



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (PCA), GITHINJI & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. SUP. 16 OF 2015

BETWEEN

JORETH LIMITED.....APPLICANT

AND

PATRICK MAGU MWANGI KIMUNYU.....RESPONDENT

(Application for certification by the Court of Appeal that a matter of general public importance is involved in an intended appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (Karanja, Mwilu & Kantai, JJ.A)

dated the 9th October 2015

in

Civil Appeal No. 52 of 2012)

RULING OF THE COURT

1. On the 9th October 2015, this Court, (Karanja, Kantai & Mwilu, JJA.) allowed an appeal by the respondent, **Patrick Magu Mwangi Kimunyu** and directed that he be registered as the proprietor of **LR No. 13330/41**, measuring in area about half an acre (**the suit property**), having acquired title to the same by adverse possession. Aggrieved by that judgment the applicant, **Joreth Limited** has now moved this Court under **Article 163(4)** of the **Constitution** for certification that its intended appeal to the Supreme Court involves a matter of general public importance. The respondent does not think so and contends that the intended appeal is a run-of-the-mill dispute with neither ramification nor consequence to anyone else beyond the parties to the dispute.

2. The background to the dispute is not very complicated. At all material times the applicant was the registered proprietor of the suit property. The applicant had sold a parcel of land, of which the suit property was a part, to a land buying company known as **Thome Farmers No. 5 Ltd.**, where the respondent was the holder of one share, having purchased the same from two previous members of the company, Joseph Gichohi Gichuhi and Leah Wanjiku Karanja. By virtue of that share the respondent

contended that he was allocated the suit property, which he took possession of in 1995 and continued in open and peaceful occupation for over 15 years. Clearly the sale of the suit property to Thome Farmers No. 5. Ltd. was not completed, otherwise the registration of the suit property could not have continued in the name of the applicant.

3. In February 2010, the respondent took out originating summons in the High Court seeking to be declared the owner of the suit property by adverse possession under the Limitation of Actions Act. The applicant resisted the summons contending that it had filed a suit in the High Court, namely H.C.C.C No. 6206 of 1992, against trespassers on its property, including Thome Farmers No. 5 Ltd. and that the respondent, having taken possession of the suit property subsequently and for valuable consideration, he could not sustain a claim founded on adverse possession.

Muchelule, J. found in favour of the applicant and dismissed the claim. The respondent appealed to this Court, which as we have already stated, reversed the decision of the High Court and directed that the respondent be registered as the proprietor of the suit property, resulting in the current application.

4. The issues of general public importance on the basis of which certification is sought are whether there can be adverse possession by a shareholder of a land buying company when the company is in possession of land with the permission of the registered owner; whether a suit for recovery of land by the registered owner against the company can stop time running as regards a claim for adverse possession by a shareholder; and whether the registered owner is obliged to file separate claims against the company and its shareholders.

5. Those are the issues, which Mr. James Nyiha, learned counsel for the applicant, agitated when he appeared before us. He submitted that this Court had erred in holding that the applicant's suit against Thome Farmers No. 5 Ltd. did not stop time running against the respondent, yet the applicant could not have sued the respondent as there was no privity of contract between them. Of course there needs to be no privity of contract between a landowner and a trespasser for the landowner to sustain a claim for eviction. This notwithstanding, counsel added that the issues set out hereinabove were of general public importance as they relate to land and affect many Kenyans who are landowners through membership of land buying companies. Counsel further contended that there were conflicting decisions of the Court regarding acquisition of title by adverse possession and when running of time commences, which made the issues matters of general public importance. In support of its application the applicant relied on the decisions of the Supreme Court in ***Steyn v Gnechchi- Ruscone, SC APP No. 4 of 2012*** and ***Telkom Kenya Ltd v John Ochanda, SC APP No. 17 of 2014*** as well as the rulings of this Court in ***Board of Governors, Moi High School, Kabarak & Another v Malcom Bell, CA No's. Nai. 12 & 13 OF 2012*** and ***Teachers Service Commission v Simon Kamau & 19 Others, CA No. Sup. 18 of 2013.***

6. The respondent, represented by Mr. Stanley King'ara, learned counsel, took a different view of the matter, submitting that beyond its belief that the judgment of the Court was wrong, the applicant had not demonstrated any matter of general public importance in its intended appeal to the Supreme Court. The issues that the applicant intended to canvass before the Supreme Court, it was further contended, did not arise in either the trial court or the appellate court; were not the subject of determinations by those courts; and therefore could not form the basis of an appeal to the Supreme Court. Lastly, it was submitted that the issues identified by the applicant affected only the applicant and the respondent and did not raise any matter the determination of which would affect the public in general. In support of those propositions the respondent relied on the decisions of this Court in ***Rachel Wairimu Mukoma v Hannah Wambui Githerere & 5 Others, C.A No. Sup 16 of 2014*** and ***Kenya Bankers Association v Rose Florence Wanjiku & Another, C.A No. Sup 21 OF 2013.***

7. We have duly considered the application, the submissions by learned counsel, the authorities cited and the law. It is axiomatic that in an appeal to the Supreme Court, the decisive factor is not whether the decision of this Court is perceived by any of the parties to be right or wrong, but rather whether the intended appeal raises a matter of general public importance. As this Court stated in ***Hermunus Philipus Styne v Giovanni Gnechchi-Ruscone, CA No. Sup. 4 of 2012***, which was subsequently upheld by the Supreme Court:

“The test for granting certification to appeal to the Supreme Court as a Court of 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... 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.”

8. What then constitutes a matter of general public importance deserving of certification to the Supreme Court? Decisions, both of the Supreme Court and this Court, abound and it is not necessary to delve into a multiplicity of them. In ***Styne v Gneccchi-Rusccone (supra)*** for example, the Supreme Court held among other things, that a matter of general public importance for purposes of **Article 163(4) (b)** of the Constitution is one involving an issue the determination of which transcends the circumstances of the particular case with ***significant bearing*** on the public interest. On the same vein, where the matter involves a point of law, the point must be ***substantial*** so that its determination will have significant bearing of the public interest.

9. Other pertinent considerations to be borne in mind are that mere apprehension that a miscarriage of justice will be occasioned if a party is not allowed to appeal to the Supreme Court is not a proper basis for certification unless the matter is within the terms of **Article 163(4) (b)** of the Constitution; that determinations of fact in contests between parties are not by and of themselves a proper basis for certification; that only ***exceptional cases*** that raise ***cardinal issues of law*** or of ***jurisprudential moment*** deserve certification; 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; 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 ***Peter Oduor Ngonge v Hon. Francis Ole Kaparo & 5 Others, SC Petition No. 2 of 2012***, and ***Bell v Arap Moi & Another, SC APP No. 1 of 2013***).

10. We agree with the respondent that substantially the applicant’s grouse in this matter is what it considers to be wrong conclusions of fact and law by this Court. That in itself is not a ground for certification that an appeal deserves the attention of the apex court. The applicant also contends that there are issues of general public importance involved regarding adverse possession and its application to land buying companies and their shareholders.

11. On the facts of the appeal before it, this Court found that the respondent’s occupation of the suit property was not with the permission or consent of the applicant and that the same was adverse to the applicant’s title. The court further found that H.C.C.C. NO. 6206 of 1992 was against Thome Farmers No. 5 Ltd. and others and not against the respondent and therefore it did not disrupt the respondent’s peaceful occupation of the suit property. On the facts of the appeal, the Court found that it was the respondent’s occupation of the suit property which was adverse to the applicant’s title, rather than of Thome Farmers No. 5 Ltd. The decision of the Supreme Court in ***Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell (supra)***, bears great relevance and is virtually a touchstone for this application. In that matter this Court certified an appeal as one involving matters of general public importance regarding, among others, issues of adverse possession, on the basis that there was no clarity in the law. On an application to the Supreme Court for review of the certification under **Article 163(5)** of the Constitution, the Supreme Court reversed the certification and held among other things, that this Court has the power and competence to canvass the legal principles and to settle the technicality of the law for the time being. The Court concluded that certification based on that premise falls outside the profile of “matters of general public importance”. Specifically on issues of adverse possession, the Court states that the question of adverse possession is ***“a subject sufficiently settled in law as to lend itself to normal interpretation and disposal by superior Courts other than the Supreme Court”***. Incidentally in this application the applicant opted to rely on the decision of this Court granting a certificate rather than that of the Supreme Court reversing the certification.

12. Having carefully considered the applicant's Motion dated the 23rd October, 2015 we find that there is no matter of general public importance involved in the applicant's intended appeal to the Supreme Court. The same is unmeritorious and is accordingly hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 11th day of December, 2015

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

E. M. GITHINJI

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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