Mogwanja & another v Roskan Investments Limited & 3 others (Civil Appeal (Application) 4 of 2019) [2024] KECA 242 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 242 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 4 OF 2019

MSA MAKHANDIA, P NYAMWEYA & JM MATIVO, JJA

MARCH 8, 2024

BETWEEN

PAULINE NJOKI MOGWANJA ..... 1ST APPLICANT

SHEILA WARIARA KARAGO ..... 2ND APPLICANT

AND

ROSEMARY WAMBUI KANYAGIA ..... 1ST RESPONDENT

ROSKAN INVESTMENTS LIMITED ..... 2ND RESPONDENT

PATRICK MUNGAI KANYAGIA ..... 3RD RESPONDENT

ANGELA NYOKABI KANYAGIA ..... 4TH RESPONDENT

(Being an application for grant of leave to appeal from the court of appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Musinga P. Nambuye & J. Mohammed JJ.A.) dated 16th December 2022 in Civil Appeal No. 4 Of 2019)

RULING

1. Before us is a Motion on Notice dated 20th April 2023, in which the applicants, Pauline Njoki Mogwanja and Sheila Wariara Karago, in the main, seek leave of this Court to appeal to the Supreme Court against the judgment and order of this Court dated 16th December 2022. They also pray peripherally, for stay of execution of the said judgment and order. However, in their written submissions, the applicants dropped and or recalled the latter prayer on account of want of jurisdiction by this Court, and rightly so in our view. This is because in the case of *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 Others* [2013] eKLR this Court held that the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court and only when leave or certification has been granted. Both in *Southern Shield Holdings Limited & 2 Others v Delphis Bank Limited & Another* [2019] eKLR and *Jamii Bora Bank Limited v Minnie Mbue* [2021] eKLR,

this Court held that it lacks jurisdiction to issue stay of execution orders after delivery of judgment in the appeal before them and pending the hearing and determination of an intended appeal to the Supreme Court as they were *functus officio* and must down its tools.

2. Turning on the substantive prayer in the application, we will have to revisit the facts of the case albeit in an abridged form to contextualize the application. Save for 1st respondent, the rest of the other parties to this application are in one way or another related. The applicants, the 2nd respondent and one, James Mirie, (James) deceased, were children of the late Paul Thiong'o Samuel Mirie and the late Emily Nduta Thiong'o Mirie who died in 1974 and 1977 respectively. The 2nd respondent is married to the 3rd respondent and is the mother of the 4th respondent. The 1st respondent is a private limited liability company whose shareholders and Directors are the 2nd, 3rd, and 4th respondents, together with the Administrators of the estate of the James.

3. The late Emily Nduta Mirie, vide a written will dated 4th October 1976, bequeathed unto the applicants and the 2nd respondent absolutely and in equal shares, the suit property known as LR No. 156/7 otherwise known as "the Island Farm" situate in Limuru. The remains of their late parents are interred on the suit property.

4. The applicants alleged in a suit they filed against the respondents jointly and severally that upon the demise of their mother, they did not have an immediate need for the use of the suit property. James who had been denied any share in the suit property by the testatrix approached the three sisters with a request for them to allow him to use the suit property for his benefit in a bid to improve his financial position.

5. The request by James was considered at a family meeting held on 13th September 1997 and was approved subject to the condition that if the suit property were to be sold, James would give the three sisters the first option to purchase. Consequently, an Indenture dated 12th July 1999 was prepared conveying, transferring, and vesting all rights, title, and interest in the suit property absolutely to James. To the applicants upon such registration, James became a trustee on their behalf, i.e. a constructive trust had been created and the applicants together with the 2nd respondent were the beneficiaries of the said constructive trust.

6. However, sometime in 2009, James, according to the applicants devised a fraudulent scheme and sold the suit property to the 1st respondent in breach of the constructive trust. The applicants therefore initiated the suit in the trial court challenging the transaction with the overriding argument being that James did not have authority to sell the suit property to the 1st respondent without giving the applicants the first priority to purchase.

7. They, therefore, sought prayers that the 1st appellant held the suit property upon trust for them; a declaration that the purported purchase of the suit property and the transfer thereof to the 1st respondent was null and void; an order that the 1st appellant transfers the suit property to the three sisters; a permanent injunction to restrain the respondents from entering or being on the suit property; and a permanent injunction to restrain the appellants from selling, charging or alienating the suit property in any manner.

8. The allegations by the applicants were denied by the respondents vide a joint Statement of Defence and Counterclaim. They denied that James held the title of the suit property upon any form of trust, constructive or otherwise. It was argued that at the family meeting, the three sisters agreed to relinquish their interest in the suit property to James absolutely.

9. The respondents also raised a counterclaim of Kshs.59,986,315.00, representing the costs and expenses incurred since the commencement of the project, but which had stalled due to the continued and unjustifiable interference by the two applicants.

10. The trial court in its judgment dated 12th November 2018 found in favour of the applicants, and the counterclaim was dismissed.

11. However, on appeal, the appeal was allowed and the judgment and decree of the High Court was reversed leading to the instant application.

12. The application is premised on the grounds on its face and the supporting affidavit sworn by the 1st applicant dated 20th April 2023. The applicants aver and depose that they were aggrieved by the judgment and order of this Court, and had consequently, filed a notice of appeal evincing their intention to appeal to the Supreme Court. They had also lodged with the court a letter bespeaking proceedings dated 22nd December 2022. They are of the view that the intended appeal will raise matters of general public importance whose determination by the Supreme Court will have a significant bearing on the general public as regards how the contracts and wills are interpreted or construed in this country. Further, the determination will guide the courts as to how the remains of a testatrix will be looked after by a child of his/her choice and the nature of the testamentary freedom that a testatrix has under section 5 of the *Law of Succession Act*.

13. The applicants posit that there was before the trial court uncontroverted evidence of Mr. Kuria Tharau to the effect that James was violent and assaulted the testatrix on a number of occasions, thus, in exercise of her testamentary freedom the testatrix bequeathed the suit property only to her three daughters. According to the applicants, the issue raised was whether a testatrix in Kenya can make a Will and disinherit a child who assaults her.

    It was the applicants' case that unless the leave and or certification sought is granted, the applicants' rights, under Article 48 of the *Constitution*, to access justice by appealing against the said judgment will be rendered otiose and the public will be denied an opportunity of having the Supreme Court decide on matters of interest to everyone and the applicants will lose the opportunity of taking care of the remains of their mother.

14. The application was opposed by the respondents who filed a replying affidavit dated 15th December 2023 sworn by the 3rd respondent who deposed that the application was grossly misconceived, gravely misplaced, fatally and incurably defective, hopelessly incompetent, frivolous, vexatious, and therefore an abuse of the process of this Court and should therefore be dismissed. That the application was filed and served on them way out of time contrary to rule 41 (2) of the *Court of Appeal Rules*, 2022 which requires that such application be filed within 14 days of the decision. That the impugned judgment and order was delivered on 16th December 2022, yet the application was filed on 20th April 2023, five or so months later. The application was therefore incompetent and ought therefore to be struck out. Furthermore, the application had not met the threshold for certification as a matter of general public importance since the dispute is a private affair between the parties and does not in any way have significant bearing on the public nor does it transcend them so as to be a matter of general public importance.

15. The application was heard by way of written submissions with limited oral highlights. Mr. Kamau Kuria, Senior Counsel "SC" appeared for the applicants while Mr. Nyachoti was present for the respondents.

16. On the competency of the application, while relying on the case of *Karanja v. Ndirangu and Another* [2021] KECA 57, SC submitted that in that case, the application was filed almost seven months down the line and the court did not consider the delay inordinate. It was, therefore, clear that the application was competent as the period of delay herein was much less. As to whether the application should be allowed, he reiterated the reasons advanced by the applicants in their grounds in support of the motion, the supporting affidavit as well as their written submissions, which we need not rehash.

17. Mr. Nyachoti in response similarly reiterated what the respondents had deposed to in their replying affidavit and therefore there was no need to rehash as well. Suffice it to add that according to the respondents, the application did not meet the threshold set out in the case of *Hermanus Phillipus Stevn v Giovanni Gnecchi Ruscone* [2013] eKLR.

18. We have considered the Motion, the rival affidavits, the respective submissions, the authorities cited, and the law. Article 163(4) of the *Constitution* provides that appeals shall lie to the Supreme Court from the Court of Appeal as of right in any case involving the interpretation or application of the *Constitution* and in any matter where it is certified that the appeal involves a matter of general public importance. Further, rule 33 of the *Supreme Court Rules* requires that the application for leave be made before this Court in the first instance. In *Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and Alied Workers' Union (Kefhau) represented by its Promoters David Benedict Omulama & 9 Others* [2018] eKLR, this Court reiterated the principles as set out in *Hermanus Phillipus Steyn v Giovanni Gnecchi - Ruscone* (*supra*) in determining an application of this nature thus: 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; 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 public interest; such question or question of law must have arisen in the court or courts below, and must have been the subject of judicial determination; 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; 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) of the *Constitution*; the intended 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 and finally, determination of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

19. Accordingly, the appeals from this Court to the Supreme are circumscribed.

20. In the instant application, we have to determine whether the above delineations have been met. However, before we get there, counsel for the respondents raised the issue of whether the application was competent having been filed way out of time and without leave of court contrary to rule 41(2) of the *Court of Appeal Rules*. Courtesy of this rule, such an application ought to be filed within fourteen days of the decision. By the applicants' own admission, the application was filed five months later. However, counsel maintained that the delay was not inordinate and that the application was therefore competent. This is such a casual response to a fundamental jurisdictional issue. We are least impressed by this submission. No explanation has been advanced by the applicants for the delay, which in our view was inordinate. Furthermore, we would have expected the applicants to have filed an application for extension of time within which to file the instant application and advance the argument that the

delay was not inordinate. They did not do so and we accordingly find the respondents' objection to the application on this ground irresistible and we sustain it.

21. Even on the merits of the application, the applicants would still have lost.

22. The applicants identified the issues for determination in its intended appeal to the Supreme Court as follows that: The determination of the intended appeal will have a significant bearing on the public interest as regards how the contracts are interpreted or construed in this country; it is a matter of public interest as to whether the remains of a testatrix will be looked after by a child of his/her choice; it is a matter of general public interest that courts should interpret contracts/agreements entered into between persons on the terms entered into; it is a matter of public interest that the Supreme Court determines the nature of the testamentary freedom which a testatrix has under section 5 of the *Law of Succession Act*; it is a matter of public interest for the court to determine whether a female legatee in Kenya should be treated in equality with a male legatee in the construction of a will and that it is a matter of public interest that human autonomy protected by Article 19 (3)(b) of the *Constitution* be given effect both in exercising the freedom of contract and the freedom of attestation.

23. In our view, the above issues do not meet the threshold and criteria contemplated by Article 163 (4) (a) and (b) of the *Constitution of Kenya*, section 15B of the *Supreme Court Act*, and the delineations in *Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone*, (*supra*). First, most of the issues were never raised in the trial as well as the appellate courts for their determination. They are being raised for the first time in this application. This runs foul of the requirement that the issue of law sought to be contested in the Supreme Court must have risen in the court of appeal or courts below and must have been the subject of judicial determination. Be that as it may, the applicants have not even demonstrated the specific elements of real public interest and concern so as to justify the Supreme Court's intervention. The issues raised by the applicants are not in our view issues that transcend the particular circumstances of the case between the parties, they do not impact on the society in any way, nor do they bear on public interest. Indeed, the issues are not of any special jurisprudential moment since they only touch on the interests and transactions between the parties with regard to the suit property and do not therefore warrant the intervention of the Supreme Court. As such, there is no matter of general public importance in that regard. In any event, the issues of interpretation of contracts and matters of succession are well taken care of by statutes, judicial doctrines, and several precedents of this Court. Therefore, doctrines and canons for the construction and interpretation of contracts and wills are well-known and settled. We do not need to revisit them in this ruling. In any event,counsel for the applicants did not bring to our attention any decisions from this court and lower courts that are contradictory, conflicting, or uncertain in the interpretation and construction of contracts and wills.

24. The applicants have in our view failed to satisfy this Court that the intended appeal falls within Article 163 (4) (b) of the *Constitution* and the parameters set out in the Hermanus Phillipus Steyn (supra) case to warrant certification by this Court to appeal to the Supreme Court.

25. The upshot is that the Notice of Motion dated 20th April 2023 is bereft of merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR