REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CORAM: WAKI, M'I NOTI & J. MOHA MMED, JJ.A.

CIVIL APPLICATION NO. SUP 3 OF 2014 (UR 3/2014)

BETWEEN

V W N …………..……………….…………. APPLICANT

AND

F N ……………………………………… RESPONDENT

(Being an application for leave to appeal to the Supreme Court from the Judgment & Decree of the Court of Appeal (Nambuye, Warsame & Kiage, JJ.A.) dated 26th July, 2013

in

CIVIL APPEAL NO. 179 OF 2009)

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RULING OF THE COURT

On 26th July, 2013, this Court *(Nambuye, Warsame & Kiage, JJ.A.),* allowed the respondents appeal against the judgment of the High Court, *Rawal, J (as she then was),* which had ordered that the interests of the applicant and the respondent in LR NO. ***[particulars withheld]*** situated in Karen [the Karen property], be severed and both parties be declared as tenants in common in equal shares.

The Court of Appeal set aside the judgment and decree of the High Court and ordered that the Karen property be surveyed and re-subdivided with the result that the respondent would have 70% of the property on which the main house stands and the applicant would have 30% on which the guest house stands.

Aggrieved by that decision, the applicant wishes to appeal to the Supreme Court.

By a notice of motion dated 29th January, 2014, the applicant seeks that:

"… in the interests of fairness and justice that this Honourable Court do certify that this matter is of general public importance and grant the applicant leave to appeal to the Supreme Court."

The brief background to the matter is that the parties were married in 1966 under the African Christian Marriage and Divorce Act and set up a home in Nairobi where both were gainfully employed and also engaged in business activities. The parties purchased property including the Karen property which was registered in their joint names. The parties also purchased two other properties Ngong/Ngong ***[particulars withheld]*** and Ngong/Ngong ***[particulars withheld]*** (the Ngong properties) which were registered in the applicants name and were later disposed of. From the records, both parties claim to have largely or solely contributed to the purchase of the Karen property and the Ngong properties. The parties separated in 1980. The record indicates that the applicant contends that they have never been divorced while the respondent contends that they divorced in 1986. The fact is that the marital relationship no longer subsists.

Submissions by counsel

The application before us is brought under *Articles 159 and 163 (4) of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act*.

Learned counsel, Mr Bernard Chenge, represented the applicant at the hearing while learned counsel Mr Githinji Mwangi represented the respondent.

Mr Chenge argued that the application merits certification as one of general public importance as it seeks to determine the following issues: whether *Article 45 (3) of the Constitution* applies in matters filed before the promulgation of the Constitution and not yet determined; the extent to which *Article 45 (3) of the Constitution* applies *vis-à-vis* the principles enunciated in the case of *PETER MBURU ECHARIA V PRISCILLA NJERI ECHARIA*, *(2007) eKLR* regarding matters filed after promulgation of the Constitution; whether property acquired during the marriage of the parties and registered in one spouses name and handed as a gift to the children of the union should be taken into account during division of matrimonial property; whether the income generated from a property and/or business should be taken into account and whether it is imperative that a valuation report be presented to the court before the determination of the matter.

Counsel submitted that it is in the public interest and beyond the circumstances of this particular case that there be certainty on the legal principles to guide the process and method of division of matrimonial property. Counsel argued that this is important particularly because of the huge number of cases on division of matrimonial property pending in the various courts in Kenya. In counsel?s view, determination of matters they intend to raise in the intended appeal to the Supreme Court will be in the public interest. Counsel urged us to allow the application and grant the certification sought.

Mr Mwangi, learned counsel for the respondent, relied on the replying affidavit sworn on 28th March, 2014, and opposed the application on the following grounds: the applicant has failed to satisfy the governing principles on what constitutes a matter of general public importance? as set out by the Supreme Court in *HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, Application No. 4 of 2012 (unreported)*; the issues raised by the applicant to justify certification to appeal to the Supreme Court were not raised in the High Court or in the Court of Appeal and were, therefore, not the subject of judicial determination and that the applicant has failed to illustrate that the issues canvassed are issues, the determination of which transcends the circumstances of this particular case and has a significant bearing on the public interest.

Analysis and Determination *Article 163 (4) of the Constitution* provides the criteria under which leave to appeal to the Supreme may be granted:

> “*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).”

The question of what amounts to *“a matter of general public importance”* has been dealt with in various cases by the courts in Kenya. It is notable that the Constitution is silent on what the phrase *“a matter of general public importance”* means.

The Supreme Court in the case of *<u>HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE,</u> (2013) eKLR* pronounced itself on the issue as follows:

> *“[58] The foregoing comparative survey, in our opinion, sheds sufficient light on the position to be taken …. Before this Court, “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.*
>
> *[59] ……*
>
> *[60] In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. 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 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. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

This position was reiterated by the Supreme Court in the subsequent case of *MALCOLM BELL V DANIEL TOROITICH ARAP MOI & ANOR, (2013) eKLR*. Counsel for the applicant argued that the application raises a number of issues of general public importance, *inter alia*, concerning the extent to which *Article 45(3) of the Constitution* applies *vis-à-vis* the principles enunciated in the Echaria case with regard to matters filed before the promulgation of the Constitution and which are pending determination.

Article 45 (3) of the Constitution states that:

"*Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage*."

On the application of *Article 45 (3) of the Constitution* vis-à-vis the *Echaria case* the Court of Appeal in *AGNES NANJALA WILLIAM V JACOB PETRUS NICOLAS VANDER GOES, CIVIL APPEAL NO. 127 OF 2011*, the Court observed that *Echaria (supra)* may no longer be good law, and then held:

"Article 45(3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage during the marriage and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However pursuant to Article 68 Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time Parliament will rise to the occasion and enact such a law. Such law will no doubt direct, a court, when or after granting a decree of annulment, divorce or separation, order a division between the parties of any assets acquired by them during the coveture. Pending such enactment, we are nonetheless of the considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."

The legislation envisaged by this Court is The Matrimonial Property Act, 2013 which received assent on 24th December, 2013, and commenced on 16th January, 2014. The passing of the Matrimonial Property Act is an important development in the law of matrimonial property for this country as it clarifies many issues pertaining to matrimonial property and the attendant rights and obligations. *Section 7* provides:

"Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved." Contribution is defined by *Section 2* to mean monetary and non-monetary contribution. Non-monetary contribution includes:

a. Domestic work and management of the matrimonial home;

b. Child care;

c. Companionship;

d. Management of family business or property;

and

e. Farm work

"Family business" means any business which-

a. is run for the benefit of the family by both spouses or either spouse; and

b. generates income or other resources wholly or part of which are for the benefit of the family;"

The provisions of *Sections 2, 6 and 7 of the Matrimonial Property Act, 2013* breath life into the rights provided in *Article 45 (3)*. The Matrimonial Property Act recognizes that both monetary and non monetary contribution should be taken into account in determining contribution.

In light of *Article 45 (3)* and *Section 2 of the Matrimonial Property Act* which define contribution to mean monetary and non monetary contribution, *Echaria [supra]* is no longer good law. Accordingly, the law having been clarified, we do not find that the applicants application raises a matter of general public importance in line with the principles espoused by the Supreme Court in the case of *Hermanus Phillipus Steyn [supra]*.

On the issue whether property acquired during marriage of the parties and registered in one spouse?s name and handed as a gift to children of the union should be taken into account during division of matrimonial property so as to reduce the share entitlement or apportionment of the party granting the gift, considering that it is the children who shall have benefitted; this argument was made in reference to the Ngong properties. The Court of Appeal found that the applicant unilaterally disposed of the Ngong properties.

We find that this issue has been settled by *section 12 of the Matrimonial Property Act, 2013* which provides that:

"(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise."

There is therefore no "*uncertainty as to the point of law*" on this issue which requires settlement by the Supreme Court.

On the issue whether *Article 45 of the Constitution* applies in matters filed before the promulgation of the Constitution, this Court in the case of *Agnes Nanjala William [supra]* rendered itself thus:

"This Court is obliged to give a broad and purposive interpretation to the Constitution that enhances the protection of fundamental rights and freedoms but such an interpretation must be founded on the words of the Constitution. Any other approach would be null and void. In so holding, we are in agreement with Supreme Court reasoning in the case of <u>Samuel Kamau Macharia And Another V Kenya Commercial Bank Ltd & 2 Others,</u> SCK Application No. 2 of

2011 [2012] eKLR where the court stated as follows:

If the words used in a particular provision are forward looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.

Having found that the right to equality as inherent and indefeasible to all human beings,

it matters not that the cause of action accrued before the current constitutional dispensation."

Accordingly, this Court has authoritatively determined this issue, there is, therefore, no uncertainty as to that point of law.

From the record, we find that the questions of law raised by the applicant did not arise in the High Court and the Court of Appeal and have, therefore, not been the subject of judicial determination to merit certification to appeal to the Supreme Court.

Accordingly, we find that the application does not meet the threshold to merit certification to appeal to the Supreme Court.

In the result, we find no merit in the application dated 29th January, 2014, and we accordingly dismiss it with no order as to costs.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. N. WAKI

JUDGE OF APPEAL

K. MINOTI

--------------------------- JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>