REPUBLIC OF KENYA

IN THECOURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & M'INOTI JJ.A.)

CIVIL APPLICATION NO.SUP 10 OF 2014 (UR 7/2014)

BETWEEN

MWANGI STEPHEN MURIITHI……..APPLICANT

AND

DANIEL TOROITICH ARAP MOI..…….....1ST RESPONDENT

RAYMARK LIMITED……...…….……...……2ND RESPONDENT

(Application for leave to appeal and for a certificate that a matter of general public importance is involved in an intended appeal against the judgment and order of the Court of Appeal at Nairobi dated 9th May 2014

in

Civil Appeal No 240 of 2011)

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RULING OF THE COURT

In the application before us, the applicant, ***Mwangi Stephen Muriithi*** invokes the provisions of ***Article 163(4)(b) of the Constitution*** and ***Rule 24 (1) of the Supreme Court Rules, 2012*** to crave a certificate that his intended appeal to the Supreme Court against the judgment of this Court ***(Mwera, Musinga and Ouko, JJ.A)*** dated 9th May, 2014 raises a matter of general public importance. Such a certificate is a precondition under ***Article 163(4)(b) of the Constitution*** before the applicant can invoke the appellate jurisdiction of the Supreme Court. The application arises from events that took place way back in 1982, some thirty-two years ago.

On 22nd May 1982 the police arrested the applicant from his residence.

After failing to trace him for three days, his wife, ***Jockbed Muthoni Muriithi*** took out a writ of ***Habeas Corpus*** under ***section 389 of the Criminal Procedure Code*** and ***rule 3 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules*** seeking the production of the body of the applicant before the High Court or cause to be shown why he should not be set to liberty forthwith. The court

(***Chesoni, J***., as he then was) issued a summons to the ***Director of the Criminal Investigations Department*** returnable on 28th May 1982 to show cause why the applicant should not be released forthwith.

On the appointed date a detention order, issued under the provisions of the now repealed ***Preservation of Public Security Act (Cap 57, Laws of Kenya)*** was presented to the High Court. The detention order showed that the Minister responsible for internal security had placed the applicant under preventive detention pursuant to the provisions of the ***Public Security (Detained and Restricted Persons) Regulations, 1978***. Upon presentation and perusal of the detention order, the High Court held that under the regulations, the applicant was deemed to be in lawful custody and that the police had therefore discharged their burden of showing cause why the applicant could not be set to liberty forthwith. Accordingly the *Habeas Corpus* application was dismissed. The decision of Chesoni, J. is reported in

MURIITHI V. DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER (1988) KLR 629.

Fast forward some twenty-seven years later. On 23rd October 2009 the applicant filed a petition in the High Court against the 1st respondent, ***Daniel Toroitich arap Moi*** who at the time of the applicant's detention was the President of the Republic of Kenya. The petition alleged violation of the applicant's right to personal liberty and to property under ***sections 72*** and ***75*** respectively, of the former Constitution of Kenya. The applicant contended that his detention in 1982 was orchestrated by the 1st respondent, who was his business partner, for the sole purpose of dispossessing the applicant of his proprietary rights in some three limited liability companies, namely ***Fourways Investments Ltd, Sheraton Holdings Ltd*** and ***Mokamu Ltd***, in which the two were shareholders. The applicant therefore prayed for declarations that his detention was illegal and in violation of section 72 of the Constitution and that the sale of the properties of the three companies was illegal and in violation of section 75 of the Constitution. The appellant also sought award of damages for deprivation of his said rights and costs of the petition.

Before the hearing of the petition the 2nd respondent applied and was joined in the petition as an interested party on the grounds that the property known as ***L.R. No. 11793, Solai, Nakuru***, which the applicant alleged to belong to Mokamu Ltd., was in fact owned by the 2nd respondent. The 1st respondent did not file any replying affidavit to the petition but instead raised a preliminary objection and applied to strike out the petition on the grounds, among others, of lack of jurisdiction, abuse of process, limitation of time and misapprehension of basic company law principles.

Gacheche, J. heard the petition and the objection on the basis only of affidavit evidence and submissions. In a judgment dated 16th April, 2011, the learned judge found for the applicant and awarded him ***Kshs 80, 161, 720/=*** being ***"his share of the proceeds"*** from the sale of the properties of the three limited liability companies and ***Kshs 50,000,000/=*** as punitive damages ***"based on the status"*** of the 1st respondent. In respect of the award of Kshs 80,161,720/=, the learned judge in addition awarded interest at 12% per annum on compound basis with effect from 1st July, 1982 until payment in full while for the Kshs 50,000,000/= she awarded interest at 12% per annum with effect from the date of the judgment until payment in full. The 1st respondent and the interested party (now the 2nd respondent) were ordered to pay the applicant's costs in the petition.

Aggrieved by the judgment, the 1st respondent lodged ***Civil Appeal No. 240 of 2011*** challenging the whole of the judgment. On his part, the applicant lodged a cross-appeal against the refusal by the learned judge to award interest at commercial rates. A second cross appeal by the 2nd respondent challenged the order by the learned judge condemning it to pay costs to the applicant. On 9th May 2014 this Court allowed the 1st respondent's appeal and set aside the judgment of the High Court. It dismissed the applicant's cross appeal on interest and allowed the 2nd respondent's cross appeal on costs. It is that judgment which provoked the application for certificate to the Supreme Court now before us.

Before us, ***Mr. Paul Mwangi***, learned counsel for the applicant, relying on the applicant's affidavit sworn

on 26th May 2014 pitched the applicant's case for a certificate on the following two broad categories of grounds, which he submitted raise matters of general public importance warranting consideration by the Supreme Court.

In the first category, counsel submitted that there was an issue of general public importance relating to the interpretation of Article 163(4)(a) of the Constitution as against ***section 15(2)*** of the ***Supreme Court Act, Cap 9A***. The relevant part of Article 163(4)(a) provides as follows:

"163 (4) 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…"***

On the other hand the relevant part of section15 of the Supreme Court Act provides that:

"15 (1) Appeals to the Supreme Court shall be

heard only ***With leave of the Court.***

2. ***Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of <u>the</u> Constitution.***

If we understood Mr. Mwangi correctly, the applicant's argument is that Article 163(4)(a), which uses the words ***"this Constitution"*** refers to the interpretation of the Constitution of Kenya, 2010 whereas Section 15(2) of the Supreme Court Act which uses the words ***"<u>the Constitution</u>"*** could also refer to the former constitution. So learned counsel submitted that because of that lack of clarity, the applicant is not sure whether to approach the Supreme Court directly as required by Article 163(4)(a) of the Constitution and has instead opted, out of abundant caution, to come to this Court for certification of the matter as an issue of general public interest under Article 163(4)(b). To buttress the point, learned counsel submitted that matters of the application of the Constitution, whether the former or the current, are matters of general public importance and in particular where the issues involved relate to the protection of fundamental freedoms and liberties.

On the second category of matters of general public importance that fall squarely under Article 163(4)(b) of the Constitution, learned counsel submitted that the judgment of this Court has far reaching implications to all persons who were detained by previous regimes in Kenya; that this Court had misapprehended, misinterpreted and misdirected itself on the effect of the decision of Chesoni, J. in the *Habeas Corpus* application by holding that the issue of the legality of the applicant's detention was *res judicata* yet *Habeas Corpus* Applications cannot determine the validity or legality of a detention order; that the decision of the Court will affect all applicants, in pending and decided cases, who having filed *Habeas Corpus* applications will now be denied access to justice; that unless the intervention of the Supreme Court is allowed, all decided cases, such as ***<u>HARUN THUNGU WAKABA V ATTORNEY GENERAL, HC Misc. App. No. 1141 of 2004, JAMES MWANGI WANYOIKE & 9 OTHERS V ATTORNEY GENERAL, HC MISC CS No 1656 of 2005, ODUOR ONG'WEN & 20 OTHERS V ATTORNEY GENERAL, HC Petition No. 777 of 2008 (consolidated)</u>*** and ***<u>DAVID GITAU NJAU & 9 OTHERS V ATTORNEY GENERAL, HC Petition No 340 of 2012,</u>*** arising from circumstances similar to those of the applicant, are in great peril.

Learned counsel concluded by submitting that the judgment of this Court raised a fundamental issue regarding the standard of proof in cases for enforcement of fundamental rights, where a respondent has not controverted an opponent's pleadings. That issue, Mr. Mwangi submitted, was a cross-cutting issue in some 64 decided cases, and all pending and future cases, arising in a situation similar to the appellant's will be affected because of the judgment.

Counsel urged us to find that the applicant had established matters of general public importance to entitle him to a certificate to appeal to the Supreme Court under the principles set out by that Court in ***STEYN V GNECCHI-RUSCONE*** ***(2013)2 EA 348***.

Mr. Ochieng Oduol, learned counsel for the 1st respondent vigorously opposed the application and submitted that the same did not raise any issue of interpretation or application of the Constitution, or even any matter of general public interest. On interpretation of the Constitution as a matter of general public interest, learned counsel argued that the applicant's cause of action arose in 1982 under the former constitution and that his petition in the High Court was brought under section 84 of the former constitution on the allegation of violation of sections 72 and 75 of the former constitution.

The decisions of the High Court and of this Court, ***Mr. Oduol*** added, turned squarely on the interpretation and application of the provisions of the former Constitution rather than those of the Constitution of Kenya, 2010. That those decisions were rendered during the currency of the present Constitution, counsel emphasized, does not change the uncontested fact that at issue were provisions of the old constitution, rather than those of the current Constitution. In learned counsel's view, the former Constitution did not provide for access to the Supreme Court, which did not then exist. Consequently, no issue of interpretation of the former constitution or the current Constitution in the Supreme Court could arise in the applicant's intended appeal. Regarding what the applicant has identified as other matters of general public importance, learned counsel submitted that the issues involved were private and personal to the applicant and did not implicate the general public interest. Specifically ***Mr. Oduol*** submitted that the central issues before the High Court and this Court were the alleged violation of the applicant's right to liberty and right to property under the old constitution.

On the right to liberty, learned counsel submitted that the applicant had rendered the same a private issue between himself and the 1st respondent rather than a matter involving the general public interest by consciously electing to bring proceedings against the 1st respondent as a private individual with whom he had alleged business and commercial dealings, rather than by bringing suit against the Attorney General.

Regarding the right to property, counsel urged that the issues raised by the applicant as matters of general public importance involved private business and commercial dealings and raised nothing beyond common and everyday company law and property law issues, such as whether the applicant had any proprietary right to assets owned by limited liability companies in which he claimed to be a shareholder and whether he was entitled to an award of a share of the proceeds from the sale of the assets of the companies.

The last issue involved, which in counsel's view was of no exceptional or great jurisprudential moment, was whether the applicant could be awarded punitive damages, which had not been pleaded or strictly proved.

Mr. Oduol concluded by urging us to follow the principles set down by the Supreme Court in ***STEYN V GNECCHI-RUSCONE*** (supra) and

MALCOLM BELL V DANIEL TOROITICH ARAP MOI & ANOTHER regarding certification of matters of general public importance, which in any event are binding upon this Court by virtue of Article 146(7) of the Constitution. A proper application of those principles, counsel submitted, would lead to only one conclusion, namely that the present application has no merit.

Mr. Morintat Leina, learned counsel for the 2nd respondent joined ***Mr. Oduol*** in opposing the application and adopted the submissions made on behalf of the 1st respondent. Learned counsel added that the 2nd respondent's cross-appeal in the Court of Appeal was limited to challenge of the costs awarded against it

and to that extent, no issue of general public interest was involved.

We have anxiously considered the application, the affidavit in support and the affidavits in opposition, the submissions by learned counsel as well as the illuminating authorities cited on behalf of each of the parties. From the outset, it is axiomatic in an application for a certificate under Article 163(4) (b) of the Constitution, that the applicant or the intended appellant:

> ***"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."***

(See the decisions of the Supreme Court in ***STEYN V GNECCHI-RUSCONE***

(supra), ***MALCOLM BELL V DANIEL TOROITICH ARAP MOI & ANOTHER, SC APP No. 1 of 2013*** and ***KOINANGE INVESTMENTS & DEVELOPMENT LTD V ROBERT NELSON NGETHE, SC APP. No. 4 of 2013).***

The jurisdictional character of Article 163(4) of the Constitution was considered and well articulated by the Supreme Court in ***LAWRENCE NDUTTU & 6000 OTHERS VS KENYA BREWERIES LTD & ANOTHER, SC***

Petition No. 3 of 2012 as follows:

> ***"At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is a case involving the interpretation of the Constitution. In such a case, no prior leave is required from this Court or Court of Appeal. The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is certification by either Court, which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court on grounds other than that the case is one which involves the interpretation or application of the Constitution, then such intending appellant must convince the court that the case is one involving a matter of general public importance. If the Court of Appeal is convinced that such is the case and the certification is affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal."***

The appellant asserts that the first issue to be raised in his intended appeal involves interpretation and application of the Constitution, which, but for the lack of clarity between Article 163(4)(a) and section 15(2) of the Supreme Court Act, would entitle him to approach the Supreme Court as of right. Therefore he requests us instead to certify that his intended appeal to the Supreme Court raises a matter of general public importance as it implicates issues of the interpretation and application of both the former and the current Constitutions.

When there is a genuine issue of interpretation or application of the Constitution, an intended appellant has unhindered access to the Supreme Court under Article 163(4)(a) of the Constitution and does not require any leave or certificate (even as a matter of general public importance) from this Court. In ***NICHOLAS KIPTOO ARAP KORRIR SALAT V. IEBC & 7 OTHERS, SC APP No. 16 OF 2014,*** the Supreme Court stated that whether or not a matter before it has properly invoked the Court's jurisdiction under Article 163(4)(a) of the Constitution on matters of interpretation and application of the Constitution ***"is a substantive matter to be decided in the main appeal if and when it is filed."*** And latter in the same judgment the

Supreme Court stated as follows:

> ***"Whether or not the constitutional questions as framed by the applicant were indeed canvassed and determined by the Court of Appeal is a substantive question that rightly falls for determination during the hearing of the appeal if and when filed."***

To entitle the intended appellant to invoke the jurisdiction of the Supreme Court under Article 163(4)(a), the issue of interpretation or application of the Constitution must be a real issue which was before this Court and or arising directly from the judgment intended to be appealed in the Supreme Court. In

PETER GATIRAU MUNYA V. DICKSON MWENDA KITHINJI & OTHERS SC APP No. 5 OF 2014, the Supreme Court stated as follows regarding whether a matter involves questions of constitutional interpretation or application:

> ***"Where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an applicant should demonstrate is that the Courts reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."***

In other words, the jurisdiction of the Supreme Court under Article 163(4) (a) will not be invoked if the issues intended to be raised in the Supreme Court are merely collateral questions or questions that are minimally related to the issues determined by this Court. In such circumstances the intended appellant must first obtain a certificate from this court that the intended appeal raises a matter or matters of general public importance.

The Supreme Court considered this question in ***THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS V ATTORNEY GENERAL & 2 OTHERS, CRIM. APP. NO. 1 OF 2012,*** and expressed itself thus:

> ***"The effect of the foregoing decisions is that:***
>
> > ***(i) appeals to the Supreme Court, in general, require grant of leave by the Court of Appeal – except where the Court of Appeal's refusal of leave has been reversed by the Supreme Court;***
> >
> > ***(ii) in matters of interpretation or application of the Constitution, an appeal will be entertained by the Supreme Court as of right;***
> >
> > ***(iii) the issue for interpretation or application of the Constitution coming on appeal to the Supreme Court, is not to be a collateral question, only minimally related to the substantive cause pending in the Court of Appeal, and if it is such, then leave of the Court of Appeal is required – unless the Supreme Court has reversed the refusal to grant leave by the Court of Appeal;*** (Emphasis added).
> >
> > ***(iv) subject to the foregoing principles, an appeal to the Supreme Court is not limited by the mere fact of the issue being preliminary or interlocutory."***

In the application then before it, the Supreme Court finally concluded:

> ***"There was, therefore, no legitimate issue of interpretation or application of the Constitution, regarding the role of the Attorney-General in the proceedings before the Court of Appeal, which merited an appeal to the Supreme Court. The issue raised before the Court of Appeal and which is now sought to be brought to the Supreme Court, squarely fell within the category of a collateral case***
>
> ***– a matter not appealable save with the leave and certificate of the Court of Appeal. There being no such certificate, and there not having been a reference, leading to a differing position taken in this Court, this is the typical case in which no appellate jurisdiction lies in the Supreme Court."***

If the first issue that the applicant seeks to take to the Supreme Court is perceived as a question of law, then under the ***STEYN V GNECCHI-RUSCONE*** principles, such question of law must have arisen in the

High Court and in this Court and must have been the subject of judicial determination.

In the present application, it is common ground that the litigation before the High Court and the appeal there from that was determined by this Court, involved interpretation of sections 72 and 75 of the former Constitution. Neither before the High Court, nor before this Court was the interpretation or application of any provision of the Constitution of Kenya 2010, involved. The former Constitution did not create any right of appeal from decisions of this Court to the Supreme Court because under that Constitution, there was no Supreme Court; the Court of Appeal was the final court. In those circumstances, can it be seriously contended that there is a legitimate question of interpretation or application of the Constitution, whether the former or the current, that is involved in the intended appeal? We do not think so.

The appellant contends that he intends to ask the Supreme Court to resolve a conflict, which he perceives between Article 163(4)(a) of the Constitution and Section 15(2) of the Supreme Court Act. Apart from the fact that the issue was never raised before this Court and was consequently not addressed, the matter the applicant proposes to take to the Supreme Court, is in our view a non-issue, granted the express and peremptory terms of Article 2(4) on the supremacy of the Constitution, which would demand that section 15(2) of the Supreme Court Act defer to the Constitution or at the very least, be interpreted in a manner consistent with Article 163(4)(a).

Accordingly, we are not satisfied that on the first issue, the applicant has established any basis in law for a certificate that a matter of general public importance is involved in his intended appeal to the Supreme Court.

Moving on to the other issues on the basis of which the applicant seeks certification that his intended appeal raises issues of general public interest, the Supreme Court has expressed itself fairly clearly on what constitutes a matter of general public importance. After its opinion in ***STEYN V. GNECCHI-RUSCONE*** (supra), which was not unanimous, the Court subsequently in ***KOINANGE INVESTMENTS & DEVELOPMENT LTD V ROBERT NELSON NGETHE*** (supra) took a unanimous position on the principles that should guide it and this Court in determining whether an issue of public importance is involved in an intended appeal. The main principles that we can distill from the opinions of the Supreme Court are:

i. ***the matter must be one the determination of which transcends the circumstances of the particular case with significant bearing on the public interest;***

ii. ***where the matter involves a point of law, the point must be substantial, so that its determination will have a significant bearing on the public interest;***

iii. ***such question(s) of law must have arisen in the Court of Appeal and must have been the subject of judicial determination;***

iv. ***issues of law of repeated occurrence in the general course of litigation may amount to matters of general public importance;***

v. ***questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general or of litigants may constitute matters of general public importance;***

vi. ***questions of law that are destined to continually engage the workings of the judicial organs; and***

vii. ***questions bearing on the proper conduct of the administration of justice may equally amount to matters of general public importance."***

Other relevant considerations to be borne in mind before certification of a matter as one raising issues of general public importance are that mere apprehension of miscarriage of justice is not a proper basis for

granting certification for an appeal to the Supreme Court unless the matter still falls within the terms of Art 163(4)(b) of the Constitution; that determinations of fact in contests between parties are not by and of themselves a basis for granting certification for an appeal before the Supreme Court; Certification of a matter as one raising matters of general public importance is justified only in exceptional cases that raise cardinal issues of law or of jurisprudential moment (***PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012,)***; 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 (***PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 5 OTHERS*** (supra); that the jurisdiction of the Supreme Court under Article 163(4) (b) is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law (***MALCOLM BELL VS DANIEL TOROITICH ARAP MOI & ANOTHER***

(supra); and that in cases of uncertainty of the law occasioned by contradictory precedents, the Supreme Court may resolve the uncertainty or refer the matter to the Court of Appeal for determination.

Applying the above principle to this application, the applicant contends that the intended appeal raises a matter of general public importance because this Court misapprehended the real tenor and effect of Chesoni, J.'s

decision in ***MURIITHI V. DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER*** (supra) and as a result former detainees intent on filing claims but who had filed similar *Habeas Corpus* applications will be adversely affected, thus elevating the issue to one of general public importance. The applicant further asserts that this Court misapplied the law on *res judicata*.

We note that after perusing the detention order under which the applicant was detained, Chesoni, J. concluded that under Regulation 6(2) of the Public Security (Detained and Restricted Persons) Regulations, 1978, the applicant was deemed in law to be in lawful custody. The Regulation provided as follows:

> ***"6(2). Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and while so detained, shall be deemed to be in lawful custody."***

In the impugned judgment this Court noted that the decision of Chesoni, J. was not appealed and in our view, that decision conclusively determined the legality of the applicant's detention under the law as it then existed. Not only that, but the fact that the applicant was detained by a detention order signed, not by the 1st respondent, but by the Minister responsible for internal security who under the regulations was the detaining authority. The question then is whether 27 years later the applicant could in law raise the same issue and ask a court of co-ordinate jurisdiction to find, contrary to the finding of the earlier court, that the applicant's detention was not, after all, lawful and that he was detained pursuant to an order by the 1st respondent.

In our view, the law on *res judicata* in our jurisdiction as of now is clear enough and its application in the applicant's appeal did not raise any cardinal issues of law or of jurisprudential moment or a substantial point of law the determination of which will have a significant bearing on the public interest, so as to deserve the attention of the Supreme Court. There are no existing contradictory decisions of this Court on *res judicata* and at best, the applicant's complaint is no more than an attempt to invoke the appellate jurisdiction of the Supreme Court to settle or rectify what he perceives to be errors with regard to application of res judicata by this Court.

To demonstrate a bearing on the public interest beyond the applicant's personal circumstances, the applicant submits that all former detainees are likely to be affected negatively by the judgment of this Court in their quest to access justice. In our view, the short answer to the applicant's concern is that each case has to be determined on the basis of its own facts and it cannot be assumed that in all cases involving former detainees, a decision like Chesoni, J.'s in ***MURIITHI V. DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER*** (supra), will have been made. Whether a suit is *res*

judicata or not will depend on the facts of each case and whether or not there was an earlier suit, which conclusively determined the issue being raised in the later suit. We cannot, without any evidence conclude that the decision of this Court will affect all potential cases by former detainees the same way.

The applicant is also aggrieved by the order of this Court that set aside the sum of Kshs ***80, 161, 720/=*** that was awarded to him being ***"his share of the proceeds"*** from the sale of the properties of the three limited liability companies. It is important to put this issue in its proper context, which is whether a party can be awarded an amount, other than general damages, which he or she has not pleaded or strictly proved at the hearing of the suit. In his petition before the High Court, the applicant did not plead the amount that was ultimately awarded as "his share". That amount was never strictly proved. In the applicant's own words:

> ***"These are the estimates I have for the properties in question which I arrive at conscientiously and to the best of my personal knowledge and experience."***

Yet the applicant's argument is that he should nevertheless have been allowed to keep the huge amounts awarded by the High Court, which he based on nothing other than "estimates". This he argues is because his assertions were not controverted and must therefore be deemed to have been proved. With respect, there are no inconsistent decisions of this Court that were cited to us or that we are aware of that allow the kind of award that was given by the High Court on the basis of estimates, however conscientious, without pleadings and strict proof. Even where judgment on liability against a party is entered, the claimant has to go through a process of formal proof where he is required to strictly prove the special damages that he or she claims.

> The quintessential statement of the law in this regard is as follows:
>
> ***"Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallized, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages".***
>
> (See ***MCGREGOR ON DAMAGES, (10th Edition), Para 1498).***

In ***BANQUE INDOSUEZ VS D J. LOWE & COMPANY LTD (2006) 2 KLR*** page ***208***, at page **222,** this Court stated the principle thus:

> ***"It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves."***

The applicant also argues that the judgment of this Court raises fundamental questions regarding the standard of proof in enforcement of fundamental rights cases, where a respondent has not controverted an opponent's pleadings. In the applicant's view, there is a danger of the judgment reversing some 64 decided cases, and all pending and future cases, arising in situations similar to the appellant's.

As we have stated, the legal requirement that claims like that made by the applicant must be pleaded and strictly proved cannot be defeated by the argument that the applicant's claim is not controverted. The failure to controvert the applicant's claim would at best lead to judgment on liability against a respondent, but that would not take away the onus on the applicant to strictly prove his alleged losses. In this case, this Court was not satisfied that the applicant had established the 1st respondent's liability in view of the earlier decision of Chesoni, J. and the fact that the applicant had been detained by the State under the hand of the relevant minister, rather than by the 1st respondent. The Court expressed itself thus, a position which we think is legally correct, to warrant any further restatement by the Supreme Court at this point in time:

"In our view we think that the facts to be proved required documentary evidence. The 1st respondent (the applicant) ought to have produced the certificates of incorporation of the three companies together with their respective

Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who[m], at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1st respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it."

We agree with the respondents too, that the other legal issues involved in the intended appeal are straight forward questions of company law, and in particular, whether the applicant as a shareholder could sustain a claim of a share of the proceeds of sale of assets of companies which in law are separate legal personalities from shareholders. The legal position is clear enough in our view to warrant engagement of the Supreme Court on such first principle questions. On this score also, the intended appeal, in our opinion is bereft of any cardinal issues of law or of jurisprudential moment.

We must also remind ourselves that the mere existence of divergent decisions of this Court would not *ipso facto* qualify to refer a matter to the Supreme Court as one involving matters of general public interest. Issues of law of repeated occurrence in the general course of litigation or issues that appear destined to continually engage the workings of the judicial organs must be involved. Thus in ***MALCOLM BELL V. DANIEL TOROITICH ARAP MOI & ANOTHER*** (supra) the Supreme Court, having found that there were existing divergent decisions of this Court on a point of law relating to adverse possession, nevertheless declined to assume jurisdiction over the issue as one raising a matter of general public importance. Instead the Supreme Court left it to the Court of appeal to align its decisions. The Court expressed itself thus:

"In principle, this Court believes these Court of Appeal decisions should be aligned, to create consistency as to when time starts running, for purposes of adverse possessory rights. The Court of Appeal itself has the competence to deal with this question in its subsequent decisions. As stated in peter Ngoge vs Ole Kaparo, this Court ought to safeguard the respective jurisdictions of other courts in the hierarchy of courts in Kenya, and should resist the temptation to encroach on their proper spheres of work."

(See also the ruling of this Court in ***MENGINYA SALIM MURGANI VS KENYA REVENUE AUTHORITY, CA No. Sup 4 of 2013***).

In the circumstances of this application we have come to the inescapable conclusion that the applicant has not discharged the burden on him to satisfy us that his intended appeal to the Supreme Court raises matters of general public importance within the meaning of Article 163(4)(b) of the Constitution. Accordingly the applicant's Notice of Motion dated 26th May 2014 is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of November, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR