Ali & another v Mwamutsi (As Administrator of the Estate of David Mwamutsi Muria) (Civil Application 11 of 2018) [2019] KESC 43 (KLR) (30 April 2019) (Ruling)

Salim Juma Ali & another v Joyce Ningala Mwamutsi [2019] eKLR

Neutral citation: [2019] KESC 43 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 11 OF 2018

DK MARAGA, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 30, 2019

BETWEEN

SALIM JUMA ALI .... 1ST APPLICANT

RASHID ALI .... 2ND APPLICANT

AND

JOYCE NINGALA MWAMUTSI (AS ADMINISTRATOR OF THE ESTATE OF DAVID MWAMUTSI MURIA) .... RESPONDENT

(Being an application for certification to appeal against the decision of the Court of Appeal (Visram, Karanja and Koome, JJA) given on 10th May 2018 in Civil Appeal No. 61 of 2016)

RULING

1. We have before us an Application for certification under Article 163(4)(b) of the *Constitution* that the applicant's intended appeal against the judgement of the Court of Appeal involves a matter or matters of general public importance warranting a further appeal to this Court and a temporary order of stay of execution of the judgement and/or decree of the Court of Appeal made on 10th May, 2018 in Civil Appeal No. 61 of 2017.

2. The subject matter of the intended appeal is a land dispute over Title Number Mbwaka/Maereni/311 (the suit land) allegedly dating back to 1975 pitying the applicant's family against that of the respondent. Both Juma Ali Birwa (deceased) the father of Salim Juma Ali and Rashid Ali (the Applicants) and Mwamutsi Murira (deceased) the father Joyce Ningala Mwamutsi (the Respondent) claim to have separately bought the suit land from the original owner one Katana Chiringa. During the adjudication process in the area, the respondent's father, who claims to have been the first purchaser of the suit land, lodged his claim and was registered as the proprietor thereof on 13th April 1987. The applicant's father was, however, in possession of the land and his family has to date been in possession.

3. In 1996, the respondent's late father filed Mombasa CMCC No. 3153 of 1996 and sought the eviction of the applicants' father. That suit was never determined. In 2016, the respondent filed another suit, Mombasa ELC No. 182 of 2016. Contemporaneous with the filing of that suit, the respondent also filed a Notice of Motion in which he sought the eviction of the applicants from and vacant possession of the suit land.

4. In their grounds of opposition to that application, the applicants averred that the entire suit was an abuse of the court process as the matter was sub-judice Mombasa HCCC No. 44 of 2012 (OS) and that having exclusively and openly occupied the suit land since 1975, the applicants' family had acquired title to it by adverse possession.

5. In its ruling dated 27th July 2017, the Malindi ELC Judge, Olola, J. granted the application and compelled the applicants to immediately hand over the suit land and in default be evicted therefrom after 45 days. The learned Judge also ordered the OCS Kisurini Police Station to supervise the execution of that eviction order.

6. Aggrieved by that ruling, the Applicants appealed to the Court of Appeal contending in 11 grounds of appeal in a nutshell that the learned judge of the Environment and Land Court erred in issuing final eviction orders in an interlocutory mandatory injunction thereby finally determining both Mombasa HCCC No. 44 of 2012 and Malindi 182/2017 even before they were formally consolidated. In its said judgment dated 10th May 2018, the Court of Appeal, declining to disturb the learned ELC Judge's discretion, which it held was properly exercised, dismissed the Applicant's Appeal with costs. That is the decision which is the basis of the application before this Court.

7. From their counsel's written submissions and the 1st applicant's affidavit in support of the application, the applicants' case is that the grant of final orders which determined the suit at an interlocutory stage without a hearing and directed their eviction from and demolition of their permanent buildings on the suit land they have occupied for over 20 years is a matter of general importance warranting a further appeal to this Court.

8. Despite service, the respondent has not filed any response to the application.

9. We have considered the application. As it stated *Daniel Kinani Njihia v. Francis Mwangi Kimani & Another* Sup. Ct. Civil Application No. 13 of 2014 cited with endorsement in *Teachers Service Commission v. Kenya National Union of Teachers & 3 Others* [2015] eKLR, this Court was not established as just "another layer in the appellate court structure." In the circumstances, "not all decisions of the Court of Appeal are … [appealable to] this Court." The jurisdiction of this Court can only be invoked pursuant to Article 163(4) of the *Constitution* which provides that:

   (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, …."

10. The question as to when this Court can assume jurisdiction under Article 163 (4) of the *Constitution* has been addressed in a number of cases. The criteria regarding the invocation of this Court's jurisdiction as of right under Article 163(4)(a) has been stated in a number of cases including: *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another* S.C Petition No. 3 of 2012; (2012) eKLR; *Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board*, Petition No. 5 of

2012 [2012] eKLR; and *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Petition No. 10 of 2013 [2014] eKLR. The ratio emanating from all these cases and others is as was stated in the *Lawrence Nduttu Case*: to warrant the invocation of this Court's jurisdiction under Article 163(4)(a) of the *Constitution*, "an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter…."

11. In this case, the applicants wish to invoke this Court's jurisdiction under Article 163(4)(b). As stated in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR, a decision it had also made in *Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others* [2012] eKLR (Supreme Court Petition No. 2 of 2012) and reiterated in many other subsequent decisions, an applicant seeking certification under Article 163(4)(b) "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…." If it is a point of law, he "must demonstrate that such point is a substantial one, the determination of which will have a significant bearing on the public interest."

12. With regard to the invocation of this Court's jurisdiction as of right under Article 163(4)(a), it was stated in *Peter Ngoge* (supra) and *Michael Mungai v. Housing Finance Co. (K) Ltd & 5 Others* SC Application No. 9 of 2015; (2017) eKLR that the matter should have progressed….. This implies that the matter must been substantially heard and the issue of constitutional interpretation and/or application determined with finality by the Superior Courts before finding its way to this Court.

13. The same analogy must apply to matters of general public importance under Article 163(4)(b). Besides other considerations such as whether the matter in question is one, "the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest", it must have been finally determined. In our recent decision in the case of *Bia Tosha Distributors Ltd v. Kenya Breweries Ltd & Others*, Civil Application No. 10 of 2017, relying on *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, Petition No. 10 of 2013 [2014] eKLR, we stated that although interlocutory orders can be the basis of appeals to this Court, there must be a definite determination or judgment on the issue.

14. It is important to recall that the dispute between the parties was first filed before the Subordinate Court in 1996 in Mombasa CMCC No. 3153 of 1996. In 2012, another suit—Mombasa HCCC No. 44 of 2012 (OS)— was also filed. In 2016, a third suit—Malindi ELC No. 182 of 2016—was also filed. None of those cases has been heard. As stated above what was heard is an application in Malindi ELC No. 182 of 2016 pursuant to which an interlocutory mandatory injunction was granted. The main suit is still pending before the Environment and Land Court at Malindi.

15. So the intended appeal which the applicants wish to proffer to this Court arises out of that interlocutory mandatory injunction issued by the High Court against which the applicants unsuccessfully appealed to the Court of Appeal. The mandatory injunction is itself interlocutory. It could be set aside when the main suit is ultimately heard and determined.

16. The question we ask ourselves is: can an inchoate determination be a matter of general public importance? We think not. Allowing an appeal from an interlocutory order of the Court of Appeal without definite determination or judgment on the issue, as we recently stated in the Bia Tosha Case, this Court risks making "premature comments on the merits of issues yet to be adjudged … [in the courts below and] … expose one of the parties to prejudice, with the danger of leading to an unjust outcome."

17. For these reasons, we find that the application before us has not met the threshold for certification that the applicants' intended appeal involves a matter of general public importance. Being of that view, the

applicants' additional prayer for a temporary order of stay of execution of the judgement and/or decree of the Court of Appeal made on 10th May, 2018 in Civil Appeal No. 61 of 2017 must also fail.

Justice Wanjala's Dissenting Opinion

18. The applicant has approached this Court seeking certification of his intended appeal, as one involving a matter of general public importance, under Article 163 (4) (b) of the *Constitution*. Crucially, he at the same time, seeks a temporary order of stay, of the Court of Appeal's decision, against which he intends to appeal. The facts are as outlined in the Ruling by the Majority. At issue is an unresolved land dispute dating as far back as 1975, in which the protagonists are claiming ownership of Title Number Mbwaka/Marereni/311 in Kilifi County.

19. The suit land has been and remains, the subject of multiple suits at the Chief Magistrate's Court, the High Court, the Environment and Land Court, the Court of Appeal, and now the Supreme Court. At the Chief Magistrate's Court, in CMCC No. 3153 of 1996, the respondent's late father sought the eviction of the applicant's father from the land, claiming that he, the plaintiff, was the legal owner thereof. This suit, was never determined. There are no discernible reasons on the record before us, as to why this case was never disposed of, one way or the other. At the High Court, the applicants filed an Originating Summons in HCCC No. 44 of 2012, seeking a declaration that he was the legal owner of the suit land on grounds of Adverse Possession. Again, the Originating Summons was never disposed of. In 2016, it was now the turn for the respondent to file suit at the Environment and Land Court in ELC No. 182 of 2016 claiming the eviction of the Applicants.

20. In a Ruling dated 27th July 2017, the Environment and Land Court, sitting at Malindi, (Olola, J.) granted the application, and issued Orders requiring the applicants to vacate the suit land or be evicted therefrom. Aggrieved by the Court's Orders, the applicants filed an appeal before the Court of Appeal. The crux of the appeal was to the effect that by granting a Mandatory Injunction at an interlocutory stage, evicting the applicants from the suit land, the learned Judge, had effectively and with finality disposed of the dispute, without hearing the parties on the merits. Another ground by the applicants was that the learned Judge had granted the impugned Orders, in total disregard of the fact that, the dispute was Sub-Judice, in view of HCCC. No 44 of 2012. The Court of Appeal dismissed the application for stay, on grounds that to do so would be interfering with the Superior Court's exercise of discretion.

i Point of Departure

21 In its Ruling declining the grant of stay Orders as prayed by the applicants, the Majority holds the view, (see paragraph 15 of the Ruling) that what was heard in Malindi ELC No. 182 of 2016, was an application (meaning, as opposed to a full hearing) pursuant to which, an interlocutory mandatory injunction was granted. It is further acknowledged that the main suit is still pending before the Environment and Land Court at Malindi. Finally, the Majority concludes that the mandatory injunction is itself interlocutory. It could be set aside when the main suit is ultimately heard and determined. Herein lies my point of departure from the majority.

22. The nature of the dispute between the parties herein, is such that, it cannot lend itself to issuance of mandatory Orders at an interlocutory stage, unless the main question has been determined. The main question in the cases before the High Court, and Environment and Land Court is who is the legal owner of Title Number Mbwaka/Maereni/311? The Applicants are in possession of the said land. They base their claim on the doctrine of adverse possession. The Respondents on the other hand, base their claim on registered title. Is it then conceivable that a court can issue a mandatory injunction based on an application by one of the parties, requiring the other party to vacate the suit land, at the pain

of eviction before the determination of the main question as to who owns the land? Would such an Order not be dispositive of the suit before the parties are heard? Can such a mandatory injunction be considered interlocutory when its real effect is to dispose of the matter with finality? Doesn't such a mandatory injunction actually amount to a final Judgment against the applicants herein? What would be left for determination when the suit is finally heard? How would a mandatory injunction be set aside, as the Majority suggests, unless it is impugned on appeal?

23. These are the questions that the Appellate Court ought to have asked itself and answered, so as to arrive at the correct conclusions in determining the application for a stay. They are the same questions that this Court ought to ask and answer. The applicants are seeking answers to these questions. Instead, in my view, the Majority is asking itself, the wrong question, when it posits thus (see paragraph 16) "Can that an (sic) inchoate determination be a matter of general public importance?" to which it must inevitably give a wrong answer thus, "We think not." The determination against which the applicants intend to appeal and indeed appealed at the Appellate Court, cannot be considered an inchoate determination. On the contrary, an Order by a Court, whose effect is to evict a party from land, when the said party, is seeking to establish his ownership of the same, based on the fact of his possession, amounts to a final Judgment, against which an appeal, such as the one intended, ought to be admitted.

24. On the basis of the foregoing, I would grant an Order for certification as sought by the applicants, on the ground that the intended appeal raises a substantial question of law, the determination of which has a bearing on the public interest. I would consequently grant an Order staying the mandatory injunction issued by the Environment and Land Court in ELC No. 182 of 2016 so as to preserve the substratum of the main cause before that Court, and the substratum of the appeal before this Court. However, as the Majority is of a contrary opinion, theirs, is the Judgment of the Court.

25. Consequently, we make the following Orders:

    i. The applicants' Notice of Motion dated 28th May 2018 is hereby dismissed

    ii. Each party shall bear its own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL 2019.

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D.K. MARAGA

CHIEF JUSTICE/PRESIDENT SUPREME COURT OF KENYA COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. WANJALA.

JUSTICE OF THE SUPREME COURT

...

N. NJOKI

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

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SUPREME COURT OF KENYA