



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJ.A)**

**CIVIL APPLICATION No. SUP. 5 of 2018**

**BETWEEN**

**KENNEDY NYAMUMBO SESE.....APPLICANT**

**AND**

**SETTLEMENT FUND TRUSTEES.....1<sup>st</sup> RESPONDENT**

**PETER NYANGOKJA.....2<sup>nd</sup> RESPONDENT**

**SHADRACK MOTURI NYANGOKA.....3<sup>rd</sup> RESPONDENT**

*(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Eldoret, (Githinji, Okwengu & J. Mohammed JJ.A) delivered on 7<sup>th</sup> December, 2017*

*in*

*Civil Appeal No.5 of 2016)*

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**RULING OF THE COURT**

1. On 7<sup>th</sup> December 2017, this Court delivered a judgment dismissing an appeal lodged by the applicant against the respondents. Aggrieved by the dismissal of his appeal, the applicant by way of Notice of Motion dated 24<sup>th</sup> January 2018 has moved this Court seeking certification and leave to appeal to the Supreme Court. The dispute between the parties is a boundary dispute over land parcel No. Kisii/Gesima Settlement/60.

2. Land Parcel Kisii/Gesima Settlement/60 measuring 187 acres had been allotted and purchased in 1965 on loan from the Settlement Fund Trustees (SFT). The parcel included 4.5 acres under tea plantation. The dispute between the parties is that the 4.5 acres was wrongfully included in the land parcel Kisii/Gesima Settlement/60.

3. The appellant's contention is that in 1985, the SFT purported to amend the Registry Index Map by

drawing another Registry Index Map which erroneously appropriated and included the disputed portion as part of the adjoining parcel owned by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That upon repaying the loan of SFT, it was discovered that the 4.5 acre portion of land had erroneously been included in the Registry Index Map of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

4. Founded on the forgoing facts, the High Court dismissed the applicant's suit. His appeal to this Court was likewise dismissed. In dismissing the appeal, this Court held that the applicant had not proved that the respondents had fraudulently altered the Registry Index Map.

5. Following the dismissal of his appeal by this Court, the applicant now seek certification to appeal to the Supreme Court. The grounds in support of the Motion as stated on the face thereof and in the supporting affidavit are that the intended appeal raises matters of general public importance that touch on land rights. That the matters to be determined by the Supreme Court will affect a large number of initial allottees of land by the Settlement Fund Trustees who may be deprived of the use, occupation and title to land thereby causing socio-economic hardship. That the matters to be urged before the Supreme Court are of jurisprudential moment.

6. Specifically, the applicant has framed the questions to be considered by the Supreme Court as follows:

(a) Can the Settlement Fund Trustee (SFT), a statutory body having demarcated, identified and allocated specific land to an allottee cause the same to be canceled, revoked and or rectified without notice and or giving a hearing to the allottee?

(b) If the SFT properly demarcates, identifies and allocates land using a provisional map can the final map purport to appropriate the land and award it to a third party without any due process?

(c) When the initial documents identifying and allocating land and the provisional map and actual occupation is held by the allottee, can the Settlement Fund Trustee purport to carve out the land belonging to the allottee on the basis of a final map which contains an error and or mistake?

(d) When acquiring land from the Settlement Fund Trustee, whose duty is it to check, verify and ascertain the boundary and acreage of the land purchased?

(e) Should a claim for land be defeated on the basis that the original title had been closed notwithstanding that the resultant parcels remain registered in the name of the same person?

7. Founded on the foregoing questions, the applicant urged this Court to grant a certificate that the intended appeal to the Supreme Court raise matters of general public importance.

8. At the hearing of the application, learned counsel, Mr. Bosire Gichana appeared for the applicant. Learned counsel, Mr. Zablon Mokuia appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Despite service of the hearing notice, the 1<sup>st</sup> respondent did not appear.

9. Counsel for the applicant in his oral submissions reiterated the grounds in support of the application. It was urged that the questions sought to be considered and determined by the Supreme Court in the intended appeal transcend the interest of the parties to this suit. That the decision of the Supreme Court will affect a large number of people who have been allotted land by the Settlement Fund Trustees. That the intended appeal to the Supreme Court raise matters of general public importance. That the questions posited for consideration by the Supreme Court raise public interest issues.

10. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in opposing the application submitted that the dispute between the parties is founded on contract and is purely a private matter. That the applicant has not demonstrated any matter of general public importance or interest. That the instant application is an abuse of the court process. That the suit before the High Court was concerned with private contracts wherein the original plaintiff and original second defendant entered into a contract of sale of land with the Settlement

Fund Trustees. That the contract between the parties created rights and obligations which do not transcend beyond the parties. That the suit before the High Court and this Court had nothing to do with other original allottees of land by the SFT. That there are no cardinal issues of jurisprudential moment disclosed in the questions posited for consideration by the Supreme Court. That the listed questions now referred to as matters of general public importance were never raised before the High Court or this Court. That the purported issues for determination by the Supreme Court are issues which do not attract any public interest. That the ascertainment of boundary and acreage between two parties cannot be a public interest issue. That whether the applicant or 2<sup>nd</sup> and 3<sup>rd</sup> respondents occupy land of the other cannot be a matter of general public importance.

## **ANALYSIS and DETERMINATION**

11. We have considered the Notice of Motion, the grounds in support thereof as stated on the face of the Motion and in the supporting affidavit, the replying affidavit as well as the submissions by counsel and the authorities cited in the matter.

12. The principles applicable in an application for 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 to the Court in **Hermanus Phillipus Steyn -v- Giovanni Gnechi – Ruscone, Supreme Court application No.4 of 2012**. The Court 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 that:

*“...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.”*

13. This Court in **Kenya Plantation and Agricultural Workers Union -v-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 Gnechi-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 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 contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

14. The foregoing principles for determination of what constitutes a matter of general public importance were restated by the Supreme Court in the case of **Pati Limited -v- Funzi Island Development Limited & 4 others** [2019] eKLR; SC Civil Application No.4 of 2015. Pertinent to this application the Supreme Court expressed:

37.....The **Hermanus** principles are not exclusive. Another certification principle that we find applicable in this matter therefore was set in the case of **Town Council of Awendo v Nelson Oduor Onyango & 13 others** [2015] eKLR which was rendered just over one month after the Ruling of the Court of Appeal under challenge herein in which this Court stated thus: -

“[35] From the content of paragraphs 32 and 34, it emerges that while this Court did, in the **Hermanus Phillipus Steyn and Malcolm Bell** cases, set out an elaborate set of criteria for ascertaining “matters of general public importance” for the purpose of engaging the Court’s jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of “matters of general public importance” (Emphasis supplied).

15. We have considered whether the questions posited by the applicant for consideration by the Supreme Court raise issues of general public importance. It is now trite law, as the Supreme Court stated in **Hermanus Phillipus Steyn -v- Giovanni Gnechi-Ruscione**, Civil Appl. No. Sup.4 of 2012 (UR3/2012), [2013] eKLR (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.

16. In this matter, the issues and questions identified by the applicant are targeted at impugning the judgment of this Court delivered in Civil Appeal No. 5 of 2016. In **Malcolm Bell -v- Hon. Daniel Toroitich arap Moi & Another**, S.C. Application No. 1 of 2013 the Supreme Court held, (at paragraph 46,) that:

“It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and **not merely for the purpose of rectifying errors with regard to matters of settled law.**”

17. The Supreme Court in **Pati Limited -v- Funzi Island Development Limited & 4 others** [2019] eKLR; SC Civil Application No.4 of 2015 further expressed that:

[35] It therefore emerges that when a party seeks certification and leave to appeal to the Supreme Court, the questions he/she seeks to bring to this Court must have been subject of consideration/litigation in the High Court and then the Court of Appeal. One cannot frame novel matters as forming matters of general public importance when making an application for leave either in the Court of Appeal or this Court.

18. In this matter, the questions posited by the applicant for consideration by the Supreme Court as matters of general public importance were neither raised nor canvassed for determination by the High Court or this Court. We are cognizant of the Supreme Court dicta in **Pati Limited -v- Funzi Island**

**Development Limited & 4 others (Supra)** where it was expressed that:

*[39] We therefore find that it is in the public interest that this Court settles with finality the question whether the land subject of this matter belongs to the Applicant or whether it fraudulently acquired its title. At play also is the balancing between private interest's vis-s-vis public interest. This balancing and determination is a matter of general public interests.....*

*[40] We are therefore under no illusion that as the crux of this matter is whether the title of the Applicant to the suit land was fraudulently acquired or not, which land has to be determined whether it was public land or not, and whether it was available for allocation or not, this matter raises questions of general public importance. Hence we are inclined to grant certification and allow an appeal to be filed.*

19. The questions and issues posited for consideration in the intended appeal to the Supreme Court are well settled in law. The dispute between the parties is a boundary dispute. The law on settlement of boundary disputes is settled. The applicant has not demonstrated to us any lacuna or gap in the law on boundary disputes that requires consideration and determination by the Supreme Court. The other questions posited for consideration by the Supreme Court are contractual in nature. When an individual purchases a parcel of land, it is settled the terms and conditions for the sale of the land and the acreage thereof are matters governed by the law of contract and the sale agreement between the parties. The applicant has not demonstrated to our satisfaction that there is a gap in the law of contract as relates to sale of land that require consideration and input of the Supreme Court. (See comparative decision from South Africa in **Buffalo City Metropolitan Municipality -v- Metgovis (Pty) Limited, (CCT78/18) [2019] ZACC 9; 2019 (5) BCLR 533 (CC) (28 February 2019).**

20. In arriving at our decision, we are persuaded by dicta from the Supreme Court decision in **Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 3 others [2015] eKLR, SC Application 1 of 2014, where it was stated:**

*The issues canvased both at the High Court and the Court of Appeal, centered on breach of a sale agreement. The instant matter did not constitute a matter of general public importance but rather a protracted multiple sale transaction of one parcel of land to different parties, the effect of whose determination did not and was not likely to go beyond the parties.*

21. One of the questions or issues posited for consideration by the Supreme Court in the intended appeal is whether the SFT as a statutory body is under duty to follow due process and observe the principle of natural justice that a require a party to be heard before any decision is made. The right to be heard and the duty to follow due process is well ingrained in Kenya's legal system. Precious and scarce judicial time of the Supreme Court should not be used to determine whether the SFT should observe the principles of natural justice and due process. It is well settled in law that any person or administrative body is under duty to observe the principles of natural justice and due process of law.

22. In totality, we find that the questions and issues posited for consideration by the Supreme Court do not evince matters of general public importance. There is no issue of jurisprudential moment that attracts input by the Supreme Court. The upshot is that Notice of Motion dated 24<sup>th</sup> January 2018 has no merit and is hereby dismissed 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) The applicant is to bear the costs of this application.

**Dated and delivered at Kisumu this 20<sup>th</sup> day of November, 2019.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**