



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & ODEK, J.J.A)

CIVIL APPLICATION No. SUP. 27 of 2019 (UR 19/2019)

BETWEEN

ROSE JEBOR KIPNGOKAPPLICANT

AND

KIPLAGAT KOTUT.....RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Eldoret (Githinji, Jamila & Odek JJA) dated 7th March, 2019

in

Civil Appeal No. 31 of 2015)

RULING OF THE COURT

1. Two applications were heard together in this matter. The first is an application for leave and certification to appeal to the Supreme Court. The second is an application to strike out the application seeking leave and certification. The two applications were argued and heard simultaneously. This ruling is a determination of both applications.
2. The first application is by way of a Notice of Motion dated 19th March 2019 in which the applicant has applied to this Court for certification and leave to appeal to the Supreme Court. In addition, the applicant has prayed for an order for stay of execution and implementation of the judgment of this Court delivered on 7th March 2019 in **Civil Appeal No. 31 of 2015**. The order for stay of execution is sought to remain in force pending the hearing of the intended appeal at the Supreme Court.
3. The ground in support of the Motion for certification is that there are two contradictory judgments by this Court over the same subject matter being **Land Reference No. Plateau/Plateau Block 2/Uasin Gishu /63** and the parties herein are the same litigants. That this Court in its judgment dated 7th March 2019 ignored its earlier judgment delivered on 14th June 2016 over the same subject matter. That the provisions of equity as read with the provisions of **Section 6 (2)** of the **Land Control Act, Cap 302, Laws of Kenya** require clarification and determination by the Supreme Court. That the instant application has been necessitated by uncertainty in law arising from the two contradictory and inconsistent judgments of this Court. That the matter raised herein has a significant bearing on public interest because contradictory precedent has been created by the differing judgments of the Court. That the applicant is apprehensive that the respondent may commence enforcement of the contradictory judgment of this Court delivered on 7th March 2019.
4. The respondent in opposing the application submitted that the application was incompetent and incurably defective. That there are no two contradictory judgments of this Court. That the judgment delivered by this Court in **Civil Appeal No. 31 of 2015** on 14th June 2016 was set aside by this Court in a ruling delivered on 17th May 2018. That the judgment having been set aside, it does not exist in law. That there is only one judgment of this Court delivered on 7th March 2019. That the dispute between the parties over **Land Reference No. Plateau/Plateau Block 2/Uasin Gishu /63** is a private dispute that does not conjure public interest. That for the foregoing reasons, the applicant has not met the threshold for certification and leave to appeal to the Supreme Court.
5. On the prayer for stay of execution and implementation of the judgment of this Court delivered on 7th March 2019, the respondent submitted that this Court has no jurisdiction to grant a stay order because no appeal is pending before this Court. That upon delivery of its judgment, the Court is *functus officio*.

6. The second application is also by way of Notice of Motion dated 2nd April 2019 wherein the respondent, **Mr. Kiplagat Kotut**, is the applicant. In the application, the respondent seeks an order to strike out the applicant's Notice of Motion dated 19th March 2019 that seeks leave and certification to appeal to the Supreme Court.

7. The grounds in support of the application is that the application for leave and certification is incompetent; that some essential step in the proceedings has not been taken out; that the said application has been filed by an advocate not properly on record; that the application offends the mandatory provisions of **rule 22 (1)** of the rules of this Court; and that no notice of change of advocate has been filed and served in the matter. The Motion to strike out is supported by an annexed affidavit deposed by counsel for the applicant **Mr. Jonah Kimutai Korir**.

8. At the hearing of the two applications, learned counsel **Mr. Tobias Mogambi** holding brief for Dr. Chebii appeared for the applicant. Learned counsel **Mr. J.K. Korir** appeared for the respondent. Both parties filed written submissions and cited judicial authorities.

APPLICANT'S SUBMISSIONS

9. Counsel for the applicant recapped the grounds in support of the application for leave and certification and stressed that there are two conflicting judgments of this Court over the same subject matter. That due to the two contradictory judgments, the Supreme Court is the proper forum to resolve the conflict. That the conflicting judgments raise a matter of general public importance and raises public interest. That there is uncertainty in law arising from the two inconsistent judgments.

10. The applicant urged that the intended appeal to the Supreme Court is meritorious because the claim of constructive trust raised before this Court was not argued before the trial court; that the issue of constructive trust was raised from the bar before this Court. It was further submitted that the intended appeal to the Supreme Court is necessary given the holding by this Court that **Article 10 (2) (b)** of the Constitution provides a legal framework that underpins the application of equity in dispute resolution. That the holding by this Court in regard to **Article 10 (2) (b)** of the Constitution is contrary to the equitable maxim that equity follows the law. That the equity cannot override the provisions of **Sections 6, 7 and 8 of the Land Control Act**, and which provisions have not been repealed.

RESPONDENT'S SUBMISSIONS

11. The respondent in a replying affidavit dated 2nd April 2019 opposed the application for leave and certification. Submitting on the prayer for stay of execution and implementation of the judgment of this Court, it was urged this Court is *functus officio* once it delivers its judgment. That there is no matter of general public importance that has been identified in the application seeking leave and certification. That there is nothing of significance having a bearing of public interest in the matter.

12. Submitting on the focal ground in support of certification, the respondent urged that it is fallacious and misleading to contend that there are two conflicting judgments of this Court. That the earlier judgment dated 14th June 2016 was set aside by a ruling dated 17th May 2018 and it ceased to exist or have any legal effect. That the learned Judges of appeal are not bound by a judgment that has been set aside. That the operative and only judgment of this Court in **Civil Appeal No. 31 of 2015** is the judgment dated 7th March 2019.

ANALYSIS and DETERMINATION

13. We have considered the two applications filed before this Court. We have considered the grounds in support of each application as stated on the face thereof and in the supporting affidavits. We have also considered the replying affidavit as well as the authorities cited.

14. We shall consider the applications at three levels. First, the application for certification and leave to appeal; second, the prayer for stay of execution and implementation of the judgment of this Court and lastly, the application to strike out the Motion for leave and certification.

15. The principles in an application for leave and certification to appeal to the Supreme Court are well settled and enunciated in numerous cases. The Supreme Court gave the test for granting certification and leave to appeal in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone, Supreme Court Application No.4 of 2012**. It was held that the meaning of "matter of general public importance may vary depending on the context. The Court considered **Article 163(4) (b)** of the **Constitution** and stated at paragraph 58 thus:

"...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."

16. This Court in **Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau) represented by Its Promoters David Benedict Omulama & 9 others [2018] eKLR** stated as follows:

"The principles set out in Hermanus Phillipus Steyn - v - Giovanni Gneccchi-Ruscone, (supra) to determine whether a matter is of general public importance included:

a) 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;

b) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point of law is a substantial one, the determination of which will have a significant bearing on the public interest

c) *such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;*

d) *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;*

e) *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 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;*

f) *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;*

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

17. In the instant application, it is our duty to consider and appraise ourselves of the principles enunciated for certification and leave to appeal to the Supreme Court have been fulfilled. We note that the applicant has not succinctly itemized the questions and issues alleged to be matters of general public importance for consideration and determination by the Supreme Court. Nevertheless, from the application, it is discernible that one of the grounds urged is that there are two conflicting and contradictory judgments of this Court in relation to the same subject matter over **Land Reference No. Plateau/Plateau Block 2/Uasin Gishu /63**. The applicant contends that the two conflicting judgments are the judgments delivered by this Court in **Civil Appeal No. 31 of 2015** on 14th June 2016 and 7th March 2019 respectively.

18. We have considered this pivotal ground in support of the application for leave and certification.

19. In opposing the application for leave and certification, the respondent submitted that there are no two judgments of this Court. That the judgment dated 14th June 2016 was set aside by a ruling of this Court delivered on 17th May 2018. The ruling setting aside the judgment delivered on 14th June 2016 was attached to the replying affidavit. When a judgment is set aside, it ceases to exist. We are satisfied that in this matter, there are no two conflicting judgments of this Court. Consequently, the primary ground in support of the application for leave and certification has no merit.

20. In support of the application for leave, the applicant urged that a matter of general public importance has arisen that requires consideration and determination by the Supreme Court. It was urged that there is uncertainty in law as a result of the two conflicting judgments of this Court over the same subject matter. We have determined that there are no two judgments of this Court over the same subject matter. It follows there is no uncertainty over meaning, impact and legal effect of the decision of this Court in relation to the suit property and subject in **Civil Appeal No. 31 of 2015**.

21. The applicant further urged that a matter of public interest and general public importance has arisen. That the issue for determination by the Supreme Court is whether principles of equity and the doctrine of trust can override the provisions of **Sections 6, 7, and 8 of the Land Control Act, Cap 302** which has not been repealed.

22. Further, it is now trite law, as the Supreme Court stated in **Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscone (supra)**, par. 60, that to succeed in an application for certification under **Article 163(4)(b)** of the Constitution, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance;

“the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ...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....; 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.” [Emphasis supplied].

23. In this matter, the issues identified and posited by the applicant are targeted at impugning the judgment of this Court delivered on 7th March 2019 in **Civil Appeal No. 31 of 2015**. We have considered the issues raised and we are satisfied that all the applicant seeks is to have a second bite at the cherry. There are no contested and disputed facts in dispute between the parties. In any event, the appellate jurisdiction of the Supreme Court cannot be invoked on matters of fact. We reiterate that in this matter, the applicant has not *identified and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought*. The applicant asserts that the judgment of this Court dated 7th March 2019 purports to repeal the statute law. The applicant has not pointed out which specific paragraphs of the impugned judgment repeals statute law. We note that the applicant contends that the verdict of this Court that the applicant holds the suit property in trust for the respondent effectively repeals the **Land Control Act**. In our considered view, it is not the function of the applicant or litigant to interpret a judgment or to insert and include words or phrases in a judgment. A judgment speaks for itself.

24. Having scrutinized the issues posited by the applicant in this matter, we find that no matter of general public importance has been identified that would justify us to grant leave and certification to appeal to the Supreme Court. We decline to exercise our discretion to grant leave and certification to appeal to the Supreme Court.

25. In penultimate, one of the prayers sought is an order for stay of execution and implementation of the judgment of this Court delivered on 7th March 2019. We have considered the prayer and we state this Court is *functus officio* after delivery of judgment. We re-affirm the

decision of this Court in **Dickson Muricho Muriuki vs. Timothy Kagundu Muriuki & 6 others** [2013] eKLR where it was held:

“On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made.....

It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court.”

26. Persuaded by the sound reasoning in **Dickson Muricho Muriuki vs. Timothy Kagundu Muriuki & 6 others** (supra), the applicant has not given us good reasons to depart from it. If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court. Accordingly, we decline to grant stay orders and we re-affirm that this Court is *functus officio* after pronouncement and delivery of its judgment. Any application for stay of a judgment of this Court should be made before the Supreme Court.

27. By parity of reasoning, the respondents Notice of Motion dated 2nd April 2019 seeking orders to strike out the application for leave and certification has merit. We allow the Notice of Motion dated 2nd April 2019 and we hereby strike out the Notice of Motion dated 19th March 2019 with costs.

28. The upshot of our consideration is that the Notice of Motion dated 19th March 2019 has no merit and is hereby dismissed with costs. The Notice of Motion dated 2nd April 2019 has merit and is hereby allowed with costs. The final orders of this Court are as follows:

- a) *We decline to grant leave and certification to appeal to the Supreme Court.*
- b) *We decline to grant stay of execution and implementation of the judgment of this Court delivered on 7th March 2019 in Eldoret Civil Appeal No. 31 of 2015.*
- c) *The applicant (Rose Jebor Kipngok) to bear the costs of both applications.*

Dated and delivered at Eldoret this 17th day of October, 2019

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR