IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. SUP 5 OF 2014 (UR 4/2014)

BETWEEN

ISACK M'INANGA KIEBIA ……...…….. APPLICANT

AND

ISAYA THEURI M'LINTARI ……..…… 1ST RESPONDENT

ISACK NTONGAI M'LINTARI ……. 2ND RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nyeri (Visram, Koome & Odek, JJ.A)

dated 1st October, 2014

in

Civil Appeal No. 24 of 2010)

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RULING OF THE COURT

1. Once again before us is an application for leave to appeal to the Supreme Court. The application is brought pursuant to ***Articles 159(2) (d), 163(3) (b) (1), 163(4) (b) & (5)*** of the ***Constitution.*** The applicant seeks *inter alia:-*

- ***A certificate do issue that a matter or matters of general public importance are involved in the applicant's intended appeal to the Supreme Court against the judgment of the Court of Appeal delivered on 1st October, 2014 in Civil Appeal No. 24 of 2010.***

- ***The applicant be granted leave to appeal to the Supreme Court against the judgment and orders of the Court of Appeal delivered on 1st October, 2014 in Civil Appeal No. 24 of 2010.***
- ***The Honourable Court be pleased to issue an injunction barring the respondents from interfering with the applicant's quiet possession of the suit property pending the intended appeal to the Supreme Court.***

2. The respondents filed a suit in the High Court against their paternal uncles, the applicant and

George Mbiti Kiebia (George).The respondents averred that L.R No. Njia/Kiegoi Scheme/86 and L.R. No. Njia/Kiegoi Scheme/70 (suit land) which are registered in the names of George and the applicant respectively were part of ancestral land; a portion of three acres in each parcel was held in trust for their benefit. They sought the determination of the trust and transfer of the aforementioned portions in their favour.

3. It was the respondents' case that the suit land was a portion of ancestral land which belonged to Athimba clan; their uncles and late father, Musa N'lintari, were brothers and belonged to the said clan. During the demarcation period the clan resolved to subdivide the ancestral land and distribute the same to each household; each household was required to nominate one person to hold a portion of land in trust for the rest of the family. The applicant and George were subsequently registered as proprietors of the suit land. According to the respondents, the applicant and George held the suit land in trust for their late father and his family.
4. On the other hand, the applicant and George denied the existence of any trust in respect of the suit land. It was not in dispute that the respondents had since birth resided in L.R No. Njia/Kiegoi Scheme/86 which was registered in favour of George and their late father was buried thereon. George maintained that their occupation was unlawful and by a counter claim sought the respondents' eviction. The applicant contended that the respondents had never resided in L.R. No. Njia/Kiegoi Scheme/70 which was registered in his name hence no trust could arise.
5. After considering the case on its merits, the learned Judge (Kasango, J.) entered judgment in favour of the respondents and directed three acres from each parcel to be transferred to the respondents. Aggrieved by the High Court's decision, the applicant and George filed an appeal before this Court. Unfortunately, before determination of the said appeal George passed away and was never substituted. The applicant prosecuted the appeal in respect of L.R No. Njia/Kiegoi Scheme/ 70.
6. This Court vide its judgment dated 1st October, 2014 concurred with the High Court's findings that the suit land was held in trust for the respondents. This Court found that the applicant held L.R No. Njia/Kiegoi Scheme/ 70 in trust for the respondents despite the fact that they had not occupied the same. This Court further held that one need not be in actual physical possession and occupation of land in order to prove the existence of a trust thereon. It is that decision that has provoked this current application.
7. The current application is supported by the grounds that firstly, the intended appeal raises issues of general public importance and secondly, that the judgment of this Court would occasion great injustice to the applicant. In opposition to the application, the respondents filed an affidavit sworn by the 1st respondent. The 1st respondent deposed that the issues which were determined by this Court were simple issues of trust which did not amount to issues of general public importance; the applicant was only representing his personal interest and not public interest.
8. Mr. Wandabwa, learned counsel for the applicant, in his submissions stated that the application and intended appeal was only in relation to L.R. No. Njia/Kiegoi Scheme/70 which is registered in the applicant's name. He submitted that the intended appeal raises issues of public importance which are general in nature and transcend beyond the case; they do not arise out of an interlocutory appeal. He argued that one issue of public importance that required consideration was, whether under the ***Registered Land Act,*** Chapter 300 (repealed), the mere fact of the existence of ancestral land established trust where there was no possession.
9. Mr. Wandabwa stated that from previous decisions where the courts had found the existence of trust in favour of a party, the said party had been in possession/occupation of the land. He submitted that customary rights are based on possession that is, people living and cultivating the land in question. He submitted that the purpose of the ***Registered Land Act*** was to extinguish customary rights except where people were in possession of the land; this Court stretched the same by holding that inter-generational equity was sufficient to prove a trust; the said finding amended the ***Registered Land Act.*** He maintained that unless this issue was settled by the Supreme Court mayhem would arise. He urged us to allow the application.
10. Mr. Ondieki, learned counsel for the respondents, in opposing the application, submitted that the intended appeal did not raise issues of public importance. This is because firstly, the dispute was between two parties and does not affect the society; secondly, the High Court and this Court made concurrent findings which could not be the basis of an appeal in the Supreme Court. According to Mr. Ondieki, the applicant had not raised serious issues of law because in his own affidavit he

deposed that he would suffer if the judgment in question was not overturned; therefore, the intended appeal has nothing to do with public interest. Mr. Ondieki finally submitted that litigation must come to an end, more so in this case that has been in court for 35 years.

11. We have considered the application, the grounds in support thereof, the submissions by counsel and the law. An appeal from this Court to the Supreme Court arises in only two instances as set out in ***Article 163(4)*** of the ***Constitution***. The said Article 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)."***

12. In this case, the applicant is seeking leave to appeal to the Supreme Court on the ground that the intended appeal raises matters of public importance. This Court in ***Hermanus Philipus Styen – vs- Giovanni Gnecchi- Ruscone-Civil Application No. Nai. Sup.4 of 2012*** observed:-

> ***"The test for granting certification to appeal to the Supreme Court as a court of the last resort is different from the test of granting leave to appeal to an intermediate court – for example, from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course.(See Machira t/a Machira & Company advocates-vs- Mwangi & another (2002) 2KLR 391and The Iran Nabuvat (1990)3 ALL ER 9)…….. In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court."***

13. What constitutes a matter of general public importance? The Supreme Court of Kenya in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone- Application No. 4 of 2012*** held,

> ***"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: it impacts and consequences are substantial, broad based , transcending the litigation- interests of the parties, and bearing upon the public interest."***

The majority opinion in the aforementioned case set out the following as the governing principles in the determination of matter(s) of general public importance:-

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 at 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."***

While adding to the aforementioned governing principles, Ibrahim & Ojwang, SCJJ in the dissenting judgment stated that matters of general importance also include:-

i. ***Issues of law of repeated occurrence in the general occurrence of litigation;***

ii. ***Questions of law that are, as fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or of litigants;***

iii. ***Questions of law that are destined to continually engage the workings of the judicial organs.***

iv. ***Questions bearing on the proper conduct of the administration of justice."***

See also the Supreme Court's decision in ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another- Application No. 1 of 2013.***

14. The applicant herein deposed that the intended appeal to the Supreme Court raises the following issues of general public importance:-

- ***Whether the Registered Land Act, Chapter 300 (now repealed) recognizes the rights of a person to ancestral land, where the person is not in possession of the land.***

- ***Whether Section 163 of the Registered Land Act (now repealed), in applying the common law of England as modified by the doctrines of Equity allows the recognition of ones right to ancestral land, where they are not and have not been in possession of the subject property.***

- ***Whether mere proof that land was ancestral land, would in fact, and law amount to sufficient proof of a trust.***

- ***Whether the mere fact that land was ancestral land, results in a trust in favour of clan members.***

- ***Who bears the burden of proving or disproving a trust in respect of land, where a trust is alleged by a person not in possession of the suit property?***

- ***Whether letters of administration are necessary to commence an action to recover ancestral land which accrued to the claimants (respondents) father.***

- ***Whether the Court in dividing (sic) ancestral land can only consider land held in the names of part of the household and exclude that held by other members of the household. Sic***

- ***Whether customary rights under the Land Registration Act, 2012 have retrospective effect going back to i963 or further.***

- ***Whether limiting the rights to land to a particular tribe is acceptable and constitutional in Kenya today?***

15. Whether or not the above issues amount to matters of general public importance falls for our consideration. In considering the application before us we bear in mind that the onus falls on the applicant to demonstrate that the aforementioned issues carry specific elements of real public interest and concern. See the Supreme Court's decision in ***Hermanus Philipus Steyn –vs- Giovanni Gnecchi-Ruscone (supra)***.
16. The applicant faults this Court's finding that he held L.R. No. Njia/Kiegoi Scheme/70 in trust for the respondents. This is because the respondents had never been in possession of the suit land which was registered under the ***Registered Land Act***. He contends that in past decisions, courts have found the existence of a trust only in favour of a litigant who was in possession of the land in question. According to the applicant, the holding by this Court that one need not be in possession/occupation of the land in question to prove a trust has brought about uncertainty in the area which ought to be addressed by the Supreme Court.
17. Without sitting on appeal of this Court's judgment, we are of the view that the law on trust is well settled and there is no uncertainty. We find that the said issue does not transcend the circumstances of the case herein nor does it have a bearing on public interest. We are of the considered view that both the High Court and this Court made concurrent findings on the contested issue of whether or not a trust existed over the suit land. The said findings cannot be a basis of granting leave to appeal to the Supreme Court. In ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another (supra)***, the Supreme Court held,

> ***"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 <u>not merely for the purpose of rectifying errors with regard to matters of settled law.</u>" Emphasis added.***

18. On the issue of letters of administration, the applicant contended that since the respondents were claiming the suit land through their late father, they ought to have taken out letters of administration. Failure to do so was fatal to their claim; both the High Court and this Court erred in finding the contrary. Again, the law on representation of deceased's estate is well settled. In this case, the respondents were representing their own interests and sued in their personal capacities hence there was no need for letters of administration.
19. The applicant contends that both the High Court and this Court erred in finding L.R No. Njia/Kiegoi Scheme/70 which is registered in his name was part of the ancestral land yet failed to find that L.R No. Kiegoi/Kinyanga/117 which is registered in favour of the respondents' late father, Musa N'lintari, as part of ancestral land. This Court ought to have also directed L.R No. Kiegoi/Kinyanga/117 to be shared amongst the parties. On this issue, this Court found that the issue concerning L.R No. Kiegoi/Kinyanga/117 was neither pleaded in the Pliant, statement of Defence or the Counterclaim; it was never an issue that fell for determination at the trial court; the registered proprietor of the said parcel was not a party to the proceedings. This Court observed that it could not make any orders in respect of the said parcel due to the foregoing. Having expressed ourselves as herein above, we find that the issue does not constitute a matter of general public importance. In ***Malcolm Bell –vs- Hon. Daniel Toroitich Arap Moi & another (supra),*** the Supreme Court held,

> ***" ..Such a position is consistent with the Court's holding in Hermanus Steyn case, that 'the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination'- for them to become a 'matter of general public importance' meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts will often be found to fall outside the proper appeal cause in the Supreme Court."***

20. We take note that the applicant also in support of the application deposed that unless leave sought was granted he would suffer great injustice. He particularized the injustice as follows:-

- ***The said land in question belongs to me and my family, who have been in possession at all material times. Sic***

- ***The respondents land, to wit Keigoi/Kinyanka/117 is not being considered as ancestral land while mine is. Sic***

- ***The Court erred in preferring the evidence of purported elders who were children at the time of the transactions involving the acquisition of the subject land over the steady evidence of the 2nd defendant (applicant) and his witness who were adults and present during the process of land acquisition.***

- ***The Court erred in relying on the disputed and unproven minutes of alleged elders' meetings.***

- ***The Court erred in encouraging discriminative practice.***

We find that apprehension of miscarriage of justice is not a proper basis for granting the leave sought. This Court in ***Gauku Mohamed –vs- Gitonga Mohamed – Civil Application No. Sup 18 of 2012*** held,

> ***"Further as held by the Supreme Court in Hermanus Philipus Styen –vs- Giovanni Gnecchi- Ruscone (Supra) a mere apprehension that miscarriage of justice will be occasioned is not a basis upon which leave to appeal to the Supreme Court can be granted."***

21. On the issue of the injunction sought by the applicant, we can do no better than reproduce this Court's finding in ***Kanyi Karoki –vs- Karatina Municipal Council & another – Civil Application No. Sup. 3 of 2014:-***

> ***"..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."***

We find that injunction sought is tantamount to stay of execution of the judgment of this Court. We are of the view that we have no jurisdiction to grant the said order.

22. Having considered the application and the grounds in support thereof we are of the view that the applicant herein has not demonstrated that there are serious issues of law which transcend the circumstances of the case herein and/or have a bearing on the proper conduct of the administration of justice.
23. The upshot of the foregoing is that we find that the application has no merit and is hereby dismissed with costs to the respondents.

Dated and delivered this 19th day of November, 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR