



REPUBLIC OF KENYA



KENYA LAW
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Amollo v Wilson (Application E014 of 2023)
[2023] KESC 77 (KLR) (Civ) (22 September 2023) (Ruling)

Neutral citation: [2023] KESC 77 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

CIVIL

APPLICATION E014 OF 2023

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

SEPTEMBER 22, 2023

BETWEEN

LINET ADHIAMBO AMOLLO APPLICANT

AND

REUBEN OPILE WILSON RESPONDENT

*(Being an application for leave to appeal against the Ruling and Orders
of the Hon. A.K. Murgor JA in Civil Application No. E099 of 2023)*

A certification for leave to appeal to the Supreme Court on a matter involving general public importance shall be made at the Court of Appeal in the first instance

The applicant sought leave to appeal to the Supreme Court to set aside a decision of the Court of Appeal and leave to stay execution of a decision of the Environment and Land Court. The applicant by passed the step of seeking leave to apply to the Supreme Court at the Court of Appeal. The court held that instead of filing the application for leave before the Supreme Court, the applicant should have filed a reference to the full bench of the Court of Appeal under rule 57(1)(b) of the Court of Appeal Rules 2022. The court also held that a certification for leave to appeal to the Supreme Court on a matter involving general public importance shall be made in the first instance at the Court of Appeal, and a party dissatisfied with the Court of Appeal decision may apply to the Supreme Court for review. The court dismissed the application.

Reported by John Ribia

Civil Practice and Procedure – proceedings before the Supreme Court – applicable legislation - whether the and its rules were applicable to the Supreme Court - Daniel Kimani Njibia v Francis Mwangi Kimani & another [2015] eKLR; County Executive of Kisumu v County Government of Kisumu and 8 others [2017] eKLR

Civil Practice and Procedure – appeals – appeals to the Supreme Court – certification of a matter as a matter involving general public importance – procedure – whether the Supreme Court had the jurisdiction to determine



a certification for leave for appeal to the Supreme Court where the same had not been lodged and determined by the Court of Appeal - article 163(4)(a) or (b); sections 15, 15A, and 15B

Brief facts

The applicant received an adverse judgment at the Environment and Land Court and sought to get a stay of the decision at the Court of Appeal. A single judge bench of the Court of Appeal, dismissed his application for stay. Further aggrieved the applicant approached the Supreme Court with an application that sought leave to appeal the decision of the Court of Appeal. The applicant sought leave in two respects. The first leave was towards the appeal to the Supreme Court and the second leave was towards the appeal to the Court of Appeal. The latter leave was sought alongside stay of execution of the decision of the Environment and Land Court.

Issues

- i. Whether the Supreme Court had the jurisdiction to determine an application for certification for leave to appeal to the Supreme Court where it had not been lodged and determined by the Court of Appeal.
- ii. Whether the and its rules were applicable to the Supreme Court.

Held

1. The applicant did not resort to rule 57(1)(b) of the 2022 by filing a reference to the full bench of the Court of Appeal to vary, discharge or reverse the said decision of the single Judge of the Court of Appeal. The applicant's prayer for leave to appeal against the dismissal did not at the first instance fall for the Supreme Court's determination.
2. The applicant had invoked the provisions of section 3A of the , which were inapplicable when moving to the Supreme Court. The Supreme Court was only moved under , the , and the 2020.
3. The appellate jurisdiction of the court to hear appeals from the Court of Appeal was exercised pursuant to article 163(4)(a) or (b) of as read together with sections 15, 15A and 15B of the . Those provisions granted the court jurisdiction to hear appeals from the Court of Appeal on matters relating to the interpretation and application of and those involving matters certified as matters of general public importance.
4. The application did not indicate which appellate jurisdiction of the court it sought to invoke. To the extent that the applicant sought leave under section 15B(2) of the , a certification for leave to appeal to the Supreme Court on a matter involving general public importance shall only be made first at the Court of Appeal, and a party dissatisfied with the Court of Appeal decision may apply to the Supreme Court for review.
5. The application had not distilled and framed any specific questions that transcended the parties so that the matter could be certified as involving issues of general public importance. The applicant did not proffer any explanation or reasons for failure to adhere to this prerequisite step. There was no reason to excuse the omission to enable the court to consider the prayer for leave.
6. The applicant was yet to file the substantive appeal as she only alluded to a draft Memorandum of Appeal as annexed to the affidavit in support of the application. The , and the provided for the institution of an appeal to the Supreme Court, including the form of the petition of appeal. Pursuant to rule 36 of the , a person intending to make an appeal to the court, was to file a notice of appeal within fourteen days from the date of judgment or ruling, and file it in the first instance with the registrar of the court from which the appeal originated and upon filing, transmit a copy of the notice to the Supreme Court registry.
7. The Notice of Appeal annexed to the application, though indicated to have been filed on March 30, 2023 has not been signed and sealed by the Registrar of the Court of Appeal. There was no evidence of transmission of the same to the Supreme Court. The failure to file or transmit a notice of appeal was not mandatory in relation to an appeal on a matter of general public importance, and could as well be filed upon grant of certification. It was not indicated which of the Supreme Court's jurisdiction the applicant sought to invoke.



Application dismissed.

Orders

Each party to bear its own costs.

Citations

Cases

1. County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016) — Mentioned
2. Daniel Kimani Njihia v Francis Mwangi Kimani & another (Civil Application 3 of 2014) — Mentioned
3. Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)) — Explained
4. Model Industries Ltd v Industrial and Commercial Development Corporation (Civil Application No. 1 of 2011) — Explained
5. Wanjigi v Chebukati & 2 others (Petition 19 (E022) of 2022; [2023] KESC 15 (KLR)) — Explained

Statutes

1. Civil Procedure Act (CAP. 21) — section 3A — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — article 28, 40, 48, 50(1); 159(1)(d); 163(4)(a) — Interpreted
3. Court of Appeal Rules, 2022 (ca 9 Sub Leg) — rule 57(1)(b) — Interpreted
4. Supreme Court Act (No. 7 of 2011) — section 15, 15A, 15B, (2); 16; 17; 20 — Interpreted
5. Supreme Court Rules, 2020 (No. 7 of 2011) — rule 36 — Interpreted

Advocates

Mr. Dola Indidis for Applicant

Mr. Mbichire for Respondent

RULING

1. Upon perusing the notice of motion application dated March 30, 2023 and filed on May 16, 2023 pursuant to section 3A of the *Civil Procedure Act*, sections 15, 16, 17, 20 of the *Supreme Court Act*, articles 28, 40, 48, 50(1) and 159(1)(d) of the *Constitution*, in which the applicant seeks leave to file an appeal against the ruling of Murgor, JA dismissing her application for extension of time to lodge an appeal to the Court of Appeal, and stay of execution of the judgment of the Environment and Land Court; and
2. Upon perusing the grounds on the face of the application and the affidavit in support thereof sworn by Dola Indidis, Advocate, on March 30, 2023 in which the applicant contends that: it is in the interest of justice that leave be granted to allow the applicant to appeal; the appeal has high chances of success; and that the application has been brought without inordinate delay; and
3. Upon further perusing the applicant's submissions dated March 30, 2023 and filed on May 16, 2023 wherein the applicant contends that: her vital witness was prevented from testifying in ELC Case No 667 of 2013 on July 21, 2021; Hon. Justice B.M. Eboso took the file with him to his new station in Thika and delivered the judgment while an application to appeal against the ruling dated July 21, 2021 that closed her case was still pending; the delay to file the appeal was inadvertent and was cured by the certificate of delay; the applicant is the registered owner of the suit property since 1/11/1987 and relies on it for rental income; the application ought to be allowed for the case to be heard wholesomely including the vital evidence locked out; she was denied justice on technicalities; the respondent did not



- oppose the impugned appeal to the Court of Appeal; and that granting the prayers sought will not prejudice the respondent; and
4. Considering the respondent's grounds of opposition dated August 9, 2023 filed in response to the application and his submissions dated August 15, 2023 where he contends that: the jurisdiction of the Supreme Court has not been properly invoked to warrant hearing of this appeal or application under article 163(4) of the Constitution; the application lacks foundation and is irregularly filed as the appellant has neither filed a notice of appeal as required by law nor sought extension of time to file the appeal out of time; and that the applicant is guilty of laches and is underserving of the discretion of the court; and
 5. Further considering the respondent's submissions where he relies on this court's decision in Wanjigi v Chebukati & 2 others SC Petition 19 (E022) of 2022 [2023] eKLR where the court stated that its appellate jurisdiction is set out in article 163(4), and under article 163(4)(a) of the Constitution, only issues involving interpretation or application of the Constitution may be considered by the court and that mere allegation by a party that a question of constitutional interpretation or application was involved, does not automatically bring the appeal within the ambit of article 163(4)(a) of the Constitution; and
 6. Upon further perusing the applicant's submissions dated August 19, 2023 as a rejoinder to the respondent's grounds of opposition, where she contends that the objection is an issue of procedural technicality which falls within the ambit of article 159(1)(d) of the Constitution; the court ought not to be tied by procedural technicalities; the authority relied on by the applicant is not relevant to the instant application; and the respondent's averments are false, as it filed its notice of appeal dated March 30, 2023; and
 7. Bearing In Mind this court's jurisdiction under article 163(4)(a) and
 - (b) of the Constitution, as read with section 15, 15A and 15B of the Supreme Court Act, to hear appeals from the Court of Appeal on matters relating to the interpretation and application of the Constitution and those involving matters of general public importance upon certification;
 8. We Have considered the application, affidavit, grounds of opposition, and submissions filed and now opine as follows:
 - i. From our understanding of the application, the applicant's grievance is against the decision of a single Judge of the Court of Appeal (Murgor JA) wherein she declined to grant leave to the applicant to file the Notice of Appeal out of time and stay of execution, arising out of the judgment of the Environment and Land Court. We note that the applicant did not resort to rule 57(1)(b) of the Court of Appeal Rules 2022 by filing a reference to the full bench of the Court of Appeal to vary, discharge or reverse the said decision of the single Judge of the Court of Appeal. Thus, the applicant's prayer for leave to appeal against this dismissal, does not at the first instance, fall for our determination.
 - ii. The applicant has invoked the provisions of section 3A of the Civil Procedure Act, which provisions we held in Daniel Kimani Njibia v Francis Mwangi Kimani & another [2015] eKLR and County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR, to be inapplicable when moving this court. The Supreme Court is only moved under the Constitution, the Supreme Court Act, and the Supreme Court Rules 2020.
 - iii. The appellate jurisdiction of this Court to hear appeals from the Court of Appeal is exercised pursuant to article 163(4)(a) or (b) of the Constitution as read together with Sections 15, 15A and 15B of the Supreme Court Act. These provisions grant this court jurisdiction to hear appeals



from the Court of Appeal on matters relating to the interpretation and application of the Constitution and those involving matters certified as involving general public importance.

- iv. The application does not indicate which appellate jurisdiction of the court it seeks to invoke. A perusal of the orders sought by the applicant suggests that the applicant seeks leave in two respects. The first leave is towards the appeal to the Supreme Court and the second leave is towards the appeal to the Court of Appeal. The latter leave is sought alongside stay of execution of the decision of the Environment and Land Court. To the extent that the applicant seeks leave under section 15B(2) of the Supreme Court Act, a certification for leave to appeal to the Supreme Court on a matter involving general public importance shall only be made first at the Court of Appeal, and a party dissatisfied with the Court of Appeal decision may apply to this Court for review. See Sum Model Industries Ltd v Industrial and Commercial Development Corporation, Civil Application No 1 of 2011; [2011] eKLR. The application has not distilled and framed any specific questions that transcend the parties as to be certified as involving general public importance as set out in Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione, Sup Ct Appl No 4 of 2012 [2013] eKLR. The applicant does not proffer any explanation or reasons for failure to adhere to this prerequisite step. We therefore see no reason to excuse this omission to enable us consider the prayer for leave.
- v. We note that the applicant is yet to file the substantive appeal as she only alluded to a draft Memorandum of Appeal as annexed to the affidavit in support of the application. The Supreme Court Act, and the Supreme Court Rules provide for the institution of an appeal to this court, including the form of the petition of appeal.
- vi. Pursuant to rule 36 of the Supreme Court Rules, a person intending to make an appeal to this court, shall file a notice of appeal within fourteen days from the date of judgment or ruling, and file it in the first instance with the Registrar of the court from which the appeal originates and upon filing, transmit a copy of the notice to the Supreme Court registry. The notice of appeal annexed to the application, though indicated to have been filed on March 30, 2023 has not been signed and sealed by the Registrar of the Court of Appeal. There is no evidence of transmission of the same to the Supreme Court. That being said, the failure to file or transmit a notice of appeal is not mandatory in relation to an appeal on a matter of general public importance, and can as well be filed upon grant of certification. However, as already stated above, it is not indicated which of the court's jurisdiction herein invoked.

For the reasons set out above, the jurisdiction of this court has not been properly invoked. As for costs, we see no reason to award costs to either party.

9. Consequently, for reasons aforesaid, we make the following orders:
 - i. The notice of motion dated March 30, 2023 and filed on May 16, 2023 be and is hereby dismissed for lacking in merit;
 - ii. Each party to bear own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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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

.....

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

