**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, OUKO & M?INOTI, JJ.A.)**

**CIVIL APPLICATION NO. 286 OF 2016 (UR 234/2016)**

**BETWEEN**

**KARAGITA SELF HELP MIXED GROUP.....APPLICANT**

**VERSUS**

**THIKA RIVER ESTATE LTD.....RESPONDENT**

*(An application to seek leave to appeal against the Judgment of the Court of Appeal at Nairobi (G.B.M. Kariuki, Azangalala, J. Mohammed, JJ.A.) delivered on 16th December 2016*

**in**

**Civil Appeal No. 222 of 2011)**

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**RULING OF THE COURT**

1. The applicant lodged an application in this Court on 30th December, 2016 by way of a Notice of Motion dated 29th December 2016 seeking orders:

> ***"Leave be granted to the applicant to file an appeal to the Supreme Court against part of the judgment delivered on 16th December 2016 on 11 issues of general public importance and in the interests of justice to the appellant and its members…."***

2. The application is premised upon several grounds on the face of the application and the supporting affidavit of the applicant?s Chairman, **Peter Mburu Ngugi.**

3. In summary, the ground on which the application is brought is that the Court of Appeal wrongly premised and misapplied various provisions of law when it upheld the ruling of the High Court (Nambuye, J.) (as she then was) which set aside ex parte judgment of the same court entered by Ang?awa, J. on 7th June, 2000.

4. A brief background of the case that gave rise to the appeal is that in 1993, the respondent sold to the appellant Land Parcel **L.R. NO. 396/29** (the suit land) situated along Moi South Lake Road in Naivasha measuring 20.6 acres. It was alleged that in spite of fulfilling all the conditions of sale, the respondent failed to transfer the land to the appellant.

5. This resulted in the appellant instituting a suit in the High Court seeking an injunction to restrain the respondent from selling or alienating the land and for eviction orders against a group of people who had unlawfully occupied parts of the suit land.

6. In an ex parte judgment delivered on 7th June 2000, the High Court (Ang?awa, J.) issued a permanent injunction restraining the respondent from alienating, cultivating or constructing on the suit land and ordered the respondent to transfer the suit land to the appellant.

7. Aggrieved by that decision, on 14th September, 2000 the respondent filed an application to set aside the ex parte judgment. The application was heard by Ang?awa, J; who struck it out vide a ruling delivered on 20th February, 2008. On 16th September, 2008 the respondent filed another application seeking to set aside the ex parte judgment. The second application was heard by Nambuye, J. (as she then was) and allowed, vide a ruling delivered on 24th September, 2010.

8. Subsequently, the applicant aggrieved by that ruling, lodged an appeal to this Court, which upheld the High Court?s decision and dismissed the appeal as being unmeritorious. It is this decision that precipitated the application for certification to the Supreme Court by the applicant.

**Submissions by Counsel**

9. On 24th July 2017, the application was heard before this Court where learned counsel, Mr**. Njuguna Karanja** (holding brief for **Mr. Rumba Kinuthia**) appeared for the applicant and Mr. Githinji (holding brief for Mr. Opini) represented the respondent.

10. **Mr. Karanja** submitted that the main issue that was argued before the High Court and the Court of Appeal was the applicable principles in setting aside ex parte judgments. He faulted this Court?s decision for failing to appreciate that the respondent?s 7 years? delay in filing the application to set aside the ex parte judgment was prejudicial to the applicant. He submitted that within that period, over 300 titles were issued to people who had purchased subdivisions of the suit land. He further submitted that about 200 families were settled on the suit land.

11. **Mr. Githinji** opposed the application and relied on grounds of opposition dated 21st July 2017. He contended that the applicant failed to satisfy the grounds for grant of certification and cited the case of **Hermanus Phillipus Steyn v Giovanni Gnechhi-Ruscone, Application No. 4 of 2012,** where the principles of what constitutes Supreme Court laid down the governing **„a matter of general public importance?**.

12. Counsel further argued that the substantive issue before this Court and the High Court was about setting aside of the ex parte judgments hence no question of general public importance arose; and further, the impact of the judgment did not raise issues of general public importance or public concern.

13. It was the respondent?s view that the law applicable in setting aside ex parte judgments is well settled and certain; and did not require any intervention by the Supreme Court. He urged the Court to dismiss the application.

14. In reply, Mr. Karanja asserted that the issue of general public importance was the inordinate delay by the respondent to move the court and the ramifications thereof.

**Analysis and Determination**

15. We have considered the application, submissions made on behalf of the parties, the cited authorities and the relevant case law.

16. The applicant wishes to appeal to the Supreme Court on the grounds that the intended appeal raises eleven issues of general public importance. The main issues outlined as being of general public

importance can be compressed as follows; whether service of a hearing notice upon the respondent?s advocates was totally ignored by the Court of Appeal; whether the 7 years? delay was inordinate; and whether the Supreme Court has a Constitutional duty to look into special circumstances of some cases, especially where there has been inordinate delay in bringing them to court.

17. In this regard, the applicant brought this application under **Article 163(4) (b) of the Constitution** and **Rule 40 (b)** of the **Court of Appeal Rules**.

18. **Article 163(4) (b)** of the **Constitution** provides thus:

> ***"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-***
>
> ***(a) …***
>
> ***(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."***

**Rule 40** of the **Court of Appeal Rules** provides**:**

> ***"Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, application for such a certificate may be made –***
>
> ***(a) ……..***
>
> ***(b) by motion or chamber summons according to the practice of the superior court, within fourteen days of that decision."***

19. It was the applicant?s argument that the intended appeal involves issues of general public importance as it touches on the subject of land rights, thus members of the public who purchased and later sold the suit land legally acquired by them will suffer substantial miscarriage of justice.

20. The guiding principles for certification of a matter as one raising issues of general public importance have been well laid from by this Court and the Supreme Court in several decisions. Our simple task in this application is to consider and determine whether the issues that the applicant intend to raise satisfy the guiding principles.

21. In determining whether the appellant has met the threshold for certification, we must have regard to the guiding principles laid out by the Supreme Court in **Hermanus Phillipus Steyn v Giovanni Gnechhi-Ruscone (supra),** which are as follows:

> ***(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 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;***

***(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.***

22. What then constitutes the term „**general public importance?**? According to **Black?s Law Dictionary** the term *"general public importance"* in relation to *"public interest"* is defined as:

***"…the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation"***.

23. In the **Hermanus case,** the Supreme Court cited with approval this Court?s decision in **Greenfield Investments Limited v. Baber Alibhai Mawji [2013] eKLR** where the Court held;

***"It would be a perversion of the law as …. unambiguously spelt out in the Constitution, were certifications to become fare for ordinary cases no matter how complex… that have for ages been concluded with finality in this Court. This is part of the rationale for the requirement that certification be first sought in this Court."***

24. Having perused the application before us, it is clear that the substratum of the intended appeal is the exercise of discretion by a judge or judges to set aside an ex-parte judgment, which, in our view, is a law that is well settled. See for example, the classic case of **Shah v Mbogo [1968] E.A. 93,** where it was held that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

25. Having analysed the submissions by the applicant, no issue of general public importance arises in this instant case. The applicant in its prayers averred that this is a matter of general public importance as it relates to land rights of parties who purchased the suit land. However, in his oral submissions, the applicant?s counsel submitted that the issue of general public interest that is intended to be argued before the Supreme Court relates to the inordinate delay by the respondent to move the High Court to set aside the ex parte judgment and the implications thereof.

26. We are not satisfied that the applicant?s application satisfies the guiding principles laid down in the **Hermanus case**. We find that the application does not raise issues of general public importance and therefore decline to grant leave to appeal to the Supreme Court as sought. Consequently, the application is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 29th day of September, 2017.**

**D. K. MUSINGA**

**.....**

**JUDGE OF APPEAL**

**W. OUKO**

**.....**

**JUDGE OF APPEAL**

**K. M?INOTI**

**.....**

**JUDGE OF APPEAL**

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

***DEPUTY REGISTRAR***