



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPLICATION NO. 27 OF 2018**

**BETWEEN**

**NIRMAL SINGH DHANJAL.....APPLICANT**

**AND**

**JOGINDER SINGH DHANJAL ..... 1<sup>ST</sup> RESPONDENT**

**DALJIT SINGH DHANJAL .....2<sup>ND</sup> RESPONDENT**

**DHANJAL BROTHERS LIMITED .....3<sup>RD</sup> RESPONDENT**

**SUKWANT KAUR KUNDI .....4<sup>TH</sup> RESPONDENT**

**JASPAL KAUR NAGI .....5<sup>TH</sup> RESPONDENT**

(Being an application for certification and leave to appeal to the Supreme Court on grounds of public importance under Article 163(4) (b) of the Constitution in respect of a judgment delivered by the Court of Appeal on the 15<sup>th</sup> of February 2018 in *Civil Appeal No. 14 of 2017*)

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**RULING OF THE COURT**

[1] The principles applicable in considering certification of matters to be heard by the Supreme Court are now well settled. The starting point is **Article 163** of the **Constitution** which not only established the Supreme Court but also delineated its jurisdiction. **Article 163 (4) (b)** requires that appeals lie from the Court of Appeal to the Supreme Court upon certification, on the basis that a matter is one of “**general public importance**”. The certification can be done by the Court of Appeal itself, or by the Supreme Court.

[2] The case of **Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione [2013] eKLR**, was one of the earliest cases to define that jurisdiction, in which the Supreme Court concluded 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: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."**

In the end, the Court outlined the governing principles in determining whether a matter is of general public importance thus:-

**"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. 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 [other] 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 themselves, a basis for granting certification for an appeal before the Supreme Court."

[3] The application herein arises from a commercial transaction pertaining to the Estate of the late **Jaswant Singh Boor Singh Dhanjal** who died intestate on 26<sup>th</sup> October, 2004. The deceased was survived by five children namely, Joginder Singh Dhanjal, (1<sup>st</sup> respondent) who was the applicant in the court below; Daljit Singh Dhanjal (2<sup>nd</sup> respondent) and administrator of the deceased estate, Sukwant Kaur Kundi (4<sup>th</sup> respondent) and Jasper Kaur Nagi (5<sup>th</sup> respondent). It would appear that when the deceased died, the family authorized the 2<sup>nd</sup> respondent, (**Daljit**) to apply to become the administrator of their father's estate. On 30<sup>th</sup> January, 2006, he petitioned for letters of administration over the deceased's estate and the grant of letters of administration was issued by the court on 26<sup>th</sup> July, 2006.

[4] Nonetheless, before the grant was issued and confirmed, **Daljit** while purporting to act as administrator of the deceased's estate; entered into a settlement agreement on 9<sup>th</sup> March, 2006 with the deceased's brothers in which certain shares of the deceased's estate were transferred in a very elaborate document titled, 'settlement agreement'. In the said arrangement, several properties and shares in companies were to be transferred or disposed of. This is where the problems began, as the other beneficiaries of the deceased's estate distanced themselves from the said settlement agreement.

[5] In a bid to make things right, the 1<sup>st</sup> respondent moved the High court vide an application dated 10<sup>th</sup> March, 2015, seeking declaratory orders to the effect that a "settlement agreement" dated 9<sup>th</sup> March, 2006 which purported to make dispositions of assets belonging to the estate of their late father, be declared null and void. The application was allowed, prompting the applicant to mount an appeal before this Court challenging the decision. By a judgment delivered on 15<sup>th</sup> February, 2018 the appeal was dismissed, with the result that this Court upheld the trial court's findings on both fact and law. In a nutshell, this Court found that any transfers done under the settlement agreement were null and void, because at the time the said transfers were executed, the letters of administration appointing Daljit the administrator of the deceased estate was not yet issued or confirmed, meaning he was not an administrator to the estate and as such, he lacked the authority to effect transfer of shares or any disposition of the deceased properties. For clarity the "*Settlement agreement*" was entered into on 9<sup>th</sup> March, 2006 while the grant was issued on 26<sup>th</sup> July, 2006.

[6] **Undeterred and desirous of presenting an appeal before the Supreme Court, the applicant is now before this Court vide a Notice of Motion dated 21<sup>ST</sup> February, 2018, in which he seeks the following orders:-**

**"1. THAT this court certify that the matters raised herein are of "general public importance" and grant leave and certification to the applicant to appeal to the Supreme Court in an intended appeal against the decision of this court in civil appeal No. 14 of 2017 between the applicant as appellant and the respondents, delivered at Mombasa on the 15<sup>th</sup> February 2018**

**2. THAT the cost of this application be in the discretion of the court."**

[7] The application is grounded under **Article 163 (4) (b)** of the **Constitution, Rule 24** of the **Supreme Court Rules** and **Rule 42** of the **Court of Appeal Rules** and based on grounds that; the intended appeal touches on succession, an issue that affects the entire general populace; that the applicant was never a party to the succession proceedings; that the applicant was only made a party to the proceedings filed by the 1<sup>st</sup> respondent before the trial court herein and; that in instituting those proceedings, the 1<sup>st</sup> respondent was solely acting as a beneficiary and not as an administrator to the estate and as such, he had no *locus standi* to seek the orders he did.

[8] Consequently, the applicant framed five issues that he contends are of general public importance that he intends to present for determination before the Supreme Court.

I. Firstly, whether it is legally tenable for any person, who neither has letters of administration nor any authority to a deceased's estate; to sue third parties for the sole purpose of collecting and preserving the estate.

II. Secondly, whether it is against public policy for a court to compel the registration of property in favour of a deceased person 10 years after his death whereas the letters of administration to his estate have not been revoked or annulled;

III. Thirdly, whether it was proper for the court to overlook the provisions of Section 93 of the Law of Succession Act and invalidate legitimate transactions concluded by a person in possession of a confirmed grant of representation; and if so, for the Supreme Court

to give certainty as to the legal position of the recipients of such property;

IV. Fourthly, when a court is called upon to interpret the law, whether the said court should apply the law as is, or should instead substitute the law for its own discretion over the matter and;

V. Lastly, whether the applicant was condemned unheard by virtue of the failure by the trial court and the first appellate court to address these issues.

[9] Opposing the application was **Mr. Maloba** learned counsel for the 1<sup>st</sup> respondent who submitted that the issue of public policy was never raised at trial and that the issues that arose for determination in this matter were confined to the specific circumstances of this case which was between the beneficiaries of the estate of the deceased. There is no dispute the 1<sup>st</sup> respondent was a son of the deceased; that being the case nothing prevented him from filing an application as a beneficiary of his father's estate. Further, that there is no point of law that was demonstrated in this matter that has a bearing on the wider public and that the application should thus be dismissed.

[10] Appearing for the 4<sup>th</sup> respondent, learned counsel **Mrs. Kipsang, who appeared alongside Ms. Mwenga, associated herself with Mr. Maloba's submissions, adding that not a single element of public importance has been demonstrated herein as is required under Article 163 (4) (b) of the Constitution. Counsel went on to state that the issues framed by the applicant do not transcend other succession matters and as such, do not call for certification of the intended appeal by this Court.**

[11] We have considered the application and submissions, we have to restate that the Constitution of Kenya, 2010 intended the Supreme Court to concern itself only with important legal issues that have a clear bearing on the public interest. The apex Court was not intended to serve as an extra tier of an appeal court, where all disputes would end up. Effective filter mechanisms were designed to ensure that only appeals that implicate the public interest over and above the narrow or direct interest of particular litigants, find their way to the final court. This is what **Article 164 (4) of the Constitution** provides;-

**‘(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**

**a. ....**

**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).’ (Emphasis added)**

It is this provision that the applicant has invoked in seeking leave to appeal to the Supreme Court. Therefore, what we are being called upon to determine in considering the application is whether the intended appeal raises issue(s) of general public importance. The principles against which to evaluate an application, in which it is alleged that a matter of general public importance is involved, so as to justify an appeal to the Supreme Court are now well crystallized.

[12] These principles have been restated by this Court and thrashed to a pulp as demonstrated in several cases as per the summary below. To begin with, this Court will not certify a matter to be one of general public importance and deserving of the attention of the Supreme Court as a matter of course. The applicant has first to satisfy the Court that the intended appeal involves a matter of general public importance within the meaning of **Article 163 (4) (b)** of the Constitution the Constitution - (***Daniel Kimani Njihia v Francis Mwangi Kimani & Another 2014* eKLR, Civil Application No. Sup 10 of 2013**). To justify certification, the intended appeal must involve cardinal issues of law or issues of great jurisprudential moment – (***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others [2012] eKLR, Supreme Court Petition No. 2 of 2012***). For an intended appeal to qualify as a matter of general public importance, it must be one, the determination of which transcends the circumstances of the particular case and has a significant bearing on the public interest - ***Hermanus Phillipus Styen vs Giovanni Gnecci-Ruscone (supra)*** Where the issue of general public importance is alleged to involve a point of law, the point of law must be a substantial one, the determination of which will have a significant bearing on the public interest. In addition, that the question of law must have arisen before this Court and it must have been the subject of judicial determination for the purpose of rectifying errors with regard to matters of settled law – see (***Malcolm Bell v Daniel Toroitich Arap Moi & Another [2013] eKLR, (Supreme Court Application No. 1 of 2013)***). Consequently, mere apprehension of a miscarriage of justice without satisfying the requirements of **Article 163 (4) (b)** of the Constitution will not suffice to justify certification.

[13] Does this application fall within the threshold of the above principles? To begin with, the applicant's indignation over the judgment that he intends to appeal against in the Supreme Court is in regard to the participation of the 1<sup>st</sup> respondent who in his view lacked *locus standi*, to file the application. Quite paradoxically, the applicant by his own admission was also not a party before the High court succession matter in which he contends that the 1<sup>st</sup> respondent lacked *locus standi*. How then can he hope to have that issue resolved on appeal before the Supreme Court and how does it transcend beyond his own interests over the deceased estate and the beneficiaries. Besides, looking at the retinue of the foregoing principles, *locus standi* is not an issue of public importance as envisioned under Article 163 (4) (b).

[14] As regards the issue of public policy *viz* the impact of the orders given by the Court, particularly concerning the fact that the order was issued 10 years after the deceased's demise, this too in our respectful view is an issue unique to the specific circumstances of this case. The applicant has not demonstrated in what way this issue falls within the domain of public policy.

[15] It is also important to clarify that whereas the applicant claims in the instant application that both the High court and this Court revoked transfers done by a holder of confirmed grant of representation, nothing could be further from the truth as both records show there were clear findings on fact and law that at the time of the transfer of the assets was effected, the grant had yet to issue in favour of Daljit and was yet to be confirmed; that owing to lack of a confirmed grant, he lacked the authority to effect the said transfers. Therefore, the applicant is being less than candid when he frames this as an issue of a transfer done by a holder of a confirmed grant. Such was not an issue before the two courts. No claim was ever made to the effect that the grant had been confirmed at the time of transfer. Consequently, such an issue cannot

arise in the intended appeal before the Supreme Court as it is factually incorrect. In addition, even if by any stretch of imagination such an issue were to be entertained, the applicant has not shown in what manner the same falls within the realm of public interest and policy.

[16] On the whole therefore, we find the application does not disclose any matter of general public interest. It was a private dispute relating to sale of the property belonging to a deceased person, and the beneficiaries of the estate and those issues of fact and law that arose were determined between the parties with finality. We think, with respect, that the opposition to the application is well founded. The only issue here was whether a person who is not appointed as a representative of a deceased person has authority to transact and transfer properties forming part of the deceased's estate without first obtaining a confirmed grant of letters of administration or probate. This was a dispute between the parties that was determined by the High court which decision was affirmed by this Court.

For the foregoing reasons we find no merit in this application which we order dismissed with costs to the respondents.

**Dated and delivered at Mombasa this 4<sup>th</sup> day of April, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**