



TMG & another (Minor suing through his mother and next friend TMG) v AP (Civil Application E003 of 2022) [2024] KECA 167 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 167 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E003 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

TMG 1ST APPLICANT

QFG 2ND APPLICANT

MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND TMG

AND

AP RESPONDENT

(An application for certification that this matter is of general public importance pursuant to Article 163(4) (b) of the Constitution with respect to the proposed appeal against the judgement of the Court of Appeal at Mombasa by (Hon. Mr. Justice Gatembu, Hon. Lady Justice Nyamweya, & Hon. Lady Justice Lesiit, JJ.A) delivered on 6th May, 2022 in Civil Appeal No. 138 of 2022)

RULING

1. On May 6, 2022, this Court (Gatembu, Nyamweya and Lesiit, JJ.A.) delivered a judgement in Mombasa Civil Appeal No. 138 of 2020, - TMG and another v AP, dismissing the appeal with no orders as to costs.
2. The impugned judgement was in determination of an appeal by the Applicants herein, TMG and QFG, against the judgement of Thande, J. delivered in Mombasa High Court in Matrimonial Property Cause No. 1 of 2016 (formerly Case No 207 of 2015) on April 10, 2019. By that judgement, the learned Judge dismissed the applicants’ suit and allowed the respondent’s counterclaim. The trial court declared that no marriage existed between the 1st applicant (TMG) and the respondent (AP), and that the respondent had no obligation to maintain the applicants. Consequently, the applicants were ordered to deliver vacant possession of property known as CR xxxx/x subdivision xxxx (Original No.xxxx/x of Section I Mainland North) measuring 0.033 hectares (the suit property), and situate in



Shanzu Serena in Mombasa (the suit property) within three months and, in any event, not later than July 31, 2019.

3. Aggrieved by the decision of this Court, the applicants intend to appeal to the Supreme Court, and have expressed their intention to do so by filing a Notice of Appeal dated May 13, 2022. They have moved this court via a notice of motion dated May 13, 2022 expressed to be brought under article 163(4) (B) of the Constitution, sections 15(1) and 19 of the Supreme Court Act, rule 24(1) of the Supreme Court Rules, 2012 sections 3A and 3B of the Appellate Jurisdiction Act. In that Motion, the applicants pray that this Court certifies that their intended appeal to the Supreme Court raises matters of general public importance and, therefore, fit and proper to be heard by the Supreme Court.
4. The 1st applicants' case before the High Court was that she met the respondent sometime in March 2008 after which the couple commenced a lengthy intimate relationship; that, shortly thereafter, the couple, together with the 1st applicant's son, QFG, the 2nd applicant herein, settled as a family on a property the respondent purchased as their matrimonial home in Kikambala before he sold it; that the respondent instituted Adoption Cause No. 5 of 2013 intending to adopt the 2nd applicant, which cause was still pending before the court; that, sometime in 2011, the respondent purchased the suit property upon which they constructed their home and lived thereon until the time the suit was filed in the High Court; and that due to some differences between the 1st applicant and the respondent, the respondent moved out of their matrimonial home back to his home country, Italy, and was threatening to evict the applicants and sell the suit property.
5. The applicants sought a permanent injunction restraining the respondent from interfering with the applicants' use and enjoyment of all that the suit property, and a declaration that she had an equitable interest therein.
6. On his part, the respondent contended that the property in Mtwapa (Kikambala) was sold, and that the parties shared the proceeds with the 1st applicant getting Kshs. 4,600,000/- and the respondent getting Kshs. 4,000,000/-; that he alone purchased the suit property from Kopex Industries Limited on September 26, 2011, effectively registered it in his name on October 31, 2011, and constructed a home on it; that he allowed the applicants to move in with him on February 25, 2014 with the understanding that the 1st applicant was to construct her own house in the meantime, which the 1st applicant never did; that due to irreconcilable differences, the respondent left the suit property and relocated back to his home in Italy; that the respondent subsequently served the applicants with an undated notice requiring the 1st applicant to vacate the suit property on or before 28th September 2015; that it was that notice that provoked the 1st applicant to institute the suit against the respondent in the High Court Family Division.
7. With regard to the adoption proceedings in respect of the 2nd applicant, the respondent admitted that he filed them, but explained that he was forced to abandon the same after learning in 2015 that the 1st applicant was legally married to one REP, and which marriage was still subsisting.
8. In the High Court, four issues were identified for determination, namely: whether a marriage could be presumed between the 1st applicant and the respondent;

whether the property in dispute was matrimonial property; whether the applicants were entitled to a 50% share in the suit property and in the proceeds of rent, or of sale thereof; and, whether the respondent had parental responsibility over the 2nd applicant.
9. The learned Judge found that the 1st applicant and the respondent were not married under any system of law; that, due to the 1st applicant's marriage to the said REP, which still subsisted as the divorce



proceedings between them were never concluded, the 1st applicant did not have a legal capacity to enter into another relationship with any other man; that, consequently, the court could not presume a marriage between the 1st applicant and the respondent; and that the suit property could not be regarded as their matrimonial home of parties who were not married to each other.

10. As regards the issue as to whether the 1st applicant had any equitable interest in, and whether a constructive trust existed over, the suit property in her favour, the learned Judge held that the applicants failed to demonstrate that the respondent represented to them that they were to obtain proprietary rights in the suit property; that, since the 1st applicant's claim was founded on an immoral and illegal act, the court could not lend its aid to the applicant; that, as regards parental responsibility and the best interest of the 2nd applicant, the learned Judge observed that, for a party to be saddled with parental responsibility, it must be demonstrated that such party has had a relationship with a child akin to that of a parent; that, in the circumstances of the case, the Court was not persuaded that the respondent was in loco parentis to the 2nd applicant; and that it was not in the best interest of the 2nd applicant to have him regard the respondent as his father when the 1st applicant and the respondent were not married.
11. It was as a result of these findings that the trial court in a judgement delivered on April 10, 2019 found that the applicants' suit lacked merit and the same was dismissed in favour of the respondent's and allowed his counterclaim.
12. In its judgement, this Court identified three main issues for determination: whether the learned Judge was correct to hold that, for a court to presume a marriage, it was necessary that the parties had capacity to marry; whether the learned Judge erred in finding that there was no constructive or resulting trust over the suit property in favour of the 1st applicant; and whether the learned Judge was right to hold that the respondent had no parental responsibility over the 2nd applicant.
13. In its judgement, this Court found that, by reason of the 1st applicant's previous and subsisting marriage to the said REP, the finding of the learned trial Judge that the 1st applicant and the respondent were not a married couple, and that a presumption of marriage could not be made in their case, was well founded as one of them had no capacity to enter into a marriage; that there was no evidence that the respondent and the 1st applicant had intention to create a trust in favour of the 1st applicant over the suit property; and that, considering lack of any documentary or other evidence presented to the court to prove the existence of a trust, the conclusion that could be made was that the two parties did not intend to create a trust in the applicants' favour; that the circumstances and facts of the case did not support the presumption of a trust, whether resulting or constructive, in favour of the applicants in connection with the legal title to the suit property; that the 1st applicant did not discharge her obligation to establish her contribution that would entitle her to claim interest in the suit property; and that, since no evidence was placed before the court to demonstrate that the respondent had a relationship with the 2nd appellant akin to that of a parent, the learned trial Judge did not err when she found that the respondent could not be burdened with parental responsibility over the 2nd applicant.
14. It was for the foregoing reasons that the appeal was found to be lacking in merit and dismissed with no order as to costs.
15. In the Motion before us, the applicants pray that this Court certifies that their intended appeal to the Supreme Court involves matters of general public importance so that they may appeal against the said judgment.
16. According to the applicants, they intend to raise the issue as to: whether it was open to the Court to overlook the fundamental rights of the applicants to proper housing in articles 27 and 43 of the [Constitution](#) in light of the evidence that the respondent had adopted the 2nd applicant; and issues



relating to men and women who enter into relations with persons of the opposite gender and, in the process, invest together and/or make promises to each other, but which promises are later violated when the union breaks up. In addition, the applicants contend that the Court should have considered the willingness by the respondent to share the proceeds from the sale of the suit property with the applicants; that they intend to raise substantial issues of law which would have significant bearing on relationships between men and women in Kenya which do not amount to a marriage, but as defined by the strict rules in Christianity and Islam law on marital unions for all intents and purposes operate as though parties therein are properly married to each other; and that it is important for the Supreme Court to fully address itself on the issues that will be raised by the applicants and to set the law straight in tune with the prevailing constitutional dispensation so as to develop progressive jurisprudence in line with the current legal regime and, in particular, article 258 of the [Constitution](#).

17. The application was supported by the affidavit sworn by the 1st applicant herein on May 12, 2022. It was deposed that the issue of women who for one reason or another have relationships with men married under the [Marriage Act](#) to other women and/or do not have the capacity to marry such women is a subject that has produced many varying decisions from the court of law with some of the courts taking a very strict view of the matter as was in this case, while other courts have taken the view that society is not static and that such relationships are recognised as creating valid family unions; that the Supreme Court has not had an opportunity of determining a matter falling within the aforesaid parameters; that it is therefore proper and opportune for this matter to be certified as meriting an appeal in the Supreme Court, which objective would not only help in the growth and development of the law but would also authoritatively determine the place of such unions for the benefit of the Kenyan society at large.
18. Opposing the application, the respondent relied on an affidavit sworn by his advocate, Mike Kyalo Mulei, on July 15, 2022 in which it was deposed that the dispute herein is not of general public importance in which the provisions of article 163(4) (b) of the [Constitution](#) can apply and, hence, the Supreme Court has no jurisdiction to deal with the matter; that the dispute involves and revolves around private property and the right to occupy such property by the applicants; that all issues of law and fact were effectively dealt with by the superior court where evidence both oral and documentary was tendered and considered; that the issues before the superior court were whether the suit subject matter was matrimonial property and whether the applicants had a right to occupy the suit premises as wife and son respectively which issues were decided by the superior court and by this Court.
19. We heard this appeal on the Court's virtual platform on October 4, 2023 when learned counsel, Mr. Gikandi Ngibuini, appeared for the appellants while learned counsel, Mr. Munzyu, held brief for Mr. Mulei for the respondent. While Mr. Gikandi briefly highlighted the applicants' submissions, Mr. Munzyu opted to rely entirely on the replying affidavit and their written submissions.
20. On behalf of the applicants, it was submitted that, based on the case of [Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and allied Workers' Union \(Kemau\) represented by its Promoters David Benedict Omulama & 9 others](#) [2018] eKLR; and [Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione](#) [2013] eKLR, that the law on the subject of certification under article 163(4) of the [Constitution](#), 2010 is that the issue must be one of general public importance; that it is not possible to decide with any degree of precision what matters pass the test of a point of 'general public importance', and that each case must be determined on its own peculiar circumstances; that the relationship between the respondent and the 2nd applicant constitutes a relationship that is actionable in law, particularly at the instance of the 2nd applicant as a child whose best interest is of paramount and primary concern and effect as set out in section 4(3) of the [Children's Act](#), 2001 and article 53(2) of the [Constitution](#) as read with [United Nations Convention on the Rights of the Child](#) (UNCRC), and the [African Charter on the Rights and Welfare of the Child](#) (ACRWC); that



the question for determination is whether, in the interplay that occurred between the 2nd applicant and the respondent in this suit, the clearly pronounced laws in the above statutes were upheld or applied; and that the determination of that issue would impact on the status of thousands of other children who find themselves entangled up in the same kind of status as the 2nd applicant herein,

21. In comparison to the decision in *Kenya Plantation and Agricultural Workers Union Case* (*supra*), which met the threshold of general public importance and thereby certified and filed in the Supreme Court, it was submitted that the said case impacted on a much smaller segment of the society as compared to the issue on the many thousands of children who unfortunately find themselves in the instant situation.
22. The other issue identified by the applicants for determination was the value of a representation made by one to another, and which makes the other person act on the basis of that representation, and when the maker of such representation reneges on those representations. To the applicants, this is also another good ground for allowing this matter to proceed to the Supreme Court of Kenya because there are thousands of women in the same situation as the 1st applicant, and that it would be good for them to know what their position in law is when they are thrown out of the residence that they were promised would be theirs for life.
23. The applicants relied on the provisions in articles 50 and 258 of the *Constitution* and the importance of contribution to the development and growth of law. According to the applicants, their research has not revealed any decision where the Supreme Court of Kenya has had any occasion to determine the issues raised above. In the circumstances, it was submitted that it is proper to allow this matter to be referred to the Supreme Court so that a decision from that court may assist in determining the law on the subjects raised herein with finality. The applicants cited two cases in their submissions on Civil Appeal No. 47 of 2016 – *Margaret Njeri Mbiyu v David Njunu Mbiyu Koinange* (Unreported); Civil Appeal No. 267 of 2011 – *Rose Mueni Musau v Brek Awadh Mbarak*; and Civil Appeal No. 121 of 2018 – *Christine Kimwana Chuba and another v Asha Nifusi Chuba*, where in support of their submissions that the widows and the children were entitled to inherit from the Estate of the deceased notwithstanding the questionable unions between the deceased and the widows. The copies of the said two cases were however not availed to us though they seem to be unreported. rule 27(3) of the *Rules* of this Court provides that:
 - i. An advocate who intends, at the hearing of an application or appeal, to rely on the judgment in any unreported case shall—
 - a. at or before the hearing, produce a certified or photostat copy of such judgment;
 - b. except in the case of an application to be heard by a single judge, two other copies of the judgment, for the use of the Court; and
 - c. in every case, one copy of the judgment for the use of the other party, or each other party appearing in person or separately represented, as the case may be.
24. Unreported authorities whose copies are not provided may be of no use to the Court where the Court is unable to get hold of them.
25. It was submitted on behalf of the respondent, that the issues before the trial court were whether, in the circumstances of the case, there was a marriage between the respondent and the 1st applicant; whether the respondent had any parental responsibility towards the 2nd applicant; and whether the subject property was matrimonial property and, hence, the applicants were entitled to occupation of the same. It was submitted that the instant application does not meet the test set out in *Hermanus*



Phillipus Steyn v Giovanni Gneccchi- Ruscone [2013] eKLR since the issues herein are private in nature, and were effectively determined by both the High Court and this Court.

26. We have considered the submissions made by the parties in support of and in opposition of the instant application.
27. It is not in doubt that the orders sought in this application are not automatically merited and that, in order for one to succeed in applications of this nature, one must bring oneself within article 163(4) of the *Constitution*. That Article provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the *Constitution* and in any other case in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved. In the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* (*supra*), the Supreme Court identified the principles governing the determination of a matter as one of general public importance in the following words:
- i. “for a case to be certified as one involving a matter of general public importance, the intending applicant must satisfy the Court that the issue to be canvassed on appeal is on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
 - ii. where the matter in respect of which certification is sought raises a point of law, the intending applicant 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;
 - 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.”
28. These principles were reiterated in the case of *Malcolm Bell v Hon. Daniel Torotich arap Moi and another*, [2013] eKLR thus:

“For a case to be certified as one involving a matter of general public importance, the intending applicant must satisfy the Court that the issue to be canvassed on appeal is on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;



- i. Where the matter in respect of which certification is sought raises a point of law, the intending applicant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;
 - ii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
 - iii. 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;
 - iv. Mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] 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*;
 - v. 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;
 - vi. 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;
 - vii. Issues of law of repeated occurrence in the general course of litigation may, in proper context, become ‘matters of general public importance’, so as to be a basis for appeal to the Supreme Court;
 - viii. 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 as litigants, may become ‘matters of general public importance’, justifying certification for final appeal in the Supreme Court;
 - ix. Questions of law that are destined to continually engage the workings of the judicial organs, may become ‘matters of general public importance’, justifying certification for final appeal in the Supreme Court;
 - x. Questions with a bearing on the proper conduct of the administration of justice, may become ‘matters of general public importance’, justifying final appeal in the Supreme Court.”
29. What can be distilled from the foregoing is that matters of general public importance are those that, inter alia, raise a substantial point of law, or occasion a state of uncertainty in the law, or arise from contradictory precedents, or will affect a considerable number of persons in general, or as litigants.
30. In determining this application, we purpose to avoid getting embroiled in the merits of the intended appeal to the Supreme Court. Our mandate in determining this kind of application is to adhere to the guidelines set out both by the Supreme Court and this Court.
31. As stated above, the issues identified by the High Court were: whether a marriage could be presumed between the 1st applicant and the respondent; whether the property in dispute was matrimonial property; whether the applicants were entitled to a 50% share in the suit property and in the proceeds of rent or sale thereof; and, whether the respondent has parental responsibility over the 2nd applicant. On appeal to this Court, those issues were reduced to three and identified as: whether the learned Judge was correct to hold that for a court to presume a marriage, it was necessary that the parties had capacity to marry; whether the learned Judge erred in finding that there was no constructive or resulting trust



over the suit property in favour of the 1st applicant; and whether the learned Judge was right to hold that the respondent had no parental responsibility over the 2nd applicant.

32. In broad terms, what the court was called upon to determine were the issue as to the existence of a marriage between the 1st applicant and the respondent; the status of the suit property, whether it was matrimonial; the 1st applicant's entitlement to the suit property; and whether the respondent had parental responsibility over the 2nd applicant. Before us, it has been argued that the applicants now intend to advance before the Supreme Court matters touching on the constitutional rights of the children born in what the applicants term "questionable unions" between their parents, as well as the status of the women who find themselves in such unions.
33. In our respectful view, the issues revolving around what constitutes a marriage; the status and capacity of a woman and a man to enter into a legally recognised marriage; what constitutes matrimonial property and the mode of their distribution, cannot, without more, be elevated to such level as would call for determination as issues that transcends the circumstances of such a case. Neither do such cases have significant bearing on the public interest. We believe that it was upon the realisation of this that the applicants mutated their appeal to the Supreme Court into one concerning the rights of children and spouses in a relationship that does not meet the threshold of a marriage. While we are not called to make any determination, we must point out that this is not a case of a child born in such a union but a child born of one of the parents in such a union.
34. As this Court held in *Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation* [2023] KECA 660 (KLR):

"This Court has the duty to ensure that the case does not involve a mere question of law, but a substantial question of law. Hence, an applicant must satisfy this test to assume jurisdiction under Article 164 (4) of the *Constitution*. (See Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* 1962 AIR 1314, 1962 SCR Supl. (3) 549).

71. To qualify as a question of law arising from the case, there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by the court so as to make it necessary to determine that question of law and arrive at a just and proper decision. If the question is settled by the highest court, or if the general principles to be applied in determining the question are well settled, and there remains the question as to the application of those principles, or that the plea raised is palpably absurd, the question ought not to be viewed as a substantial question of law."

35. Our consideration of the issues identified before us leads us to the conclusion that the same were never raised in this Court or in the High Court, or in any court below, and were not the subject of judicial determination. It is clear to us that those issues are intended to be raised for the first time in the Supreme Court in the event that we grant the certification sought.
36. In our considered view, the applicants' Motion has failed the test set out in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione* (*supra*). Accordingly, the same is hereby dismissed with no order as to costs.
37. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

A. K. MURGOR



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JUDGE OF APPEAL

Dr. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

