IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 38 OF 2016

BETWEEN

MISTRY VALJI NARAN MULJI …….....…….…… APPLICANT

AND

JANENDRA RAICHAND ……..……..……. 1ST RESPONDENT

VIRCHAND MULJI MALDE ……..……..…….. 2ND RESPONDENT

RATILAL GHELA SAMAT ……..……..……..……. 3RD RESPONDENT

(Being an application seeking leave to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal (Makhandia, Ouko & M'inoti, JJ.A)

in

Civil Appeal No. 46 of 2015)

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RULING OF THE COURT

[1] The applicant herein has approached us under the provisions of ***Article 163(4)(b)*** of the ***Constitution*** seeking certification that his intended appeal to the Supreme Court against this Court's (Makhandia, Ouko & M'inoti, JJ.A) judgment dated 27th May, 2016 in Civil Appeal No. 46 of 2015 raises issues of public importance.

[2] The facts which culminated in the impugned decision relates to the ownership and/or entitlement of a portion of **Mombasa/Block XII/4** (suit land). Apparently, the suit land was originally registered in favour of Dolatkhanu w/o Amirali Khetsi Hansraj, Abdulahi Khetsi Hansraj and Zulfakir Khetsi Hansraj. In the year 1971, the three proprietors leased out the suit land to the applicant who carried out his construction business thereon.

[3] Somewhere along the line, a dispute arose between the original proprietors and the applicant with respect to payment of rent which dispute was referred to arbitration. The arbitrator's award was to the effect that the applicant's lease was renewed for a further period of 5 years with effect from 1st January, 1975 and he was directed to pay a monthly rent of Kshs.1,650. Notwithstanding the arbitrator's award the applicant did not pay rent as directed but stayed put on the suit land.

[4] Thereafter, the original proprietors sold the suit land to the respondents herein on 10th June, 1985 but nonetheless, the applicant continued in possession of the suit land. However, owing to the non -payment of rent the respondents deemed the applicant as a trespasser and by a letter dated 30th May, 1998 demanded he vacates the suit land. It appears that the applicant did not heed the demand but remained on the suit land. Consequently, a series of suits were filed by the parties herein *to wit*, the applicant filed H.C.C.C No. 204 of 2001 seeking declaration that he was entitled to the suit land by virtue of adverse possession; the respondents filed H.C.C.C No. 423 of 2001 seeking for the applicant's eviction amongst other orders. Meanwhile, the respondents sold the suit land on 24th November, 2004 to Vantage Road Transporters who forcefully evicted the applicant.

[5] It is after the said eviction that H.C.C.C No. 84 of 2005 which is relevant to this matter, was filed on 12th May, 2005 at the instance of the respondents. They sought *mesne* profits in the sum of Kshs.156,086,545.75, general and punitive damages for trespass and wrongful

occupation of the suit land together with costs and interest thereon.

[6] In response, the applicant's position was that the respondents lacked the capacity to institute the suit because their title over the suit land had been extinguished by the statute of limitation. In particular, that he had been in an uninterrupted, continuous and adverse possession of the suit land for a period of over 12 years hence, he was entitled to be registered as the proprietor by dint of ***Section 38*** of the ***Limitation of Actions Act***. He also attacked the competency of the suit on the ground that under ***Section 4(2)*** of the ***Limitation of Actions Act*** a claim based on tort should be filed within 3 years from the date on which the cause of action arose. In this case, the cause of action of trespass arose on 30th May, 1998 following the demand that he vacates the suit land and thus, the suit was time barred.

[7] The trial court (**Tuiyott, J.)** which was seized of the matter by a judgment dated 12th August, 2014 held that the applicant's defence of adverse possession did not hold any weight. This was because the court found that the applicant's occupation was with the consent of the original proprietors and subsequently, the respondents; the original proprietors had acknowledged in the sale agreement between themselves and the respondents that the applicant dwelt on the suit land as a tenant; and it was agreed that the respondents would continue to act as the landlords and receive the requisite rent plus the unpaid arrears. The trial court expressed that the applicant was no more than a tenant at sufferance having failed to pay the requisite rent. Furthermore, the applicant had always recognized the respondents' title over the suit land as manifest by the fact that once he learnt of their intention to sell the same, he made numerous attempts to purchase the same without success.

[8] The trial Judge also found that whilst the cause of action of trespass commenced in the year 1989 the same continued up to when the respondents sold the suit land. By virtue of ***Section 4(2)*** of the ***Limitation of Actions Act*** the respondents would only be entitled to *mesne* profits for the period of 3 years preceding the filing of the suit. He assessed the period as running from 12th May, 2002 up to 24th November, 2004 when the suit land was sold to Vantage Road Transporters. In computing the *mesne* profits, he applied a sum of Kshs. 250,000 as the probable monthly rent payable and awarded the respondent's a total of Kshs.7, 500, 000.

[9] Both the applicant and the respondents were not happy with that decision and they filed an appeal and cross appeal respectively in this Court being Civil Appeal 46 of 2015. Upholding the trial court's decision, this Court in the impugned judgment concurred that the applicant's defence of adverse possession was not applicable on more or less similar grounds as the trial court. The Court went on to add that in as much as the applicant was in occupation of the suit land for a period of over 12 years that by itself did not give rise to adverse possession.

[10] Unlike, the trial court this Court was of the view that since the suit was to recover *mesne* profits ***Section 8*** of the ***Limitation of Actions Act*** was applicable as it relates to the limitation period of instituting the suit. Ultimately, despite expressing its reservation on the period used to calculate the *mesne* profits the Court was convinced that it would not be in the interest of justice to disturb the award.

[11] It is that decision that the applicant claims gave rise to matters of general public importance which transcend the facts of the case and the private interests of the parties herein. In support of the application, the applicant deposed that the intended appeal raises points of law which are not only important and substantial but will also have a significant bearing on public interest. Unless the leave sought is granted he stands to suffer irreparable loss because the respondents had commenced the execution process. He also stated that the intended appeal has good chances of success and that the respondents would not suffer any prejudice if leave is granted.

[12] Opposing the application, the 1st respondent deposed that the application was frivolous, vexatious and an abuse of the court process. According to him, the application did not specify or disclose the issues alleged to constitute matters of general public importance. Further, the law on adverse possession and trespass is well settled and does not merit the consideration of the Supreme Court.

[13] At the plenary hearing, Mr. Matheka held brief for Mr. Khatib who is on record for the applicant while Mr. K'bahati appeared for the respondents. Counsel relied on the written submissions filed on behalf of the parties and also made oral highlights.

[14] For some reason, while expounding on the issue(s) of general public importance which he believed arose from the impugned decision, the applicant's submissions focused on the merits of the intended appeal to the Supreme Court. According to counsel, the Court erred by failing to uphold the applicant's defence of adverse possession which had been established. He added that the applicant had proved that he was in open and uninterrupted occupation of the suit land for a period of over 12 years. Despite the Court appreciating as much it went ahead to find that mere occupation and use of land does not establish adverse possession. In his view, this particular finding threw into disarray the once settled principles of adverse possession. It was also submitted that at no point had the applicant recognized the respondents as the owners of the suit land as evidenced by his objection to the registration of the suit land in their favour. It followed therefore, that the Court misapprehended the evidence before the trial court by finding that the applicant acknowledged the respondents' title over the suit land.

[15] Besides, the Court was wrong to confirm the award issued to the respondents on the basis of an otherwise time barred claim for trespass. Mr. Matheka faulted the Court for holding that since the respondents' suit sought to recover *mesne* profits for the unlawful occupation of the suit land it fell under ***Section 8*** of the ***Limitation of Actions Act*** which provides for a limitation period of 6 years from the time the cause of action arose. In his opinion, the claim was based on tort and subject to ***Section 4(2)*** of the ***Limitation of Actions Act*** which prescribes 3 years as the limitation period of instituting such a case. As such, time begun to run with respect to the claim of trespass in 1998 when the respondents were registered as suit proprietors hence the suit which was filed in the year 2005 was time barred.

[16] We also understood counsel to argue that the Court had failed to take note that a distinction exists between *mesne* profits and general damages for unlawful occupation of property. In that regard, it was his contention that this Court having found like the trial court that the sum of Kshs.156,086,545.75 which had been sought as *mesne* profits by the respondents had no basis erred in confirming the award of Kshs.7,500,000 as *mesne* profits yet the said award was in the nature of general damages.

[17] All in all, counsel submitted that the Supreme Court's input is required for purposes of clarifying, the principles of adverse possession in light of the impugned judgment; whether there is a distinction between mesne profits and general damages and whether ***Section 8*** of the

Limitation of Actions was applicable as opposed to ***Section 4(2)*** with respect to the matter. In addition, the intended appeal revolves around a question of the right to property.

[18] On his part, Mr. K'Bahati began by stating that the only relevant consideration in an application for leave to appeal to the Supreme Court as stipulated in ***Article 163(4)(b)*** of the ***Constitution*** is whether a matter (s) of general public importance is involved. As far as he was concerned, the grounds in support of the application do not disclose issue(s) which constitute matters of general pubic importance. What is more, the intended appeal is premised on tort, equity and adverse possession which do not transcend beyond the parties' dispute.

[19] Equally, the law on adverse possession is well settled and even assuming that there are conflicting decisions of this Court on the issue that by itself does not give rise to a matter of general public importance. This is simply because the Court still reserves the competence to reconcile the varying decisions, if any. Mr. K'bahati contended that there was no novel issue either to warrant the leave sought. He went on to state that the Supreme Court's jurisdiction could not be invoked for merely rectifying errors in matters of settled law as the applicant purports to do in this application. In conclusion, counsel urged that the application lacked merit and should be dismissed with costs.

[20] We have considered the application, the rival submissions made on behalf of the parties as well as the law. It is common ground that an appeal against a decision emanating from this Court can only be on the basis of two avenues as outlined under ***Article 163(4)*** of the ***Constitution***. Either as a matter of right in any case involving interpretation and/or application of the ***Constitution***; or where the intended appeal is certified either by the Supreme Court or this Court as involving matters of general public importance.

[21] As aptly noted by the Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** **[2013] eKLR** no definite description can be applied to determine what a matter of general public importance entails for the reason that it varies in different circumstances. Be that as it may, broad guiding principles of determining what constitutes a matter of general public importance have since been developed. These principles were set out by the Supreme Court in the aforementioned case to include:

> ***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;***
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> ***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;***
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> ***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;***
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> ***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 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;***
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> ***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;***
>
> ***vi) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.***

[22] Applying the aforementioned criteria does the applicant's intended appeal involve matters of general public importance? We do not think so. We say so because firstly, on the issue that the impugned judgment has caused uncertainty on the principles of adverse possession, we draw guidance from the following sentiments of the Supreme Court's in ***Malcolm Bell vs. Daniel Toroitich Arap Moi & another*** ***[2013] eKLR***:

> ***"Not only is the adverse-possession question a subject sufficiently settled in law as to lend itself to normal interpretation and disposal by superior Courts other than the Supreme Court, but, as the foregoing analysis shows, the Court of Appeal conscientiously and judiciously applied its mind to the subject. It is no longer a proper subject on any account, and least of all as "a matter of general public importance," to be the subject of an appeal before the Supreme Court."***

Consequently, the issue of adverse possession as raised by the applicant does not qualify for certification.

[23] Secondly, we cannot help but note that the issue of distinction between *mesne* profits and general damages was not a matter that arose for consideration at the trial court or in this Court. Therefore, it cannot be an issue which is capable of being certified as a matter of general public importance.

[24] Thirdly, on whether this Court erred in applying ***Section 8*** as opposed to ***Section 4(2)*** of the ***Limitation of Actions Act*** we are not satisfied that the appellant has demonstrated that such a point is a substantial one, the determination of which will have a significant bearing on the public interest.

[25] In our view, 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 judgment all of which do not warrant the certification sought.

[26] In the end, we find that the applicant has not established a case to justify certification of the intended appeal as involving a matter of general public importance. Accordingly, the application is devoid of merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 15th day of November, 2018.

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