



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 54 OF 2014

BETWEEN

MUTANGA TEA AND COFFEE COMPANY LIMITED APPELLANT

AND

SHIKARA LIMITED 1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA 2ND RESPONDENT

(Being an application under Article 163 (4) (b) of the Constitution for certification to the Supreme Court against the decision of the Court of Appeal (Makhandia, Ouko & M'Inoti JJA)

in

(Civil Appeal No.54 of 2014)

RULING OF THE COURT

The Preliminary objection to the applicant's suit in the High Court, HCCC No. 171 of 2011 was sustained and the suit struck out on the ground that the High Court lacked jurisdiction to entertain it.

The applicant was aggrieved and lodged an appeal to this Court. Like the High Court, this court held that the High Court indeed had no jurisdiction, finding that both Physical Planning Act (PPA) and Environment Management & Co-ordination Act (EMCA) make elaborate provisions for the procedure to be followed by an aggrieved party to take his grievance to bodies established under the two statutes and that only decisions of those bodies are appealable to the High court. The court went on to hold thus:

“The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court not in an appeal as provided, but in the first instance.

This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. Speaker of the National Assembly v Karume (supra) ... the court made the often-quoted statement that;

‘[W]here there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.’

Such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved more expeditiously and in a more cost effective manner”

The applicant now wishes to challenge the latter dismissal in the Supreme Court. To do so it has moved us to issue a certificate that the intended appeal raises a matter of general public importance under the provisions of **Article 163(4) (b)** (not specifically stated but introduced by an oral application to amend) of the Constitution and **section 16** of the Supreme Court Act. The specific ground upon which it is claimed that the intended appeal to the Supreme Court will be raising a matter of general public importance may be set out as follows;

“4 THAT the applicant is aggrieved by the aforesaid judgment, and wishes to file an appeal based on the grounds as hereunder;

(b) That the decision sought to be appealed against has the effect of limiting the jurisdiction of the High Court in matters dealing not only with public rights over private property but also those relative to the right of access to the High Court as a default forum by parties aggrieved by deliberate or even inadvertent non-compliance with mandatory provisions of statute with inbuilt dispute resolution mechanisms but devoid of jurisdiction to entertain an action sui generis challenging such avoidance or the effect of decisions made such avoidance notwithstanding.

(c) That the impugned decision is underpinned by a misconstruing of the historical background of the dispute insofar as it is grounded on the wrong premises that there is on record a decision of the Director of Physical Planning under the Physical Planning Act, Cap 296 which decision would have been the subject of dispute before the superior court, with resultant failure to address the effect of that Court’s failure to distinguish between Planning permission under Part IV of the Act, development control under part V and the miscellaneous provisions of the Act under Part VI thereof dealing with the mechanism for redress available to parties affected by a proposed development and whether a party deprived by the avoidance of those provisions by a developer or regulatory body can have recourse to the High Court or the Environment and Land Court.

5. THAT I am advised by counsel appearing for the applicant which advice I verily believe as sound that the intended appeal is not only arguable, but raises a matter of general public importance insofar as it touches on the scope of the jurisdiction of the High Court, and that the decision of this Honourable Court would, if left to stand, redefine to a great extent the scope of the High Court’s jurisdiction on matters touching on rights deriving from property ownership and the user thereof.”

Mr. Mwakisha learned counsel for the applicant, on these grounds urged us to certify the intended appeal as raising a matter of general public importance on the strength of the following famous decisions of the Supreme Court on the subject.

Harmanns Phillipus Steyn v Giovanni Guecchi – Ruscone, Civil Application No. 4 of 2012 and Town Council of Awendo v Nelson Oduor Onyango & 13 others, Misc. Application No. 49 of 2014.

Mr. Kariuki holding brief for **Mr. Ndegwa** for the 1st respondent did not make any submissions while **Mr. Kadima** for the 2nd respondent, although served with the hearing notice did not attend court.

The jurisprudence on this question is now sufficiently settled by case law and the applicable principles are now old hat. The operative words “**general public importance**” have been defined in a number of cases including the above two to mean; a matter whose impact and consequences are substantial, broad-based, transcending the litigation – interests of the parties, and bearing upon the public interest. It must involve a substantial point of law, the determination of which has a bearing on the public interest generally, or if the point raised involves contradictory precedents, the Supreme Court may either itself resolve the uncertainty or refer it to the Court of Appeal for determination. Mere apprehension of miscarriage of justice is a matter for resolution in the lower superior courts and therefore is not a proper basis for granting certification for an appeal to the Supreme Court. See **Hermanns Phillipus Steyn** (supra).

In **Town Council of Awendo** case, (supra) the Supreme Court added that questions of law that are destined to continually engage the workings of the judicial organs may become **matter of general public importance** justifying certification for final appeal in the Supreme Court. Equally, questions with a bearing on the proper conduct of the administration of justice may also become **matters of general public importance**.

In summary the Supreme Court has stated that for an appeal to qualify as raising a **matter of general public importance** it must be of a cardinal nature involving issues of jurisprudential moment. See **Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 others S.C. Petition No. 2 of 2012**; and that it must involve the welfare of the public.

Looking at the grounds upon which the intended appeal is premised, we fail to see how the determination of the right forum for adjudicating a particular grievance can be one of jurisprudential moment. The question of jurisdiction of courts is one that is so often and ordinarily determined by courts. The particular issue that was decided by the court is one that has been consistently decided in the past in the **Karume** case (supra), **Kones v R & Another** Exparte **Kimani wa Nyoike & 4 others (2008) 3KLR 296**, **Rich Productions Ltd v Kenya Pipeline Company & Another Petition No. 173 of 2014**, **Vania Investment Pool Ltd v Capital Markets Authority & 8 others, CA No. 92 of 2014**, among others. The point is not novel, its impact and consequences do not transcend beyond the interest of the parties, neither does it bear upon the public interest.

For these reasons we decline to certify the intended appeal as involving a matter of general public importance and dismiss the application dated 4th November 2015 with costs.

Dated and delivered at Mombasa this 17th day of June, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR