



Kipngok v Kotut (Application 34 of 2019) [2020] KESC 26 (KLR) (4 September 2020) (Ruling)

Rose Jebor Kipngok v Kiplagat Kotut [2020] eKLR

Neutral citation: [2020] KESC 26 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 34 OF 2019
DK MARAGA, CJ & P, PM MWILU, DCJ & V-
P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ**

SEPTEMBER 4, 2020

BETWEEN

ROSE JEBOR KIPNGOK APPLICANT

AND

KIPLAGAT KOTUT RESPONDENT

(Being an application for review of the ruling of the Court of Appeal at Eldoret in Civil Application No 27 of 2019 (Nambuye, Makhandia & Otieno, JJ.A) delivered 17th October, 2019)

Parties in a suit must invoke the relevant constitutional or statutory provisions when seeking to invoke a court's jurisdiction.

The application sought to review the ruling of the Court of Appeal that denied certification and leave to appeal to the instant court. The court held that parties in a suit must invoke the relevant constitutional or statutory provisions when seeking to invoke a court's jurisdiction.

Reported by Sharon Sang & Kakai Toili

Jurisdiction – jurisdiction of the Court of Appeal – jurisdiction to certify matters as being of general public importance and thus capable of being appealed against at the Supreme Court - where an applicant had not invoked the relevant constitutional provisions when seeking certification of the matter – whether the Court of Appeal could determine the application for certification of the matter as being of general public importance - Constitution of Kenya, 2010, article 163(4)(b).

Civil Practice and Procedure – appeals – appeals from the Court of Appeal to the Supreme Court – grounds for appealing to the Supreme Court – matters of general public importance - what were the guiding principles in determining whether a matter was of general public importance capable of invoking the Supreme Court's appellate jurisdiction – Constitution of Kenya, 2010, article 163 (4)(b) and (5).



Brief facts

The application sought to review the ruling of the Court of Appeal that denied certification and leave to appeal to the instant court. The Court of Appeal in the application for certification considered whether the dispute could sustain a second appeal before the Supreme Court on the basis of article 163(4) and (5) of the Constitution, before dismissing the application on grounds that the dispute did not involve a matter of public importance.

The Court of Appeal, in the decision in which the applicant wanted to appeal against, had overturned the trial court's judgment and upheld the agreement for sale of land between the parties. Further, the Court of Appeal found that the equity doctrine of constructive trust and proprietary estoppel applied to the Land Control Act. The trial court had dismissed the respondent's suit with costs and declared the agreement void on grounds that no valid consent of the Land Control Board was issued, as the application for consent had been made outside the stipulated six months in contravention of section 8 of the Land Control Board Act.

The applicant averred that the application for leave to appeal to the court was struck out without giving any proper reasons. It was further contended that the intended appeal raised matters of general public importance and that the issues in the appeal transcended her case and had a significant impact on public interest. Lastly, the applicant contended that the Court of Appeal's failure to reconcile its two differing judgments caused uncertainty in existing precedent and negatively impacted on the state of the law.

Issues

- i. What was the effect of failure to cite the relevant constitutional or statutory provisions when invoking a court's jurisdiction?
- ii. What were the guiding principles in determining whether a matter was of general public importance and it warranted the exercise of the Supreme Court's appellate jurisdiction?

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 –

1. *as of right in any case involving the interpretation or application of this constitution; and*
2. *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. The constitutional provisions the applicant should have cited so as to properly invoke the review jurisdiction of the court were articles 163(4) (a) and (b) and (5) of the Constitution of Kenya.
2. In seeking to invoke a court's jurisdiction, a litigant had to invoke the relevant constitutional or statutory provisions. The applicant ought to have based her application for certification at the Court of Appeal on article 163(5) of the Constitution; she did not do that thus the appellate court had no option but to dismiss her application. Having been dismissed for incompetence at the appellate stage, the application was dead on arrival and no life could be breathed into it.
3. For a case to be certified as one involving a matter of public importance, the intending appellant had to satisfy the court that the issue to be canvassed on appeal was one of which the determination transcended the circumstances of the particular case, and had a significant bearing on the public interest. Where the question in issue was one of law, then such question had to be a substantial one.
4. There was no reason to allow a second appeal to the Supreme Court as the determination by the appellate court did not transcend the circumstances of the particular case. There was no significant question of law that required the further input of the court.



Application dismissed; decision of the Court of Appeal declining leave to appeal to the instant court affirmed; parties to bear their own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. Before the Court is a Notice of Motion dated 12th November 2019, and lodged on 15th November 2019. The Motion seeks to review the ruling of the Court of Appeal (Nambuye, Makhandia & Otieno, JJ.A) sitting at Eldoret delivered on 17th October 2019, denying certification and leave to appeal to this Court against the decision of the Court of Appeal (Githinji, Mohamed & Odek, JJ.A) in Civil Appeal No. 31 of 2015, delivered at Eldoret on the 7th March 2019. In the impugned decision, the Appellate Court overturned the trial Court Judgement and Orders in Environment and Land Court No. 691 of 2012 delivered on 24th November 2014, upheld the agreement for sale of land between the parties and found that the equity doctrines of constructive trust and proprietary estoppel applied to the Land Control Act by dint of Article 10(2)(b) and Article 159(2) of the Constitution. The trial Court had dismissed the Respondent’s suit with costs and declared the agreement null and void on grounds that no valid consent of the Land Control Board was issued, as the application for consent had been made outside the stipulated six months in contravention of Section 8 of the Land Control Act.

B. Application For Review

2. The Motion is based on the Applicant’s Supporting Affidavit sworn on 12th November 2019. The Applicant urges that the application for leave to appeal to this Court was struck out by the Appellate Court without giving any proper reasons. It is her further contention that the intended appeal raises matters of general public importance to wit; whether the doctrines of constructive trust and proprietary estoppel apply irrespective of statutory provisions; whether the doctrines of constructive trust and proprietary estoppel apply when not pleaded before the trial court; whether a valid consent of the Land Control Board can be granted outside the six-month period; and whether the Court of Appeal issues a second judgment or amend an error in respect to its first judgment. It is the Applicant’s further contention that the intended appeal transcends her case and has significant impact on public interest. Lastly, the Applicant contends that the Appellate Court’s failure to reconcile its two differing judgments, caused uncertainty in existing precedent and negatively impacted on the state of the law.
3. The Application is opposed by the Respondent, who through a Notice of Preliminary Objection dated 15th January 2020 seeks to have the application struck out on grounds that, the Applicant has not properly invoked this Court’s jurisdiction as she has failed to cite the relevant provisions of law on which the Application is premised. He urges further that the application for certification having been struck out by the Court of Appeal for being incompetent and void ab initio, it is not available for review by this Court under Article 163(4) (b) of the Constitution. Lastly, the Respondent argues that the Application is incompetent for raising new issues that were not canvassed before the Appellate Court.



C. The Applicant's Case

4. In her written submissions dated 20th February 2020 and filed on 21st February 2020, the Applicant submits both on the Preliminary Objection and Motion. She argues that the application before the Court of Appeal was brought under Articles 163 (4) of the Constitution, Section 19 of the Supreme Court Act, Rules 24 and 26 of the Supreme Court Rules and other relevant provisions of the Court of Appeal Rules. She adds that the current application is brought under Section 15, 16, 17 and 19 of the Supreme Court Act as well as Rule 23 of the Supreme Court Act.
5. The Applicant submits that even though Section 16(2) of the Supreme Court Act was declared unconstitutional, the Rules, specifically Rule 23 is still in force, hence jurisdiction has been properly invoked. It is the Applicant's case that as borne out by paragraphs 26 and 27 of the ruling, the Respondent's contention that the application before the Court of Appeal was struck out for incompetence, on the basis of representation is misleading. The Applicant submits therefore that she has met the threshold for review and relies on this Court's decision in *Parliamentary Service Commission vs Martin Nyaga Wambora & Others* (2018) eKLR.

D. The Respondent's Case

6. The Respondent also submits both on the Preliminary Objection and the Motion. On the Objection, he urges that the application is incompetent as the Applicant has not properly invoked this Court's jurisdiction. It is his case that Section 16(2) of the Supreme Court Act was declared unconstitutional and all the other provisions cited in the Application cannot confer jurisdiction upon this Court. Application 34 of 2019 review the decision of the Appellate Court. He relies on this Court's decision in *Suleian Mwamlol Warrakah & 2 Others vs Mwamlol Tchappu Mbwana & 4 Others*, Sup Petition No. 12 of 2018 [2018] eKLR and *Daniel Kimani vs Francis Mwangi Kimani & Another*, Civil Application 3 of 2014 (2015) eKLR to urge that a litigant must invoke the correct constitutional or statutory provision on the basis of which he seeks to invoke the Court's jurisdiction. It is his further case, that this Motion emanates from an application for certification before the Court of Appeal, which was struck out for being incompetent and void ab initio hence the Court cannot assume jurisdiction in proceedings that were null and void ab initio. He relies on this Court's decision in *Bwana Mohamed Bwana Vs Silvano Buko Bonaya & 2 Others* [2015] eKLR and the Nigerian Supreme Court case of *Ocheja Emmanuel Dangana vs Hon Atai Aidoko Aliusman & 4 others* Sc. 11/2012, to urge that as a pertinent issue of jurisdiction, a case before the court must be initiated within the due process of law. The Respondent also relies on the decision of *Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others* [2015] eKLR to further submit that the Applicant has raised new issues that were not canvassed before the appellate Court.
7. The Respondent submits that the intended appeal does not involve matters of general public importance. It is his view that the application is a disguised second appeal. He urges the Court not to disturb the findings of the Appellate Court as the outcome thereof would not transcend this particular dispute. In support of his argument the Respondent cites this Court's decisions in *Charles Karathe Kiarie & 2 Others Vs Administrators of the Estate of John Wallance & 3 Others* [2015] eKLR and *Kenya Commercial Bank Limited Vs Muiri Coffee Estate & Another* [2016] eKLR.

E. Determination

On Jurisdiction

8. The Respondent has challenged the jurisdiction of this court on two grounds, firstly, that the application for review is incompetent as the Applicant has not cited the relevant constitutional or



statutory provisions on the basis of which she seeks to invoke the Court's jurisdiction. Secondly, that since the application for certification filed before the Court of Appeal was struck out for being incompetent and void ab initio, this Court lacks review jurisdiction.

The Applicant on the other hand argues that the application before the Court of Appeal was brought under Articles 163 (4) of the Constitution, Section 19 of the Supreme Court Act, Rules 24 and 26 of the Supreme Court Rules and other relevant provisions of the Court of Appeal Rules; while the current application is brought under Section 15, 16, 17 and 19 of the Supreme Court Act and Rule 23 of the Supreme Court Rules, hence jurisdiction has been properly invoked. The Applicant submits that having first gone to the Court of Appeal and having been denied leave, she is now rightfully before the Supreme Court.

Regarding the question as to which constitutional/statutory provision the Applicant should have cited so as to properly invoke the review jurisdiction of this Court, the answer is simple and straight forward. Towards this end, article 163 4 (a) and (b) and (5) is the threshold provision. 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 Court of Appeal, certifies that a matter of general public importance is involved, subject to clause 5.

Clause 5 then 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.

9. The question to consider then is, whether having been dismissed by the Appellate Court on grounds of incompetence and voidability ab initio, this application has any ground on which to stand. As already settled by this Court in *Suleian Mwamlole Warrakah & 2 Others vs Mwamlole Tchappu Mbwana & 4 Others*, Sup Petition No. 12 of 2018 [2018] eKLR and *Daniel Kimani vs Francis Mwangi Kimani & Another*, Civil Application 3 of 2014 [2015] eKLR, in seeking to invoke a court's jurisdiction, a litigant must invoke the relevant constitutional or statutory provisions. It cannot be in doubt that the Applicant herein ought to have based her application for certification at the Court of Appeal on Article 163 (5) of the Constitution. This she didn't, thereby inviting the wrath of the Appellate Court which had no option but to dismiss her application. Towards this end therefore, we agree with the Respondent that having been dismissed for incompetence at the appellate stage, this application is dead on arrival and no life can be breathed into it.

This finding should ideally bring this matter to an end were it not for the fact that, the Court of Appeal, none the less proceeded to consider whether the dispute before it, could sustain a second appeal before the Supreme Court on the basis of Article 163 (4) (5) of the Constitution. It is our perception that in taking this course of action, the Court of Appeal was inspired by the provisions of Article 259 of the Constitution which frowns upon procedural technicalities. The Appellate Court then still dismissed the application on grounds that the same did not involve a matter of public importance. So the question remains whether the application before us can be sustained on the basis of Article 163 (4) (b) of the Constitution.

The principle set out in *Hermanus Phillipus Steyn Vs Giovanni Gneccchi-Ruscione* Supreme Court Application No 4 of 2012 [2013] eKLR, by this Court do put this matter to rest. We did declare that for a case to be certified as one involving a matter of public importance, "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." This Court also laid down the principle that where the question in issue is one of law, then such question must be a substantial one.



10. We note that the issues raised in the intended appeal are:
 - a. Whether the doctrines of constructive trust and proprietary estoppel apply irrespective of statutory provisions;
 - b. Whether the doctrines of constructive trust and proprietary estoppel apply when not pleaded before the trial court;
 - c. Whether a valid consent of the Land Control Board can be obtained outside the six months period;
 - d. Whether the Court of Appeal is entitled to prepare a second judgment or amend an error in respect of the third judge's signature.
11. It is undoubtedly 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 consent of the Land Control Board, which application had been made outside the six months period, from the date of agreement, in conflict with Section 8 of the Land Control Act. The trial court (Munyao J) declared an agreement for sale of land between the Applicant and the Respondent null and void on grounds that no valid consent of the Land Control Board was issued. The court found that the application and consent was made outside the stipulated six months' timeline in contravention of Section 8 of the Land Control Board. It determined that an extension of the stipulated period as contemplated by the said section could only be granted where the application for extension is made after the expiry of the six months but before an application for consent is lodged with the Land Control Board.
12. Aggrieved by the decision of the trial court, the Respondent lodged an appeal in the Court of Appeal. After hearing the parties, the Court of Appeal on the contestation relating to the validity of the consent of the Land Control Board, agreed with the trial court that pursuant to section 8 of the Land Control Act, an application for consent of the Land Control Board is made within six months of entering into a contract for sale of controlled land, provided that for sufficient reason, the High Court may extend the period. However, it found that it was indisputable that a sale agreement was entered into between the Applicant and the Respondent and that pursuant to the agreement, the Applicant received a deposit of Kshs 700,000. It opined that the Land Control Act was not intended to be an instrument for unjust enrichment and that the equity doctrines of constructive trust and proprietary estoppel are applicable to the appeal. The Appellate Court proceeded to fault the trial court for failing to consider and apply the two equity doctrines and added that nothing in the Land Control Act prevents the Respondent from relying on the doctrines of equity. Consequently, it allowed the appeal and issued orders for specific performance against the Applicant.

Flowing from the summary above, we see no reason to allow a second appeal to this Court as the determination by the Appellate Court in our view, does not transcend the circumstances of this particular case. By the same token, we do not see any significant question of law that requires the further input of this Court.

Orders

The foregoing conclusion of triggers the following orders.

- i. The Originating Motion Application dated 12th November, 2019, is hereby dismissed;
- ii. The decision of the Court of Appeal delivered on 17th October, 2019, declining leave to appeal to this Court is hereby affirmed;



iii. Each Party shall bear its own costs

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF SEPTEMBER, 2020

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P. M. MWILU M. K. IBRAHIM

DEPUTY CHIEF JUSTICE & VICE JUSTICE OF THE SUPREME COURT

PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

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ISAAC LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

