



IN THE COURT OF APPEAL

AT NYERI

(CORAM, WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPLICATION NO. SUP. 4 OF 2016

BETWEEN

MARY WANJIKU KAMONDE.....APPLICANT

VERSUS

DANIEL MURIITHI KAMONDE.....RESPONDENT

(Being an application for leave to lodge petition of appeal to the Supreme

Court of Kenya against the judgment of the Court of Appeal - Nyeri,

(Omollo, Waki & Koome, JJA.) dated 24th May, 2012

in

CIVIL APPEAL NO. 348 of 2005)

RULING OF THE COURT

The principles applicable in considering certification for 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.

In ***Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone [2013]eKLR***, one of the earliest cases to define that jurisdiction, the Supreme Court carried out extensive comparative survey on the matter before concluding 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, which principles have been applied in numerous subsequent decisions, 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."

With such clarity, it is puzzling that parties continue to be ill-advised to make applications that border on abuse of court process. Take the application before us.

It arises from a Succession matter in the Estate of the late **Stephano Kamonde Kabuta** who died intestate 35 years ago in August 1982. The only free property for distribution was a six acre parcel of land and his widow petitioned for and was granted the letters of administration to do so. However, a dispute arose before confirmation of the grant after a protester claimed to be a son of the deceased and was therefore entitled to inherit but had been left out. That dispute was heard and determined 24 years ago in 1993 by Kerugoya Senior Resident Magistrate's Court which found and declared that the protester was the son of the deceased and included him in the distribution of the estate.

The widow appealed the decision to the High Court in Nyeri, which without considering or setting aside the finding of fact by the lower court that the protester was a son of the deceased, found that the deceased had made his intentions in the distribution of the land known in his lifetime and the so-called son was not included in those plans. There was no valid will placed in evidence or proved in that regard.

On appeal by the son to the Court of Appeal, the decision of the High Court was reversed and the decision of the trial court reinstated that he was indeed one of the sons of the deceased and could not be disinherited. The decision was made on 24th May 2012. Ordinarily that would have been the end of the dispute which had raged for more than a quarter of a century. But no!

About five years after the decision, the widow is now before us by a notice of motion dated 15th September 2016 which seeks the following order:

"1. THAT this Honourable court may be pleased to grant leave to lodge petition in the

Supreme Court of Kenya at Nairobi against the judgment of this court dated 24th May 2012.

2. THAT the cost of this application be in the cause."

The application was drawn in person and perhaps that explains why there is no citation of the enabling legal provisions for considering it. There is certainly no provision in our procedure requiring this Court to **"grant leave to lodge a petition in the Supreme Court"**. But the basis for making the application is as follows:

a) The judgment and decree of the High Court of Kenya (Mitey) dated 22nd June 2002 at Nyeri was discriminative in that the respondent through misinterpretation of facts he conveniently misled the Honourable Court to arrive to a wrong decision.

b) The Court of Appeal judgment dated 24th May 2012 wholly relied on the evidence and judgment/decree of the High Court of Kenya (Mitey) dated 22nd June 2002 at Nyeri in HCCA No. 21 of 1994 which was discriminative contrary to Article 27 (1) (2) (4) and (5) of the Constitution of Kenya 2010.

c) The application dated 5.07.2012 in Succession Cause No. 81 of 1993 in the matter of the Estate of STEPHANO KAMONDE KABUTA (Deceased) and the Court of Appeal judgment dated 24th May 2012 which were wholly relied upon in determination of the lower court's decision were discriminative contrary to Article 27 (1) (2) (4) and (5) of the Constitution of Kenya 2010."

A combination of those grounds, the affidavit in support, and the brief oral submission by the applicant in person, discloses that the intention is to obtain certification of the matter for a further appeal to the Supreme Court. That can only be an application based on **Article 163** of the Constitution. The matter does not involve Constitutional interpretation either, otherwise there would have been an automatic right of appeal and no need therefore to come before this Court. It clearly falls for consideration under **Article 163 (4) (b)** which was discussed at the opening paragraphs of this ruling.

The response to the application by learned counsel for the respondent **Mr. Ngangah**, is that the application is an abuse of court process since it does not disclose any matter of general public interest. It was a private dispute relating to distribution of property in a small estate and only issues of fact arose and were determined between the parties with finality. In addition, observed counsel, the application was made 5 years after the decision of the Court of Appeal and there was no explanation for such inordinate delay.

We think, with respect, that the opposition to the application is well founded. The only issue here was whether a person claiming to be the son of the deceased was in fact such son, and oral evidence was called on both sides to prove and disprove that fact. The Court of Appeal accepted the evidence and findings of the trial court rather than the 1st appellate court because the latter made no attempt to examine the evidence relating to the core issue. All that process was lawful and within the jurisdiction of the Court of Appeal.

We have tested the motion before us against the principles enunciated by the Supreme Court on the application of **Article 163(4)(b)** of the Constitution but we are unable to find any merit in the application. We reject it and order that it be and is hereby dismissed. As this is a family matter, there will be no order as to costs.

Dated and delivered at Nyeri this 5th day of April, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR