Mbiyu v Mbiyu & 15 others (Civil Application 10 of 2018) [2018] KESC 29 (KLR) (28 September 2018) (Ruling)

George Kihara Mbiyu v Margaret Njeri Mbiyu & 15 others [2018] eKLR

Neutral citation: [2018] KESC 29 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 10 OF 2018

DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ

SEPTEMBER 28, 2018

BETWEEN

GEORGE KIHARA MBIYU .... APPLICANT

AND

MARGARET NJERI MBIYU & 15 OTHERS .... RESPONDENT

The jurisdiction of the Supreme Court to review a Court of Appeal's decision declining certification that a matter is one of general public importance

The instant application sought a review of the appellate court's decision. The court discussed its jurisdiction to review a Court of Appeal's decision declining certification that a matter was one of general public importance.

Reported by Sang Angela

***Jurisdiction** – jurisdiction of the Supreme Court – review – jurisdiction of the Supreme Court to review a decision of the Court of Appeal with respect to certification of a matter for appeal to the Supreme Court – where the Court of Appeal had dismissed an application for leave to file an appeal to the Supreme Court –– whether the Supreme Court had jurisdiction to review a Court of Appeal's decision declining certification that a matter was one of general public importance-Constitution of Kenya, 2010 article 163(4) (b); Supreme Court Rules, 2012, rule 24(1).*

***Law of Evidence** - the doctrine of estoppel - application of the doctrine of estoppel - where the court relied on depositions in an affidavit sworn long after the death of the deceased to determine that certain parties were widows of the deceased on the basis of the doctrine of estoppel - whether the court correctly applied the doctrine of estoppel when it relied on depositions in an affidavit sworn by certain parties long after the death of the putative husband to create the status of a widow - Evidence Act, section 120.*

***Civil Practice and Procedure** - doctrine of res judicata - application of the doctrine of res judicata - whether interlocutory orders previously given by a court could render a matter res judicata.*

Brief facts

Peter Mbiyu (the deceased) died intestate. A dispute arose as to whether or not Margaret Mbiyu and Eddah Mbiyu were widows of the deceased and therefore beneficiaries of his estate and also whether or not Eddah's daughter, Sylvia, was a biological child of the deceased entitled to inherit a share of his estate. The High Court found that Margaret and Eddah were not widows of the deceased hence not beneficiaries of his estate. The court also found that Eddah's said daughter Sylvia was not sired by the deceased and was therefore also not a beneficiary of his estate. That decision prompted appeals and cross appeals to the Court of Appeal. The Court of Appeal overturned the High Court decision holding that the deceased had four wives.

Aggrieved by that decision, the applicant filed an application under article 163(4) (b) of the Constitution seeking from the Court of Appeal certification that the matter before the Court involved points of general public importance. The Court of Appeal dismissed the said application.

The applicant filed the instant application seeking a review of the Appellate Court's said decision. Alternatively, the applicant sought certification by the instant court (Supreme Court) that the matter raised issues of general public importance warranting a further appeal to the Supreme Court. Pending the hearing and final determination of the application, the applicant also sought stay of the proceedings in the High Court (Nairobi Succession Cause No. 527 of 1981).

The application was premised on two main grounds. First, that the Court of Appeal erred in holding that the status of a widow could be created by the doctrine of estoppel based on depositions in affidavits sworn long after the death of a putative husband. Secondly, that the Court of Appeal erred in holding that interlocutory orders given in a case rendered the matter *res judicata* as this distorted the settled principle of law that interlocutory proceedings should not override evidence adduced at the main trial.

Issues

i. Whether the Supreme Court had jurisdiction to review a Court of Appeal's decision granting or declining certification that a matter was one of general public importance.

ii. Whether interlocutory orders previously given by a court could render a matter *res judicata*

iii. Whether the court correctly applied the doctrine of *estoppel* when it relied on depositions in an affidavit sworn by certain parties long after the death of the putative husband to create the status of a widow.

Relevant provisions of the Law

Constitution of Kenya

Article 27

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 50(1)

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 163(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).

Article 163(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.

Evidence Act

Section 120

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing .

Held

1. Article 163(4) of the Constitution vested both the Court of Appeal and the Supreme Court with concurrent jurisdiction to grant or to decline certification that a matter was of general public importance warranting a further appeal to the Supreme Court. Once a party had chosen his forum, he could not file the same application in another court.
2. Article 163(5) of the Constitution vested the Supreme Court with jurisdiction to review the Court of Appeal's decision granting or declining certification that a matter was one of general public importance. To deny a party aggrieved by a refusal to grant certification that a matter was one of general public importance was discriminatory and contrary to article 27 and a denial of the right to a fair hearing under article 50(1) of the Constitution. Therefore, the instant court had jurisdiction to entertain the application.
3. To succeed in an application for certification under article 163(4)(b) of the Constitution, an applicant had to demonstrate that the issue to be raised in the intended appeal involved a matter of general public importance.
4. There was no merit in the applicant's contention that the Court of Appeal established Margaret and Eddah's status as widows of the deceased on the basis of the doctrine of estoppel under section 120 of the Evidence Act by relying on affidavit evidence of events occurring after the deceased's death and not those in his lifetime. It was true that the Court of Appeal relied on affidavits sworn after the deceased's death but the contents of the depositions, with regard to Margaret and Eddah's status as widows of the deceased, related to events preceding the deceased's death. The Court of Appeal therefore correctly applied the doctrine of estoppel under section 120 of the Evidence Act.
5. There was also no fault in the Court of Appeal's application of the doctrine of *res judicata*. The doctrine applied equally to decisions on applications as it did to final decisions on a matter. At any rate and more importantly, the Court of Appeal reached its conclusions on the unique facts of the instant matter which would have no bearing whatsoever on any other case.
6. There was no issue of general public importance in the applicant's intended appeal to warrant a review of the Appellate Court's decision declining certification.
7. The interim order of stay issued by a single Judge of the Supreme Court was pending the hearing and determination of the instant application. Having determined the application, it followed that the stay order had lapsed and there was no need to waste time on Margaret and Eddah's applications challenging it.

Application dismissed; each party to bear its own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. We have before us an application made under Article 163(5) of the Constitution for review of the Court of Appeal decision denying George Kihara Mbiyu (the applicant) certification that his intended appeal raises a matter or matters of general public importance warranting a further appeal to this Court.

2. The background of this matter is that Peter Mbiyu Koinange (the deceased), to whose estate this matter relates, died intestate on 3rd September 1981. He was polygamous. There was no dispute regarding the beneficiaries of the first two houses of Loise Njeri Mbiyu (Loise) and Rith Damaris Wambui Mbiyu (Damaris) both of whom are deceased but left children. The dispute was whether or not the deceased had two other wives.

3. In Succession Cause No. 527 of 1981 before the High Court and later in Civil Appeal No. 47 of 2016 (consolidated with Civil Appeal Nos. 50 and 56 0f 2016) before the Court of Appeal, the major issues were whether or not Margaret Njeri Mbiyu (Margaret) and Eddah Wanjiru Mbiyu (Eddah) were widows of the deceased and therefore beneficiaries of his estate. The other issues were whether or not Eddah's daughter, Sylvia Wambui Mbiyu (Sylvia), born about 83 days after the deceased's death, was a biological child of the deceased entitled to inherit a share of his estate; whether or not two companies which had bought portions of the deceased's pieces of land acquired interests in those pieces of land; and the rightful share of each beneficiary.

4. For inexplicable reasons, the matter dragged on in court for over 30 years. It was eventually heard by Musyoka, J. who, in a judgment delivered on 25th September 2015, found that Margaret and Eddah were not widows of the deceased hence not beneficiaries of his estate. The learned Judge also found that Eddah's said daughter Sylvia was not sired by the deceased and was therefore also not a beneficiary of his estate. That decision provoked the said appeals and cross appeals to the Court of Appeal. After hearing them and upon a thorough re-evaluation of the evidence on record, the Court of Appeal overturned the High Court decision holding that the deceased had four wives.

5. Aggrieved by that decision, George Kihara Mbiyu, (the applicant), filed an application under Article 163(4)(b) of the Constitution and sought from the Court of Appeal certification that the matter involves points of general public importance warranting a further appeal to this Court. In its ruling delivered at Nairobi on 27th April 2018 in Nairobi Civil Application No. NAI SUP. 12 of 2017, the Court of Appeal (Makhandia, Ouko & Odek, JJA) dismissed that application.

6. Further aggrieved by that decision, on 10th may 2018, the applicant filed this application under Article 163(4)(b) and (5) of the Constitution and Sections 15(1) and 19 of the Supreme Court Act No. 7 of 2011 as well as Rules 24(i) and 31 of the Supreme Court Rules, 2011 and sought a review of the Appellate Court's said decision declining certification and substitution therefor with an order allowing that application and granting leave to appeal to this Court against the Appellate Court's judgment delivered on 24th November 2017. Alternatively, the applicant seeks certification by this Court that this matter raises issues of general public importance warranting a further appeal to this Court. Pending the hearing and final determination of the application, the applicant also seeks a stay of the proceedings of Nairobi Succession Cause No. 527 of 1981.

7. The application is premised on two main grounds. First, that the Court of Appeal erred in holding that the status of a widow can now be created by the doctrine of estoppel under Section 120 of the Evidence Act based on depositions in affidavits sworn long after the death of a putative husband. Counsel for the applicant argued that the Court of Appeal's alleged preference of untested affidavit evidence filed in interlocutory proceedings to viva voce evidence adduced in the main trial has not only disturbed the settled principle of law that viva voce evidence prevails over affidavit evidence but has also established an erroneous principle, unknown in the entire common law jurisdiction, of estoppel by trial founded on interlocutory proceeding.

8. The second ground is that the Court of Appeal's further holding that interlocutory orders given in a case renders the matter res judicata has also distorted the settled principle of law that interlocutory

proceedings should not override evidence adduced at the main trial. In the applicant's opinion therefore, those two findings have turned settled law on the doctrines of estoppel and res judicata on their heads hence warranting a further appeal to this Court under the rubric of matters of general public importance.

9. On 11th May 2018, Ojwang, SCJ, sitting as a single of this Court, granted the prayer for stay of the High Court proceedings in the said Cause pending the hearing and determination of this application.

10. In their written submissions, the 2nd and 10th respondents support the application for review. However, the 1st, 3rd, 8th and 10th respondents oppose the application.

11. Besides opposing the application, Margaret and Eddah filed separate applications seeking the setting aside of the single Judge's orders halting proceedings in HCSC No. 527 of 1981 for want of jurisdiction. In her application, Eddah also sought the striking out of George Kihara Mbiyu's review application dated 10th May 2018 also for want of jurisdiction. Margaret and Eddah's case is that given the minimum of quorum of five Judges set out in Article 163(1), a single Judge of this Court has no jurisdiction to deal with any matter brought to the Court. On review, Eddah contends that this Court has no jurisdiction under Article 163(5) to review the Appellate Court's refusal to grant certification under Article 163(4).

12. In their written submissions, learned counsel for 1st, 8th and 14th respondents echoed Margaret and Eddah's position and further submitted that contrary to the applicant's contention, the Court of Appeal did not, by interlocutory affidavit evidence, override viva voce evidence. Basing itself on the doctrine of estoppel under Section 120 of the Evidence Act, all that the Court of Appeal did was to restate the law that the applicant and those supporting his case cannot be allowed to change their positions in the matter and swing like a pendulum. On res judicata, they submitted it is trite law that the doctrine arises even in interlocutory proceedings. With those submissions, the 1st, 3rd, 8th and 14th respondents urged us to dismiss this application.

13. We have considered the application. Starting with the issue of this Court's jurisdiction, we agree with the applicant that as this Court stated in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, [2012] eKLR, Article 163(4) vests both the Court of Appeal and this Court with concurrent jurisdiction to grant or to decline certification that a matter is of general public importance warranting a further appeal to this Court. Once a party has chosen his forum, he cannot file the same application in the other court.

14. We, however, disagree with him that there is no right of review under Article 163(5) if a party's application is dismissed. As this Court stated in both the Sum Model and the Hermanus Cases, Article 163(5) of the Constitution vests the Supreme Court with jurisdiction to review the Court of Appeal's decision granting or declining certification that a matter is one of general public importance. To deny a party aggrieved by a refusal to grant certification that a matter is one of general public importance is discriminatory and contrary to Article 27 and a denial of the right to a fair hearing under Article 50(1) of the Constitution. We therefore hold that this Court has jurisdiction to entertain this application.

15. On the merits of the application, it is now trite law, as this Court stated in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, Civil Appl. No. Sup.4 of 2012 (UR3/2012), [2013] eKLR (Par. 60), that to succeed in an application for certification under Article 163(4)(b) of the Constitution, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance;

> " the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ...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….; 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." [Emphasis supplied].

See also Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others [2012] eKLR (Supreme Court Petition No. 2 of 2012) and Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell [2013] eKLR. Do the issues the applicant wishes to raise in his intended appeal meet these criteria to warrant a review of the Court of Appeal's said denying him certification?

16. Having considered the issue, we find no merit in the applicant's contention that the Court of Appeal established Margaret and Eddah's status as widows of the deceased on the basis of the doctrine of estoppel under Section 120 of the Evidence Act by relying on affidavit evidence of events occurring after the deceased's death and not those in his lifetime. True, the Court of Appeal relied on affidavits sworn after the deceased's death but the contents of the depositions, with regard to Margaret and Eddah's status as widows of the deceased, related to events preceding the deceased's death. The Court of Appeal therefore correctly applied the doctrine of estoppel under Section 120 of the Evidence Act.

17. We also find no fault in the Court of Appeal's application of the doctrine of res judicata. As was stated in Kanorero River Farm & Others ---Vs—National Bank of Kenya Ltd [1986] KLR, the doctrine of res judicata applies equally to decisions on applications as it does to final decisions on a matter. At any rate and more importantly, the Court of Appeal reached its conclusions on the unique facts of this matter which will have no bearing whatsoever on any other case.

18. In the circumstances, we are unable to find any issue of general public importance in the applicant's intended appeal to warrant a review of the Appellate Court's decision declining certification. Consequently, we dismiss this application.

19. The interim order of stay issued by a single Judge of this Court was pending the hearing and determination of this application. Having determined the application, it follows that the stay order has lapsed and we need not waste time on Margaret and Eddah's applications challenging it. And this being a family dispute, we order that each party bears its own costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2018

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D.K. MARAGA P.M. MWILU

CHIEF JUSTICE/PRESIDENT DEPUTY CHIEF JUSTICE/VICE

OF THE SUPREME COURT PRESIDENT OF THE SUPREME

COURT

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M.K. IBRAHIM S. WANJALA

JUSTICE OF THE SUPREME JUSTICE OF THE SUPREME

COURT 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