Gatua v Mathenge (Civil Appeal (Application) 94 of 2018)
[2024] KECA 1318 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1318 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) 94 OF 2018

MA WARSAME, PM GACHOKA & JM MATIVO, JJA

SEPTEMBER 27, 2024

BETWEEN

JOSEPH CHEGE GATUA ..... APPLICANT

AND

CHARLES MWANGI MATHENGE ..... RESPONDENT

(An application seeking leave to appeal to the Supreme Court from the judgment and decree of this Court (Ochieng, Gachoka & Korir, JJ. A) delivered on 22nd March 2024. in Nakuru Civil Appeal No. 94 of 2018)

RULING

1. By a Notice of Motion dated 3rd April 2024, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Nakuru Civil Appeal No. 94 of 2018 (Ochieng, Gachoka & Korir, JJ.A.) delivered on 22nd March 2024.

2. The application is expressed to be brought under Articles 159 and 163 (4) (b) of *the Constitution* of Kenya, section 3B of the *Appellate Jurisdiction Act* and rules 1 (2) and 42 of the Court of Appeal Rules, 2022.

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

> " Appeals shall lie from the Court of Appeal to the Supreme Court—
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> a. as of right in any case involving the interpretation or application of this Constitution; and
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> 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 vs. 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. To put this application in context and to determine whether it meets the threshold for certification for leave, we shall give the background to the dispute, albeit in a summary form. The dispute related to a plot of land that was originally owned by a land-buying company namely Laikipia Farmers Ltd, which later allotted the plots to its shareholders. The dispute concerned plot no B 132 Mwenje and the contestation revolved around who the rightful owner of that plot was.

6. The parties appeared before the Ng'arua Disputes Tribunal which was established under the Land Disputes Tribunal Act, 1990 (now repealed) and the Tribunal ruled in favor of the respondent. The award was subsequently adopted as a judgment of the Court in Nanyuki Senior Principal Magistrates Court, Case No. 37 of 2006. It is common ground that the applicant did not appeal to the Provincial Land Disputes Tribunal which was the appeal mechanism provided in the Act.

7. Later the applicant filed ELC No 92 of 2017 in the Environment and Land Court (ELC), Nyahururu seeking to have Tribunal's decision declared null and void. In lieu, the applicant and one Zakaria Karimi Gatua prayed that they be declared the duly registered owners. On his part, the respondent filed a statement of defence and counterclaim seeking among other prayers, an order for cancellation of the title that had been issued to the applicant and further, an order for the eviction of the applicant from the suit land.

8. Upon hearing the parties, the ELC, (L.N. Waithaka, J.) determined the dispute in favor of the applicant and dismissed the respondent's counterclaim. The respondent then moved this Court challenging the judgment of the ELC. In its judgment delivered on 22nd March 2024, this Court held in favor of the respondent and pronounced itself in part as follows:

> " Therefore, the role of the magistrates' court is limited to what is provided for in Section 7 of the Land Disputes Tribunal Act. At the time when the matter came before the magistrates' court, the respondents who were the objectors before the tribunal had not filed an appeal to the Appeals Committee as provided under Section 8 of the Act. The court was therefore bound to adopt the award and enter judgment in terms of the said award. In any event, the parties consented to the adoption of the award by the court. In this regard, we find no fault with the exercise of jurisdiction by the magistrates' court in entering judgment in terms of the award by the tribunal.

On the issue of the declaratory orders, it is well established that the Land Disputes Act provides a comprehensive mechanism for resolving disputes. In this instance, if the respondents felt aggrieved by the decision of the tribunal, they ought to have followed the due process provided for under the Act... It follows therefore that the respondents did not appeal to the Appeals Committee within thirty days of the decision or at all. Instead, the matter was placed before the Magistrates' court as envisaged under Section 7 of the Act, and the award was adopted as the judgment of the court. The respondents still did not appeal against the judgment...

It follows therefore that had the respondents followed due procedure to resolve the dispute, the issues raised in the declaratory suit would have been determined. If such determination were deemed unsatisfactory by any party, they ought to have taken appropriate action in accordance with the due process as stipulated in the Land Disputes Tribunals Act.

When the respondents did not follow due process, and the decision of the Tribunal was adopted by the Magistrates' court, it became a legally binding judgment. Later, when the respondents moved the trial court with a case that challenged the legitimacy of the tribunal's decision, they were utilizing a process that was not provided for by law to try and circumvent the judgment of the magistrates' court.

As the learned Judge was persuaded that the tribunal lacked jurisdiction, and she so declared, the result was akin to pulling the rug from underneath the feet of the tribunal, whereas the tribunal had long before that ceased to have anything to do with the matter. The tribunal's decision had already metamorphosed into a judgment of the court, following its adoption.

In the circumstances, there remains a judgment that is valid and unchallenged by an appeal, whereas the foundation upon which the said judgment was based was being voided by a parallel legal process. In our considered view, the courts are duty-bound to take heed to deliver substantive justice. We must not be enslaved to procedures and technicalities.

Nonetheless, the court cannot be expected to harp on the need to guard against enslavement to technicalities and in the process ignore the real confusion that could arise when we endorse the failure to comply with the written law.

Incidentally, in this case it was the parties who informed the tribunal about the particulars of how they had resolved the dispute. Strictly speaking, therefore, the tribunal did not render its own considered decision. Furthermore, the learned Judge noted that it was the respondents who moved the magistrates' court to adopt the decision of the tribunal as a judgment of the court.

We are cognizant of the fact that jurisdiction cannot be granted to the court or the tribunal by an agreement between the parties, if no jurisdiction is granted by law. We are not therefore to be understood to be saying that the tribunal had jurisdiction or lacked jurisdiction. The position is that a judgment had been entered, and the same has not been challenged through any process known in law.....

By invalidating the decision of the tribunal whilst the judgment of the magistrates' court remains in place, the learned Judge has created a situation in which the judgment has been set aside by implication yet the said judgment had been entered properly. We find ourselves unable to uphold the consequential anarchy brought about by the decision in issue herein "

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

have been done without taking into account the fact that the award before the tribunal had crystalized into a judgment; there is no known procedure for disputing the findings of a magistrate's court; the only recourse the applicant had was to appeal before a court of law; the Environment and Land Court was properly seized of unlimited and original jurisdiction to hear and determine the subject matter; the impugned judgment set a bad precedent across the Republic of Kenya; the judgment appealed against condoned fraudulent acts in land acquisition; the learned judges of Appeal favored procedural technicalities rather than substantive justice; the learned judges of Appeal considered extraneous matters that had not been pleaded by the respondent; the decree issued on 27th April 2007 violated the provisions of the *Limitation of Actions Act*; Consequently, the judgment was an affront to the law and the interests of the public the judgment of this Court outlawed other mechanisms such as judicial review to challenge judgments or decrees the respondent had since passed on thereby abating the suit; and there was an error apparent on the face of the record calling for an audience before the Supreme Court.

10. The applicant filed his written submissions dated 6th February 2024 which reiterate the grounds in support of the application and we therefore need not rehash them. The applicant submitted that he had 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. He also stated that the respondent would not suffer any prejudice if we exercised our discretion to grant the leave. The applicant stated that this case involves the question of the land registration system and that the judgment of this Court bore an impact on land registration more so on the principles relating to the history or root of a title, possession and ownership of land, especially if it is taken into account the fact that he had been in possession of the land for over 20 years. In fortifying his submissions, the applicant cited the following decisions: Owners of Motor Vehicle Lilian 'S' vs. Caltex Oil Kenya Limited [1989] eKLR, Republic vs. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex parte Tom Mbaluto [2018] eKLR and United India Insurance Company Limited & 2 others vs. East African Underwriters (Kenya) Limited [1985] eKLR.

11. At this juncture, 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 of a similar nature.

12. On his part, the respondent filed written submissions dated 12th September 2022. He cited many authorities and submitted that the applicant had not made out a case for the grant of leave and certification to appeal to the Supreme Court. He submitted that the applicant had not raised any substantial question of law with significant bearing on public interest. He cited the case of Hermanus Phillips Steyn vs. Giovanni Gnecchi –Ruscone [2013] eKLR in support of this proposition. He stated that a mere misapprehension of a miscarriage of justice is not a proper basis for certification. In addressing the grounds raised by the applicant, he stated 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.

13. When this matter was called for hearing on 16th September 2024 through a virtual platform, Mr. Sigilai appeared for the applicant and Mr. Ojare appeared for the respondent. The parties relied on their respective 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 vs. Kenya Airports Authority Limited & 2 Others, the Court referred to the English case of

Compton vs. 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 vs. Giovanni Gnecchi- 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*;

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;

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 setting aside the judgment of the ELC and whether the ELC had then jurisdiction to hear the matter. The applicant went to great lengths to attack the judgment of this Court on many grounds including: that it was wrong to hold that the applicant should have followed the procedure set out in the Land Disputes Tribunal Act but failed to state what happens once the decision of the tribunal crystallized into a judgment; that a point of general importance arose as the said Act did not have set out procedure to challenge the judgment and decree of the magistrate's court; whether the ELC had supervisory powers over other courts and tribunals; that this Court did not sum up the facts correctly; that the decision of the magistrate's court was a nullity; that the judgment of the court of appeal paid lip service to substantive justice; that the judgment outlawed other mechanisms like judicial review to challenge judgments or decrees; that the question of jurisdiction was not raised before the ELC; that the judgment allowed execution of a decree that is more than 12 years old; that the judgment involved a deceased respondent whose appeal had abated and that the application raised issues of general public importance and thus leave to appeal to the Supreme Court should be granted.

18. An analysis of the grounds that the applicant has raised shows that it is dissatisfied with the decision of this Court, differently constituted. 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.

19. As already noted, the main issue in the appeal was whether the applicant followed the right procedure to challenge the award of the Land Disputes Tribunal and whether the subsequent decree of the magistrate court was valid. 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. The

multiple grounds raised by the applicant expressing his dissatisfaction with the judgment of this Court do not in any way demonstrate that there are conflicting decisions on the issues and how this judgment affects other related disputes. We are unable to discern what the applicant states to be a point of general public importance. Indeed, we do not see any question that the applicant has framed that can meet that test. In any event, the Land Disputes Tribunal Act is long repealed. As such, this dispute is specific to the parties and cannot in any way be deemed to transcend beyond them.

20. We hasten to add that parties ought to understand that whereas our hierarchical judicial system establishes an elaborate ladder for climbing up the appeal mechanism, certification and grant of leave to appeal to the Supreme Court is only appropriate in a case that raises a matter of general public importance, whose consequences are substantial, broad-based, transcending the litigation interests of the parties and bearing upon the public interest. This is not one of those cases. A mere dissatisfaction with a judgment is not enough in an adversarial system where there will always be an unhappy party.

21. 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 respondent. 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 unmerited and we dismiss it in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR