



Tawai Limited v Eldoret Express Limited & another [2021] eKLR

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Neutral citation: [2021] KESC 68 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 23 OF 2020**

PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MARCH 17, 2021

BETWEEN

TAWAI LIMITED APPLICANT

AND

ELDOR ET EXPRESS LIMITED RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

(Being an application for review of the Ruling of the Court of Appeal (Ouko, Karanja & Mohamed, JJ.A) in Civil Application No. 167 of 2019, delivered at Nairobi on 29th September, 2017 denying grant of certification to appeal to the Supreme Court and for stay of execution of the Court of Appeal Judgment (Makhandia, Kiage & Odek, JJ.A) in Civil Appeal No. 118 of 2017 pending the hearing and determination of this application and the intended appeal)

RULING

A. Introduction

1. Before the Court is a Motion dated 19th August 2020 and lodged on 21st August 2020. It is brought under Articles 159, 163 (4) (b) and 163 (5) of the Constitution, Sections 15, 16, 23 and 24 of the Supreme Court Act, 2011, Rule 33 of the Supreme Court Rules, 2020 and all other enabling provisions of Law. It seeks to review the Ruling of the Court of Appeal (Ouko, Karanja & Mohamed, JJ.A) in Civil Application No. 167 of 2019 sitting at Nairobi, delivered on 29th September 2017, denying certification and leave to appeal to this Court against the decision of the Court of Appeal (Makhandia, Kiage & Odek, JJ.A) in Civil Appeal No. 118 of 2017, delivered at Nairobi on the 28th November 2019. It also seeks stay of execution of the Court of Appeal Judgment, pending the hearing and determination of this application and intended appeal. In the impugned decision, the Appellate



Court overturned the trial Court's decision (Ombwayo J) in which it had declared the transfer and registration of L.R No. 5707/6 in favour of the respondent illegal.

B. The Application

2. The Motion is based on the applicant's Supporting Affidavit sworn on 9th August 2020. It urges that; Karanja, J. irregularly sat in the bench that determined the application for certification while the Judge had previously sat in a bench that had heard and determined Kitale High Court No. 15 of 2006 (Tawai Express Limited v. Eldoret Express), a suit between the same parties, involving substantially similar issues and whose decision was substantially relied on in determining the suit, the subject of the intended appeal.
3. The applicant further avers that the intended appeal raises ten issues of general public importance transcending the circumstances of its case and which were raised and determined by the courts below, to wit:
 - (i) Whether an unverified and unregistered deed plan under the Survey Act can confer legal title;
 - (ii) whether such omissions can be normalized by a court of law;
 - (iii) what entity has the obligation of verifying whether a title is properly created;
 - (iv) what is the role of the Director of Survey in the survey process and whether a director's authentication of a deed plan or other survey instrument is proof that title was procedurally acquired;
 - (v) whether it is a legal requirement for a deed plan to be authenticated;
 - (vi) whether under the Registration of Titles Act (repealed) a charged property could be transferred without first discharging it;
 - (vii) whether a duly registered charge would limit dealings in land;
 - (viii) whether a road reserve can be transferred to a private entity;
 - (ix) whether time begins to run where fraud is alleged contrary to the provisions of Article 40 (6) of the Constitution; and
 - (x) whether a title acquired in contravention of the law is a good title.
4. It is the applicant's further averment that the determination of these issues will greatly contribute to the development of jurisprudence regarding matters such as the role of the Director of Surveys in the registration of titles in Kenya; the legal position of Deed Plans in the registration process; the effect of a registered charge; and the issue of limitation of time, where fraud is alleged.
5. The Motion is opposed via the respondent's Replying Affidavit sworn by Joseph Ng'ang'a Thungu on 2nd September 2020. It is urged that the issues raised in the intended appeal do not raise any point of law transcending the facts of the case between the parties and that they are of no public interest. It is urged that the issue of bench constitution at the Court of Appeal has no bearing on this Court's exercise of jurisdiction under Article 163 (4) & (5) of the Constitution.

C. The Applicant's Case

6. In its written submissions dated 19th August 2020, the applicant submits that it has met the threshold to warrant certification as a matter of general public importance. It adds that the issues, (as earlier listed)



are of general public importance and transcend the circumstances of the appeal, hence this Court has jurisdiction to entertain the intended appeal under Article 163 (4) (b) of the *Constitution*.

7. The applicant urges that the issue ‘whether an unverified and/or unregistered deed plan under the *Survey Act* can confer legal title over land’, is heavily relied on by the courts in determining the legality of titles, hence the Court of Appeal’s finding, admitting an unverified and unauthenticated Deed Plan possess a challenge that needs clarification by this Court. The applicant further submits that this Court’s pronouncement on the raised issues is critical as litigants, courts and the general public hold documents from the Survey Department as an instrument for determining creation of contested titles, by providing a trace to the root title.
8. It is submitted that the finding by the Court of Appeal that a charged property can pass good title to a third party, without first discharging it, exposes lenders in whose favour a charge has been registered, to the danger of losing their securities. It is added that a determination by this Court on this issue will assist in protecting the right to property under Article 40 of the *Constitution*.
9. In conclusion, on the prayer for stay, it is the applicant’s submission that the respondent is likely to evict and/or prohibit its more than one hundred members from accessing the suit property, leading to a humanitarian crisis unless the Order sought is granted to preserve the status quo.

D. The Respondent’s Case

10. The respondent, through its submissions dated 2nd September 2020, urges that, for a matter to pass as one of general public importance warranting the exercise of this Court’s jurisdiction under Article 163 (4) (b) of the *Constitution*, it must be a matter of law or fact with substantial impacts and consequences, broad based, transcending the litigation of the parties, and bearing upon the public interest. It is the respondent’s case that the applicant has failed to demonstrate to the Court that the issues raised in its Motion meet this threshold. On the contrary, contends the respondent, the issues raised are evidentiary in nature and do not raise any substantial questions of law to warrant the further input of this Court. In support of its argument, the respondent relies on the Decision of this Court in *Hermanus Phillipus Steyn v. Giovanni Gnechchi Ruscone*, SC Application No. 4 of 2012 [2013] eKLR (Hermanus Case).
11. Regarding the applicant’s prayer for an order of stay of execution, it is the respondent’s submission that the Order is not available to the applicant, since it can only be granted after leave to appeal to this Court has been granted. In support of this argument, the respondent relies on this Court’s Decision in *Board of Governors, Moi High School Kabarak & Another v. Malcom Bell*, SC Petition No.6 and 7 of 2013 [2013] eKLR.
12. The respondent submits that in any event, the application fails to meet the threshold for granting stay of execution as was established by this Court in *Law Society of Kenya v. Attorney General & another* Sup, Ct Appl. No. 4 of 2019 [2019] eKLR and *Gatirau Peter Munya v. Dickson Mwenda Kithinj & 2 other*; Sup, Ct Appl No. 5 of 2014, [2014] eKLR. It therefore urges the Court to dismiss the application for reasons that the same is misplaced, misconceived, contentious, incompetent and an abuse of the court process.

E. Issues for Determination

13. Two issues fall for the Court’s consideration, i.e, whether the issues raised by the applicant are of general public importance as envisaged by Article 163(4)(b) of the *Constitution*; and whether this Court should grant an Order for Stay of Execution.



F. Determination on Jurisdiction

14. The applicant has enumerated a range of matters which it considers to be of general public importance, warranting determination by this Court. It submits, that the Court of Appeal's finding admitting an unverified and unauthenticated deed plan possess a challenge that needs clarification by this Court. Further, the finding by the Court of Appeal that a charged property could transfer to a third party, without first discharging such charge, deprives lenders in whose favour a charge has been registered, their right to property, contrary to Article 40 of the Constitution.
15. on the other hand, it is the respondent's submission that this Court lacks jurisdiction to entertain the appeal under Article 163 (4) (b) of the Constitution, since the appeal does not raise matters of general public interest and importance as required by Article 163(4)(b) of the Constitution. That the matters raised are: a dispute between the parties; a mere apprehension of miscarriage of justice; targeted at impugning the Judgment of the Court of Appeal; of no special jurisprudential moment requiring the intervention of the Court; and are matters that were not pleaded before the lower superior courts.
16. The extent of this Court's appellate jurisdiction is provided for in Article 163(4) of the Constitution. Article 163 (4) provides that:

“appeals shall lie from the Court of Appeal to the Supreme Court:

- (a) as of right in any case involving the interpretation or application of this Constitution; and
- (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 sub-Article 5.
[Emphasis added]

Article 165 (5) provides that:

“a certification by the Court of Appeal under clause 4 (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

17. The question to consider then is, whether the application before us can be sustained on the basis of Article 163 (4) (b) of the Constitution. In the Hermanus Case, this Court declared that for a case to be certified as one involving a matter of general public importance:
 - “(i) 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.”

18. It is clear from the Court record that the gist of the suit before the Trial Court and the Court of Appeal was the validity of the respondent’s title and occupation of L.R No. 5707/6. The Trial Court found that the suit land was illegally and fraudulently created through misrepresentation. It declared the transfer and registration of L.R No. 5707/6 in favour of the respondent illegal; cancelled the title; ordered the respondent’s eviction; permanently restrained it from trespassing the suit land; and ordered the respondent to pay Kshs 11,970,000 as mesne profits.
19. Aggrieved by this decision, the respondent lodged an appeal in the Court of Appeal. After hearing the parties, the Court of Appeal faulted the Trial Court’s finding regarding the legality of the contested title. In particular, the Appellate Court took issue with the Trial Court’s analysis of the evidence on record. In this regard, the Court observed that the Trial Court’s finding of illegality of title was not backed by the evidence on record. on the contrary, held the Appellate Court, all the documents before the lower court actually went to prove the legality of the contested title. The Court further concluded that there was nothing on record to suggest that the title to the suit property had been created fraudulently or through misrepresentation.
20. It is not in question that the dispute was resolved based on the analysis of the evidence on record. We agree with the respondent’s submission to the effect that the applicant has not raised any issues whose determination would transcend this particular case. Consequently, we see no reason to allow a second appeal to this Court. By the same token, we do not see any significant question of law that requires the further input of this Court. The finding of this Court on jurisdiction consequently disposes of the issue of Stay of Execution.

G. Orders

- (i) The Originating Motion dated 19th November 2019, is hereby dismissed;
- (ii) The decision of the Court of Appeal delivered on 7th August 2020, declining leave to appeal to this Court is hereby affirmed;
- (iii) The Costs of this application shall be borne by the applicant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2021.

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P. M. MWILU

Ag. CHIEF JUSTICE & Ag. 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

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I. LENAOLA
JUSTICE OF THE SUPREME COURT
I certify that this is a true copy of the original
REGISTRAR
SUPREME COURT OF KENYA

