



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, MWILU & J. MOHAMMED, J.J.A.**

**CIVIL APPLICATION NO. SUP 3 OF 2013**

**BETWEEN**

**DANIEL NG'ANG'A KIRATU.....APPLICANT**

**AND**

**SAMUEL MBURU KIRATU.....RESPONDENT**

*(An Application for a grant of leave from the Court of Appeal to the Supreme Court of Kenya under Rule 22(1) of the Supreme Court of Kenya Rules from the Judgment of the Court of Appeal at Nakuru delivered on 6<sup>th</sup> November, 2009*

*in*

***CIVIL APPEAL NO. 58 OF 2006)***

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**RULING OF THE COURT**

On 6<sup>th</sup> November 2009, this Court dismissed the appellant's appeal being Civil Appeal No. 58 of 2005 which had been filed at the Court of Appeal in Nakuru. The appeal was challenging the judgment of the High Court (Visram, J as he then was) dated 5<sup>th</sup> May 2003.

The parties herein are brothers and their dispute is in respect of land reference No. **NYANDARUA/MELANGINE/1631**, which according to the applicant is held in trust for him by the respondent. The High Court heard the parties after which it dismissed the applicant's claim. His appeal to this Court was similarly dismissed. Undeterred, the applicant has come back to this Court, seeking by way of the notice of motion filed on 22<sup>nd</sup> February 2013, an order that he be granted leave to move to the Supreme Court on second appeal. His application is supported by his affidavit sworn on 22<sup>nd</sup> February 2013. It is opposed by the respondent by way of the replying affidavit sworn on 4<sup>th</sup> July 2013.

Before the motion could be heard, Mr. Karanja, learned counsel appearing for the respondent, raised a preliminary objection on the ground of lack of jurisdiction by this Court to entertain the application. His submission was that the judgment which the applicant seeks to challenge was delivered before the coming into force of the Constitution of Kenya 2010, and he cannot therefore seek refuge in **Article 163(4)(b) of the Constitution**, which created the right of appeal to the Supreme Court in the situations circumscribed thereunder. Learned counsel also reminded us that this Court is bound by the decisions of the Supreme

Court by dint of **Article 163(7) of the Constitution of Kenya 2010**.

In this regard, counsel was of the view that since the Supreme Court has expressly excluded appeals from matters that predate the **Constitution of Kenya 2010**, then we are bound by the said decisions and we cannot therefore entertain this motion.

Learned counsel cited to us the case of **Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] EKLK** where the Supreme Court dealt with the issue similar to the one now before us.

Asked to comment on the said decision and the others in the respondent's list of authorities, Mrs. Gatheca, learned counsel for the applicant acknowledged the import of the Supreme Court decisions in question, but insisted that her employer and the applicant himself had insisted that she proceeds with the application.

From the outset, it is clear that this application is for dismissal. Indeed, we note that even learned counsel for the applicant having read the **S. K. Macharia** case (supra) is well aware of the law and the legal position taken by the Supreme Court on this issue. We cannot understand why learned counsel chose to proceed with an application knowing clearly that the same was doomed to fail.

We do not need to expend much time on this ruling. We agree that the preliminary objection was well taken and the same falls squarely within the criteria set out in the case of **Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA.**, in that its determination can dispose of the notice of motion at this stage. To settle this issue, all we need to do is to refer to the Supreme Court's decision in the **S. K. Macharia** case (supra) where the Court asked itself:-

***“Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of Appeal before this Court came into existence? Does the appellate jurisdiction of the Court stretch back to the time prior to the promulgation of the***

***Constitution?”***

The Court then answered that question as follows:-

***“We find that a final judgment by the highest court in the land at the time vested certain property rights in, and imposed certain obligations upon the parties to the dispute. We hold that Article 163(4) (b) is forward looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalised by the Court of Appeal before the commencement of the Constitution.”***

We need not say more. The Supreme Court spoke. Ours is to obey as commanded by **Article 163(7) of the Constitution**. It is clear therefore that this application is not destined to see the light of day. The preliminary objection is meritorious. We uphold it with the result that the notice of motion dated 22<sup>nd</sup> February, 2013 is hereby dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2015.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**