



**Muchiri v Gachau (Civil Appeal (Application) 399 of 2017)
[2024] KECA 279 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 279 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 399 OF 2017
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
MARCH 8, 2024**

BETWEEN

JOHN GACHAU MUCHIRI APPLICANT

AND

GRACE WAMBUI GACHAU RESPONDENT

(Being an application for leave to appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal at Nairobi (Okwengu, Mativo and Gachoka, JJ.A.) dated 3rd March 2023 and delivered electronically via email on 6th June 2023) in Civil Appeal No. 399 of 2017)

RULING

1. Before us is a notice of motion dated 17th March 2023, brought under Articles 10, 24, 25 (c) 48, 50 (1) 159 & 163 (4) (b) of the Constitution, sections 3, 3A, and 3B of the Appellate Jurisdiction Act, sections 3 & 36 of the Court of Appeal (Organization and Administration) Act, rule 36(4) of the Supreme Court Rules, rules 41(2) 49, 61, (A) of the Court of Appeal Rules 2022, and any other enabling provisions of the law.
2. In the motion, the applicant, John Gachau Muchiri, seeks for the specific order that he be granted leave to appeal to the Supreme Court against the judgment and orders of this Court, differently constituted, delivered on 6th June 2023. Peripherally, he also prays for an order of injunction, as well as stay of proceedings in the trial court.
3. The application is supported by the grounds on its face and the supporting affidavit of the applicant dated 17th March 2023. The applicant's case is that he was the estranged husband of the respondent and they are separated. Pursuant to the separation, the respondent successfully mounted an originating summons for the division of matrimonial property. The summons were allowed since, on the hearing date, both the applicant and his counsel failed to attend court for no apparent reasons. His subsequent application to set aside the judgment on the grounds that mistakes of his counsel should not be visited



on him for failing to notify him of the hearing date of the suit and also failing to attend court for the hearing of the suit was dismissed. His appeal to this Court against that ruling and order was similarly dismissed, thereby provoking this application.

4. The applicant urges that the grounds he intends to pursue in the Supreme Court if the application is allowed, are that the issues to be canvassed transcend the circumstances of the case and have a significant bearing on the public interest. Further, that the intended appeal raises points of law regarding the mistakes of counsel being visited upon a client, breach of the rules of natural justice, and the right to a fair trial. That the applicant's rights in terms aforesaid were breached when the suit proceeded in his absence and that of his counsel, and when his application to set aside the resulting ex parte judgment was denied. That these were substantial issues, the determination of which will have a significant bearing on the public.

That the Supreme Court will be called upon to interrogate and settle the question of exercise of discretion by both the trial and first appellate courts. The applicant therefore prayed that the application be allowed with costs.

5. The application was opposed by the respondent through her replying affidavit dated 3rd November 2023. The respondent deposed that throughout the proceedings, the applicant had variously been invited to fix hearing dates for the suit but had failed to do so. That on the date of the hearing, the applicant and his counsel failed to turn up, though they had been served with the hearing notice. Given the circumstances, the applicant cannot therefore claim not to have been given an opportunity to be heard. That looking at the application, it is apparent that the applicant's purported issues as set out do not involve the interpretation and application of the Constitution, and are purely personal matters involving the division of matrimonial property and the discretion exercised by the trial court in refusing the application to set aside the ex parte judgment. That the respondent had not demonstrated that the trial court exercised the discretion injudiciously.
6. The application was canvassed by way of written submissions, with limited oral highlights. Mr. Charles Midenga, learned counsel, appeared for the applicant whilst Mrs. Wambugu, learned counsel, appeared for the respondent. In highlighting his written submissions, Mr. Midenga urged that the applicant had an arguable case for reasons that the issues to be canvassed in the Supreme Court in the event that the application was allowed were of general public importance. He relied on the case of Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscone [2013] eKLR, to submit that the issues will have a significant bearing on the public interest and raised substantial points of law, and in particular, the issues of mistake of counsel being visited upon an innocent litigant, breach of the rules of natural justice as well as the right to a fair trial as enshrined under Article 25 (c) of the Constitution and the right to be heard. These were issues of general public importance, according to the applicant. Relying on the cases of Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR and Susan Ogutu Oloo & 2 others vs. Doris Odindo Omolo [2019] eKLR, counsel further submitted that the question of the right to representation and to what extent the same can be limited was an issue for consideration by the apex court. Lastly, that one of the principles for certification is that where there is uncertainty in law and conflicting precedents, then an application of this nature merits referral to the Supreme Court.
7. On her part, Mrs. Wambugu reiterated the depositions in the respondent's replying affidavit and submitted that there was nothing to demonstrate that the trial court misdirected itself on some matters, or that it took into consideration irrelevant considerations, misdirected itself, and or misinterpreted the facts of the case and the law. In a nutshell, the respondent submitted that the discretion was properly exercised by the trial court and affirmed by this Court, and therefore, there was no miscarriage of justice. According to counsel, this Court has no jurisdiction to grant the prayers of injunction or stay of proceedings as sought in the application. That the power of this Court to hear and determine



an application of this nature is donated by Article 163(4) (b) of the Constitution, which does not include jurisdiction to grant prayers for injunction and stay of proceedings. She relied on the case of Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone (*supra*) to submit that though this Court has jurisdiction to certify a matter to the Supreme Court if it raises matters of general public importance, it must satisfy the laid down parameters. That the dispute was purely a private matter involving the division of matrimonial property. Counsel further relied on the cases of Hassan Musambayi Mbaruku vs. Nashon Aseka [2017] eKLR and Patel vs. Lagat [2022] KECA 509, to submit that the application does not merit certification as the applicant had not demonstrated the public element in the matter. Lastly, counsel relied on the case of Butt vs. Rent Restriction Tribunal (1979) eKLR to submit that the applicant had failed to demonstrate that the trial court’s discretion was exercised injudiciously. That this Court in its well-reasoned judgment and order explained itself and cited various authorities as to why it declined to interfere with the exercise of judicial discretion by the trial court which should be upheld by rejecting the instant application. She therefore prayed that the application be dismissed with costs.

8. We have considered the application, the grounds, rival affidavits, the able submissions of the parties, and the law. We wish to deal first with the peripheral prayers for injunction and stay of proceedings. We hasten to state that these remedies are not available to the applicant. This is because in the case of Dickson Muricho Muriuki vs. Timothy Kagondu Muruiki & 6 Others [2013] eKLR, this Court held that the proper forum to seek and apply for such remedies 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 vs. Delphis Bank Limited & Another [2019] eKLR and Jamii Bora Bank Limited vs. Minnie Mbue [2021] eKLR, this Court held that it lacks jurisdiction to issue any other order after delivery of judgment in the appeals before it and pending the hearing and determination of an intended appeal to the Supreme Court as it was functus officio and must down its tools.
9. The applicant invokes Article 163 (4) (b) of the Constitution in seeking leave to appeal to the Supreme Court from the decision of this Court. This Court therefore has to determine whether the intended appeal involves the interpretation or application of the Constitution, or the issues intended to be canvassed in the Supreme Court raise matters of general public importance transcending the circumstances of the case, and having a significant bearing on the public interest as a pre- requisite for the grant of the certificate.
10. The rationale for certification to the Supreme Court was stated in the case of Koinange Investment & Development Ltd vs. Robert Nelson Ngethe [2013] eKLR as follows:

“.... There is a distinction between leave to appeal to this Court [i.e. the Court of Appeal] from the High Court and from this Court to the Supreme Court... 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 was observed in R. vs. Secretary of States, Exparte Eastway]] per Lord Bingham] that this Court cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist...”
11. In Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and Allied Workers Union (Kefbau) represented by its Promoters - David Benedict Omulama & 9 Others [2018] eKLR, this Court stated the principles as set out in Hermanus Phillipus Steyn vs. Giovanni Gneccchi - Ruscone (*supra*) in determining whether a matter is of general public importance thus:



- i. 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 public interest;
 - iii. Such question or question 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) of the Constitution;
 - vi. 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;
 - vii. Determination of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
12. We are required to apply the above tenets and parameters to the specific circumstances of this case. First, this is not a matter where the issues to be determined transcend the circumstances of the particular case and have a significant bearing on the public interest. The dispute arose out of a suit for the division of the matrimonial property between the parties. Further contestation is the exercise of discretion by the trial court. We are unable to appreciate how these issues can be matters of general public importance, whose determination transcends the circumstances of the particular case, and has a significant bearing on the public interest. the Constitution, Statute law, and legal precedents have long settled the law on the issue regarding the division of matrimonial property. Consequently, it is no longer a matter of law of jurisprudential moment.
13. We note, though, that the suit was prosecuted in the absence of the applicant and or his counsel as they failed to attend court on the day the case was scheduled for hearing despite service of a hearing notice upon the applicant's advocate. In refusing the subsequent application by the applicant to set aside the ex parte judgment and decree of the trial court, the trial court reasoned that despite the applicant's counsel failing to notify him of the hearing date as well as failing to attend court on the hearing date, it was still the duty of the applicant to pursue and look out for the progress of his case with his counsel, which he failed to do in the circumstances of this case. This is the ground upon which the trial court pegged its discretion in refusing to set aside the ex parte judgment. It is obvious that in refusing the application, the trial court was exercising discretion. This Court's judgment upheld the trial court's finding, inter alia, that the trial court exercised its discretion properly, and that there were no proper grounds to justify disturbing the ruling. Other than stating that the trial court took into consideration irrelevant issues, misguided itself and misinterpreted facts and the law, the applicant did not bring on board any materials that would justify those accusations.



14. We are aware that since *Shah vs. Mbogo* (1968) EA 93, there are no conflicting decisions of this Court or courts below regarding the exercise of discretion by the trial court and when an appellate court can interfere with such exercise. The law is thus settled and does not require the input of the Supreme Court. The applicant's lamentation regarding the alleged breach of the rules of natural justice and the right to a fair trial is neither here nor there. That being the case, the intended appeal to the Supreme Court on that question does not raise any issue of general public importance as touted by the applicant.
15. In the intended appeal to the Supreme Court, the applicant also intends to pursue the argument that mistakes of counsel should not be visited upon an innocent litigant who ought not to be punished for such mistake. To our minds, this is a well-trodden path, and the law is settled. Though the applicant claims that there are contradictory and conflicting decisions of this Court and in the courts below on the issue, he was unable to cite and bring to our attention any of the alleged contradictory or conflicting judgments, or judgments with conflicting interpretations. There is therefore no state of uncertainty in the law on that aspect requiring the input of the Supreme Court.
16. In the end, we find the application devoid of merit, and it is accordingly dismissed with costs to the respondent.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

