**REPUBLIC OF KENYA**

**Court of Appeal at Nairobi**

**Civil Application 5 of 2012**

**GREENFIELD INVESTMENTS LIMITED……....……APPLICANT**

**AND**

**BABER ALIBHAI MAWJI ……..…….…….……RESPONDENT**

***(Application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya***

***from the judgment of the Court of Appeal at Nairobi dated 30th April 2010***

***in***

***HCCC NO. 155 OF 2004)***

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**RULING OF THE COURT**

Even though the application before us is styled ***"an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya",*** the constitution does not contemplate such an application. Rather, it is *certification* that the constitutional provisions cited speaks of and we treat the application as such.

The application is brought by notice of motion under Article **163 (4) (b)** of the Constitution and Section 3A and 3B of the Appellate Jurisdiction Act. In it, **GREENFIELD INVESTMENTS LTD** (the Applicant) craves of us the following orders;

***"1. THAT the Honourable Court be pleased to certify that the intended appeal concerns a matter of great public importance.***

***2. THAT this Honourable court be pleased to grant leave to the Appellant (sic) to lodge an appeal against the judgment of the Court of Appeal in Civil Appeal No. 155 of 2004 – Greenfields Investments Ltd vs. Baber Alibhai Mawji, delivered on 30th April 2010".***

The rest of the application, predicated on the outcome of the main prayers above, seeks directions as to the timelines for filing and service of a notice of appeal as well as costs.

The application bears on its face nearly a dozen grounds though, with respect, only one of the them is relevant in the consideration of an application of this kind, namely;

***"(f) The intended appeal meets the threshold requirement for leave to appeal to this court in that;***

***1. <u>The appeal involves a matter of general public importance in that the said decision inter alia, purported to rewrite the law relating to adverse possession.</u>***

***2. A substantial miscarriage of justice occurred by dint of the said decision as the applicant has been deprived of its constitutional right to property". (***Emphasis ours).

Much as we have stated that the above ground is the only relevant one of the near dozen, it is easy to see that there was a deficit of attention in its formulation. The ground would be perfectly framed if meant for the Supreme Court ("appeal to this court") but not for this Court. Indeed, the second part of the ground seems to invoke a totally different and independent jurisdiction available to and exercisable by the Supreme Court (the interpretation or application of the Constitution) about which we are not here concerned.

The foregoing inelegancies of a cut and paste type must be a residuum from the application of similar character that the applicant had made to the Supreme Court seeking essentially the same orders as it seeks before us. The Supreme Court declined any consideration of the said application on its merits and ordered instead that the application for certification be first filed and determined in this Court.

Even though we do not have the benefit of the Supreme Court's reasoning in its decision to send the applicant first to this Court, that Court has in subsequent cases articulated the premises. The Supreme Court has made clear that its jurisdiction under **Article 163 (4) (b)** of the Constitution must necessarily and by definition be exercised more as an exception rather than as a matter of course. It cannot have been the intention of the framers of the Constitution that appeal to the apex court be one to be lightly and generally invoked. The historical finality of the Court of Appeal in matters of law is retained and maintained save for a limited number of cases and subject to certification. This has to be so, for, in the words of the Supreme Court in **<u>PETER ODUOR NGOGE vs. HON. FRANCIS OLE KAPARO & 5 OTHERS, (SUPREME COURT PETITION NO. 2 OF 2012</u>** [2012] e KLR;

***"[T]he instant matter … has given occasion for us to further explicate this Court's appellate jurisdiction.***

***We draw analogies with the plurality of autonomous structures created by the Constitution of Kenya, 2010, which represents progressive trend of governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its power strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.***

***In the application of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, 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".***

It would indeed be a perversion of the law as is unambiguously spelt out in the Constitution were certifications to become fare for ordinary cases no matter how complex that have for ages been concluded with finality in this Court. This is part of the rationale for the requirement that certification be first sought in this Court.

In **<u>SUM MODEL INDUSTRIES LTD vs. INDUSTRIAL AND COMMERCIAL CORPORATION (*Supreme Court Civil Application No. 1 of 2011*)</u>**the Supreme Court stated;

***"This being an application for leave to appeal against a decision of the Court of Appeal (under Art 163 (4) (b) of the Constitution) it would be good practice to originate the application in the Court of Appeal***

***which would be better placed to certify whether a matter of general public importance is involved".***

What the Supreme Court in that inaugural application termed good practice has subsequently been further developed by the same Court to a position of a peremptory postulate making it mandatory that certification applications be originated in this Court. This was authoritatively enunciated by the Supreme Court in **SAMUEL KAMAU MACHARIA & ANOR. vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS, CIVIL APPLICATION NO. 2 OF 2012** thus;

***"We therefore affirm the principle of good practice laid down in the SUM MODEL case that those seeking certification to appeal from the Court of Appeal on the basis of Article 163 (4) have to originate their application in that court.***

***The Court of Appeal when faced with such an application must entertain it notwithstanding the fact there is no rule of procedure providing for how the said application is to be made. The right to seek certification stems from the Constitution and it is on that basis that it is exercised. For the course of experience shows cases in which appeal to the Supreme Court has been sought on grounds other than of merit, the Court of Appeal has the necessary case-management obligation to grant leave only for weighty cause".***

That said, this application is properly before us and should indeed have been filed here in the very first instance.

The impugned judgment of this Court was delivered on **30th April 2010**. That judgment was the culmination of litigation spanning three decades between the parties. It was rendered in **Civil Appeal No. 155 of 2004** in which the Applicant had challenged the decision of the High Court given after a full trial in ***CIVIL SUIT NO. 3655 (OS).*** That court *(Kuloba J.)* had found and decreed in an elaborate judgment that BABER ALIBHAI MAWJI (the Respondent) was entitled to all that property known as L.R. No. 214/273 by adverse possession and ordered that he be registered as the sole proprietor thereof.

The appeal to this Court had been consolidated with ***CIVIL APPEAL NO. 269 OF 2001*** by the respondent against the applicant and another party, one SULTAN HASHAM RALJI. That appeal was from a ruling of the High Court at Nairobi *(Ole Keiwua J.),* dated 24th January 1996. After hearing the two appeals, the court in a considered judgment came to this conclusion;

***"The respondent having been put into possession in 1976 as a Purchaser under contract for sale, time started running against the Vendor and the subsequent owner from the time of entry into possession – see the case of BRIDGES vs. MEES [1957] ch. 475.***

**In conclusion, we would like to add that possession has ancient origins in every community. In many ways, it is a cradle right. Historically, it was first in time. The concept of ownership came later and in its trail, systems of registration of title. Adverse possession re-asserts that ancient right of possession. The law allows possessors to reassert it where circumstances justify it, such as in this case.**

**The upshot is that Civil Appeal No. 269 is hereby allowed with the result that the ruling of the Superior Court dated 14th July 1996 is set aside and the order prayed for in the chamber summons dated 13th September, 1995 is granted. We award the costs of the appeal to the appellant.**

**In addition, for the foregoing reasons, Civil Appeal No. 155 of 2004, is dismissed with costs"**.

Before us, Mr. Amoko, learned counsel for the applicant, assailed the judgment of this Court above as suffering an analytical deficit for being incomplete and inaccurate. He also attacked the distinction the Court made between ownership and possession as pedantic. In his view, a miscarriage of justice may have occurred. He urged that outcome and parties aside, the country would stand to benefit from the Supreme Court's authoritative pronouncement on the issues.

On his part, Mr. Monari, learned counsel for the respondent, was categorical that the issues argued before us did not warrant certification. To him, the depth or non-depth of analysis by this court as alleged was not a matter of general public interest to bring into play the certification jurisdiction. In any event, argued Mr. Monari, the submission by his counterpart that the judges did not conduct a proper analysis was fallacious. He castigated his opposite number's assertion that this application is not about outcomes and countered that litigation is always about outcomes and that the applicant was in fact seeking a re-opening and overturning of the outcome before this Court in a roundabout way. Mr. Monari concluded by making an impassioned plea for finality and closure, an end to litigation.

In light of what we are about to say, we do not consider it necessary to make a determination one way or the other on the rival submission on the point of whether or not the applicant has satisfied the general public importance threshold for certification under Article **163 (4) (b**) of the Constitution. We shall, instead, determine this application on the single issue that goes to the jurisdiction of the Supreme Court to hear the intended appeal.

As we have said, the judgment of this Court was rendered on **30th April 2010** which was some four months before the Constitution of Kenya, 2010, came into force on 27th August 2010. The fact of the judgment predating the promulgation of the Constitution is fatal to any intended appeal therefrom and to any application for certification such as is before us.

The point has been dealt with by the Supreme Court itself in the ***S.K. MACHARIA*** case (supra) which first posed the issue as follows;

***"… before us, there is a significant question regarding the appellate jurisdiction of this Court. The issue has been raised by the respondents. Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of Appeal before this Court came into existence? Does the appellate jurisdiction of the Court stretch back to the time prior to the promulgation of the Constitution?"***

After analyzing the question whether the Constitution conferred upon aggrieved parties a retrospective right of appeal, from decision of this Court that bore the stamp of finality in all matters at the time, the Supreme Court delivered itself thus;

"***Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that court. If this court were to allow appeals from cases that had been finalized by the Court of Appeal before the commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens ….***

***We hold that Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court before the commencement of the Constitution".***

We respectfully agree and are, in any event, bound by the Supreme Court's enunciation of the law on the specific point. It is a pragmatic decision for it is unthinkable that the birth of the new constitutional order with new expanded rights should be treated as an opportunity to go back into the mists of time and revive old legal disputes no matter how unsatisfactorily, in the eyes of the aggrieved, they may have been concluded.

In the result, the Supreme Court is bereft of jurisdiction to entertain the appeal for which our certificate is sought. We accordingly cannot grant the said certificate for to do so would be tantamount to attempting to grant the Supreme Court a jurisdiction it does not possess and that would be an act of signal judicial futility. Where, as here, the judgment predated the Constitution, this Court must decline certification. It did so in ***BAIBA DHIDHA MJIDHO vs. VANLEER (EA) LTD (GRIEF K. LTD) A BUSINESS OF BRIEF BROS CORPORATION, Civil Application No. Sup 8 of 2012 (unreported)).*** We likewise decline.

The application stands dismissed with costs to the Respondent.

***Dated and delivered at Nairobi this 8th day of March 2013.***

**W. KARANJA**
**.....**

**JUDGE OF APPEAL**

**P.O. KIAGE**
**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**
**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**