Okeno & 2 others v Yhap (Civil Application E118 of 2024) [2025] KECA 805 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 805 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E118 OF 2024

SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

ERICK OKENO .... 1ST APPLICANT

JUDITH ZEMBI OKENO .... 2ND APPLICANT

TONY OKENO .... 3RD APPLICANT

AND

JAMES OVID SHUGAS YHAP .... RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Mombasa (Murgor, Laibuta & Odunga, JJ.A.) delivered on 11th October 2024 in Civil Appeal No. E027 of 2020)

RULING

1. The applicants moved to this Court on appeal in Civil Appeal E027 of 2020 from the judgment of the High Court of Kenya at Mombasa (M. Thande, J.) dated 9th October 2020 in HCCC No. 2 of 2014 in which the respondent sought to recover from the applicant's vacant possession of the suit property, to wit, Land Title No. CR 51563, Subdivision 5813 section III MN Kikambala jointly owned by him and their deceased sister, Rosemary Anne Akinyi, in undivided shares of 40%/60% respectively. In its judgment, the trial court allowed the respondent's suit as prayed and awarded him: vacant possession of the suit property; general damages for trespass in the sum of Kshs. 1,200,000; and costs of the suit.

2. Aggrieved by the judgment of the trial court, the applicants moved to this Court on appeal faulting the learned Judge for, inter alia: failing to find that she had no jurisdiction to determine matters relating to ownership of land; failing to find that the respondent had no locus standi to institute the suit without first taking out letters of administration to the estate of their deceased sister; concluding that there was a valid marriage between their deceased sister and the respondent; by concluding that the applicants

were intermeddlers in the absence of any evidence in that regard; by failing to find that the 1st applicant was an administrator to the estate of the deceased; and for awarding the respondent costs of the suit.

3. In its judgment dated 11th October 2024, this Court dismissed the applicants' appeal with costs to the respondent and upheld the judgment and decree of the trial court, which prompted the applicants' Notice of Motion dated 25th October 2024 seeking certification and leave to appeal to the Supreme Court on a troop of 23 argumentative grounds, which we need not replicate here. Suffice it to note that most of them relate to matters of law and factual evidence on presumption of marriage and property rights. The concluding ground "w" reads:

> "... the issues raised in the intended appeal are hinged on settlement of the law on presumption of marriage and as such the application should be allowed".

4. The applicants' Motion is supported by the annexed affidavit of Erick Okelo (the 1st applicant) sworn on 25th October 2024 essentially deposing to the grounds on which their Motion is anchored.

5. In support of the Motion, learned counsel for the applicants, M/s. Omondi, Abande & Company, filed written submissions dated 11th November 2024 citing two judicial decisions in support of the Motion. Urging us to allow the Motion, counsel relied on Article 163(4) (b) of the *Constitution*, which stipulates that appeals lie from this Court to the Supreme Court in any other case in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved.

6. To buttress his submissions, counsel cited the Supreme Court decision in the case of *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (2013) KESC 11 (KLR) where the Court held that, to succeed in an application for certification under Article 163(4) (b) of the *Constitution*, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance, the determination of which transcends the circumstances of the particular case, and has a bearing on the public interest; and, where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest.

7. Counsel further submitted that the judgement of the Court of Appeal delivered on 11th October 2024 failed to take into account the eight principles of presumption of marriage as laid down in the decision of the Supreme Court of Kenya in the case of *MKN v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (2023) KESC 2 (KLR) where the Court stated that all eight principles must be met to prove the existence of the presumption of marriage.

8. Opposing the Motion, the respondent filed a replying affidavit sworn on 19th November 2024 in which he contended that the applicants have not demonstrated that the matter raises an issue of general public importance involved in their dispute and that, therefore, their application should be dismissed. It is noteworthy though that a substantial part of the respondent's replying affidavit comprised of paragraphs 8 to 18 is missing from the record.

9. Be that as it may, learned counsel for the respondent filed written submissions dated 21st November 2024 contending, inter alia: that there are no new matters of general public importance involved which this Court did not deal with in the appeal; that there is no constitutional issue for interpretation or determination by the Supreme Court; that the issue relating to the presumption of marriage has already been dealt with by both the Supreme Court and this Court as demonstrated in the afore-cited case of *MKN v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (*ibid*). They urged us to find that the applicants' Motion lacks merit, and that it be dismissed with costs to the respondent.

10. We take to mind the Supreme Court's decision in *TMG & another v AP* [2024] KESC 48 (KLR) where the Court had this to say on the stringent conditions to be satisfied to merit certification under Article 163(4) (b) of the *Constitution*:

> "It is trite that a matter(s) of general public importance which would warrant the exercise of this Court's appellate jurisdiction under Article 163(4)(b) of the *Constitution* should transcend the dispute between the parties, and have a significant bearing upon public interest. Further, the onus lies with the applicants to demonstrate that the matter in question carries specific elements of real public interest and concern. We cannot help but note that the applicants did not concisely set out the issues they deem are of general public importance in their Motion. Rather, they set out the issues in their written submissions. This Court has time and time again underscored the requirement and necessity of an intended appellant(s) to concisely set out the issues deemed to be of general importance as appreciated in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (*supra*). In short, the delineated issues form the basis upon which both the Court of Appeal and this Court determine whether indeed an intended appeal raises issues of general public importance which warrant this Court's consideration. Therefore, we find that for proper order and notice to the other parties, an intended appellant, like the applicants, should concisely delineate the issue(s) of general public importance he/she deems arises from an impugned decision of the Court of Appeal...." [Emphasis ours]

11. What then may be viewed as points of general public importance in this case to warrant judicial scrutiny in the intended appeal to the Supreme Court? A similar question was addressed by this Court in *Memphis Limited v Kenya Ports Authority* [2022] KECA 105 (KLR) in the following words:

> "18. ... For leave to appeal to be granted, the applicant needs to demonstrate that the points of law are 'of general importance the determination of which will substantially affect the rights of one or more of the parties.'
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> 19. The Act does not however provide direction on what may be considered to be 'of general importance'. We think what the Supreme Court of Kenya stated in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR though in the context of certification under Article 163(4) (b) of the *Constitution*, does provide guidance in interpreting the words 'of general importance' under Section 39(3) (b) of the Act. In that case, the Supreme Court stated thus:
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> > "Before this Court, "a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern." [Emphasis added]

12. In the afore-cited decision in *Memphis Limited v Kenya Ports Authority* (*supra*), the Court took to mind the Supreme Court's pronouncement in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* (*supra*) and concluded thus:

> " 20. .... The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law".

13. Having considered the instant Motion, the grounds on which it is anchored, the affidavits in support and in reply thereto, the cited authorities and the law, we find that the applicants' Motion falls short of demonstrating to our satisfaction beyond a mere restatement that the intended appeal raises issues of general public importance. To our mind, the intended appeal seeks to secure an interpretation of the law relating to property rights over private land and the circumstances under which marriages may be presumed in the context of the peculiar facts of this case, which constitute private matters that are beyond the Supreme Court's appellate jurisdiction under Article 163(4)(b) of the *Constitution*. Moreover, and as mentioned above, the Supreme Court already considered and pronounced itself on the principles of presumption of marriage in *MKN v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (*ibid*).

14. The appellants having failed to demonstrate that their competing interests in the suit property fall in the category of those contemplated in Article 163(4) (b) of the *Constitution*, and having failed to show what in their intended appeal constitute points of law of general public importance that transcend their private litigation interests and, further, having failed to demonstrate how such interest have a bearing on the general public interest and concern with regard to specific elements, we reach the inescapable conclusion that their Motion fails and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

...

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR