



Isaak Aden Mahad & Alima Mohamed Abdi (Suing on the own behalf and as the Administrators of the estate of the Late Mohammed Abdi Roba) & another v West End Butchery Limited (Civil Application Sup 147 of 2016) [2022] KECA 611 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 611 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION SUP 147 OF 2016
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
APRIL 28, 2022**

BETWEEN

ISAAK ADEN MAHAD & ALIMA MOHAMED ABDI (SUING ON THE OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE MOHAMMED ABDI ROBA) 1ST APPLICANT

IBRAHIM LEMARIN 2ND APPLICANT

AND

WEST END BUTCHERY LIMITED RESPONDENT

(Being an application for leave to appeal to the Supreme Court of Kenya from the Judgment and Order of the Court of Appeal of Kenya at Nairobi (Karanja, Martha Koome and G.B.M. Kariuki, JJ.A.) delivered on 22nd February 2016 in Civil Appeal No. 87 of 2013)

RULING

1. The brief background of this case is that the 1st applicant (Mohammed Abdi Roba, now deceased) was allegedly employed by the respondent West End Butchery Ltd. in 1968 as a security officer while the 2nd applicant was also allegedly employed by the respondent company in 1978 as a mechanic. During the term of their alleged employment, the applicants and their families purportedly occupied LR No. 7149/10 (the suit property) belonging to the respondent company and situate North-West of Athi River.
2. In 2002, the applicants sued the respondent company in Nairobi HCCC No. 1540 of 2002 (O.S) claiming adverse possession on account of occupation of the suit property since 1984. In their Originating Summons dated 27th September and amended on 14th November 2002, the two moved the High Court seeking determination of the following questions: whether the applicants were entitled to be registered jointly as the proprietors of the suit property pursuant to section 38 of the Limitation



of Actions Act; whether the said property was registered in the name of the respondent; whether their occupancy had been continuous and as of right and without force on the part of the applicants, and without permission from the respondent, their servants or agents; whether the respondent by itself, its agents or officers were aware of such user, and whether they were able to resist such occupancy, but did not in any manner do so; whether by any reasons of the occupation aforesaid the respondent's title to the suit property was extinguished by virtue of section 17 of the Limitation of Actions Act; whether the officers, the respondent by itself, servants or agents should execute transfer and do all the acts necessary to convey the said title to the applicants as joint proprietors to enable them to be registered as proprietors and, in default, whether the Deputy Registrar should be authorised to sign all the necessary papers on behalf of the respondent and/or anyone of its servants, agents or officer "in singular and plural;" and whether the applicants were entitled to the costs of the suit.

3. The respondent company opposed the applicants' Originating Summons. In his replying affidavit, the respondent's Managing Director (Mr. Mohammed Juma Allarakha) deposed that the property in questions belonged to the respondent having purchased it on 24th December 1976. He denied that the applicants were ever employed by the respondent, and that the first time he ever saw them was in 2002 when they filed suit. He also denied that the applicants ever lived in the suit property. According to him, some intruders moved into the suit property in 2002 and hurriedly erected temporary structures thereof whereupon the invasion/trespass was reported to Athi River Police Station following which the intruders were evicted.
4. Mr. Allarakha stated that five months later, another batch of trespassers invaded the suit property and constructed illegal structures, managed to stay on the property for 3 months before their eviction and removal of the structures. Annexed to his replying affidavit was a letter dated 16th September 2002 from the District Officer Athi River Division confirming that the DO had visited the suit property and confirmed that there were no structures on the property, and that there were only two watchmen guarding the property on behalf of the respondent.
5. By a Chamber Summons dated 7th May 2004, the respondent applied for orders to strike out/dismiss the applicants' Originating Summons. In its Ruling delivered on 4th March 2005, the High Court (Mugo, J.) allowed the application with the result that the applicants' Originating Summons was struck out and dismissed with costs to the respondent.
6. Following the decision of the trial court, Isaak Aden Mahad and Alima Mohamed Abdi subsequently entered the proceedings on appeal to this Court in Civil Appeal No. 87 of 2013 following the death of the 1st applicant, whose estate they now represent. Their appeal was predicated on 7 grounds to the effect that: the application in question was misconceived; that it was prematurely before the Court, directions under Order XXXVI Rule 8A and 8B of the Civil Procedure Rules having not been taken; that the impugned Ruling was arrived at without any conclusive findings of fact of a competent court; and that the learned Judge should not have referred to findings/Rulings made in previous matters which had not been heard and conclusive findings made as to whether the alleged prescriptive rights had accrued or not.
7. Having heard the appellants and the respondent, the Court (W. Karanja, M.K. Koome and G. B. M. Kariuki, JJ. A) dismissed the appeal with costs to the respondent both here and in the High Court. The Court agreed with and upheld the High Court's decision to strike out the applicants' Originating Summons.
8. Dissatisfied by the judgment of this Court, the applicants filed a Notice of Motion dated 20th June 2016 seeking: leave to appeal to the Supreme Court; that in addition and/or in the alternative, that the applicants' intended appeal be certified as involving a matter of general public importance; and



that costs of this application be provided for. The applicants' Motion is made under Rule 24(1) of the *Supreme Court Rules* and Rule 5(2) (b) of this Court's Rules. Suffice it for the moment to observe that the exercise of this Court's jurisdiction is guided by the Rules of the Court, and that Rule 5(2) (b) of this Court's Rules relates to stay of execution or further proceedings pending appeal, which is not sought in the application before us.

9. The applicants' Motion is anchored on the following grounds set out on the face of the Motion:

- “(a) Whether the Court of Appeal in its judgment upholding the summary striking of the Amended Originating Summons (suit) under then Order VI Rules 13(1) (a) (b) (c) and (d), 13 and 16 of the *Civil Procedure Rule*, impotence, was in breach of the Article 50 (1) of *the Constitution* 2010, (and/or section- of the former constitution) the provides thus;(sic)
- “50(1) Every; person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a Court or if appropriate, another independent and impartial tribunal or body ...?”
- (b) Whether the decision of the Court of Appeal in upholding the summary striking out of the Originating Summons (suit) amounted to an undue validation of an erroneous and irregular decision that had violated the principle of natural justice, by the denying of a party the constitutionally underpinned right or an opportunity to be heard?
- (c) Whether obiter observations or findings of facts in deciding an application on a preliminary objection can operate as an estoppel by the principle of res judicate, to procedurally correctly re-filed case on the withdrawal of the irregularly filed case before hearing and determination on merit?
- (d) Whether the Court of Appeal in its decision dated 22nd February, 2016 which dismissed the appeal against the decision of Hon. Lady Justice Mugo dated 4th March, 2005 by this decision? (sic)
- (e) Whether the decision to dismiss the appeal and hence in effect uphold the decision or Order of the High Court striking out/ dismissing the suit was manifestly wrong as the Order under appeal had been made on the basis of an error on principle or where the trial Court was plainly wrong in allowing admitting evidence and proceeding to Order striking out of the suit, on the basis of a fatally defective application as the application contravened Order VI Rule 13(2) of the *Civil Procedure Rules*?
- (f) Whether the Court of Appeal correctly exercised its Appellate jurisdiction when it failed to interfere with the purported exercise of the discretionary power of the High Court under Order VI Rule 13(a), of the *Civil procedure Rules*?
- (g) Whether the Appellate Court failed to sufficiently address itself to whether the High Court exceeded or acted beyond its powers, in considering its jurisdiction of striking out pleadings under Order VI, rule 13 of the *Civil Procedure Rules* when it made findings of facts and answered the issue as whether the statement of claim as framed in the Amended Originating Summons will or will not succeed, which is the duty of the trial Court proceedings under the special



jurisdiction provided for under Order XXXVI of the Civil Procedure Rules, whereas its duty if any, under Order VI Rule 13, to determine whether the pleadings have been formulated in accordance with the established rules of pleadings, as it is the soundness of the pleading itself, which is the concern of the Court at that stage in the Litigation process?

- (h) Whether the Appellate Court failed to review, or evaluate the proceedings on record and the pleadings sufficient enough to make a finding that the mixture of the grounds and the prayers sought in the application to strike out or dismiss the Appellant's case was such that it amounted to a complete muddle and offended the provisions of Order VI, Rule 13(1) and (2) as well as Order L, rule 15(2) and that the said muddle was so fatal that the application should instead have been struck out?
- (i) Whether the Court of Appeal so substantially misdirected itself when in its decision under appeal failed to appreciate the finding it was applying as binding were obiter dicta and that the requisite principles or elements of law that define res judicata were absent and its misdirection resulted in a miscarriage of justice?
- (j) Whether the Court of Appeal in its decision on appeal committed a travesty of injustice when it trampled and casually treated the Petitioners' complaint that they had been condemned unheard, prematurely, and that when the High Court Judge in a ruling on a preliminary objection on a procedural issue, made a finding of contested facts without the benefit of a trial on merit, the Court trampled on the Appellants fundamental right to a fairly hearing?"

10. The application is also supported by the annexed affidavit of the 2nd applicant (Ibrahim Lemarin) sworn on 20th June 2016 in which he narrates the history of the claim in the superior court, which we need not reproduce. He contends inter alia that the intended appeal has high chances of satisfying the threshold for the grant of leave to appeal; and that the intended appeal raises a number of questions/issues of law. They urge us to grant the orders sought.

11. The respondent opposes the Motion vide the replying affidavit of Mohamed Asif (a shareholder and Director of the respondent) sworn on 20th February 2017. According to him, the belated application is an attempt to make out a case where there is none and to frustrate the decision in the respondent's favour; that the application is a gross abuse of the law; and that the issue before the High Court was a simple issue of striking out of pleadings on grounds of failure to disclose a cause of action, and that it can hardly be said to be a novel point of law of general public importance. He asks us to dismiss the Motion with costs. Neither party has filed submissions in support of their respective positions on the matter.

12. To our mind, the right of appeal from a superior court to the Supreme Court is not absolute. The exercise of that right must be in accord with Article 163(4) of the Constitution and Rule 40 of the Court of Appeal Rules. Article 163(4) (b) of the Constitution Provides:

- “(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)” [which makes provision for power of the Supreme Court to review, affirm, vary or overturn a certificate given in this regard by the Court of Appeal].

13. Rule 40 of the *Court of Appeal Rules* provides for the procedure, and sets out the criteria for determination by this Court of applications for leave to appeal to the Supreme Court. The Rule reads:

“40. Application for certificate that point of law of general public importance involved 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—

(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 ...”.

14. Having carefully considered the applicants’ Motion, the grounds on which it is made, the affidavit in support thereof, and the provisions of Article 163(4) of *the Constitution* and Rule 40 of this Court’s Rules, we are of the considered judgment that the same stands or falls on three main issues: first, whether the applicants’ intended appeal involves a point or points of law; secondly, whether the point or points of law in issue are of general public importance; and, thirdly, whether the application has been made within 14 days of the impugned decision of this Court.

15. The Black’s Law Dictionary defines “Point of Law” as “a discrete legal proposition at issue in a case.” The question as to what constitutes a point or points of law of general public importance was enunciated in the case of *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* [2013] eKLR where the Supreme Court explained 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.”

16. That cannot be said of the applicants’ intended appeal. While their intended appeal may be said to raise points of law, those points are, in our considered judgment, of no general public importance. They relate to purely personal claims in land in which the public has no stake. The Black’s Law Dictionary links “general importance” to “public interest”. It defines public interest as “... the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation.”

17. As Madan, JA. (as he then was) observed in *Murai vs. Wainaina* [1982] KLR p.38 at p.49 para 1:

“A question of general public importance is a question which takes into account the well-being of a society in just proportions.”

18. The principles set out in the afore-cited case of *Hermanus Phillipus Steyn vs. Giovanni Gneccchi - Ruscone*, to determine whether a matter is of general public importance include:



- (a) 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;
 - (b) 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;
 - (c) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
 - (d) 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;
 - (e) 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*;
 - (f) 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;
 - (g) determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
19. In view of the foregoing, we find that the applicants’ intended appeal raises no points of law of general public importance. That settles the first and second requirements for certification, which leaves us with the third requirement relating to the time within which an application for certification under Article 163(4) (b) of *the Constitution* and Rule 40 of this Court’s Rules should be made.
20. Rule 40 (b) requires that such an application be made within 14 days of the impugned decision of the superior court. This Court’s judgment the subject of the intended appeal was delivered on 22nd February 2016. It took the applicants four months to file their application on 21st June 2016, three-and-a-half months late, and without extension of time pursuant to Rule 4. The applicants have therefore failed to comply with Rule 40 of the *Court of Appeal Rules*.
21. Having carefully considered the applicants’ Motion, the grounds on which it is anchored, the constitutional and other statutory requirements for certification/leave to appeal to the Supreme Court, we find for reasons stated above that the applicants’ Notice of Motion dated 20th June 2016 fails, and the same is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....



JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

