



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KOOME & M'INOTI, JJ.A.

CIVIL APPLICATION NO. SUP 5 OF 2013

BETWEEN

KINYUA NG'ANG'A.....1ST APPLICANT

PETER MBURU NG'ANGA.....2ND APPLICANT

RACHEL WANJIRU NGARIHU.....3RD APPLICANT

AND

NAHASHON NJENGA NG'ANG'A.....1ST RESPONDENT

AMOS GAKUYA.....2ND RESPONDENT

JOHANA KIMANI.....3RD RESPONDENT

IBRAHIM KINYUA MAINA.....4TH RESPONDENT

(Application for certificate to appeal to the Supreme

Court of Kenya from the ruling of the Court of Appeal at

Nairobi, (VISRAM, MWERA & GATEMBU, JJ.A) dated 1st

March 2013

in

Civil Application No. Nai. 31 of 2008)

RULING OF THE COURT

The dispute that has led to the application before us has a rather checkered history in our courts, spanning more than twenty years. The applicants and the respondents are half brothers, the sons of a deceased *mzee* called *Ng'ang'a*. The dispute involves some three parcels of land in Murang'a that were registered in the

names of the applicants, which the respondents contended were so registered in trust for them.

In 1994 the respondents filed *Murang'a Senior Principal Magistrates Court Case No. 46 of 1994* claiming half share of those parcels of land. The dispute was referred to elders under the chairmanship of the District Officer, Murang'a, who heard and determined the same. The decision of the elders was however successfully challenged and set aside.

The dispute was heard afresh by the Senior Principal Magistrates, who by a judgment dated 7th December 2001 dismissed the respondent's claim. Aggrieved by the judgment, the respondents filed in the High Court at Nairobi *Civil Appeal No 662 of 2002*. That appeal was heard and allowed by *Khamoni, J.* in a judgment dated 5th December 2007 which also awarded the respondent half share of the parcels of land as prayed.

The applicants were aggrieved by the judgment of the High Court and filed a Notice of Appeal on 11th December 2007. They also applied for copies of judgment and proceedings on 7th January 2008. Subsequently it was alleged that the notice of appeal got misplaced or lost in this Court and the applicants applied for extension of time to file their appeal.

That application was heard and granted by *Tunoi, JA (as he then was)* on 25th May 2010. The learned judge directed the applicants to file the Notice of Appeal within 7 days and the record of appeal within 30 days of the filing of the Notice of Appeal. The applicants did not file the record of appeal as directed or at all. By an application dated 6th April 2011, they applied once again before a single judge for extension of time to file and serve the record of appeal, *Okwengu, JA* heard the second application for extension of time, and found the applicants' delay of almost one year before making the application inordinate, and the explanation for the delay lacking in candor. Accordingly, the learned single judge, in a ruling dated 2nd March 2012, dismissed the application, but made no orders on costs.

Undeterred, the applicants made a reference to the full Court under *rule 47* of the *Court of Appeal Rules*. A bench of this Court comprising *Visram, Mwera* and *Gatembu, JJA* heard the reference and on 1st March 2013 dismissed the same after finding no valid grounds for interfering with the exercise of discretion by the single judge.

The applicants are now before us, this time round seeking certification (which on the authority of *GREENFIELD INVESTMENT LTD V. BABER ALIBHAI MWAJI, CA NO 5 OF 2012* is improperly framed as leave) to appeal to the Supreme Court against the ruling of this Court in the reference. Their Notice of Motion dated 25th March 2013 purports to be taken out exclusively under *Section 15 (1)* and *16 (b)* of the *Supreme Court Act Number 7 of 2011*. It is worthy pointing out that there is no section 16(b) in the Supreme Court Act. What the applicant may have had in mind is *section 16 (2) (b)* of the same Act. That provision was however declared to be unconstitutional by the High Court in *COMMISSION ON ADMINISTRATIVE JUSTICE V. ATTORNEY GENERAL, H.C.P. NO 242 OF 2012*, after the court found it to be *ultra vires* the Constitution of Kenya, 2010 to the extent that it added to the jurisdiction of the Supreme Court to determine appeals where the Court was satisfied that a substantial miscarriage of justice may have occurred or may occur unless the appeal was heard.

The grounds upon which the certificate to the Supreme Court is sought is that by declining to extend time to enable the applicants prosecute their intended appeal, this Court occasioned them a serious miscarriage of justice; that by its ruling this Court disregarded the letter and spirit of *Article 159(2)(d)* of the Constitution which requires justice to be administered without undue regard to procedural technicalities; that such disregard makes the matter of general public importance; and that *rule 4* of the rules of this Court is unconstitutional to the extent that it empowers the Court to shut a party from exercising its constitutional right to be heard.

When he appeared before us, *Mr. Thiong'o*, learned counsel for the applicants, in a brief address relied exclusively on the grounds that we have set out above and urged us to allow the application to enable the applicants agitate their grievance before the Supreme Court.

Mr. Mbutia, learned counsel for the respondents, in an equally brief address, opposed the application as totally lacking in merit. It was contended that no matter of general public importance was involved or disclosed in the applicant's intended appeal to the Supreme Court. Counsel urged us to find that there was nothing in **rule 4** of the **Court of Appeal Rules** raising constitutional issues to warrant consideration by the Supreme Court.

Having carefully considered the application before us, we are not satisfied that there is any issue of general public importance within the meaning of **Article 163(4)** of the Constitution to warrant certification to the Supreme Court. To the extent that the application is founded on alleged miscarriage of justice under **section 16(2)(b)** of the **Supreme Court Act**, we will only restate that the provision has already been declared unconstitutional by the High Court and to the best of our knowledge the decision of the High Court has not been appealed or otherwise reversed.

A matter of general public importance is one whose determination will transcend the circumstances of the particular case with **significant bearing** on the public interest and where the alleged matter of general public importance involves a point of law, the point has to be **substantial** so that its determination will have significant bearing on the public interest. (See **STYNE V. GNECCHI-RUSCONE, SC APP. NO. 4 OF 2012**).

Other germane principles that have been laid down by the Supreme Court for purposes of determining whether a matter of general public importance is involved in an application for certification are 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; that determinations of fact in contests between parties are not by and of themselves a proper basis for certification; that mere apprehension of miscarriage of justice is not a proper basis for certification; that only exceptional cases that raise cardinal issues of law or of jurisprudential moment deserve certification; and that the jurisdiction of the Supreme Court under **Article 163(4) (b)** is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law. (See for example, **PETER ODUOR NGOGE V. HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012, BELL V. ARAP MOI & ANOTHER, SC APP NO. 1 OF 2013** and

KOINANGE INVESTMENTS & DEVELOPMENT LTD V. ROBERT NELSON NGETHE, SC APP. No. 4 of 2013).

The issues that the applicants intend to canvass before the Supreme Court, do not, in our view, make out an exceptional case, which raises cardinal issues of jurisprudential moment. On the contrary, they revolve around the exercise of judicial discretion based on the peculiar facts of the applicants' case. In **DANIEL KIMANI NJIHIA V. FRANCIS MWANGI KIMANI & ANOTHER, CA No Sup 10 of 2013**, this Court stated as follows regarding certification of a matter to the Supreme Court on the mere ground of exercise of discretion:

“Strictly speaking, the issue that the applicant seeks to take to the Supreme Court is merely the exercise of judicial discretion by this Court. In our view, that is not a matter of general public importance transcending the circumstances of this case and with a significant bearing on public interest or one that raises a substantial point of law the determination of which will have a significant bearing on the public interest. The exercise of judicial discretion is an undertaking that is invariably dependent on the peculiar facts and circumstances of each case. To the extent that no two cases are exactly the same, exercise of judicial discretion in one case cannot constitute an issue of general public importance. In our view, if there was ever a decision that prima facie negates application to the public in general, it is a decision based on the exercise of discretion.”

The constitutionality of rule 4 of the Court of Appeal Rules was never an issue before the single judge or in the reference. Accordingly, it cannot form the basis for certification to the Supreme Court because the jurisdiction of that Court ought not to be invoked where the issues intended to be canvassed are merely collateral questions or questions that are minimally related to the issues that were determined by this Court (See **THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS V.**

ATTORNEY GENERAL & 2 OTHERS, CRIM. APP. NO. 1 OF 2012). Nor do we think

that it can be seriously argued that the issue intended to be raised in the Supreme Court, put into proper context, has taken a trajectory of constitutional interpretation or application (See **PETER GATIRAU MUNYA V. DICKSON MWENDA KITHINJI & OTHERS SC APP NO. 5 OF 2014**).

We are satisfied that the applicant's intended appeal to the Supreme Court does not constitute a matter of general public importance within the meaning of Article 163(4) (b) of the Constitution. Accordingly, the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 27th day of March, 2015.

R. N. NAMBUYE

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR