IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. NO. 2 OF 2014 (UR 2/2014)

JOHNSON GITHAIGA NJOROGE …..……. APPLICANT

AND

DANIEL GITHAIGA MWANIKI …..... RESPONDENT

(An application for certification and leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nyeri

(Visram, Gatembu & Odek) dated 28th May, 2014

in

Civil Appeal No. 3 of 2014)

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RULING OF THE COURT

1. By a Notice of Motion dated 13th June, 2014, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of the Court of Appeal sitting at Nyeri in ***Civil Appeal No. 3 of 2014***. The application is under the provisions of ***Article 163 (4)*** of the ***Constitution*** and ***Sections 21 and 26*** of the ***Supreme Court Act*** and ***Rule 24*** of the ***Supreme Court Rules***. In ***Lawrence Nduttu & 6000 Others –v – Kenya Breweries Ltd. & Another, Supreme Court Petition No. 3 of 2012 [2012] eKLR***, the Supreme Court stated that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under ***Article 163(4)*** of the ***Constitution***.
2. The applicant's ground for certification as reproduced verbatim here-under is that the intended appeal involves and raises weighty issues of law and of general public importance *to wit* that:

a. ***An application for execution for a sum awarded in a civil court for the value of developments in purported cause of action following an angry mob demolishing a structure the respondent had put up in a public land at Mweru Trading Centre, Mukurweini in Nyeri and subsequently the burden being shouldered by the applicant as a private citizen;***

b. ***the provisions of land laws providing for acquisition of public land by a private citizen and the***

fate of such citizen's developments effected thereon and/or value thereof, in the event the process of acquisition was in gross violation of the law, hence void ab initio and or rendered legally inconsequential.

3. An auxiliary prayer by the applicant is for an order to stay any further execution process and or issue temporary injunction and or conservatory orders to restrain the respondent from executing the decree issued in the Chief Magistrate's Court at Nyeri in ***Civil Case No. 787 of 2002*** on 14th June, 2004 and taxing his costs in ***Nyeri Civil Appeal No. 3 of 2014,*** pending the interpartes hearing of the intended appeal.
4. In support of the application for certification, we hereby reproduce verbatim issues that the applicant states are pertinent questions for determination by the Supreme Court:
    a. ***Whether the law should aid the respondent following his attempt to illegally and unlawfully acquire a public property/plot after his developments thereat were demolished by angry members of the public.***

b. ***Whether the respondent's bid and or pursuit amount to sheer abuse of the court process and or due process of law.***

c. ***Whether the applicant having failed to appeal the judgment and decree of 14th June, 2004, was precluded from subsequently seeking review of the judgment pronounced on 14th June, 2004, and the decree issued thereto in the Chief Magistrate's Court at Nyeri Civil Case No. 787 of 2002 afortiori appealing the refusal and or order refusing review given on 5th February, 2009, through Nyeri High Court Civil Appeal No. 23 of 2009 which was speedily precipitated as Nyeri Civil Appeal No. 3 of 2014 and a final bid to the Supreme Court of Kenya.***

d. ***Whether the appeals in Nyeri High Court Criminal Appeals Nos. 75, 76 and 77 of 2002 and which were consolidated at the hearing and a consolidated judgment exhibited at the hearing of the applicant's co-defendants in Chief Magistrate's Court at Nyeri Civil Case No. 787 of 2002 could aid the applicant escape/avoid liability.***

e. ***Whether failure to accord the applicant benefit of the said judgment quashing conviction and sentence on the strength of which the respondent filed a civil suit at the Chief Magistrate's Court Case No. 787 of 2002 was an error apparent on the face of the record.***

f. ***Whether failure to produce a valuation report in Criminal Case No. 101 of 2001 was also an error apparent on the face of the record warranting review.***

g. ***Whether the Nyeri Civil Appeal No. 3 of 2014 should, therefore, have been dismissed with costs.***

5. At the hearing of the application, learned counsel Peter Muthoni represented the applicant; there was no appearance for the respondent despite service of hearing notice. Counsel for the applicant elaborated on the grounds in support of the application for certification. He submitted that the respondent tried to grab a public plot and members of the public demolished the structures he had erected thereon; that the trial court held the applicant responsible for damages to the developments on the plot caused by the angry mob; that it is wrong in law for a private citizen to be held personally liable for damages committed by a mob more specifically on a public plot of land that was being grabbed by the respondent; that the applicant is greatly prejudiced to be called upon to make good for loss by a party who was annexing public land illegally, unlawfully, irregularly and whose action was *void ab initio*; that the law should not aid the respondent who was bent on grabbing a public plot. The applicant submitted that he intends to lodge an appeal to the Supreme Court because the Court of Appeal erred in its *ratio decidendi* when it stated as follows:

> ***"In this case, the respondent was aware of the criminal appeal wherein his conviction was quashed. He was also aware of the civil suit in the subordinate court. We note that during the hearing of the civil suit, the respondent neither appeared nor tendered any evidence in his defence. Consequently, the evidence that his conviction had been***

quashed was never placed before the trial court before delivery of the judgment dated 14th June, 2004. Therefore, we find that there was no error on the face of the record. We are of the considered view that the High Court's action in setting aside the trial court's judgment was tantamount to admitting evidence which was never tendered during the trial".

6. We have considered the instant application, the grounds in support thereof, the affidavit sworn by the applicant, the able submissions of counsel and the law. ***Article 163 (4)*** of the ***Constitution*** provides as follows,

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

a. **…..**
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)."(Emphasis added)***

7. The applicant invokes this foregoing provision of the Constitution and seeks leave to appeal to the Supreme Court. What we are being called upon to determine in considering the application is whether the intended appeal raises issue(s) of general public importance. In ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, Supreme Court Application No 4 of 2012***, the Supreme Court gave the test for granting certification and leave to appeal to the Supreme Court. The Court also stated that the meaning of "matter of general public importance" may vary, depending on context. The Supreme Court, after a comparative review of the practice in various jurisdictions, pronounced itself on the significations contemplated in ***Article 163 (4) (b)*** of the ***Constitution***. The Court stated (at paragraph 58):

"…a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern".

8. In ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, Supreme Court Application No 4 of 2012,*** the Supreme Court set the following principles for determining if a matter would merit certification as one of general public importance (at paragraph 60):

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 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;***

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. ***determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court".***

9. Guided by the above, we apply these principles to the instant case to determine if the requirements set out in the ***Hermanus case (supra)*** have been met. The first question we ask is whether the applicant has raised a point of law and demonstrated that such point of law is substantial and having a significant bearing on the public interest. We have reproduced verbatim the applicant's grounds in support of certification and the pertinent questions that he seeks the Supreme Court to determine. The main issue in the applicant's case is whether the law should aid the respondent following his attempt to illegally and unlawfully acquire a public property/plot after his developments thereat were demolished by angry members of the public. *Prima facie*, this issue transcends the circumstances of the instant case and may have bearing on public interest.

10. The next issue for consideration is whether the applicant has been able to identify and concisely set out the specific elements of *"general public importance"* which he intends to rely on. The applicant has listed what he terms pertinent questions for consideration by the Supreme Court. However, he has failed to concisely and succinctly set out the matters perceived to be of general public importance on liability of a private citizen for damage to development on a grabbed public plot. The issue of liability of a private citizen for damage done by an angry mob is not an issue that arose for consideration and determination by this Court or any of the two courts below; the issue has not been subjected to judicial determination. As was stated by the Supreme Court in ***Peter Odour Ngoge – v- Francis Ole Kaparo & 5 Others, Supreme Court Petition No. 2 of 2012 [2012]eKLR*** , the question requiring the Supreme Court's examination must have undergone examination in all lower courts. Further, we note that the present application does not allege that the instant application has been occasioned by a state of uncertainty in law arising from contradictory precedents.

11. We have analyzed the Notice of Motion and the affidavit in support of the application. The applicant has failed to give background facts that lay foundation to the application. He has cited various criminal cases *to wit* ***Nyeri High Court Criminal Appeals Nos. 75, 76 and 77 of 2002*** and ***Nyeri Magistrate's Court Case No. 101 of 2001,*** without indicating the factual relevance of these cases to the instant application. It is our considered view that the alleged pertinent questions for the Supreme Court to determine do not demonstrate the point of law in issue. In the absence of a concise factual background to this application, what we have before us is a jumbled and incoherent narrative that does not demonstrate an issue of general public importance that is substantial, broad-based and transcending the litigation-interests of the parties. In addition, the applicant has not concisely identified the constitutional issue that he seeks the Supreme Court to interpret or determine. In ***Hassan Ali Joho & Another – v- Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR at para 52***, it is stated that an appeal to the Supreme Court within the terms of ***Article 163 (4)*** should be founded on cogent issues of constitutional controversy. The applicant has neither demonstrated to our satisfaction that he intends to challenge the interpretation or application of any specific provision in the Constitution nor has he demonstrated how the issues that were before the High Court and the Court of Appeal became matters within the ambit of Article 163 (4) of the Constitution. The Supreme Court in ***Peter Odour Ngoge – v- Francis Ole Kaparo & 5 Others, Supreme Court Petition No. 2 of 2012 [2012]eKLR*** stated that a petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave to appeal, to a meritorious theme involving the interpretation or application of the Constitution, such that it becomes a matter as of right falling within the appellate jurisdiction of the Supreme Court. In the instant case, the applicant has not demonstrated that this Court's reasoning and conclusions in Nyeri Civil Appeal no. 3 of 2014can properly be said to have taken a trajectory of constitutional interpretation or application.

12. For the foregoing reasons, it is our considered view that the present application fails the test established in the ***Hermanus Steyn Case***. As the applicant has not demonstrated to the Court's satisfaction the existence of specific elements of *general public importance* which he attributes to this matter, we decline to certify the same .We also decline to grant stay orders sought in this application for reason that this Court became *functus officio* after it pronounced its judgment in ***Nyeri Civil Appeal No. 3 of 2014***. The upshot is that the Notice of Motion dated 13th June, 2014, is hereby dismissed with no order as to costs.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR