Maulo & another v ROU (Civil Application 25 of 2021)
[2021] KECA 285 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 285 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION 25 OF 2021

PO KIAGE, K M'INOTI & M NGUGI, JJA

DECEMBER 3, 2021

BETWEEN

THOMAS MUKA MAULO ..... 1ST APPLICANT

WALTER WASHINGTON BARASA NYONGESA ..... 2ND APPLICANT

AND

ROU ..... RESPONDENT

(An application for certification and leave to appeal to the Supreme Court against the judgment of the Court of Appeal (Karanja, Okwengu & Sichale, JJ.A) dated 19th February, 2021 and for stay and preservation of the suit property in KISUMU CIVIL APPEAL NO.76 OF 2016)

RULING

1. By a notice of motion dated 5th March, 2021, the appellants seek for orders that;

    a. This Court be pleased to grant leave to appeal to the Supreme Court against the decision of this Court delivered on 19th February 2021;

    b. This Court be pleased to certify that the intended appeal to the Supreme Court raises questions of general public importance;

    c. The applicants' Notice of Appeal lodged on 23rd February 2021 be deemed as having been duly lodged;

    d. There be temporary stay of execution of the Judgment dated 19th February 2021 and Decree therein pending hearing and determination of this Application and the intended appeal;

    e. Such further relief be granted as this Court deems fit and expedient in the circumstances.

2. The application is based on a numerosity of grounds running to 43 in number. We think the primary grounds for this application are that, the intended appeal is of general public importance as it raises the following questions of law;

    a. Whether the respondent, a minor aged 16 years had requisite intention to adversely possess on entry to parcel xxxx in 1971 to entitle acquisition of title by adverse possession;

    b. Whether there is a controversy on the law of adverse possession by treating the respondent a trespasser when he and his father had no adverse holding on parcels xxxx and xxxx since the 1st appellant controlled their occupation and procedurally surveyed and subdivided the two parcels in 1996 and 2003 respectively without claim of interest by the respondent on the land;

    c. Whether adverse rights are transferrable to entitle the respondent's adverse rights that allegedly accrued on parcel xxxx to legally pass to the successor parcel xxxx in 1996 and be transferrable to parcel 3116 (suit land) in 2003 for acquisition;

    d. Whether the interpretation of Section 38(1) of the *Limitation of Actions Act* contemplates concurrent possession of parcel xxxx and parcel xxxx by both parties herein to entitle the respondent's acquisition of parcel xxxx (suit land) by virtue of adverse rights acquired on parcel xxxx;

    e. Whether the 1st appellant's accommodation of the respondent in his registered property parts with possession occupied by the respondent in an adverse possession claim.

    f. Whether the respondent's mere long occupation for more than 12 years on parcels xxxx and xxxx without requisite intention to possess results in acquisition of title to parcel xxxx;

    g. Whether the respondent's mere permissive possession as admitted without proof that same became hostile against the 1st appellant amounts to dispossession;

    h. Whether Adverse Possession can accrue to the respondent as a minor whose parent had permission to have occupation on Parcel xxxx;

3. The application is supported by an affidavit sworn by the 2nd applicant on his behalf and that of the 1st applicant on 5th March, 2021. In the affidavit, the applicants question the judgement of this Court claiming that the learned judges ignored various issues including that; the applicants and the respondent could not have been both in possession of parcel xxxx from 1974 to 1996 and parcel xxxx from 1996 to 2003 without the consent of the 1st applicant, the survey report of 1996 in evidence showed that there was no identifiable portion exclusively possessed by the respondent, and that for purposes of adverse possession, time cannot accrue where the land occupant is a relative staying with permission. There is no replying affidavit on record by the respondent.

4. In written submissions dated 17th September, 2021, the 2nd applicant, acting in person states that, a registered owner and an intruder without consent cannot both be in possession of land at the same time. He further asserts that the respondent entered the 1st applicant's land in 1970 as a 15year old, and at common law a minor cannot have intention to possess on entry to an owner's land to found an adverse possession claim. In the end the 2nd applicant submits that they have satisfied the principles constituting matters of general importance as set out in the Supreme Court decision of *HERMANUS PHILLIPUS STEYN -VS- GIOVANNI GNECCHI-RUSCONE [2013] eKLR*, and prays that we allow his application.

5. In opposition to the application, the respondent lodged a brief response titled 'grounds of opposition' dated 28th September, 2021 in which he contends that the application does not raise any point of law

or significant point of law which has a public interest bearing. The respondent urges that we dismiss the application with costs.

We have considered the application, the grounds in support thereof, the submissions by parties, and the law. An appeal from this Court to the Supreme Court arises in only two instances as set out in Article 163(4) of the *Constitution*;

> " 163(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)."

6. An intending appellant is obliged to demonstrate that the matter in question carries specific elements of real public interest concern. The Supreme Court in HERMANUS PHILLIPUS STEYN (supra) spoke of the transcendent quality of the matters that qualify for the engagement of its appellate jurisdiction thus;

> " Before this Court 'a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: it impacts and consequences are substantial, broad based, transcending the litigation - interests of the parties, and bearing upon the public interest."

7. The Apex Court proceeded to authoritatively set down the following as the governing principles in the determination of what entails a matter of general public importance: -

> "(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 transcends the circumstances of the particular case, and has a significant bearing on the public interest;
>
> (i) 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;
>
> (ii) Such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
>
> (iii) 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;
>
> (iv) 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;

(v) The intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance"

(vi) Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court." (See also *MALCOLM BELL -VS- DANIEL TOROITICH ARAP MOI & ANOTHER* [2013] eKLR)

8. Does the application before us satisfy the test? We think not. The applicants' main contention is that the respondent is not entitled to the suit land by virtue of adverse possession. Both the High Court and this Court upon properly examining the matter and applying the law, arrived at the same conclusion, that possession by the respondent of the suit property since 1974 was open, uninterrupted and adverse to the title of the applicants. We think the dispute was well settled by the two superior courts.

9. Further, on the face of the application, the issues raised by the applicants do not transcend the circumstances of the case nor do they have a bearing on public interest. Nor does, the application raise any substantial points of law that would warrant the Supreme Court's intervention.

10. The upshot is that we find that the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR