Kiai v Gicheru & 4 others (Civil Application 3 of 2019)
[2023] KECA 1587 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KECA 1587 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPLICATION 3 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 27, 2023

BETWEEN

CHARLES ALEXANDER KIAI ..... APPLICANT

AND

FRASHIA WANGUI GICHERU ..... 1ST RESPONDENT

LAND REGISTRAR, NYERI ..... 2ND RESPONDENT

THE CHAIRMAN, PROVINCIAL APPEAL CENTRAL PROVINCE .... 3RD RESPONDENT

THE CHAIRMAN, LAND DISPUTES TRIBUNAL, OTHAYA .... 4TH RESPONDENT

THE CHIEF MAGISTRATE NYERI ..... 5TH RESPONDENT

(Application for leave to appeal to the Supreme Court against the ruling and order of the Court of Appeal at Nyeri (Waki, J.A. (In Chambers)) dated 17th June, 2015 in Civil Appeal (Application) No. 247 of 2010)

RULING

1. Before us is a Notice of Motion dated 17th August, 2019, brought pursuant to Articles 10, 20 (3), 25 (c), 40, 50, 159 (2) (a) and (d), 163 (4) (b) and 259 (1) of the *Constitution*; Sections 3A and 3B of the *Appellate Jurisdiction Act*; Rule 1 (2) of the Court of Appeal Rules; Section 15 (1) of the *Supreme Court Act* and all other enabling provisions of the law. The application seeks, inter alia, a certificate that a matter of general public importance is involved in the intended appeal to the Supreme Court, against the ruling of this Court sitting at Nyeri in Civil Appeal (Application) No. 247 of 2010.

2. The application is premised upon five grounds: that the intended appeal involves questions of great public interest; the impugned ruling is marred with errors which if not corrected, will cause injustice

to the applicant; the impugned ruling violated the applicant's constitutional right to equal protection of the law guaranteed by Article 27 (1) of the *Constitution* as he was not granted a fair hearing; the learned Judge misdirected himself on principles applicable when considering the issue of illegality in land disputes; the effect of the impugned ruling was to deprive him of his property contrary to the provisions of Article 40(2) of the *Constitution*; and that the learned single Judge gave undue regard to procedural technicalities in disallowing his application to reinstate his appeal.

3. The application is supported by an affidavit sworn by the applicant, Charles Alexander Kiai, on 17th August, 2019.

4. The application is opposed. The 1st respondent filed a replying affidavit sworn by herself dated 6th October, 2019. The 1st respondent deposed that the applicant's application contravened the provisions of Rule 39 (b) of the *Court of Appeal Rules, 2010*, which are couched in mandatory terms. The 1st respondent averred that the application was bad in law having been filed out of time, and that the applicant failed to give a sufficient reason for failing to lodge the application within the stipulated time. She invited this Court to strike out the application with costs to the respondents.

5. The 2nd, 3rd, 4th and 5th respondents filed a joint replying affidavit in opposition to the application. It was sworn by Susan Mueni Mwanzawa, a Land Registrar at Nyeri and dated 6th September, 2019. The respondents averred that this Court lacked jurisdiction to hear and determine the applicant's application by dint of Section 15 of the *Supreme Court Act*, which provides that an application of this nature ought to be filed before the Supreme Court, and not before this Court. They deposed that the application as filed was therefore incompetent, and an abuse of the court process.

6. The application was canvassed through written submissions of the applicant which were later orally highlighted in Court. The applicant appeared in person. No appearance was entered on behalf of the respondents. They additionally did not file any written submissions. The applicant, in his submissions, contends that he is the registered proprietor of Land Parcel Number Othaya/Itemeni/1045 and that the 1st respondent had fraudulently acquired title to the said parcel of land. He submitted that he never participated in the proceedings before the Court which enabled the 1st respondent to fraudulently acquire the title, as he was never served with any hearing notice to attend Court. That is the reason why he is seeking leave to appeal the impugned ruling so that his appeal before this Court may be reinstated to hearing and be heard on merit. The applicant asserted that the learned single Judge in the impugned ruling acknowledged that he has never been heard on the land dispute. He invited this Court to allow his application.

7. A brief background of this case is that the applicant alleges that he is rightful owner of a parcel of land registered as Number Othaya/Itemeini/1045 (suit land). It is the applicant's case that he and Geoffrey Gicheru Kagiri (1st respondent's husband, now deceased) entered into an agreement for the sale of the suit land on 10th February, 2003. The applicant claims that the deceased breached the terms of the contract. He therefore rescinded the said agreement for sale of the suit land. Shortly thereafter, the deceased died, and his widow, the 1st respondent lodged a dispute for arbitration with the Othaya Land Disputes Tribunal. According to the 1st respondent, her late husband paid the full consideration for the suit land. The land therefore belongs to her. After hearing both sides, on 2nd November 2006, the tribunal decided in the 1st respondent's favour, and held that the 1st respondent and her husband paid the purchase consideration for the suit land in full, and were therefore the rightful owners.

8. The award by the tribunal was adopted as a judgment of the court by the Chief Magistrate Court at Nyeri on 23rd February, 2007. Subsequently thereafter, a title deed was issued to the 1st respondent on 13th November 2007. One year later, the applicant approached the Chief Magistrate's Court in Nyeri,

with an application dated 5th November, 2008, and sought to review the judgment entered into on 23rd February 2007, on grounds that he had appealed against the decision of the said tribunal to the Nyeri Provincial Appeals Committee. He also sought orders to maintain status quo in respect of the ownership status of the suit land, pending hearing and determination of the appeal by the Provincial Appeals Committee. The Chief Magistrate Court struck out the application on the basis that it lacked jurisdiction to entertain such an application for review, as the dispute came before it as an award by the tribunal, and therefore, the matter was governed by the Land Disputes Tribunal Act; and further that the court could not entertain an application for review where the applicant had lodged an appeal against the award by the tribunal before the Provincial Appeals Committee.

9. On 22nd May 2009, the applicant lodged a judicial review application before the High Court seeking an order of certiorari to quash the award made by the tribunal on 2nd November, 2006, and an? order dated 23rd February, 2007 by the Chief Magistrate's Court, Nyeri adopting the said award as the judgment of the court. The High Court (Sergon, J.) struck out the said application as incompetent after finding that it was filed out of time, contrary to the provisions of Section 9 of the *Law Reform Act* and Order LIII Rule 2 of the *Civil Procedure Rules*.

10. Aggrieved by this decision, the applicant, through his counsel, Messrs Gori Ombogi & Co. Advocates, lodged an appeal before this Court, in Nyeri Civil Appeal No. 247 of 2010, against the decision of the High Court. The appeal was lodged on 10th September, 2010. The appeal came up for hearing on 12th June, 2013. None of the parties were present in Court. The appeal was dismissed under Rule 102 (1) of the Court of Appeal Rules (2010) for non-appearance, after this Court (Koome, M'Inoti, Odek, JJ.A.) was satisfied that all the parties had been served with hearing notices for the day. About two months later, on 5th August, 2013, the applicant filed an application before this Court seeking to set aside the dismissal orders. He asked this Court to reinstate his appeal to hearing for determination on merit. This Court (Visram, Koome, Odek, JJ.A.) on 20th January, 2015, after hearing the parties, dismissed the applicant's application on the basis that it was filed out of time in contravention of Rule 102 (3) of the Rules of this Court, and that the applicant failed to give a reasonable explanation for the delay occasioned in filing the application.

11. On 9th February 2015, the applicant filed another application before this Court under Rules 4 and 102(3) of the Rules of this Court in which he sought leave to file an application for reinstatement of his appeal out of time. The Court (Waki, J.A.) dismissed the application for lack of merit on the basis that the applicant ought to have lodged the application under Rule 4 seeking leave to file the application for reinstatement out of time, prior to having filed the application for reinstatement dated 20th January, 2015 under Rule 102 (1), which was heard on merit and dismissed. The Court found that the applicant's action of filing the application under Rule 4 after his application under Rule 102 (1) had already been heard and determined on merit was fatal and, therefore, the Court could not exercise its discretion in his favour, and that the principle of res judicata came into play to prevent the abuse of the court process. The Court further found that Article 159 (2) (d) of the *Constitution*, which was relied on by the applicant, was not a cure for all procedural shortfalls, and that it was only applicable on a case by case basis. It is this decision that the applicant intends to appeal before the Supreme Court.

12. We have considered the application, replying affidavits filed by the respondents, and the written submissions filed by the applicant. We consider the following issues as necessary for determination in arriving at a proper finding:

    i. Whether this court has jurisdiction to entertain the instant application;

    ii. Whether the applicant's application was filed out of time;

iii. Whether the application raises a "matter of general public importance" to be certified for appeal before the Supreme Court.

13. Beginning with the first issue, the 2nd, 3rd, 4th and 5th respondents contend that this Court lacks jurisdiction to entertain the applicant's application that seeks the leave of this Court to appeal to the Supreme Court. Jurisdiction to hear and determine applications seeking certification that a matter of general public importance is involved, is granted to this Court by virtue of Article 163 (4) (b) of the *Constitution*, which gives both the Supreme Court and the Court of Appeal jurisdiction to hear applications for such certification. Article 163 (4) and (5) of the *Constitution* stipulate that:

> " 4. Appeals shall lie from the Court of Appeal to the Supreme Court:
>
> a. as a right in any case involving the interpretation or application of the *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). (emphasis ours)
>
> 5. A certification by the Court of Appeal under clause 4(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

14. Section 15B of the *Supreme Court Act* provides that:

> " Appeal upon certification
>
> 1. Any appeal to the Supreme Court involving a matter of general public importance shall only be made—
>
> a. upon certification by the Court of Appeal; or
>
> b. upon certification by the Supreme Court in accordance with Article 163 (4)(b) of the *Constitution*.
>
> 2. An application for certification shall be filed before, and determined by the Court of Appeal at the first instance."

15. The above provision stipulates that an application for certification, such as the instant application, shall be lodged before this Court at the first instance. This was buttressed by the Supreme Court in the case of *Sum Model Industries Ltd v Industrial & Commercial Development Corporation* [2011] eKLR where the court observed as follows:

> " It is clear to us that before an appeal under these provisions can be entertained; either the Supreme Court or the Court of Appeal must be satisfied that it involves a matter of general public importance. Upon being so satisfied, the Court may then issue a certificate for leave to appeal...
>
> This being an application for leave to appeal against a decision of the Court of Appeal, 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."

16. The applicant's application is therefore properly before this Court.

17. Turning to the second issue for determination, the 1st respondent contends that the application as filed, violates the provisions of Rule 39 (b) of the Rules of this Court (2010), as it was filed out of time, and without any reasonable explanation by the applicant. Rule 39 (b) (now Rule 41 (b)) provides as follows:

> " Where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal, or where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal."

18. This Court formed the view that since the instant application is brought under Article 163 (4) (b) of the *Constitution*, and seeks certification that a point of law of general public importance is involved in the intended appeal, the relevant and applicable law is Rule 40 of the then *Court of Appeal Rules, 2010*, which provided that:

> " Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made:
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> a. informally, at the time when the decision against which it is desired to appeal is given; or
>
> b. by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision..."

19. The applicant was therefore required to file the instant application within fourteen (14) days of the date of the decision of this Court that he seeks certification to appeal to the Supreme Court. The applicant filed the instant application on 26th August, 2019. The decision which he seeks to appeal to the Supreme Court was delivered on 17th June, 2015. This application was therefore lodged way out of time, being four years, two months and nine days after delivery of the decision by this Court. The applicant did not seek extension of time to lodge the present application before filing the same. He has also not furnished this Court with any reasonable explanation why he took so long to file the instant application. We agree with the 1st respondent that the application as filed is incompetent as it violates the provisions of Rule 40 (now Rule 42) of the Rules of this Court.

20. That said, by dint of Article 163 (4) of the *Constitution*, a decision of this Court is liable to be appealed to the Supreme Court only in two instances: as of right in any case involving the interpretation or application of the *Constitution*; and in any other case in which the Supreme Court, or the Court of Appeal, certifies a matter to be of general public importance.

21. The application having been filed under Article 163(4) (b) of the *Constitution*, the third question to be determined is whether the applicant's case raises substantive issues of law of general public importance.

22. The applicant in his Notice of Motion states that his appeal raises matters of general public importance on the premise of the following grounds that he (please confirm) seeks the Supreme Court's intervention:

    a. It will address the issue of a litigant's right and chance to be heard before a court of law;

    b. The issues of technicalities of procedure when administering justice and the effect of vigorously applying the same on justice and failure thereof will be considered;

    c. Whether a person who holds a genuine title to land can be deprived of that land by the illegal actions of another;

    d. Whether the defunct land disputes tribunal had powers to order the deprivation of a person's right to his property even when he has a valid title deed to that property;

    e. Whether failure by a member of the defunct land disputes tribunal to append his signature to a judgment renders that judgment invalid and unlawful;

    f. Whether the Chief Magistrate had powers to adopt an award by the defunct Land Disputes Tribunal that had been set aside the defunct Provincial Appeals Committee.

23. What constitutes a matter of general public importance and the factors that this Court takes into consideration in determining an application of this nature is now well settled. The Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR laid out the governing principles to be considered by the Court as follows:

    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 a point is a substantial one, the determination of which will have a 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.

24. The applicant contends that the single Judge of this Court gave undue regard to procedural technicalities, and that this condemned him unheard, leading to a miscarriage of justice. In the Hermanus Steyn case (supra), the Supreme Court held as follows on apprehension of a miscarriage of justice:

> " ...it is clear that "miscarriage of justice" is more consistent with failings in the judicial process of a rather glaring nature, and in threshold trial stages, than with the adjudication of complex questions of law at tertiary-level Courts."

25. From the foregoing, mere apprehension of miscarriage of justice is not a sufficient ground for this Court to certify a matter for appeal to the Supreme Court. It is our view that the intended appeal does not raise any uncertainty or lacunae in the relevant law, or incongruence of Court decisions on the law, that impacts adversely on public interest. Further, the intended appeal does not raise an important question of law which has not been addressed before by the Court. The issue of regard given to procedural technicalities and the application of Article 159(2)(d) of the *Constitution* has been widely discussed in various decisions by this Court as well as by decisions of the Apex court. For instance, the Supreme Court in *Raila Odinga v. I.E.B.C & others* [2013] eKLR and *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR discussed the extent of the application of Article 159(2) (d) of the *Constitution* in determining the effect of non- compliance with the Court of Appeal Rules or rules of procedure, which is the applicant's contention in the intended appeal.

26. The applicant has also failed to demonstrate how the determination of a land dispute between himself and the 1st respondent to be canvassed in the intended appeal transcends the circumstances of the case between the parties, so as to have a significant bearing on public interest.

27. In the end, we find no merit in this application and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR