



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL (APPLICATION) NO. 84 OF 2015

BETWEEN

ALFEEN MEHDI MOHAMEDAPPLICANT

AND

BASIL FEROZ MOHAMED & 223 OTHERS...RESPONDENTS

(An application for leave to file an appeal in the Supreme Court against the decision of the Court of Appeal at Mombasa (Makhandia, Ouko & M'noti, JJ.A)

in

Civil Appeal No. 84 of 2015)

RULING OF THE COURT

1. Before us is an application brought pursuant to **Sections 15 & 16** of the **Supreme Court Act, Rules 24(1) & 31(2)** of the **Supreme Court Rules, Sections 3A & 3B** of the **Appellate Jurisdiction Act** and **Rules 1, 42, 43 & 47** of the **Court of Appeal Rules**. The applicant seeks leave to file an appeal to the Supreme Court against the decision of this Court dated 17th June, 2016 in Civil Appeal No. 84 of 2015.

2. On or about 4th October, 2011 following a grant of probate of the will of his late uncle, Mr. Azim Shamsudin Esmael, the applicant inherited Parcel No. 148/V/MN situated in Changamwe, Mombasa measuring 13.5 acres (the suit property). It was not until the year 2012 that the applicant learnt of the presence of the respondents on the suit property. After all his efforts to evict the respondents failed, the applicant filed a suit being E.L.C No. 37 of 2012 seeking *inter alia*, vacant possession of the suit property, claiming that the respondents were trespassers.

3. In response, the respondents filed a statement of defence denying the allegations by the applicant. In addition, they also filed a counter-claim, seeking a declaration that they were entitled to the suit property through adverse possession. They contended that they had been in continuous and uninterrupted possession of the suit property for over a period of 12 years prior to the registration of the same in favour of the applicant's uncle; in point of fact, the respondents had filed a suit being H.C.C.C No. 510 of 2010

(O.S) against Sleek Properties Ltd., the immediate former registered owner, claiming ownership of the suit property by virtue of adverse possession and an interlocutory judgment had indeed been entered in their favour.

4. The trial court in its judgment dated 30th October, 2015 dismissed the applicant's suit and entered judgment in terms of the counter-claim. In doing so, the trial court expressed: -

“As I have found in the preceding paragraphs that the evidence on record demonstrates that the defendants have been in occupation for over 30 years, I shall not belabor the point on proof of possession of the suit land by the defendants. The plaintiff also admitted possession when he stated in evidence in chief that the defendants have put up semi-permanent structures on the suit land ... The first time he went to view the land the defendants were already in possession and had been for a long time. The plaintiff did not tell this Court whether his uncle did anything on the land although it is doubtful because the uncle passed on about 2 months after he acquired registration of the suit property into his name.

...

The plaintiff and/or the previous owners have never been in possession of the suit property....the defendants continued stay on the suit property was open and without the consent of the subsequent owners. The activities of the defendants on the land were adverse to those of the plaintiff and the previous owners. Since the defendants filed their suit claiming to claim that right vide Originating Summons No. 51 of 2010, the filing of this suit cannot be said to have stopped time from running in their favour. Further, with the filing of their defence, they also filed a counter-claim for adverse possession. I am thus satisfied that the defendants are entitled to the land by virtue of adverse possession and enter judgment in their favour...”

5. Aggrieved with the foregoing decision, the applicant preferred an appeal to this Court which was dismissed by a judgment dated 17th June, 2016. It is that decision that the applicant desires to appeal to the Supreme Court.

6. Going back to the application at hand, the grounds in support thereof are that firstly, the intended appeal raises issues of general public importance which warrant consideration by the Supreme Court. The issues of general public importance set out were as follows :-

a. Decisions by the Environment and Land Court and this Court on land ownership are ipso facto matters of general public importance.

b. This Court adopted a restrictive interpretation of Article 40(2) of the Constitution & Section 28(1) (h) of the Land Registration Act warranting reconsideration of the contested issues by the Supreme Court.

c. The decision was an affront to the applicant's constitutional right to own property as enshrined under Article 40 of the Constitution.

d. The Court failed to respect the sanctity of the applicant's title and appreciate the full import of granting a claim of adverse possession.

e. The Court failed to appreciate when time begins to run in the case of adverse possession.

Secondly, that the intended appeal has high chances of success.

7. Ms. Muthee, learned counsel for the applicant, attributed the delay in filing the notice of appeal in the Supreme Court to this Court. She contended that despite the impugned judgment being dated 17th June, 2016 it was actually delivered in August. She went on to submit that the applicant seeks the interpretation of **Section 28** of the **Land Registration Act** by the Supreme Court. Relying on the Supreme Court's

decision in *Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscione [2013] eKLR*, she urged that ownership of land affects the entire nation, affecting many people, thus it qualifies as a public interest issue.

8. In opposing the application, Mr. Oranga, learned counsel for the respondents, relied on the grounds of opposition filed on behalf of the respondents. He argued that the matter before the trial court was in respect of eviction and not a determination of the applicant's rights under **Article 40** of the **Constitution**. Referring also to the Supreme Court's decision in the *Hermanus case*, he submitted that for an issue to qualify as a matter of public interest it ought to transcend the circumstances of the particular case and have a significant bearing on public interest. According to him, the issues sought to be raised in the intended appeal had been decisively dealt with by the Supreme Court in *Malcolm Bell vs. Daniel Toroitich Arap Moi & another [2013] eKLR*.

9. We have considered the application, submissions by counsel and the law. In our view, two issues arise for our consideration, namely:-

- *Whether this Court can extend time for filing a notice of appeal in the Supreme Court.*
- *Whether the intended appeal warrants certification as raising a matter of public importance envisioned under Article 163 (4)(b) of the Constitution.*

10. **Rule 31** of the **Supreme Court Rules** provides in part that-

1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.

2) Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal. Emphasis added.

11. It is instructive to note that the submission by the applicant's counsel attributing the delay in filing the notice of appeal to this Court was made from the bar. Be that as it may, we doubt that this Court has jurisdiction to extend time limited by the **Supreme Court Rules** for filing a notice of appeal. Only the Supreme Court has jurisdiction to enlarge such time as set out in **Rule 53** of the **Supreme Court Rules**. Our jurisdiction to extend time is circumscribed under **Rule 4** of the **Court of Appeal Rules** which states:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

12. It is now settled where leave is sought to appeal to the Supreme Court, the critical consideration is not whether the decision of this Court is perceived by any of the parties to be right or wrong, but rather whether the intended appeal raises a matter of general public importance. As stated by this Court in *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione [2012] eKLR* which was subsequently upheld by the Supreme Court:

“The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate court-for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.”

13. The Supreme Court in the *Hermanus case* set out the guiding principles in determining what constitutes a matter of general public importance. This Court in *Town Council of Awendo v Nelson Oduor Onyango & 13 others [2014] eKLR* summed up those principles as follows: -

“The guiding principles for determining whether a matter is one of general public importance under Article 163(4)(b) of the Constitution were outlined by the Supreme Court in Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscione, Sup. Ct Appl. No. 4 of 2012.

The applicant is required to satisfy us that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case and has significant bearing on public interest; where a point of law is raised, that such a point is a substantial one the determination of which will have a significant bearing on the public interest; the question or questions of law must have arisen in the courts below and must have been the subject of judicial determination; that where the certification is occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty or refer the matter to this Court for determination; that mere apprehension of miscarriage of justice is not a proper basis for granting certification and the matter must still fall under Article 163(4)(b) of the Constitution; that the applicant must 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; and that determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

14. Having considered the foregoing, we are not satisfied that the applicant has demonstrated that the intended appeal raises issues of general public importance. The central issue revolves around whether the applicant’s title had been extinguished by adverse possession. The Supreme Court while considering whether the issue of adverse possession was one of general public importance in *Malcolm Bell vs. Daniel Toroitich Arap Moi & another (supra)* expressed in its own words-

“It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law.

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.”

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.”

See also this Court’s decisions in *Joreth Limited vs. Patrick Magu Mwangi Kimunyu [2015] eKLR* and *Loise Kaguu Munge vs. Wakaria Mboi Njaramwe & another [2014] eKLR*.

15. In the end, we find that the application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 21st day of September, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

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