



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 10 OF 2016 (UR 2/2016)

BETWEEN

MTANA LEWA.....APPLICANT

AND

KAHINDI NGALA MWAGANDI.....RESPONDENT

(Being an application for leave to appeal from the Court of Appeal to the Supreme Court of Kenya against the judgment and decree of the Court of Appeal at Malindi (Makhandia, Ouko & M'Inoti, JJ.A.) dated 17th July, 2015

in

Civil Appeal No. 56 of 2014.)

RULING OF THE COURT

The Judiciary Architecture in this country confers appellate jurisdiction at three levels of the courts; firstly, the High Court, the Employment and Labour Relations Court and the Environment and Land Court, secondly, the Court of Appeal and thirdly, the Supreme Court. The High Court and related courts ordinarily hear appeals from the subordinate courts and tribunals established under the Constitution and in exercise of other appellate jurisdiction conferred on them by legislation. As for this Court, it has jurisdiction to hear appeals from, the High Court and any other court or tribunal as prescribed by an Act of Parliament. Lastly is the Supreme Court which hears appeals from the Court of Appeal. However, unlike the other superior courts, the jurisdiction of the Supreme Court to hear appeals from the Court of Appeal is guarded. This is to say that not every decision of the Court of Appeal is appealable to the Supreme Court. The Supreme Court will only entertain appeals from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution, and in any other appeals in which itself or this Court has certified that it raises a matter of general public importance.

It is against this background that the application before us should be seen. The application is by way of a motion on notice dated 16th February, 2016. In the motion, **Matana Lewa** “*the applicant*” seeks in the main that we grant him leave to lodge an appeal in the Supreme Court against the judgment of this Court in **Malindi Civil Appeal No. 56 of 2014**, delivered on 17th July, 2015 on the ground that the appeal will be raising matters of general public importance.

The application is anchored on **Section 15** and **16** of the Supreme Court Act, **Rule 24(1)** and **31(2)** of the Supreme Court Rules, **Section 3A** and **3B** of the Appellate Jurisdiction Act, **Rules 4, 41, 42, 43** and **47** of the Court of Appeal Rules and all other enabling provisions of the law. The application is based on the main ground that the invocation of the doctrine of adverse possession in the light of the express provisions of **Article 40** of the Constitution is unconstitutional and is therefore a matter of general public importance. That for good practice of law generally the issue ought to be litigated at the Supreme Court and a final binding decision rendered by the said Court. That it is important that the constitutionality of the doctrine of adverse possession as applied under the repealed Constitution as compared to the current Constitution be finally determined by the Supreme Court.

In support of the application, **Mr. Augustus Khisa Wafula**, learned counsel for the applicant, swore an affidavit in which he depones that he took up instructions by the applicant to challenge the constitutionality of the application of the doctrine of adverse possession as envisaged under the Limitation of Actions Act. **Kahindi Ngala Mwangandi** “*the respondent*” had lodged in the Environment and Land Court at Malindi against the applicant an originating summons in which he sought a declaration that the title to **Tezo/Roka/371** “*the suit premises*” measuring approximately 16 acres and belonging to the applicant had by operation of the doctrine of adverse possession devolved to him. However, before the originating summons could be set down for hearing, the applicant took out a preliminary objection challenging the jurisdiction of the court to entertain the claim for the reason that **Section 38** of the Limitation of Actions Act was in conflict with **Article 40** of the Constitution as read together with the doctrine of *causa non oritur action* and *ex dolo malo no oritur action* and therefore unconstitutional.

The objection was canvassed before **Angote, J.** who in a ruling delivered on 31st July, 2014 dismissed it. Aggrieved by the ruling, the applicant filed an interlocutory appeal in this Court challenging the ruling. The appeal was heard and in separate judgments prepared, and delivered on 17th July, 2015, we upheld the decision of the High Court. We were all in agreement just like the trial court that the doctrine of adverse possession was neither arbitrary nor an unconstitutional limitation of the right to property. That is to say, that acquisition of land by adverse possession was not inconsistent with **Article 40(2)(a)** of the Constitution. It is this holding that the applicant wishes to challenge in the Supreme Court.

Submitting on the application, **Mr. Wafula**, learned counsel for the applicant stated that in our judgments we had observed that the doctrine of adverse possession as applied in this country was a matter of national concern. Accordingly, that observation makes the issue a matter of general public importance. Counsel further submitted that dispossessing a land owner of his land through adverse possession renders him landless if not a squatter. That in view of the fact that land is an important asset in this Country, the application of the doctrine is a matter of concern and therefore of general public importance. In support of his application, counsel filed the following authorities that we have carefully read and considered:-

1. **Benjoh Amalgamated Limited & Another v. Kenya Commercial Bank Limited [2014] eKLR;**
and,
2. **Malcolm Bell v. Hon. Daniel Toroitich Arap Moi & Another [2013] eKLR.**

Opposing the application, the respondent swore a replying affidavit. In pertinent paragraphs he deponed that the issue of the constitutionality of the doctrine has been heard and determined by this Court and cannot be appealed against to the Supreme Court. That the applicant had not identified specific elements of general public importance that arise so that he may be granted leave. Otherwise the respondent was of the firm view that the applicant had failed to demonstrate that the matter in question carries specific elements of real public interest and contest.

Submitting, **Mr. Nyange**, learned counsel for the respondent, contended that the doctrine did not qualify or have a bearing on general public importance. The application of the doctrine is between private individuals. That the applicant had not identified the specific elements of general public importance and whether it is substantial or not. The issue is simple and straightforward and there are no conflicting decisions on the doctrine in the courts below. Counsel concluded by submitting that the application had not met the threshold required for certification. The following authorities were availed by the respondent in support of his position:-

1. **Hermanus Phillipus Steyn v. Giovanni Gnechchi-Ruscione [2013] eKLR**; and,
2. **Charles Karathe Kiarie & Others v. The Administrators of the Estate of John Wallace (Deceased) & 5 Others. [2013] eKLR.**

We have carefully read and considered the application, the affidavits in support and opposition thereof, the rival oral submissions and the authorities cited.

It is apparent that the applicant has invoked **Article 163(4)(b)** of the Constitution in bringing this application though it is not specifically mentioned. It is therefore our turn to determine whether the application has met the threshold for certification. What goes in defining or determining what constitutes “*matters of general public importance*” (was identified in their essence) by the Supreme Court in the case of **Hermanus Phillipus Styen case** (supra). These, for convenience, may be set out 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.” (Our emphasis).

More recently, the same court added a further limb to the above principles in the case of **Town Council of Awendo v Nelson Oduor Onyango & 13 others [2015] eKLR** in the following terms:-

“...From the content of paragraphs 32 and 34, it emerges that while this Court did, in the Hermanus Phillipus Steyn and Malcolm Bell cases, set out an elaborate set of criteria for ascertaining “matters of general public importance” for the purpose of engaging the Court’s jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of “matters of general public importance...”” (Our Emphasis)

Of course, these principles should be considered alongside **Article 163 (4)(b)** of the Constitution as a filter to protect the Supreme Court from being inundated with all manner of appeals in the process becoming just like any other appellate court with unlimited jurisdiction which the drafters of the

Constitution and indeed the Kenyan people never intended. Indeed, the rationale behind this filtering process was explained by the Supreme Court in **Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 Others**, Supreme Court Petition No. 2 of 2012 [2012] eKLR thus:

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.” (emphasis supplied).”

We reiterate that the present application is premised on one ground, the application of the doctrine of adverse possession *vis a vis* the provisions of **Article 40** of the Constitution. So it turns on the interpretation or application of the Constitution. This is not among the above considerations for purposes of certifying by this Court, a matter to the Supreme Court on account of being a matter of general public importance.

Before the High Court and this Court, the applicant maintained that the claim for adverse possession under **Section 38** of the Limitations of Actions Act was inconsistent with and violated **Article 40(2)** of the Constitution hence in terms of **Article 2(4)** was invalid. To the extent that the issue involved is the interpretation of the Constitution, it cannot pass for a matter of general public importance for purposes of certification. Under **Article 163(4) (a)** of the Constitution, the applicant has a right to proceed to the Supreme Court without the necessity of leave and certification from us. At the hearing of this application, we did point out to counsel for the applicant the above articles of the Constitution. However, counsel for the applicant elected to soldier on and undertook to demonstrate to us how the dispute was a matter of general public importance.

He submitted that in our judgments we had appreciated that the application of the doctrine was a matter of national concern. However, our mere observation in judgments of that fact cannot *prima facie* and for purposes of certification to the Supreme Court, turn it into a matter of general public importance. When we made those observations, it was not in the context of the matter ending up in the Supreme Court. They were mere observations and we were in no way granting the applicant *carte blanche* and or a leeway to the Supreme Court as a matter of course, without bringing himself within the confines and parameters set by the Supreme Court on what constitutes matters of general public importance outlined elsewhere in this ruling.

We appreciate that our decision is perhaps the only one so far in which the doctrine has been challenged on unconstitutional grounds. But does this fact alone render it a matter of general public importance? No. Nor does the fact of dispossessing a land owner of his land through the application of the doctrine thereby rendering him a squatter become a matter of general public importance. These are transactions involving private individuals. Lastly, the assertion that in view of the fact that land is an important asset in this Country and that therefore the application of the doctrine becomes a matter of general importance is indeed stretching the imagination too far.

Essentially, what we are saying is that the applicant need not have come to us for leave and or certification since the issue involved is one of constitutional application and or interpretation. What will be canvassed if at all in the intended appeal to the Supreme Court, is the constitutionality of the application of the doctrine. It will involve the interpretation of **Article 40** of the Constitution. That being the case, the applicant has an automatic and unhindered right of appeal to the Supreme Court pursuant to **Article 163 (4)(a)** of the Constitution. We would reiterate that where a right and procedure has been conferred on a party by the Constitution or any other law, such right and procedure should not be watered down by a party who adopts a totally different procedure or route to secure that right.

It is for this reason that we decline to grant leave and or certification, since in our view it is superfluous. We make no order as to costs.

Dated and delivered at Mombasa 27th this May, 2016.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR