IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. SUP. 6 OF 2014 (UR 4/2014)

IN THE MATER OF THE ESTATE OF LIVINGSTONE MACHARIA GICHERU (DECEASED)

BETWEEN

NJENGA LIVINGSTONE... ……..……...…….. APPLICANT

AND

JOYCE WANJIKU …… 1ST RESPONDENT

PAULINE WANGUI ……. 2ND RESPONDENT

GRACE WANJIRU KAMAU …...…… 3rd RESPONDENT

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

dated 25th November, 2014

in

Civil Appeal No. 26 of 2014)

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RULING OF THE COURT

1. By a Notice of Motion dated 2nd December, 2014, the applicant seeks leave to appeal to the Supreme Court. The applicant seeks *inter alia:-*

a. ***That this Court may be pleased to grant the applicant leave to file appeal to the Supreme Court against the decision of this Court dated 25th November, 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 applicant has arguable grounds of appeal.***

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

2. The application for leave is supported by the affidavit of the applicant and is based on the following grounds reproduced verbatim on the face of the Notice of Motion:

a. ***That the applicant has arguable grounds of appeal to the Supreme Court of Kenya.***

b. ***That the applicant never acknowledged before the trial court at Kerugoya that the 1st and 2nd respondents were surviving widows of the deceased otherwise the applicant should not have gone to far to file appeals against those orders.***

c. ***That this Honourable Court did not consider that the respondent did not comply with the High Court order of Justice Khamoni dated 11th May 2006 where they were to serve the applicant with a replying affidavit but they did not serve.***

d. ***That it is unfair and unconstitutional because out of more than 18 acres together in Gichugu and Muranga, the applicant and his large family use only one acre contrary to the fundamental freedom of rights in the Constitution of Kenya (sic).***

e. ***That the decision reached by this Court and the courts below shall put the applicant and his family in a very serious situation and Article 22 (1) of the Constitution of Kenya has prohibited the violation of future life of Kenyan citizens (sic).***

f. ***That the question of whether the 1st and 2nd respondents are the wives of respective husbands mentioned in the Memorandum of Appeal has not been answered or considered by the High Court or this Court.***

g. ***The question of when the two, 1st and 2nd respondents effectively got married to the deceased under Kikuyu customary law to establish the truth of this matter has not been answered or considered by this Court or the two courts below.***

h. ***That the applicant and his family shall suffer irreparable damages if the stay is not granted.***

i. ***It is not the duty of advocates to distribute the estates and therefore the applicant never instructed any lawyer to say that or another sentiment act that way and that was the reasons why he dropped those advocates to act on his own (sic).***

3. The 1st respondent, Joyce Wanjiku, filed a replying affidavit opposing the application for leave to appeal to the Supreme Court. It is deposed that there is nothing new the applicant intends to raise in the Supreme Court as these grounds of fact and law have been raised before this Court and the two courts below; that the issue of the marital status of the respondents was not an issue in the subordinate court; but when the applicant raised it, the High Court and this Court put it to rest; that after the two courts below put this issue to rest, the same should not form the basis of an appeal to the Supreme Court; that the applicant opposed the Summons for Revocation of Grant when he was served with a replying affidavit and the issue of service was settled before the High Court; that the applicant was dissatisfied with the distribution of the estate of the deceased and instead of filing an appeal, he choose to revoke the grant; that the dispute between the applicant as a son to the deceased and the respondents as widows do not meet the threshold of matters that the Supreme Court should entertain; that issues of fact and law have been ventilated and determined from the subordinate court, the High Court and this Court and there has been no miscarriage of justice; that this Court has no jurisdiction to grant stay of execution at this stage.
4. We have considered the application, the grounds in support thereof, the submissions by the applicant who acted in person and the law. The instant application does not state under which provisions of law it is based. We nevertheless shall consider the application on its merits. As reiterated in various decisions of the Supreme Court, 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)."***

5. The grounds in support of the instant application also do not expressly state whether the applicant intends to invoke the jurisdiction of the Supreme Court on constitutional interpretation or whether an issue of general public importance has arisen in the matter. The applicant alleges that ***Article 22 (1)*** of the ***Constitution*** is in issue where the violation of future life of Kenyan citizens is at stake; it is also alleged that there is a violation of fundamental rights and freedoms of the applicant because out of more than 18 acres in Gichugu and Muranga, the applicant and his large family use only one acre.
6. We have evaluated the grounds in support of the present application to determine whether a matter of general public importance is raised. 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".

7. 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 majority opinion in the aforementioned case 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).***

8. The applicant herein has neither identified nor indicated the general matters of public importance that he intends the Supreme Court to determine. There are no issues or questions that have been framed for determination by the Supreme Court. The applicant simply states that he has an arguable appeal and he should be granted leave to proceed to the Supreme Court. In considering the application before us we bear in mind that the onus falls on the applicant to demonstrate that there are specific matters of general public importance for determination by the Supreme Court; he must demonstrate which 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)***.
9. The factual issues raised by the applicant as to whether the respondents were wives of the deceased are not issues that transcend the circumstances of the case herein nor does it have a bearing on public interest. We are of the considered view that the subordinate court, the High Court and this Court made concurrent findings of fact on the contested issue of whether or not the respondents were wives of the deceased. The said findings of fact cannot be a basis of granting leave to appeal to the Supreme Court.
10. Regarding the alleged violation of ***Article 22 (1)*** of the ***Constitution*** and breach of fundamental rights and freedoms, we have perused the judgment of this Court dated 25th November, 2014. Nowhere in the judgment does it show that constitutional issues were canvassed and considered before this Court and in the two courts below. In the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another, Sup. Ct. Petition No. 3 of 2012,*** the Supreme Court stated:

"… 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)".

11. We are alive to the decision of the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application No. 5 of 2014 [Munya 1],*** where a two- Judge Bench of the Supreme Court held:

"That where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. The import is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application".

12. It is our considered view that the applicant in this application has not demonstrated that this Court in arriving at its decision dated 25th November, 2014, had taken a trajectory of constitutional

interpretation or application. We find that the instant application incorporates no issue involving constitutional interpretation or application under ***Article 163(4) (a)*** of the ***Constitution*** that can warrant an appeal to the Supreme Court.

13. We take note that the applicant also in support of the application deposed that unless stay and the leave sought were granted he would suffer irreparable damages. The applicant has not demonstrated what irreparable damages he would suffer. We surmise that his argument that it is unfair and unconstitutional for more than 18 acres of land to be for the respondents and he lives on one acre to be the basis of this assertion. We find that this allegation of unfairness is not per se a proper basis for granting the leave sought. 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."

14. 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".***

15. Having considered the application and the grounds in support thereof we are of the view that the applicant herein has not demonstrated that there are serious issues of law which transcend the circumstances of the case herein and/or have a bearing on the proper conduct of the administration of justice. We are not satisfied that there is an issue of constitutional interpretation or application that should be considered by the Supreme Court; and neither are we satisfied that a matter of general public importance has been disclosed in this application. The upshot of the foregoing is that we find that the Notice of Motion application dated 2nd 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