IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPLICATION NO. SUP. 7 OF 2014

ANDREW IRERI NJERU

MOTOKAA NTHAUTHO

NATHAN MAGANJO & 3 OTHERS..……...…….. APPLICANTS

AND

THE HON. ATTORNEY GENERAL…….…...…… 1ST RESPONDENT

MWANIKI MUNYI & 55 OTHERS……..……..…. 2ND RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Ruling of the Court of Appeal at Nyeri (Visram, Koome & Odek, JJ.A.)

dated 16th December 2014

in

Civil Appeal (Application) No. 47 of 2010)

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RULING OF THE COURT

1. The applicants by Notice of Motion dated 29th December, 2014, seek leave to appeal to the Supreme Court. The orders sought in the application are:

a. ***That this Court may be pleased to grant the applicants leave to appeal to the Supreme Court against the decision of this Court dated 16th December, 2014.***

b. ***That this Court may be pleased to stay the execution herein pending the hearing and final determination of the intended appeal to the Supreme Court of Kenya where the applicants have arguable grounds of appeal.***

c. ***That costs of this application be provided for.***

2. The application is supported by the affidavit of Andrew Ireri Njeru and is based on the following grounds verbatim on the face of the Motion:

a. ***That the applicant has arguable grounds of appeal to the Supreme Court of Kenya with a high probability of success.***

b. ***That the file which was appealed against being No. 882 of 2013 at Kerugoya was transferred from Embu for determination and for further orders.***

c. ***That Advocate Mungai for the 2nd respondent was not properly on record because he had not filed any Notice of Appointment or served the same to the interested parties (sic).***

d. ***That the delay in serving the records of appeal was occasioned by the bureaucracy of the court in Kerugoya and the applicants had requested for extraction of the order dated 16th July, 2014, and the same was signed on 22nd September, 2014.***

e. ***That the said application dated 16th October, 2014, by Advocate Mungai is incompetently filed for it is filed by an advocate without clear instructions from interested parties or failed to serve them.***

f. ***That the said application by Advocate Mungai was an abuse of the court process and ought to be struck out in the first instance thereof in order for justice to prevail.***

g. ***That according to Chapter 10 of the Constitution of Kenya, Article 159 (4) it is stipulated that justice shall be administered without undue regard to technicalities and further in clause (e) the purpose and principles of the Constitution shall be protected and promoted.***

h. ***That matters of land are sensitive and the same ought to be considered and handled with at most care as it touches on livelihood of people (sic).***

i. ***That Advocate Mungai has been named in the said Appeal No. 47 of 2014 at Nyeri as an interested party by virtue of him having been irregularly allocated Mbeti/Gachuriri/2684 by one of the interested party by the name Mwaniki Munyi purporting to be a trustee of Mbandi clan.***

j. ***That the said author of the said application dated 16th October 2014 Advocate Mungai has a personal interest in the said land appealed for having obtained the same from his former client Motokaa Nthauthu and channeled or have the same registered in his wife's name Eunice Nyaguthi Karani.***

k. ***That this Honourable Court did not consider that the records of appeal had weighty issues to be considered especially the 2nd respondent did not comply with the High Court Decree issued at Embu by Honourable Justice H. Ong'udi dated 5th February, 2013.***

- ***That the decision reached by this Honourable Court and the court below shall put the applicant and their families in a very serious situation and Article 22 (1) of the Constitution of Kenya has prohibited the violation of future life of Kenyan citizen (sic).***

m. ***That the said Advocate Mungai took advantage of the 2nd appellant's illiteracy being a lay person to defeat justice, which is also an abuse of the Constitution of Kenya under Article 259 (3) which stipulate that every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.***

❒ ***That it is in the interest of justice and fairness that the application is brought.***

❍ ***That the applicants and their families shall suffer irreparable damages if stay is not granted.***

p. ***That the applicants pray for leave to appeal to the Supreme Court.***

3. The background facts relevant to in this matter is that the respondents herein filed an application pursuant to ***Rule 84*** of the Rules of this Court seeking orders that the applicants ***Nyeri Civil Appeal No. 47 of 2014,*** be struck out in its entirety. The applicants filed the Notice of Appeal on 17th July, 2014, which was seven days after the High Court ruling; in addition, the Notice of Appeal was not served until 21st July, 2014, which was seven days out of time. The applicant was required under ***Rule 82*** of the Rules of this Court to lodge an appeal within 60 days of filing the Notice of appeal. The Record of Appeal was to be filed on or before 15th September, 2014; the Record was filed on 3rd October, 2014, which was 18 days late. In the Ruling delivered on 16th December, 2014, this Court held that the applicants never gave a satisfactory explanation and reasons for delay in serving the Notice of Appeal and no satisfactory explanation was given for the delay in filing the Record of Appeal. Due to failure to adequately explain the reasons for delay, in a Ruling delivered on 16th December, 2014, this Court struck out ***Nyeri Civil Appeal No. 47 of 2014***. It is from this Ruling that the appellants seek leave to appeal to the Supreme Court.

4. In the instant application for leave, the respondents did not file a replying affidavit. At the hearing of this application, the applicants appeared in person while the 1st respondent was represented by learned Counsel Mr. F.O Makori while the 2nd respondent was represented by learned counsel Mr. D. K. Mungai.

5. The applicants' oral submission was made by Mr. Andrew Ireri acting in person; he submitted that the applicants are seeking leave to appeal to the Supreme Court against the Ruling of this Court in ***Civil Appeal (Application) No. 47 of 2014,*** delivered on 16th December, 2014. He submitted that the applicants are dissatisfied with the decision because they were not heard at the High Court and at the Court of Appeal. He reiterated the grounds in support of the application arguing that Counsel for the 2nd respondent was an interested party and should not have been allowed to take part in the proceedings; that Counsel for the 2nd respondent was allocated part of the disputed property ***Mbeti/Gachuriri/2684*** by one of the interested parties by the name Mwaniki Munyi purporting to be a trustee of Mbandi clan; that the applicants stand to suffer irreparable damage if stay is not granted. The applicants reiterated that they rely on the supporting affidavit and all annextures thereto.

6. Counsel for the 1st respondent submitted that from the body of the application, it was clear that there were no grounds raised sufficient to invoke the appellate jurisdiction of the Supreme Court; that the Ruling of this Court dated 16th December, 2014, clearly stated that no explanation had been given for the delay in filing the Notice of Appeal. Counsel urged this Court to find that the grounds in support of the application do not disclose an arguable appeal.

7. Learned counsel Mr. Mungai for the 2nd respondent associated himself with the submissions of the 1st respondent. He stated that whereas the applicants seek leave to appeal to the Supreme Court, the grounds in support thereof do not fall within the provisions of ***Article 163 (4)*** of the ***Constitution***; that there was no issue of constitutional interpretation or application canvassed before this Court and the High Court; that the applicants have not demonstrated any issue of general public interest or public importance to warrant leave to appeal to the Supreme Court; that there is nothing exceptional in this case that would warrant the matter to be referred to the Supreme Court; that the instant application has no merit and should be dismissed. In reply to the submission by the respondents, the applicants through Mr. Andrew Ireri reiterated the grounds in support of the application emphasizing that counsel for the 2nd respondent was sued as an interested party.

8. We have considered the application before us, the grounds in support thereof, submissions by counsel, the applicants who acted in person and the applicable law. The application does not state under which provisions of law it is based. However, noting that the applicants are acting in person, we nevertheless shall consider the application on its merits. An appeal from this Court to the Supreme Court arises in only two instances as set out in ***Article 163(4)*** of the ***Constitution***. The said Article provides:-

"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-

a. ***As of right in any case involving the interpretation or application of this Constitution; and***

b. ***In any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."***

9. The grounds in support of the instant application do not expressly state whether the applicants intends to invoke the constitutional jurisdiction of the Supreme Court or whether they assert that an issue of general public importance has arisen in the matter. On the face of the application, the applicants allege that ***Article 22 (1)*** of the ***Constitution*** is in issue where the violation of future life of Kenyan citizens is at stake.

10. In arriving at our decision, we are cognizant of the Supreme Court's dicta in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others, Sup. Ct. Application No. 12 of 2014***, where the Supreme Court observed the need to balance between the Rules of Procedure which are important for the efficient, fair and evenhanded process on one hand and the core principle of imparting substantial justice on the other. We have evaluated the grounds in support of the application to determine whether a matter of general public importance is raised and disclosed. This Court in ***Hermanus Philipus Styen –vs- Giovanni Gnecchi- Ruscone-Civil Application No. Nai. Sup.4 of 2012*** observed:-

> ***"The test for granting certification to appeal to the Supreme Court as a court of the 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.(See Machira t/a Machira & Company Advocates -vs- Mwangi & Another, (2002) 2KLR 391and The Iran Nabuvat (1990)3 ALL ER 9)…….. 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."***

11. What constitutes a matter of general public importance? The Supreme Court of Kenya in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone- Application No. 4 of 2012*** held:

> ***"Before this Court 'a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: it impacts and consequences are substantial, broad based, transcending the litigation- interests of the parties, and bearing upon the public interest".***

The Supreme Court set out the following as the governing principles in the determination of matter(s) of general public importance:-

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 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 at 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 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."***

(See also the Supreme Court's decision in ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & Another,- Application No. 1 of 2013).***

12. Upon consideration of the application before us, it shows that the applicants have neither identified nor indicated the general matters of public importance that they intend the Supreme Court to determine. There are no issues or questions that have been framed for determination by the Supreme Court. The applicants simply states that they have an arguable appeal with a high chance of success and they should be granted leave to proceed to the Supreme Court. The grounds in support of the application as enumerated on the face of the Motion are allegations of fact which were neither considered nor determined by the High Court or this Court. In so far as appeals from this Court to the Supreme Court are concerned, the Supreme Court is an appellate court and not a court of first instance. The grounds cited on the face of the application are misconceived as they seek to canvass factual disputes before the Supreme Court which is not a Court of first instance on issues relevant to the applicants' case.

13. In considering the application before us we bear in mind that the onus falls on the applicants to demonstrate that there are specific matters of general public importance for determination by the Supreme Court; they must demonstrate that the issues carry specific elements of real public interest and concern. (See the Supreme Court's decision in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone, (supra)***. The factual issues raised by the applicant as to whether Counsel for the 2nd respondent was an interested party is not an issue that transcend the circumstances of the case herein nor does it have a bearing on public interest. The grounds in support of the application are allegations of fact that require proof. As already stated above, the Supreme Court is not a Court of original jurisdiction to hear and determine disputes of fact between parties. Disputed allegations of facts cannot be a basis of granting leave to appeal to the Supreme Court.

14. Regarding the alleged violation of ***Article 22 (1)*** of the ***Constitution*** and breach of fundamental rights and freedoms, we have perused the Ruling of this Court dated 16th December, 2014. Nowhere in the Ruling does it show that constitutional issues were canvassed and considered before this Court and High Court. Neither have we discerned an issue of constitutional interpretation in the proceedings and Ruling before this Court and the High Court. In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another, Sup. Ct. Petition No. 3 of 2012***, the Supreme Court set out the requirements that an applicant needs to satisfy, in an appeal under ***Article 163(4) (a)***. It was stated that:

> ***"… the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution; an applicant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)".***

15. In ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & Another, (supra),*** the Supreme Court held:

> ***" ..Such a position is consistent with the Court's holding in Hermanus Steyn case, that 'the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination'- for them to become a 'matter of general public importance' meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts will often be found to fall outside the proper appeal cause in the Supreme Court".***

16. On our part, we find that the instant application does not raise any issue of constitutional interpretation and application that would justify an appeal to the Supreme Court. Having considered the application and the affidavit in support thereof, we are unable to find and discern the issues of general public importance that the applicants seek the Supreme Court to determine.

17. The applicants urged this Court to grant stay of the Ruling dated 16th December, 2014, and that unless stay is granted they would suffer irreparable damages. The applicants have not demonstrated what irreparable damages they would suffer. The applicants also allege that it is unfair for the decision of this Court to stand. An allegation of unfairness is not per se a proper basis for granting the leave to appeal to the Supreme Court. This Court in ***Gauku Mohamed –vs- Gitonga Mohamed, – Civil Application No. Sup 18 of 2012*** held:

> ***"Further as held by the Supreme Court in Hermanus Philipus Styen –vs- Giovanni Gnecchi- Ruscone (Supra) a mere apprehension that miscarriage of justice will be occasioned is not a basis upon which leave to appeal to the Supreme Court can be granted".***

18. On the issue of the stay sought by the applicant, we can do no better than reproduce this Court's finding in ***Kanyi Karoki –vs- Karatina Municipal Council & Another – Civil Application No. Sup. 3 of 2014:-***

> ***"..Therefore, this Court has no power to issue an order of stay of execution once it has passed judgment. This Court can only exercise the restricted jurisdiction of considering applications for leave to appeal to the Supreme Court as provided under Article 163(4) (b) of the Constitution."***

19. In this application, the applicants acted in person. We take liberty to bring to the attention of the applicants the decisions of this Court in ***George Wachira Kirira v Joe Maina Ruthuthi, [2013] Civil Application No. Nyeri 11 of 2013*** wherein it was ruled that:

> ***"It is trite law that a party whose appeal has been struck out as incompetent has the liberty and right to restart the appellate process." In this case, the following statement was made:***
>
> > ***There are two legal issues…before making…final decision. The first is whether an applicant can make a second, third or further application seeking leave to extend time after a similar application had been granted and or declined or after a Notice and Record of Appeal have been struck out; this raises the issues of res judicata. I have considered the decision in Mohammed Osman Malllim – v- Mercedes Sanchez Rao Tussela & 4 Others, Civil Application No. Nai. 208 of 1999 where Justices of Appeal, Kwach, Bosire and Keiuwa, considered a second application for leave to extend time. I have also looked at the decision in James Thuo Ndaguri and Kenya Power & Lighting Company Limited (2005) eKLR where a second application for leave to extend time was considered. In view of these decisions, I am satisfied that a second or third or a further application seeking leave to extend time to file and serve a Notice and Record of Appeal can properly be placed before a single Judge and such an application cannot be res judicata".***

20. We further bring to the attention of the applicants the decision in ***Machakos District Co-operative***

Union Limited vs Philip Nzuki Kiilu, ***[1997] eKLR***; wherein Shah, A.B. J.A. (as he then was) cited with approval the case of ***Jedida Alumasa &3 Others vs S.S. Kesitany,*** ***- Civil Application No Nai. 337 of 1996*** where Bosire, Ag. J.A. (as he then was) said:

> ***"It is now established that a litigant whose appeal has been struck out has the liberty to restart the appellate procedures, provided he is able to come to court promptly for an order extending time, at least to lodge a fresh notice of appeal".***

21. Having considered the instant application and the grounds in support thereof, we are of the view that the applicants have not demonstrated that there is an issue of constitutional interpretation or application that need to be resolved by the Supreme Court; the applicants have also not demonstrated that there is a matter of general public importance that is sufficient to invoke the Supreme Court's appellate jurisdiction. The upshot is that we find that the Notice of Motion application dated 29th December, 2014, has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 17th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

……..……

JUDGE OF APPEAL

J. OTIENO - ODEK

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR