IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), NAMBUYE & G. B. M. KARIUKI, JJ.A.)

CIVIL APPLICATION NO. SUP 16 OF 2013

BETWEEN

GEORGE CHEGE KAMAU …….....……..
…….....APPLICANT

AND

ESTHER WANJIRA KAMAU….……...……
RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nakuru, (Karanja, Mwilu & Musinga, JJ.A) dated 25th July, 2013

in

Civil Appeal No. 274 of 2006 (NAK 34/2006)}

****

RULING OF P. KIHARA KARIUKI, JA

(1) The notice of motion before us is dated the 14th August, 2013, and is taken out under ***Article 163 (4) (b)*** of the Constitution of Kenya***, sections 15*** and ***16*** of the Supreme Court Act and ***Rule 1 (2)*** of the Rules of this Court. In the application, the applicant, George Chege Kamau, seeks certification that his intended appeal to the Supreme Court from the judgment of this Court dated the 25th July, 2013 in Civil Appeal No. 274 of 2006 (NAK

34/2006) involves a matter of general public importance within the meaning of ***Article 163 (4) (b)*** of the Constitution of Kenya. The central dispute in the intended appeal is the respective shares of the appellant and the respondent,

Esther Wanjira Kamau, in the property known as ***Plot Title No. Ndundori/Mirireni/Block 2/56 (Ndimu)***, (hereafter referred to as "the suit property"), measuring approximately ten acres. For purposes of certification under ***Article 163 (4)*** of the Constitution, the applicant contends that the intended appeal raises substantial and important issues of general public importance pertaining to the right to a fair hearing by an independent and impartial court and the right to access justice.

(2) The factual background of the application is not seriously contested. Between 1975 and 1978 the applicant and the respondent cohabited as husband and wife, during which time they jointly acquired the suit property. Upon termination of the cohabitation, the respondent filed Nakuru HCCC No. 389 of 1978 seeking an order for division of the suit property in accordance with the contribution of each party.

(3) The court file for Nakuru HCCC No. 389 of 1978 disappeared from the registry and for an incredible period of almost 20 years, no progress was made towards resolving the dispute regarding the suit property. In 1998, the applicant got himself registered as the proprietor of the suit property. In response, the respondent filed another suit, Nakuru HCCC No. 415 of 1998, seeking a declaration that she was the lawful owner of the suit property; that the registration of the applicant as proprietor was fraudulent; and an order for

cancellation of the registration of the applicant and, in lieu thereof, registration of the suit property in her name.

(4) The applicant resisted the new suit on the basis that the respondent's contribution towards the acquisition of the suit property was meager and that in any event, she had sufficiently repaid herself from proceeds generated from the suit property. In addition, the applicant averred that the first suit, Nakuru HCCC No. 389 of 1978, was still pending and ought to be determined before the second suit.

(5) On the 14th April, 1999 the advocates for both the parties appeared before Rimita, J. and, by consent, stayed the hearing of all pending interlocutory applications and agreed on a hearing date for the suit in HCCC No. 415 of 1998. On the date scheduled for the hearing of the suit, the applicant, who in the meantime had elected to act in person, insisted on arguing an interlocutory application. In view of the earlier consent order, he was overruled and the suit was heard on merit.

(6) In a judgment dated the 28th June, 1999 which has drawn considerable attention in this Court, the learned judge ordered the suit property to be divided into two equal portions and directed the applicant to transfer to the respondent the portion with the houses occupied by her sons. In default, the Executive Officer of the Court was directed to execute all the forms necessary to implement and comply with the judgment.

(7) Aggrieved by the judgment of the trial judge, the applicant filed in this Court Civil Appeal No. 274 of 2006 (NAK 34/2006) contending that the learned judge had erred by declining to entertain interlocutory applications; by hearing HCCC No. 415 of 1998 while the earlier suit, HCCC No. 389 of 1978 was still pending; by compelling the applicant to proceed with the hearing of the suit on a date when the same was not set down for hearing and when the applicant was not represented by counsel; by holding that the respondent was entitled to a half share in the suit property; and by violating the rules of natural justice and denying the applicant a fair hearing.

(8) The appeal was heard by this Court ***(Karanja, Mwilu & Musinga, JJ. A)*** who, in a judgment dated the 25th July, 2013, faulted the judgment of the trial judge, but nevertheless, after re-evaluation and reconsideration of the evidence, upheld the order that the suit property be shared equally between the applicant and the respondent. It is against that judgment that the applicant now seeks certification to enable him lodge a further appeal before the Supreme Court.

(9) Before us, Mr. A. B. Shah**,** learned counsel for the applicant submitted that this was a suitable case for certification that a matter of general public importance

was involved. From the judgment of the High Court, counsel submitted, bias against the appellant was glaringly obvious, amounting to contravention of the national values and principles of governance set out in ***Article 10 (2) (a)*** and ***(b)*** of the Constitution, and a violation of the

applicant's right to human dignity and equality and the right to a fair hearing under ***Article 50*** of the Constitution. Counsel further submitted that by condemning the applicant as corrupt without any evidence, the trial judge lacked neutrality, resulting in a miscarriage of justice.

(10) Mr. Shah next invoked ***Articles 73*** and ***232*** of the Constitution and submitted that a judge is a state officer who is obliged by the Constitution to show respect for the people and to uphold the highest standards of professional ethics. It was Mr. Shah's submission that this Court, having expressed displeasure at the trial judge's intemperate language, erred by declining to order a re-trial, which is what ought to have happened in view of the contraventions of the Constitution enumerated above.

(11) The judgment of the Supreme Court in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR (Application No. 4 of 2012)*** was cited to illustrate what constitutes a matter of general public importance. Counsel contended that the intended appeal touched on land rights that may affect a large number of people and involved questions bearing on the proper conduct of the administration of justice.

(12) Learned counsel concluded by identifying the following seven issues of general public importance that the applicant wished to place before the Supreme Court for determination:

1. ***"Can a judge with an open bias towards one of the litigants come up with a judgment which can stand the principle of neutrality of a judicial officer?***

2. ***Can a judge allow a second suit to proceed to hearing when the first one is still pending and the pleadings in both are the same?***

3. ***Can a judge without any evidence presume a party to be a corruptor?***

4. ***Can a judge without the issues having been formed (sic) proceed with the trial?***

5. ***Can this Court, having found that "we can openly state that the same (judgment) does not comply with the above quoted-provision of the law" (that is to say the then order 21 rule 4 of the Civil Procedure Rules) in its equity conscience dismiss the appeal?***

6. ***Can this Court conclude that the previous suit was abandoned by the plaintiff?***

7 Was this Court obliged to order a retrial in view (of) the open and obvious bias of . Rimita, J. as he then was?"

(13) Ms. Njeri Njagua, learned counsel for the respondent, opposed the application, contending that the intended appeal did not meet the threshold of a matter of general public importance. In counsel's view, the intended appeal raised issues of concern only to the applicant and the respondent and did not implicate the general public. As regards the issues of law raised such as whether or not a latter suit can be heard in lieu of an earlier pending suit between the same parties on the same subject matter and whether or not a suit can be heard while there is a pending application, counsel submitted that there was no weighty legal issue raised and that in any event, the trial court had resolved those matters with the consent of the parties prior to the hearing of the suit.

(14) The respondent relied on the rulings of this Court in ***Telkom Kenya Limited v John O. Ochanda (Suing on His Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] eKLR (Civil Application No. Sup 24 of 2013)*** and ***Charles Nderitu Gitoi (Suing On His Behalf and As Legal Representative of Charity Nyaguthii Gitoi (Deceased) v Christopher Muchomba Warui & 2 others [2014] eKLR*** (***Civil Application No. Sup 9 of 2013)*** and submitted that the application before us did not raise any issue of great jurisprudential moment to warrant further input by the Supreme Court and that the jurisdiction of the Supreme Court cannot be invoked merely for the purpose of rectifying errors with regard to settled matters of law.

(15) Counsel concluded by submitting that although this Court had decried the manner in which the judgment of the High Court was couched, after due re- evaluation and analysis of the evidence, this Court found that on merit, the final decree of the High Court was correct.

(16) It should by now be pretty obvious that by deliberate design, the Constitution of Kenya, 2010 intended the Supreme Court to concern itself only with important legal issues that have a clear bearing on the public interest. The apex court was not intended to serve as an extra tier of an appeal court, where all disputes would end up. Effective filter mechanisms were designed to ensure that only appeals that implicate the public interest over and above the narrow or direct interest of particular litigants, find their way to the final court.

(17) The principles against which to evaluate an application, in which it is alleged that a matter of general public importance is involved, so as to justify an appeal to the Supreme Court are now well crystallized. These principles may be restated as summarized hereunder.

(18) This Court will not certify a matter to be one of general public importance and deserving of the attention of the Supreme Court as a matter of course. The applicant has first to satisfy the Court that the intended appeal involves a matter of general public importance within the meaning of ***Article 163 (4) (b)*** of the Constitution - (***Daniel Kimani Njihia v Francis Mwangi Kimani & Another 2014] eKLR, Civil Application No. Sup 10 of 2013***). To justify certification, the intended appeal must involve cardinal issues of law or issues of great jurisprudential moment – ***(Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others [2012] eKLR, Supreme Court Petition No. 2 of 2012***). For an intended appeal to qualify as a matter of general public importance, it must be one, the determination of which transcends the circumstances of theparticular case and has a significant bearing on the public interest - **(Styen vs Gnecci-Ruscone)** ***(supra).***

Where the issue of general public importance is alleged to involve a point of law, the point of law

must be a substantial one, the determination of which will have a significant bearing on the public interest. In addition, that the question of law must have arisen before this Court and it must have been the subject of judicial determination - **(Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone)** ***(supra)***.

(19) The jurisdiction of the Supreme Court under ***Article 163 (4) (b)*** is not to be invoked merely for the determination of contested facts between the parties. Nor is it to be invoked merely for the purpose of rectifying errors with regard to matters of settled law – see ***(Malcolm Bell v Daniel Toroitich Arap Moi & Another [2013] eKLR, (Supreme Court Application No. 1 of 2013)***. Consequently, mere apprehension of a miscarriage of justice without satisfying the requirements of ***Article 163 (4) (b)*** of the Constitution will not suffice to justify certification.

(20) These principles, particularly the latter ones, are underpinned by the consideration, succinctly articulated by the Supreme Court as follows in ***Peter Odour Ngoge vs Hon Francis Ole Kaparo & 5 Others*** ***(supra):***

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety design, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

(21) I have carefully considered the issues raised by the applicant. I would find no difficulty in holding that most of the issues intended to be canvassed by the applicant before the Supreme Court do not constitute matters of general public importance within the meaning of ***Article 163 (4) (b)*** of the Constitution and as further expounded by the Supreme Court and this Court. That the dispute involves land does not of itself make the matter one of general public interest. In addition, I cannot see any issue for reference to the Supreme Court arising from the fact that the learned trial judge declined to entertain interlocutory applications on the date scheduled for the hearing of the suit or, indeed, for proceeding with HCCC No. 415 of 1998, in lieu of HCCC No. 389 of 1978, whose file had been missing for almost 20 years.

(22) This is because the parties had, by consent, agreed that on the appointed day, HCCC No. 415 of 1998 would be heard and that all interlocutory applications would be abandoned. The applicant too, having in the intervening period, dispensed with the services of his advocate and having opted to act in person, cannot resile and allege that he was denied an opportunity to be represented by an advocate and that there is a matter of general public importance involved in that respect.

(23) In my view as this application has not attained the threshold set by ***Article 163 (4)*** of the Constitution, there is no other ground to justify a certification by this Court that there is a matter of general public importance involved in the case. I agree with the submission of Ms. Njeri Njagua, learned counsel for the respondent, that the intended appeal raised issues of concern only to the applicant and the respondent, and did not implicate the general public. A bench of this Court differently constituted, dealt with all the complaints raised by the applicant, and which he now wants to be ventilated before the Supreme Court yet again, and censored the trial Judge appropriately. I would decline to issue a certificate under ***Article 163 (4)*** of the Constitution and dismiss the application with costs to the respondent.

(24) As my sister, Nambuye, JA and brother, G. B. M. Kariuki, JA also agree, this application fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of October, 2014.

P. KIHARA KARIUKI, PCA

…….……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

RULING OF NAMBUYE,JA

1. Before us is a notice of motion dated the 14th day of August, 2013. It is premised on Article 163(4) (b) of the Constitution of Kenya, 2010, Section 15 and 16 of the Supreme Court Act and Rule 1(2) of the Court of Appeal Rules. A total of five(5) reliefs are sought. In a summary, the applicant seeks leave of this Court to appeal to the Supreme Court against the decision of this Honorable Court delivered on the 25th day of July, 2013 by ***Karanja, Mwilu and Musinga JJA***. Alternatively, this Honourable Court to certify that the matter in issue as concerning land occupied by the applicant is of general public importance and/or that a substantial miscarriage of justice may have occurred (based on the ratio decidendi of the case of ***Erin Ford Properties***

Limited versus Chesire Country Council [1974] 1ALLER 448) and/or that the law relating to joint possession needs to be considered by the Supreme Court.

2. The motion is anchored on the grounds in the body of the application and the content of a supporting affidavit of ***George Chege Kamau,*** deponed on the same date of the 14th day of August, 2013 and oral submissions in Court. The application is opposed by a replying affidavit of ***Esther Wanjira,*** the respondent**.**

3. The brief background information to this application as gleaned from the judgment of ***Rimita J,*** (as he then was) and the content of the grounds in the body of the application, supporting affidavit and oral submissions to Court is that, the applicant and the respondent at one time cohabited as man and wife, in the course of which they acquired Land Parcel Number L.R. 9514/1 now known as LR. No.Dondori/Mirorani Block2/56 (Ndimu) measuring ten (10) acres, at a purchase price of Kshs. 85,000.00. A dispute arose over the ownership of the subject property after the applicant obtained title in his name only and forcefully evicted the respondent from the land, culminating in the respondent filing Nakuru HCC. No. 389 of 1978 claiming dissolution of the partnership between them and subdivision of the subject property. Nakuru HCCC No. 389 of 1978 was however never heard and finalized. It allegedly disappeared from the Court Registry with no trace. Consequent to its disappearance, a skeleton file was opened, but it is not clear what subsequently became of this skeleton file or as to why no further proceedings were continued in the said skeleton file.

4. Meanwhile, the respondent filed Nakuru HCCC No. 415of 1998 seeking the same reliefs as those previously sought in 369 of 1978. The parties with the participation of their advocates agreed to dispense with summons for directions in the latter suit and fixed the matter for merit hearing before ***Rimita, J.*** On the hearing date, the trial Judge discovered that the applicant had slotted in an application raising objection to the hearing of the latter suit (HCCC No. 415 of 1998) during the pendence of an earlier suit (369 of 1978) over the same subject matter. The Registry gave the hearing date of the application to coincide with the date earlier fixed by the learned Judge for the main hearing. The learned Judge declined to hear that application, and instead proceeded with the hearing of the main suit as previously fixed, culminating in a judgment of the learned Judge of 28th day of June, 1999 sharing out the subject property equally between the applicant and the respondent.

5. The applicant was aggrieved by that judgment and he appealed to this Court vide appeal number 274 of 2006 (Nak 34/2006) seeking either an order for a retrial or a reversal of the learned Judge's findings. In a judgment dated the 25th day of July, 2013 ***W. Karanja, P.M. Mwilu and D.K. Musinga JJA.*** re-evaluated, re-assessed and re-appraised the above evidence, made observations on the judgment, took note of their powers under rule 31 of this Courts Rules, and then arrived at their own conclusion on the matter thus:

> ***"In conclusion, we must state that, the learned Judge erred in law in making such interpreter remarks against the appellant as earlier pointed out. Such attacks on a partys". Characters have no place in a judgment unless they can be justified on the evidence on the record. But having said that we think the appellants conduct on the hearing day in trying to frustrate the hearing of the suit by attempting to side step the consent that had been recorded by counsel must have infuriated the trial Judge. That notwithstanding, the learned Judge took his anger a little bit too far, judging by the kind of remarks he made regarding the appellant."***

6. It is against the above background that the applicant seeks leave of this Court to have his grievances interrogated by the Supreme Court. ***A.B. Shah*** holding brief for ***Kagucia*** for the applicant urged us to allow the application arguing that the applicant's application meets the threshold for a reference to the Supreme Court. Reliance was placed on Article 10(2) (a) (b) for the proposition that the learned trial Judges judgment offends principles of adherence to the rule of law and principles of Equity and Equality in the assessment of evidence adduced by the parties in that the learned Judge tended to favour the respondent in the assessment of the said evdience; Article 50(1) for the proposition that, by reason of the apparent biased mind of the learned trial Judge, the applicant did not receive a fair hearing; Article 73(1) (v) for the proposition that the learned trial Judge's judgment failed to promote public confidence in the integrity of the office of a judge; Article 73(2) (b) for the proposition that the learned trial Judge lacked objectivity and impartiality by failing to ensure that his judgment was not influenced by favouritism and other improper motive such as bias as against the applicant; Article 73(2) (c) for the proposition that the learned trial Judge's judgment lacked objectivity in the protection of public interest that requires objectivity in the administration of justice; Article 73 (2) (d) for the proposition that the learned trial Judge failed in his duty of being accountable to the public in his judgment writing considering that a judgment is not only meant to serve the particular litigants who are party to the litigation giving rise to it only but the entire public, Article 20(4) for the proposition that in the discharge of his duty of administration of justice, the learned Judge failed to apply principles of equity and equality in the administration of justice; Article 23 for the proposition that the standard of administration of justice was not met, in the learned Judges judgment Article 25(c) for the proposition that the applicant did not receive a fair trial.

7. On case law, reliance was placed on the Supreme Court decision in the caseof ***Steyn versus Gnecci- Ruscone SP application NO. 40 of 2012 (S.C.K.)*** for the propositions that: (i) Allowing the applicant to proceed on to the Supreme Court will advance the principles of the rule of law and permit the development of the law by enabling the Supreme Court to redefine new standards for the administration of justice in line with the current demands on the administration of justice set by the prescriptions in the current Constitution (paragraph 12); (ii) they are not only properly before the seat of justice but have also cited the correct provisions of law for access to the seat of justice in the Supreme Court (paragraph 23); (iii) a denial of leave to the applicants to proceed to the Supreme Court as requested will be an affront to the applicants right to access to justice (paragraph 33); (iv) the applicant received a raw deal from both the High Court and this Court in his guest for justice for which he seeks not only a remedy but an effective remedy, that is, access to the seat of justice in the Supreme Court to indicate his grievances.

8. In opposition ***Njeri Njagua*** learned counsel for the respondent, reiterated the content of the replying affidavit of ***Wanjiru Kamau*** the respondent and urged us to dismiss the applicants' application on the grounds that, it has not met the thresh hold for its certification for hearing by the Supreme Court. To Njeri Njagua the applicant's major complaints against the High Court judgment

were that the trial Judge's opening remarks. However, these notwithstanding, the trial Judge went a head to write a fair and balanced judgment which has been upheld by this Court; despite the Court of Appeal reproaching the learned trial Judge for these unfortunate remarks argued ***M/s Njeri Njagua,*** upon the said Court revisiting, re-evaluating and re-assessing the evidence as placed before it, the learned appellate Judges confirmed the findings of the High Court; the issues set out in paragraph 8 of the applicant's supporting affidavit as the issues intended for interrogation, by the Supreme Court do not meet the threshold for submission to the Supreme Court for interrogation as these do not demonstrate existence of any public interest in them. They are simply personal issues between the applicant and the respondent, fairly adjudicated upon by both the High Court and this Court. Reference of these to the Supreme Court for interrogation will be nothing but an abuse of the court process aimed at prolonging this protracted litigation which has been in Court for over 36 years.

9. On law and case law, the respondent relies on Article 10(b) of the Constituion of Kenya, 2010 for the proposition that allowing the applicant's application will infringe on the respondents human dignity as it will in essence prolong the denial of justice to her; the case of ***Telkom Kenya Limited versus John O. Ochande [2014] eKLR*** and ***Charles Nderitu Gitui (suing on his behalf and as legal representative of Charity Nyaguthi Gitoi (deceased) versus Christopher Muchemba Werui and 2 others [2014] eKLR*** for the proposition that the Supreme Court has already on its own in the case of ***In the matter of Hermanus Phillipus Steyn versus Giovanni Gnecci Ruscone (supra)*** provided the extend of the threshold required to be met by any applicant seeking certification of his/her matter for determination by the Supreme Court.

10.Our Jurisdiction to grant the relief sought has been invoked vide Article 163(4) (b) of the Kenya Constitution 2010, Section 15 and 16 of the Supreme Court Act No. 7 of 2011 and Rule 1(2) of the Court of Appeal Rules. Article 163(4) (b) ***Appeals shall lie from the Court of appeal to the Supreme Court.***

> (a) ***In any other case in which the Supreme Court, or the Court of Appeal certifies that a matter of general public importance is involved, …..***
>
> ***Section 15(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.***
>
> ***Section 16(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interest of justice for the Court to hear and determine the proposed appeal.***
>
> ***(2) (a) The appeal involves a matter of general public importance; or***
>
> ***(b) (Struck out)***

Rule 1(2) of the Court of Appeal Rules enshrines the inherent jurisdiction of the Court of appeal. It provides:-

> ***"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

11.Issues the applicant intends to raise before the Supreme Court have been set out in paragraphs 8 and 9 of the supporting affidavit reproduced herein as hereunder:-

> ***8. "That I am advised by my Advocate Mr. Kagucia that the matters which this Court ought to consider whilst dealing with this application are:-***
>
> a. ***It is a matter of general public importance that a new suit on the same subject matter cannot proceed to hearing when an earlier suit is still pending or there was no***

bar to re-constitute the file in HCCC No.389 of 1978.

b. ***It is a matter of general public importance that issues relating to land in Kenya cannot be adjudicated upon by pre-conceived notions in the mind of the Judge that one of the parties was fraudulent when no fraud was pleaded and when there was no evidence that the applicant was responsible for the alleged disappearance of file in HCCC No.389 of 1978.***

c. ***It is a matter of general public importance that a suit cannot proceed to hearing when there is a pending substantial application to be disposed off and more so when the applicant was acting in person.***

d. ***It is a miscarriage of justice when a judge proceeds to formulate or write his judgment with notion in mind that the applicant had greased the hands of the "good District Land Registrar" to obtain his title to the land L.R. 95/4/1 now known as Ndundori/Miroreni Block 2/56 (Ndimu) when it was a first registration.***

e. ***Where an appellate Court makes a finding to the effect that the proceedings were tainted by reason of the trial judge's bias, at least a re-trial ought to have been ordered.***

9. ***In her evidence in the High Court the respondent stated that she paid Kshs.100, 000.00 for the land whilst the "agreement talks of Kshs.85, 000.00.***

12.The judgment of Rimita J complained of was written pursuant to the provisions of Order XX Rule 4 of the Civil Procedure Rules (as it then was) now Order XXI Rule 4 of the Civil Procedure Rules. Order XX rule 4 as it was then and Order XXI Rule 4 as it is now provided and still provides thus:-

"***Judgment in defended suits shall contain a conclusive statement of the case, the point for determination, the decision thereon, and the reasons for such a decision"***

In the case of ***PIL Kenya Limited versus Oppong [2009] KLR442,*** this Court held *inter alia* that:-

"4. Where as it is not necessary for every Judgment to contain what each witness said in evidence as that would in some cases mean irrelevant evidence being included in the judgment and in that would make judgments unnecessarily long and thus delay expeditious disposal of the matter, and whereas a judgment in a civil case is proper if it complies with order 20 rule 4 of the Civil Procedure Act, where a Court has decided to set out evidence of the parties to a suit even if only briefly, it shall for purposes of apparent impartially set out the conflicting evidence of both parties before analyzing and evaluating the same"

In ***Mulla.*** *The code of Civil Procedure* **by Sir Dinshah Fardunji Mulla**. *18th Edition Reprint 2012* ***B.M. Prasad****:* **Butter Worths: Wadhwa pg. 2273** *paragraph 5 on* ***contents of Judgment*** *observations are made inter alia thus:-*

"The decision of a case should be based on grounds raised in the pleadings. Where a plea is not taken in the pleadings and an issue has not been raised, evidence on such a plea should be disregarded and a finding need not be given. The Court also need not give findings on questions raised in arguments but not in the pleadings. A finding without pleadings and issue, is not binding on the parties. A decision based on findings beyond the scope of the suit is outside the jurisdiction of the Court. It has also been held that "un balanced language is generally out of place in judicial adjudication. The judgment should contain points for determination, discussion, the evidence, oral and documentary and give the reasoning on which the conclusion was reached

....

Judges should not inject his own views into the

Judgment."

13.Nowhere in the content of order XX rule 4 as it was then and Order XXI rule 4 as it is now or the above holding in the ***PIL Kenya Limited case*** do we find room or an allowance for intemperate remarks or unsubstantiated assertions by a judge or judicial officer. It means that the " ***judgment"*** of ***Rimita, J*** when properly so called should have been within the confines set out in the then order XX rule 4 as was confirmed by this Court in the ***PIL Kenya Limited case (supra).*** This has been lend credence by observations set out above from ***Mulla*** Code of Civil Procedure (supra) and the book of ***K. Mani*** on Civil Jurisprudence by Kamal Publishers. D-232, ***Saruadaya Enclave, New Delhi-110017.*** At page 172 paragraph 9, there is found the title ***"character of judgment"***

It is stated thus:-

"The judgment delivered by Courts must be characterized by restraint of language, sobriety of expression and addiction which does not smack of being undignified"(See also Mula)

14.The question to be answered by us is whether by the learned trial Judge over stepping the parameters set by order XX rule 4(supra) and as confirmed by the reproach by the learned Appellate Judges; perse, satisfies and or warrants certification of this matter to the Supreme Court. Both sides are in agreement that the principles, criteria and the test to be applied as to whether to certify a matter or not for adjudication by the Supreme Court are those that were set by the Supreme Court itself in the case of ***Hermanus Phillipus Steyn (supra)*** as approved by this Court in civil application No. Sup.24 of 2013 ***Telkom Kenya Limited versus John O. Ochanda (suing on his behalf and on behalf of 996 Former employees of Telkom Kenya Limited (supra)*** and ***Charles Nderitu Gitui (suing on his behalf and as legal representative of Charity Nyaguthii Gitui (deceased) (supra).*** These are set out at paragraph 60 of the ***Hermanus Phillipus Steyni*** case as:

(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 of questions or 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 statutus 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 of 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)***Determination of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."***

15.The above test elements have been applied to all the issues fronted by the applicant for certification to the Supreme Court. My observations on the same are that these arise from a determination of facts in contest as between the applicant and the respondent; issues in controversy as between the applicant and the respondent have been the subject of judicial determination both in the High Court (Nakuru HCCC No.415/1998) and the Court of Appeal Nakuru Civil Appeal No.274 of 2006 (Nak34/2006). They partially raise a point of law touching on issues of bias and fair trial arising from a judgment in which intemperate language has been partly employed against the applicant on the one hand, and on the other hand, there is complaint that the learned trial Judge in the said judgment also took into consideration matters that had not been pleaded and or agitated by the parties to that litigation. In the manner framed, they have greater leaning towards specifics of the litigation between the applicant and the respondent namely, A complaint that the learned trial Judge flauted well known Civil Procedure Rules and practices by determining a latter suit (Nakuru HCCC 415/1998) during the pendence of an earlier suit (Nakuru HCCC No.369 of 1978), by proceeding with the hearing in the latter suit (Nakuru HCCC 415/1998) in the wake of a pending interlocutory application seeking to forestall the hearing and disposal of the latter suit until the status of the earlier filed suit was known, by introducing and taking into consideration extraneous issues of corruption, attributing these to the applicant in the absence of a pleading and agitation of such issues by the parties and lastly by failing to take note of the contradictions in the respondents testimony and pleadings as regards the alleged price of the subject matter of the litigation.

16. It is also my observation that since these are framed with heavy leaning towards the specifics of the litigation as between the parties herein, they cannot fall into the category of issues that transcend beyond the litigation as between the parties herein and are therefore not fit for certification to the Supreme Court. The issues as framed also do not allege uncertainity of the law in the area of litigation which has given rise to contradictory precedents needing reconciliation by the Supreme Court. Instead there is alleged apparent misapprehension of justice arising from alleged imputation of corruption on the part of the applicant which was satisfactorily dealt with by the Court of Appeal. Issues of alleged bias and lack of fair hearing no doubt transcends the applicant and respondent's litigation. These are contained in issue number 8(d) and 8(e). However, in the manner they are framed, there is clear indication that they center on the alleged bias and lack of fair trial in relation to the particular litigation between the parties herein. Had these been framed in a manner that would have made them transcend beyond the litigation herein, they may very well have been used for certification to the Supreme Court for it to interrogate the bare skeleton framework in Order XX rule 4 now Order XXI rule 4 and come up with guidelines as to the elements of a judgment that complies with the principles of the rule of law, that demonstrates evidence of equal treatment or fair assessment of evidence as regards disputes between litigants before a Court of law (Article 102(a) (b), one that demonstrates existence of elements of a fair trial, one that demonstrates elements of public accountability of a particular judicial officer, devoid of lack of improper motive, contains elements of impartiality, demonstrates objectivity, and one that demonstrates accountability of the public judicial officer not only to the litigants before him or her but to the entire public as well, elements of good judicial language. In other words, a judgment that qualifies to be an all round judgment that is prima facie evidence that justice was not only done but has been seen to have been done. The Supreme Court would also have been invited to provide guidelines as to the role of the Court of Appeal with regard to assessment of Judgments that may apparently be within the ambit of Order XXI rule 4 but fall short of the current demands on the administration of justice as envisaged by the Constitutional provisions relied upon by the applicant.

17.I do appreciate that Article 163(4) (a) does not preclude this Court from framing such issues of its own motion and then certify these for interrogation by the Supreme Court. It is however my opinion that in circumstances where

preferred issues have been fronted by a litigant, it will not be prudent for the Court to impose its will on the parties, in absence of an alternative prayer that in the event of the issues framed by the party

not meeting the threshold, on the basis of the facts presented to Court, the court does identify issues that transcends the litigation before it and then certify these for interrogation by the Supreme Court. No such invitation was extended to us. The upshot of the above assessment is that the application stands faulted.

18.I have had the privilege of reading the drafts of the ***Hon. Mr. Paul Kihara Kariuki, PCA*** and my brother Judge- the ***Hon Mr. Justice G.B.M. Kariuki JA.*** I agree with the final conclusion. Orders shall be as proposed by the president of the Court of Appeal.

Dated and delivered at Nairobi this 10th day of October, 2014.

R.N. NAMBUYE

…….……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

D/O

RULING OF G.B.M. KARIUKI SC – JA

1. The appellant, George Chege Kamau, seeks in his notice of motion certification under Article 163(4) b) of the Constitution that his intended appeal to the Supreme Court from the decision of this Court dated July 25th 2013 (made in Civil Appeal No.274 of 2006 (Nai 34/2006)) is of general public importance.

2. The facts on which the application is grounded are elegantly set out in the Ruling by the President of the Court, the Hon. Mr. Justice P. Kihara Kariuki, PCA, which I have had the advantage of reading in draft.

3. I am in complete agreement with the President's decision to decline the application.

4. The applicant's learned counsel, **Mr. A. B. Shah**, was at pains to persuade us that because of the ostensible bias by the learned Judge of the High Court against the applicant, the latter's rights to human dignity and equality and to fair hearing were violated and that the Judge contravened the national values and principles of governance set out in Article 10(2) (a) of the Constitution. This contention was informed by the condemnation of the applicant as a corrupt person by the trial Judge who stated that the applicant was a corrupt person. Mr. Shah's take was that the learned Judge lacked neutrality in hearing the suit and that miscarriage of justice ensued warranting a retrial.

5. Miss Njeri Njagua, the learned counsel for the respondent, opposed the application and relying on her client's replying affidavit submitted that the applicant had not met the test for an order for leave to appeal to the Supreme Court. She contended, correctly in my view, that although the applicant alleged miscarriage of justice, justice was administered and there is nothing new that could be established in the litigation as all the issues of law had been addressed and determined. Clearly, in her view, the matter raised was not of general public importance. She urged the Court to dismiss the application.

6. In its judgment dated 25th July 2013, this Court (Karanja, Mwilu & Musinga JJ.A) faulted the learned Judge's judgment which the applicant attacked. This Court considered the entire record of

appeal as well as the submissions made by counsel for both parties and while observing that the learned trial Judge did not set out properly in his judgment the points for determination and the reasons for the decision made, nevertheless this Court found that the Judge did arrive at the correct determination in the matter which was whether the respondent, Esther Wanjira Kamau, was entitled to a share of the land comprised in the title known as Ndundori/Miroteni/Block 2/56 (Ndima) formally known as L.R.9514/1 (the suit land). On the basis of the evidence placed before the High Court, this Court found that the Judge was justified in holding that the suit land was jointly owned by the applicant and the respondent and therefore saw no reason to disturb that finding and the decision thereof.

7. As for the conduct of the Judge which the applicant's counsel; made heavy weather of, this Court in its judgment criticized the learned Judge's intemperate remarks against the applicant (who was the appellant in the appeal in this Court). This court rendered itself thus-

> **"Such attacks on a party's character have no place in a judgment unless they can be justified on the evidence on record. But having said that, we think that the appellant's conduct on the hearing date in trying to frustrate the hearing of the suit by attempting to side- step the consent that had been recorded by counsel must have infuriated the trial Judge. That notwithstanding, the learned Judge took his anger a little too far, judging by the kind of remarks he made regarding the appellant."**
>
> **"Having re-evaluated the evidence that was adduced at the trial Court, we are persuaded that the learned Judge arrived at the right determination of the suit as regards division of the suit-land between the parties herein. We see no basis for interfering with the decree that was issued on 1st August 2001. Consequently, we dismiss this appeal with costs to the respondent**.

8. Notwithstanding the intemperate language by the learned Judge of the High Court against the applicant, this Court confirmed in its judgment that at the end of the day justice was meted out to the parties.

9. The applicant has based his application for certification on the conduct and intemperate language by the learned Judge of the High Court. His counsel was at pains to show that the threshold set by **Article 163(4) (b)** of the Constitution had been attained and that a matter of general public importance was involved to warrant an appeal to the Supreme Court. The matter complained of did not bear on the decision made by the High Court which was confirmed by this Court to be correct. The issue for determination in the suit was division of the suit-land. That issue did not evince any matter of general public importance. Neither the decision of the High Court which was upheld by this Court nor this Court's judgment threw up any issue of general public importance to warrant leave to appeal to the Supreme Court.

10. The jurisdiction of this Court under **Article 163(4) (b)** of the Constitution is to determine whether, in an application seeking certification to appeal to the Supreme Court, a matter of general public importance is involved. The jurisprudence that has emerged in relation to the threshold on what constitutes "a matter of general public importance" under Article 163(4) (b) in an intended appeal to the Supreme Court shows that such matter must transcend the interest of the parties to the litigation. It must impact on society and/or have consequences that bear on public interest.

11. In the case of **Hermanus Phillipus Steyn V. Giovan Gnecchi-Ruscone** (Civil Application No. Sup 4 of 2012 (UR 3/2012) the Supreme Court succinctly stated:-

> **"1. At law, there is no exhaustive definition of what amounts to "a matter of general public importance".**
>
> **2. In Kenya, the Court of Appeal has dealt with what amounts to a "a matter of general public importance" on at least three occasions.**

3. As early as 8th March 1979, the Court of appeal (Madan, Wambuzi JJ.A & Miller Ag. JA,) stated, per Madan JA, in Murai v. Wainaina (No.4) (1982) KLR at page 48-49 that:

"…..A question of general public importance is a question which takes into account the well-being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of continuity of lift in human society.

…..the question is obviously made one of general public importance for the subject affects the land rights of a large number of people not merely the portion to the appeal.

…..Indeed it is of general public importance that the exact status of Ahoi be resolved by the court."

12. In **Esso Standard v Income [1971] EA 127 Duffus, P.** stated at page 141 as follows:

The appeal having been set down for hearing we had the advantage of full consideration of the proceedings and in our view the points for decision in this case were on a matter of public importance; the point involved the circumstances in which foreign investors have to pay income tax on loans made abroad for the purposes of development in East Africa. This is undoubtedly a question which should be clearly defined from the point of view of foreign investors and it is also a matter of great importance to the three States of the Community that there should be no doubt about the position in future. We therefore, in all the circumstances of this case, granted the extension and reserved our decision on the costs until we heard the substantive appeal."

13. Madan JA, as he then was, stated in **Belinda Murai v Amos Wainaina [1982]** KLR 38 in relation to a "Muhoi" under Kikuyu customary law with regard to land that;

"**this appeal is of public importance as it touches on the subject of land rights, and will not only affect the parties to the appeal but will also affect a large number of original land owners, by dethroning them, causing economic and social upheaval…"**

"…a question of general public importance is a question which takes into account the well-being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society?

"…if the position of a Muhoi which I have earlier set out has been correctly expounded, which has yet to be decided, the question is obviously made one of general public importance for the subject affects the land rights of a large number of people and not merely the portion to the appeal…"

In the light of these principles, it is clear that the issues that the applicant has raised do not involve a matter of general public importance.

14. The draft Petition of Appeal attached to the applicant's application for certification of the matter shows that the proposed grounds of appeal relate to the dispute between the parties over the suit land and the conduct of the learned Judge of the High court. Clearly, these issues have no bearing on public interest. They do not even evince public interest concerns. In short, they do not amount to a matter of general public importance within the meaning of Article 163(4) (b) of the Constitution.

15. It is my finding that the application does not show that the matter intended to be pursued in the

Supreme Court is of general public importance not least because the issues involve only the parties to the litigation and do not in any way impact on society or affect the rights of other people. At any rate, all the issues of law in the litigation were determined initially at the High Court level and subsequently by this court on appeal. There is nothing shown in the application that can remotely be said to involve interest of the general public or even a section of the society in relation to the suit-land.

16. The Supreme Court cannot be engaged in litigation, however interesting, merely to gratify the curiosity of litigants. It is there to guide and lead on administration of justice and development of our jurisprudence.

17. The application has no merit. I agree with the decision of the President of the Court that it should be dismissed and disposed of in line with the orders he has proposed.

Dated and delivered at Nairobi this 10th Day of October, 2014

G.B.M. KARIUKI SC

…….....

JUDGE OF APPEAL

mwk.

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR