



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. SUP. 160 OF 2019

CONSOLIDATED WITH

CIVIL APPLICATION NO. SUP 167 OF 2019

BETWEEN

TAWAI LIMITED.....APPLICANTS

AND

ELDORET EXPRESS LIMITED.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court from the judgment of the Court of Appeal at Eldoret (Asike, Kiage and Odek, JJ.A) dated 28th November, 2019

in

Civil Appeal No. 118 of 2017)

RULING OF THE COURT

In its judgment rendered at Eldoret on the 28th day of November, 2019, this Court overturned the decision of the Environment and Land Court (Ombwayo, J), in which it had been declared that the registration and transfer of LR. NO. 5707/6 in favour of the respondent was illegal, ordered that the respondent's title to the suit property be cancelled and the respondent be evicted from the suit property. In addition, it had been ordered that the respondent be restrained by an order of permanent injunction from trespassing on the suit property and to pay to the applicant Kshs.11,970,000 in *mesne* profits.

In setting aside these orders, the Court expressed its satisfaction with the evidence that the suit property was sold at a consideration of Kshs.7,100,000 to Kaitet by Kenya National Capital Corporation (KNCC), exercising its statutory power of sale under **section 69(1)** of the Indian Transfer of Property Act (repealed) by private treaty; that the transfer was duly registered and thereafter, one Kaitet had dealt with the suit property as its owner, and had in fact charged it to Agricultural Finance Corporation on 12th November, 1987 and subsequently discharging it on 2nd November, 2000; and that Kaitet later sold the suit property to the respondent on 12th February, 2001. The Court was further satisfied that allegations of fraud were not proved; and that further, the prayer for cancellation of Kaitet's title having been filed on 12th May, 2011, some 24 years after the registration, was statute-barred. In the end, the Court arrived at the conclusion that the respondent was a *bona fide* purchaser for value; and that, for these reasons the learned Judge erred in the impugned decision.

The applicant has returned to the Court with two identical applications, Civil Application No. 160 of 2019 and No. 167 of 2019, brought pursuant to **Article 163(4)(b)** of the Constitution, **section 15** of the Supreme Court Act and **sections 3A** and **3B** of the Appellate Jurisdiction Act, praying for leave to challenge the Court's decision to the Supreme Court and that, in the meantime there be an order staying the Court's decision under **Rule 5(2)(b)** of the Court of Appeal Rules. Since the two applications arose from the same judgment and are seeking the same reliefs, they have been consolidated and this ruling relates to both.

In the main, the applicant applies for leave to appeal to the Supreme Court on the ground that the appeal it intends to bring raises questions of

general public importance. The questions intended to be asked in the intended appeal include; whether a deed plan in contravention of the law can confer title; whether land can be transferred under the Registration of Titles Act (repealed) before discharging the charge; whether a road reserve can be transferred to a private individual; when time, for purposes of Limitation of Actions Act, begins to run where fraud is alleged; and whether land fraudulently alienated and registered in contravention of the law can confer genuine and lawful title.

We have considered arguments presented by both sides on whether the questions enumerated above are indeed matters of general public importance that ought to go to the Supreme Court for its input and final determination.

The 1st respondent in its replying affidavit and submissions does not think there is any merit in the application, contending that the issues intended for the Supreme Court are matters of settled law and do not involve any cardinal issue of law or of jurisprudential moment; and that the prayer for stay of execution is misguided. The 2nd respondent, though served, did not participate in the hearing of the application.

In determining this sole question in the application, we are guided by the now well-established principles enunciated by both this Court and the Supreme Court in numerous decisions, some of which were cited to us by the parties.

For example, in **Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscione**, Supreme Court Application No. 4 of 2012, the Supreme Court gave the test for granting leave to appeal 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.

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.....

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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

Applying the above test to the issues listed by the applicant intended for consideration by the Supreme Court, we do not ourselves see in them anything of general public importance. They do not transcend beyond the litigation-interests of the parties in the dispute. The points of law intended to be raised are, in the circumstances of the case unlikely to have a significant bearing on the public interest. Finally, the applicant has not demonstrated that there is uncertainty in the law, arising from contradictory precedents, which would require the Supreme Court to resolve.

All we read in this application is dissatisfaction by the determination of facts in contest between parties in the suit, which cannot, by themselves, be a basis for granting a certificate to go to the Supreme Court. This Court and the court below determined questions ordinarily dealt with on nearly daily basis by courts, such as whether the respondent’s title and occupation of the suit property was illegal, whether the respondent was a *bona fide* purchaser, whether the action was *res judicata* and whether eviction orders against the respondent could issue.

On the prayer for stay of execution, we reiterate that under **Rule 5(2)(b)** the Court, in civil proceedings, can only order a stay of execution of the order or decree of the superior courts below and not of its own decision. The Court of Appeal Rules has no provision equivalent to **Order 42 rule 6** of the Civil Procedure Rules, which allows the superior courts below to stay their decisions pending appeal to this Court. Therefore, the proper forum to apply for stay of execution after this Court’s judgment is, the Supreme Court and only when certification has been granted. This is confirmed by the decision of the Supreme Court in **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell**, S.C Application Nos. 12 and 13 of 2012, where it stated as follows:

“ ...it is clear that the core question was, whether the Supreme Court has the jurisdiction to grant interlocutory orders, and more particularly, orders of stay of execution of decrees issued by other superior Courts. This question is, by this Ruling, now set to rest: where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues.”

The prayer for stay of execution was, for the foregoing reasons misguided.

Ultimately, we come to the conclusion that this application is bereft of merit.

Accordingly, we dismiss it with costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR