



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OKWENGU, GBM KARIUKI & J. MOHAMMED, JJ.A.**

**CIVIL APPLICATION NO. SUP 11 OF 2015**

**BETWEEN**

**BENSON IRUNGU MBARIA**

**MUCHANGI NDUATI NGINGO [FOR AND ON BEHALF OF**

**EMBAKASI WELFARE SOCIETY].....APPLICANTS**

**AND**

**ENOCK IRUNGU.....RESPONDENT**

**(Being an application for leave to appeal to the Supreme Court from the Judgment  
of the Court of Appeal (Mwera, Nambuye & Murgor, JJ.A.) dated 25<sup>th</sup> March, 2015**

**in**

**CIVIL APPEAL NO. 167 OF 2006)**

**\*\*\*\*\***

**RULING OF THE COURT**

**Background**

1. On 25<sup>th</sup> March, 2015, this Court (*Mwera, Nambuye & Murgor, JJ.A.*), allowed an appeal by the respondent herein, **ENOCK IRUNGU**, against the applicants herein, **BENSON IRUNGU MBARIA and MUCHANGI NDUATI NGINGO** the office bearers of a body called Embakasi Welfare Society.
2. Aggrieved by that judgment, the applicants have now moved to this court under **Article 163 (4) of the Constitution** for certification that their intended appeal to the Supreme Court involves a matter of general public importance. The respondent does not agree and contends that the intended appeal has neither ramification nor consequence to any other party save the parties to the dispute and does not, therefore, meet the required threshold as a matter of general public importance.
3. The genesis of the application is that the respondent filed a Plaintiff dated 8<sup>th</sup> September, 1997 against the applicants who are the office bearers of the Embakasi Welfare Society. The respondent averred that by a

letter dated 22<sup>nd</sup> November, 1993, the then Nairobi City Council [now County] allotted to him the suit property to build a nursery school. He took possession and duly paid the requisite premiums and rates. However, on or about 15<sup>th</sup> July, 1997, he espied the applicants trespassing, digging trenches and erecting structures on the suit property without consent. Despite the respondent's requests that they cease doing so, the applicants did not take heed whereupon their acts caused loss and damage to the respondent. He, therefore, sought a mandatory injunction to issue against the applicants in respect of the acts complained of and also leave to evict them from the suit property, damages and costs.

4. The applicants filed their defence dated 17<sup>th</sup> September, 1997 pleading, inter alia, that they were the officials of Embakasi Welfare Society and were, therefore, wrongly joined in the suit; that there was no cause of action against them and that the City Council ought to have been sued; that if the respondent was allotted the suit property for private development, such allotment was irregular and that the society had expended a lot of energy and resources in developing the suit property. Mugo, J found in favour of the applicants and dismissed the claim. The respondent appealed to this court which allowed the appeal and set aside the findings of the High Court resulting in the current application.

5. The issues said to be of general public importance on the basis of which certification is sought are, *inter alia*, whether an individual's rights can outweigh the rights of a community welfare group; whether the respondent tendered better documents than the applicant as proof of ownership of the suit property; whether the respondent acted diligently in allowing the applicant to substantially develop the suit property without raising any issue for three years, whether the respondent was lawfully allocated the suit property, it being specifically designated as a community facility and whether in the alternative, the applicants are entitled to compensation from the respondent for developments on the suit property if the suit property is to be forfeited.

### **Submissions by counsel**

6. Those are the issues which Mr Mucoki, learned counsel for the applicants agitated when he appeared before us. He submitted that the applicants are raising fundamental issues of general public importance including whether an individual's rights can outweigh the rights of a community welfare group. Counsel urged us to allow the application.

7. The respondent represented by learned counsel, Mr LM Ombete, opposed the application and submitted that the applicants had not demonstrated any matter of general public importance in its intended appeal to the Supreme Court; that the issues raised by the applicant affected only the applicants and did not raise any matter, the determination of which would affect the public in general. Counsel urged us to dismiss the application.

### **Determination**

8. We have duly considered the application, the submissions by learned counsel, the authorities cited and the law. It is axiomatic that in an appeal to the Supreme Court, under **Art 163 (4) (b)** the decisive factor 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 this Court stated in ***HERMUNUS PHILIPUS STYNE V GIOVANNI GNECCHI-RUSCONE, CA NO. SUP 4 OF 2012***, 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.”***

9. For the purposes of this application, it is important to consider what constitutes a matter of general public importance deserving of certification to the Supreme Court. In the *Hermanus Steyn case [supra]* this Court had the opportunity to pronounce itself on the test applicable in determining whether a matter is of general public importance. The court outlined the governing principles 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 [other] 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;*

*viii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.*

10. The applicants’ main contention is whether an individual’s rights can outweigh the rights of a community welfare group and whether in the alternative, the applicants are entitled to compensation from the respondent for development on the suit property if the suit property is to be forfeited.

11. From the laid down principles, the applicants have not satisfied this Court that the issue to be canvassed on appeal at the Supreme Court is one the determination of which transcends the circumstances of this particular case and has a significant bearing on public interest. As stated in the *Hermanus Steyn case [supra]*:

***“Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”***

13. Accordingly, and after careful consideration of the applicants’ motion dated 3<sup>rd</sup> July, 2015, we find that there is no matter of general public importance involved in the applicants’ intended appeal to the Supreme Court. The application lacks merit and is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of May, 2016.**

H. M. OKWENGU

.....

JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR