



**Kiragu v Mugambi & 2 others (Civil Application 10 of 2019)  
[2020] KESC 77 (KLR) (7 February 2020) (Ruling)**

*Ananias N Kiragu v Eric Mugambi & 2 others [2020] eKLR*

Neutral citation: [2020] KESC 77 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL APPLICATION 10 OF 2019**

**DK MARAGA, CJ, PM MWILU, DCJ & VP, MK IBRAHIM & SC WANJALA, SCJJ**

**FEBRUARY 7, 2020**

**BETWEEN**

**ANANIAS N. KIRAGU ..... APPLICANT**

**AND**

**ERIC MUGAMBI ..... 1<sup>ST</sup> RESPONDENT**

**FRANKLIN MWIRIGI ..... 2<sup>ND</sup> RESPONDENT**

**MARTIN NJERU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for Review of the Order of the Court of Appeal sitting at Mombasa (Visram, Karanja & Koome JJA) dated 14th March 2019 in Civil Appeal (Application) 59/2016 refusing certification and grant of leave to appeal against that Court's order dated 7th December 2017)*

**Circumstances in which the Supreme Court could determine an appeal on an interlocutory decision where the substantive matter had not been determined by the superior courts**

Reported by Sharon Sang & Kakai Toili

***Jurisdiction*** - jurisdiction of the Supreme Court - appellate jurisdiction – appellate jurisdiction over an interlocutory decision - where the substantive matter had not been determined in the superior courts – what were the circumstances in which the Supreme Court could determine an appeal on an interlocutory decision where the substantive matter had not been determined in Superior Courts. – Constitution of Kenya, 2010, article 163(4)(a).

***Civil Practice and Procedure*** – appeals – appeals from the Court of Appeal to the Supreme Court – grounds of appeal to the Supreme Court – matters of general public importance – where the Court of Appeal declined to adopt an alternative dispute resolution (ADR) award after the dispute had been referred to ADR by consent of the parties - whether the appeal could be considered as raising a matter of general public importance hence appealable to the Supreme Court – Constitution of Kenya, 2010, article 163 (4)(b).



## **Brief facts**

The instant application sought a review of the Court of Appeal's decision denying the applicant certification to appeal to the Supreme Court under the rubric of matter of general public importance. At the High Court, the applicant claimed ownership of the suit land and sought a perpetual injunction to restrain the respondents from continuing to trespass on it and vacant possession. Contemporaneous with the filing of that suit, the applicant applied for an interlocutory injunction to restrain the respondents from interfering with his access or entry on to the suit property. The High Court dismissed the applicant's application and allowed the one by the respondents hence maintaining the prevailing status quo on the suit land.

The applicant appealed against the High Court's ruling and when the appeal came up for hearing, the Court of Appeal referred the matter to an alternative dispute resolution forum, the National Supreme Council of Njuri Ncheke Ya Ameru Elders (Njuri Ncheke) by consent of the parties. In its award, the Njuri Ncheke decreed the suit land to the applicant and directed each of the respondents to give a he goat to their father (applicant) as compensation for exposing him to court ridicule contrary to the Ameru customs. The respondents contested that award, contending that it was biased and did not address pertinent issues they had raised. The Court of Appeal held that as the arbitration was not sanctioned by the court but was at the initiative of the parties with no consent to be bound by the resultant award, the court could not impose it on either party. Moreover, the Court of Appeal further held that, it was the High Court, which had jurisdiction to determine challenges to arbitral awards.

Aggrieved by that decision, the applicant sought certification by the Court of Appeal to appeal to the instant court. However, the Court of Appeal dismissed that application thus provoking the instant application.

## **Issues**

- i What were the circumstances in which the Supreme Court could determine an appeal on an interlocutory decision where the substantive matter had not been determined by the superior courts?
- ii Whether refusal to adopt an alternative dispute resolution (ADR) award could be considered as a matter of general public importance appealable to the Supreme Court where the dispute had been referred to ADR by consent of the parties.

## **Relevant provisions of the Law**

### **Constitution of Kenya, 2010**

#### **Article 163 – Supreme Court**

*(4) 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 clause (5)*

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

## **Held**

1. As a general rule, the Supreme Court did not entertain appeals on interlocutory decisions where the substantive matter was pending before the superior courts save where the appeal was not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that had been canvassed right through from the High Court to the Court of Appeal even though the substantive matter was pending before the High Court.

2. The issue canvassed before the High Court was an application for an interlocutory injunction. There was no substantive determination by the Court of Appeal or even the High Court of a constitutional question. Moreover, the Court of Appeal's refusal to adopt an ADR award by Njuri Ncheke was a private matter between the parties and did not satisfy the criteria of a matter of general public importance.

*Application dismissed.*



## **Orders**

- i. *Application dismissed*
- ii. *Respondents shall have the costs of the application.*

## **Citations**

### **Statutes**

1. Constitution of Kenya, 2010
2. Supreme Court Act

### **Advocates**

None mentioned

## **RULING**

1. Before the Court is an Originating Motion brought under the provisions of Article 163 (4)(b) and (5) of the Constitution of Kenya, 2010 and Sections 15(1) and 16(2) of the Supreme Court Act, 2011. It seeks a review of the Court of Appeal's decision of 14<sup>th</sup> March, 2019 denying the applicant certification to appeal to this Court under the rubric of matter of general public importance (GPI).
2. The dispute giving rise to this matter pits a father (the applicant) against his sons (the respondents) on the occupation and ownership of a piece of land situate at La Marina area in Mtwapa Township and known as subdivision No. 655 (Original No. 539/39) Section III MN (the suit land). In Malindi ELC Case No. 101 of 2015, the applicant, who claims ownership of the suit land, sought a perpetual injunction to restrain the respondents from continuing to trespass on it and vacant possession. Contemporaneous with the filing of that suit, the applicant applied for an interlocutory injunction to restrain the respondents from interfering with his access or entry on to the suit property.
3. In response to both the suit and that application, the respondents claimed they have occupied the suit land since childhood. They also filed a counter application for injunction to restrain the applicant from alienating or otherwise interfering with their quiet possession of the suit land. Angote J. heard the two applications together. In his ruling of 1<sup>st</sup> April 2016, the learned Judge dismissed the applicant's application and allowed the one by the respondents hence maintaining the prevailing status quo on the suit land.
4. When the applicant's appeal against that ruling came up for hearing on 23<sup>rd</sup> November 2016, by consent of the parties, the Court of Appeal referred the matter to an alternative dispute resolution forum – the National Supreme Council of Njuri Ncheke Ya Ameru Elders (Njuri Ncheke). In its award dated 21<sup>st</sup> February 2017, the Njuri Ncheke decreed the suit land to the applicant and directed each of the respondents to give a he goat to their father (applicant) as compensation for exposing him to court ridicule contrary to the Ameru customs. The respondents contested that award contending that it was biased and did not address pertinent issues they had raised. Acceding to that plea, the Court of Appeal held that as the arbitration was not sanctioned by the court but was at the initiative of the parties with no consent to be bound by the resultant award, the court could not impose it on either party. Moreover, the Court of Appeal further held that, it is the High Court which has jurisdiction to determine challenges to arbitral awards.
5. Aggrieved by that decision, the applicant sought the Court of Appeal's certification to appeal to this Court but the Court of Appeal dismissed that application thus provoking the one now before us.
6. This application is based on the applicant's contention that by submitting to the ADR process, the parties should be taken to have consented to be bound by the resultant award. In the circumstances,



the Court of Appeal's said decision declining to enforce an award on the ground that the arbitration was not sanctioned by the court and was not based on a written consent transcends the dispute between the parties and is therefore a matter of general public importance as it impacts on the proper implementation of Article 159(2)(c) & (3) of *the Constitution*.

7. In opposing the application, the respondents urge that the issues raised do not meet the criteria for certification that this is a matter of general public importance. The respondents further argue that in any event the original matter before the ELC as well as the appeal before the Court of Appeal are still pending determination and the Applicant has not demonstrated any willingness to pursue those matters to their logical conclusion.
8. As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the Superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that had been canvassed right through from the High Court to the Court of Appeal even though the substantive matter is still pending before the High Court—*Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR. See also *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR.
9. In this case, the issue canvassed before the High Court was an application for an interlocutory injunction. The Court of Appeal did not determine the issue of injunction. As stated, the parties, on their own initiative, referred it to ADR and when the Court of Appeal declined to adopt the ADR award, the applicant sought certification to appeal to this Court against that refusal. So there is no substantive determination by the Court of Appeal or even the High Court of a constitutional question. Moreover, the Court of Appeal's refusal to adopt an ADR award by Njuri Ncheke is a private matter between the parties and does not satisfy the criteria of a matter of general public importance as enunciated in the cases of *Malcolm Bel v Daniel Toroitich Arap Moi & Anor* [2013] eKLR and *Hermanus Phillipus Steyn v Giovanni Ruscone* [2013] eKLR. In the circumstances, we dismiss the application with costs.
10. Flowing from the above determination, we make the following orders
  - (a) The applicant's Originating Motion dated March 26, 2019 is hereby dismissed.
  - (b) The respondents shall have the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**D. K. MARAGA P. M. MWILU**

**CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE**

**OF THE SUPREME COURT PRESIDENT OF THE SUPREME COURT**

**M. K. IBRAHIM S. C. WANJALA**

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

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

Registrar,



**SUPREME COURT OF KENYA**

