Boit & another v Muyesu (Application E004 of 2024)
[2025] KESC 8 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KESC 8 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION E004 OF 2024

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MARCH 14, 2025

BETWEEN

THOMAS KIMUTAI BOIT ..... 1ST APPLICANT

JOSIAH KIMEBUR KIBIAS ..... 2ND APPLICANT

AND

JOSEPH NDAYALA MUYESU ..... RESPONDENT

(Being an application for review of the Ruling and orders of the Court of Appeal in Civil Application No. E017 of 2023 given at Eldoret (Sichale, Achode & Korir JJ. A) dated 2nd February, 2024 dismissing the Applicant's Application for grant of certification)

RULING

Representation:

Mr. Tororei for the Applicants (Tororei & Company Advocates)

Mr. Kibii for the Respondent (Limo R. K. & Co. Advocates)

1. Upon reading the Notice of Motion application dated 16th July, 2024 and filed on 8th November, 2024 pursuant to Article 163(4) of the *Constitution*, Section 19 of the *Supreme Court Act*, Rules 24 and 26 of the *Supreme Court Rules*, and Rules 5(2) and 40 of the *Court of Appeal Rules*, seeking *inter alia*, a review of the Court of Appeal Ruling (Sichale, Achode & Korir JJ.A) dated 2nd February, 2024 declining to certify the matter as raising issues of public importance and leave to appeal against the Court of Appeal judgment (Koome (as she then was), Mohammed and Kantai, JJ.A) dated 9th July, 2021; and

2. Upon perusing the grounds on the face of the application and the supporting affidavit sworn by Josiah Kimebur Kibias, the 2nd applicant on his own behalf and on behalf of the 1st applicant on 16th July 2024, in which they contend that: the intended appeal presents pertinent questions for the determination

of this Court and raise matters of general public importance; the judgment of the Court of Appeal is erroneous and against relevant statutes and the *Constitution*; that the issues have a significant bearing and are matters of public interest in so far as the contradictory precedents created in the judgment are concerned; and that unless the said appeal is heard, the judgment of the Court of Appeal will gravely affect the applicants. The questions framed by the applicants for this Court's determination in that regard are set out as follows:

i. Whether an application for consent of the Land Control Board, which was signed by both the 1st applicant and the respondent, as the transferor and transferee respectively, has a contractual and binding effect on the parties thereto and is capable of varying a previous agreement between the parties which has been reduced into writing; and

ii. Whether where an agreement has been reduced into writing, a party may by his conduct vary the agreement and or whether an agreement that has otherwise been reduced into writing can be varied/waived by conduct of the parties or orally; and

3. Upon considering the applicants' further grounds that: the Court of Appeal in its judgment made a finding that the written agreement between the parties was not credible or that, there was a valid oral agreement, and/or that the agreement had been varied by the conduct of the parties; that in making these findings, the appellate court overlooked the findings of the trial court that there was a written agreement between the parties dated 22nd January 1996, whose contents were not challenged in the trial court nor interrogated by the superior court; the appellate court created uncertainties and ambiguities in law as it altered the settled principle on parole evidence under the *Evidence Act*; it failed to appreciate that its decision now means that an application for the consent of the Land Control Board has the same effect as a contract when that was not contemplated by statute; the decision now binds all superior courts and subordinate courts on the basis of the doctrine of stare decisis thus it is a matter of general public importance; and

4. Upon reading the applicants' submissions dated 16th July, 2024 and filed on 8th November, 2024 wherein they set out the facts of the case and the litigation history before the Chief Magistrates' Court, the Environment and Land Court (ELC), and the Court of Appeal, and contend that: the appellate court anchored its decision on the equitable doctrine "to do more perfect and complete justice" altering the settled principle on privity of contract; the issue of trust was only introduced at the appellate court, whereas the respondent's suit was all along based on an alleged oral agreement. The applicants therefore urge the Court to: re-examine the application of the doctrine of constructive trust into an express contract of sale of land especially where it was not pleaded by a party; the application of the *Law of Contract Act* and laws relating to disposal of rights in land; and whether a court has judicial authority to declare that a party had abandoned an agreement/ varied a contract by the conduct of the parties;

5. Taking into account the respondent's replying affidavit sworn on 21st November, 2024, and the submissions dated 21st November, 2024 both filed on 27th November, 2024 wherein he opposes the application on the grounds that: it is devoid of merit and amounts to abuse of the court process; the applicants had applied for a review of the judgment of the Court of Appeal in Civil Application No. E.108 of 2021 and the same was dismissed vide a Ruling dated 31st March, 2023; that having elected to pursue a review of the judgment of the Court of Appeal, the applicants cannot purport to appeal against the judgment through the present application citing this Court's decision in *Oyatsi vs. Nzoia Sugar Company Limited* (Civil Application No. E032 of 2023 [2023] KESC 103 (KLR) (the Oyatsi case); the applicants seek to frustrate the enforcement of the decree in issue through the judicial process; and the applicants have not demonstrated any sufficient reason to warrant reviewing the decision of the Court of Appeal; and

6. Further upon perusing the respondent's submissions that: the matter revolves around the ownership of land between the parties and has nothing to do with public interest; it is not disputed that the 1st applicant acquired ownership and possession of Uasin Gishu/Kahungura Scheme/278 courtesy of the exchange arrangements with the 2nd applicant who owned Uasin Gishu/Illula Settlement Scheme /126; the decisions in Eldoret ELC No. 8 of 2018 and Civil Appeal No. 112 of 2018 ordered the 2nd applicant to honour his part of the agreement; that the law relating to constructive trust, proprietary estoppel, parole evidence and contract law is well settled by judicial precedents and statutes; there are no ambiguities or uncertainties in the law but rather the applicants are complaining about interpretation and application of the settled principles by the Court of Appeal; the application does not meet the threshold and parameters required by law to warrant grant of the orders sought; there has been inordinate delay on the part of the applicants in filing the instant application; and the respondent has obtained a copy of the title deed demonstrating enforcement of the decree;

7. Considering the respondent's averments that: the outcome of the intended appeal would not transcend the circumstances of the matter herein; the law relating to parole evidence is inapplicable to the matter since the exchange of Uasin Gishu/Illula Settlement Scheme/126 and Uasin Gishu/ Kahungura Scheme/278 was done in 1997; flowing from the said oral agreement between the parties, the 1st applicant acquired possession and ownership of Uasin Gishu/Kahungura Scheme/278; the respondent honoured the terms of the verbal agreement only for the 2nd applicant to renege on the same and therefore the case herein is an exception to the parole evidence rule;

8. Bearing in mind this Court's jurisdiction under Article 163(4)(b) of the *Constitution*, Section 15B of the *Supreme Court Act* and rule 33 (1) and (2) of the *Supreme Court Rules, 2020*, and the well settled principles for the grant of certification set out in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone* SC Application No. 4 of 2012 [2013] KESC 11 (KLR) (Hermanus case);

9. We have considered the application, affidavits and the submissions filed including the issues proposed to be certified, and now opine as follows:

    i. Following the judgment of the Court of Appeal dated 9th July 2021, the applicants filed an application for review of the said decision in Civil Application No. E108 of 2021. In a ruling dated 31st March, 2023 the appellate court (Sichale, Ochieng & Achode JJ.A) dismissed the application on the grounds that the application was not a proper case for review as it was an appeal disguised as a review.

    ii. Subsequently, the applicant filed an application at the Court of Appeal seeking leave to prefer an appeal to the Supreme Court and to certify it as raising a matter of general public importance arising from the ruling of 31st March, 2023.

    iii. We have considered the ruling of the Court of Appeal dated 2nd February, 2024 wherein it found that the applicants had failed to clearly and satisfactorily establish any issues of general public importance in line with the principles set out by this Court in the Hermanus case. It is instructive for us to cite paragraph 1 of the ruling where the appellate court states:

> ...In their application, they seek orders inter alia, that the court do certify their intended appeal as raising a matter of general public importance and subsequently grant them leave to prefer an appeal to the Supreme Court against the ruling delivered on 31st March 2023 by Sichale, Ochieng & Achode JJA in Eldoret Civil Application No. E108 of 2021..." (Emphasis ours)

iv. We note that the instant application has transmuted from seeking leave to appeal against the ruling dated 31st March, 2023 arising from the application for review of the judgment of the Court of Appeal, to seeking leave to appeal against the judgment of the Court of Appeal dated 9th July, 2021.

v. The Court of Appeal in its ruling dated 2nd February, 2024 considered whether to grant certification to appeal against the ruling of 31st March 2023. This Court cannot therefore consider the decision of the grant of certification to appeal against the decision of 9th July, 2021. Moreover, there is no evidence before us to show that the applicants seek to appeal against the decision of 31st March, 2023. We further note that this is an ingenious attempt by the applicants to circumvent the clearly stipulated timelines on filing of an application seeking certification for leave to file an appeal against the decision of the Court of Appeal. This, we will not allow.

vi. Furthermore, this Court in the Oyatsi case held that once an applicant takes the root of reviewing the Court of Appeal's decision, the option to pursue an appeal is no longer available or placed in abeyance to be reverted to at a later stage. Similarly, in *University of Eldoret & another vs. Hosea Sitienei & 3 others*, App. 8 of 2020 [2020] eKLR we stated as follows:

> "(34) We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences."

The applicants having pursued the option of review of the Court of Appeal judgment dated 9th July 2021, the option for instituting an appeal against the judgment to the Supreme Court was no longer available.

vii. Moreover, having examined the judgments of the Chief Magistrates' Court, High Court and the Court of Appeal, we note that the genesis and the contention between the parties is an agreement made in the year 1997. The trial court, (Hon. S. Mokua SPM) determined that the cause of action was founded on a contract and thus the suit was time barred pursuant to Section 4 of the *Limitation of Actions Act*. On appeal to the ELC (Odeny, J.), the court determined that the Land Control Board granted a consent for the exchange of parcel No. Uasin Gishu/Kahungura/278 with Uasin Gishu Illula Scheme/126. Further, the fact that the parties were exchanging land, it was a land transaction, and therefore the suit was not time barred. It additionally held that the lack of consent from the Land Control Board did not preclude the court from giving effect to equitable principles, in particular, that of a constructive trust. The Court of Appeal agreed with the ELC adding that the requirement on written contracts came into effect through an amendment *vide* the Statute Laws (Amendment) Act which came into effect on 4th June, 2002. Therefore, the agreement between the parties could not be said to be void for not being in writing.

viii. From the questions framed by the applicants, we note that the oral agreement entered into between the parties was made in the year 1997 before the amendments to the *Law of Contract Act*. On this question, and that of the consent from the Land Control Board, and imputing of constructive trust into sale agreements, the law is settled. Moreover, the applicants have not demonstrated the contradictory precedents it avers have been set by the appellate court from the said decision. No ambiguities or uncertainties in the law have been established by the applicants to warrant the exercise of this Court's jurisdiction under Article 163(4)(b) of the *Constitution*. We must add, as we held in the Hermanus case, that a mere apprehension of miscarriage of justice, a matter most apt for resolution in the superior courts below, is not a proper basis for granting certification for an appeal to the Supreme Court. For a matter to be certified for a final appeal to the Supreme Court, it must fall within the terms of Article 163 (4) (b) of the *Constitution*.

ix. On the issue of costs, we set out the principles that guide the grant of costs in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others*, Pet. 4 of 2012 [2014] eKLR. We held that the award of costs would normally be guided by the principle that "costs follow the event". The effect being that the party who calls forth the event by instituting a suit, will bear the costs if the suit fails. Further, the relevant question to be asked is

Whether or not the circumstances merit an award of costs. The circumstances in the instant case warrant the award of costs.

10. Consequently, for reasons aforesaid, we make the following orders:

i. The Notice of Motion dated 16th July, 2024 and filed on 8th November, 2024 be and is hereby dismissed.

ii. The applicants shall bear the costs of this Notice of Motion.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2025.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA