Brief facts**

At the heart of the dispute between the parties was the question of ownership of certain assets in the form of immovable properties, money in the bank, and control and management of the 7<sup>th</sup> applicant. The assets were allegedly acquired using donor funds from the 2<sup>nd</sup> respondent and other donors; the 2<sup>nd</sup> respondent remitted funds to the 1<sup>st</sup> applicant to register the 7<sup>th</sup> applicant as well as to purchase land with a view to setting up a children’s home and drug addiction rescue and rehabilitation centre. The first two plots were registered in the name of the 7<sup>th</sup> applicant while the latter property in the name of the 1<sup>st</sup> applicant.

The instant application sought among others the review and setting aside of the Court of Appeal decision declining leave to appeal to the instant court; the grant of leave of the court to file an appeal against the judgment of the Court of Appeal in Civil Appeal No 260 of 2018, ; and the certification of their appeal as raising matters of general public importance.

The applicants submitted that the Court of Appeal did not analyse each of the framed issues and consider the arguments advanced for certification, to the effect that the instant court needed to clarify the law. It was the applicants’ argument that the position relating to remedies available upon the finding of the existence of a trust was unsettled.

#### **Issues**

- i. What were the principles to be considered in an application for certification of a matter as one of general public importance warranting an appeal to the Supreme Court?
- ii. What was the nature of a resulting trust?



## Held

1. The principles governing applications for certification of matters as being of general public importance capable of appeal to the instant court as enunciated by the court in were;

1. that the applicant must satisfy to the court that the issue to be canvassed on appeal before the court was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest;
2. where a point of law was raised, that such a point was a substantial one the determination of which would have a significant bearing on the public interest;
3. the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination;
4. that where the certification was occasioned by a state of uncertainty in the law arising from contradictory precedents, the court could either resolve the uncertainty or refer the matter to the Court of Appeal with appropriate directions;
5. that mere apprehension of miscarriage of justice was not a proper basis for granting certification and the matter must still fall under article 163(4)(b) of the of Kenya, 2010 (the Constitution);
6. that the applicant must identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for certification; and
7. that determinations of fact in contests between parties were not, by themselves, a basis for granting certification for an appeal before the court

2. A resulting trust was a remedy imposed by equity where property was transferred under circumstances which suggested that the transferor did not intend to confer a beneficial interest upon the transferee. A resulting trust would automatically arise in favour of the person who advanced the purchase money and whether or not the property was registered in his name or that of another, was immaterial. The issues, as determined by the superior courts below, were settled.

3. In ; SC Application No 3 (E008) of 2022; [2022] eKLR, the issue raised by applicants was whether it was open to the court to imply and import the doctrine of trust into land sale transactions and into shareholding of a company as to disentitle the registered holder of land or shares, respectively, obtained for valuable consideration without offending the constitutional right to property under article 40 of the and other statutory provisions. In the instant case, the 1<sup>st</sup> applicant was challenging the right to property with respect to a resulting trust having failed to present proof that he had purchased any of the plots with funds other than those from the 2<sup>nd</sup> respondent and his donor friends. The remedy available as a result of an implied trust was never an issue before the superior courts below. A declaration of the existence of a resulting trust was itself a remedy in an action like the instant one.

4. No instance of state of uncertainty in the law arising from contradictory precedents on the issues raised had been pointed out. The questions presented in the instant application did not transcend the circumstances of the case. The issues in dispute arose from a private claim between the parties that resulted in a trust. There was no significant question of law that required further input from the court. All the applicants were asking the court to do, was to grant them another opportunity to have a third bite at the cherry by revisiting factual issues that had concurrently been resolved by the two courts below.

5. The two courts below reached the conclusion that, in view of the relationship between the parties therein, an implied trust resulted; that decision being founded on pure evidence which pointed to the fact that the 1<sup>st</sup> appellant was attempting to reap where he did not sow by insisting to derive personal benefits from projects that were intended to benefit the less fortunate in the society. Being conclusions based on facts, the court was precluded from attempting to re-evaluate them. In the circumstances, there was no justification to disagree with the determination of the Court of Appeal that the application had not passed the threshold for the grant of leave to appeal to the instant court pursuant to article 163(4)(b) of the .



*Application dismissed; decision of the Court of Appeal delivered on February 3, 2023, declining leave to appeal to the instant court affirmed.*

### **Orders**

*Costs of the application to be borne by the applicants.*

### **Citations**

#### **Cases**

1. Hatayan, Twalib & Another v Said Saggar Ahmed Al-Heidy & 5 others (Civil Appeal 51 of 2014; [2015] KECA 713 (KLR)) — Explained
2. Juletabi African Adventure Limited & Another v Christopher Michael Lockley (Civil Appeal 75 of 2016; [2017] KECA 118 (KLR)) — Explained
3. Muli, Henry & others v Cyrus Robert Sala Zibu & others (Civil Application 199 of 2018; [2018] KECA 352 (KLR)) — Explained
4. Njenga, Peter Ndungu v Sophia Watiri Ndungu; (CA 2 of 2000; [2000] KECA 202 (KLR)) — Explained
5. N W K v J K M & Another (ELC No 422 of 2011; [2013] eKLR; 2 KLR) — Explained
6. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Explained
7. Steyn v Giovanni Gnechi-Ruscone (Application 4 of 2012; [2013] KESC 11 (KLR); 2 KLR166) — Explained

#### **Statutes**

1. Constitution of Kenya, 2010 — article 40,162(2), 163(4)(b) — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 15, 16 — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 33 — Interpreted

#### **Advocates**

*Henia Anzala & Associates* for applicants

*Munyithya, Mutugi, Umara, Muzna & Co.* Advocates for st -9th respondents

## **RULING**

1. Upon perusing the originating notice of motion dated February 28, 2023 and filed on March 31, 2023 by the applicants, pursuant to article 163(4)(b) of the *Constitution*, sections 15 and 16 of the *Supreme Court Act, 2020* as well as rule 33 of the *Supreme Court Rules, 2020* seeking the review and setting aside of the Court of Appeal decision in Civil Application No E260 of 2022 delivered on February 3, 2023 declining leave to appeal to this court; the grant of leave of this court to file an appeal against the judgment of the Court of Appeal in Civil Appeal No 260 of 2018, *Henry Muli & others v Cyrus Robert Sala Zibu & others* delivered on July 8, 2022; the certification of their appeal as raising matters of general public importance; and that the grant of leave do operate as a stay of execution of the entire judgment and decree of June 20, 2018 in ELC Case No 78 of 2017; and
2. Upon perusing the affidavit sworn by Henry Muli Munguti on February 28, 2023 in support of the motion that gives a detailed account of the circumstances that necessitated the taking out of aforesaid motion and;
3. Upon considering the written submissions by the applicants filed on March 31, 2023, wherein they have urged that the Judges of Appeal did not analyse each of the framed issues and consider the arguments advanced for certification, to the effect that the Supreme Court needs to clarify the law; whether the doctrine of resulting trust can be imported into an express contract of sale and against



express provisions of article 40 of the Constitution on the right to own property; whether a court of law has jurisdiction to rely on a resulting trust to issue an order in rem to cover and bind people that are not parties to the suit; whether a court of law has jurisdiction to rely on a resulting trust to issue an order in rem to affect properties and assets that are not specifically mentioned in a plaint or claim; whether a court has jurisdiction to declare a resulting trust in favour of a third party who is not the source of funds subject to the resulting trust; whether a court of law has jurisdiction to declare a resulting trust with respect to positions held by officials of a society or directors of a company; and whether the jurisdiction of the Environment and Land Court extends to documents, entities, funds and moveable property “as matters related thereto”. In other words, it is the applicants’ argument that the position relating to remedies available upon the finding of the existence of a trust is unsettled; and

4. Upon considering that the 1<sup>st</sup>-9<sup>th</sup> respondents in their replying affidavit of April 5, 2023 and written submissions of February 13, 2023 are opposed to the application on the grounds that the issue at the centre of the dispute before the trial court was the question of registration and control of Plot No 3792 Mangelete Settlement Scheme; that the issue of jurisdiction of the Environment and Land Court, as framed in the instant application is an afterthought, the applicants having failed to object to the transfer of the case from the High Court to the Environment and Land Court and having fully participated in the proceedings throughout; that the issues now raised by the applicants as forming matters of general public importance are *prima facie* the same issues determined by the superior courts below; that the respondents are now the registered members of the 7<sup>th</sup> Applicant after they took over and changed the signatories of bank account relevant to these proceedings and therefore an order for stay would be an academic exercise; that the application does not meet the threshold established in the Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone; SC Application No 4 of 2012; [2013] eKLR case because the appeal relates to private interests over land; and as such the decision of the Court of Appeal ought to be upheld.

#### **We Now Therefore Opine as Follows:**

5. Restating the principles governing applications for certification as enunciated by the court in Hermanus Phillipus Steyn; that the applicant must satisfy the court that the issue to be canvassed on appeal before the court is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; where a point of law is raised, that such a point is a substantial one the determination of which will have a significant bearing on the public interest; the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination; that where the certification is occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty or refer the matter to the Court of Appeal with appropriate directions; that mere apprehension of miscarriage of justice is not a proper basis for granting certification and the matter must still fall under article 163(4)(b) of the Constitution; that the applicant must identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for certification; and that determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court; and
6. Upon applying these strictures to the rival Submissions; on the one hand, that the appeal raises matters of general public importance and that the Court of Appeal did not consider the arguments raised by the applicants with respect to resulting trusts, and on the other hand that the issues raised by the applicants as forming matters of general public importance do not meet the threshold established in the Hermanus Phillipus Steyn case because the appeal relates to private interests over land; the single issue for consideration and determination is whether the applicants have made a case to the satisfaction



- of the court to warrant us to review the decision of the Court of Appeal denying the applicants the certificate to appeal to this court; and
7. Upon examining the record, it is inarguably clear that at the heart of the dispute between the parties is the question of ownership of certain assets in the form of immovable properties (plot numbers 3762, 3763, and 3792), money in the bank, and control and management of the 7<sup>th</sup> applicant. The assets were allegedly acquired using donor funds from the 2<sup>nd</sup> respondent and other donors; the 2<sup>nd</sup> respondent remitted funds to the 1<sup>st</sup> applicant to register the 7<sup>th</sup> applicant as well as to purchase land with a view to setting up a children's home and drug addiction rescue and rehabilitation centre; that the first two plots were registered in the name of the 7<sup>th</sup> applicant while the latter property in the name of the 1<sup>st</sup> applicant; and
  8. Upon determination of these issues, the Environment and Land Court held that the relationship between the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent resulted in the creation of an implied trust; that the 1<sup>st</sup>-6<sup>th</sup> applicants, who are the officials of the 7<sup>th</sup> applicant, in the circumstances were trustees of the 2<sup>nd</sup> respondent and his donor friends in respect to the subject plot, funds in the bank, moveable and immovable assets registered in the name of the 1<sup>st</sup> applicant, his agents, spouse, servants and or appointees; that the implied trust between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> applicant graduated and became a public trust in which the respondents and the people of Makueni County were beneficiaries of; a mandatory injunction compelling the 1<sup>st</sup> applicant to register Plot No 3792 in the name of the 7<sup>th</sup> applicant; and
  9. On Appeal, the Court of Appeal isolated four issues to consider; whether the 2<sup>nd</sup> respondent demonstrated that the funds sent to the 1<sup>st</sup> applicant were sourced from the former and his friends from Germany; whether the 7<sup>th</sup> applicant received funds from other donors not connected to the 2<sup>nd</sup> respondent; whether a resulting trust was created in favour of the 2<sup>nd</sup> respondent, over all funds, movable and immovable assets respectively registered in the applicants' and the 1<sup>st</sup> applicant's names, as well in the names of 1<sup>st</sup> applicant's agents, spouse, servants or appointees and; whether the orders made were within the jurisdiction of the Environment and Land Court; and
  10. Upon considering these issues, the appellate court found, just like the trial court, that the 1<sup>st</sup> applicant bought the three plots in question with funds remitted to him by the 2<sup>nd</sup> respondent and other donors connected to the 2<sup>nd</sup> respondent; that the 1<sup>st</sup> applicant failed to present proof that he had purchased any of the plots with funds from any other source; and that in registering one of the plots in his name automatically created a resulting or implied trust in favour of the 2<sup>nd</sup> respondent from whom the funds in the form of donations for the purchase of the plots originated; and
  11. Upon affirming further the trial court's conclusions and bearing in mind that the declaratory orders issued by that court concerned the issue of trust over the subject plot and related assets, the appellate court was satisfied that the Environment and Land Court had the jurisdiction under article 162(2) of the *Constitution* to entertain the dispute and determine it; and
  12. Considering the principles enunciated in *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others*; CA No 51 of 2014; [2015] eKLR that a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee; that a resulting trust will automatically arise in favour of the person who advances the purchase money; and whether or not the property is registered in his name or that of another, is immaterial; it is our view that the issues, as determined by the superior courts below, are settled; and



13. Further Satisfied that the courts below, besides the Court of Appeal's decision in *Twalib Hatayan & another v Said Saggar* (*supra*) have, in the following cases, in a long list of others, firmly and consistently established the above principles of a resulting trust; *Peter Ndungu Njenga v Sophia Watiri Ndungu*; CA No 2 of 2000; [2000] eKLR and *Juletabi African Adventure Limited & another v Christopher Michael Lockley*; CA No 75 of 2016; [2017] eKLR and *N W K v J K M & Another*; ELC No 422 of 2011; [2013] eKLR; and
14. Distinguishing the instant case from this court's decision in *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others*; SC Application No 3 (E008) of 2022; [2022] eKLR, the issue raised by applicants in the latter was whether it was open to the court to imply and import the doctrine of trust into land sale transactions and into shareholding of a company as to disentitle the registered holder of land or shares, respectively, obtained for valuable consideration without offending the constitutional right to property under article 40 of the *Constitution* and other statutory provisions. On the other hand, in the former, the 1<sup>st</sup> applicant is challenging the right to property with respect to a resulting trust having failed to present proof that he had purchased any of the plots with funds other than those from the 2<sup>nd</sup> respondent and his donor friends. Secondly, the remedy available as a result of an implied trust was never an issue before the superior courts below. A declaration of the existence of a resulting trust is itself a remedy in an action like this one; and
15. Therefore persuaded that no instance of state of uncertainty in the law arising from contradictory precedents on the issues raised have been pointed out to us; that the questions presented in the present application do not transcend the circumstances of this particular case; and that the issues in dispute arise from a private claim between the parties that resulted in a trust. Likewise, in the specific circumstances of this case, we do not see any significant question of law that requires further input from this court. All the applicants are asking us to do, is to grant them another opportunity to have a "third" bite at the cherry by revisiting factual issues that have concurrently been resolved by the two courts below; and
16. And bearing in mind that the two courts below us reached the conclusion that, in view of the relationship between the parties herein, an implied trust resulted; that decision being founded on pure evidence which pointed to the fact that the 1<sup>st</sup> appellant was attempting to reap where he did not sow by insisting "to derive personal benefits from projects that were intended to benefit the less fortunate in the society". Being conclusions based on facts, we are precluded from attempting to reevaluate them; and
17. In the circumstances, we see no justification to disagree with the determination of the Court of Appeal that the application has not passed the threshold for the grant of leave to appeal to this court pursuant to article 163(4)(b); and
18. Therefore, we dismiss this application and make the following orders:
  - a. The application dated February 28, 2023 and filed on March 31, 2023 is hereby dismissed.
  - b. The decision of the Court of Appeal delivered on February 3, 2023, declining leave to appeal to this court is hereby affirmed.
  - c. The costs of this application shall be borne by the applicants.
19. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE 2023.**

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**P.M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE 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**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

