



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (WAKI, WARSAME & MURGOR, J.J.A)

CIVIL APPLICATION NO. SUP. 18 OF 2018

BETWEEN

REUBEN MUNA KANGETHE.....APPLICANT

AND

ATHANAS BONAVENTURE WANYAMA.....1<sup>ST</sup> RESPONDENT

PRISCILLA OMBITO WANYAMA.....2<sup>ND</sup> RESPONDENT

THE LAND REGISTRAR KIAMBU DISTRICT.....3<sup>RD</sup> RESPONDENT

*(Being an application to seek leave to the Supreme Court against the judgment and orders of the Court of Appeal, Nairobi (Visram, Azangalala, Kantai, JJA) delivered on 3<sup>rd</sup> February 2017)*

in

*Civil Appeal No. Nai 241 of 2014*

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RULING OF THE COURT

This Notice of Motion dated 24<sup>th</sup> July 2018 is made under **Article 163(4) (b)** of *the Constitution* following a decision of this Court (Visram, Azangalala and Kantai, JJA), delivered on 3<sup>rd</sup> February 2017. The applicant seeks for certification to appeal to the Supreme Court.

The motion was filed on the grounds that this Court failed to appreciate that the applicant was a purchaser for value of the suit property, of which he had taken possession, and not having been a party to the fraud that resulted in his becoming the registered proprietor, an order of rectification ought not to have been made so as to cancel the applicant's name as registered proprietor. It was further contended that the intended appeal was a matter of general public importance, as it is concerned with the interpretation of **section 143** of the repealed **Registered Land Act** and **section 80 (2)** of the **Land Registration Act**, where different benches of this Court had interpreted the provisions differently.

The application was supported by the applicant's affidavit sworn on 11<sup>th</sup> July 2018, wherein it was deponed that it had just been brought to the deponent's attention that, another decision of this Court delivered on 23<sup>rd</sup> February 2018, by a bench differently constituted, that is *Dennis Noel Mukholo Ochwanda & another vs Elizabeth Murungari & another*, Civil Appeal No. 298 of 2014 had reached a different conclusion, where it was held that since fraud was not proved against a registered proprietor, who had no knowledge of the fraud or mistake and the property was acquired for valuable consideration, and the registered proprietor was in possession of the land, **section 143 (2)** of the **Registered Land Act** (repealed) prohibited rectification of the register.

In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition to the motion on 24<sup>th</sup> October 2018 wherein they contended that this Court did not have jurisdiction to entertain the application for extension of time contemplated by virtue of **rule 31 (1)** of the *Supreme Court rules*.

As a brief background *Athanas Bonaventure Wanyama* and *Priscilla Ombito Wanyama* the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a suit in the High Court against *the applicant, Reuben Muna Kangethe* seeking a permanent injunction to restrain him from occupying, dealing with and or

developing Kiambu Municipality/Block 11-101 (*the suit property*). Also sought was an order of cancellation of the transfer of the title registered in favour of one Stanley Kimani Irungu, as well as the subsequent registration of the property in the applicant's favour, and an order of declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the genuine proprietors of the suit property. Finally, they also alleged general damages for trespass and the restoration of the suit property to its original status and costs.

In his defence the applicant claimed to be a bona fide purchaser for value without notice of any defect in the title. On his part, the Kiambu Land Registrar, the 3<sup>rd</sup> respondent asserted that there was fraud against the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents which fraud was committed by one Stanley Kimani Irungu who, though joined as a party to the suit, could not be traced.

The trial court (*Ougo, J*) on considering the evidence, found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the legal owners of the suit property. The applicant was aggrieved by the said decision, hence an appeal was filed.

And in its judgment, this Court upheld the findings of the trial court that the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were the registered owners of the suit property did not transfer, it to Stanley Kimani Irungu and that the records in the Lands registry had been fraudulently altered to indicate that the property had been transferred to Kimani. It further held that since the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not transfer the suit property to Kimani, the latter had no rights or interest to transfer to the applicant or to anyone else, and as a consequence the applicant could not purport to have acquired a valid title.

In the submissions before us, **Mr. Maina**, learned counsel for the applicant reiterated the contents of the applicant's affidavit and submitted that the decision of the Court had created a conflict in the interpretation of **section 143** of the repealed **Registered Land Act** and the **Land Registration Act**, which was a matter of general public importance that required to be clarified by the Supreme Court.

With regard to the late filing of the application, counsel contended that the aforementioned judgment of *Dennis Noel Mukholo Ochwanda & another vs Elizabeth Murungari & another*, Civil Appeal No. 298 of 2014 was only recently delivered on 23<sup>rd</sup> February 2018 which was well after the decision herein was rendered, and hence the delay in filing the application.

On her part **Ms. Okimaru** opposed the application, and stated that this Court had no jurisdiction to entertain the application, as it had been filed out of time, and that *rule 31* of the *Supreme Court rules* restricted powers to extend time to the Supreme Court. It was further submitted that this Court could only address the question of certification sought after time had been extended for certification. In counsel's view, this Court had no jurisdiction to hear the application for certification until the time for filing the application was extended by the Supreme Court.

We have considered the application, submissions by counsel and the law. In our view, two issues arise for our consideration, namely:-

- i) *Whether time for filing a notice of appeal in the Supreme Court can be extended by this Court; and if so*
- ii) *Whether the intended appeal raises a matter of public importance stipulated by Article 163 (4) (b) of the Constitution thereby requiring certification.*

And if not; then this Court has no jurisdiction to hear the application as **Rule 31** of the **Supreme Court Rules** provides in part that-

**1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.**

**2) Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal. (Emphasis ours).**

With respect to whether this Court is empowered to extend time to file an appeal to the Supreme Court, in the case of *Alfeen Mehdi Mohammed vs Basil Feroz Mohammed & 223 others* [2017] eKLR this Court differently constituted stated thus;

**“It is instructive to note that the submission by the applicant's counsel attributing the delay in filing the notice of appeal to this Court was made from the bar. Be that as it may, we doubt that this Court has jurisdiction to extend time limited by the Supreme Court Rules for filing a notice of appeal. Only the Supreme Court has jurisdiction to enlarge such time as set out in Rule 53 of the Supreme Court Rules.”** Rule 53 of the **Supreme Court Rules 2016** reserves the right to the Supreme

Court to enlarge time thus;

**“The Court may extend time limited by these Rules, or by any decision of the Court.”**

And in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014 [2014] eKLR, the Supreme Court thus held;

**“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”**

Our jurisdiction to extend time is circumscribed under **rule 4** of the **Court of Appeal Rules** which clearly provides that;

***“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”***

Indeed, the impugned judgment of this Court was delivered on 3<sup>rd</sup> February 2017, and this Motion having been filed on 22<sup>nd</sup> July 2018 has rendered it as having been filed out of time. Since **rule 53** of the **Supreme Court rules** has reserved the determination of such matters to that court, and does not confer on us jurisdiction to extend time for filing of appeals on behalf of that court, we clearly lack jurisdiction to extend time, for filing of this application. Accordingly, our lack of jurisdiction requires that we down our tools, as adumbrated by **The Lillian ‘S’ case Owners of Motor Vessels ‘Lillian S’ Vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** which essentially means that we are unable to entertain the question of certification.

That said, the application is struck out with no orders as to costs.

***It is so ordered.***

***Dated and Delivered at Nairobi this 8<sup>th</sup> day of February 2019.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**