



Wandabusi & another v Attorney General for and on behalf of the Commissioner for Lands & 3 others (Originating Motion 23 of 2017) [2019] KESC 4 (KLR) (8 November 2019) (Ruling)

Geoffrey Wambanda Wandabusi & another v Attorney General for and on Behalf of the Commissioner for Lands & 3 others [2019] eKLR

Neutral citation: [2019] KESC 4 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
ORIGINATING MOTION 23 OF 2017
DK MARAGA, CJ & P, PM MWILU, DCJ & V-
P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ
NOVEMBER 8, 2019**

BETWEEN

GEOFFREY WAMBANDA WANDABUSI 1ST APPLICANT

MARGARET NALIKA WAMBANDA 2ND APPLICANT

AND

**ATTORNEY GENERAL FOR AND ON BEHALF OF THE COMMISSIONER
FOR LANDS 1ST RESPONDENT**

CLERK BUNGOMA COUNTY COUNCIL 2ND RESPONDENT

MOHAMED NOOR AHMED (NOW DECEASED) 3RD RESPONDENT

BUNGOMA MUNICIPAL COUNCIL 4TH RESPONDENT

(Being an application for review of refusal to grant certification that the intended appeal to the Supreme Court raised a matter of general public importance by the Court of Appeal at Eldoret in Civil Appeal No.118 of 2017 (Musinga, Gatembu & Murgor, JJ.A) delivered on 16th November 2017)

Decision on certification of an intended appeal to the Supreme Court as a matter of public importance

The applicants filed an originating motion on a review of the refusal to grant certification by the Court of Appeal at Eldoret in Civil Appeal No.118 of 2017. The applicants submitted that the intended appeal involved a matter of general public importance that deserved to be admitted to appeal. The Supreme Court discussed issues relating to its jurisdiction reviewing decisions on certification of an intended appeal to the Supreme Court as a matter of public importance.



Reported by Robai Nasike Sivikhe

Civil Practice and Procedure- *reviews- application for review- review by the Supreme Court of a Court of Appeal's ruling on grant of certification- the scope of the Supreme Court's review jurisdiction- what timelines applied when filing a review before the Supreme Court- whether there was inordinate delay in filing a review before the Supreme Court- Supreme Court rules, rule 24 (2)*

Civil Practice and Procedure- *appeals- appeals to the Supreme Court- grant of certification to appeal to the Supreme Court by the Court of Appeal- where a judge had not participated in the hearing of an appeal but participated in the decision to grant certification to appeal to the Supreme Court- whether a judge who had not participated in an appeal could grant certification to appeal to the Supreme Court*

Jurisdiction- *appellate jurisdiction - appeals to the Supreme Court- grant of certification to appeal to the Supreme Court- whether the matters raised were of great public importance hence warranted grant of certification to appeal*

Brief facts

The applicants filed an originating motion on a review of the refusal to grant certification by the Court of Appeal at Eldoret in Civil Appeal No.118 of 2017. The applicants submitted that the intended appeal involved a matter of general public importance that deserved to be admitted to appeal

Issues

- i. Whether there was inordinate delay in filing a review before the Supreme Court.
- ii. Whether a judge who had not participated in an appeal could grant to a party certification to file an appeal to the Supreme Court.
- iii. Whether the matters raised were of great public importance hence warranted grant of certification to appeal.

Held

1. New material ought not to be raised when seeking to review the Court of Appeal's ruling on grant of certification. The Supreme Court's review jurisdiction, unlike the normal review power of courts was specific. The Supreme Court ought to have the same information that was presented before the Court of Appeal by the applicant seeking certification.
2. The application for review of certification before the Supreme Court ought to be filed within fourteen days under rule 24(2) of the Supreme Court's Rules. The application for review was filed ten days out of time. Considering that the applicants were based in Makutano Area, South Kanduyi of Bungoma County as per their address on the pleadings and considering also that the impugned ruling was issued in Eldoret and further that the applicants were acting in person, the delay was not inordinate.
3. There was no sufficient evidence before the court to conclusively determine that a judge had not participated in the appeal but participated in the judgment. The mere issuance of a cause list, which in most cases happened in advance of the actual court sessions, had not demonstrated that the matters listed proceeded, or judges indicated within had not sat on any matter as listed. There was need for more substantive evidence such as the court proceedings or even the judges' notes by judges who actually participated in the hearing.
4. The fact that a judge had not participated in the hearing and determination of an appeal on its merits, did not challenge the decision/ruling in respect of an application for certification that an intended appeal to the Supreme Court involved a matter of general public importance under article 163(5) of the Constitution. Such a judge had not sat in an appeal in the Court of Appeal which was heard and determined on its merits. When a judge who was not part of the bench that rendered the judgment in an appeal in the Court of Appeal was considering an application for certification, they only looked at the framed issues and those that were presented by the applicants as matters of general public importance. The judge would not delve in the hinterland of the arguments, submissions, factual and evidentiary aspects of the appeal. Such a judge was able to independently and reasonably consider and make a fair



- decision on whether any issue/matter was of general public importance. In the circumstances there would be no prejudice to any of the parties.
5. Whereas, the fact that the subject property was public land could have been persuasive to warrant the grant of a certification, the applicants fell short of demonstrating the same to the court's satisfaction beyond a mere restatement that the intended appeal raised issues of general public importance. The basis of submissions and ultimate decision of the instant court was likely to revolve around determination of the applicants' rights over the suit property as opposed to the then County Council's rights over the suit property.
 6. It was only the issues that were certified as being of great public importance that had to form the basis for submissions and ultimately the decision of the Supreme Court. To frame certain issues as being of great public importance at the point of certification under article 163(4)(b) of the Constitution and then submit on issues that were specific to the parties at hand with no public element exhibited was an abuse of court process and could lead to the dismissal of an appeal.
 7. Despite the then County Council passing a resolution to award the applicants property, they went ahead to oppose the suit right from the High Court to the Supreme Court. As a public body, they were expected to conduct themselves better on the matter. As the evidence of the Council Minutes was not in issue in light of the Court of Appeal's determination of the question before it, and the same being uncontested, the 2nd respondent was expected to adopt a more responsible approach towards the applicants in resolving the dispute at hand. Therefore they had to bear their own costs.

Application dismissed. Each party would bear their own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. The applicants in this matter filed an Originating Motion on 20th December 2017 seeking a review of the refusal to grant certification by the Court of Appeal at Eldoret in Civil Appeal No.118 of 2017, through its ruling delivered on 16th November 2017. The application is supported by respective affidavits by the applicants. The applicants also filed written submissions and a list of authorities on 14th September 2018.
2. The applicants submit that the intended appeal involves a matter of general public importance that deserves to be admitted to appeal before this court and as such for it involves public land namely parcels numbers 1062 later subdivided into 6666 registered to Mohammed Noor, the 3rd respondent and 6668 registered to Bungoma County Council, which has since been succeeded by the Bungoma County Government under the new constitutional dispensation following the promulgation of the 2010 Constitution. The applicants seek restoration of the original title No. 1062 in their favour and faults the Court of Appeal for failing to take into account additional evidence introduced and allowed in which the 2nd respondent consented to giving back part of the said parcel to the applicants; that the judgment is a nullity having been delivered by a bench that included a judge who did not participate in the hearing of the appeal and that the application to the Court of Appeal was refused and rejected on wrong principles of law and fact.



3. The applicants argue that their intended appeal meets the threshold for certification as laid down by this court in *Hermanus Phillips Steyn v Giovanni G Ruscone* Sup. Ct App No.4 of 2012 [2013]eKLR, *Malcolm Bell v Daniel Toroitich Arap Moi & Another* Sup. Ct Appl. No. 1 of 2013 [2013]eKLR and *Town Council of Awendo v Nelson Oduor Onyango & 13 others* Misc. Appl. No.49 of 2014 [2015]eKLR; that the County is registered as trustees for the benefit of the residents of Bungoma and the Bukusu people whose original land was taken including the deceased's parcel; that the decision over the land will affect the many residents of Bungoma County who would otherwise be entitled to get the land as the 3rd respondent did; that the land might be put into public use by building a school or market or hospital and other public facilities or utilities; that the issue of other people whose land may have been taken and registered in the name of the County Council can assert their claim even after many years, needs to be considered and that the issue that the County Council recommended in their full Council meeting to give at least 1.5 acres of the suit land to the applicants as the original owners before the land adjudication process needs to be considered as binding on them.
4. In response to the 2nd respondent's ground of objection that the application is filed out of time, the applicants submit that the fourteen day rule under Rule 24(2) of this Court's Rules is not mandatory as this Court has discretion to waive certain forms on the conduct of proceedings. The applicants cite this Court's decisions in *Telcom Kenya Limited v John Ochanda & 996 others* [2015] eKLR and *Dhanjal Investments Limited v Kenindia Insurance Company Limited* Sup Ct. Civil Appl. No.39 of 2014 [2016]eKLR. With regard to failure to annex the decision of the High Court to the application for review of certification and the failure to put in written submissions in support of the application, the applicants submit that the same is not fatal and urge this Court to consider its duty to deliver substantive justice.
5. Despite several mentions before the Hon. Deputy Registrar of this Court to ensure compliance by all the parties, only the 2nd respondent filed grounds of opposition, written submissions and a list of authorities all on 29th June 2018. It appears from the heading of the applicants' pleadings that the 3rd respondent has already died. The 4th respondent no longer exists under the new constitution with the establishment of the Bungoma County Government, represented by counsel for the 2nd respondent. This effectively left the Hon. Attorney General as the party who has not complied with the directions issued by the Hon. Deputy Registrar.
6. The 2nd respondent's objection is on the following grounds: that there is no sufficient reason advanced to warrant a review of the reasoned ruling of the Court of Appeal; the application for review is out of time and does not lie, the Court of Appeal ruling having been made on 16th November 2017 and the application having been filed on 20th December 2017; that no new matters are advanced to warrant the review as the affidavit in support of the application is a replica of that filed at the Court of Appeal; that there is no error or mistake on the record in the considered Court of Appeal ruling to warrant a review; that there is no issue on the interpretation or application of the Constitution to clothe jurisdiction under Article 163(4)(a) of the Constitution; that there is no issue sought to be canvassed as a matter of general public importance so as to bring it within the ambit of Article 163(4)(b) of the Constitution and that the application does not meet the requisite parameters, is bad in law and otherwise an abuse of the process and the public policy that there should be an end to litigation.
7. The 2nd respondent further submits that the applicants do not meet the threshold set out in the *Hermanus Phillips Steyn* case (supra) as there is neither a draft intended appeal from which one would gauge any public interest nor is there anything disclosed in the affidavits filed that the issue affects a large number of persons. In addition, the contention that the delivery of judgment included a Judge that



did not participate in the appeal bears no weight and cannot invalidate the judgment as was considered in the Malcolm Bell case (supra).

- 8 We have considered the application, the 2nd respondent's grounds of objection, written submissions of the parties and the authorities. At the heart of the application is whether we should review the decision of the Court of Appeal that declined to certify the applicants' intended appeal as that involving a matter of general public importance. We are therefore being called upon to exercise our jurisdiction under Article 163(5) of the Constitution. In so doing, we are mindful that we have settled the principles for certification as was enunciated in the Hermanus Phillips Steyn case (supra). We note in that regard that both parties and even the Court of Appeal took into account the said principles in its ruling subject of the present application. We do not share the 2nd respondent's argument that new material ought to be raised when seeking to review the Court of Appeal's ruling on grant of certification. This jurisdiction, unlike the normal review power of courts is specific and we ought to have the same information that was presented before the Court of Appeal by the applicant seeking certification.
9. Before we revert to the issue of certification, it is prudent that we also address ourselves to the other contentions raised. The first contention is whether the application is filed out of time and if so, the consequences thereon and the second contention is on the place of the judgment being delivered by a judge who did not participate in the hearing of the appeal.
10. On the first issue, it is common ground that the application for review of certification such as this one before us ought to be filed within fourteen days under Rule 24(2) of this Court's Rules. It is also not in contention that the ruling on certification was made on 16th November 2017 and that the application for review was filed before this Court on 20th December 2017. Accordingly, the application ought to have been filed by 6th December 2017 and it was thus ten days out of time. Considering that the applicants are based in Makutano Area, South Kanduyi of Bungoma County as per their address on the pleadings and considering also that the impugned ruling was issued in Eldoret and further, that the applicants are acting in person, we exercise our discretion to excuse the delay in filing the application out of time which delay is in any event not inordinate. In the same vein, we excuse the applicants for filing the application without accompanying it with written submissions as the matter was in any event mentioned before the Hon. Deputy Registrar of this Court who issued directions on filing of submissions.
11. On the second issue, we are not in a position to address ourselves on it as there is no sufficient evidence before us to conclusively determine that a judge did not participate in the appeal but participated in the judgment. The mere issuance of a cause list, which in most cases happens in advance of the actual court sessions, does not of itself demonstrate that the matters listed proceeded or judges indicated therein did or did not in fact sit on any matter as listed. We needed more substantive evidence such as the court proceedings or even the Judges' notes by judges who actually participated in the hearing. Moreover, it does not appear to us that the applicants sought the certification on this issue as involving general public importance for which our review is sought.
12. In any case, it is our opinion that the fact that a judge who did not participate in the hearing and determination of an Appeal on its merits, does not impugn the Decision/Ruling in respect of an Application for certification that an intended Appeal to the Supreme Court involves a matter/s of general public importance under Article 163(5) of the Constitution. Such a judge did not sit in the Appeal in the Court of Appeal which was heard and determined on its merits. The principles to be considered in an application for Certification are very well established by a string of well-considered decisions of the Supreme Court, the cause classical being the case of Hermanus Phillips Steyn –v- Giovanni G. Ruscone Sup. Ct. App. No. 4 of 2012 (2013)e KLR. This case laid down the principles to be considered and applied in the determining of an application for Certification. So when a judge



who was not part of the Bench that rendered the judgment in an Appeal in the Court of Appeal is considering an application for Certification, he/she looks only at the framed issues and which are presented by the Applicant/s as matter/s of general public importance. The judge does not delve in the hinterland of the arguments, submissions, factual and evidentiary aspects of the Appeal. It follows that such a judge is divorced from all of the foregoing and is able to independently and reasonably consider and make a fair decision on whether any issue/matter is of general public importance. In the circumstances there would be no prejudice to any of the parties.

As a result we hold that we cannot interfere with the decision of the Court of Appeal on this ground.

13. Back to the issue of certification, we reiterate that the applicants have to demonstrate satisfactorily that there is a legal question the subject matter of which transcends the present litigation. We note that the Court of Appeal was not satisfied that the subject of the intended appeal is public land, the subject property having been compulsorily acquired. Instead, the learned Judges of Appeal discerned from the claim that the intended appeal relates to a dispute involving private interests of the deceased from which the applicants accrue their rights.
14. We have perused the pleadings, the judgments by the High Court and by the Court of Appeal. Whereas, were it a fact that the subject property was public land could have been persuasive to warrant the grant of a certification, the applicants have fallen short of demonstrating the same to our satisfaction beyond a mere restatement that the intended appeal raises issues of general public importance. It is apparent that the basis of submissions and ultimate decision of this Court is likely to revolve around determination of the applicants' rights over the suit property as opposed to the then County Council's rights over the suit property. The following caution in our judgment in *Dhanjal Investments Limited v Kenindia Insurance Company Limited* Sup Ct. Petition No.7 of 2016 is imperative under the circumstances:
 - (67) Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this Court. To frame certain issues as being of great public importance at the point of certification under Article 163(4)(b) of the Constitution and then submit on issues that are specific to the parties at hand with no public element exhibited is an abuse of Court process and may lead to the dismissal of an appeal."
15. On the new evidence adduced before the Court of Appeal, it was rather puzzling that despite the then County Council passing a resolution to award the applicants property, they went ahead to oppose the suit right from the High Court to this Court. As a public body, we expected them to conduct themselves better on the matter. As the evidence of the Council Minutes is not in issue in light of the Court of Appeal's determination of the question before it, and the same being uncontested, we expected the 2nd respondent to adopt a more responsible approach towards the applicants in resolving the dispute at hand. For this, they have to bear their own costs before us.
16. Based on the above findings and pursuant to the provisions of sections 21(2) and 23(2)(b) of the Supreme Court Act, 2011 and Rules 21, 24(5) and 53 of the Supreme Court Rules, 2012, we make the following Orders:
 - a) The Originating Motion filed on 20th December 2017 is hereby disallowed.
 - b) Each party to bear their respective costs in this application.It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2019.



.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

