



REPUBLIC OF KENYA



**Mombasa Bricks & Tiles Ltd & 5 others v Shah & 7 others (Application  
3 (E008) of 2022) [2022] KESC 72 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KESC 72 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION 3 (E008) OF 2022  
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ  
NOVEMBER 4, 2022**

**BETWEEN**

**MOMBASA BRICKS & TILES LTD ..... 1<sup>ST</sup> APPLICANT  
DINESH KUMAR ZAVERCHAND JETHA ..... 2<sup>ND</sup> APPLICANT  
ATEET DINESH JETHA ..... 3<sup>RD</sup> APPLICANT  
ZAVERCHAND SOJPAL JETHA HOLDINGS LTD ..... 4<sup>TH</sup> APPLICANT  
EXON INVESTMENTS LTD ..... 5<sup>TH</sup> APPLICANT  
EXON PLASTICS LIMITED ..... 6<sup>TH</sup> APPLICANT**

**AND**

**ARVIND SHAH ..... 1<sup>ST</sup> RESPONDENT  
HARHABEN SHAH ..... 2<sup>ND</sup> RESPONDENT  
GOSHRANI HOLDINGS LTD ..... 3<sup>RD</sup> RESPONDENT  
COAST PROPERTIES LTD ..... 4<sup>TH</sup> RESPONDENT  
COAST CLAY WORKS LTD ..... 5<sup>TH</sup> RESPONDENT  
COAST MAIZE MILLERS LTD ..... 6<sup>TH</sup> RESPONDENT  
SPA MILLERS NAIROBI LTD ..... 7<sup>TH</sup> RESPONDENT  
HIGHWAY CENTRE LTD ..... 8<sup>TH</sup> RESPONDENT**

*(Being an application for review of the Ruling of the Supreme Court delivered on 8th July 2022)*



## **The Supreme Court cannot consider the merits of the issues sought to be certified at the point of certification**

*The instant application sought the review of a ruling of the court declining to certify a matter. The court held that at the point of certification, the court could not consider the merits of the issues sought to be certified. The court also mentioned the factors to consider in determining an application for review of an application for certification of a matter as of general public importance.*

Reported by Kakai Toili

**Jurisdiction** - jurisdiction of the Supreme Court - jurisdiction to consider the merits of the issues in an application for certification of a matter as being of general public importance - whether the Supreme Court could consider the merits of the issues in an application for certification when reviewing the Court of Appeal's decision declining to certify the issues - what were the factors to consider when determining an application for review of an application for certification of a matter as of general public importance warranting an appeal to the Supreme Court - , 2011, section 21(4); , 2020, rule 28(5).

### **Brief facts**

The 1<sup>st</sup> - 4<sup>th</sup> applicants and the 5<sup>th</sup> and 6<sup>th</sup> applicants filed two applications both dated July 22, 2022 wherein they sought among others, orders; that pending the hearing and determination of the application *inter-parties*, the court to stay the ruling, certification, and order issued on July 8, 2022 and any further progression of the main appeal arising from the ruling in Supreme Court Application No. 3 (E008) of 2022; and that the court reviews and/or set aside its ruling of July 8, 2022 in Supreme Court Application No. 3 (E008) of 2022.

The applicants argued that on May 23, 2022, the Deputy Registrar gave directions that the preliminary objection was to be heard and determined first vacating and superseding prior directions given and that by the ruling delivered on July 8, 2022, the court proceeded to determine the preliminary objection as well as the substantive application by the respondents' seeking review of the decision of the Court of Appeal denying certification, and the application for leave to file a supplementary affidavit to produce a notice of appeal; hence condemning the applicants unheard. The applicants further argued that the court had not taken directions for the applications since the directions issued on May 23, 2022 were limited to the preliminary objection.

### **Issues**

- i. Whether the Supreme Court could consider the merits of the issues in an application for certification when reviewing the Court of Appeal's decision declining to certify the issues.
- ii. What were the factors to consider when determining an application for review of an application for certification of a matter as of general public importance warranting an appeal to the Supreme Court?

### **Held**

1. The applicants were not condemned unheard since they were aware of the directions of the court with regard to the application dated April 19, 2022. It was their prerogative to file the preliminary objection and submissions in support of the objections as opposed to or in addition to submissions with regard to the application. They chose to only limit themselves to their objection. In any event, the applicants' objections raised substantive grounds as to the merit of the application including that the application did not raise issues amounting to general public importance to warrant the review of the decision of the Court of Appeal. In addition, the applicants filed grounds of objection and a replying affidavit which raised issues that transcended the preliminary objection, an objection being a pure point of law.
2. The court was in charge of how it conducted its proceedings, upon the direction to comply, it was incumbent upon the parties to do so, as they eventually did, within the specified timelines. At no time should parties imagine that they could direct the court on its preferred course of action over a matter before it. It was not feasible to the court, in the application before it, based on the pleadings on record



- to first determine the preliminary objection and thereafter revert to the application considering the scarce judicial time and resources.
3. The ruling delivered on July 8, 2022 considered all the pleadings and went ahead to determine the main question before it, to wit, whether the application for review of certification was with merit, the Court of Appeal having declined the same. At the point of certification, the court could not consider the merits of the issues sought to be certified. The applicants would in the fullness of time have the opportunity to submit on the certified issue at the hearing.
  4. Nothing turned on the application dated June 16, 2022 for leave to file a supplementary affidavit to produce a notice of appeal. Hence, that was a non-issue and the court did not determine the application as submitted by the applicant. The parties were at liberty to pursue the same further, if they so wished.
  5. The applicants had not met the threshold for review of the court's decision. There was no exceptional circumstance, error apparent on the record, illegality, fraud or deceit to warrant such a decision. The alleged violation of the right to be heard and fair trial as submitted by the applicants did not satisfy the criteria for exceptional circumstance to warrant a review of the court's ruling.

*Applications dismissed.*

### **Orders**

*Costs of the application to abide the outcome of the appeal.*

### **Citations**

#### **Cases**

1. Musembi & 13 others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co. Ltd & 3 others (Application E019 of 2021; [2022] KESC 19 (KLR)) — Explained
2. Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others (Petition 6 of 2017; [2017] KESC 25 (KLR)) — Explained

#### **Statutes**

1. Constitution of Kenya, 2010 — Article 25 (c), 48, 50, 159 (1), 159 (2) (e), 163 (7) – (9), 259 — Interpreted
2. Supreme Court Act, 2011 (No 7 of 2011) — Section 3, 14 (5), 16 (1) (5), 21(4) — Interpreted
3. Supreme Court Rules, 2020 (No 7 of 2011 Sub Leg) — Rule 3(2), 28(5) — Interpreted

#### **Advocates**

None mentioned

## **RULING**

1. Upon perusing the two comparable notice of motion applications by the 1<sup>st</sup> - 4<sup>th</sup> applicants and 5<sup>th</sup> and 6<sup>th</sup> applicants both dated July 22, 2022 brought pursuant to articles 25(c), 48, 50, 159(1), 159 (2)(e), 163(7) – (9), 259 of the [Constitution of Kenya, 2010](#) as read together with sections 3, 14(5), 16(1) and (5), 21(4) of the [Supreme Court Act](#) and rules 3(2), 28(5) of the [Supreme Court Rules](#) and all other enabling provisions of the law, and electronically filed on even date, wherein the said applicants seek orders That:
  - i. This application be certified as urgent and considered *ex – parte* in the first instance.
  - ii. Pending the hearing and determination of this application *inter- parties*, this honourable court be pleased to stay the ruling, certification, and order issued on July 8, 2022 and any further



progression of the main appeal arising from the foresaid ruling in Supreme Court Application No 3 (E008) of 2022.

- iii. This honourable court be pleased to review and/or set aside its ruling of July 8, 2022 in Supreme Court Application No 3 (E008) of 2022.
- iv. This honourable court be pleased to grant the applicants an opportunity to file and serve written submissions in respect of the respondents' application dated 19<sup>th</sup> April and responses and written submissions on the application dated June 16, 2022.
- v. Upon filing of (4) above this honourable court be pleased to hear and determine the respondents application dated April 19, 2022 and June 16, 2022 *inter - partes*.
- vi. Any other orders that the honourable court may deem fit.
- vii. The costs of this application be provided for.

while the 5<sup>th</sup> and 6<sup>th</sup> applicants seek the following orders That:

- i. This application be certified as urgent and considered ex – parte in the first instance.
  - ii. Pending the hearing and determination of this application *inter- partes*, this honourable court be pleased to stay any further progression of matters in Supreme Court Application No 3 and/or E008 of 2022.
  - iii. This honourable court be pleased to review and/or set aside its ruling and orders made on July 8, 2022.
  - iv. This honourable court be pleased to grant the 5<sup>th</sup> and 6<sup>th</sup> applicants an opportunity to file and serve responses and written submissions in respect of the respondents' application dated April 19, 2022.
  - v. Any other orders or further orders that the honourable court may deem fit.
  - vi. The costs of this application be provided for.
2. Upon perusing the grounds on the face of the applications; the supporting affidavit sworn on April 22, 2022 by Ateet Jetha, the 3<sup>rd</sup> applicant and director of the 4<sup>th</sup> applicant on behalf of the 1<sup>st</sup> to 4<sup>th</sup> applicants and supporting affidavit sworn by Riteet Jetha, director of the 5<sup>th</sup> and 6<sup>th</sup> applicants; submissions by the 1<sup>st</sup> to 4<sup>th</sup> and 5<sup>th</sup> and 6<sup>th</sup> applicants, respectively, both dated July 25, 2022 and electronically filed on even date and July 26, 2022 respectively; and rejoinder submissions dated July 28, 2022 and filed on July 29, 2022 by the 1<sup>st</sup> to 4<sup>th</sup> applicants; and
  3. Noting that the applicants argue that on May 23, 2022, the Deputy Registrar gave directions with respect to the preliminary objection dated April 28, 2022; that from the said directions the preliminary objection was to be heard and determined first vacating and superseding prior directions given; that by the ruling delivered on July 8, 2022, this court proceeded to determine the preliminary objection as well as the substantive application dated April 19, 2022 by the respondents' seeking review of the decision of the Court of Appeal denying certification, and the application dated June 16, 2022 for leave to file a supplementary affidavit to produce a notice of appeal; hence condemning the applicants unheard; that the court had not taken directions for the applications dated April 19, 2022 and June 16, 2022 since the directions issued on May 23, 2022 were limited to the preliminary objection; and
  4. Upon Further considering the applicants' argument that they were denied the right to be heard and the right to a fair trial under article 50 of the Constitution which is an absolute constitutional right and one



of the fundamental rights that cannot be waived or limited under article 25; and that resultantly, from the circumstances and rule 28(5) of the *Supreme Court Rules* as read with section 3 of the *Supreme Court Act*, their application is meritorious, exceptional and in the public interest; and

5. Taking into Account the replying affidavit sworn on July 27, 2022 by Arvind Shah on behalf of the respondents and submissions dated July 27, 2022 where the respondents contend that the applicants were granted ample opportunity to file not only their responses but also submissions but they deemed fit, out of their choice, and selected what to submit on; that on April 20, 2022 the Court directed the respondents to effect service of their application dated April 19, 2022 along with their submissions and the applicants directed to file and serve their written submissions within seven days upon service; that on April 22, 2022 the applicants wrote to the court seeking variation of the said directions to instead be granted fourteen days from April 21, 2022; that they then proceeded to file their preliminary objection and grounds of objection dated April 28, 2022. As for the directions issued by the Hon. Deputy Registrar of the Court, the respondents indicate that on May 4, 2022 the applicants were given further seven days to comply with the filing their responses and submissions; that on May 23, 2022, the 5<sup>th</sup> and 6<sup>th</sup> respondents were granted three days to file their submissions on matters they deemed fit out of which they limited themselves to matters raised on the preliminary objection. In that regard, it is not true that the preliminary objection was going to be heard first. The respondents rely on section 21(4) of the *Supreme Court Act* and the decision of this court in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* to urge that the application is not merited.
6. Taking Note of the centrality of the directions before the Hon. Deputy Registrar of this court in this matter since the first application dated April 19, 2022 was filed, the record as we perused establishes that the respondents were directed to serve the application with their written submissions and the applicants directed to file and serve their written submissions within seven days upon service. On May 4, 2022 the applicants had filed and served their preliminary objection and the respondents sought time to reply. On May 23, 2022, Mr Weda, Advocate, had come on record for the 5<sup>th</sup> and 6<sup>th</sup> respondents (applicants herein) leaving Dr Ndegwa, Advocate, to represent the rest of the respondents (applicants herein). The Hon. Deputy Registrar issued the following directions:
  1. I consider the replying affidavit on record filed by counsel for the respondents to have been filed within the 7 days granted on 4/5/22.
  2. In view of practice direction 29 this matter is to be disposed of by way of written submissions and not oral submissions.
  3. Considering the nature of the application and P.O., I direct that the matter be placed before the President of the court for determination on how P.O. will be heard and disposed of by a bench.
  4. The new advocates for 5<sup>th</sup> and 6<sup>th</sup> respondents, I consider their intended PO. which is not yet on record can still be served by the PO already on record.
  5. The 5<sup>th</sup> and 6<sup>th</sup> respondents are at liberty to file and serve their submissions to the PO. already on record within 3 days from today.
  6. The petitioners are granted time to file their submissions by close of business today.
7. From the Foregoing, it is apparent that from the directions issued when the application dated April 19, 2022 was mentioned on April 20, 2022, the applicants were to file their submissions within seven days from the date of service. In spite of the parties being given seven days as opposed to fourteen days as stipulated by rule 33(4)(b) of the *Supreme Court Rules*, by the time the matter was coming up for mention approximately fourteen days later on May 4, 2022 they had still not filed their submissions.



The court then proceeded to grant the applicants seven more days to file their submissions by which time they had filed their preliminary objection. The directions issued on May 23, 2022 relating to the determination of the preliminary objection did not exempt the parties from compliance on the application itself as the Hon Deputy Registrar, relying on Practice Direction Number 29 of the *Supreme Court (General) Practice Directions, 2020* had noted that the matter, being the application for review of certification in which the preliminary objection had been raised was to be determined by written submissions.

8. Accordingly, we opine that the applicants were not condemned unheard as alleged since they were aware, as stated above, of the directions of the court with regard to the application dated April 19, 2022. It was their prerogative to file the preliminary objection and submissions in support of the objections as opposed to or in addition to submissions with regard to the said application. They chose to only limit themselves to their objection. In any event, the applicants' objections raised substantive grounds as to the merit of the said application including that the application did not raise issues amounting to general public importance to warrant the review of the decision of the Court of Appeal. In addition, the applicants filed grounds of objection and a replying affidavit which obviously raised issues that transcended the preliminary objection, an objection being a pure point of law.
9. Appreciating that the court is in charge of how it conducts its proceedings, upon the direction to comply, it was incumbent upon the parties to do so, as they eventually did, within the specified timelines. At no time should parties imagine that they can direct the court on its preferred course of action over a matter before it. It was not feasible to the court, in the application before it, based on the pleadings on record to first determine the preliminary objection and thereafter revert to the application considering the scarce judicial time and resources. The ruling delivered on July 8, 2022 considered all the pleadings and went ahead to determine the main question before it, to wit, whether the application for review of certification was with merit, the Court of Appeal having declined the same. It is worth pointing out that at the point of certification, the court cannot consider the merits of the issues sought to be certified. The applicants will in the fullness of time have the opportunity to submit on the certified issue at the hearing.
10. Mindful that regarding the application dated June 16, 2022 for leave to file a supplementary affidavit to produce a notice of appeal, in our ruling, we established that nothing turns on it. Hence, this is a non-issue and the court did not determine the application as submitted by the applicant. The parties are at liberty to pursue the same further, if they so wish.
11. We further opine that section 21(4) of the *Supreme Court Act* as read with rule 28(5) of the *Supreme Court Rules* and following our decisions in *Fredrick Ottieno Outa v Jared Odoyo Okello*, SC Petition No 6 of 2014; [2017] eKLR and in *Musembi & 13 other (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co Ltd & 3 others* (Application EO19 of 2021) [2022] KESC 19 (KLR) (Civ)(19 May 2022) (Ruling)), the applicants have not met the threshold for review of the court's decision. There is no exceptional circumstance, error apparent on the record, illegality, fraud or deceit to warrant such a decision. Alleged violation of the right to be heard and fair trial as submitted by the applicants, which allegation we dismiss in any event, does not satisfy the criteria for exceptional circumstance to warrant a review of our ruling.
12. For These reasons, we inevitably conclude that the two notice of motion applications lack merit in their entirety and are for disallowing. As for costs, it is only prudent that we defer the costs to follow the ultimate outcome of the appeal. As we previously noted, the matter is one that requires expedited disposal.



13. Consequently, we make the following orders:

- i. The notice of motion dated July 22, 2022 filed by the 1<sup>st</sup> to 4<sup>th</sup> applicants be and is hereby disallowed.
- ii. The notice of motion dated July 22, 2022 filed by the 5<sup>th</sup> and 6<sup>th</sup> applicants be and is hereby disallowed.
- iii. The costs of this application to abide the outcome of the appeal.

**DATED AND DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2022.**

.....

**P.M. MWILU**

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

.....

**S.C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**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**

