IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ. A)

CIVIL APPLICATION NO. SUP 17 OF 2019 (UR 11/2019)

BETWEEN

THRIFT ESTATES LIMITED.....1ST APPLICANT

DAKAGI HOLDINGS LIMITED.....2ND APPLICANT

AND

ETRADE LIMITED.....1ST RESPONDENT

EQUATORIAL COMMERCIAL BANK.....2ND RESPONDENT

(An Application for leave and Certification on the basis that matters of general public importance are involved in the intended appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal at Nairobi (Alnashir Visram, Gatembu Kairu & Otieno-Odek, JJ.A) delivered on 5th July, 2019

in

Civil Appeal No. 109 of 2017

Consolidated with

Civil Appeal No. 156 of 2015)

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RULING OF THE COURT

1. Thrift Estates Limited (1st applicant) borrowed a sum of Ksh. 30,000,000 (thirty million) from Equatorial Commercial Bank (2nd respondent), (the Bank) sometime in September, 2011. As security for the loan, it charged land Parcel **L.R No. 14902/70 (IR 89871)** (suit property) which property was registered in the name of the 2nd applicant (Dakagi Holdings Limited), as security for the said loan.

2. Following default in repayment of the loan the Bank advertised the suit property for sale on 4th September, 2013. This prompted the applicants to move to the High Court vide Nairobi **HCCC No. 403 of 2013** in an endeavour to stop the impending sale. Before the suit was heard, the parties engaged in out of court negotiations which culminated into a consent order in which the 1st applicant agreed to dispose of some other properties in a bid to liquidate the outstanding loan. Before this arrangement come to fruition, the Bank once again advertised the suit property for sale by public auction on 24th November, 2014.

3. This second attempt to dispose of the suit property caused the applicants to move back to the High Court seeking injunctive orders against the Bank to stop it from selling the suit property. In a Ruling dated 30th April 2015, the High Court allowed the application and ordered that the suit property be “preserved pending resolution” of the issue. That ruling was subject of appeal before this Court.

4. It suffices for purposes of this application to state that the dispute appears not to have been resolved as expected and so the suit property was sold to Etrade Company Limited (1st respondent) for Ksh. 42,750,000 and a memorandum of sale was duly executed.

5. Aggrieved by the turn of events, the applicants herein filed yet another suit against the Bank seeking orders to prevent transfer of the suit property to the 1st respondent. It would appear that contemporaneously with the suit, they filed an application seeking interim orders of

injunction against the Bank, which orders were granted in a Ruling dated 21st December, 2016. Two appeals were filed against this Ruling and the earlier Ruling dated 30th April, 2015.

6. The appeals and a cross appeal were heard before this Court (Visram, Gatembu, Otieno-Odek JJ.A) resulting into the judgment dated 5th July, 2019. In the said judgment, the Court allowed both appeals and the cross-appeal. Both impugned Rulings were set aside and the orders of injunction issued by the High Court on 21st December 2016 was set aside with the applicants herein being condemned to pay costs of the appeal.

7. The applicants now seek leave of this Court to appeal to the Supreme Court against that judgment pursuant to **Article 163(4)(b) of the Constitution of Kenya 2010.** It is important to note at this early stage that the judgment sought to be appealed is in respect of two rulings granting orders of injunction. According to the applicant, the judgment raises important legal issues of general public importance as listed in paragraph 18 of the application as follows:-

> **"(a) Whether the order of the Court setting aside interim injunction against an interest obtained pursuant to a sale by public auction is justifiable.**
>
> **(b) Whether this Honourable court erred in law by solely relying on the provisions of section 99(4) of the Land Act as its persuasion to set aside the injunctive orders but failed to consider that pursuant to Section 97(3), an aggrieved party may apply to court to declare the said sale void.**
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> **(c) Whether this Honourable court erred in law by interfering with the discretion of the superior court's judge without necessarily finding that the said discretion was not exercised judiciously.**
>
> **(d) Whether the Court of Appeal being a court of record whose decisions are binding on lower courts can make a decision condemning borrowers who charge their properties as security to be at the mercy of the chargees even where it appears prima facie that the sale in exercise of the statutory power of sale was void.**
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> **(e) What would be the fate of the applicant and all other borrowers whose properties are sold illegally by the banks if they cannot seek protection in section 97 of the Land Act?"**

8. The application is supported by the affidavit of Daniel Kamita Gichuhi, sworn on 19th July, 2019. From the grounds on the face of the application and the deponments in the supporting affidavit, it is clear to us that the applicant is dissatisfied with this Court's application of **Section 99(4) of the Land Act** and the purported failure by the Court to apply Section **97 of the Land Act**. **Section 99** deals with a chargor's remedy lying in damages, while **Section 97** talks about a sale being declared void. There is not even the slightest insinuation by the applicant that the learned Judges failed to interpret these two provisions correctly.

9. In the replying affidavit sworn by Mr. Vincent Komu Kibiro on behalf of the 1st respondent, he deposes that the law in respect of remedies available to the charger after exercise of power of sale is settled both by statute and by this Court. In his view, there is nothing arising from the judgment of this Court to warrant this matter to be propelled to the Supreme Court for determination. Urging the Court to dismiss the application, the 1st respondent stated that nothing turns on this application to require it to be certified as raising issues of General Public Importance. He stated that there is no uncertainty in law on the interpretation of Sections 97 or 99 of the Land Act, nor was such interpretation an issue before the trial court or this Court.

10. These sentiments are reiterated in the affidavit sworn by John Wageche on behalf of the 2nd respondent on 2nd December, 2019. The 2nd respondent also urges that the application fails to meet the threshold set by the Supreme Court in **Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscone**, **Supreme Court Application No. 4 of 2012.**

11. The matter proceeded by way of oral submissions on 9th December, 2019 where learned counsel Mr. Eredi Emmanuel appeared for the applicants with Mr. Charles Njuguna appearing for the 1st respondent. There was no appearance on behalf of the 2nd respondent despite service of the hearing notice on 27th November, 2019. According to Mr. Eredi, the Court set a dangerous precedent in relying only on **Section 99 of the Land Act** instead of reading that section along with **Section 97 of the Land Act**.

12. Opposing the application, Mr. Njuguna reiterated the contents in the 1st respondent's affidavit and stated that the applicant has failed to demonstrate that the issues raised transcend the interests of the parties herein. He stated that the issue of interpretation of Section 97of the Land Act did not arise and has not been determined as the main suit has not been heard and determination made on the issue. He said that the issue did not arise for the determination of this Court either. He submitted that there is no uncertainty in the law in this area and the application fails to meet the threshold already set by the Supreme Court of Kenya in a chain of decisions which are contained in their list of authorities.

13. We have considered carefully the entire record, the rival affidavits and oral submission by counsel. We have also been guided by the law as espoused in the list of authorities cited to us by counsel. There is only one issue for our determination; that is whether this application involves a matter of general public importance as circumscribed by the Supreme Court in the **Hermanus Steyn** case (*supra).* In determining the scope or parameters to be met for a matter to qualify as one raising issues of General Public Interest, the Supreme Court rendered itself as follows in the **Hermanus Steyn** case (*supra).*

> **"Para 60: In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or courts below. Where the said point of law arises on account of any contradictory decisions of the courts below, the Supreme Court**

may either resolve the question, or remit it to the Court of Appeal with appropriate directions, in summary, we would state the governing 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 interests;

(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 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. The application before us seems to suggest that the Court said that the only recourse available to a person whose property is found to have been erroneously sold by public auction is an award of damages. We note that by the time the 2nd order of injunction was granted by the court, the suit property had been sold over one year earlier. The issue of **Section 97 of the Land Act** was not therefore before this Court when it heard the appeal. The Court could not therefore address its mind to the same. The Court cannot therefore be faulted for failing to interpret or apply a section of the Land Act that was not before it for determination. To that extent, we agree with counsel for the respondent that the issue of Section 97of the Land Act did not arise before this Court on appeal. It cannot therefore be an issue for this Court to transmit to the Supreme Court for determination. (See **Peter Ngoge vs Francis Ole Kaparo & 5 Others [2012] eKLR.**

15. We note further that the main suit has not been determined yet and the Court that will be seized of the matter will have the opportunity to address the application of Section 97 of the Land Act if so moved by the parties. The parties dissatisfied with that application will then have opportunity to move to this Court on appeal and thereafter to the Supreme Court if circumstances allow the party to do so.

16. Overall, in the circumstances of this case, we find the application as it relates to the application of Section 97 of the Land Act inchoate, it having not gone through the hierarchy of the courts. We also find that the applicant has not demonstrated any conflict in the interpretation of **Sections 97 or 99 of the Land Act** to require the Supreme Court to settle the law in that area; and further that the law and practice on the issue of the exercise of the courts discretion one way or another is also settled and does not qualify as a point to be taken up by the Supreme Court; lastly, that we see no issue transcending the interests of the parties herein to qualify as matters of general public importance calling for determination by the Supreme Court.

17. Accordingly, we find this application devoid of merit and dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR