Mint Holdings Limited v Kinluck Holdings Limited & another (Civil Application 6 of 2019) [2024] KECA 586 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 586 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 6 OF 2019

M NGUGI, PM GACHOKA & F TUIYOTT, JJA

MAY 24, 2024

BETWEEN

MINT HOLDINGS LIMITED ..... APPLICANT

AND

KINLUCK HOLDINGS LIMITED ..... 1ST RESPONDENT

MACHARIA NJERU ..... 2ND RESPONDENT

(An application seeking certification and leave to appeal the judgment and decree of this Court (Warsame, Musinga & Murgor, JJ. A) delivered on 5th April 2019inCivil Appeal No. 69 of 2011)

RULING

1. By a Notice of Motion dated 12th April 2019, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No. 69 of 2019 (Warsame, Musinga & Murgor, JJA) delivered on 5th April 2019.

2. The application is expressed to be brought under Article 163 (4) of the *Constitution* of Kenya, sections 3A and 3B of the *Appellate Jurisdiction Act*, rule 24 of the *Supreme Court Rules*, 2012, and rules 5 (2) (b), 39, 40 and 43 of the *Court of Appeal Rules*, 2010 (now rules 5(2) (b), 39, 40 and 43 of the 2022 Rules respectively).

3. Article 163 (4) of the *Constitution* states as follows:

> " 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)."

4. Although certification can be sought either from the Supreme Court or from this Court, the Supreme Court has held that it is good practice to originate the application in this Court. In *Sum Model Industries Ltd v Industrial & Commercial Development Corporation* [2011] eKLR, the Supreme Court said in part:

> "...it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the *Constitution*. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to abuse of the process of Court."

5. By way of background, Mint Holdings Ltd (hereinafter referred to as the applicant), was the 1st respondent in Civil Appeal No. 69 of 2012, in which Kinluck Ltd (herein the 1st respondent) was the appellant. Macharia Njeru was the 2nd respondent both in the appeal and in the application before us. The appeal was against the judgment delivered on 15th October 2009 in HCCC No. 3693 of 1995, in the High Court of Kenya at Nairobi (Rawal, J. as she then was). The bone of contention in the High Court related to the ownership of a parcel of land namely LR No. 12494 /10. Nairobi. The applicant and the 1st respondent had signed an agreement for sale, with the 2nd respondent being the common advocate for both of them. It is common ground that after the payment of the 10% deposit of Kshs 600,000.00, the property was transferred to the applicant. The applicant failed to pay the balance of the purchase price, which forced the 1st respondent to file a suit in the High Court.

6. Upon hearing the parties, the High Court ordered the applicant to pay the 1st respondent the balance of the purchase price of 3.9 million and the 2nd respondent to pay the 1st respondent the balance of 1.5 million, which had been deposited with him in his capacity as an advocate for the parties.

7. The 1st respondent, dissatisfied with the judgment of the High Court, filed an appeal in this Court. The 2nd respondent also filed a cross-appeal against the order for the payment of 1.5 million plus interest. Just like in the High Court, the main issue in the appeal revolved around the question whether the applicant should have paid the balance of the purchase price. Alternatively, whether the property should have been retransferred back to the 1st respondent.

8. Upon hearing the parties, this Court pronounced itself in part as follows:

> "The issue of variation of a contract is as much as a question of law as it is of fact. It is not in dispute that immediately after the execution of the agreement, the appellant authored a letter authorizing payment of the 10% deposit of the purchase price to one of its directors. This in itself was a variation of the sale agreement by the appellant. However, we think that nothing much turns on this because the appellant as the owner of the suit property was well within its powers to give direction on how the deposit was to be paid.

Of importance to us is the fact that contrary to clause 14 of the sale agreement, the appellant gave possession of the suit property to the 1st respondent before it had received the entire purchase price. Two other things that further concern us is the fact that not only did the appellant execute the transfer of the suit property at the same time as the sale agreement but one of its directors accompanied the 2nd respondent to the now defunct Nairobi City Council to procure the Rates Clearance Certificate which was an essential document without which transfer of the property could not be effected. Further, even after the undertaking it sought to impugn was issued, and the suit property was transferred, the appellant authored a letter dated 5th December 1995 authorizing the 1st respondent to pay the balance of the purchase price directly to itself. This letter was authored after the transfer was done and we are of the view that the appellant more or less acquiesced to the transfer and to the terms of the professional undertaking. The above conduct by the appellant leaves us in doubt that the appellant in one way or another varied the agreement to its detriment to wit; giving out possession contrary to clause 14 of the agreement, facilitated the transfer of the property to the 1st respondent by procuring the land rates clearance certificate, executing the transfer and the sale agreement on the same date. We therefore agree with the trial court that the evidence of 2nd respondent that the appellant varied the contract is more credible than that of the appellant, and that the 2nd respondent unilaterally varied the contract. Our conclusion is further strengthened by the fact that the conduct of the appellant was at odds with what it was saying. One would wonder why it would express reservations of signing the transfer, but on the other hand go ahead and help in procuring the rates clearance certificate.

The 1st respondent took advantage of the said variation and failed to pay the balance of the purchase price knowing full well that not only was it in possession of the suit property, but the same had also been transferred to it. It knew that at this juncture the appellant could not cancel the transaction and was clearly unmotivated or had no inclination to demand the balance. However, the question that begs an answer is, did the conduct of the appellant justify the failure by the 1st respondent not to pay the balance of the purchase price? We think not. As we have state above, by virtue of clause 5 of the sale agreement, the appellant was to pay the balance of the purchase price to the 2nd respondent within 30 days. We have keenly analyzed the professional undertaking given by the 2nd respondent and what is clear in our minds is that the same did not contradict clause 5 of the sale agreement as far as the obligation by the 1st respondent to deposit the balance of the purchase price with the 2nd respondent is concerned. What we are saying is that despite the contents of the undertaking, the 1st respondent was still under an obligation to comply with clause 5 on depositing the balance of the purchase price with the 2nd respondent. We are of the view that the failure by the 1st respondent to deposit the balance with the 2nd respondent resulted in a fundamental breach of an important term of the contract by the 1st respondent. That failure is a clear manifestation of a party seeking to benefit from his unlawful conduct.

It is very important to note that since the inception of the suit to date the 1st respondent has made no attempt to pay the balance of the purchase price. The last attempt at payment was the Kshs. 1,500,000/= which the appellant obviously refused. Even after the High Court had directed it to pay the Kshs. 3,900,000/= plus interest no attempt at payment was made. The fact that a person can fail to pay 90% of the purchase price of someone else's property which it has sought to acquire in a deceitful manner and has been in possession of the property for more than twenty years is unjustifiable. In essence, the 1st respondent, wishes to retain the suit property, which was illegally transferred to it on 18th October 1995 contrary

to the clear terms of the agreement. Thereafter, several opportunities were granted to make good the terms of the agreement, to which it failed or neglected to comply. Clearly, the conduct of the 1st respondent smacks of bad faith, since it had breached its obligation, and thereafter sought to benefit from its unlawful conduct. The law recognizes, and we reiterate that no man shall be allowed to benefit from his/her wrong doing with a view to prejudicing or injuring the rights and interests of another party. That is what the 1st respondent has succeeded in doing for the last 20 years. The transfer of the property and subsequent conduct of refusing either to retransfer or pay the balance of the purchase price in reasonable time was not only unconscionable, but fraudulent. For this Court to countenance such behaviour would result in absurdity, and more importantly, unjust enrichment on the part of the 1st respondent."

9. The applicant is aggrieved by the judgment of this Court and seeks certification and leave to appeal to the Supreme Court on the following grounds:

   a. The scope and extent of an order for retransfer of property in a voluntary conveyance and whether the same has abrogated the protection of right to property as guaranteed under Articles 40 and 60 of the *Constitution*.

   b. The scope of the power of Court of Appeal in directing that a transfer of the suit property be effected forthwith in absence of fraud which may set a dangerous precedent in the conveyancing practice.

   c. Whether the scope of the power of the Court of Appeal in asserting judicial authority by ordering a retransfer of the suit property to the 1st respondent is tantamount to the Court entering into the arena of conveyancing and thereby amending a voluntary sale agreement and transfer.

   d. Whether the Court's scope in ordering that the 2nd respondent to return the amount of Kenya shillings 1,500,000/= to the applicant in absence of such a prayer having been made by the 1st respondent in the pleadings placed before the Court, is a great departure from the general principle of law that parties can only be granted special prayers pleaded and proved.

   e. Whether the Court's scope and power in asserting judicial authority on matters not properly before the court as submitted by parties therein is tantamount to exercising jurisdiction on alien facts.

   f. Whether the Court's scope and power in declining to grant costs in its order of return of the sum of Kenya shillings 1,500,000/= by the 2nd respondent to the applicant is a great departure on general principle that costs should ordinarily should follow the event.

   g. Whether the Court can set aside a judgment premised on a principal prayer and in lieu thereof, substitute it with an alternative prayer.

   h. Whether the rights of a proprietor may be defeated as provided under the law in section 23 of the *Registration of Titles* (sic) Cap 281 (repealed) except on grounds of fraud or misrepresentation to which a party is proved to be a party to.

10. The applicant has filed written submissions dated 6th February 2024 which reiterate the grounds in support of the application and we therefore need not rehash them. The applicant submits that it has met the principles that have been laid down in similar cases and that this matter raises an issue of general public importance that transcends the interests of the parties. It also states that the respondents will

not suffer any prejudice if we exercise our discretion to grant the leave. The applicant states that this case involves the question of the land registration system and that the judgment of this Court has an impact on land registration, the history or root of the title, possession and ownership of land, especially if it is taken into account that it had been in possession of the land for over 20 years. At this point, it is important to note that the applicant has not stated in the grounds or the submissions that there is uncertainty in the law or that there are several contradicting decisions in the High Court or this Court on the question of land registration or possession of land.

11. On its part, the 1st respondent filed written submissions dated 26th September 2022. It cited many authorities and submitted that the applicant has not made a case for the grant of leave and certification to appeal to the Supreme Court. It submits that the applicant has not raised any substantial question of law with significant bearing on public interest. It cited the case of *Hermanus Phillips Steyn v Giovanni Gnecchi –Ruscone* [2013] eKLR in support of this proposition. It states that a mere misapprehension of a miscarriage of justice is not a proper basis for certification. In addressing the grounds raised by the applicant, it states that a matter should not be reopened simply because a litigant is of the view that the decision ought to be different or a certain weight be given to a particular piece of evidence.

12. On its part, the 2nd respondent filed written submissions dated 16th July 2019 which are almost on all fours with those of the 1st respondent and therefore we need not rehash them.

13. When this matter was called for hearing through a virtual platform, Miss Purity Mureithi and Mr. Evans Ogada appeared for the applicant, Kamau Kuria SC appeared for the 1st respondent and Mr. Elijah Mwangi appeared for the 2nd respondent. The parties relied on the written submissions that were orally highlighted.

14. We have carefully considered the Notice of Motion, the respective affidavits, the documents, and the submissions by the parties. We note that the parties are walking on a well-trodden path. In the last ten years or so, this Court has set out the principles applicable for certification and leave to appeal to the Supreme Court in various decisions. In Civil Application Sup No. 3 of 2016, *Mitubell Welfare Society v Kenya Airports Authority Limited & 2 Others*, the Court referred to the English case of *Compton v Wiltshire Primary Care Trust* [2008] ECWA Civil page 749, where Waller, LJ. outlined the prerequisites for determining a matter to be of general public importance 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."

15. Our *Hermanus Phillipus Steyn Supreme Court in the case of Giovanni Gnecchi v Ruscone*, [2013] eKLR held inter alia:

> "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."

16. In the case of *Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union (KEFHAU) represented by Its Promoters David Benedict Omulama & 9 others* [2020] KESC 59 (KLR), the Court stated as follows:

> "The principles set out in Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone, to determine whether a matter is of general public importance included:
>
> 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 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 [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*;
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> 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 [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;
>
> viii. 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;
>
> ix. 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;
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> x. 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;

xi. 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."

17. We have also considered the applicant's grounds in support of certification and note that the intended appeal to the Supreme Court, primarily revolves around the question of whether this Court was right in ordering the retransfer of the suit property to the 1st respondent. An analysis of the grounds that the applicant has raised shows that it is dissatisfied with the decision of the Court. As already stated, the test is not whether we would have reached a different conclusion on the same set of facts. Further, the test is not on the merit or otherwise of the judgment of the Court. The applicant has to demonstrate how the questions raised amount to issues of general public importance that transcend the dispute between the parties.

18. As already stated, the main issue in the appeal was whether the applicant should have retained a property, which was duly registered in its name, but which it had not fully paid for. The question of how the agreement was signed, how the transfer was done and the nature of the undertaking that had been issued raise matters of fact and law that are only relevant to the parties in this case. The applicant has not demonstrated even one single point that can be termed as a point of general public importance that transcends the dispute between these parties. A mere allegation that it touches on issues of land registration, possession of land and property rights is not enough ground for a grant of leave.

19. We hasten to add that parties to litigation ought to understand that whereas our hierarchical judicial system establishes an elaborate ladder for climbing up the appeal mechanism, it is important to examine the weight of one's case and decide whether taking one more step up is necessary. History books are replete with cases where many have unnecessarily climbed the appeal ladder, only to fall with a heavy thud. As the applicant aptly observes, litigation is burdensome, tedious, time- consuming, and costly and an applicant ought to realize when it has reached the end of the road, which may be painful and sometimes unfavorable. We agree that this litigation that started in 1995 must come to an end, irrespective of who is left with tears or pain, as nothing has been placed before us to demonstrate that the applicant should try his luck in the Supreme Court.

20. For the foregoing reasons, it is our considered view that the questions raised by the applicant are not of general public importance that transcends the dispute between the applicant and the respondents. It is, therefore, our holding that the application has not met the test set in the locus classicus case of Hermanus Steyn. Accordingly, we find that the application is not merited at all and we dismiss it in its entirety with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR