IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. SUP 16 OF 2014

BETWEEN

RACHEL WAIRIMU MUKOMA ……..……...… APPLICANT

AND

HANNAH WAMBUI GITHERE ……...…… 1ST RESPONDENT

WANJIKU GITHERE ……..…….. 2ND RESPONDENT

HARUN THIONG'O NJIRI ……..…….. 3RD RESPONDENT

KAGUONGO NJIRI ……..……. 4TH RESPONDENT

JOSEPH NJIRI GITHERE ……..…….. 5TH RESPONDENT

NJIRIRI GITHERE ……..……...… 6TH RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Maraga, Mwilu & Kairu, JJ.A) dated 25th July, 2014

in

Civil Appeal No. 197 of 2011)

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RULING OF THE COURT

1. This is an application for leave to appeal to the Supreme Court. The application is brought pursuant to ***Articles 48 & 163 (4) (b)*** of the Constitution, ***section 3*** of the Appellate Jurisdiction Act and ***Rule 93*** of the Court of Appeal Rules. The applicant seeks *inter alia:-*

> ***(i) A certificate do issue that a matter or matters of general public importance are involved in the applicant's intended appeal to the Supreme Court against the judgment of the Court of Appeal delivered on 25th July, 2014 in Civil Appeal No. 197 of 2011.***

(ii) The applicant be granted leave to appeal to the Supreme Court against the judgment and orders of the Court of Appeal delivered on 25th July, 2014 in Civil Appeal No. 197 of 2011.

(iii) The Honourable Court be pleased to issue an injunction barring the respondents from interfering with the applicant's quiet possession of the suit property pending the intended appeal to the Supreme Court.

2. In January 1988, the respondents, Hannah Wambui Githere, Wanjiku Githere, Harun Thiongo Njiri, Kaguongo Njiri, Joseph Njiri Githere and Njiriri Githere as the 1st to 6th plaintiffs respectively commenced a suit in the High Court by way of originating summons against the appellant's late husband, Mukoma Njiri. In that suit, the respondents sought a declaration that Mukoma Njiri (hereafter referred to as "Mukoma") holds the properties known as Githunguri/ Gathangari/ 1057 (Parcel 1057) and Githunguri/ Gathangari/ T. 105 (Parcel T105) in trust for himself and for the respondents; alternatively a declaration that the 1st respondent is entitled, under ***section 38*** of the Limitation of Actions Act, to be registered as proprietor of 1.5 acres or thereabouts of parcel number 1057; alternatively that the 5th and 6th respondents who are in joint exclusive possession and occupation of parcel T. 105 have jointly acquired the same by adverse possession.

3. The originating summons was supported by an affidavit sworn by the 1st respondent. She deposed that parcel 1057, parcel T.105 and T.106 belonged to Njiri Githere but that during the land adjudication, demarcation and consolidation exercise the same were registered in the name of Mukoma, being the eldest surviving son of Njiri Githere, in trust for the family; and that the 1st to 4th respondents are entitled to inherit those properties.

4. In response, Mukoma filed a replying affidavit sworn on 2nd March, 1988 in which he denied holding the suit properties as a trustee and contended that he is the absolute owner of the properties in respect of which he holds indefeasible titles under ***section 143*** of the Registered Land Act; that the only portion of land he inherited from his father Njiri Githere measures 4 acres; that his brothers, the 3rd and 4th respondents, sold their inheritance rights in that 4 acre property to him and that the 1st respondent's late husband, Githere Njiri, who died in 1952 was not entitled to any share in the 4 acres left by their father.

5. He filed a further affidavit sworn on 28th June, 1988 and reiterated that the 4 acre property was shared between the 4 brothers, with each brother taking one acre; that out of that one acre, each person contributed 0.10 of an acre for their mother Wairimu Njiri referred to as Wamando, and a portion of 0.10 acre was contributed by each person for common land with the result that each brother was left with only 0.80 of an acre.

6. After considering the case on its merit, the learned Judge (Angawa, J.) entered judgment in favour of the respondents by holding that Mukoma was in fact registered as proprietor of number 1057 (measuring 11.6 acres); T.105 and T.106 in trust for the family and that the 5th and 6th respondents had acquired title to T.105 by adverse possession. The judge proceeded to apportion the interest in parcel 1057 as follows:

(a) 5.13 acres of the property to Hannah Wambui Githere and Wanjiku Githere.

(b) 1.10 acres of property to Kaguongo Njiri.

(c) 1.10 acres of the property to Harun Thingo Njiri.

(d) 3.87 acres of the property to Mukoma Njiri.

The court further ordered the 4th respondent to compensate the 1st respondent for 0.13 of an acre in respect of parcel T.106 which was awarded as follows:

(a) 0.125 acres to Kaguongo Njiri, and

(b) 0.125 acres to Hannah Wambui Githere and Wanjiku Githere.

7. Aggrieved by the High Court's decision, the applicant preferred an appeal to this Court in Civil Appeal No. 197 of 2011. After considering the rival submissions and re-evaluation of the evidence, this Court (differently constituted) vide its judgment dated 25th July, 2014 concurred with the High Court's findings that the suit property was held in trust for the respondents.

The Court partially allowed the appeal to the extent, and to the extent only that they set aside the judgment of the High Court given on 13th March, 2007 in relation to the apportionment of parcel number 1057 and substituted the same with an order that parcel number Githunguri/ Gathangari/1057 shall be apportioned as follows:

(a) 1st and 2nd respondents - 1.5 acres + 4 acres = 5.5 acres respectively

(b) Appellant 1.5 acres + 1 acre = 2.5 acres approximately

(c) 3rd respondent 1.5 acres approximately

(d) 4th respondent 1.5 acres approximately.

8. The applicant being dissatisfied with the aforesaid judgment has now returned to this Court with the instant application for a certificate to challenge the same in the Supreme Court.

9. The application is based on the ground that the intended appeal to the Supreme Court involves matters of general public importance, that is, it raises important questions of law as to whether:

(i) A party should not be denied the right to access justice under Article 48 of the Constitution at the appellate level, on account of the fact that the record of evidence of trial court, in relation to it alone, is unintelligible or in a sorry state.

(ii) A party can be denied the right to access justice under Article 48 of the Constitution at the appellate level, having given affidavit evidence at the trial court, on account of the fact that he/ she dies before cross examination.

(iii) Appellate court should exercise the power to re – evaluate the evidence given at the trial court to reach its own independent conclusion.

(iv) What should be the guiding principles to the appellate court when expressing the powers under Section 3 of the Appellate Jurisdiction Act either to remit a matter for re – trial or to re – evaluate the evidence afresh and make its own independent conclusions.

(v) The appellate court can interfere with the decision of the trial court to the advantage of a respondent who did not cross-appeal the decision in terms of rule 93 of the Court of Appeal rules but merely supported the decisions of the trial court.

10. Mr. Ng'ang'a, learned counsel for the applicant, submitted that the matter is of general public importance, raising both matters of fact and law, and urged us to follow the principles set out in the Supreme Court's decision in **Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone - Application No. 4 of 2012.** Mr. Ng'ang'a reiterated the grounds in support of the application. He submitted that the matter affected advocate/client relationship and went beyond the parties.

11. Mr. Ng'ang'a contended that the intended appeal transcends the circumstances of the particular case and has a significant bearing on public interest issues, involving witnesses who are dead and unavailable for cross-examination on their affidavits, and a record of proceedings which is unintelligible and incomprehensible making it difficult for the appellate court to re-evaluate the evidence. He submitted that where the record was incomprehensible and unclear, this Court should follow the principles set out in the Court of Appeal decision in ***Selle and Another vs Associated Motor Boat Company Limited and Others*,** and not be bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or that there were gross inconsistencies in the evidence generally. He urged us to allow the appeal and order a re-trial.

12. Mr. Ogutu, learned counsel for the 1st respondent, in opposing the application, submitted that the intended appeal raised no issues of public importance. The matter involved a family dispute over land, and urged us to end this 27 year old dispute between family members.

13. We have considered the application, the grounds in support thereof, the submissions by counsel, the law and the cases cited. An appeal from this Court to the Supreme Court arises in only two instances as set out in ***Article 163 (4)*** of the Constitution, as follows:

> ***"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)".***

14. In this case, the applicant is seeking leave to appeal to the Supreme Court on the ground that the intended appeal raises matters of public importance. 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 391 and 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."***

15. What constitutes a matter of general public importance? The Supreme Court of Kenya in **Hermanus Philipus Steyn vs Giovanni Gnecchi- Ruscone (supra)** 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 apt 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.***

While adding to the aforementioned governing principles, Ibrahim & Ojwang, SCJJ in the dissenting judgment stated that matters of general importance also include:-

> ***(i) Issues of law of repeated occurrence in the general occurrence of litigation;***
>
> ***(ii) Questions of law that are, as fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or of litigants;***
>
> ***(iii) Questions of law that are destined to continually engage the workings of the judicial organs.***
>
> ***(iv) Questions bearing on the proper conduct of the administration of justice."***

16. The matter was further considered in the Supreme Court's decision in **Malcolm Bell vs Hon. Daniel Toroitich Arap Moi & Another - Application No. 1 of 2013** where the 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."

17. The applicant herein deposed that the intended appeal to the Supreme Court raises issues of general public importance as outlined hereinbefore.

18. Whether or not these issues amount to matters of general public importance falls for our consideration. In considering the application before us we bear in mind that the onus falls on the applicant to demonstrate that the aforementioned 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)***.

19. Without sitting on appeal of this Court's judgment, we are of the view that the law on trust is well settled and there is no uncertainty. We find that the said issue does not transcend the circumstances of the case herein nor does it have a bearing on public interest. We are of the considered view that both the High Court and this Court made concurrent findings on the contested issue of whether or not a trust existed over the suit land. The said findings cannot be a basis of granting leave to appeal to the Supreme Court. In **Malcolm Bell vs Hon. Daniel Toroitich Arap Moi & another** ***(supra)***, the Supreme Court held,

"It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law." Emphasis added.

20. With regard to the issue of right to access justice, under Article 48 of the Constitution, at the appellate level, on account of the fact that the record of evidence of trial court, in relation to it alone, is unintelligible or in an incomprehensible state, we are satisfied that the first appellate court considered the evidence by reviewing the record of appeal, considered the grounds of appeal and the submissions by both counsel for the parties. We reiterate the sentiments of the first appellate court that:

> "Our duty as the first appellate court as summed up by this Court in ***Kenya Ports Authority versus Kuston (Kenya) Limited*** **(2009) 2EA 212** is to "**consider the evidence, evaluate it.. and draw…**
>
> (our) **own conclusions"** bearing in mind that we have **"neither seen nor heard the witnesses" and making "due diligence in that respect."** In the same case this Court went on to say **"the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

Consequently, we cannot consider the same as a ground for granting the leave sought. See **Malcolm Bell vs Hon. Daniel Toroitich Arap Moi & Another** ***(supra).***

21. Again, on the same issue of right to access justice, a witness having given affidavit evidence at the trial court before his death, and before he is cross-examined on the same, we are satisfied that the trial court relied on the evidence of the further affidavit sworn by Mukoma on 28th June, 1988 to

reach her conclusion. The further affidavit contradicted in material respects the contents of his earlier affidavit sworn on 2nd March, 1988. The first appellate court questioned the credibility of Mukoma but nevertheless held that apart from some inconsistencies in the actual area or size of the family land and minor contradictions in their evidence regarding the "price" paid by the 1st

and 2nd respondents towards acquisition of the 4 acres, their evidence that the family land measured 6.2 acres or thereabouts was consistent. This, in our view, has no bearing on public interest, and is a simple family dispute. Having said that, we do not see the need for this court to issue a certificate for leave to appeal to the Supreme Court for orders relating to re-trial.

22. We take note that the applicant also in support of the application deposed that unless leave sought was granted he would suffer great injustice. We find that apprehension of miscarriage of justice is not 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."***

23. On the issue of the injunction 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."***

We find that the injunction sought is tantamount to stay of execution of the judgment of this Court. We are of the view that we have no jurisdiction to grant the said order.

24. 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 public interest or law which transcend the circumstances of the case herein and/or have a bearing on the proper conduct of the administration of justice.

25. The upshot of the foregoing is that we find that the application has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered this 19th day of June, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

……

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