**Lopoyetum v Watia & 4 others (Civil Application E45 of 2021) [2022] KECA 899 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 899 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CIVIL APPLICATION E45 OF 2021**

**SG KAIRU, P NYAMWEYA & JW LESSIT, JJA**

**MAY 13, 2022**

**BETWEEN**

**JAMES TEKO LOPOYETUM ................................................................. APPLICANT**

**AND**

**ROSE KASUKU WATIA ................................................................ 1ST RESPONDENT**

**DICKSON KYALO WATIA .......................................................... 2ND RESPONDENT**

**EDWARD WATIA NZILU ............................................................ 3RD RESPONDENT**

**THE ATTORNEY GENERAL (ON BEHALF OF THE GOVERNMENT OF KENYA & MINISTRY OF LANDS AND SETTLEMENT) ....... 4TH RESPONDENT**

**THE NATIONAL LANDS COMMISSION ................................ 5TH RESPONDENT**

***(An application for certification to appeal to the Supreme Court of Kenya against the Judgment and Orders of the Court of Appeal (Ouko (P), Musinga & Gatembu, JJ.A) delivered on the 19{{^th}} May 2021 arising from Malindi Civil Appeal No. 68 of 2018)***

**RULING**

1. Aggrieved by the judgment of this Court delivered on May 19, 2021, James Teko Lopoyetum, the applicant, who was a defendant before the trial court in a suit that was instituted by the 1st and 2nd respondents, now seeks, by his application dated June 2, 2021, leave under Article 163(4)(b) of *the Constitution*, Section 16 of the *Supreme Court Act*, and Rules 1(2), 42, 43, and 45 of the *Court of Appeal Rules,* 2010 to appeal the said decision to the Supreme Court of Kenya.

2. In the said judgment, the Court upheld a decision of the Environment and Land Court at Machakos (Angote, J.) delivered on April 13, 2018 restraining the National Land Commission, the 4th respondent, from making compensation payments to the applicant; declared unlawful, null and void

the transfer in favour of the applicant of a property known as Title Number Lamu/Hindi/ Magogoni/ 682 ("the property") in Lamu County; ordered cancellation of the title issued to the applicant; and ordered the Chief Land Registrar to issue a title in respect of the property to Edward Watia Nzilu, the 3rd respondent.

2. The facts as established by the trial court, in brief, are that applicant claimed to have purchased the property from the 3rd respondent. In the suit before the trial court, the 1st and 2nd respondents, who are the wife and son respectively of the 3rd respondent, challenged the purported sale and transfer of the property to the applicant. The 3rd respondent on his part, disowned the transaction in favour of the applicant. The trial court found no evidence to show that the 3rd respondent signed the transfer of the property in favour of the applicant or that the applicant paid the alleged purchase price for the property to the 3rd respondent. The court found the transfer of the property in favour of the applicant was fraudulent.

4. On appeal, this Court namely, whether the 1st identified two issues for consideration, and 2nd respondents, the wife and son of the 3rd respondent, had locus standi to institute the suit before the trial court in light of the contention that they were not privy to the alleged sale of the property to the applicant. The second issue was whether the 1st and 2nd respondents had established their case before the lower court to the required standard. This Court found that the 1st and 2nd respondents, who were in occupation of the property, had the standing to institute the suit and that there was no basis for interfering with the finding by the trial court that the purported transfer of the property in favour of the appellant was fraudulent.

5. The applicant intends to challenge the judgment of this Court before the Supreme Court on what he says are matters of general public importance on points of law, namely, that the intended appeal raises the question of legality of sustaining locus standi; legality of retrospective application of law; and legality of orders that do not arise from the pleadings.

5. Urging the application before us, learned counsel Mr. Muyuri for the applicant, relying on his written submissions which he orally highlighted, submitted that it was demonstrated before this Court that the judgment of the ELC did not arise from the pleadings; and that the 3rd respondent who was privy to the alleged contract with the applicant did not allege fraud or challenge the sale and transfer of the property to the applicant as he was named as a defendant in the suit.

7. It was submitted that the issues of law intended to be canvassed before the Supreme Court of Kenya, which are matters of general public importance, include the question whether the Court of Appeal erred in retroactively applying to law on spousal consent; that the Court ignored the principle of privity of contract; that the court failed to heed the principle, as pronounced by the Supreme Court in *Raila Amolo Odinga vs IEBC and another* [2017] eKLR, that parties are bound by their pleadings and that the right to fair hearing under Article 50 of *the Constitution* was breached.

7. Counsel urged that the threshold established by the Supreme Court in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR for purposes of determining whether a matter is one of general public importance has been met. It was submitted that the matter does not cease to be a matter of general public importance merely because it involves private citizens. The case of *Langata Development Company Limited vs Mary Wanjiru Dames* [2019] eKLR was cited.

7. Opposing the application, learned counsel for the 1st and 2nd respondents Mr. Muia referred to his replying affidavit and written submissions which he also orally highlighted. Counsel submitted that the subject property is family land on which the entire family of 1st and 2nd respondents live; that

the finding by the trial court that the property was fraudulently transferred to the applicant was well founded and there is nothing of general public importance within the meaning of Article 163(4)(b) of *the Constitution* for consideration by the Supreme Court; that it was established that Section 3(3) of the *Law of Contract Act* was not complied with as there was no contract of sale of land and neither was any consideration paid for the sale; that the suit before the trial court involved a land dispute over private property involving private citizens; that the issues proposed to be raised before the Supreme Court have been fully addressed by the trial court and the Court of Appeal; and that the law on the issues raised is settled and it is important that litigation should come to an end.

10. Although the 3rd to 5th respondents were served with notice of hearing of the application, there was no appearance on their behalf and neither did they file submissions in the application.

11. We have considered the application and the submissions. The application before us is made under Article 163 (4)(b) of *the Constitution* and sections 16 of the *Supreme Court Act*. Article 163(4)(b) of *the Constitution* of Kenya, 2010 provides:

> " (4) 4) Appeals shall lie from the Court of Appeal to the Supreme Court—
>
> (a) as of right in any case involving the interpretation or application of this 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]

12. The guiding principles for determining whether a matter is one of general public importance to merit reference to the Supreme Court under Article 163(4)(b) of *the Constitution* were outlined by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscone* (above). The Supreme Court in that case pronounced that an applicant is required to satisfy this Court that the issues to be canvassed on appeal to the Supreme Court are issues the determination of which transcends the circumstances of the particular case and has significant bearing on public interest. The Supreme Court stated further that:

> " ...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....; 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." (Emphasis)

13. The Supreme Court explained further that 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 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.

14. Applying those principles to this matter, the thrust of applicant's appeal before this Court was that the threshold for establishing fraud to warrant an order for cancellation of the applicant's title to the property was not met; that since the 1st and 2nd respondent were not privy to the sale between the 3rd respondent and the applicant, they could not sustain a claim by reason of doctrine of privity of contract; and that the 1st and 2nd respondents had not discharged their burden of proof. Arising from the judgment of this Court dismissing his appeal, the applicant has urged that the Supreme Court needs to pronounce itself on whether parties and the court are bound by pleadings; whether the applicant's right to fair hearing was violated; whether the Court of Appeal misapprehended the burden of proof; and whether the threshold for cancellation of his title was met.

15. In our view, the question whether parties are bound by their pleadings is not a novel one. Indeed, as the applicant's counsel has pointed out, the Supreme Court decision in *Raila Amolo Odinga vs IEBC and another* speaks to this issue. The question whether the 1st and 2nd respondents had locus standi to institute the suit is one dependent on the specific facts in the case and does not transcend the circumstances of the particular case. The alleged violation of the applicant's right to fair trial and the claim that there was retrospective application for requirement of spousal consent are not a matters that were raised or canvassed before the trial court or before this Court. As to the threshold for establishing fraud, authorities abound.

16. As the Supreme Court stated in *Malcolm Bell vs. 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."

17. All in all, we do not consider that the applicant's application meets the criteria in Court in *Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscone* (above) to warrant certification. As indicated, there is no uncertainty in the state of the law on the matters proposed to be taken up before the Supreme Court to warrant leave to appeal to the Supreme Court. The application fails and is hereby dismissed with costs to the 1st and 2nd respondents.

**DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**