IN THE COURT OF APPEAL

AT NYERI

(CORAM: MARAGA, MWERA & G.B.M. KARIUKI, JJ.A.)

CIVIL APPLICATION NO. NYERI SUP 2 OF 2013

BETWEEN

DICKSON MURICHO MURIUKI.....APPLICANT

AND

TIMOTHY KAGONDU MURIUKI.....1ST RESPONDENT

FRANCIS KIMONDO MURIUKI.....2ND RESPONDENT

JANE WARIGIA MURIUKI.....3RD RESPONDENT

WILFRED WAIRIMU MURIUKI .....4TH RESPONDENT

DAVID WANJOHI MURIUKI.....5TH RESPONDENT

REPUBLIC.....6TH RESPONDENT

CENTRAL PROVINCE LAND DISPUTES APPEALS COMMITTEE.....7TH RESPONDENT

CHIEF MAGISTRATE'S COURT, NYERI.....8TH RESPONDENT

(Being an application to seek leave to appeal to the Supreme Court against the judgment

(Orders) of this Court, (Visram, Koome & J. Otieno, JJ.A.) delivered 26th June, 2013

in

Civil Appeal No.195 Of 2009)

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RULING OF THE COURT

1. The applicant, Dickson Muricho Muriuki, lodged in this Court on 16th July 2013 an application by way of notice of motion seeking the following four orders:-

1. This honourable court be pleased to grant leave to the applicant to appeal to the Supreme Court against the decision of this Court delivered on the 26th June 2013 by Hon. Alnasir Visram, M. K. Koome and J. Otieno-Odek Judges of Appeal.

2. That this honourable court do certify that the matters in issue as regards when an order of prohibition can be granted are of general public importance and/or that it is likely that a substantial miscarriage of justice may have occurred based on the ratio decidendi in the case of KADAMAS =VS= MUNICIPALITY OF KISUMU (1985) KLR 954 and it is important that the applicable law be considered by the highest court of Kenya.

3. The applicant's notice of appeal lodged on 3rd July 2013 be deemed as having been duly lodged.

4. That the costs of and incidental to this application abide the result of the said appeal.

2. The application was supported by an affidavit sworn by the applicant on 16th July 2013.

3. The application shows that the applicant and the 1st to the 5th respondents are siblings and their mother Susan Nyambura Wahome, is now deceased.

4. A parcel of land measuring 10.07 hectares comprised in land title No.RUGURU/GACHIKA/83 situate in Nyeri has over the years from the decade of 2001 been the subject of litigation between the applicant on the one hand and his mother and siblings on the other hand following claims by the applicant that the said land was his property to the exclusion of his mother and siblings and was not held by him on trust for the said family members.

5. The Land Disputes Tribunal at Nyeri in claim (N.6 of 2004) exercising its powers under the now repealed Land Disputes Tribunal Act No.18 of 1990 adjudicated on the matter on 14th June 2007 and held that the said land belonged to the mother and the applicant and his siblings and that each was entitled to 3.88 acres of the same.

6. The litigation of the land eventually culminated in a judgment of this Court delivered on 26th June 2013 in Nyeri Civil Appeal No.195 of 2009 in which this Court set aside the judgment of the High Court (The Hon. Justice M. Kasango) and dismissed a notice of motion filed in the High Court at Nyeri dated 26th November 2008 in which the applicant (Dickson Muricho Muriuki) sought, besides costs, an order of prohibition directed against the Chief Magistrate Court at Nyeri to restrain the said Court from proceeding with execution or enforcement of the decree given on 12th July 2007 in Nyeri CMC award case No.12 of 2004.

7. The notice of motion (dated 26th November 2008) was heard and on 26th February 2009 the High Court (Kasango,J.) determined it in a judgment delivered on 26.11.2008 which decreed as follows:-

"(1) ***That an order of prohibition is hereby issued directed against the Chief Magistrate Court Nyeri restraining the said Court or any other Court under its control from proceeding with execution or enforcement of the decree given on 12th July 2007 in Nyeri CMCC Award Case No. 12 of 2004.***

2. That costs of the notice of motion dated 26th November 2008 and the application for leave dated 25th November 2008 are awarded to the ex parte applicant as against the interested parties"

8. It is that decision by the High Court made in the said motion that gave rise to the Civil Appeal No.195 of 2009 in this Court sitting in Nyeri which was determined on 26th June 2013 (in Nyeri).

9. In the judgment dated 26th June 2013, this Court (Visram, Koome, Odek, JJA) held, inter alia, as follows:-

> ***"It is common ground that the respondents' application for orders of judicial review in the nature of certiorari was not successful. That is when the 4th respondent filed another suit this time seeking for an order of prohibition. The law on when a writ of prohibition can issue as appreciated by both counsel is well settled in a long line of authorities by this Court and others which form part of the precedents. In the case of Kenya National Examination Council, Ex parte, Geoffrey Gathenji Njoroge, C.A. No.266 of 1996, this Court discussed at length when the remedy of prohibition can issue."***
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> ***"The learned Judge issued an order of prohibition against the Chief Magistrate's Court, Nyeri, restraining the said Court or any other Court under its control from proceedings with execution or enforcement of the decree given on 12th July, 2007, in Nyeri CMCC Award Case No.12 of 2004. Unfortunately, the act that was being prohibited or restrained, had taken place almost 18 months before. In essence, the order of the Chief Magistrate remains because the available remedy that could have set it aside was an order of certiorari." "This is a matter that touches on a principle of law regarding the effects of remedies in judicial review and also touches on the fundamental rights over rights to property by members of the same family who have occupied land through their mother in all their lifetime and now the suit land is registered in the name of one of them, the 4th respondent. It is the 4th respondent who pursued the wrong remedy after he lost a case for what would have been an appropriate remedy. Was he entitled to litigate in installments and after he lost the case for orders of certiorari, file another suit seeking for the order of prohibition?***
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> ***We think not because of the circumstances of this case; an order of prohibition is futuristic, it is pre-emptive and not retroactive. For an order of prohibition to issue the decision complained of must not be completed, it is a contemplated decision. See the case of Republic V University of Nairobi C.A. 73 of 2001, in which this Court observed:***
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> ***"As a matter of common sense, the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done."***

10. This Court found merit in the appeal from the decision of the High Court (Kasango, J) and without hesitation allowed it on 26th June 2013 and set aside the High Court judgment dated 26th February 2009 and dismissed the notice of motion seeking an order of prohibition.

11. The applicant was aggrieved. Desirous of moving to the Supreme Court on appeal he filed the motion, now the subject of this ruling. He avers that *"there are various issues of general public importance involved in the proposed appeal to the Supreme Court"* and he has attached a draft petition of appeal containing 8 proposed grounds of appeal. He states that the issues of general public importance which he has alluded to can also be deciphered therefrom. The 8 grounds stated the 6 issues thereof as follows:-

> **Grounds-**
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> ***1. The Appellate court erred in finding that the suit property was land held in common and provisions of Section 3 (1) of the LAND DISPUTES TRIBUNALS ACT NO. 18 OF 1990 (now repealed) could be invoked.***
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> ***2. The Appellate Court erred in holding that the act being prohibited or restrained had taken place almost 18 months before the order whereas there was no evidence on record that execution had taken place.***
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> ***3. The Appellate court erred in law in holding that the Learned Judge of the Superior Court***

intended to nullify an order that was made in excess of jurisdiction whereas there was no such order on record.

4. The Appellate court erred in holding that the appellant should have applied to quash the decision of the LAND DISPUTES TRIBUNAL instead of appealing to the PROVINCIAL LAND DISPUTES COMMITTEE.

5. The Appellate court erred in holding that the appellant pursued a wrong remedy after he lost a case for what would have been an appropriate remedy and was thus disentitled to the orders given by the Superior Court.

6. The Appellate court erred in holding that an order of prohibition could not issue in the circumstances of the appellants case contrary to its own decision in the case of KADAMAS = vs = MUNICIPALITY OF KISUMU (1985) KLR 954.

7. The Appellate court erred in holding that an order of prohibition was issued to stop adoption of orders that were already adopted.

8. The Appellate court erred in holding that the dispute filed before the LAND DISPUTES TRIBUNAL was not res judicata despite existence of previous proceedings involving ownership of the suit land.

Issues for determination by this Court:-

(A) whether execution is a process capable of being prohibited.

(B) whether Prohibition and Certiorari are mutually exclusive remedies

(C) Whether the Superior Court was entitled to inquire into the validity of the decision sought to be impugned before granting an order of Prohibition

(D) Whether the Court of Appeal was entitled to depart from its decision in the KADAMAS case (supra) without stating so or giving reasons for doing so.

(E) Whether the doctrine of Res Judicata could operate to bar members of the same family or clan from litigating a dispute previously resolved between their kin.

(F) Whether a litigant who prefers an Appeal against a decision loses his right to apply for judicial review.

12. When the application came up for hearing before us, Mr. Gakuhi Chege, the learned counsel for the applicant, urged us to find that a matter of general public importance is involved in the proposed petition of appeal to the Supreme Court from this Court's judgment dated 26th June 2013. He wondered whether it was open to the Court to enquire about validity of that which is sought to be prohibited in judicial review and *"whether the remedies of prohibition and certiorari were mutually co-existent."* He took the position that the Court was not correct in its holding that no order of prohibition could issue if the act sought to be stopped had taken place. He opined that the Supreme Court ought to decide if there are conflicts or inconsistences in the decisions in **Malcolm Bell v. Hon. Daniel Toroitich arap Moi and Another Supreme Court Application No. 1 of 2013 (e KLR) and Kadamas vs Municipality of Kisumu (1985) KLR 954.** It was the said Counsel's view that the doctrine of *res judicata* needed to be clarified in relation to its application on family members where some of the members have been parties to litigation involving family land. Mr. Gakuhi further submitted that this argument was not advanced with clarity but it seems to us that members of a family engaged in civil litigation *inter se* are bound by the doctrine just like other litigants in normal civil litigation are and the principle of *res judicata* would have like consequences. He said the point raised by the applicant's counsel does not show any matter of law that is of general public importance to warrant certification and hence/clarification by the Supreme Court.

13. On her part, Mrs. Muthike, learned counsel for the 1st to the 5th respondent opposed the application and relying on the affidavit sworn by the 1st respondent on behalf of all the respondents submitted that there was no matter of general public importance shown in the application to warrant certification under Article 163(4)(b) of the Constitution. She urged the Court to dismiss the application.

14. Though served, the 6th, 7th and 8th respondents were not represented in the hearing before us nor had they or any of them filed any affidavit to respond to the application.

15. We have carefully perused the application and the affidavits and annextures thereof and have given due consideration to the rival submissions made by counsel for the parties.

16. The jurisdiction of this Court to determine whether an applicant is entitled in law to appeal to the Supreme Court from our decisions and therefore to receive a certification that his/her appeal involves a matter of general public importance is given by Article 163(4)(b) of the Constitution. The Article states:-

> ***"163(4) appeals shall lie from the Court of Appeal to the Supreme Court:***
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> **(a)** ***as of right in any case involving the interpretation or application of this Constitution; and***
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> **(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).***
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> ***Article 163(5) states that:-***
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> ***A certification by the Court of Appeal under clause 4 (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.***

17. As is apparent from Article 163 (4)(b) of the Constitution, a matter of general public importance must be shown before leave is granted to appeal to the Supreme Court from the decisions of this Court unless the intended appeals involve the interpretation or application of the Constitution in which case they lie to the Supreme Court as of right. Clearly, the appeal intended by the applicant does not involve the interpretation or application of the Constitution. The application seeking certification of the proposed appeal falls under Article 163(4)(b) and it is therefore imperative that it does evince a matter of general public importance to warrant certification in that regard.

18. The emerging jurisprudence 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 involve legal issues that transcend the interest of the parties to the litigation and encompass and impact on legal rights or obligations of members of society in general or a section of society or have consequences that bear on public interest.

19. 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".***
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> ***2. In Kenya, the Court of Appeal has dealt with what amounts to "a matter of general public importance" on at least three occasions.***
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> ***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:***
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> ***"……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 life 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."

20. In **Esso Standard v Income Tax [1971] EA 127** Duffus, P. said 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."

21. 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..."

22. The issues that the applicant is desirous of canvassing in the Supreme Court relate to the land dispute that has pitted him on one side and his mother and siblings on the other. Do the issues involve matters or a matter of general public importance?

23. The applicant claims that the Court erred in finding that the suit property was held in common and that provisions of Section 3(1) of the Land Disputes Tribunals Act No.18 of 1990 (now repealed) could be invoked. There is nothing new or peculiar in this. Indeed, the said Act was the subject of an avalanche of litigation. The Law Reports are replete with decisions on the Act. This is not the sort of a matter that the Supreme Court should dissipate its time and energy considering as clearly the matter is common-place and decisions on like litigation show a well beaten track.

24. As regards the criticism by the appellant that this Court erred in holding that *"the Act being prohibited or restrained"* had taken place almost 18 months before the order whereas there was no evidence on record that execution had taken place and the contention that an issue does arise *"whether prohibition and certiorari are mutually exclusive remedies"* is contrived not least because this Court has made a decision that the High Court erred in issuing an order of prohibition to stop the Chief Magistrate at Nyeri from proceeding with execution of the decree given on 12.07.2007 in Nyeri CMCC Award Case No.12 of 2004 on account of the fact that the act sought to be prohibited had already taken place 18 months before. This Court observed in its judgment that the order of certiorari to quash the award would perhaps have been more appropriate. But the applicant had already filed a judicial review Miscellaneous

Application No.112 of 2008 seeking an order of certiorari which was dismissed and he did not appeal against the dismissal order and it was not open to the applicant to revisit the matter. Whereas prohibition relates to stoppage of an act and is akin to *quia timet* injunction, an order of certiorari goes to quash that which already exists. The law reports are replete with decisions of this Court relating to orders litigating in the Supreme Court, there is not in our view any aspect that can remotely be described as involving a matter of general public importance in the proposed appeal.

25. It was the position of the applicant that there existed previous proceedings involving ownership of the suit land and that this Court erred in holding that the dispute filed before the Land Disputes Tribunal was not *res judicata.* The question posed by the applicant in that context is whether the doctrine of *res judicata* could operate to bar members of the same family or clan from litigating a dispute previously resolved between such members. This question is academic as the decision with which the applicant is aggrieved did not repose on its application. At any rate, the circumstances of the litigation in this case do not show that the principle of *res judicata* has given rise to any legal issue that requires illumination or amplification or clarification by the Supreme Court. The point is contrived.

26. In sum, the issues that the applicant is desirous of pursuing in the Supreme Court by way of an appeal from the judgment of this Court dated 26th June 2013 do not show that a matter of general public importance is involved.

27. We find no merit in the application by the applicant and we accordingly dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 7th day of November 2014.

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR