Boit & another v Kibias (Civil Application E017 of 2023) [2024] KECA 63 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KECA 63 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPLICATION E017 OF 2023

F SICHALE, LA ACHODE & WK KORIR, JJA

FEBRUARY 2, 2024

BETWEEN

THOMAS KIMUTAI BOIT .... 1ST APPLICANT

JOSIAH KIMEBUR KIBIAS .... 2ND APPLICANT

AND

JOSEPH KIMEBUR KIBIAS .... RESPONDENT

(Application for leave to appeal from the Court of Appeal to the Supreme Court of Kenya from the Ruling of the Court of Appeal of Kenya at Eldoret (F. Sichale, F. Ochieng, & L. Achode, JJA) delivered on 31st March 2023 in Civil Application No. E108 of 2021)

RULING

1. The 1st applicant, Thomas Kimutai Boit, and the 2nd applicant, Josiah Kimebur Kibias, have brought their application through the notice of motion dated 14th April 2023 pursuant to Article 163(4) of the *Constitution* , section 19 of the *Supreme Court Act*, rules 24 and 26 of the *Supreme Court Rules*, and rules 5(2) and 40 of the *Court of Appeal Rules*. In their application, they seek orders, inter alia, that the Court do certify their intended appeal as raising a matter of general public importance and subsequently grant them leave to prefer an appeal to the Supreme Court against the ruling delivered on 31st March 2023 by Sichale, Ochieng & Achode, JJA in Eldoret Civil Application No. E108 of 2021. The applicants also pray for the costs of this application.

2. The application is based on the grounds on its face as well as the affidavit sworn on the date of the application by the 2nd applicant. By way of a background to their application, the applicants aver that the Chief Magistrate's Court at Eldoret dismissed a claim lodged against them by the respondent, Joseph Ndayala Muyesu, in CMCC No. 885 of 2007 on 17th June 2014. The respondent being aggrieved by that decision, preferred an appeal to the Environment and Land Court (E&LC) at Eldoret vide Appeal No. 8 of 2014. In a judgment delivered on 11th July 2018 the E&LC allowed the appeal

in its entirety. Thereafter, it was the applicants' turn to appeal to this Court which they did through Eldoret Civil Appeal No. 112 of 2018. Their appeal was unsuccessful as it was dismissed on 9th July 2021.

3. It is the applicants' averment that in its judgement, this Court made a finding that the written agreement between the parties was not credible as found by both the trial court and the Superior Court and that there was a valid oral agreement between the parties. According to the applicants, in arriving at its conclusion this Court overlooked the findings of the trial court that there was a written agreement dated 22nd January 1996 between the parties whose contents were not challenged in the trial court nor interrogated at the superior court. It is the applicants' deposition that they were aggrieved by the said findings and sought to invoke this Court's powers to review its own decision through Civil Application No. E108 of 2021 but the application for review was dismissed on the basis that it was a disguised appeal. According to the applicants, their application for review was aimed at correcting the miscarriage of justice as this Court in dismissing their appeal had overlooked the findings of the trial court on the existence of a written agreement whose contents were not challenged at the trial or interrogated by the superior court.

4. Turning to the instant application, the applicants depose that the intended appeal to the Supreme Court raises pertinent questions of general public importance including the questions whether the learned judges of appeal erred in law in finding that they lacked residual jurisdiction to determine the application for review and whether the learned judges of appeal erred by misapprehending the law regarding the residual jurisdiction of this Court thereby disfranchising the applicants. It is the applicants' case that by dismissing their application, the Court has created uncertainty in law on its power to invoke its residual jurisdiction which includes the prevention of miscarriage of justice. They state that the ruling is not founded on sound legal principles as it contravenes statute and the doctrine of stare decisis owing to the Court's refusal to deliberate on the issues raised in the application for review. It is thus their case that their intended appeal merits elevation to the pedestal of matters of general public importance thus deserving of a hearing by the Supreme Court. The applicants also indicate that they intend to appeal against this Court's judgment arguing that it has created uncertainties and ambiguities in law with regard to the parol evidence rule and the place of the consent of land control board. The applicants therefore pray that the application be allowed as prayed.

5. The respondent opposed the application through grounds of opposition dated 14th August 2023. The application is opposed on the grounds that the applicants have failed to demonstrate that their intended appeal raises matters of general public importance; that the applicants have not met the threshold for the grant of certification and leave to appeal to the Supreme Court; and, that appeals from this Court to the Supreme Court only lie in respect of cases involving the interpretation or application of the *Constitution* or where the appeal involves a matter of general public importance.

6. When this matter came up for hearing on 25th October 2023, Mr. Tororei appeared for the applicants while Mr. Kibii came on record for the respondent. The submissions by Mr. Tororei were dated 11th October 2023 while those for the respondent were dated 13th October 2023. Counsel relied on their respective submissions and also made brief oral highlights.

7. In asserting that the applicants' intended appeal raises matters of general public importance, Mr. Tororei submitted that the judgment of this Court elevated the consent of the land control board to the level of a binding contract hence making the consent override a contract executed by the parties. Counsel argued that the holding of the Court created a new interpretation of the law which would impact all land transactions. According to counsel, this interpretation would jeopardize the importance of reducing land sale agreements in writing. Counsel also submitted that the judgment of the Court had the effect of opening room for written contracts to be varied orally or by the conduct

of the parties. Mr. Tororei urged that this would go against the well-established parol evidence rule which renders any agreement made outside an agreement inadmissible unless there is evidence of fraud, duress, or a mutual mistake. Further, that this Court being essentially the final appellate court, the courts below would be compelled to adhere to this interpretation unless the same is subjected to further scrutiny by the Supreme Court. Counsel submitted that the applicants' intended appeal to the Supreme Court also seeks to establish whether an order of specific performance can be enforced against a person who is not a party to the contract. According to the counsel, the 2nd applicant was never a party to the application for the consent of the land control board but the Court made a finding that by virtue of the application for consent, he was to transfer his land to the respondent. Counsel urged that this finding altered the settled doctrine of privity of contract. It was also counsel's submission that the Court erred in adopting the decision in *Willy Kimutai Kitilit v. Michael Kibet* [2018] eKLR and it is therefore necessary for the Supreme Court to re-examine the question of application of constructive trusts especially where the same is not pleaded by the parties. Counsel therefore urged us to allow the application and grant them leave to move to the Supreme Court.

8. In response, Mr. Kibii asked us to dismiss the application stating that it does not meet the conditions set in Article 163(4)(b) of the *Constitution* to warrant grant of leave to appeal to the Supreme Court. Counsel cited the cases of *Hermanus Philipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR and *Malcolm Bell v. Daniel Toroitich Arap Moi & Another* [2013] eKLR in support of the submission that there is an established threshold that must be met before a matter can be certified as raising issues of general public importance. According to counsel, the present application does not transcend the established threshold. Consequently, counsel urged us to dismiss the application with costs to the respondent.

9. We have given due consideration to the pleadings of the parties and the submissions filed in support of their positions. The single question that arises for our determination in this matter is whether the applicants' intended appeal raises a matter or matters of general public importance warranting certification for appeal to the Supreme Court.

10. An application like the one before us is not a novel one. This Court and the Supreme Court have already established substantive jurisprudence in this area. In *Koinange Investment & Development Ltd v. Robert Nelson Ngethe* [2013] eKLR, this Court underscored the purpose of this kind of application as follows:

> "After reviewing these decisions the court in Hermanus Phillipus Steyn held that there is a distinction between leave to appeal to this Court from the High Court and from this Court to the Supreme Court; that the requirement for certification under Article 163(4)(b) is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court, as the role of the Supreme Court, as was observed in R v Secretary of State Exp. Eastway [2001] 1 All ER 27 at page 33 paragraph b (per Lord Birgham), cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist."

11. Therefore, the starting point is to appreciate that only genuine cases raising matters of public importance should reach the Supreme Court. Thus, in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2012] eKLR this Court highlighted the features of a matter of public importance as follows:

> "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 that 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. As Madan JA. (as he then was) said in Murai v. Wainaina [1982] KLR 38 at page 49 para 1:

> "A question of general public importance is a question which takes into account the well being of a society in just proportions.""

12. On its part, the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR defined a matter of general public importance thus:

> " 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."

13. The Court went on to set the requirements for certification in respect of a matter of general public importance as follows:

> " (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;
>
> 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;
>
> 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."

14. The cited decisions form the basis upon which we will render ourselves on this application. Before we delve into the merits of the application, it is necessary to restate that the onus of establishing that a matter meets the threshold for certification reposes with the intended appellant. In that regard, it was stated in *Koinange Investment & Development Ltd v. Robert Nelson Ngethe* (*supra*) that:

> "In so far as Article 163(4) of the *Constitution* is concerned, it is now settled that the party alleging that the appeal raises a matter of general public importance must demonstrate the existence of that importance by identifying and formulating in the application the matter of public importance relied upon."

15. In this application, the applicants' contention is that the Court misapprehended its residual jurisdiction thus disenfranchising them, and also that the decision of the Court contravenes statute and stare decisis as it is not founded on sound legal principles. In our view, we do not find the issues identified in this application as fitting within the definition of 'matters of public importance' as elucidated by the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (*supra*). These issues do not disclose substantial and broad-based consequences transcending the litigation interests of the parties, and bearing upon the public interest. The applicants have further failed to satisfactorily establish how the decisions of this Court in Eldoret Civil Appeal No. 112 of 2018 and Civil Application No. E108 of 2021 have occasioned a state of uncertainty in the law by contradicting settled precedents. All that we see in this application are parties who seek to further their dissatisfaction with the judgment and ruling of the Court and nothing of general public interest at all. The intended litigation is one which does not transcend the dispute between the parties into the public sphere.

16. Our view is that the intended appeal is one which is merely based on the belief that an injustice has been occasioned to the applicants and that they need to climb to the top of the country's judicial hierarchy in the hope that they will obtain favourable relief. That is not the purpose for which the Supreme Court was created. In *Sanitam Services (EA) Ltd v. Patrick Nyaga & Another* (2023) eKLR the Supreme Court spoke to circumstances similar to those of the applicants as follows:

> " We reiterate, as we have in previous decisions of the Court, that a mere apprehension of a miscarriage of justice, is a matter most apt for resolution in the superior courts below, and is not a proper basis for granting certification for an appeal to the Supreme Court;"

17. It is also important to point out that the applicants' application is convoluted as they desire to appeal against both the judgement of 9th July 2021 and the ruling of 31st March 2023. It is unlikely that both the judgement and the ruling raise matters of public importance. And even if the applicants had a meritorious application, their approach makes it difficult for the Court to identify the specific decision from which the intended appeal originates in order to frame the questions that befit the determination of the Supreme Court. Ordinarily, each ruling or judgment is appealed against individually. Consolidation of such appeals is something within the remits of the Court appealed to. Similarly, and for good order, applications for leave can always be consolidated by the Court possessed of such applications and not through a convoluted application by a party. That notwithstanding, from the issues enumerated in the notice of motion, we cannot find any issue which qualifies to be of general public importance. Ultimately, this application lacks merit and the leave sought to appeal cannot be granted. The applicants have failed to clearly and satisfactorily establish any issue of general public importance in line with the principles set by the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (*supra*). The application is therefore for dismissal.

18. Before we conclude, we need to address the issue of costs.Ordinarily, costs follow the event unless the court for good reason otherwise orders. In this matter, nothing has been placed before us to warrant

the exercise of our discretion to deny the respondent costs. Consequently, the respondent shall have the costs of this application.

19. The upshot of the foregoing is that the notice of motion dated 14th April 2023 has no merit. We decline to certify the intended appeal as befitting a hearing by the Supreme Court. The notice of motion is hereby dismissed in its entirety with costs to the respondent.

20. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

....

JUDGE OF APPEAL

W. KORIR

....

. JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR