



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPLICATION NO. NYR. 28 OF 2013**

**BETWEEN**

**LOISE KAGUU MUNGE ..... APPLICANT**

**AND**

**WAKARIA MBOI NJARAMWE ..... 1<sup>ST</sup> RESEPONDENT**

**NICHOLAS BUNDI MBOI ..... 2<sup>ND</sup> RESPONDENT**

*( An application for leave to appeal to the Supreme Court from the judgment of the Court of Appeal  
(Koome, M'Inoti & Odek, JJ.A) dated 18<sup>th</sup> July, 2013*

**in**

**CIVIL APPEAL NO. 220 OF 2010)**

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**RULING OF THE COURT**

1. Before us is a Notice of Motion application brought pursuant to **Article 163 (4)** of the **Constitution, Sections 3A & 3B** of the **Appellate Jurisdiction Act**, Chapter 9, Laws of Kenya and **Rule 42** of the **Court of Appeal Rules** wherein the applicant seeks the following orders:-
  - **The Honourable Court be pleased to grant an order for stay of proceedings and execution of the judgment in Nyeri Civil Appeal No. 220 of 2010 and Nyeri H.C.C.C No. 151 of 2001 (O.S) pending the hearing and determination of the appeal against the judgment in Civil Appeal No. 220 of 2010.**
  - **The Honourable Court be pleased to certify that the proposed appeal from the judgment of this Court delivered on 18<sup>th</sup> July, 2013 in Civil Appeal No. 220 of 2010 raises points of law of general public importance in regard to the principles laid down on adverse possession necessitating adjudication before the Supreme Court.**
  - **The Honourable Court be pleased to certify, in addition, that there is a manifest uncertainty in the law, arising from contradictory precedents that necessitates rectification by the Supreme Court.**

- ***The Honourable Court be pleased to issue directions in regard to the lodging of the requisite Notice of Appeal pursuant to the Supreme Court Rules.***
2. The genesis of this application is that respondents commenced a suit by way of an Originating Summons in the High Court against one John Murithii Kiragu ( deceased) who was substituted by the applicant. The respondents sought *inter alia* a declaration that they had acquired a portion of 2.5 acres from L.R No. Mutira/Kirunda/390 (suit property) registered in the deceased's name; the portion of 2.5 acres be excised from the suit property and registered in the respondents names. It was the respondents contention that they had occupied the said portion for a continuous uninterrupted period of 12 years without the consent of the deceased. On the other hand, the applicant maintained the deceased purchased the suit property from one Muchiri Mwega and was registered as the proprietor in 1977; subsequently, in 1978 the deceased gave the respondents possession of one acre of the suit property after they were evicted from the land in which they had previously settled in. Therefore, based on the fact that the respondents possession was with the consent of the registered proprietor a claim of adverse possession did not arise. The trial court ( Makhandia, J.) vide a judgment dated 25<sup>th</sup> January, 2010 held that the respondents' occupation of the suit land was with the deceased's consent and consequently dismissed the claim of adverse possession.
  3. Aggrieved with the decision of the trial court the respondents filed an appeal in this Court. The main ground of appeal was that the trial Judge erred by finding that the respondents' occupation of the suit property was with the consent of the deceased, yet in actual fact the respondents' occupation commenced before the deceased purchased the suit property. It was the respondents' contention that they occupied the suit property with the consent of Muchiri Mwega (the original proprietor). In opposing the appeal, the applicant's contention was that the respondents occupied the suit property from 1978 with the consent of the deceased who was the registered proprietor and a claim for adverse possession could not be raised by the respondents.
  4. This Court in allowing the appeal in its judgment dated 18<sup>th</sup> July, 2013 held that firstly, the testimonies by the respondents as to the dates when their occupation commenced were conflicting and the applicant also contradicted herself as to the date when the respondents commenced occupation. Secondly, from the affidavits sworn by Muchiri Mwega and the deceased in RMCC No. 1807 of 1975 it was clear that the respondents were in occupation of the suit property in the year 1975 before the deceased was registered as the proprietor; the respondents' occupation was with the consent of Muchiri Mwega and not the deceased. Thirdly, the respondents had been in continuous uninterrupted occupation of the suit property for a period of 12 years from the time the deceased was registered as the proprietor in the year 1977. Consequently, the respondents proved their claim to the portion of the suit land through adverse possession. It is the said decision by this Court that the applicant desires to appeal against in the Supreme Court.
  5. The grounds upon which the applicant relies on in support of her application are that substantial miscarriage of justice has been occasioned and/or is highly likely to occur as a result of the execution of the impugned judgment of this Court which needs to be rectified. The intended appeal provides a jurisprudential opportunity for the Supreme Court to correct a state of uncertainty of the law, arising from contradictory precedents on the issue of adverse possession and that the intended appeal is arguable.
  6. Mr. Mugambi, learned counsel for the applicant, in relying on the Supreme Court's decision in ***S.A.J -vs- A.O.G & 2 Others - Petition No. 1 of 2013*** submitted that intended appeal to the Supreme Court raises points of general public importance in that there are contradictory decisions on the issue of adverse possession which makes the law therein uncertain. He argued that the Supreme Court's intervention was necessary to clear the uncertainty.
  7. Mr. Mugambi stated that if the judgment of this Court was enforced it would lead to disproportionate and substantial injustice to the deceased's Estate. This is because the deceased's Estate mainly comprised of the suit land measuring 5 acres which was left to be inherited by his five children as beneficiaries. He maintained that this Court erred in re-evaluation of the evidence tendered at the trial court by relying on affidavits filed in RMCC No. 1807 of 1975. According to Mr. Mugambi, this Court in considering the claim of adverse possession went contrary to established case law. Mr. Mugambi urged us to grant an order of stay of execution of this Court's judgment under **Sections 3A & 3B** of the **Appellate Jurisdiction Act**.

8. In opposing the application, Mr. Wahome, learned counsel for the respondents, submitted that the prayers in the application were omnibus in nature; the applicant had placed the cart before the horse by seeking stay of execution of the impugned judgment before being granted leave to file an appeal in the Supreme Court. He argued that the applicant did not outline what issues were of general public importance and needed to be addressed by the Supreme Court. He maintained that evidence which was not produced before the trial court could not constitute a matter of public importance; the application was tantamount to seeking this Court to sit on appeal of its own judgment. On the issue of stay of execution, Mr. Wahome argued that once this Court delivered its judgment it became *functus officio* and could not entertain an application for stay of execution; **Rule 5 (2) (b)** of the Rules was only applicable where an appeal is pending before this Court.
9. We have considered the application, the grounds in support thereof, affidavits sworn by the parties herein, able submissions of both the applicant and the respondent's counsel and the law. **Article 164** of the *Constitution* provides as follows,

***'(4) Appeals shall lie from the Court of Appeal to the Supreme Court-***

.....

***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).'*** (Emphasis added)

It is this provision that the applicant has invoked in seeking leave to appeal to the Supreme Court. Therefore, what we are being called upon to determine in considering the application is whether the intended appeal raises issue(s) of general public importance.

10. The test for granting leave to appeal to the Supreme Court is different from the test for granting leave to appeal to this Court. See this Court's decision in ***Gauku Mohamed -vs- Gitonga Mohamed – Civil Application Sup. No. 18 of 2012***. In ***Hermanus Philipus Styen –vs- Giovanni Gnechi- Ruscone -Civil Application No. Nai. Sup 4 of 2012***, this Court held as follows:-

***'The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for 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 & ano* (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. The role of a Supreme Court was succinctly stated by the House of Lords in *R-vs- Secretary of State Exp. Eastaway* (Lord Bingham) (2001) 1 ALL ER 27.'***

See also this Court's decision in ***Koinage Investment & Development Ltd. –vs- Robert Nelson Ngethe – Civil Application No. Sup 15 of 2012*** and the Supreme Court's decision in ***Peter Odour Ngoge –vs- Attorney General- Petition No. 2 of 2012***.

11. Neither the *Constitution* nor the *Supreme Court Act* defines what constitutes a matter of general public importance. The Supreme Court in ***Hermanus Philipus Styen –vs- Giovanni Gnechi- Ruscone- Application No. 4 of 2012*** held that a matter of general public importance that is envisaged under Article 163(4)(b) of the Constitution could be a matter of law or fact provided that impacts and consequences are substantial, broad based, transcending the litigation interests of the parties and have bearing upon the public interest. Since the categories constituting public interest are not closed, the burden falls on the applicant herein to demonstrate that the intended appeal to the Supreme Court has matter(s) of real public interest.
12. The Supreme Court in ***Hermanus Philipus Styen –vs- Giovanni Gnechi- Ruscone (supra)*** set

out the following broad principles to be taken into account when both this Court and the Supreme Court are considering whether an intended appeal to the Supreme Court raises a matter of general public importance,

*‘In summary, we would state the governing principles as follows:-*

- *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 is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;*
- *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;*
- *Such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;*
- *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;*
- *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 still fall within the terms of Article 163(4)(b) of the Constitution;*
- *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;*
- *Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.’*

13. Based on the foregoing, we are of the considered view that the intended appeal by the applicant to the Supreme Court does not raise matter(s) of general public importance. This is because the dispute revolved around a claim of adverse possession which in our view does not transcend the particular case into the public realm. This Court in its duty as the first appellate court re-evaluated the evidence and made findings of facts on the evidentiary matters that were in controversy which by themselves cannot be a basis for granting the leave sought. This Court was faced with contradictions in the testimony of the parties herein as to the exact date the respondent commenced occupation of the suit land and made a finding on the same. Further as was 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.

14. In our view the issues set out by the applicant in her application are not issues of public importance which require to be determined by the Supreme Court. We are also of the view that the applicant herein has not demonstrated that there are serious issues of law, arising from any past decisions contradicting each other, that require resolution by the Supreme Court. The law as it stands in respect of claims of adverse possession is clear and there is no uncertainty in this area. Therefore, the leave to appeal to the Supreme Court cannot be granted.

15. On the issue of the order of stay of execution this Court in its decision in *Dickson Muricho Muriuki-vs- Timothy Kagonda Muriuki- Civil Application No. 21 of 2013* expressed itself as follows:-

***“ 15. We are of the considered view that the jurisdiction exercised by this Court under Rule 5(2)(b) in granting stay of execution is not applicable in this current application....***

***16. From the foregoing it is quite clear as pointed out in this Court's decision in Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011 that the true nature of an application under Rule 5(2)(b) is an interlocutory application in an appeal pending before this Court;...***

***17. Rule 5 (2)(b) confers power to this Court to hear interlocutory applications before the main appeal that is pending before the Court is heard and determined. The Rule does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgement. ....***

***23. 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.”***

Based on the foregoing, we find that this Court has no power to issue an order of stay of execution once it has passed judgment. The 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**.

16. The upshot of the foregoing is that the application dated 14<sup>th</sup> October, 2013 lacks merit and is dismissed with costs to the respondents.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of January, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J.OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**