



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPLICATION NO. SUP 18 OF 2012

BETWEEN

GAUKU MOHAMED APPLICANT

AND

GITONGA MOHAMED RESPONDENT

*(An application for leave to appeal to the Supreme Court from the judgment of the Court of Appeal
(Githinji, Nambuye & Maraga, JJ.A) dated 25th October, 2012*

in

CIVIL APPEAL NO. 64 OF 2008)

RULING OF THE COURT

1. Before us is a Notice of Motion application brought pursuant to **Article 163 (4) (b)** of the **Constitution, Section 15(1) & 16(2) (a) & (b)** of the **Supreme Court Act** and **Order 51 rule 1** of the **Civil Procedure Rules** wherein leave to appeal to the Supreme Court against the judgment of this court dated 25th October, 2012 is sought.
2. The genesis of this application is that one Mohamed Gatonge (deceased) died intestate on 14th February, 1979. Thereafter, Gauku Mohamed, the applicant, applied for letters of administration over the deceased's estate on the ground that she was the deceased's only surviving child. The deceased's estate only comprised of a parcel of land described as Plot No. 6 Meru (suit property) situated at Makutano in Meru. After publication of the above mentioned application by the applicant, Gitonga Mohamed, the respondent, filed on 10th December, 1996 an objection against letters of administration being granted to the applicant. The respondent's case was that the applicant fraudulently concealed the existence of other beneficiaries entitled to the deceased's estate when she applied for letters of administration; that the beneficiaries included seven children and his mother; and that the respondent being the deceased's only son together with his mother, Karambu Mohamed, were entitled in priority over the applicant to administer the deceased's estate.
3. In response to the objection, the applicant claimed that the respondent was not the deceased's son; that in 1962 before the respondent was born, the deceased divorced one Karambu Mohamed (both the applicant's and respondent's mother); and that thereafter she got married to someone else who is the respondent's father. It was the applicant's case that she stayed with and took care of the deceased during his illness and that she vigorously defended claims over the suit property by third

- parties.
4. Subsequently, on 16th September, 2002 the parties herein recorded a consent order in the High Court to the effect that the parties would be joint administrators to the deceased's estate; and that the applicant would tabulate the expenditure she incurred in defending the suit property and account for rent she had collected thereon. However, two years down the line, the applicant filed two applications seeking to set aside the said consent. The applications were ultimately dismissed by the High Court. The trial court directed the parties herein to file affidavits proposing the mode of distribution of the suit property. On one hand, the applicant deponed that she was entitled to get the entire suit property because the respondent was not the deceased's son. On the other hand, the respondent proposed that the suit property be divided equally between the parties. The High Court in its judgment dated 17th October, 2007 ordered the suit property to be shared equally. Aggrieved with the High Court decision, the applicant filed an appeal in this Court being Civil Appeal No. 64 of 2008.
 5. The main grounds of appeal that were put forth by the applicant are that firstly, that the trial court erred in dismissing the applications seeking to set aside the consent order dated 16th September, 2009 despite the same being recorded without the applicant's authority or her then counsel's consent; and that the trial court erred by failing to take *viva voce* evidence to determine whether the respondent was the deceased's biological son.
 6. In the said appeal, the applicant submitted that the suit property was given to her as a gift by the deceased during his lifetime. She also submitted that the respondent's claim was time barred as she had been in occupation of the suit property since 1978. In opposing the appeal, the respondent argued that both parties relied on affidavit evidence to establish their respective claims and that the applicant neither objected to the same nor raised the issue of *viva voce* evidence in the trial court. It was also the respondent's case that his claim was not time barred because there is no time limitation against a beneficiary's claim to his/her entitlement over a deceased's estate.
 7. This Court in its judgment dated 25th October, 2012 upheld the trial court's decision. It held firstly, that the consent order dated 16th September, 2002 was recorded with the consent of the parties herein; that the applicant's 2nd application which sought to set aside the consent order was dismissed on 18th December, 2012; that the period within which the applicant could have appealed against the decision expired on 19th January, 2007; and that consequently, the appeal filed before this Court on 31st March, 2008 without leave of the Court was out of time. Secondly, that the issue of the respondent's paternity had been conclusively determined by the trial court and therefore there was no issue to be determined through *viva voce* evidence. Thirdly, this Court held that the trial court was correct in declining to rely on an alleged translation of a letter wherein the deceased allegedly gifted the applicant the suit property since the said letter was not produced. It is the said decision by this Court that the applicant desires to appeal against in the Supreme Court.
 8. The applicant through her application claims that the intended appeal involves matters of general public importance in that complicated factual and legal issues were decided upon without *viva voce* evidence being adduced. The grounds upon which the application is based on is that firstly, the applicant's plea to this Court to order a retrial where *viva voce* evidence would be adduced was dismissed casually; secondly, that the issues of paternity and the fraudulent consent were ignored summarily; and thirdly, that a substantial miscarriage of justice may occur if the said leave is not granted. The applicant also in her further affidavit sought an order of stay of execution.
 9. At the *interpartes* hearing, the applicant appeared in person while the respondent was represented by Mr. E. Kimathi. The applicant submitted that she is seeking leave to appeal to the Supreme Court since both the trial court and this Court had not properly determined the matter. She contended that she had not received justice from the two courts which ordered for division of the suit property since the deceased had left her the suit property in 1978. She argued that she had not given her authority for the consent order dated 16th September, 2002 to be recorded. She submitted that the intended appeal involved a matter of general public importance since the suit property is occupied by her six children and 100 people worship in the church that has been constructed thereon.
 10. Mr. Kimathi learned counsel for the respondent, in opposing the application relied on the replying affidavit sworn by the respondent. He submitted that there was no basis for this Court to grant the leave sought since no matter of (public) general public importance had arisen. He argued that the

matter only involved a family dispute over land. In urging us to disallow the application, Mr. Kimathi relied on this Court's decision in **Hermanus Philipus Styen –vs- Giovanni Gneccchi-Rusccone- Civil Application No. Nai. Sup 4 of 2012.** He submitted that the applicant had been heard by both the trial court and this Court and that the issue of the consent order had already been determined by both courts.

11. We have considered the application, the grounds in support thereof, affidavits sworn by the parties herein, able submissions of both the applicant and the respondent's counsel and the law. **Article 164** of the **Constitution** provides as follows,

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

- a.
- 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).'*** (Emphasis added)

It is this provision that the applicant has invoked in seeking leave to appeal to the Supreme Court. Therefore, what we are being called upon to determine in considering the application is whether the intended appeal raises issue(s) of general public importance.

12. We are of the considered view that at this juncture it is necessary to point out that the test for granting leave to appeal to the Supreme Court is different from the test for granting leave to appeal to this Court. In **Hermanus Philipus Styen –vs- Giovanni Gneccchi- Rusccone (supra)**, this Court held as follows:-

'The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for 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 & ano (2002) 2KLR 391 and 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. The role of a Supreme Court was succinctly stated by the House of Lords in R-vs- Secretary of State Exp. Eastaway (Lord Bingham) (2001) 1 ALL ER 27..'

See also this Court's decision in **Koinage Investment & Development Ltd. –vs- Robert Nelson Ngethe – Civil Application No. Sup 15 of 2012** and the Supreme Court's decision in **Peter Odour Ngoge –vs- Attorney General- Petition No. 2 of 2012.**

13. Neither the **Constitution** nor the **Supreme Court Act** defines what constitutes a matter of general public importance. The Supreme Court in **Hermanus Philipus Styen –vs- Giovanni Gneccchi- Rusccone- Application No. 4 of 2012** held that a matter of general public importance that is envisaged under **Article 163(4)(b)** of the **Constitution** could be a matter of law or fact provided that its impacts and consequences are substantial, broad based, transcending the litigation interests of the parties and have bearing upon the public interest. Since the categories constituting public interest are not closed, the burden falls on the applicant herein to demonstrate that the intended appeal to the Supreme Court has matter(s) of real public interest.

14. The Supreme Court in **Hermanus Philipus Styen –vs- Giovanni Gneccchi- Rusccone (supra)** set out the following broad principles to be taken into account when both this Court and the Supreme Court are considering whether an intended appeal to the Supreme Court raises a matter 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 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.’*

15. Based on the foregoing, we are of the considered view that the intended appeal by the applicant to the Supreme Court does not raise matter(s) of general public importance. This is because the main issues in dispute in the matter is over the paternity of the respondent and the consent order dated 16th September, 2002 which in our view does not transcend the particular case into the public realm. We are of the considered view that both the High Court and this Court made concurrent findings of facts on the evidentiary matters that were in controversy which by themselves cannot be a basis for granting the leave sought. Further as was 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. We are also of the view that the applicant herein has not demonstrated that there are serious issues of law, arising from any past decisions contradicting each other, that require resolution by the Supreme Court.

16. The upshot of the foregoing is that we find no merit in the applicant’s application. Accordingly, we dismiss the same with costs to the respondent.

Dated and delivered at Nyeri this 18th day of September, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR