



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. SUP 20 OF 2014

BETWEEN

PETER KAMAU IKIGU.....APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED.....1ST RESPONDENT

PETERSON OGINO ONGARO.....2ND RESPONDENT

(An application for leave to appeal to the Supreme Court from the Orders of the

Court of Appeal (Kiage, M'Inoti & Murgor, JJ.A) dated 7th November, 2014

in

Civil Appl. No. 306 of 2013)

RULING OF THE COURT

1. The applicant herein charged L.R. No. 2/653 (suit premises) as security for a loan advanced by the 1st respondent to Kanconsult Ltd. Following default in repayment of the loan, the 1st respondent exercised its statutory power of sale and sold the suit premises to the 2nd respondent. Consequently, the applicant filed suit in the High Court being H.C.C.C No. 719 of 2003 challenging the sale and seeking *inter alia* a declaration that the sale was illegal, null and void. The trial court by its judgment dated 27th February, 2013 dismissed the suit thereby instigating Civil Appeal No. 719 of 2003 which is still pending before this Court.

2. Subsequently, the applicant by a Motion under **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules) sought three substantive prayers. The first was an order restraining the 2nd respondent from selling, mortgaging, leasing or dealing with the suit premises pending the hearing and determination of the appeal. The second was an order of prohibition to prohibit the Registrar of Titles from registering any dealings as regards the suit premises pending the determination of the appeal. Lastly, an order for stay of execution of the respondents' bill of costs pending the hearing and determination of the above mentioned appeal. At the hearing of the application the first two prayers had been overtaken by events and only the

last was subsisting since the suit premises had been transferred by the 2nd respondent to a third party who had not been enjoined as a party. This Court considered the merits of the application and by its ruling delivered on 7th November, 2014 dismissed the same with costs.

3. Aggrieved by that decision the applicant has moved this Court by a Motion anchored on **Articles 159 (2) (a), (d) (d) & (e), 163 (4) (b), 259 (1)** of the Constitution and **Sections 15 (1) & 16 (1)** of the Supreme Court Act seeking leave to appeal against this Court's ruling to the Supreme Court. We gather from the application that the applicant's contention is that the issue in the intended appeal is one of general importance to a class of litigants, that is, land owners who offer their properties as security; the issues regarding imposters and land cartels and how the law should deal with them which are at the center of the intended appeal ought to be settled as a matter of law.

4. In support of the application, the applicant deposed that the application under **Rule 5 (2) (b)** of the Rules raised various serious issues of great public importance involving land cartels, imposters and how they defraud and steal from unsuspecting land owners and investors. One of the serious issues which were to be interrogated by the court was the identity, character and integrity of the 2nd respondent which is critical more particularly given the manner in which he dealt with the suit premises. Further, the intended appeal seeks the establishment of a precedent of general application with respect to land cartels.

5. At the hearing of the application, Mr. W. L. Khalwale appeared for the applicant, while there was no appearance for the respondents. We also note that neither of the respondents filed a replying affidavit. Mr. Khalwale submitted that the case involved land which was a sensitive issue and urged us to allow the application.

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

“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).”

In this case the applicant has brought the application under (b) above hence the first issue to consider is whether the intended appeal involves a matter of general public importance.

7. As was held by this Court in ***Joseph Amisi Omukanda -vs- The Independent Elections & Boundaries Commission & 2 Others – Civil Application No. Nai. 114 of 2014*** the requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance should engage the Supreme Court, whose role may not be relegated to that of correcting errors in the application of settled law, even where they are shown to exist. The applicant is therefore obliged to satisfy us that the issue intended to be canvassed before the Supreme Court transcends the circumstances of the case and has a significant bearing on the public interest and that where the issue involved is a point of law, it is a substantial one, the determination of which will have a significant bearing on the public interest. See ***Hermanus Phillipus Steyn -vs- Giovanni Gneccchi-Ruscone SC App. No. 4 of 2012.***

8. The Supreme Court's view is that categories constituting matters of general public importance are not closed and will vary with the circumstances of each case. The Supreme Court in the Hermanus case went further to lay down guiding principles for determining whether a matter was one of general public importance. The Supreme Court in ***P. M. Wamae & Co. Advocates -vs- Hon. Ntoitha M'mithiaru – SC App. No. 48 of 2014*** expressed that key among those principles is, that the issue to be canvassed on appeal transcends the circumstances of the particular case and has a significant bearing on the public interest.

9. In this case, the applicant contends that the application which was dismissed by this Court raised issues of public importance namely, how the law should deal with imposters and land cartels. The issues according to the applicant, transcend the circumstances of the particular case and their determination was of importance to land owners who offer their properties as securities.

10. We cannot help but note that the application which is the subject of the intended appeal to the Supreme Court sought interlocutory orders under **Rule 5 (2) (b)** of the Rules pending the determination of the appeal before this Court. That being the case this Court did not take into consideration the merits of the appeal and was only concerned with whether the applicant had demonstrated that he was entitled to the orders sought. We note that this Court neither made any determination on imposters, land cartels or even the appropriateness of the dealings over the suit premises nor were these the issues before it. These were issues that could only be dealt with in the appeal which is pending before this Court. In **Bwana Mohamed Bwana -vs- Bonaya & 2 Others - SC App. No. 20 of 2014** the Supreme Court held,

“We also note that this matter was not heard on its merits by the Court of Appeal. We have pronounced ourselves on the issue of this Court’s jurisdiction in Peter Oduor Ngoge versus Hon. Ole Kaparo & 5 Others, Supreme Court Petition 2 of 2012 at paragraph 29 and 30 where we stated that:

[29]...The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.

[30] In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be 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 only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

Consequently, if we were to entertain this application and subsequently hear the intended appeal we would, in effect be usurping the jurisdiction of the Court of Appeal. It would also be tantamount to hearing an appeal that has not gone through the chain of Courts in the Constitutional set-up. This will not do.”

Therefore, the issues raised by the applicant can only be dealt with at the appeal, and not at this interlocutory stage, and cannot form the basis of the certification sought. See **P. M. Wamae & Co. Advocates -vs- Hon. Ntoitha M’mithiaru** (supra).

11. Further, the Court in dismissing the application exercised its discretionary power and such discretion cannot be a ground for certification. The Supreme Court in **Daniel Kimani Njihia -vs- Francis Mwangi Kimani & Another**, SC App No. 3 of 2014 observed;

“[T]his Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.” Emphasis ours.

12. We find that the alleged issues of public importance as set out by the applicant neither transcend the circumstances of the case herein nor do they have a bearing on the public interest. The applicant has also not demonstrated the existence of serious issues of law, arising from past contradictory precedents that require resolution by the Supreme Court. Consequently, we find that the application lacks merit and it is

hereby dismissed. We make no order as to costs as the respondents neither appeared before us, nor filed any depositions in reply.

Dated and Delivered in Nairobi this 11th day of December, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR