



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)**

**CIVIL APPLICATION NO. 36 OF 2015**

**BETWEEN**

**SAMWEL MOKUA AYIENDA ..... APPLICANT**

**AND**

**TINGA TRADING COMPANY LIMITED ..... RESPONDENT**

*(Application seeking leave to appeal from the Judgment of the Court of Appeal at Kisumu, (Onyango Otieno, Azangalala & Kantai, JJ.A.)*

*dated 19<sup>th</sup> September, 2014*

**in**

**CIVIL APPEAL NO. 160 OF 2010)**

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**RULING OF THE COURT**

1. The applicant was the appellant in **Civil Appeal No. 160** of **2010** in the Court of Appeal at Kisumu. The said appeal was determined in favour of the respondent on 19<sup>th</sup> March, 2014.
- 2 Being dissatisfied with the judgment of the Court of Appeal, the applicant wishes to prefer a second appeal to the Supreme Court of Kenya.
- 3 On 9<sup>th</sup> July, 2015, the applicant filed an application under section **163 (4)** of the **Constitution of Kenya, 2010**, seeking certification to enable him lodge the intended appeal.
- 4 The certification was sought on the grounds that the matter raises issues of general public importance and that substantial miscarriage of justice is likely to be occasioned to the applicant and his family unless the leave sought is granted.
- 5 In his affidavit in support of the application, the applicant set out the brief history of the dispute between him and the respondent. He stated that in the year 2000 he filed a suit, **HCCC NO. 98**, in the High Court of Kenya at Kisii, which was decided against him. Thereafter he preferred an appeal to this Court which he also lost.

6 In the High Court matter, the applicant wanted to set aside a consent order recorded on 28<sup>th</sup> June, 2001 vide which he was released from Kisii G. K. Prison on his undertaking to give vacant possession of the property known as **Kisii Municipality Block 111/265** and pay the respondent a sum of **Kshs.300,000/=** being rent arrears by agreed instalments. The applicant alleged that the said consent was recorded by his advocate who had no practicing certificate without his instructions.

7 In the intended appeal, the applicant intends to raise various issues that are set out under paragraph 12 of his affidavit as follows:

**“(a) Whether this Court is bound by its own judgments;**

**(b) Whether this Court shall assist in the building of jurisprudence by failing to rely on its own judgments;**

**(c) Whether a purported consent entered by an unqualified person is not duly given instructions to do so is a lawful order;**

**(d) Whether the Supreme Court ought to declare the consent signed by an unqualified person, illegal, unlawful, null and void;**

**(e) Whether an advocate without a practicing certificate is authorized to practice law, represent a party and/or sign a consent for a party;**

**(f) How an advocate can enter a consent on behalf of a client, the procedure and right way to enter a consent.”**

8 The applicant contends that the aforesaid issues are of general public importance and the Supreme Court ought to pronounce itself on them.

9 The application was opposed. The respondent’s advocate swore a replying affidavit stating, *inter alia*, that the points of law that are intended to be raised are neither substantial nor of public interest; that there is no uncertainty in law arising from contradictory precedents; that mere apprehension of miscarriage of justice is not a proper basis for granting certification as sought; that the issues of law intended to be raised are well settled; and that the course of action in the original suit involved a landlord and tenant relationship which is not an issue of general public importance. He urged us to dismiss the application.

10 We have considered the application and the brief submissions raised by **Mr. Begi**, learned counsel for the applicant and **Mr. Gichana**, learned counsel for the respondent. **Section 16 (2)** of the **Supreme Court Act** states as follows:

**“It shall be in the interest of justice for the Supreme Court to hear and determine a proposed appeal if -**

**a. the appeal involves a matter of general public importance; or**

**2 a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.”**

11 In **MALCOM BELL V HON. DANIEL TOROITICH ARAP MOI & ANOTHER, [2013] e KLR**, the Supreme Court cited its earlier decision in **HERMANUS PHILIPPEUS STEYN V GIOVANI GNECCHI RUSSCONE [2013] e KLR** where it pronounced itself on the tests applicable in determining whether a matter is of general public importance as follows:

**“(i) for a case to be certified as one involving a matter of general 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;

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

12 Further, the Supreme Court held that its appellate jurisdiction is not to be invoked for the purpose of rectifying errors of law with regard to matters of settled law.

13 Having carefully considered the issues intended to be raised by the applicant and weighing them against the tests outlined above, we are not satisfied that the applicant has established a firm basis for lodgment of an appeal to the Supreme Court. We therefore decline to grant the certification as sought. Consequently, this application is dismissed with costs to the respondent.

**DATED and Delivered at Kisumu this 29<sup>th</sup> day of July, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**