



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJA)

CIVIL APPLICATION NO. NAI.142 OF 2016

BETWEEN

HARUN OSORO NYAMBOKIAPPLICANT

VERSUS

PETER MUJUNGA GATHURURESPONDENT

(Being an application for leave to appeal to the Supreme Court of Kenya against the ruling and order of the Court of Appeal at Nairobi (Karanja, Warsame & Azangalala, JJA) dated 27th May 2016

in

Civil application No. NAI.39 OF 2015)

RULING OF THE COURT

[1] The applicant **Harun Osoro Nyamboki** has moved this court by way of a Notice of Motion dated 10th June 2016 in which the substantive prayers are to have this Court grant him leave to appeal to the Supreme Court against the ruling and order of the Court dated 27th May 2016, and a certification that the decision of the Court dated 27th May 2016 raises a matter of general public interest.

[2] The decision of 27th May 2016 was preceded by a judgment of the Court delivered on 30th January 2015 in which the Court allowed Civil Appeal No. 184 of 2004 filed by **Peter Mujunga Gathuru** (the respondent herein) against the judgment of the High Court in HCCC No. 2974 of 1987. In addition to setting aside the judgment that was in favour of the appellant, the Court also ordered property known as LR 12767/11 to be transferred to the respondent or in the alternative if the property had already been transferred to a third party, the applicant to refund the respondent the current market value of the property to be determined upon valuation by a competent licensed surveyor.

[3] Being aggrieved by the judgement of 30th January 2015, the applicant moved the Court for an order of stay of execution, review and setting aside of the judgment. Upon hearing the application the Court made a ruling declining to entertain the applicant’s prayer for an order of stay of execution under Rule 5(2) (b) of the Court Rules as there was no appeal filed under Rule 75 of the Court Rules that was pending before the Court. The Court also rejected the prayer for review of the judgment of 30th January 2015 holding that its residual jurisdiction to review its judgment was only applicable in exceptional circumstances where such review would promote public interest and enhance public confidence in the

rule of the law; and that there were no such exceptional circumstances to warrant review of the Court's judgment. This is the ruling that the applicant now wishes to appeal against in the Supreme Court.

[4] The motion is brought under Article 163(4)(b) of the Constitution that empowers this Court to make such orders. It is based on grounds stated on the face of the motion and an affidavit sworn by the applicant in support of the motion. The applicant contends, inter alia, that the decision of 27th May 2016 affects litigants in general in regard to constitutional right to fair hearing as provided under Article 50(1) of the Constitution; that it also affects the conduct of proceedings by counsel on behalf of litigants and how acts of omission or commission by counsel will affect the administration of justice; the practice of legal practitioners in relation to procedure and adherence to time frames set by court; service of written submissions between parties counsel during proceedings; and land transactions in Kenya in relation to refund of purchase price which are normally awarded with interest but not based on market value of the land.

[5] Hearing of the Motion proceeded by way of written submissions that were duly highlighted by the parties' respective counsels. The applicant's main complaint is that he was not given a hearing before the judgment of 30th January 2015 was given; that the Court had given directions that Civil Appeal No. 184 of 2004 be disposed of by way of written submissions; that the respondent was given 14 days to file and serve submissions, while the applicant was also to file his submissions within a similar period, with leave to the respondent to respond to applicant's submissions within 7 days; that the applicant was never served with the respondent's submissions as directed by the Court; and that on 22nd January 2015, the applicant's advocate filed written submissions but the same were returned by court officials on the grounds that the judgment had already been prepared; that on 30th January 2015 the Court delivered a judgment, which was in favour of the respondent.

[6] Relying on the Supreme Court's decisions in **Hermanus Phillipus Steyn v Giovanni Gnechhi Ruscone [2013] eKLR (Hermanus Phillipus Decision); Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014]eKLR; and the Court of Appeal decision Nyutu Agrovot (K) Ltd v Airtel Network Kenya Limited (Civil Application Sup. 3 of 2015)**, the applicant argued that he was denied a fair hearing; that his grievances transcend beyond the dispute between him and the respondent; that the decision affects general litigants as it undermines the right to a hearing by placing a burden on litigants to bear mistakes committed by their counsel.

[7] Further that the decision implies that a right to be heard is at the discretion of the Court and this creates uncertainty in the law as a right to be heard is a constitutional right. Thus, it is necessary for the Supreme Court to intervene and set the record straight. With regard to mistake of counsel, the applicant conceded that his counsel ought to have raised the issue of non-service of submissions by the respondent and not waited until 22nd January when he attempted to file his submissions. Nevertheless, the applicant argued that he should not be made to bear the burden of the mistakes made by his counsel, as he never played any role in the events ensuing between 30th October 2014 and 30th January 2015 when judgment was delivered.

[8] Several authorities were cited in support of the applicant's submission. Of note is **Belinda Murai & Others vs Amoi Wainaina [1978] LLR 2782** quoted in **Richard Nchapi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, wherein Madan JA stated;

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

[9] In his replying affidavit the respondent maintains that the application is an abuse of the court process

and is against public policy, in that the property subject of the suit was transferred to the respondent in the 1980s, but the applicant has continued to have the enjoyment of the suit property for over 30 years; that the respondent is entitled to protection of his constitutional right to property under the law; that the learned judges of the Court of Appeal considered the entire record of appeal, re-evaluated the evidence and came to the right conclusion in declining to review or set aside its judgment delivered on 30th January 2015 in favour of the respondent. That the intended appeal has no effect on any other party other than the parties to the dispute, and therefore does not meet the threshold of “matter of general public importance”.

[10] In the respondent’s written submissions that were orally highlighted by his counsel, it was submitted that the appellant was not denied the right to a fair trial because in the judgment the Court addressed the issue as to whether the appellant suffered any gross injustice as a result of failure to file written submissions and found that it did not materially affect their judgment.

[11] The respondent also relied on several authorities, including **Florence Nyamboke Machani vs Mogere Amosi Ombui & 2 others [2015] eKLR; Yusuf Gitau Abdalla vs Building Centre(K) Limited & 4 others [2014]eKLR; and Benjoh Amalgamated & another vs Kenya Commercial Bank Ltd. [2014] eKLR**. The court was urged to find that the circumstances in the applicant’s case do not reveal any matter of general public importance and therefore the motion has no merit.

[12] The grounds upon which an application for leave to appeal to the Supreme Court under Article 163(4)(b) of the Constitution is to be considered are clear that the applicant must satisfy the court that his intended appeal raises a matter of general public importance. In the **Hermanus Phillipus Decision**, the Supreme Court laid out the principles to be used in identifying a matter of general public importance. First, that the issue to be canvassed on appeal must be one whose determination goes beyond the circumstances of the particular case and has a significant bearing on the public interest.

Secondly, where the matter raises a point of law, the applicant must demonstrate that such a point is substantial and its determination will have a significant bearing on public interest. Thirdly, the question of law must have arisen in the court or courts below and must have been subject of judicial determination. Fourthly, the matter may arise from uncertainty in the law caused by contradictory precedent. Fifthly, it is the applicant’s obligation to identify and concisely set out the specific elements of general public importance that he attributes to the matter for which certification is sought. The issue before us therefore is whether the applicant has met these parameters.

[13] The applicant’s main complaint is that he was denied an opportunity to present his written submissions to the Court. Although the Court stated that the submissions would not have made any difference, the absence of the submissions meant that the applicant was actually denied an opportunity to respond to the appeal. The right to fair hearing in regard to an appeal is the right to be able to have access to and respond to the contending arguments in support and in opposition to the appeal.

[14] In this case, it is common ground that the respondent did not comply with the timeline that was given for the filing of written submissions in support of his appeal, and that when he did eventually file his submissions the same were not served on the applicant. The fact that the applicant was not served with the respondent’s submissions denied the applicant access to the information regarding the arguments made by the respondent in support of the appeal. The applicant’s problem was further compounded by the rejection by the Court of his belated attempts to file his written submissions. It is thus evident that the applicant’s complaint with regard to his right to a fair hearing in the handling of his appeal was not without substance. But the question is, assuming that the applicant’s right to fair hearing was compromised as he alleges, is this “a matter of general public importance” as elucidated by the Supreme Court in the **Hermanus Phillipus Decision**?

[16] In rejecting the applicant’s motion for review the Court addressed the applicant’s complaints as follows;

“During the hearing of this application the appellant submitted to us that the fact that the court

prepared its judgment without the benefit of his submissions was a violation of his constitutional right to a fair trial as enshrined in Article 51 of the Constitution of Kenya and that failure of the registry to accept its documents was discriminatory and resulted in a violation of his rights under Article 50 of the Constitution. The applicant further relies on rule 27 of this Court's rules on the order in which parties to an appeal should address the Court. According to the applicant, if the Court had the opportunity to consider his submissions, it would have arrived at a different decision....The question that we must now address is whether or not the applicant has satisfied the parameters that have been set out above, and whether a gross injustice was occasioned to him. In our view, the applicant has not satisfied this Court that his application for review falls within this purview. The fact that the Court was constrained to prepare a judgment without his written submissions did not materially affect the judgment of the Court; we reminded ourselves that the duty of this Court when hearing an appeal is to re-evaluate and reconsider the evidence that was tendered at trial. There is no indication that even if the applicant's submissions were not on record,(sic) that the evidence tendered by him at the trial stage was not considered. As matters stand, there are no exceptional circumstances to warrant this Court's review of its judgment dated 30th January 2015. This application is therefore devoid of merit, and we hereby order it dismissed with no order as to costs."

[17] There is no doubt that the applicant raised a point of law regarding his right to fair hearing. Nevertheless, the issue at hand was simply the Court's jurisdiction to review its judgment in light of the peculiar circumstances of the applicant's case. The Court's judgment dealt with the issues raised with specific reference to the circumstances surrounding the applicant's motion, and the Court did not lay down any hard and fast rule or precedent concerning the right to fair hearing of appeals generally, or the issue of a litigant's responsibility for mistake made by counsel, as to have a significant bearing on public interest. The judgment cannot therefore be said to be one that lays any precedent, or deals with any matter that goes beyond the applicant's case. The applicant's intended appeal does not therefore raise any matter that goes beyond his case. It is not a matter of general public importance as to justify certification under Article 163(4)(b) of the Constitution.

[18] For the aforesaid reasons we reject the applicant's motion dated 10th June 2016 and decline to certify the decision of the Court dated 27th May 2016 as a matter of general public importance. Consequently, we decline the applicant's prayer for leave to appeal to the Supreme Court.

Dated and delivered at Nairobi this 17th day of November 2017

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR