



REPUBLIC OF KENYA



**Gachina v Karama (Civil Application E033 of 2021)  
[2023] KECA 68 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 68 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E033 OF 2021  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**JOHN KAMAU GACHINA ..... APPLICANT**

**AND**

**SAFIA SALIM KARAMA ..... RESPONDENT**

*(Being an application for leave to extend the time to lodge an appeal out of time to the Supreme Court against the judgment of this Court at Mombasa (Ouko, Gatembu & M’Inoti, JJ.A) dated 19th February 2021 and also being an application for certification and stay of the suit property)*

**RULING**

1. In his omnibus application dated April 23, 2021, John Kamau Gachina, the applicant, seeks three main prayers. Firstly, that “leave to extend the time to lodge an appeal out of time” against the judgment of this Court delivered on February 19, 2021 in Civil Appeal No. 40 of 2019 be granted; Secondly, that leave be granted to lodge an appeal against the said judgment to the Supreme Court; Thirdly, that an order of stay and preservation of the suit property be granted pending the hearing and determination of the intended appeal to the Supreme Court. As the basis of his application, the applicant has cited Article 163(4)(b), (5)) of the Constitution of Kenya, Rule 4 of the Court of Appeal Rules, and Section 15 of the Supreme Court Act.
2. In the impugned judgment delivered on February 19, 2021, the Court (W Ouko, (as he then was) Gatembu & K M’Inoti, JJA) dismissed, with costs, the applicant’s appeal against the judgment of the Environment and Land Court (ELC) delivered on October 17, 2018. The main issue in the suit before the ELC and the appeal before this Court was the ownership of the property known as LR No 8097 (Original No 4830/6) Section 1 MN. The applicant claimed ownership based on a certificate of title allegedly issued to him and asserted that the respondent was a trespasser thereon. The respondent on the other hand asserted that the property was bequeathed to her by her husband and that the purported transfer of the property, which she had occupied for over thirty years, was illegal. The respondent



- counterclaimed seeking an order of rectification of the register by cancellation of the appellant's name as proprietor and for her to be registered as the proprietor.
3. In upholding the respondent's claim to the property, the ELC (and this Court in affirming the decision of the ELC) held that the applicant had failed to prove the root of his title or that he was a bona fide purchaser of the property, while the respondent had established her claim to the property.
  4. Although the applicant has in the present application sought several prayers, in our view the overarching question, which is dispositive of the entire application is whether the application meets the threshold for certification that the intended appeal raises a matter of general public importance under Article 163(4)(b) of the Constitution.
  5. During the hearing of the application before us on October 11, 2022, Miss Ambetsa, learned counsel, who held brief for Mr Lumatete Muchai, learned counsel for the applicant relied on the applicant's written submissions which she orally highlighted. There was no appearance for the respondent, despite service of notice of hearing.
  6. Miss. Ambetsa submitted that the application is merited; that it has been made without delay; that the intended appeal to the Supreme Court raises questions of sanctity of title under Article 40 of the Constitution and the applicant's right to property as an innocent purchaser of the suit property; and that there are issues of public interest and concern whether Mohammedan law overrides the Constitution of Kenya and statutory law with regard to land ownership and sanctity of title. It was urged that the application meets the threshold for certification in accordance with the principles established by the Supreme Court in Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione, Sup Ct Appl No 4 of 2012 [2013] eKLR. As indicated, there was no appearance for the respondent and neither have we seen submissions on her behalf.
  7. Having considered the application and the submissions, the issue is whether the applicant has established that the intended appeal to the Supreme Court raises a matter of general public importance under Article 163(4)(b) of the Constitution. As correctly pointed out by counsel, the guiding principles in that regard were spelt in Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione, Sup Ct Appl No 4 of 2012 (above) where the Supreme Court expressed that it is incumbent upon the applicant to 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 significant bearing on public interest; where a point of law is raised, that such a point is a substantial one the determination of which will have a significant bearing on the public interest; the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination; that where the certification is occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty or refer the matter to this Court for determination; that mere apprehension of miscarriage of justice is not a proper basis for granting certification and the matter must still fall under Article 163(4)(b) of the Constitution; that the applicant must 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 that determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
  8. In the present case, the applicant's main complaints in his appeal against the judgment of the ELC were that the Judge erred by finding the transfer of the suit property to the applicant was invalid; that the judge also erred in holding that the respondent was entitled to the suit property by virtue of her occupation; that the judge erred in ordering the cancellation of his title. The question which the applicant has now framed for purposes of the present application, namely whether Mohammedan law on Hiba (an irrevocable gift) overrides the Constitution of Kenya and statutory law regarding land



ownership and sanctity of title, is not one which the ELC or this Court was called upon to determine. It is not an issue that arose from the onset of the proceedings between the parties and neither did the ELC nor this Court pronounce on it. And even if the issue framed for purposes of this application had arisen in the earlier proceedings, it seems to be an issue that would involve the application or interpretation of the Constitution in which event the applicant would have an automatic right of appeal under Article 163(4)(a) of the Constitution without requiring leave or certification.

9. What the applicant is essentially seeking to do in our view is to urge the Supreme Court to rectify what he perceives to be an error by the trial court in ordering the cancellation of his title, a matter that does not transcend the interest of the parties. As the Supreme Court stated in Malcolm Bell v Daniel Toroitich Arap Moi And Others Sup Ct Appl No 1 Of 2013 in The Matter Of The Court Of Appeal Civil Application Nos 12 & 13 of 2012 (Consolidated):

“It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law.”

10. We are therefore not satisfied that the applicant has discharged his burden that the matter warrants certification. The application fails and is hereby dismissed with no orders as to costs as the respondent did not participate in the application.

Orders accordingly.

**Dated and delivered at Mombasa this 3<sup>rd</sup> day of February, 2023.**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*signed*

**DEPUTY REGISTRAR**

