



**Barnge'tuny v Virji (Civil Application 14 of 2021)
[2021] KECA 6 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 6 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 14 OF 2021
MSA MAKHANDIA, S OLE KANTAI & M NGUGI, JJA
SEPTEMBER 23, 2021**

BETWEEN

OGLA JEMELI BARNGE'TUNY APPLICANT

AND

SHIVJI NARAV VIRJI RESPONDENT

(An application for leave to appeal to the supreme court and a preservative order against the judgment and orders of the Court of appeal (Hon. W. Ouko (P), S. Gatembu & A. K. Murgo,r JJA) delivered on the 29th January 2021 in Civil Appeal No. 262 of 2019)

RULING

1. This is a motion brought on notice dated 23rd of February, 2021 in which the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court sitting at Kisumu in civil appeal No. 262 of 2019. The applicant further prays that a conservatory order do issue preserving title No. Eldoret Municipality Block 13/886. "The suit property" pending the determination of the application.
2. The application is brought pursuant to the provisions of Article 163(4) (b) of the *Constitution, 2010*, Section 3A and 2B of the *Appellate Jurisdiction Act*, Section 15 and 16 of the *Supreme Court Act* and Rule 33 (1), (3) (4) and (5) of the Supreme Court Rules and any other enabling Provisions of the Law.
3. The grounds upon which the application is premised are that the court of appeal agreed with the decision of the trial Court and dismissed her appeal. The effect of that decision was that the court of appeal just like the trial court found that there was an agreement for sale of the suit property to the respondent by the applicant and consideration for the same had been fully paid which was not the case. Further that the applicant's intended appeal to the Supreme Court involve matters of public



interest and of general public importance as required by Article 163 (4) (b) of the constitution as can be gathered from the grounds that the applicant intends to canvass which include: -

- i) Whether there was a sale of the suit property, to the respondent by the applicant or whether the respondent is trying to acquire the suit property illegally, unconstitutionally, through an illegal process and an attempt to reap where he did not sow. This is a matter of public interest.
- ii) Whether or not section 3 (3) of The *Law of Contract Act* "the act" has sufficient provisions to deal with a situation where one party in this case the applicant states that there was no written sale agreement and indeed no sale took place while the respondent dangles a written sale agreement in which he posits that it satisfied section 3(3) of the Act. In the applicant's view there is a lacuna in Law. This raises a question of general public importance including the proper and sound interpretation of section 3(3) of the Act.
- iii) That land in Kenya being sensitive, scarce and emotive issue then the protection of land owners from unlawful, illegal, unconstitutional and unprocedural deprivations of the same is a matter of general public interest, whose determination will go beyond the parties and once fully and finally decided there will be peace and stability within the family, community and the country at large. It is one the determination which transcends the circumstances of the particular case, and has a significant bearing on the public interest.
- iv) Whether the respondent who has been unable to demonstrate the payment of the purchase price can as a matter of general public importance, reason and equity be entitled to the suit property by way of specific performance.
- v) whether or not an order of specific performance to convey suit property without demonstrated payment of purchase price amounted to sanctioning the breach of Article 40 of the constitution of Kenya on the protection of the right to property. This is a matter of general public importance transcending the litigation interests of the parties as it touches on the proper and sound interpretation of Article 40 of the constitution of Kenya 2010.
- vi) Whether private property can be conveyed and or transferred to another person and in this case, the respondent without a written agreement that satisfies section 3(3) of the Act and in this case the question to ask is whether the agreement dated 28th may 2011 between the appellant and the respondent satisfied section 3(3) of the act and what was the mischief that parliament intended to cure by the enactment of the said Act. That the issue of interpretation of section 3(3) of the said Act was a matter before the trial court and before the Court of Appeal.
- vii) If the answers to all the issues framed above are in favour of the applicant, then what is the remedy that commends itself to the appellant who has suffered substantial miscarriage of justice with regard to losing the suit property?

4. The motion is further supported by the affidavit of the applicant in which she merely reiterates and expounds on the grounds aforesaid. We see no reason to rehash the same here.



5. The motion is however opposed by the respondent through his replying affidavit in which he deposes that the purported issues the applicant claims to involve matters of general public importance are mere disputes between the two parties and peculiar only to their case hence do not affect the general public. That further most issues being raised in the application as grounds for certification are new and were not raised nor canvassed before the trial court or this court., hence cannot form the basis for certification. The respondent asserts that the main issue before trial court was whether there was a valid agreement for sale and whether the consideration was paid in full and not at all about the interpretation of Section 3 (3) of the act and both this court and the trial court were never invited to determine whether the statute was wanting in resolving the dispute. To the respondent there was no lacuna in the act.
6. Regarding the scarcity, emotiveness or sensitivity of land disputes in this country, the respondent maintains that, that alone does not qualify the intended appeal as a matter of public general importance.
7. The application was canvassed by way of written submissions. The applicant in her submissions reiterated the grounds in support of the motion and added that this court had jurisdiction under article 163(4) (b) of the Constitution to grant the prayers sought. She relied on the case of *Republic Versus Ahmed Abolfathi Mohamed & Another* to buttress the need for this court to find her case for certification merited. The applicant made no submissions on her second prayer in the motion for preservatory order.
8. The Respondent in his written submissions posits that this Court should be guided by the Supreme Court decision in the case of *Malcolm Bell Vs. Daniel Toroitich Arap Moi & another [2013] eKLR* in determining whether this is a fit and proper case for certification and having special regard to whether the issue involved is a matter is of general public importance. The respondent further relies on the cases of *Omega Chemicals Industries Ltd. Vs. Barclays Bank of Kenya Limited [2013] eKLR* and *George Kihara Mbiyu Vs. Margaret Nyeri Mbiyu and 15 others* for the same proposition. On the whole the respondent is of the view the intended appeal does not concern itself with nor does it raise matters of general public importance.
9. The Respondent further submits that the applicant has not justified why the court should issue the conservatory order sought. The assertion that the suit property is matrimonial property is neither here or there as it ceased to be such when it was sold to the respondent. Reliance was placed on the case of *Stella Mokeira Matara Vs. Thaddues Mose Mangenya & Another* for this proposition. In conclusion the respondent prays that this court rejects the application with costs.
10. We have considered the application, the grounds, the affidavits sworn in support thereof and in opposition to the application, the able submissions of both parties and the law. The applicant invokes Article 163 (4) (b) of the constitution and seeks leave to appeal to the Supreme Court from the decision of this court. This Court therefore has been moved to determine whether the intended appeal to the Supreme Court raises issues of general public importance transcending the circumstances of the case and having a significant bearing on the public interest as a pre-requisite for grant of the certificate.
11. Court in case of *Koinange Investments and Development Ltd.V. Robert Nelson Ngethe* stated the purpose and governing principles in respect of leave to appeal to the Supreme Court as follows: -

“.... There is a distinction between leave to appeal to this court [i.e. the court of appeal] from the High court and from this court to the Supreme court... the requirement for Certification under Article 163(4) (b) is a genuine filtering process to ensure that only appeals with elements of general Public Importance reach the Supreme Court, as was



observed in R.V. Secretary of states, EX Parte Eastway)] per Lord Bingham] that this court cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist...”

12. The Supreme court in the case of *Hermanus Phillipus Steyn V. Giovanni Guecchi- Ruscone*, set out the principles that should guide this court when considering whether or not to grant a certificate and or leave to appeal to the supreme court. The Supreme Court considered the purport of article 163(4) (b) of the constitution and observed: -

“.....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.”

13. The Supreme Court outlined albeit in summary the principles 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.

14. We shall now endeavor to apply the above parameters to the specific circumstances of this case. First, is this a matter where the issue to be determined can be said to transcend the circumstances of the particular case, and have a significant bearing on the public interest? The dispute whose final judgment the applicant seeks to reverse in the Supreme Court, arose out of a land sale agreement whose thrust



was that the applicant sold to the respondent the suit property but refused to transfer the same to the respondent. She later contested the sale and the matter proceeded before the trial court. The respondent was successful and the respondent was ordered by way of specific performance to transfer the suit property to the respondent. The applicant appealed against the judgment and decree of the trial court to this court. In its judgment this court concurred with the findings of the trial court and accordingly dismissed the appeal. It is this dismissal that has provoked this application.

15. The pleadings from the trial court all the way to this court disclose one irrefutable fact that this was a contestation over sale of suit property that was governed by the party's private terms and conditions set out in the sale agreement which was negotiated between the parties themselves. This being a dispute between the two parties about whether there was a sale agreement and payment of consideration for the suit property, is governed by the party's choice of laws applicable and in this case the act. That means that the dispute was between the parties and does not transcend the particular case into the public realm. We are unable to see how the determination of question of fact and evidence would have a significant (if any) bearing upon the public interest in Kenya leave alone the area where the suit property is situated.
16. The applicant submits that the need for certification is for the supreme court to make a proper and sound interpretation of Section 3 (3) of the act. As already stated, for us to be able to grant certification, the issue which is sought to be considered by the Supreme court must have arisen in the court below and must have been subjected to judicial determination. We have looked at the record and the judgments of both courts and there is nowhere that the issue of interpretation of Section 3(3) of the act was raised, canvassed and a determination on it made. This therefore is a new issue that has only been brought forth in this application. Accordingly, we refuse to be a party to such an expedition. In any event, even if it had been raised the provision is very clear and unambiguous and there can be no other interpretation other than what the provision says. We unable to see what other interpretation that the supreme court would probably give. In other words, the applicant has not demonstrated the uncertainty in that provision that the supreme court will need clear and clarify. The intention of the parliament in enacting the act are clearly set out in the preamble of the act. In our view we doubt whether the Supreme Court will have anything to add. The applicant has neither demonstrated how the determination of an issue affecting the ownership, sale and transfer of the suit property helps the general public and or becomes a matter of general public importance where the general welfare of the public shall be affected.
17. Accordingly, we are not persuaded that the applicant has made out a case for the grant of a certificate to appeal to the Supreme court in accordance with the principles set in the Hermanus case (Supra) and thus the prayer must fail. It also follows that the prayer for preservation of the suit property fails based on our finding that the application for certification is unsuccessful.
18. In the end, the order that merit the application dated 23rd February, 2021 is a dismissal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL



MUMBI NGUGI

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JUDGE OF APPEAL.

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

Signed

DEPUTY REGISTRAR

