



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPLICATION SUP. NO. 2 OF 2015**

**BETWEEN**

**WILSON NGATIA KARUNGARU (Suing as the**

**Personal Representative of the estate of GEOFFREY**

**KARUNGARU KABUA) ..... 1<sup>ST</sup> APPLICANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MBAU SAW MILLS LIMITED ..... RESPONDENT**

*(An application for leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal (Waki, Nambuye & Kiage, JJ.A) dated 20<sup>th</sup> May, 2015*

**In**

**Civil Appeal No. 54 of 2014)**

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**RULING OF THE COURT**

This Court seized with an appeal relating to the ownership of Plot No. Karatina Block 1/639 (the suit property) delivered its judgment on 20<sup>th</sup> May, 2015. The main issue was who between the 1<sup>st</sup> applicant and the respondent was entitled to the suit property. This Court set aside the High Court's decision and entered judgment in favour of the respondent.

The applicant has now returned to this Court by way of a Notice of Motion invoking **Article 163(4)(b)** of the **Constitution, Section 15** of the **Supreme Court Act, Regulation 30** of the **Supreme Court Regulations, Sections 3A & 3B** of the **Appellate Jurisdiction Act, Rule 5(2)(b) & 42** of the **Court of Appeal Rules** as a basis for seeking six orders, one of which was overtaken by events before the hearing of the application. The five remaining prayers are as follows: -

- i. ***This Honourable Court be pleased to certify that the proposed appeal raises questions of general public interest and importance;***

- ii. ***This Honourable Court be pleased to certify that the applicant may lodge an appeal to the Supreme Court against the judgment and orders of the Court of Appeal at Nyeri in Civil Appeal No. 54 of 2014 (Mbau Saw Mills –vs- The Honourable Attorney General & Wilson N. Karungaru) delivered on 20<sup>th</sup> May, 2015.***
- iii. ***The Honourable Court be pleased to issue directions as to the period of time within which the Memorandum of Appeal ought to be filled and served including other directions regarding the filling and service of pleadings and any interlocutory matters;***
- iv. ***Pending the hearing and determination of the proposed substantive appeal at the Supreme Court this Honourable Court be pleased to issue an order of stay against execution of the judgment and orders of the Court of Appeal made on 20<sup>th</sup> May, 2015;***
- v. ***Costs of the application be provided for.***

The main grounds upon which the application are predicated is that the intended appeal raises issues of general public importance and that unless stay is granted the intended appeal would be rendered nugatory.

The background to this application is that the suit property was originally meant for a lorry depot but was subsequently allotted to one Joseph K. Mugambi by the District Commissioner, Nyeri vide an allotment letter dated 21<sup>st</sup> October, 1971. Joseph K. Mugambi sold his interest in the suit property to the respondent and on 26<sup>th</sup> April, 1985 the transfer was confirmed and adopted by the full Council of Karatina. Subsequently, it's the Town Clerk of Karatina Town Council who requested the Commissioner of Lands to effect the transfer. By an allotment letter dated 30<sup>th</sup> July, 1992 the Commissioner of Lands allocated the suit property to the 1<sup>st</sup> applicant and on 4<sup>th</sup> February, 1993 a Certificate of Lease was issued in his favour.

Following the double allocation of the suit property, the respondent filed suit seeking *inter alia* a declaration that the allotment to the 1<sup>st</sup> applicant was illegal and unconstitutional, cancellation of the 1<sup>st</sup> applicant's title and registration of the title in his favour. The 1<sup>st</sup> applicant denied the allegations by the respondent and maintained he was the proprietor of the suit property; his title was indefeasible and that the respondent had no proprietary interest over the suit property.

The High Court held that Joseph K. Mugambi neither communicated his acceptance of the allocation nor complied with the conditions set out in the allotment letter which included payment of a specified amount of money hence he never acquired any transferable interest over the suit property that he could pass to the respondent. This Court on appeal set aside that decision as earlier stated.

The applicant in his supporting affidavit deposed he was aggrieved with the decision of this Court regarding the validity or otherwise of the legal process of allotment and acquisition of title (if at all) to the said Joseph Mugambi and the jurisdiction of this Court on admission and consideration of evidence on allegations of fraud and misrepresentation. He set out the following as issues of general public importance which would be raised in the intended appeal for consideration and determination by the Supreme Court;

- ***Question on superiority of certificate of title over a letter of allotment in the instance of an alleged double allocation and locus standi of parties asserting competing interest thereunder;***
- ***Whether the Government (as the head lessor) through the Commissioner of Lands and an allottee enjoy any additional relationship other than a contractual one the breach of which can only be remedied by way of damages;***
- ***Whether a purported transfer of a demonstrably unaccepted allotment can be sanctioned and legitimized by a local authority (devolved unit) in violation of express terms in a letter of allotment and in disregard of the Commissioner of Lands consent and whether such a transfer can confer any recognized property rights;***

- ***Effect on proprietorship of allotted land viz payments mandatorily required by the Government as prerequisites;***
- ***Whether the jurisdiction of this Court could extend to review of unsubstantiated allegations of fraud and misrepresentation to defeat the ratio decidendi in Re Dr. Joseph M.K. Ngo’k –vs- Moiwo Ole Keiuwa & 4 others- Civil Application No. 60 of 1997 the same never having been urged and/or otherwise propounded by the state or the appellant;***
- ***Whether a court can rely on uncorroborated, untested, unchallenged and irregularly adduced allegation in a letter to deprive an individual of a constitutionally and statutorily guaranteed right to property;***
- ***Whether this Court can override and disregard the settled principle that ex turpi causa non oritur action and if so, under what circumstances;***
- ***There was an apparent misdirection and misapplication of evidentiary rules in violation of the Evidence Act, Chapter 80 Laws of Kenya.***

The applicant deposed that the question of proper allocation and management of public land is a concern of the greater public and as such this Court ought to grant the certification sought. According to him, this Court’s decision set erroneous principles which ought to be reviewed by the Supreme Court.

In opposition to the application, Mr. Eliud Matu Wamae, one of the respondent’s directors swore a replying affidavit. He deposed that the application was grossly misconceived, incompetent and misleading and that the applicant’s intended appeal did not raise any issue of general public importance warranting consideration by the Supreme Court. The issues as set out by the applicant do not transcend the circumstances of the case at hand and involve facts which have been dealt with comprehensively by this Court. He further deposed that the application was an attempt by the applicant to deny the respondent its right to enjoy the fruits of this Court’s judgment.

Mr. Wilfred O. Lusi, learned counsel for the 1<sup>st</sup> applicant, submitted that the applicant acknowledged that litigation must come to an end but the same has to be a just end. Counsel stated that the applicant was not contesting errors of fact or law. Rather, he was seeking to place before the Supreme Court questions of general public importance. He submitted that the issues of general public importance as set out herein above arose from the judgment of this Court and they transcend the circumstances of this particular case. Mr. Lusi was of the emphatic view that some of those issues include the determination of: question of allotment and alienation of public land; jurisdiction and discretion of this Court under **Rule 29(1)(a)** of the **Court of Appeal Rules** as read with **Section 35** of the **Evidence Act**; relationship of National Government versus devolved government in dealing with public land; and discretion of this Court to make a finding vis-à-vis the principle that a cause of action cannot be founded on an illegality.

Elaborating on those issues, Mr. Lusi submitted that the Supreme Court ought to make a pronouncement on **Sections 67 & 68** of the **Evidence Act** which relate to proof of documents with regard to proof of payment made to the Government and whether a delegated authority could vary express conditions delegated to it. He also submitted that the applicant was seeking stay of execution in the event this Court granted leave to appeal to the Supreme Court.

Mr. George M. Gori, learned counsel for the respondent, in opposing the application submitted that none of the issues as raised by the applicant met the threshold of general public importance. He argued that there was no conflict of title since the 1<sup>st</sup> applicant’s title which was erroneously given was recalled hence the title was illegal and therefore there was nothing to take to the Supreme Court. According to him, Karatina Town Council acted within its mandate and there was nothing to show that the money paid by Mr. Mugambi was never received by the Central Government. He urged this Court to dismiss the application.

The two instances where an appeal can arise from this Court to the Supreme Court are set out in **Article**

163(4) of the *Constitution* thus;

***“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).”***

The applicant has moved us under (b) above contending that the intended appeal involves a matter of general public importance.

This Court in **JOSEPH AMISI OMUKANDA –vs- THE INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION & 2 OTHERS** – Civil Application No. Nai. 114 of 2014 (2014) eKLR held,

***“It has been consistently held by the Supreme Court and this Court that in applications for certification under Article 163(4) (b) of the Constitution, only exceptional cases which raise “cardinal issues of law or of jurisprudential moment” will deserve the attention of the Supreme Court. (See PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012 and KOINANGE INVESTMENTS & DEVELOPMENT LTD VS ROBERT NELSON NGETHE, C.A No 15 of 2012). The reason behind that approach is that the Supreme Court was never intended to serve as an additional tier for all and sundry appeals from this Court. On the contrary, the requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance engaged 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 is one, the determination of which 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, the point of law involved is a substantial one, the determination of which will have a significant bearing on the public interest. (See HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, (SC App. NO 4 OF 2012).”***

An intending appellant is obliged to demonstrate that the matter in question carries specific elements of real public interest concern. The Supreme Court in **HERMANUS PHILIPUS STEYN –vs- GIOVANNI GNECCHI- RUSCONE** - Application No. 4 of 2012 (2013) eKLR 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 of that Court proceeded to state 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.”*

It is the applicant’s contention that the Supreme Court ought to consider and make a finding on this Court’s jurisdiction and discretion under **Rule 29(1) (a)** of this Court’s **Rules** and **Sections 35, 67 & 68** of the **Evidence Act**. Without sitting on appeal over our own judgment, the above provisions relate to this Court’s jurisdiction as a first appellate court, admissibility of documentary evidence as to facts in issue and proof of documents respectively which, in our view, are well settled and admitting to no uncertainty. The findings of this Court on the same cannot therefore be a basis of granting the certification the applicant craves. In **MALCOM BELL –vs- HON. DANIEL TOROTICH ARAP MOI & ANOTHER-** Application No. 1 Of 2013 (2013) eKLR, 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***

As regards the superiority and/or sanctity of a certificate of title over a letter of allotment, the law is clear in respect of sanctity of title of land and the circumstances under which title can be challenged. We also find that the law is settled in respect of *locus standi*. We are quite clear that those issues do not raise matters of general public importance.

The applicant argued that the Supreme Court ought to pronounce itself on whether this Court could consider unsubstantiated allegations of fraud and misrepresentation the same never having been urged by the respondent herein. Again we find that the law is settled on issues which this Court can entertain on a first appeal and there is no novelty there constituting a matter of general public importance.

The intended appeal revolves around the 1<sup>st</sup> applicant’s perception that this Court erred in finding that the respondent was entitled to the suit property and ordering cancellation of the 1<sup>st</sup> applicant’s title. This Court in **KENYA BANKERS ASSOCIATION-VS- ROSE FLORENCE WANJIRU & 2 OTHERS –** Civil Application Sup. No. 21 of 2013 (2014) eKLR held,

***“The law regarding the jurisdiction of this Court under Article 163 (4) (b) aforesaid is now firmly settled by a long line of decisions emanating from the Supreme Court and from this Court. That jurisdiction does not include a consideration whether the Court was in error in making the decision sought to be challenged on appeal to the Supreme Court.” Emphasis added.***

Furthermore, as held by the Supreme Court in **Hermanus case** 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.

We find that the alleged issues of public importance as set out by the applicant hardly transcend the circumstances of the case herein. They also do not 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 or matters of unique jurisprudential moment that require resolution by the Supreme Court.

Lastly, on the issue of stay, this Court in **DICKSON MURICHO MURIUKI –VS- TIMOTHY KAGONDU MURIUKI-** Civil Application No. 21 of 2013 (2014) eKLR held ,

***“It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after the judgment of the Court of Appeal is the Supreme Court; and only when leave or certification has been granted.”***

We respectfully agree that this Court has no power to issue an order of stay of execution once it has passed judgment as it only exercises the restricted jurisdiction of considering applications for certification to the Supreme Court as provided under **Article 163(4)(b)** of the **Constitution**.

In the result, we find that the application herein is devoid of merit and we hereby dismiss it with costs.

***Dated and delivered in Nyeri this 2<sup>nd</sup> day of December, 2015.***

***P. WAKI***

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***JUDGE OF APPEAL***

***R.N. NAMBUYE***

.....

***JUDGE OF APPEAL***

***P.O. KIAGE***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**