



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MWERA, OUKO & GATEMBU, JJ.A)**

**CIVIL APPLICATION NO. SUP 9 OF 2013(UR 3/2013**

**BETWEEN**

**CHARLES NDERITU GITOI (Suing on his behalf and as legal Representative of  
Charity Nyaguthii Gitoi (deceased))..... APPLICANT**

**AND**

**CHRISTOPHER MUCHOMBA WARUI ..... 1<sup>ST</sup> RESPONDENT**

**PETER NDERITU JULIUS (Legal Representative of**

**Nderitu Julius (deceased) ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**(Application for leave to appeal to the Supreme Court of Kenya against the judgment of the  
Court of Appeal at Nyeri No. 166 of 2009 (Onyango Otieno, Wanjiru Karanja & Maraga, JJ.A)  
dated 22<sup>nd</sup> February, 2013**

**in**

**CIVIL APPEAL NO. 166 OF 2009)**

**\*\*\*\*\***

**RULING OF THE COURT**

1. By an application dated 25th April 2013 expressed to be under sections 15 and 16 of the Supreme Court Act, 2011 and Rule 24 of the Supreme Court Rules, 2012 the applicant, Charles Nderitu Gitoi, seeks an order, among other orders, that this Court *“be pleased to certify that this matter...is a matter of general public importance in respect of which the applicant...may apply to the Supreme Court for review...”*
2. The application is based on the grounds that the subject matter of Civil Appeal No. 166 of 2009 from which he intends to appeal is a matter of general public importance; that in its judgment, this Court erred in its findings and the decision of the Court *“will be an eyesore in analyzing and applying available evidence in legal matters”*; that the judgment offends provisions of the Civil

Procedure Rules and may have the effect of members of the public regarding titles to property “to be of no legal value” and that the judgment violates the applicant’s rights to protection of private property.

### **Background**

3. Julius Maina Gitoi, James Mwangi Gitoi and the applicant are the children of Charity Nyaguthii Gitoi, now deceased. In the year 2002, together with their mother Charity Nyaguthii Gitoi, they filed suit in the High Court at Nyeri in Civil Case No. 114 of 2002 against Christopher Muchomba Warui, the 1<sup>st</sup> respondent and Nderitu Julius, now deceased and represented by his personal representative, the 2<sup>nd</sup> respondent. During the pendency of the suit in the High Court, Charity Nyaguthii Gitoi died and was substituted by the applicant. The claim in the High Court was that upon the death of their father, his property known as Title Number Iria-ini/Kiaguthu/141 was subdivided into four parcels (parcel numbers 752,753,754 and 755) two of which were fraudulently transferred to the 1<sup>st</sup> respondent and to Nderitu Julius. They accordingly sought declarations that the subdivision of that property into four parcels bearing title numbers 752,753,754 and 755 and the subsequent transfer of those parcels was fraudulent and should be cancelled and that the title should revert to the original Title Number Iria-ini/Kiaguthu/141.
4. After hearing the parties, the High Court (Kasango J) delivered its judgment on 7<sup>th</sup> December 2004 holding that parcel numbers 752 and 754 were fraudulently transferred and reversed the same. The High Court however declined to interfere with parcel numbers 753 and 755 with respect to which the 1<sup>st</sup> respondent and Nderitu Julius claimed to be entitled under agreements for sale.
5. Dissatisfied, Julius Maina Gitoi, James Mwangi Gitoi and Charles Nderitu Gitoi (hereafter together referred to as ‘the appellants’) appealed the judgment of the High Court in Civil Appeal No. 166 of 2009. The 1<sup>st</sup> respondent and Nderitu Julius (hereafter referred to together as ‘the respondents’) also cross-appealed. In a judgment delivered on 22<sup>nd</sup> February 2013 at Nyeri in Civil Appeal No. 166 of 2009, this Court dismissed the appeal as well as the cross-appeal.
6. The applicant is aggrieved by that judgment of this Court and wishes to challenge it in the Supreme Court hence the present application.

### **Grounds in support of the application and submission**

7. At the hearing of the application before this Court, the applicant appeared in person. Mr. Kimathi Muthuri represented the 1st respondent. Mr. R. M. Kioko represented the 2nd respondent. W. N. Mariarie held brief for R. M. Nyakundi for the 4<sup>th</sup> and 5<sup>th</sup> respondents.
8. The applicant, Charles Nderitu Gitoi began his address by asking the Court to strike out the 2<sup>nd</sup> respondent’s replying affidavit on the ground that it was filed outside the time provided by the Court.
9. In support of his main application for leave to appeal to the Supreme Court, the applicant referred us to the grounds set out in the body of the application and in his affidavit in support. He argued that matters of general public importance are involved in that the judgment of this Court given on 22<sup>nd</sup> February 2013 contravenes numerous statutes including the Law of Contract Act Cap 23; the Land Control Act Cap 302; the Law of Succession Act Cap 160; the Registration of Titles Act formerly Cap 281 and now the Land Registration Act 2012; the Stamp Duty Act Cap 480; the Evidence Act Cap 80, Registered Land Act Cap 300 and the Civil Procedure Act Cap 21.
10. The applicant went on to say that the decisions of the High Court and of this Court are wrong and that the subdivision of the property **LR No Iria-Ini/Kiaguthu/141** should have been declared null

and void; that the judgment gives credence to fraudulent acts of persons who deal with private and public properties; that the respondents did not establish their claim before the High Court yet they were awarded two parcels of the suit land; that the applicant's constitutional rights to protection of private property have been violated; that he will suffer substantial miscarriage of justice unless the intended appeal is heard and determined by the Supreme Court; that the property **LR No Iria-Ini/Kiaguthu/141** is ancestral land, which upon the death of their father in 1974 was to be subdivided into five equal portions for their mother and her four sons; that the respondents created five titles over the suit property with a fraudulent sale agreement between themselves and James Mwangi Gitoi, the 2<sup>nd</sup> appellant. Based on all those complaints the applicant argued that this is a suitable matter for appeal to the Supreme Court.

11. Opposing the application, Mr. Kimathi Muthuri learned counsel for the 1<sup>st</sup> respondent relied on the replying affidavit sworn on 16<sup>th</sup> May 2013 in which the 1<sup>st</sup> respondent deposed that he, together with the 2<sup>nd</sup> respondent, have been in occupation of the suit property since 1996 when they purchased the same from the appellants; that the applicant has on numerous occasions attempted to evict them from the property using the police or hired gangs; that the applicant has failed to cooperate with the respondents in order to subdivide the property as ordered by the High Court; that the applicant is attempting to dispossess the respondents of the portions of the suit property awarded to them by both the High Court and the Court of Appeal by couching a private interest matter as one of general public importance; that the applicant purports that the 1<sup>st</sup> and 2 appellants shall be rendered landless yet they do not reside on the property; that an injustice has been visited upon the respondents by virtue of being dispossessed of part of the suit property following the judgments of both the High Court and the Court of Appeal in view of the fact that the respondents had purchased the same legally and in good faith from the appellants and they have suffered loss and damage as a result and that the application should be dismissed with costs.
12. Mr. Muthuri went on to submit that this is not a suitable matter for appeal to the Supreme Court as no points of law that require to be settled are involved; that the matter is not, as the applicant suggests, one of great public importance. Mr. Muthuri referred to the decision of this Court in the case of **Hermanus Phillipus Steyn V Giovanni Gnechchi Ruscone**, Nairobi Court of Appeal Civil Application No. Sup 4 of 2012 and submitted that the criteria set for granting leave to appeal to the Supreme Court has not been met.
13. Mr. R. M. Kioko learned counsel for the 2<sup>nd</sup> respondent began by seeking an extension of time with regard to the late filing of his client's affidavit and explained that the delay in filing the affidavit was occasioned by changes in representation. He urged us to allow the affidavit out of time and to deem it as duly filed saying that while he regrets the delay in filing, the applicant has not suffered any prejudice.
14. In the replying affidavit sworn on 7<sup>th</sup> March 2014, the 2<sup>nd</sup> respondent deposes that the dispute between the parties that led to the suit that culminated in the judgment of the Court of Appeal is a private dispute and not a matter of public interest; neither does the matter involve unsettled points of law to warrant an appeal to the Supreme Court; that there has been delay in making the present application and that the applicant had failed to respect court decisions by frustrating the registration of parcels of land in the names of the respondents.
15. Opposing the application Mr. R. M. Kioko submitted, on the authority of **Daniel Kimani Njihia V Francis Mwangi Kimani [2014] eKLR** that certification for appeal to the Supreme Court is not a matter of right; that the matters involved in this case are of a private nature concerning land and succession and are not matters of public importance for reference to the Supreme Court.
16. Mr. W. N. Mariaria, learned counsel who held brief for R. M. Nyakundi representing the 4<sup>th</sup> and 5<sup>th</sup> respondents, supported the application submitting that it is in the interest of the public to know if justice in any particular matter was done and that the public is affected when a wrong is not put right and that if the parcels of land in question were created fraudulently and are allowed to stand,

then the matter is of public interest as the appearance to the public might be that violators of law benefit from breaking the law.

## **Determination**

17. We have considered the application, the affidavits and the submissions. We will begin with the applicant's application to have the 2<sup>nd</sup> respondent's replying affidavit struck out due to late filing.
18. When dealing with the 2<sup>nd</sup> respondent's previous advocates' motion dated 24<sup>th</sup> July 2013 for leave to withdraw from acting for the 2<sup>nd</sup> respondent in this matter on 4<sup>th</sup> February 2014, the Hon. Mr. Justice Kiage JA, ordered "the second respondent to file and serve a replying affidavit within 10 days of today."
19. Counsel for the 2<sup>nd</sup> respondent has conceded that that order was not complied with to the extent that the 2<sup>nd</sup> respondent's replying affidavit was filed approximately 21 days later. He explained that the delay was occasioned by the changes in representation and has asked us to abridge time.
20. Timelines imposed by orders of the Court and under the rules of the Court must strictly be observed for orderly administration of justice. The Court has power, under rule 4 of the rules of the Court, to extend time where circumstances warrant. We are satisfied that counsel for the 2<sup>nd</sup> respondent has satisfactorily explained the delay in filing the 2<sup>nd</sup> respondent's affidavit and considering that the applicant has not demonstrated that he has in any way been prejudiced by the late filing of the affidavit, we accede to the 2<sup>nd</sup> respondent's request to admit the affidavit out of time.
21. Turning now to the substance of the application before us, the only question with which we are concerned is whether the applicant satisfies the threshold for the grant of leave to appeal the decision of this Court to the Supreme Court. The basis of the application is that the judgment of the High Court as confirmed by this Court contravenes several statutes, that the judgment will give credence to fraudulent acts perpetrated by persons when dealing with land and that substantial miscarriage of justice will be occasioned upon the applicant if leave to appeal to the Supreme Court is not granted.
22. In the case of **Hermanus Phillipus Steyn** (supra) the Supreme Court established the governing principles in terms of what constitutes a matter of "general public importance". It is necessary to reproduce in extenso what the Supreme Court stated;
  - 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.” (emphasis added).***

23. Applying those principles to the matter before us, the applicant’s contention is that this matter is of general public importance and that to the extent that the judgment, in his view, offends statutory provisions of numerous statutes it raises points of law which have bearing on public interest.

24. As noted above the appellants had sought declarations from the High Court that the subdivision of their late father’s property known as Title Number Iria-ini/Kiaguthu/141 into parcels bearing title numbers 752,753,754 and 755 and subsequent transfer of those parcels was fraudulent and should be cancelled and the title reverts to the original Title Number Iria-ini/Kiaguthu/141. In its judgment the High Court found that parcel numbers 752 and 754 were fraudulently transferred and reversed the same but declined to interfere with parcel numbers 753 and 755 with respect to which the respondents claimed under agreements for sale. That judgment gave rise to the appeal to this Court that is intended to be appealed to the Supreme Court. The central issue in the suit that both the High Court and the Court of Appeal addressed was whether the transfer of the parcels of land in question was fraudulent.

25. No doubt the applicant considers that the High Court and this Court made errors in their judgments, which the Supreme Court should rectify. However, as the Supreme Court stated recently in the case of **Malcolm Bell vs. Hon. Daniel Toroitich Arap Moi and Anor**, Application No. 1 of 2013 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.*”

26. In our view the issues raised in this matter do not “*transcends the circumstances of the particular case,*” and neither do they have “*a significant bearing on the public interest*”. The matter does not raise any points of law for determination that would have a significant impact on the public. And as the Supreme Court stated in the **Hermanus Phillipus Steyn case** that “*a 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*”. To use the language of the Supreme Court in the case of **Peter Oduor Ngoge V Hon Francis Ole Kaparo and 5 others Petition No. 2 of 2012 [2012] eKLR** there are no “*cardinal issues of law or of jurisprudential moment*” involved in this matter that “*deserve the further input of the Supreme Court*”

27. For those reasons the application fails and is dismissed with costs.

**Dated and delivered at Nairobi this 9th day of May, 2014.**

**J. W. MWERA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

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

**REGISTRAR**