



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. SUP. 3 OF 2014

BETWEEN

KANYI KAROKI..... APPLICANT

AND

KARATINA MUNICIPAL COUNCIL 1ST RESPONDENT

THOMAS THINWA KAROKI 2ND RESPONDENT

(An application for certification and leave to file an appeal in the Supreme Court of Kenya from the judgment of the Court of Appeal at Nyeri (Visram, Koome & Odek, JJ.A) dated 17th June, 2014

in

Civil Appeal No. 15 of 2014)

RULING OF THE COURT

1. Before us is a Notice of Motion application brought pursuant to the **Supreme Court Rules** and **Rules 39, 40, 41, 42 & 43** of the **Court of Appeal Rules**. The applicant seeks *inter alia*:-
 - ***That pending the filing of the Record of Appeal and the hearing and determination of the intended appeal in the Supreme Court of Kenya this Honourable Court do order a stay of all proceedings including taxation of the bill of costs and execution in Nyeri Civil Appeal No. 15 of 2014 .***
 - ***That pending the filing of the Record of Appeal and the hearing and determination of the intended appeal in the Supreme Court of Kenya this Honourable Court do order a stay of all proceedings including taxation of the bill of costs and execution in H.C.C.A No. 45 of 1999.***
 - ***That this Honourable court do hereby certify that the intended appeal before the Supreme Court of Kenya raises substantial points of law of general public importance.***
 - ***That this Honourable court do grant leave to the applicant to appeal in the Supreme Court of Kenya.***

2. The subject of the intended appeal to the Supreme Court is this Court's judgment in Civil Appeal 15 of 2014 dated 17th June, 2014. The genesis of this application is that the applicant filed suit in the Principal Magistrate's Court at Nyeri seeking damages for personal injuries sustained in a road accident which occurred on 4th May, 1991. At the material time the applicant was a lawful passenger in the 1st respondent's vehicle which was being driven by the 2nd respondent. The trial court on 2nd March, 1999 entered judgment in favour of the applicant and awarded him Kshs. 26,100/= as special damages and Kshs. 80,000/= as general damages. Despite being aggrieved with the said decision the respondents failed to file an appeal within 30 days. Consequently, the respondents filed an application dated 6th May, 1999 seeking extension of time within which to file the appeal. Before the said application was determined the respondents filed a Memorandum of Appeal on 7th May, 1999. Subsequently, on 10th May, 1999 the High Court granted the respondents leave to file the appeal within 15 days of the said ruling and directed the decretal amount to be deposited in an joint interest earning account
3. Thereafter, the applicant filed an application seeking *inter alia* dismissal of High Court Appeal No. 45 of 1999 (High Court appeal) on the ground that it had been filed out of time without leave of the court. However on 6th March, 2000 the High Court (Juma, J.) admitted the High Court appeal for hearing. Subsequently, the High Court appeal was dismissed for non-attendance on 19th November, 2003. By an application dated 22nd November, 2003, the 1st respondent sought an order reinstating the appeal. On the other hand, the applicant vide an application dated 24th April, 2013 sought an order for release of the decretal amount from the joint interest earning account. The High Court (Wakiaga, J.) heard both applications and by a ruling dated 30th January, 2014 dismissed the applicant's application and reinstated the High Court appeal. It is that decision that instigated Civil Appeal No. 15 of 2014 which was dismissed with costs by this Court on 17th June, 2014.
4. The grounds upon which the applicant relies on in support of his application are that the intended appeal against the judgment of this Court dated 17th June, 2014 raises substantial points of law of general public interest. According to the applicant, the High Court appeal was filed out of time and without leave of the court; consequently, it was a nullity and abuse of the court process. Mr. Gacheche Wa Miano, the applicant's counsel, deposed that the intended appeal to the Supreme Court raises the following issues of general public importance:-
 - ***Was the High Court appeal competent since it was filed out of time and without leave?***
 - ***Did the High Court have jurisdiction to entertain an appeal filed out of time without leave and in particular to reinstate the same for hearing 10 years after it had been dismissed for having been filed out of time without leave?***
 - ***Did the Court of Appeal have jurisdiction to legitimize an appeal in the High Court which had been filed out of time and without leave?***
 - ***Do courts in the Republic of Kenya have jurisdiction to entertain and hear pleadings filed out of time without leave?***
 - ***Is a pleading (including an appeal) filed out of time without leave an abuse of the court process and if so is it null and void ab initio?***
5. The respondents filed a replying affidavit in opposition to the application. Mr. Arphaxad Johnstone Kariuki, learned counsel for the respondents, deposed that the trial court delivered its judgment on 2nd March, 1999 in the absence of the respondents and himself. He was never served with the judgment notice. He deposed that the trial court issued a Certificate of Delay dated 3rd May, 1999; thereafter, the respondents filed the High Court appeal on 7th May, 1999; the appeal was filed within the requisite time frame. Subsequently, the High Court (Juma, J.) admitted the appeal for hearing. The applicant never appealed against the admission of the appeal for hearing. He deposed that intended appeal did not raise any issue of general public importance.

6. At the *interpartes* hearing of this application, Mr. Gacheche wa Miano, learned counsel for the applicant, reiterated the grounds in support of the application. He maintained that the issue of public importance raised by the intended appeal was whether an appeal filed out of time without leave was an abuse of the court process. Mr. Kariuki, learned counsel for the respondents, submitted that the applicant had not demonstrated any issue of public importance which would be raised by the intended appeal. According to him, the matter was an ordinary litigation relating to a road accident. Mr. Kariuki urged us not to grant the leave sought. He argued that the other prayers ought to fail because they were predicated on the assumption that an appeal lies in the Supreme Court.
7. We have considered the application, grounds in support thereof, submissions by counsel and the law. We are of the considered view that two issues arise for determination namely:-

- ***Is the applicant entitled to leave to appeal to the Supreme Court?***
 - ***Is the applicant entitled to stay of proceedings and execution in Civil Appeal 15 of 2014, High Court Civil Appeal 45 of 1999 pending the filing and determination of the appeal in the Supreme Court?***
8. We cannot help but note that the applicant did not bring the current application under the correct provisions of the law. The applicant brought the application pursuant to **Rules 39,40,41,42 & 43** of the **Court of Appeal Rules** which relate to appeals from the High Court to this Court. The applicant seeks leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal 15 of 2014 on the ground that the intended appeal raises a matter of general public importance. Therefore, the applicant ought to have invoked **Article 163(4) (b)** of the **Constitution**. Is this omission fatal? The Supreme Court in **Hermanus Phillipus Steyn –vs- Giovanni Gneccchi Ruscone- Application No. 4 of 2012** held,

“The question then is, whether this omission is fatal to the appellant’s case. It is trite law that a court of law has to be moved under the correct provisions of the law. We note that this court is the highest court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite Article 163(5) will not be fatal to the applicant’s case.”

We find that the omission is not fatal.

9. Not all matters in this Court are appealable to the Supreme Court. The Supreme Court in **Malcolm Bell –vs- Daniel Torotich Arap Moi & others- Application No. 1 of 2013** expressed itself as herein under:-

“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.”

By dint of **Article 163(4)** of the **Constitution** there are only two instances in which one can appeal to the Supreme Court. **Article 163(4)** of the **Constitution** provides:

“163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-

- a. ***As of right in any case involving the interpretation or application of this Constitution; and***
- 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).”***

See also the Supreme Court's decision in *Lawrence Ndutu & 6000 others –vs- Kenya Breweries Ltd. & Another- Petition No. 3 of 2012*.

10. In this case, the applicant seeks leave to appeal to the Supreme Court on the ground that the intended appeal raises issues of general public importance. Categories constituting matters of general public interest are not closed and vary with the circumstances of each case. The Supreme Court in *Hermanus Phillipus Steyn –vs- Giovanni Gnechi Ruscone (Supra)* set out the following governing principles in determining whether a matter merits certification as one of general public importance:-

“In summary we would state the governing principles as follows:-

- 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 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 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.”***

11. The burden falls on the applicant to demonstrate the existence of an issue of general public importance. (See this Court's decision in *Loise Kaguu Munge –vs- Wakaria Mboi Njaramwe & Another- Civil Application No. 28 of 2013*). We find that the applicant has not demonstrated that the intended appeal raises any issue of general public importance. Why do we say so? Firstly, from the issues which the applicant has set out in his application as matters of general public importance, it is clear that the main issue is the competence of the High Court appeal which was allegedly filed out of time and without leave. The applicant contends that the determination of whether such an appeal can be entertained is a matter of public interest. The High Court appeal herein was filed on 7th May, 1999 and subsequently, Juma, J. admitted the appeal for hearing on 6th March, 2000. The applicant never appealed against that decision. We cannot help but note that on 19th November, 2003 the appeal was dismissed for non-attendance and not for being filled out of time as alleged by the applicant. By a judgment dated 30th January, 2014 Wakiaga, J. reinstated the appeal and it is that decision that was the subject of Civil Appeal No. 15 of 2014 before this Court. In the said appeal, this Court considered the competency of the High Court appeal and expressed itself as follows:-

“Pertaining to the competence of the appeal before the High Court, as the appellant (applicant herein) has never appealed against the decision of the High Court (Juma, J.) admitting the respondents’ appeal for hearing, the appeal remains competently on record and the present appeal cannot be used to circumvent the principle that no appeal shall lie unless a Notice of Appeal has been lodged against the decision being challenged.”

The issue that fell for consideration in the appeal before this Court was whether the learned Judge (Wakiaga, J.) erred in reinstating the High Court appeal. We find that the competency of the High Court appeal was not subject of judicial determination in this Court.

12. Secondly, we find that the alleged issue of public importance neither transcends the circumstances of the case herein nor does it have a bearing on the public interest. Thirdly, the applicant has not demonstrated the existence of serious issues of law, arising from past contradictory precedents that require resolution by the Supreme Court.

13. Lastly, on the issue of granting stay orders, this Court in ***Dickson Muricho Muriuki –vs- Timothy Kagonda Muriuki- Civil Application No. 21 of 2013*** held,

“It is our considered view that subject to the Court of Appeal’s jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after the judgment of the Court of Appeal is the Supreme Court; and only when leave or certification has been granted.”

Therefore, this Court has no power to issue an order of stay of execution once it has passed judgment. This Court can only exercise the restricted jurisdiction of considering applications for leave to appeal to the Supreme Court as provided under ***Article 163(4)(b)*** of the ***Constitution***.(See this Court’s decision in ***Loise Kaguu Munge –vs- Wakaria Mboi Njaramwe & Another (Supra)***).

14.The upshot of the foregoing is that the applicant’s application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 1st day of October, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

J. OTIENO- ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

