



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kagina v Kagina & 2 others (Application E002 of 2023)  
[2023] KESC 54 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 54 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION E002 OF 2023**

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, I LENAOLA & W OUKO, SCJJ  
JUNE 16, 2023**

**BETWEEN**

**CHRISTOPHER NDARU KAGINA ..... APPLICANT**

**AND**

**ESTHER MBANDI KAGINA ..... 1<sup>ST</sup> RESPONDENT**

**TABITHA IKAMBA KAGINA ..... 2<sup>ND</sup> RESPONDENT**

**CHARITY NJOKI KAGINA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for review of the Ruling and orders of the Court of Appeal in Civil Application Sup. E003 of 2021 given at Nyeri (Okwengu, Asike- Makhandia & J. Mohamed JJ.A) dated 3rd February, 2023 dismissing the Applicant's Application for Grant of Certification.)*

**Supreme Court's appellate jurisdiction should not be invoked merely for the purpose of rectifying errors with regard to matters of settled law**

*The application sought for among others a review of the Court of Appeal's decision declining to grant certificate of leave to appeal against the decision of the Court of Appeal. The court reiterated that if the applicant's appeal was based on a point of law, the applicant had to demonstrate that such point was a substantial one, the determination of which would have a significant bearing on the public interest. The court held that as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court was not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law.*

Reported by Kakai Toili

***Civil Practice and Procedure*** - appeals - appeals to the Supreme Court - appeals in cases certified as matters of general public importance - what was the requirement for one to appeal to the Supreme Court as a matter of general public importance where the appeal was based on a point of law - whether the appellate jurisdiction of the Supreme Court could be invoked merely for the purpose of rectifying errors with regard to matters of settled law.



## **Brief facts**

The application sought for among others a review of the Court of Appeal's decision declining to grant certificate of leave to appeal against the decision of the Court of Appeal. The applicant contended that: the intended appeal raised matters of general public importance as it presented controversy on the law of succession and required precedence on the threshold of what constituted intermeddling and the application of section 45(1) and (2)(a) and (b) and section 55 of the Cap 160 Laws of Kenya. The applicant further contended that the matter transcended the circumstances of the case and had an important bearing on the public interest. The applicant's grievance was that the respondents, who were his co-administrators in the estate of the deceased, had intermeddled with the estate and had either subdivided and sold, alienated or earmarked fraudulently to sell certain properties of the estate.

## **Issues**

- i. What was the requirement for one to appeal to the Supreme Court as a matter of general public importance where the appeal was based on a point of law?
- ii. Whether the appellate jurisdiction of the Supreme Court could be invoked merely for the purpose of rectifying errors with regard to matters of settled law.

## **Held**

1. Article 163(5) of the of Kenya, 2010 (Constitution), section 15B of the and rule 33(1) and (2) of the granted the court jurisdiction to review the Court of Appeal's certification of a matter as one of general public importance. If the applicant's appeal was based on a point of law, the applicant must demonstrate that such point was a substantial one, the determination of which would have a significant bearing on the public interest.
2. The applicant had not demonstrated the manner in which the decisions of the superior courts had created uncertainty and confusion over the meaning and application of the provisions of section 45(1), (2)(a) and (b), and section 55 of the .
3. On the proposed issues for certification, the applicant's objective was to secure an interpretation of the law in the context of the facts of his case. Further, the decisions of the superior courts below were based on the evidence adduced at the trial court, which evidence was evaluated by the trial court and re-evaluated by the appellate court. Those did not raise issues of general public importance which transcended the circumstances of the case or have a significant bearing on the public interest in line with the guiding principles set in the Sup Ct Application No 4 of 2012 [2013] eKLR.
4. As a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court was not to be invoked save in accordance with the terms of the and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law.

*Application dismissed; no orders as to costs.*

## **Citations**

### **Cases**

1. Bell, Malcolm v Daniel Toroitich Arap Moi & another (Application 1 of 2013; [2013] eKLR) — Explained
2. Glencore Energy (UK) Ltd v Kenya Pipeline Company Ltd (Civil Application 16 of 2016; [2018] KESC 33 (KLR)) — Explained
3. Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (Application 4 of 2012; [2013] KESC 11 (KLR)) — Explained

### **Statutes**

1. Constitution of Kenya, 2010 — Article 40; 159 (2)(d);163 (4)(b), (5) — Interpreted
2. Law of Succession Act (cap 160) — Section 45 (1), (2) (a) (b); 55 — Interpreted
3. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 15, 16 — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 32, 33 — Interpreted



## Advocates

*Mulwa Isika & Mutia Advocates* for Applicant

### RULING

1. Upon perusing the undated originating motion application filed on February 17, 2023 pursuant to article 40, 159(2)(d) and 163(4)(b) of the Constitution, section 15 and 16 of the Supreme Court Act, and rules 32 and 33 of the Supreme Court Rules, 2020 seeking, inter alia: a review of the Court of Appeal's decision declining to grant certificate of leave to appeal against the decision of the Court of Appeal; leave to file the application excluding certified copies of the judgment and ruling of the Court of Appeal; the notice of appeal be deemed as duly filed; and there be temporary stay of execution of the Judgment dated December 3, 2021 in Nyeri Civil Appeal No 21 of 2017 pending hearing and determination of the application and the intended appeal;
2. Upon perusing the proposed issues for certification, grounds on the face of the application, the supporting affidavit sworn on February 14, 2023 and submissions of even date in which the applicant contends that: the intended appeal raises matters of general public importance as it presents controversy on the law of succession and requires precedence on the threshold of what constitutes intermeddling and the application of section 45(1) and (2)(a) & (b) and section 55 of the Law of Succession Act cap 160 Laws of Kenya; that the matter transcends the circumstances of the case and has an important bearing on the public interest, and that the issues were not resolved in the judgment delivered on December 3, 2022;
3. Noting that the respondents, despite service of the application, neither filed a response, submissions nor participated in these proceedings;
4. Bearing in mind article 163(5) of the Constitution, section 15B of the Supreme Court Act and rule 33 (1) and (2) of the Supreme Court Rules, 2020 which grants this court jurisdiction to review the Court of Appeal's certification of a matter as one of general public importance; and this court's guiding principles on certification of a matter as one involving general public importance set out in Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone Sup Ct Application No 4 of 2012 [2013] eKLR and the decision in Glencore Energy (UK) Ltd v Kenya Pipeline Company Ltd Sup Ct Civil Application No 16 of 2016 [2018] eKLR, where we stated that if the applicant's appeal is based on a point of law, the applicant "must demonstrate that such point is a substantial one, the determination of which will have a significant bearing on the public interest"; and
5. Taking into account that the applicant's grievance is that the respondents who are his co-administrators in the estate of Silas Kagina Gichoni (deceased) have intermeddled with the estate and have either subdivided and sold, alienated or earmarked fraudulently to sell certain properties of the estate.
6. We have considered the application, supporting affidavit, submissions and the issues proposed to be certified and now opine as follows:
  - i. The applicant has not demonstrated the manner in which the decisions of the superior courts have created uncertainty and confusion over the meaning and application of the provisions of section 45(1), (2)(a) and (b), and section 55 of the Law of Succession Act.
  - ii. On the proposed issues for certification, to wit, whether an expert witness who testified without a contrary opinion is an acceptable expert; whether the



Supreme Court’s jurisdiction may be invoked to resolve the failure by the superior courts to appreciate documentary and uncontested evidence; and whether lack of a clearance certificate and consent to transfer properties is sufficient proof of fraud thus illegally disinheriting the applicant, we find that the applicant’s objective is to secure an interpretation of the law in the context of the facts of his case. Further, the decisions of the superior courts below were based on the evidence adduced at the trial court, which evidence was evaluated by the trial court and re-evaluated by the appellate court. These do not raise issues of general public importance which transcend the circumstances of this particular case or have a significant bearing on the public interest in line with the guiding principles set in the *Hermanus* case (*supra*).

iii. As we held in *Malcolm Bell v Daniel Toroitich Arap Moi & another* Sup Ct Application No 1 of 2014 [2013] eKLR, 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 not merely for the purpose of rectifying errors with regard to matters of settled law.

7. Consequently, for reasons aforesaid, we find no issue deserving further input of this court and make the following orders:

- i. The originating motion filed on February 17, 2023 be and is hereby dismissed.
- ii. No orders as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

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**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**  
.....

**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**  
.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**  
.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**  
.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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



**REGISTRAR,  
SUPREME COURT OF KENYA**

