IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, PCA, MARAGA & OUKO, JJ.A.)

CIVIL APPLICATION NO. SUP 10 OF 2013

BETWEEN

DANIEL KIMANI NJIHIA…….……..……..……. APPLICANT

AND

FRANCIS MWANGI KIMANI…..…….....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR – THIKA..…....……2ND RESPONDENT

(An application to grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya from the ruling of the Court of Appeal at Nairobi (Visram, Makhandia & Ole Kantai, JJA) dated 12th April, 2013

in

Civil Appeal No 146 of 2010)

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RULING OF THE COURT

1. By a Motion on Notice filed on 2nd May, 2013 and expressed to be taken out under **sections 3A and 3B** of the Appellate Jurisdiction Act [Cap 9] and **Rules 39, 42** and **43** of the Rules of this Court as well as *"all other provisions of the law"*, the applicant, ***DANIEL KIMANI NJIHIA*** made one substantive prayer, namely leave to appeal to the Supreme Court against the decision of this Court dated the 12th April, 2013 (***Visram, Makhandia and S. Ole Kantai JJA***). The decision that the applicant seeks to appeal to the Supreme Court is a *ruling* rather than a *judgement* of this Court.
2. Notwithstanding the choice of words and phraseology in the Motion, we opted to treat the Motion as an application for certificate that a matter of general public importance is involved within the meaning of Article 162(4) (b) of the Constitution, not the least because the Motion was drawn by the applicant in person. The ground upon which certification was sought was that:

> ***"The appeal involves a matter of general public importance in that it raises an important question of law as to whether the Land Registrar can arbitrarily transfer land without the consent of the registered owner".***

3. The Motion was supported by an affidavit sworn by the applicant on the 30th April, 2013 in which he elaborated briefly on the matter of general public importance, to the effect that the 2nd respondent, the District Land Registrar, Thika, had hived off a 0.62 acre portion of the applicant's land comprised in plot ***No. LOC1/MUKARARA/253*** and awarded the same to the 1st respondent***, FRANCIS MWANGI KIMANI***.
4. The 1st respondent opposed the Motion by a replying affidavit sworn on the 7th November, 2013 in which he deponed that the 2nd respondent had not transferred to him any portion of the applicant's land but had instead only directed rectification of the Registry Index Map to accord with what was on the ground and that the applicant's Motion therefore did not raise any matter of general public importance. The 2nd respondent opposed the Motion on the basis of what purported to be "grounds of opposition" filed on the 3rd October, 2013.
5. As the following brief background to this application will show, this Court has not heard or determined the applicant's intended appeal on merit. All that the Court has done is to deny an application by the applicant for extension of time within which to appeal the decision of the High Court to this Court. To the extent that this Court has not expressed itself on the merit of the applicant's intended appeal, there is no substantive decision of this Court that the applicant can appeal to the Supreme Court pertaining to the matters that were before the High Court. As the Supreme Court enunciated in ***HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, (SUPREME COURT APPLICATION NO 4 OF 2012)***, if the matter of general public interest alleged is a question of law, the question or questions of law must have arisen in this Court and must have been the subject of judicial determination by this Court.
6. As framed, the applicant's intended appeal relates to the ruling dated the 12th April, 2013. The matter of general public interest that the applicant is obliged to establish therefore must primarily relate to that ruling, as it is only in it that this Court has made a determination. Anything touching on the determination by the High Court which has not been addressed by this Court can only be a collateral consideration for the purposes of the argument that because of the importance of the issue(s) in the intended appeal, this Court ought to have exercised its discretion differently and in favour of the applicant.
7. The dispute herein revolves around the boundary between the applicant's parcel of land known as Title No. ***LOC 1/MUKARARA/253*** and that of the 1st respondent known as Title No. ***LOC 1/MUKARARA/960***. By a Plaint dated the 23rd November, 1990 and subsequently amended on the 25th April, 2002, the applicant averred that the 2nd respondent had on or about the 10th November, 1988 unlawfully altered the Registry Index Map on the boundary between the said two properties, effectively transferring 0.25 of a hectare from the applicant's property to that of the 1st respondent. The applicant therefore prayed for various reliefs including re-amendment of the Registry Index Map boundary, delivery to him of vacant possession of the said 0.25 of a hectare, damages for trespass and costs.
8. The respondents filed their defences which the applicant has not included in the record before us. Be that as it may, the suit was heard by ***Osiemo, J.*** who in a judgement dated the 7th June, 2006 found no merit in the suit and dismissed the same.
9. On the 15th June, 2006 the applicant lodged a notice of appeal evincing his intention to appeal the decision of ***Osiemo, J.*** to this Court. Thereafter he took no action regarding his intended appeal until four years later when he applied to a single judge of this Court for extension of time to file the appeal. The grounds upon which the application for extension of time was based were that the applicant's advocate had ceased to practice; that the applicant had been ailing between the months of May and December 2007, and that the applicant had been unable to raise money for filing the intended appeal.
10. The application was heard by ***Nyamu. JA.*** who on the 12th November, 2010 declined to grant the same on the grounds that the applicant's inordinate delay was not explained; that the alleged illness for 6 days did not explain the four years of delay; that certified copies of the proceedings had been availed to the applicant way back on the 14th May, 2007; that the applicant had an avenue open to him for relief from costs and securities under the Rules of this Court, and that granting the application would occasion great prejudice to the respondents.
11. Aggrieved by the decision of the single judge, the applicant preferred a reference to the full Court

under Rule 55 (10 (b). That reference was heard by this Court (***Visram, Makhandia*** and ***S. ole Kantai, JJ.A***) who on the 12th April, 2013 held that the learned single judge had taken into account relevant factors and had properly exercised his discretion in declining to grant the application. Accordingly, the Court dismissed the reference, thus precipitating the current application for certificate to the Supreme Court.

12. Under Article 163(4) of the Constitution, the jurisdiction of the Supreme Court to hear appeals from this Court is limited to two situations only. The first is where the case involves the interpretation or application of the Constitution. The second, and which the applicant has invoked, is where the Supreme Court or this Court certifies that ***a matter of general public importance*** is involved.
13. This Court does not certify a matter to be of general public importance, and deserving of the attention of the Supreme Court, as a matter of course. The applicant must satisfy the Court that the intended appeal involves a matter of general public importance within the meaning of Article 163(4) of the Constitution.
14. The Supreme Court in ***MALCOLM BELL ~vs~ DANIEL TOROITICH ARAP MOI & ANOTHER***, **S C Application No. 1 of 2013** expressed that caution in the following terms:

> ***"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."***

On its part, this Court in ***HERMANUS PHILLIPUS STEYN ~vs~ GIOVANNI GNECCHI-RUSCONE, Civil Application No. Sup 4 of 2012 (UR 3/2012)*** stated as follows regarding what constitutes a matter of general public importance:

> ***"The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law; not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law."***

15. The Supreme Court has now, with sufficient clarity, pronounced itself on what constitutes a matter of general public importance for the purposes of ***Article 163(4) of the Constitution***. In ***HERMANUS PHILLIPUS STEYN ~v~ GIOVANNI GNECCHI-RUSCONE, (supra)***, the majority in the Supreme Court laid down the following as the principles that should guide the Court in determining whether an intended appeal to the Supreme Court raises a matter 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 is one the determination of which 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 [other] 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;***

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.***

16. The matter of general public interest raised by the intended appeal, according to the applicant, is whether the Land Registrar can arbitrarily transfer land without the consent of the owner. As already stated, this Court has not pronounced itself on that issue and the same can be raised only as a collateral issue. The question therefore arises as to whether or not the applicant has satisfied the principles that must guide certification of appeals to the apex Court as expounded by the Supreme Court.
17. With due respect, we do not think so. Strictly speaking, the issue that the applicant seeks to take to the Supreme Court is merely the exercise of judicial discretion by this Court. In our view, that is not a matter of general public importance transcending the circumstances of this case, and with a significant bearing on public interest or one that raises a substantial point of law the determination of which will have a significant bearing on the public interest. The exercise of judicial discretion is an undertaking that is invariably dependent on the peculiar facts and circumstances of each case. To the extent that no two cases are exactly the same, exercise of judicial discretion in one case cannot constitute an issue of general public importance. In our view, if there was ever a decision that *prima facie* negates application to the public in general, it is a decision based on the exercise of discretion. In short, to borrow the words of the Supreme Court, we do not find in this application any cardinal issues of law or of jurisprudential moment deserving the further input of the Supreme Court. (See ***PETER ODUOR NGOGE ~vs~ HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012).***
18. On the collateral issue, the decision of the High Court turned on the facts of the case before it and it did not lay down any general rule that the Land Registrar has powers to transfer land arbitrarily. As a matter of fact, the High Court found that there was no transfer of the appellant's land to the 1st respondent. All that the Land Registrar did was to order rectification of the Registry Index Map so that the boundary between Plot No. ***LOC 1/MUKARARA/253*** and Plot No. ***LOC 1/MUKARARA/960*** could accord with the reality on the ground. That rectification did not result in transfer of any land from the applicant to the first respondent. The learned judge concluded as follows:

> ***"Both the plaintiff (applicant) and the first defendant (1st respondent) concede that there were no changes on the physical ground occupation since the titles were issued in 1988. That being the position, the plaintiff claim that the amendment effected on the map index deprived him of his 0.62 acres that were reflected on the map as having been removed and added to land parcel No. 960 of the first defendant as amendment of the register did not affect ground occupation by both the plaintiff and the defendant."***

19. We have no hesitation concluding that the applicant has not demonstrated that his intended appeal to the Supreme Court raises a substantial point of law, the determination of which will have a significant bearing on public interest. Accordingly, the application for certificate lodged in this Court on the 2nd May, 2013 be and is hereby dismissed. There will be no order as to costs.

Dated and delivered at Nairobi this 14th day of February, 2014.

P. KIHARA KARIUKI

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PRESIDENT, COURT OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR