



REPUBLIC OF KENYA



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**Karanja v Ndirangu & another (Civil Application 5 of 2021)
[2021] KECA 57 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 57 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 5 OF 2021
HM OKWENGU, MA WARSAME & S OLE KANTAI, JJA
OCTOBER 8, 2021**

BETWEEN

MARTIN THIRIMBU KARANJA APPLICANT

AND

ESTHER NJOKI NDIRANGU 1ST RESPONDENT

AMOS KINUTHIA NDIRANGU 2ND RESPONDENT

(An application for certification and grant of leave to appeal to the Supreme Court against the Judgment of the Court of Appeal delivered at Nairobi (Kiage, M’Inoti & Murgor JJ.A) on 8th February 2019 in Civil Appeal No. 36 of 2017)

RULING

1. By a notice of motion dated 10th December 2020, Martin Thirimbu Karanja (the applicant) seeks two reliefs, that is, certification and leave to appeal to the Supreme Court against the decision of this Court delivered on 8th February 2018 and stay of execution of the said judgment pending the hearing of the intended appeal to the Supreme Court as per the consent orders made on 19th May 2015 in Civil Application No. 178 of 2014. The application is brought under the provisions of Article 159 & 163 (4) of the *Constitution of Kenya, 2010*, Rule 31 & 40 of the *Appellate Jurisdiction Act* and Rule 24 & 26 of the *Supreme Court Rules, 2011*.
2. Briefly, the facts informing the application revolve around a longstanding family dispute over L.R Title No. Muguga/Gitaru/805(the suit land). Upon the death of one, Mzee Amos Kinuthia in 1983, his land was subdivided into three plots being Muguga/Gitaru/803,804,805 to be inherited by his three sons Peter Kinuthia, Geoffrey Kinuthia and James Kinuthia respectively. Apparently, James Kinuthia was gravely ill during the subdivision process and his intended property -Muguga/Gitaru/805 was registered in the name of his mother Hannah Muthoni.



3. Following the demise of both Hannah and James Kinuthia, a dispute arose between the widow of James Kinuthia- Mary Njoki Karanja (the original plaintiff/applicant) on the one hand and the two brothers over the ownership of the suit land. After a litany of cases, Mary Njoki (now substituted by the applicant) was declared the rightful heir of the suit land in HC Misc. Cause No 1735 of 1995 and an order that the brothers be evicted from her land was issued.
4. On 29th August 2001, the eviction order was executed. Thereafter, Peter Ndirangu moved to the High Court and filed HC No 1678 of 2002 alleging that he and his family were in fact evicted from his own parcel of land being Parcel No. 1705 that bordered the suit land and his house was demolished. He contended that the government had compulsorily acquired a small portion of his land being Muguga/Gitaru/804, to aid the construction of the Nairobi-Nakuru Highway and the remaining portion was registered as LR Muguga/Gitaru/1705 and a new title issued. In a judgment dated 18th December 2013, Waweru J. found inter alia, that Peter Ndirangu (now deceased and substituted by the respondents) was not evicted from the suit land but from his own parcel No. 1705; ordered the applicant to vacate the respondents' parcel within 14 days, granted injunctive orders against the applicant and awarded Kshs 800,000.00 as general damages.
5. Aggrieved with that decision, the applicant lodged an appeal in this Court vide Civil Appeal No. 36 of 2017. In a judgment dated 8th February 2018, the Court (Kiage, M'Inoti & Murgor JJ.A) dismissed the appeal and upheld the High Court's decision. Dissatisfied, with the court's decision the applicant filed an application for the court to review its judgment. Upon considering the arguments put forth by the parties, the Court (Musinga, Gatembu, M'Inoti JJA) in a ruling dated 10th December 2020 refused to exercise its jurisdiction to review and held:

“that jurisdiction is exceptional and is not available in a case like the present where the applicants are literally seeking to reopen the litigation and take a second bite of the cherry...”
6. Further dissatisfied by this Court's decision, the applicant has now filed the application before us and desires to challenge the court's Judgment in the Supreme Court. The applicant contends that the anticipated appeal raises an important constitutional issue under Article 40 of general public importance. The grounds on the face of the application are that both courts erred in their decisions given that the ownership of the suit land had been determined in Civil Appeal No. 270 of 1997 in favour of the applicant's mother Mary Njoki rendering the High Court in HCCC No. 1678 of 2002 and the Court of Appeal in CA No. 36 of 2017 functus officio, and that the effects of the judgments was to displace the applicant's family from their ancestral land where several kin have been buried.
7. In opposing the application, the 2nd respondent, Amos Ndirangu filed a replying affidavit dated 30th April 2021. In a nutshell he deponed that the application was time barred as the applicant had failed to file and serve a notice of appeal within the prescribed period; that the application for leave was filed inordinately and inexcusably late; that the intended appeal did not disclose any matter of general public importance; that the subject matter of the appeal did not involve any interpretation of the Constitution and that the issue of the right to property was never an issue before the superior courts.
8. We have considered the application, the affidavits on record, the rival positions of the parties articulated in their submissions and the law.
9. Article 163(4) of the Constitution succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of the Constitution and in any matter where it is certified that the appeal involves a matter of general public importance.



10. The principles governing what constitutes matters of ‘general public importance’ were set out by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* 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.”
11. Before determining whether the application has met the threshold espoused above, the preliminary question we must ask is whether it is competent. The respondents contend that the law mandates a party who intends to lodge an appeal to the Supreme Court to file a notice of appeal within 14days after the delivery of the judgment. However, there is no provision in this Court’s rules limiting the time of filing an application for certification such as this one (see *Teachers Service Commission vs. Simon P. Kamau & 19 Others*). The only consideration is whether the application was filed without unreasonable delay as stated under article 259(8) of the Constitution of Kenya which provides

“If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises.”
12. We have perused the record. This application was filed on 10th December 2020 almost seven months after the delivery of the impugned judgment. Taking into account the death of the 2nd applicant and the fact that the applicant is acting in person, we find that the delay was not inordinate. Furthermore, the question whether the applicant filed a notice of appeal indicating his intent to appeal to the Supreme Court has no bearing on the certification of a matter to the Supreme Court. This is a jurisdictional matter that remains to be determined by the apex Court.
13. Having found that the application is competent and bearing in mind the principles set out in the Hermanus case above, does the application raise issues of general public importance as required by Article 163(4)(b) of the Constitution? We think not. Having keenly perused the grounds in support of



certification, we cannot deduce any substantial issue of law to be determined or any matter that affects public interest. The finding of the High Court which was upheld by this Court was that the applicant wrongly evicted the respondents from their own land and that the dispute between the parties was a boundary dispute resulting in wrongful eviction / trespass. The applicant has not set out in any form why these elements of settled law require consideration by the Supreme Court and how they impact third parties or other cases.

14. As for the assertion that the applicant intends to raise an important constitutional issue of general public importance under article 40 of the Constitution, this court cannot speculate or act on mere conjecture as to which question on the right to property the applicant would want the Supreme Court to determine or interpret. Again, we cannot find any express pronouncement by the judgments of the Court of Appeal and the High Court touching on the constitutional right to property under Article 40. As was stated in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* the Court held thus:-

“That where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. The import is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

15. The applicant has failed to demonstrate that the court’s reasoning took a trajectory that warrants constitutional interpretation. In our view, it is evident that the applicant, who had his day in court by seeking a review of this Court’s decision is now seeking another chance to relitigate the same issues on another appeal in a different forum. The judgment of the Court of Appeal upheld the trial Court’s finding inter alia, that the applicant wrongly evicted the respondents from their own land and became a trespasser therein. This Court differently constituted, in reviewing the said Judgment held that the appellate court had considered all the issues raised by the applicants on appeal and found on merit in the issues raised. All litigation must sooner than later, come to an end and its conclusion must have a finality. A matter cannot be reopened before the Supreme Court simply because a litigant is of the view that the decision should have been different or certain weight ought to have been given to a particular piece of evidence. That is exactly what the applicant is trying to do. We think that the applicant must bear the burden of trying to reopen the litigation in order to achieve a different result.
16. We are aware that litigation is burdensome, tedious, time consuming and costly and it is time for the applicant to realize that he has reached the end of the road. It may be painful and sometimes unfavourable to him but the earlier he comes to the realization that time is up, the better. The applicant must forget the past and forge a unity with his other family members and be satisfied with what he has, so that he can live in peace and harmony with the rest of the family. That is not an easy burden but is a reality for now. We think we have said enough to demonstrate that the journey is over and there is no more through road for the applicant.
17. In the end, we find that the applicant has not made out a case to warrant the certification that the intended appeal to the Supreme Court involves matter(s) of general public importance or the leave to appeal to the Supreme Court. As for the prayer seeking stay of execution of this court’s judgment pending the hearing of the intended appeal to the Supreme Court, the same is untenable by virtue of



the fact that this court is functus officio and lacks the jurisdiction to grant such orders. The application is devoid of merit and is hereby dismissed. Each party to bear own costs.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF 2021.

H.M. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

