



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL (APPLICATION) NO. 59 OF 2016

BETWEEN

ANANIAS N. KIRAGU.....APPLICANT

AND

ERIC MUGAMBI .....1<sup>ST</sup> RESPONDENT

FRANKLIN MWIRIGI .....2<sup>ND</sup> RESPONDENT

MARTIN NJERU .....3<sup>RD</sup> RESPONDENT

*(An application for certification that a matter of general public importance is involved in an intended appeal to the Supreme Court from the Ruling of the Court of Appeal at Malindi (Visram, Karanja & Koome, J.J.A) dated 7<sup>th</sup> December, 2017 in*

*Civil Appeal No. 59 of 2016.)*

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RULING OF THE COURT

1. The gravamen of the matter before us which pitted the applicant against the respondents, who happen to be father and sons respectively, was with respect to the proprietorship of a parcel of land described as Subdivision No. 655 (Original No. 539 /39 ) Section III MN(suit land). On one hand, the applicant contended to be the sole proprietor of the suit land and that the respondents had not only trespassed on the land but also interfered with his possession. On the other hand, the respondents claimed to have interest over the suit land as a matter right by virtue of being in occupation of the same since birth.

2. As a result, the applicant filed a suit in the Environment and Land Court (ELC) being E.L.C No. 101 of 2015 seeking a permanent injunction restraining the respondents from interfering with his quiet enjoyment and their eviction. In the interim, the applicant prayed for an interlocutory injunction against the respondents by an application dated 25<sup>th</sup> June, 2015. In turn, the respondents on their part, filed an application dated 20<sup>th</sup> August, 2015 also asking for an interim injunction restraining the applicant from interfering with their peaceful occupation or evicting them.

3. Angote, J. who was seized of both applications found in favour of the respondents and dismissed the applicant's application. The decision did not go down well with the applicant culminating in an appeal which came up for hearing on 23<sup>rd</sup> November, 2016, when the following order was recorded with the consent of the parties:

***“Being a dispute involving close family members who desire to resolve it through an alternative forum- Njuri Ncheke, we order that the appeal be and is hereby taken out of today's hearing list to enable the parties explore this out- of –court alternative within the next 90 days. The appeal shall be listed in the last part of the new term for mention.”***

4. Pursuant to the said order, the dispute was ventilated before the National Supreme Council of Njuri Ncheke Ya Ameru Elders (*Njuri Ncheke*) which issued an award on 23<sup>rd</sup> November, 2016. The award was subsequently filed in this Court on 3<sup>rd</sup> February, 2017. Be that as it may, the respondents were aggrieved by the award which they felt was biased, and did not address the issues in controversy. It is for those reasons that they declined to execute the said award or consent to the same being adopted as a final order of the Court.

5. Nonetheless, the applicant filed an application dated 30<sup>th</sup> June, 2017 calling upon the Court to adjust or dispose the appeal herein in terms of the award issued by *Njuri Ncheke*. In his view, it did not matter that the respondents had declined to consent to the award being adopted by the Court. Of relevance, was that they had subjected themselves to the *Njuri Ncheke* forum. The application in question was resisted by the respondents on the grounds set out herein above.

6. After considering the application, this Court in a ruling dated 7<sup>th</sup> December, 2017 declined to accede to the applicant's invitation. In doing so, the Court rendered itself as follows:

***“What happened in the instant appeal was different as the parties who submitted themselves to an alternative forum did not agree to be bound by the outcome by signing a consent. Moreover, this alternative forum was not a Court aided arbitration or mediation, thus the central question is, whether this Court can compel the respondents to accept the award as argued by the applicant under Article 159 (2) (c ) of the Constitution. The record of appeal before us shows it is the parties who indicated to the Court when the appeal came up for hearing that they wished to have the appeal subjected to an alternative forum. Of course as the matter involved family members it made good sense to allow them explore alternative forum. Can this Court adopt the said award? We are of the view this cannot happen in the face of the appeal that is pending before us. We say so because even if the parties had accepted to adopt the award by consent, it can only be filed in the High Court and the appeal before us is withdrawn by consent or we dismiss it as per the Rules or hear it and determine it one way or the other.***

...

***For the aforesaid reasons, we do not see how the orders sought by the applicant can be granted in the face of a pending appeal before this Court. If parties desired to withdraw the appeal, as provided for in the above Rules, the appeal would be struck out or withdrawn. The Court of Appeal exercises appellate jurisdiction which entails correction of errors or affirmation of the orders appealed against. This therefore explains why the Rules are couched as they are, as the Court's jurisdiction is appellate and if an appeal is compromised, the award of the elders which is not by consent of the parties cannot replace a determination of an Appeal. Similarly, this Court cannot refer the matter to the High Court for adoption as it was not a court aided arbitration, and nor did the reference emanate from the High Court.”***

7. Aggrieved with the foregoing decision, the applicant has approached us under **Article 163(4)(b)** of the **Constitution** asking us to certify that his intended appeal to the Supreme Court raises issues of general public importance. The issues which the applicant perceived as being of general public importance were with respect to the effective implementation of **Article 159(2)(c)& (3)** of the **Constitution** which advocates for courts to promote Alternative Dispute Resolution (ADR); and whether the adoption of awards emanating from ADR by a court was dependent on the consent of the parties to be bound by the outcome of the said ADR. He contended that the aforesaid issues transcend the dispute between the parties and would have an impact on the promotion of ADR.

8. Resisting the application, the 2<sup>nd</sup> respondent deposed that the applicant had not demonstrated that the intended appeal raised matters of general public importance or that the issue(s) sought to be determined by the Supreme Court had a significant bearing on public interest.

9. At the plenary hearing, Mr. Kimani, learned counsel for the applicant, reiterated the grounds in support of the application for certification. He submitted that the application was competently before us and that the intended appeal to the Supreme Court was not based on an interlocutory application. Mr. Kimani added that it was necessary for the Supreme Court to pronounce itself on this Court's broader jurisdiction with respect to ADR as envisaged under **Article 159** and **Section 3** of the **Appellate Jurisdiction Act**.

10. On her part, Ms. Mwanja, learned counsel for the respondents, argued that the intended appeal to the Supreme Court did not raise issues of public importance as envisaged in the Supreme Court's decision in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione [2013] eKLR**. Elaborating further, counsel submitted that this Court clearly set out the reasons why it did not adopt the award by *Njuri Ncheke* and there was no lacuna with regard to adoption of awards emanating from ADR by courts.

11. The essence of certification under **Article 163(4)(b)** of the **Constitution** is to ensure that only appeals which raise issues of public importance escalate to the Supreme Court. Putting it another way, this Court in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione [2012] eKLR** summed up our role as a filtering process of matters which can go up to the Supreme Court.

12. As this Court observed in **Africa Merchant Assurance Company vs. Kenya Power & Lighting Company Limited [2018] eKLR**, there is no hard and fast definition of what a matter of general public importance entails. Be that as it may, a broad criteria of determining what constitutes a matter of general importance was established by the Supreme Court in **Malcolm Bell vs. Daniel Toroitich Arap Moi & Another [2013] eKLR** 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 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 [at earlier levels of the] 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 [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;

viii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become “matters of general public importance”, so as to be a basis for appeal to the Supreme Court;

ix. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;

x. questions of law that are destined to continually engage the workings of the judicial organs, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;

xi. questions with a bearing on the proper conduct of the administration of justice, may become “matters of general public importance,” justifying final appeal in the Supreme Court.”

13. Applying the foregoing principles to the application before us, we find that the intended appeal does not involve issues of general public importance. Why do we say so? Firstly, without delving into the merits of the impugned decision, the Court rendered itself on whether the award issued by *Njuri Ncheke* could be adopted as this Court’s orders with respect to the appeal herein and in the manner suggested by the applicant. In our view, the Court’s decision on the application does not transcend beyond the dispute between the parties.

14. Moreover, looking at the grounds of the intended appeal as set out in the draft petition of appeal annexed to the application, the issues raised therein revolve around the determination of the contested facts between the parties and merit review of the impugned ruling all of which do not warrant the certification sought. In a nutshell, what the applicant seeks in the intended appeal is for the Supreme Court to adopt and enforce the *Njuri Ncheke* award.

15. Secondly, apart from alleging that there is need for the Supreme Court to pronounce itself on the effective implementation of **Article 159(2)(c)** and whether consent of parties is a prerequisite for adoption of an award emanating from ADR by courts, the applicant had not demonstrated the existence of any lacuna with regard to those issues. See the Supreme Court’s decision in **Koinange Investments & Development Ltd vs. Robert Nelson Ngethe [2014] eKLR**. In our view, the law with respect to ADR and adoption of the said awards is settled.

16. Ultimately, 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. Consequently, the application is devoid of merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 14<sup>th</sup> day of March, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**