



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A

CIVIL APPLICATION NO. 68 OF 2016

BETWEEN

PAUL KHAKINA MUSUNGU.....APPLICANT

AND

JOSEPH CHEBAYI CHESOLI.....1ST RESPONDENT

PEPELA KHATIELI.....2ND RESPONDENT

(An Application seeking for leave to appeal from the Judgment of (D. K.

Maraga, D. K. Musinga & S. Gatembu Kairu, JJ. A) dated 29th July, 2016 at

Kisumu

in

ELDORET CIVIL APPEAL NO. 58 OF 2013 TO THE SUPREME

COURT)

RULING OF THE COURT

1. In his Notice of Motion dated 23rd August 2016, presented to this Court under Article 163 (4)(b) of the Constitution of Kenya, 2010, Sections 1 and 2 of the Supreme Court Act and Rule 24(1) of the Supreme Court Rules, 2012, the applicant seeks leave of this Court to appeal to the Supreme Court against the judgment of this Court delivered on 29th July 2016 in Eldoret Civil Appeal No. 58 of 2013. The applicant asserts that the intended appeal raises a matter of general public importance and that substantial miscarriage of justice will be occasioned unless the intended appeal to the Supreme Court is heard.

2. Appearing for the applicant, learned counsel Miss. Annet Mumalasi canvassed the grounds appearing on the face of the motion and referred to the supporting affidavit sworn by the applicant on 26th August 2016. She stated that the High Court allowed the applicant's claim to Title Number Ndivisi/Ndivisi/64 under the doctrine of adverse possession in a judgment delivered on 20th December 2013. However, this Court, in its said judgment delivered on 29th July 2016 (the subject of the intended appeal to the Supreme Court) reversed the decision of the High Court on the ground that the High Court erred regarding the question of when time began to run for purposes of the claim under the doctrine of adverse possession.

3. According to counsel, the decision of this Court is in conflict with an earlier decision of this Court in **Public Trustee vs. Wanduru [1984] KLR 314** and there is therefore a contradiction in law, on a matter of general public importance, which requires to be resolved by the Supreme Court in the intended appeal. Counsel maintained that adverse possession affects many people and the principles in adverse possession need to be clarified by the Supreme Court. According to counsel, this is a proper case for leave to be granted within the governing principles established by the Supreme Court in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone [2013] eKLR**.

4. On the other hand, learned counsel for the respondents, Mr. Joseph Sichangi, submitted that this case does not meet the test in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone** (above); that the dispute in this case does not involve public land and neither is the land in question held for the benefit of a larger community; that even if the decision of this Court is erroneous, that is not a ground for leave to appeal to the Supreme Court to be granted; that there is nothing in this matter that transcends the interests of the parties; and that the

applicant has not demonstrated that the intended appeal is a matter of general public importance.

5. We have considered the application and the submissions by learned counsel. The governing principles for a case to be certified as involving a matter of general public importance, are as indicated by counsel, set out in the decision of the Supreme Court in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione** (above).

6. The applicant 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. Where a point of law is involved, it must be a substantial one, the determination of which will have a significant bearing on the public interest. Such point(s) of law must have arisen in the courts below and subject of judicial determination. Where it is urged that there is uncertainty in the law, the Supreme Court may resolve the uncertainty or refer the matter to this Court for determination. The mere apprehension of miscarriage of justice is not a proper basis for granting certification. The applicant must identify and concisely set out the specific elements of general public importance attributed to the matter for which leave is sought; and determinations of fact that are in contest between parties are not by themselves a basis for granting leave to appeal to the Supreme Court.

7. Given those parameters, the question for us to determine is whether the applicant has demonstrated that the intended appeal to the Supreme Court raises a matter of general public importance.

8. As already stated, the applicant asserts that the decision of this Court intended to be appealed to the Supreme Court has created uncertainty with regard to the legal question when time begins to run in a claim for adverse possession. According to counsel for the applicant, the decision contradicts the principle upheld by this Court in **Public Trustee vs. Wanduru** (above) that time begins to run from the day the one asserting a claim to title on the basis of adverse possession took possession of the land.

9. The Supreme Court has had occasion to express itself on whether the question “*when does time begin running, in regard to the emergence of rights of adverse possession*” raises a matter of general public importance. It did so in the case of **Malcolm Bell vs. Daniel Toroitich Arap Moi and another [2013] eKLR**. While acknowledging that there is need to align past decisions with regard to that question so as to create consistency, the Supreme Court stated:

“In the instant matter, the Court of Appeal alluded to the existence of conflicting decisions on the question: when does time begin running, in regard to the emergence of rights of adverse possession.” That is a straightforward issue, which lends itself to resolution on the basis of a review of factual scenarios, and a review of the decisions of the superior Courts rendered over the years; and on that basis the Court of Appeal has it in its power to canvass the legal principles and to settle the technicality of the law, for the time being. Such a scenario falls outside the profile of “matter of general public importance.” [Emphasis]

10. That decision puts to rest the question whether the intended appeal in the present matter is one that raises a matter of general public importance. It does not. The result is that the applicant’s application dated 23rd August 2016 fails and it is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated and delivered at Eldoret this 25th day of May, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL *I certify that this is a*

true copy of the original.

DEPUTY REGISTRAR