Magondu v District Land Registrar, Kirinyaga District & 3 others; Ndumbi & another (Interested Parties) (Civil Application E009 of 2022) [2024] KECA 1087 (KLR) (19 August 2024) (Ruling)

Neutral citation: [2024] KECA 1087 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION E009 OF 2022

J MOHAMMED, W KARANJA & AO MUCHELULE, JJA

AUGUST 19, 2024

BETWEEN

WILLIAM NJUGUNA MAGONDU ..... APPLICANT

AND

DISTRICT LAND REGISTRAR, KIRINYAGA DISTRICT .... 1ST RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA ..... 2ND RESPONDENT

THE DISTRICT COMMISSIONER KIRINYAGA DISTRICT .... 3RD RESPONDENT

HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

JAMES MUNENE NDUMBI ..... INTERESTED PARTY

NJUGUNA MIANO ..... INTERESTED PARTY

(Being an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal (Koome, Warsame & Kiage JJ.A.) dated 5th November 2021 in Civil Appeal No. 1 of 2017)

RULING

Background

1. William Njuguna Magondu, the applicant, filed an application by way of a notice of motion dated 31st January, 2022 expressed to be brought under Article 25, 27, 50, 159 & 163(4) of the *Constitution* of

Kenya, Sections 15 and 16 of the *Supreme Court Act* and Rule 1(2) of the Court of Appeal Rules 2010 (repealed) now *Court of Appeal Rules 2022* (this Court's Rules). The applicant seeks orders in the main:

> " 1 spent
>
> 2. That leave be granted to the applicant to lodge an appeal against the judgement of the Court of Appeal delivered on 18th December 2014 in civil application 5th November 2021(sic)
>
> 3. That this honourable court do certify that the matter in issue is a matter of general public importance.
>
> 4. Costs of this application be the cause"

The District Land Registrar, Kirinyaga District, The County Government of Kirinyaga, The District Commissioner Kirinyaga District and The Hon. Attorney General are the respondents herein while James Munene Ndumbi and Njuguna Miano are joined as the 1st and 2nd Interested Parties respectively.

2. The application is premised on the grounds listed on the face of the application and on the applicant's supporting affidavit of which are:

   a. that this Court (Koome (as she then was), Warsame & Kiage, JJ.A.) has jurisdiction to certify that the proposed appeal to the Supreme Court by the applicant is a matter of utmost public importance as various courts have made conflicting judgments and rulings;

   b. that this Court sitting in Nyeri delivered a judgment and decree in Civil Appeal No. 1 of 2017 on 5th November 2021 dismissing the applicant's appeal;

   c. that the appeal relates to an illegal allocation and ownership of plot no. 2 (77) Kagumo-Kerugoya (the suit property) to the Interested Parties;

   d. that at the centre of the dispute between the parties is the protection of private property as enshrined in section 75 of the former Constitution of Kenya and Article 40 of the 2010 Constitution;

   e. that this Court ignored the supplementary record of appeal in Civil Appeal No. 1 of 2017 at Nyeri occasioning grave injustice to the applicant and a violation of his right to fair trial and protection of the law as contemplated by Article 25 (c) and 27(1) of the *Constitution*;

   f. that the applicant's right to protection and benefit of the law was violated and Article 10 of the *Constitution* was also violated;

   g. that the 2nd respondent allocated the suit property to the applicant in 1961 and the applicant consistently paid annual rates and the same was acknowledged by the 2nd respondent who issued receipts of payments to the applicant;

   h. that the matter involves land which is an emotive issue in Kenya and thus it is a matter of general public importance which this Court ought to appreciate;

   i. that the matter presents a unique set of facts and law which the Court should use to develop its jurisprudence; and

   j. that the matters are of general public importance which are occasioning substantial miscarriage of justice.

3. The applicant seeks, inter alia, the following orders: that the Supreme Court be pleased to reverse the orders issued by this Court dismissing the appeal and in lieu issue orders for a retrial of the entire appeal before another Bench; that the impugned judgment and decree of this Court be set aside; that a declaration do issue stating that the applicant's rights to a fair trial were infringed thereby affecting the applicant's right to own property that he has occupied for over 50 years; that the Supreme Court do issue such further orders, declarations and/ or directives it may deem just and convenient in the interests of justice taking the exceptional circumstances of this appeal; that allowing the instant application will not prejudice the respondents in any way; that the intended appeal raises an exceptional point of law that has not been interrogated; and that it is in the interest of justice that the application be allowed.

4. The application is opposed through a replying affidavit of James Munene Ndumbi (Ndumbi), the 1st Interested Party on his own behalf and that of the 2nd Interested Party who deponed that: the application is misconceived, incompetent, bad in law, incurably defective, belated, omnibus, an afterthought and should be dismissed with costs. He deponed further that the issues raised in this matter do not involve matters of public interest to warrant certification from this Court to the Supreme Court.

5. Ndumbi further deponed that public policy favours finality of proceedings and it is time that this matter comes to an end as there are no issues warranting certification to the Supreme Court as the issues raised herein are of no public importance as they involve issues of whether the petition before the ELC was res judicata.

6. A brief background of the application is that the applicant filed a petition before the Environment and Land Court (ELC) at Kerugoya (B. N. Olao J.) on the grounds that that the suit property was allocated to him in 1961 and that he has since then paid land rates which have been acknowledged by the 2nd respondent; that upon learning of allegations that the suit property was alienated as a road reserve, he sought clarification from the Ministry of Roads which confirmed that the suit property is not within a road reserve; that contrary to the assertion that the suit property is a road reserve, the 2nd respondent who entrusted the suit property to him has never notified him that the suit property is within a road reserve; that he is aware that the interested parties have, arbitrarily, capriciously, fraudulently and contrary to the law alienated the suit property to their own use through an illegal and schemed tactic to appropriate the suit property into their own parcels; that he laid a prima facie case with overwhelming chances of success and there was not basis for the ELC and this Court to find as they did; and that the allotment to the Interested Parties was fraudulent and was obtained through corruption.

7. The applicant sought orders against the respondents and the Interested Parties that: the 2nd respondent and the Interested Parties' action of declaring the suit property a road reserve was arbitrary, illegal, null and void and should be quashed; and an order restraining the respondents and the Interested Parties, their agents or servants from dealing in any way whatsoever with the suit property

8. The ELC found as follows;

> "By his own admission therefore, the Petitioner concedes that the subject of this dispute (the suit plot) was the subject of another case but adds that he was misled into agreeing to a consent. In light of that admission this petition is really res- judicata. There is nothing on record indicating that the Petitioner appealed or attempted to set aside that consent when he found out that he had been misled. That judgment is therefore binding on him and his counsel's submission that the previous suit was not determined, expressly or impliedly and when that happens, res-judicata becomes immediately applicable. It would be an exercise in

futility to hold a trial in respect of an issue which has been admitted...this Court has made a finding that this petition is res-judicata as the subject herein was canvassed in a previous forum and is therefore caught up by the provisions of Section 7 of the *Civil Procedure Act*. Ultimately therefore, this petition is ordered struck out with costs to the respondents and Interested parties."

9. Aggrieved by that decision, the applicant filed an appeal to this Court against the decision of the ELC. This Court considered the applicant's appeal on the question whether the Petition before the ELC was res judicata and whether the ELC erred in ordering the applicant to pay costs of the petition.

10. Kiage, JA in the leading judgment held as follows:

> " ...the appellant's assertion that the previous suits did not conclusively determine issues of adverse possession and compulsory acquisition is insupportable. As this Court stated in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR
>
> "The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation and the judicial process would be rendered a noisesome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice...this is not a public interest matter for the reason that he is seeking a personal proprietary interest in the suit property. I therefore find the appellant's objection to the order of costs to be without merit."

11. On the basis of these findings, this Court found that there was a sound basis for the ELC's finding on the issue of res judicata and the appeal was dismissed with costs. Undeterred, the applicant now seeks grant of leave to appeal to the Supreme Court.

Submissions By Counsel

12. There are no written submissions filed by the applicant or the respondents on record. There is on record written submissions filed by learned counsel, Mr. Wahome Gikonyo, for the 1st Interested Party. Counsel submitted that the instant application does not meet the requirements of grant of leave to the Supreme Court under Article 163(4)(b) of the *Constitution* as it does not involve a matter of general public importance. Counsel further submitted that the impugned decision of this Court was that the issue was res judicata and the mere fact that the issue concerns a parcel of land does not make it one of general public importance. Counsel relied on the Supreme Court case of *Hermanus Phillippus Steyn v Giovanni Gnecchi-Ruscone* [2013 eKLR] in support of his propositions.

13. Counsel asserted that the issue sought to be appealed against is not substantial, broad-based and does not transcend the particular case and has no bearing on public interest. Counsel further asserted that the applicant has neither demonstrated how the determination of the intended appeal would have a significant impact on public interest nor demonstrated that there was a point of law in the intended appeal which was an issue in this Court or courts below to warrant certification.

14. Counsel submitted that the issue that the applicant seeks to appeal to the Supreme Court merely relates to whether the petition before the ELC was res judicata. Counsel further submitted that the law on res judicata is clear and has no uncertainty that necessitates clarification by the Supreme Court. Counsel

submitted that this Court has pronounced itself on the law regarding res judicata and the courts below have equally settled the law on the same.

15. Reliance was placed on the Supreme Court case of *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others* [2012] eKLR where it was held that:

> "[30] In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the Constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law: and only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court." [Emphasis supplied].

16. Counsel further submitted that the applicant has not framed the legal issues for determination by the Supreme Court. That nowhere in the entire application has the applicant framed the legal issues or issues that he considers the Supreme Court shall be required to pronounce itself on in the event that the leave sought is granted. Counsel further submitted that in the absence of such legal issues framed, this Court has no means of ascertaining the particular issues that it is called upon to certify. Counsel urged that the application be dismissed with costs as there is no basis for granting the orders sought.

Determination

17. We have considered the motion, the affidavits, the submissions, the authorities cited and the law. The motion before us seeks leave and certification to appeal to the Supreme Court.

Article 163(4) of the *Constitution* stipulates that appeals lie from this Court to the Supreme Court:

> "a) ...as of right in any case involving the interpretation or application of the *Constitution*; and
>
> b) in any other case in which the Supreme Court, or this Court, certifies that a matter of general public importance is involved

Article 163(5) of the *Constitution* provides that:

"Certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

18. In view of the above constitutional provisions, the mandate of this Court in determining the application herein is to determine whether the issues raised by the applicant are of general public importance. This Court in the case of *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR stated that:

> "The jurisdiction of this Court under Article 163(4) (b) of the *Constitution* is to determine whether, in an application seeking certification to appeal to the Supreme Court, a matter of general public importance is involved. ..."

19. What constitutes a matter of general public importance was succinctly laid out by the Supreme Court in the case of *Hermanus Phillippus Steyn* (*supra*) in the following terms:

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 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 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."

20. The Supreme Court in the *Hermanus Phillipus Steyn case* (*supra*) pronounced itself on the meaning of "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 an intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern." [Emphasis supplied].

21. In the instant application, it is our duty to consider and appraise if the foregoing principles enunciated for certification have been satisfied. The question that we are called upon to determine is whether the applicant has set out specific elements of general public importance which he attributes to the question or questions to be urged before the Supreme Court in the intended appeal?

22. The applicant has annexed a draft Petition in respect of the intended appeal to the Supreme Court and has also detailed the grounds in support of the orders sought on the face of the application, among them:

> "That the appeal relates to an illegal allocation and ownership of plot No. 2 (77) Kagumo-Kerugoya to the interested parties.
>
> That at the centre of the dispute between the parties is the protection of private property as enshrined in section 75 of the *Constitution* of Kenya (repealed) and Article 40 of the *Constitution* of Kenya;"

23. From the above facts as detailed by the applicant, it is clear that the bedrock of the matter is a private property (the suit property). To our mind, this is not an issue of general public importance. It is purely a civil suit between parties over a private property with no impact to the general public to warrant certification for leave to appeal to the Supreme Court.

24. The applicant also raised the issue that there are conflicting decisions of the various courts that should be clarified by the Supreme Court. The applicant did not however elaborate on this ground. The applicant also claimed that this Court erred in failing to hold that the ELC erred in finding that the Petition before it was res judicata. The applicant did not clarify which particular aspect of the doctrine of *res judicata* he sought to obtain clarification by the Supreme Court. This Court has pronounced itself on the law regarding res judicata in various cases including in the Maina Kiai case (supra). The Supreme Court has had occasion to pronounce itself on the doctrine of res judicata in various authorities including *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 of 2014 [2016] eKLR where the Supreme Court stated as follows:

> "*Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....the doctrine of res judicata, in effect, allows only one bite at the cherry... The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

25. In the circumstances, we are not persuaded that these issues fit the criteria for certification as enunciated by the Supreme Court in *Hermanus Phillippus Steyn* case (*supra*). The upshot is that we find no merit in the notice of motion dated 31st January, 2022 and dismiss it with costs to the Interested Parties.

26. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF AUGUST, 2024

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR