IN THE COURT OF APPEAL

AT KISUMU

CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. 96 OF 2015

HASSAN MUSAMBAYI MBARUKU…….....APPLICANT

VERSUS

NASHON ASEKA……...……..... RESPONDENT

(An application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal dated 16th December 2016 and/or to recall, review and set aside the Judgment and Decree.

in

Civil Review Application No.44 of 2016)

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RULING OF THE COURT

[1] By a notice of motion dated 2nd February, 2017, the applicant, **Hassan Musambayi Mbaruku,** has moved this Court for leave to appeal to the Supreme Court against the judgment of this Court delivered on 27th May, 2017. In the motion filed by the applicant in person the orders sought are in the following terms:

> *(i) That this Honourable Court under the appellate jurisdiction may grant me leave as referred to the notice of appeal to Supreme Court, dated 20th December, 2016 to proceed to file a further appeal in the Supreme Court of Kenya, upon seeking appropriate justice.*
>
> *(ii) That costs of this application be provided for.*

[2] A brief history of this application is necessary. The applicant filed a suit at the High Court of Kenya at Kakamega HCCC No. 123 of 1998 where he sued **Nashon Aseka** *(the respondent)* for non-completion of payment of the purchase price of land parcel number **Isukha/Shirere/ 3245** in furtherance of a sale agreement entered into between the applicant and the respondent. The applicant pleaded breach of contract and sought to have the sale of the land declared null and void. The applicant also alleged that the consent from the Land Control Board had been fraudulently obtained since both parties never attended the Land Control Board meeting. Having heard the suit, the trial court found that the applicant had been paid

the full purchase price for the property, and that the transaction did not require consent from the Land Control Board as the suit land was not agricultural property. Consequently, the trial court dismissed the applicant's suit.

[3] Being dissatisfied with the judgment of the trial court, the applicant lodged an appeal in this Court against that judgment. In his grounds of appeal the applicant faulted the trial court in finding that the respondent had paid the entire purchase price and in failing to find that the trial court did not have jurisdiction to hear the suit because the trial judge was a judge of the Civil Division of the High Court and not a judge in the Environment and Land Court.

[4] Having heard the appeal, the Court (Musinga, Gatembu, Murgor, JJA) in a judgment dated 27th May, 2016, found that the trial Judge had jurisdiction to hear and determine the suit. The Court upheld the trial court's decision that the suit land was situated within Kakamega Municipality and hence, it was not agricultural land requiring the land Control Board's consent to transfer. Consequently the Court dismissed the applicant's appeal.

[5] The applicant's next course of action was to lodge an application before this Court for review of the judgment dated 27th May, 2016 on the ground that there was an error on the face of the judgment, and that there was discovery of new evidence that was not within the knowledge of the applicant and hence, could not have been produced at the hearing of the suit. The new evidence alleged was that at the time of the hearing of his suit by the trial Court, Chitembwe, J was not gazetted as a Judge of the Environment and Land Court of Kenya and thus under the provisions of **Articles 166(1)(b)** and **162(2)(b)** of the **Constitution**, the learned Judge had no jurisdiction to hear the case. The applicant also faulted the Court's finding that the suit land was not agricultural land and that it fell within a Municipality and sought to introduce in evidence, a letter from the Assistant County Commissioner Kakamega Municipality, which purported to show that the suit land was agricultural land. The same bench of this Court (i.e. Musinga, Gatembu, Murgor, JJA), who had dismissed the appeal, heard the application for review and dismissed it. The Court held that the grounds raised by the applicant had not met the required threshold to warrant this Court to exercise its residual jurisdiction to review its own decision.

[6] Undeterred, the applicant now wishes to have an opportunity to challenge the judgment of this Court in the Supreme Court, hence the motion before us. When the application came up for hearing, the applicant appeared in person while Mr. Murunga appeared for the respondent.

[7] The applicant submitted that the provisions of the Constitution were violated since his initial suit at the trial court which was a land dispute should have been heard by the Environment and Land Court; that the suit was irregularly transferred to the Civil Division without him being notified; that the High Court Judge in the Civil Division had no jurisdiction to handle the land matter; that despite the applicant producing evidence that the trial judge had no jurisdiction to deal with a land dispute, the Court failed to consider the same; that in support of his application for review the applicant also tried to tender evidence to show that the suit property was not agricultural land but the same was not taken into account. The applicant thus urged the Court to grant him leave to appeal to the Supreme Court.

[8] Mr. Murunga, learned counsel for the respondent, opposed the application contending that it was incompetent having been brought under the wrong provisions of the law; that the appeal does not raise any issues of public importance, as the applicant's main ground of appeal was that there was an error on the face of the record. Counsel referred the Court to the provisions of **Article 163(4)(b)** of the Constitution which provides circumstances in which an appeal can lie from the Court of Appeal to the Supreme Court, and argued that the grounds raised by the applicant did not meet the threshold for certification by the Court of Appeal as provided for under the provisions of **Article 163(5)** of the **Constitution.** Counsel drew the attention of the Court to the applicant's notice of appeal to the Supreme Court that was in regard to the judgment of the Court delivered on 16th December 2016, and submitted that the applicant was not clear in the decision he intends to appeal against. Counsel pointed out to the Court the leading case of **Hermanus Steyn Philipus v Giovanni Gnecchi Ruscone [2012] eKLR** which set out the parameters to be met before the Court can certify an appeal from this Court as appropriate to go to the Supreme Court. Counsel concluded by urging the Court to dismiss the application as it lacked

merit.

[9] We have considered the motion, the submissions made before us and the authorities cited. The motion concerns the jurisdiction of the Supreme Court to hear appeals from this Court. This jurisdiction is set out under **Article 163(4)(b)** of the Constitution that states as follows:

> ***(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; and***
>
> ***(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).***

[10] The applicant has not invoked **Article 163(4)(a)** that concerns the interpretation or application of the Constitution, but has invoked **Article 163(4)(b)** that concerns a matter of general public importance. Therefore in determining the motion before us the issue is whether the applicant has satisfied this Court that his intended appeal involves a matter of general public importance.

[11] In the case of **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone** *(supra),* the Supreme Court in considering what amounts to a matter of general public importance stated as follows:

> ***"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".***

[12] In the same case Harmanus Phillipus Steyn case, the Supreme Court set out certain characteristics of an intended appeal that would qualify the appeal to be raising a matter of general public importance. Such consideration include the appeal raising issues the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; or the appeal raising a substantial point of law, the determination of which will have a significant bearing on the public interest.

[13] With the above in mind we have considered whether the issues raised by the applicant in the intended appeal relate to a matter of general public importance to warrant certification under **Article 163 (4) (b)** of the **Constitution.** The applicant has not availed a draft of his intended memorandum of appeal, and therefor we can only glean the issues that he intends to raise in the appeal from the grounds stated on the motion and the affidavit in support. The main issue raised by the applicant in these documents is that the trial Judge who heard his case being a Judge attached to the High Court Civil Division had no jurisdiction to handle an Environment and Land matter. Firstly, this is an issue that is anchored on the applicant's specific claim and cannot be said to be a matter that goes beyond the specific circumstances relating to the applicant's case. Secondly, the issue was not raised before the trial court, and was only taken up during the appeal before this Court.

[14] In regard to the issue of jurisdiction, this Court in the judgment dated 27th May 2016 stated as follows:

> "**Parliament did not enact the Environment and Land Court Act until 2011. However, section 22 of the 6th Schedule to the Constitution stipulates that:**
>
> ***"All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under the constitution or as directed by the chief Justice or the Registrar of the High Court"***
>
> **With regard to cases that were pending before the High Court in Kakamega, the appellant**

did not tell this Court when the Chief Justice issued the directive requiring judges of the High Court at Kakamega to cease hearing the land cases filed there before the promulgation of the new Constitution. In the absence of such information, the suit having been filed in 1998, we have no basis of finding that Chitembwe, J had no jurisdiction to hear and determine the suit. The ground of appeal is without merit and we hereby dismiss it"

[15] Again the above confirms that the issue of jurisdiction as raised by the applicant had to be determined in accordance with the specific circumstances of his case. The issue is not one whose impact and consequences transcend the interests of the applicant and respondent as litigants. It cannot therefore be said to be a matter of general public interest.

[16] Looking at the motion, it is evident to us that the applicant is merely trying to have another bite of the cherry after having had his fair share. Having exhausted all the opportunity provided to him, litigation must to come to an end. We therefore find no merit in this application and do therefore decline to certify the applicants intended appeal as raising a matter of public importance. Accordingly this application is dismissed with costs.

Dated and delivered at Kisumu this 23rd day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR