



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Mbochi (Civil Application 401 of 2020)
[2022] KECA 72 (KLR) (4 February 2022) (Ruling)**

Neutral citation: [2022] KECA 72 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 401 OF 2020
W KARANJA, M NGUGI & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

WILLIAM NJIHIA KIMANI APPLICANT

AND

FRANCIS WAWERU MBOCHI RESPONDENT

(Being an Application for certification and leave to appeal to the Supreme Court from the Ruling and Order of the Court of Appeal (Warsame, Kiage & Kantai, JJ.A.) delivered on 7th August 2020 in Nrb C. Application No. 87 of 2019)

RULING

1. William Njihia Kimani (the applicant) was the plaintiff in Civil Suit No 2761 of 1994 before the Environment and Land Division of the High Court at Nairobi in which he was seeking transfer of the suit land to himself. Interlocutory judgment was entered in his favour on 21st November, 1994 but the same was subsequently set aside by Githinji J (as he then was) on 5th November, 1996 and the land reverted to the respondent.
2. Thereafter, the respondent moved the court by way of chamber summons dated 10th December, 2008 seeking orders of rectification of the register to reflect the respondent as the registered owner of the suit land. In a ruling rendered by Okwengu J, (as she then was) on 23rd November, 2010 the court ordered the Land Registrar to rectify the Land register by cancelling the Title Deed issued in the applicant's name, reinstating it to the respondent's name.
3. Aggrieved by the said ruling, the applicant decided to appeal to this Court but he was already outside the prescribed time allowed by the Court of Appeal Rules, necessitating the filing of the application dated 11th June, 2019 under Rule 4 of the Court of Appeal Rules seeking extension of time to file and serve out of time, the Notice and Record of Appeal against the said ruling.



4. The grounds in support of the motion were that the applicant was unaware of the ruling by the High Court allowing the respondent's application dated 10th December, 2008 seeking cancellation of the title deed issued in favour of the applicant; that the ruling was delivered in his absence, that his advocate on record never informed him of the intended delivery of the impugned ruling as he had fallen out with the advocate over fees payable and as a result he had not lodged a Notice of Appeal within the stipulated time frame.
5. He further averred that he only became aware of the impugned ruling when he was served with pleadings by the respondent herein in Engineer Magistrate's Court ELC Suit No. 4 of 2018 seeking to evict him from the suit property; that the delay was neither inordinate nor deliberate on his part as it was occasioned by the failure of the advocate then on record for him to notify him of the delivery of the ruling.
6. The application was heard by a single judge of the Court (Nambuye, JA) who was not persuaded that the delay of 8 years 6 months and 19 days had been sufficiently explained, among other reasons and dismissed the application with costs to the respondent. The applicant thus moved the Court by way of reference under Rule 55 (1)(b) of the Court of Appeal Rules, inviting this Court to interfere with the exercise of discretion bestowed on a single judge under Rule 4 of the rules.
7. The Court considered the reference, the submissions of parties and counsel, the applicable law and ultimately, finding no basis for interfering with the decision of the single judge, dismissed the reference with costs to the respondents on 7th August, 2020.
8. Undeterred and still aggrieved, the applicant now seeks to proceed to the Supreme Court where he wants to challenge the ruling of this Court declining his application to file his appeal out of time. In his Notice of Motion dated 9th October, 2020 the applicant seeks orders, inter alia, as follows:-
 - “(a) That this Court be pleased to deem the application as having been filed within time.
 - (b) That this Court be pleased to certify that an intended appeal to the Supreme Court raises questions of general public importance and to grant leave to appeal to the Supreme Court.
 - (c) That this Court certify that the applicant may lodge an appeal to the Supreme Court against the Ruling and orders of this court issued in Civil Application No. 87 of 2019 (UR 62 of 2019).
 - (d) That this Court be pleased to issue directions as to the period of time within which the applicant should lodge the intended appeal and serve the Memorandum of Appeal to the Supreme Court.
 - (e) That this Court be pleased to issue an order of preservation of the suit property in respect of the decision of this Court issued in Civil Application No. 87 of 2019 (UR 62 of 2019 pending the hearing and determination of the intended appeal at the Supreme Court.”
9. In the application, the applicant avers that a question has arisen as to the sanctity of a duly issued certificate of title; whether the Court can ignore the applicant's right to ownership of property as bestowed on him by Article 40 of the Constitution of Kenya; whether the Court can ignore the fact that the applicant is entitled to a fair process; whether the Court can legally restrict the applicant's right to appeal when the process is guaranteed in the Constitution and whether the Court can ignore the



fact that the applicant, who is an innocent purchaser for value, stands the risk of being evicted from the suit property.

10. He further avers that the respondent is in the process of executing a decree arising from a ruling arising from a non-existing suit at the High Court and has threatened to commence execution which orders are subject to the issues of general public importance to be raised in the intended appeal at the Supreme Court; that the applicant has a good appeal with high chances of success; that the applicant is likely to suffer irreparable loss should execution proceed and lastly, that the matter carries specific elements of real public interest and concern, whether discretion can be used to remove a right to ownership of property as enshrined in the Constitution.
11. The applicant filed submissions in which he condenses the issues for determination into three;
 - a. Whether a right as envisaged in the Constitution of Kenya can be repressed by time lapses?
 - b. Whether this Honourable Court can decline to allow a party to pursue an appeal over a right under Article 40 of the Constitution of Kenya?
 - c. Whether Court precedents and judicial pronouncements can override the right to appeal and right to ownership of property.
12. He submits that the issues raised in the instant application are of fundamental importance to the administration of justice and are of critical importance to the property ownership in the country; that it touches on the undeniable right to own property under Article 40 of the *Constitution*, and the precarious balance the courts have to consider in entertaining appeals touching on the right to ownership of property.
13. It is the appellant's position that the decision of the Court will thus guide all Kenyans and the lower courts as to the threshold to be met when entertaining an appeal on a matter touching on the right of ownership of property under Article 40 of the Constitution; that the decision of the Court will serve to guide the lower Courts on the question whether judicial precedents can oust constitutional provisions; that the intended appeal is thus a test case; that in the premise a legal lacuna exists in regard to which the Court is invited to address in a judicious manner.
14. He further submits that there is need for clarity on whether a court can exercise its discretion to oust a claimant's right of appeal emanating from the right under Article 40; that the Court's holding removes the protection placed on all legal and beneficial owners of properties in the country from pursuing their claims to a full and final conclusion of the law; that the court failed to appreciate that the issue before it was intrinsically hinged on the balance between the exercise of the court's discretion and the protection and realization of fundamental rights under the Constitution.
15. Therefore, that applying a blanket judicial paradigm, based on time lapses and laches, without considering the merits of the matter before it amounted to perpetuating a rather unfortunate grave miscarriage of justice and the deliberate design to defeat the claim by the applicant; that he has;
 - a. satisfied the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of his case, and has a significant bearing on public interest;
 - b. that he has demonstrated that the intended appeal raises serious and substantial points of law, the determination of which will have a significant bearing on public interest;



- c. that he has met the obligation to identify and concisely set out the specific elements of "general public importance" which he attributes to the matter for which certification is sought.
16. There was no response filed to the application and we could not confirm if the same had been served on counsel for the respondent. However, having confirmed that counsel on record for the respondent was served with the hearing notice for the application and the said counsel having failed to appear, we decided to proceed with the application and determine it on its merit.
17. At the hearing of the application, the applicant appeared in person and adopted his very thorough and detailed submissions. In his oral highlights, the applicant submitted that the impugned court order was issued on a non – existent suit; that the order was based on an application which was presented to court 6 – 7 years later after the case was withdrawn; that he was advised at Nyeri High Court to go to the Court of Appeal; that he did so to correct the anomaly in 2017; that the single judge dismissed his application and it then went for reference; that the three judges agreed with the single judge; that this being a land matter where he stays with his family he decided to present the instant application based on public interest.
18. He confirmed that he was in possession of the suit land with his family. He also confirmed that there was an ongoing case in Nyahururu where he had a counter – claim over the same suit property; that he understood the Court of Appeal could not help him get his land back but he was seeking to be allowed to go to a proper forum (Supreme Court) since the precedent created by the Court of appeal would be upheld by the High Court thus prolonging a mistake; that he saw the need to seek rectification of the mistake and while at it also develop jurisprudence.
19. We have carefully considered the application before us along with the submissions by the appellant. Article 163 (4) (b) of the Constitution provides as follows,
- “(4) Appeals shall lie from the Court of Appeal to the Supreme Court-
- a.
- 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).”
20. The applicant has invoked the foregoing provision of the Constitution and seeks leave to appeal to the Supreme Court. The issue before this Court (us?) is whether the appeal to the Supreme Court raises issues of general public importance.
20. The Supreme Court set the threshold for granting certification and leave to appeal to the Supreme Court in *Hermanus Phillipus Steyn vs Giovanni Gnechi – Ruscone*, Supreme Court Application No. 4 of 2012. The principles set therein have been applied and amplified in many subsequent decisions emanating from that Court. In the *Hermanus case (supra)* the Supreme Court held that the meaning of “matter of general public importance” may vary depending on the context. The Supreme Court considered Article 163(4) (b) of the Constitution and stated at paragraph 58 that:
- “...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.”

22. The Supreme Court further crystallised the principles that should guide the Court when determining whether a matter is of general public importance to include the following:-

- i. ...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. Determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

23. The applicant is, therefore, enjoined by law to bring his application within the above parameters. It is the Court’s duty to consider and appraise if the foregoing principles enunciated for certification and leave to appeal have been satisfied. At the risk of repetition, the applicant has raised several questions and issues claimed to be matters of general public importance for consideration and determination by the Supreme Court. Some of the issues are;

- a. Whether a right as envisaged in the Constitution of Kenya can be repressed by time lapses?
- b. Whether this Honourable Court can decline to allow a party to pursue an appeal over a right under Article 40 of the Constitution of Kenya
- c. Whether Court precedents and judicial pronouncements can override the right to appeal and right to ownership of property.

24. We bear in mind the fact that the applicant’s grievance or discontent is not on a merit determination of his right to ownership of property. The gist of his complaint is on time limitation within which to



file an appeal to this Court. He seems to harbour the belief that Rule 4 of the Court of Appeal Rules is antithetical to his constitutional right to access to justice. This is actually the sole issue he wishes the Supreme Court to address.

25. Can a right as envisaged in the Constitution of Kenya be repressed by time lapses? In other words, should causes of action be open ended for the right of access to justice to be actualized? The *Limitation of Actions Act* (Cap22) Laws of Kenya; gives statutory timelines within which specific causes of action can be presented to court. These include claims based on contract, tort, land claims etc. There are other statutes also, such as the *Civil Procedure Act*, the *Government Proceedings Act*; the *Appellate Jurisdiction Act* and others which contain time limits for lodging suits or appeals.

These statutes demonstrate that many causes of action have time limits. The only exception to this would be constitutional petitions but even with these, the courts have emphasized that they have to be filed within a reasonable time. In most of these cases however, the court properly moved has discretion to extend time, depending on the peculiar circumstances of each case.

26. This Court had occasion to discuss the importance of limitation of Actions in *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR where Ouko JA (as he then was) expressed himself as hereunder:-

“Limitation of actions mechanisms ... played an important role in the enforcement of one of the fundamental legal principles of the judicial system, which was that at some point, litigation needed to come to an end. Limitation of time for land claims as with claims of any other nature exists for three main reasons which were:

- i. A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent);
- ii. A defendant might have lost evidence over time to disprove a stale claim; and
- iii. Long dormant claims have more cruelty than justice in them (Halsbury’s Laws of England, 4th Edition).

A right or fundamental freedom could be limited by legislation if such limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation.”

27. Some of the issues identified by the applicant for consideration by the Supreme Court are well settled in law. For instance, from the above holding, it is evident that even the right to ownership of land can be repressed by time lapses as it is not absolute.

28. In the same case, M’ Inoti JA held,

“The Constitution of Kenya generally focused on the guaranteed rights and left parliament in appropriate cases to supply any limitations to the rights, so long as those limitations satisfied the requirements set out in article 24 of the Constitution. Limitation needed to be set by a clear and specific law evincing intention to limit a right, and that the limitation ought to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom that included; the nature of the right to be limited, the purpose of the limitation, the nature and extent of the limitation, whether enjoyment of the right prejudiced the rights of others and whether there were other less restrictive means of achieving the purpose of the limitation. No derogation was allowed whose effect was to derogate from the core or essential content of the guaranteed right.



Article 40, which guaranteed the right to property, was part of the Bill of Rights. It was not one of the rights, which under article 25 could not be limited. In appropriate circumstances therefore, the rights to property could be legitimately limited in terms of article 24 of the Constitution, so long as the requirements of that provision were satisfied.”

29. The applicant posited that the question he would want the Supreme Court to consider and determine is whether this Honourable Court could disallow a party to pursue an appeal over a right under Article 40 of the Constitution of Kenya. We hold the view that appeals to this Court are subjected to the same Rules and Rule 4 applies equally to all cases where extension of time is sought. It matters not whether the intended appeal relates to simple trespass, misdemeanors or felonies in criminal appeals, or violation of constitutional rights as claimed by the applicant.
30. The law on this question is well settled in case law and well outlined in statute and we see no ambiguity whatsoever that requires the intervention of the Supreme Court. We do not think any question of application of Rule 4 of the Court of Appeal Rules arises that transcends the interest of the applicant because the circumstances that informed the Court in dismissing the applicant’s application for extension of time were peculiar to his case and not to any other application. In our considered view, the matter does not qualify for escalation to the Supreme Court for determination.
31. On the other issues and questions identified by the applicant, it has not been demonstrated to the Court’s satisfaction that there is a substantial point or question to be urged in the intended appeal the determination of which will have a significant bearing on the public interest. Additionally, the other issues identified by the applicant for determination by the Supreme Court cannot be said to be of any special jurisprudential moment. (See Ruling of the Supreme Court in *Prof. Olive Mugenda vs Dr. Wilfred Itolondo & Others*, Supreme Court Civil Application No. 21 of 2015).
32. On the other hand, if the applicant feels that he needs an interpretation on whether rights under Article 40 of the Constitution should be open ended and not subject to any statutory limitations, then he can approach the Supreme Court direct under Article 163 (4)(a) of the Constitution and he does not need our certification.
33. In totality, having scrutinized the issues and questions framed by the applicant, there is no matter of general public importance that has been identified that would justify this Court to grant leave and certification to appeal to the Supreme Court. This application is devoid of merit and the same is hereby dismissed with no order as to costs as it was not defended.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

W. KARANJA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

