Peter v Kamacho & another (Civil Application E002 of 2024)
[2025] KECA 957 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 957 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E002 OF 2024

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

MAY 9, 2025

BETWEEN

NANCY WANGECHI PETER ..... APPLICANT

AND

GIDEON KANINI KAMACHO ..... 1ST RESPONDENT

CYRUS KANINI NDEGE ..... 2ND RESPONDENT

(An application for certification and leave to apply to the Supreme Court from the Judgment of this Court (Jamila Mohammed, Kimaru & Muchelule, JJ.A.) dated 12th April 2024inCivil Appeal No. 171 of 2017)

RULING

1. By a notice of motion dated 25th April 2024, brought under Article 163(4)(b) of *the Constitution*, sections 15(1), 15(1)(a),(b)and (2) of the *Supreme Court Act* 2011, rules 33 (1) of the Supreme Court Rules, the appellant Nancy Wangechi Peter is seeking for certification and leave to appeal to the Supreme Court against the decision of this Court sitting in Nyeri in Civil Appeal No. 171 of 2017 (Jamila Mohammed, Kimaru & Muchelule, JJ.A.) delivered on 12th April 2024.

2. By way of a background to the matter, and to put this application into perspective, the dispute subject matter relates to the property known as Land Parcel Kabare/Mutige/65 (suit property), which originally belonged to the father of the 1st respondent, Gideon Kanini Kimacho and Kariuki Kanini the applicant's father. According to the respondents, this suit property was granted to the father of the original owner by the Unjiru clan and after the demise of the original owner, the suit property was registered in the name of the applicant's father, who was the elder brother of the 1st respondent, to hold in trust for both himself and the 1st respondent.

3. The plaintiffs before the High Court were Gideon Kanini Kamacho (1st respondent) and Cyrus Kanini Ndege (2nd respondent) (father and son, respectively), while the defendants were Kariuki Kanini (brother to Gideon and applicant's father) and the appellant, Nancy Wangechi Peter.

4. The respondents, the plaintiffs before the High Court, argued that the applicant's father was meant to hold the suit property in trust for himself, the 1st respondent, and their respective dependants, all of whom were living on the suit property. In 1997, however, the applicant's father transferred the property to the applicant and her mother (his wife) without considering the respondents' interests, effectively undermining their claims to the property. The respondents alleged that this transfer was fraudulent, orchestrated by the applicant's desire to deny them their rightful entitlement to the land.

5. The applicant, the 2nd defendant before the High Court, opposed the suit claiming that the issues raised in the plaint were res judicata. She cited similar cases filed by the respondents: Kerugoya Civil Suit No. 81 of 1997 and Land Dispute Tribunal Case No. Award 37 of 1997 as well as ELC No. 1 of 1997, all of which rendered the matter res judicata. The applicant's father asserted that the respondents had their land Parcel No. Baragwe/Guama/301, which they obtained through a transfer from the Gichungu Land Control Board.

6. On 8th November 2016, the High Court found that the Land Registrar wrongfully removed a caution against the property, as proper procedures were not followed and the affected parties were not heard; the respondents were not involved in previous related court proceedings. Although no fraud was proven, there was evidence of misleading information about the caution and the respondents' possession of the land.

7. The court acknowledged the existence of a Kikuyu customary trust involving the land, noting that both the applicant's father and the 1st respondent had lived on the land before its demarcation in 1958, and that despite the applicant's father being registered as the owner, the 1st respondent and his family continued to occupy the land. By the time the suit was filed, the respondents had possessed their portion for over 50 years.

8. The trial court found sufficient evidence to support the position that the applicant's father held half of the parcel of land in trust for the 1st respondent, resulting in a judgment in favor of the respondents.

9. Aggrieved by the judgment of the trial court, the applicant moved the Court of Appeal with the following grounds of appeal: the trial judge erred by rendering a judgment against the weight of the evidence and by relying on extraneous factors; disregarded the fact that the 1st respondent had passed away by the time the matter was heard; overlooked that the 2nd respondent did not possess letters of administration for the estate of the 1st respondent, and thus lacked the legal standing to seek a determination of trust on his behalf; the existence of trust was not proven to the required standard and the learned judge neglected the decree issued in Kerugoya SRMC CC No. 161 of 1996, despite no appeal being lodged against it; and the learned judge also disregarded the fact that the respondents had their parcel of land, Baragwi/Guama/301.

10. On 12th April 2024, the Court of Appeal upheld the trial court's decision and held that while the 1st respondent's claim had abated, it remained valid and enforceable. The same reasoning applied to the claim against applicant's father, meaning that the claim against the applicant was also valid, notwithstanding the abatement of the suit against her father.

11. Aggrieved by this Court's judgment, the applicant seeks certification and permission to appeal to the Supreme Court on grounds that the intended appeal raises a matter of great public importance and that the matter transcends the circumstances of this particular case.

12. The application is supported by the grounds on its face and the supporting affidavit sworn by the applicant dated 25th April 2024, in which she deposes that both Gideon Kanini Kamacho and Kariuki Kanini passed away during the trial in Nyeri Civil Suit No. 137 of 2002, and no application for substitution was filed on behalf of their estates, leading the trial court to declare the suit against them as having abated on 1st July 2010; the applicant had raised in her defence the existence of court orders issued in Kerugoya SRMCC No. 161 of 1996 where the court gave orders for the subdivision and transfer of the LR No. Kabare/Mutige/65: despite the claim against Kariuki Kanini (deceased) having abated on 1st July 2010, this Court upheld the trial court's decision, stating that despite the abatement of the claims by Gideon Kanini Kamacho (deceased) and Kariuki Kanini (deceased), the claim against the applicant remained valid and enforceable.

13. The applicant further asserts that the intended appeal raises points of law that are of general public importance, specifically: the effect of the abatement of a suit under Order 24 rule 3(2) & 4(3) of the Civil Procedure Rules; the effect of orders made regarding land registered in the name of a deceased party; whether a court can alter the determination made in a previously decided suit other than through an appeal or review.

14. The 2nd respondent filed a replying affidavit sworn on 9th May 2024. He contends that the issues the applicant intends to raise do not warrant the Supreme Court's consideration as they lack public interest; the applicant was aware of these matters but failed to present them in the primary appeal, seemingly attempting to delay the 2nd respondent's benefits from the judgment; further applicant seeks a review of an issue already addressed; the applicant subdivided the suit property into three portions; the Nyeri High Court's decree in HCCC No. 137 of 2002, which canceled her titles, directly affects her; the decree was in favor of the 2nd respondent and therefore the issue of abatement does not apply, and there are no grounds for the Supreme Court's involvement; further the orders of the court are specific to the parties and do not raise issues of public importance for the Supreme Court; further the third issue, Nyeri High Court's decree in Case No. 137 of 2002 found that the land subject matter was held in trust for the applicant's father, the 2nd respondent's father and their respective families, and was to be shared equally upon execution, the last issue raised is rhetorical; that it is well-established that a lower court's decision can be reviewed or appealed, and the case against the 1st respondent did not abate since both respondents were part of the suit, allowing the cause of action to survive through the 2nd respondent.

15. The 2nd respondent also deposes that: the applicant, who previously sued her own father in Kerugoya SRMCC No. 161 of 1996 regarding the subdivision of the property, has acted vexatiously by not executing the court's decree and further dividing the land after his death. This pattern of behavior suggests the applicant is pursuing her own selfish interests rather than addressing matters of public concern. The 2nd respondent argues that the issues raised in the applicant's intended appeal have already been resolved and do not meet the threshold necessary to refer matters to the Supreme Court.

16. Learned counsel for the applicant in support filed submissions dated 9th May 2024. Referring to Article 163(4)(b) of *the Constitution* of Kenya, he submitted that the applicant intends to appeal on three legal questions that should be certified as matters of public importance and rehashes the averments in the applicant's affidavit on the same which we need not rehash. Learned counsel in his arguments cited the Supreme Court decision of Hermanus Phillipus Steyn v Giovnni Gnechi- Ruscone [2013] eKLR on the test of what qualifies to be a matter of general public importance.

17. In opposition, the 2nd respondent's filed written submissions dated 13th May 2024. Regarding the effect of abatement of a suit as stated in Order 24 rule 3(2) and rule 4(3) of the Civil Procedure Rules, the 2nd respondent contended that the answer lies within the provisions cited by the applicant. He argued that

if a cause of action does not survive a deceased party, the case abates within twelve (12) months unless there is a substitution for the deceased party. In the present appeal, the case is between the applicant and 2nd respondent who was also sued in his capacity as a respondent; furthermore, in Nyeri High Court Civil Suit No. 137 of 2002, the respondents had sued the applicant along with Kariuki Kanini and Tabitha Wawira Kariuki, two of whom are now deceased, leaving only the applicant, meaning the cause of action survived the deceased parties, which is why the applicant was able to lodge the current appeal that the court determined. No issues require statute interpretation by the Supreme Court, and this matter is not of general public importance.

18. On the issue of abatement of the suit and the orders related to the land registered in the name of a deceased party, the 2nd respondent argues that the suit land was initially registered in the name of the applicant's father. After his passing, the applicant and her family took control of the land, prompting the filing of Nyeri High Court Case No. 137 of 2002, which challenged the subdivision by the applicant and sought a rightful share. The High Court ruled in favor of the 2nd respondent and ordered an equal subdivision of the land. By the time these orders were issued, the land was registered under the applicant's name, making the issue of a deceased registered owner irrelevant.

19. On the third point concerning whether a court can alter the determination in a previous suit other than through appeal or review, it was urged that a competent court already decided the issue and need not be presented to the Supreme Court, as it would waste judicial time and delay the respondent's judgment. Citing the case of Hermanus Philipus Steyn v Giovanni Gnecchi-Ruscone (supra), learned counsel submitted that the applicant's issues are personal and do not affect the general public, thus lacking justification for an appeal to the Supreme Court.

20. We have carefully considered the notice of motion, the rival affidavits, and the parties' submissions. Regarding the principles applicable in certification and grant of leave to appeal to the Supreme Court, the parties are walking on a well-trodden path.

21. Article 163(4)(b) of *the Constitution* provides that:

    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; and

    b. In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

22. In the case of Mitu-Bell Welfare Society v Kenya Airports Authority Limited & 2 Others [2018] eKLR, this Court cited the case of Cromptom v Wiltshire Primary Care Trust [2008] EWCA in which the prerequisites for determining a matter of general public importance were elaborated as follows:

    "(i) that the matter involves the elucidation of public law by higher courts, in addition to the interests of the parties;

    ii. that the matter is of importance to a general class, such as the body of tax-payers;

    iii. that the matter touches on a department of State, or the State itself, in relation to policies that are of general application."

23. The Supreme Court in the case of Herminus Phillipe Steyn v Giovanni Gnechi-Ruscone [2011] eKLR, considered at length what a matter of general public importance entails and stated thus:

> " 59. From the research material availed to this Court, it is clear that a matter of general public interest may take different forms: as instances, an environmental phenomenon involving the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of persons in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance, or the Court's scope for dispensing redress, or the mode of discharge of duty by public officers.
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> 60. In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows:
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> i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
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> ii. 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;
>
> iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
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> iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
>
> v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*:

vi. the intending applicant 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;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

24. We are not satisfied that the matter being sought to be referred to the Supreme Court has a bearing on public interest that transcend the circumstances of this case, further it has not been demonstrated either that the matter raises any issues that are novel, or that they arise on account of contradictory decisions of this Court.

25. For the reasons stated above we dismiss the application with costs to the 2nd respondent.

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

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR