



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CIVIL APPLICATION NO. 125 OF 2015

(CORAM: NAMBUYE, G.B.M. KARIUKI & KIAGE, JJA)

BETWEEN

GRACE SAMSON KOMEN.....APPLICANT

AND

WILLIAM KIPROP KOMEN.....1ST RESPONDENT

RACHAEL CHEPNG'ENO.....2ND RESPONDENT

MOHAMED KOMEN.....3RD RESPONDENT

SOTE KOMEN.....INTERESTED PARTY

(Application for certification of Appeal to the Supreme Court against

the Judgment of the Court of Appeal of Kenya at Nakuru

(Gatembu, M'Inoti & J. Mohammed, JJA) dated and

delivered on the 13th day of February, 2015

C. A. C. A. NO. 210 OF 2013

RULING OF THE COURT

By her amended motion dated 17th March, 2016 and lodged in this Court's Registry at Nakuru on 21st day of March 2016, the applicant **Grace Samson Komen** seeks an order that this Court do certify her intended appeal to the Supreme Court as involving matters of general importance fit and proper to be canvassed at the Supreme Court. It is expressed as brought under **Article 163(4)** of the Constitution of Kenya, **Rule 24(1)** of the Supreme Court Rules, 2012 and **Rule 42** of the Court of Appeal Rules, 2012 and the supposed grounds on which it is premised appear on its face as follows;

a. "The Applicant was the unsuccessful appellant in Civil Appeal No. 210 of 2013.

b. The Applicant lodged a Notice of Appeal dated 24th February, 2015, pursuant to Rule 31(1) of the Supreme Court rules, 2012 (“the Rules”)

c. The provisions of Article 163(4) (b) of the Constitution of Kenya, 2010 (“the Constitution”) and rule 24(1) of the Rules makes it a legal requirement to first seek certification from the Hon. Court that the Applicant’s intended appeal involves matters of general public importance before the Applicant can appeal to the Supreme Court.

d. The under listed issues are matters of general public importance, fit and proper to be canvassed on a further appeal to the Supreme Court.

i. The extent to which courts are legally permitted to deviate from the ascertainable wishes of a deceased person in the distribution of his estate.

ii. Whether liabilities of an estate should be paid from the share of one house or unit or from the gross assets of the estate”.

In support of the motion the applicant swore an affidavit on 17th March 2016. In it she stated that she is aggrieved by this Court’s judgment (Gatembu, M’Inoti & J. Mohammed JJA) and seeks to approach the Supreme Court on appeal therefrom. She swore that she intends to raise matters of public importance touching on, first, the extent to which courts can deviate from the ascertainable wishes of a deceased person on the distribution of his estate and, second; whether the liabilities of an estate can be paid from the share of one house as opposed to from the gross assets of the estate.

The application is opposed. The 1st Respondent **William Kiprop Komen** swore an affidavit on 16th May 2016 in which he averred that the entire application is groundless, unmeritorious, unsustainable and raising no issue of public importance. He charged that the application was merely meant to scuttle the judgment of the Court and halt distribution of the estate of the deceased.

Sote Komen, named in these proceedings as an “**Interested Party**” (although in this Court she could only be a respondent) also opposed the motion and swore a replying affidavit on 4th April 2016. She averred that the application does not raise substantive or proper questions of general public importance to warrant certification and defended the concurrent conclusions and findings of the High Court and this Court as proper in that they divided the estate between the three houses of the deceased who was polygamous. She complained that the applicant, a daughter-in-law of the deceased, had all along attempted to disinherit her, the deponent, notwithstanding that she was a lawful wife of the deceased. She contends that the issue of determination of the ascertainable wishes of the deceased had never been raised before the courts which dealt with the matter and cannot now be introduced as a basis for certification. At any rate, she swore, a court would be entitled to interfere with any such wishes if they were inconsistent with the law or failed to provide for any beneficiaries. She contends that the applicant was in occupation of L.R. No. 10684 merely as a daughter-in-law of the deceased but not as an independent owner thereof by bequest of the deceased who continued to cultivate the same and even intended to dispose part of the same measuring 185 acres by sale to pay off his liabilities. It is these liabilities that were intended to be paid by the estate hence the order to sell the same 185 acres by both the High Court and this Court. She complained that the intended appeal is calculated to deny her the inheritance of 150 acres she got while the applicant “**continues to sell her share of 450 acres to third parties**”.

The deponent contends that the application does not meet the threshold of general public importance set out in **HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE** [2013] eKLR and is merely a wasteful academic exercise of attempting to clothe private law matters with the ingredients of public interest. She urged dismissal of the motion.

When the application came before us for hearing, respective learned counsel for the parties namely, Mr. Kibiru (led by Mr. Kilukumi who was however indisposed) for the applicant; Mr. Biko holding brief for Prof Ojienda S.C. for the 3rd Respondent and Mr. Waiganjo for the “**Interested Party**” all agreed that the

matter be disposed of by way of written submissions to be filed together with bundles of authorities within set timelines.

Accordingly, the applicant filed her submissions on 24th April 2016 together with a bundle of authorities while the 1st Respondent did so on 10th June 2016; the 3rd Respondent on 14th April and the “**Interested Party**” on 28th April 2016.

We have carefully perused and considered the application, the supporting affidavit and those in opposition thereto as well as the submissions filed and authorities cited by the parties. As a matter of principle, litigation must come to an end sooner rather than later and for the vast majority of the cases that reach this Court, once this Court pronounces itself on the dispute, finality sets in. That is the norm. Only in a rarefied category of cases is it open for litigants to go beyond this Court to the Apex Court. Those categories are those provided for in the Constitution as follows;

“Article 163(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

a. As of right in any case involving the interpretation or application of this Constitution

b. In any case in which the Supreme Court or the Court of Appeal certifies that a matter of general importance is involved, subject to clause (5)”

The application before us involves the latter jurisdiction. It is presented before this Court in the first instance in keeping with the guidance given by the Supreme Court in **SUM MODEL INDUSTRIES LTD -VS- INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION** [2011] e KLR thus;

“This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal, which would be better placed to certify whether a matter of public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant be dissatisfied with the Court of Appeal’s decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution”.

The key that opens our certification of an intended appeal as deserving of escalation to the Supreme Court is the presence or existence of a matter of general public importance without which an applicant hopes in vain to receive a ticket to the apex Court. That Court’s existence was never intended to provide an additional tier for the pursuit of appellate justice in any and every case. Only exceptional cases merit admission and, as we have said, they must have a discernible general public importance quotient and this is established on the basis of sound principles which are now settled. They were distilled and well-summarized by this Court in **KIRAN CHANDUBHAI PATEL -VS- TRANSWORLD SAFARIS LIMITED** [2015] e KLR thus, and we are in full agreement;

“The threshold of ‘general public importance’ has been defined variously to embody the following principles:

i. a clear formulated definition of what in the intended appeal amounts to a matter of general public importance. See Steyn V. Gnechi – Ruscone [2013] 2 EA 348 AND Koinange Investments & Development Ltd V. Robert Nelson Ngethe SC. Appl. No. 4 of 2013;

ii. the matter must be one the determination of which transcends the circumstances of the particular case with significant bearing on the public interest;

iii. where the matter involves a point of law, the point must be substantial, so that its

determination will have a significant bearing on the public interest;

iv. such question(s) of law must have arisen in this Court and must have been the subject of judicial determination;

v. issues of law of repeated occurrence in the general course of litigation may amount to matters of general public importance;

vi. questions of law that are, as a matter of fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or of litigants may constitute matters of general public importance;

vii. questions bearing on the proper conduct of the administration of justice may equally amount to matters of general public importance. See Koinange Investment & Development Ltd. (supra) and Mwangi Stephen Muriithi V. Daniel Toroitich Arap Moi & Another, Civil Application No. Sup. 10 of 2014 (UR 7/2014).

viii. the determination of fact in contest between parties are not by and of themselves a basis for granting certification for an appeal to the Supreme Court;

ix. certification of a matter as one raising matters of general public importance is justified only in exceptional cases that raise cardinal issues of law or of jurisprudential moment respecting and upholding the jurisdictional set up of courts running up to the Court of Appeal with professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law.

See Peter Oduor Ngoge V. Francis Ole Kaparo & 5 others SC Petition No. 2 of 2012;

x. the jurisdiction under Article 163 (4) (b) is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law”.

Having considered the present application with those principles in mind, we do not see how we can certify it to the Supreme Court. The issues the applicant seeks to engage the Supreme Court on are common, run of the mill matters that are daily fare in courts dealing with succession causes. The law on what weight to be attached to the wishes of a deceased person with regard to the distribution of his estate and the circumstances under which their wishes may be overridden or modified are not rocket science. They are not some esoteric and highly taxing jurisprudential questions of first impression requiring the determinative norm-setting pronouncement of the Supreme Court.

The distribution of an estate belonging to a polygamous deceased person is nothing new under the sun. Magistrates' courts do it daily. The High Court does it routinely and this Court has pronounced on it times without number. There is also nothing novel or jurisprudentially challenging about how the liabilities of the estate of a deceased person should be met.

In the result, we find absolutely no basis upon which we would be persuaded, much less justified, to give certification. We see that the matters sought to be taken on appeal to the Supreme Court present neither difficulty nor ambiguity. They do not transcend the limited scope of the instant case to have a more general significance. They are no more than an expression of a private, personal grievance by the applicant. And they do not deserve certification.

The application is devoid of merit and it is accordingly dismissed with costs.

Dated and delivered at Nakuru this 23rd day of February, 2017.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR