Njiroine v Maroro (Motion 5 of 2013) [2014] KESC 43 (KLR) (27 March 2014) (Ruling)

Daniel Shumari Njiroine v Naliaka Maroro [2014] eKLR

Neutral citation: [2014] KESC 43 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

MOTION 5 OF 2013

KH RAWAL, DCJ & VP, PK TUNOI, MK IBRAHIM, SC WANJALA & N NDUNGU, SCJJ

MARCH 27, 2014

IN THE MATTER OF THE COURT OF APPEAL CIVIL APPLICATION NO. SUP. 9 OF 2012

-AND-

IN THE MATTER OF THE REVIEW OF THE RULING OF THE COURT OF APPEAL DATED 22ND FEBRUARY 2013

BETWEEN

DANIEL SHUMARI NJIROINE .... APPLICANT

AND

NALIAKA MARORO .... RESPONDENT

The Supreme Court has no jurisdiction to entertain matters finalized by the Court of Appeal before the commencement of the Constitution

Reported by Njeri Githang'a Kamau & Charles Mutua

Jurisdiction *– appellate jurisdiction of the Supreme Court – certification to appeal to the Supreme Court on the basis that the matter was of general public importance – retrospectivity of the law - where the issue arose before the promulgation of the Constitution and therefore before the Supreme Court was established – where the Court of Appeal had concluded the matter before the establishment of the Supreme Court – whether the Supreme Court had jurisdiction grant certification for an appeal in the circumstances – Constitution of Kenya 2010, article 163(4)(b):Supreme Court Act No. 7 of 2011, section 3 .*

Civil Practice and Procedure *- leave-application for leave - matters of public interest - what amounted to matters of public interest - an appeal of the decision of the Court of Appeal denying an applicant leave to appeal to the Supreme Court with respect to a matter of general public importance - criteria to be considered - Constitution of Kenya, 2010, article 163(3)(b) and (4).*

Brief facts

The application before the court was a motion seeking a review of the Court of Appeal's decision in which the court declined to grant leave to the applicant to appeal to the Supreme Court. The dispute in the case

arose before the promulgation of the Constitution of Kenya, 2010 and the Court of Appeal had concluded the matter before the establishment of the Supreme Court.

Issues

i. Whether the Supreme Court had jurisdiction to determine a matter in which the Court of Appeal had rendered its decision before the commencement of the Constitution of Kenya, 2010.

ii. Whether the issues forming the subject- matter of the case were "of great public importance" and met the threshold of article 163(4) (b) of the Constitution.

Relevant provisions of the Law

Article 163(4)(b) of the Constitution of Kenya, 2010 provides:

"*(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)."

Held

1. The objectives of the Supreme Court were set out in section 3 of the Supreme Court Act No. 7 of 2011. One of the objects was to "improve access to justice". With respect to the applicant, the Supreme Court would always strive to deliver justice to all. However, the court would only do that in matters in which it was rightly seized of jurisdiction. It would not usurp jurisdiction where there was none, so as 'to do justice'. Justice as a concept also connoted rightful assumption of jurisdiction. Jurisdiction was given by law: the Constitution, or statute; and one could not exercise what was not properly bestowed.
2. It was a general principle that laws, where enacted or promulgated, were progressive in nature. Where the Legislature intended a law to apply retrospectively, it would expressly say so. While the Constitution was not, in its essence, to be interpreted like a statute, if and where it intended a particular provision to apply retrospectively, the makers expressly had to have stated so.
3. The Supreme Court upon its establishment became functional with effect from June 23, 2011 when the Supreme Court Act came into force. The court would not reopen matters that were finalized under the valid judicial structure in place before the promulgation of the Constitution of Kenya 2010. In the spirit of the principle of finality to litigation, the Supreme Court was not to embark upon a journey of re-opening matters closed by the apex court of the earlier period.
4. The Supreme Court was a creature of the Constitution of Kenya 2010. Before then, decisions of the Court of Appeal were final. The parties to the appeal derived rights and incurred obligations from the judgments of that court. If the court were to allow appeals from the cases that had been finalized by the Court of Appeal before the commencement of the Constitution of Kenya 2010, it would trigger a turbulence of unmanageable propositions in the private legal relations of the citizens of the country. Every party, against whom the Court of Appeal delivered judgment in the past, however far in history, would be entitled to approach the Supreme Court and seek a reversal of the same.
5. A final judgment by the highest court in the land at the time vested certain property rights in and imposed certain obligations upon the parties to the dispute. Article 163(4) (b) was forward-looking and did not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution. The application was incompetent, as it sought leave to reopen a matter in the Supreme Court which was determined long before the Supreme Court came into being which the Constitution did not permit.
6. Cases finalized by the Court of Appeal before the commencement of the Constitution of Kenya 2010 could not be reopened through appeals to the Supreme Court. The court lacked jurisdiction to grant leave to reopen a matter that was heard and determined by the Court of Appeal, which was the apex court before the promulgation of the Constitution of Kenya, 2010.

7. Whether or not a matter was of general public importance, was an issue to be determined on a case-to-case basis. In determining such suitability, the following were to be the guiding principles:(i) The intended appellant had to satisfy the court that the issue to be canvassed on appeal was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest; (ii) where the matter in respect of which certification was sought raised a point of law, the intending appellant had to demonstrate that such a point was a substantial one, the determination of which had a significant bearing on the public interest; (iii) such question or questions of law had to have arisen in the court or courts below, and must had been the subject of judicial determination; (iv) where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court would either resolve the uncertainty, as it would determine, or refer the matter to the Court of Appeal for its determination; (v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, was not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, had to fall within the terms of article 163 (4) (b) of the Constitution; (vi) the intending applicant had an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributed to the matter for which certification was sought; (vii) determinations of fact in contests between parties were not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
8. The applicant failed to meet the prescribed criteria. None of the grounds proffered by the applicant had any bearing on a matter of great public importance. The only averments that 'tended' to lean towards third parties was the claim by the applicant that he had other sixty persons who depended on him. That claim failed, as the applicant had not even tendered the names or identities of those persons. He had not shown the 'public' element of those persons. Even after taking judicial notice of Kenyan traditional family ties involved the extended family, the objective position, was that one party's own family members and dependents did not, *per se*, represent the phenomenon typified as "the public interest.

Application dismissed.

Orders

i. *Application dismissed.*
ii. *No orders as to costs.*

Citations

East Africa

1.*Jusab, Shabbir Ali v Anaar Osman Gamrai & another* Civil Appeal No 1 of 2013 –(Affirmed)

2.*Macharia, Samuel Kamau & another v Kenya Commercial Bank and 2 others* Application No 2 of 2012 –(Applied)

3.*Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 –(Explained)

4.*Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai and 4 others* Petition No 4 of 2012 –(Applied)

5.*Steyn, Hermanus Phillipus v Giovanni Gnecchi- Ruscone* Application No 4 of 2012 –(Explained)

6.*Yakub, Mohamed & another t/a Yasser Butchery v Badur Nasa & 2 others t/a Covenant Auctioneers* Civil Appeal No 211 of 1998 –(Approved)

Statutes

East Africa

1.Constitution of Kenya, 2010 article 163(4)(b) –(Interpreted)

2.Supreme Court Act, 2011 (Act No 7 of 2011) section 3–(Interpreted)

RULING

I Background

1. The application before this Court is by way of Motion dated 22nd May, 2013 seeking a review of the Court of Appeal's decision (Maraga, Kariuki, Sichale JJA) dated 22nd February, 2013 in which that Court declined to grant leave to the applicant to appeal to the Supreme Court.

2. The historical background of this matter harks back to the Court of Appeal's decision dated 22nd February, 2001. This suit can be traced to the 1970s, when the applicant and the respondent lived together as man and wife (they have since separated). Both parties claimed ownership of a property: L.R. Uasin Gishu/ng'enyileL/333 (the "suit land"). The applicant herein claimed to have bought the suit land in 1972. The respondent also claimed to have bought the suit land in the same year, and that the applicant then registered it in his name, in trust for her. Each party claimed to have purchased the land from the same person: Pius Koskei.

The matter before the High Court

3. In 1990, the respondent, Naliaka Maroro sued the applicant herein, Daniel Shumari Njiroine in the High Court at Kakamega, seeking a declaration that the applicant had taken advantage of her illiteracy and fraudulently registered the land in his name. On 25th September, 1990 the High Court granted the respondent an interim order prohibiting the applicant engaging in any dealings in the suit land. And she was on 4th October, 1991 granted an interim injunction stopping Mr. Shumari from ploughing the suit land.

4. The case then went through a myriad of interlocutory proceedings in the High Court, culminating in the High Court (Tanui J) granting inter alia, the transfer of the suit land to the respondent on 17th June, 1998, and entering an eviction order against the applicant on 20th July, 1998.

5. The applicant filed an application for stay of execution, and sought to set aside the judgement on 29th September, 1998, claiming that he was not aware of earlier Court proceedings regarding the suit land. His application was dismissed by the Court (Tanui J.) on 28th October, 1998.

The matter before the Court of Appeal

6. Aggrieved by the High Court's decision, the applicant filed an appeal at the Court of Appeal at Kisumu. His appeal was supported by an affidavit in which he deponed that he did not know of the hearing date for the case, this date having been taken by his former advocate, Mrs. Wena, who had not informed him of the hearing date. He averred that he would have attended Court and defended the case in person, had he known of the hearing date.

7. The Court of Appeal declined to accept such an averment by the applicant and his new advocate on record, Mr. Paul Birech. The Court of Appeal observed that there was no deposition to substantiate the averments by the applicant. The Court cited with approval the case of Mohamed Yakub & Mohamed Yusuf T/A Yasser Butchery v. Mrs. Badur Nasa, Saidi Nashean, Robert M. Chege T/A Covenant, Auctioneers Civil Appeal No. 211 of 1998 (unreported) in which it was held:

   " we think the omission of the advocate on record should not be visited upon her client"

8. The Court of Appeal held that the new advocate on record, Mr. Paul Birech, was negligent in not getting an affidavit from Mrs. Wena: “the possible reason for this negligent non-action on the part of [Mr] Paul Birech, would seem to be, and . . . was consistent with [Mr.] Shumari’s subsequent conduct, namely, . . . [Mr.] Shumari well knew of the hearing date of the suit and deliberately stayed away”.

9. Dismissing the applicant’s appeal, Akiwumi, JA said:

> “It must be obvious by now that I think that on the facts, having also re-appraised as I can under Rule 29(1) (a) of our Rules the evidence before the learned judge, . . . Tanui, J exercised his discretion correctly or, at the very least, to borrow the words of Apaloo JA, Shumari ‘has failed to show that’ Tanui, J ‘exercised it injudiciously’. I will therefore dismiss Shumari’s appeal with costs. As Tunoi and Lakha JJA also agree, the order of this court is that Shumari’s appeal is hereby dismissed with costs”.

10. That judgement, delivered on 2nd February, 2001 by the Court of Appeal at Kisumu, ought to have laid the matter to rest, as this was the apex Court in Kenya at the time. But this was not to be.

Application for leave in the Court of Appeal

11. On 27th August, 2010 the people of Kenya promulgated the current Constitution. One of the new elements of this Constitution was the creation of the Supreme Court of Kenya as the apex Court. This constitutional dispensation awakened Mr. Shumari’s urge to pursue his cause further.

12. On 5th July, 2012, he filed an application by way of Notice of Motion in the Court of Appeal, seeking a certification granting him leave to file an appeal in the Supreme Court, pursuant to Article 163(4) (b) of *the Constitution*. The order sought was for certification that his intended appeal to the Supreme Court involves a matter of general public importance. His Motion was supported by an affidavit which, unfortunately, bears no paragraph presenting what amounts to “a matter of general public importance”.

13. The application was heard on 29th January, 2013 and a Ruling delivered on 22nd February 2013. In the Ruling, the Court of Appeal first held that the suit was not one that involved “a matter of general public importance”. In part, that Court held as follows:

> “As rightly admitted by the applicant, the dispute in the litigation affected the applicant and his family and the respondent, and has nothing to do with the general public. It is our view that the facts in this application clearly show that the intended appeal does not raise or involve a matter that can even remotely be said to be of general public importance. To our mind, a matter of general public importance is one in which the general welfare of the public is involved, or in which the public has a stake, or in which the rights or obligations of the public is involved”.

14. The Court further observed that the nature of the Supreme Court’s jurisdiction under Article 163 (4) (b) of *the Constitution* was appellate, and also forward looking. The Court of Appeal relied on this Court’s decision in Samuel Kamau Macharia &Aanother Versus Kenya Commercial Bank and 2 Others (Supreme Court Application No.2 of 2012), finally holding as follows:

> “Accordingly, it is our finding that the application is incompetent, as it seeks leave to re-open a matter in the Supreme Court which was determined long before the Supreme Court came into being, [something] which *the Constitution* does not permit. The Supreme Court in the Samuel Kamau Macharia case held that cases finalised by the Court of Appeal before

the commencement of the 2010 Constitution cannot be reopened through appeals to the Supreme Court. That is the law. Moreover, as we have said, the application does not show that the intended appeal involves a matter of general public importance."

15. Consequently, the Court of Appeal struck out the applicant's Notice of Motion with costs.

16. The Court of Appeal's decision further aggrieved the applicant, and he now seeks a review of that decision which denied him certification to appeal to the Supreme Court.

II Submissions

Applicant's case

17. The applicant appeared in person before the Court, and made his address in Kiswahili, being interpreted by the Court Clerk, Mr. Ismael Imoleit. He had not complied with the requirement that, where a party would like to address the Court in a language other than English which is the official medium of expression, he should inform the Court some seven days before the hearing day. This enables the Court to make necessary arrangements, such as the sourcing for interpreters, or the provision of requisite equipment. As Mr. Shumari's application and pleadings had been prepared in English, it was right to assume that he would address the Court in English.

18. In his motion dated 22nd May, 2013, the applicant has cited fourteen grounds in support of his application for review. Most of these grounds contain matters of fact touching on the substantive appeal to be filed if he is granted leave. He has set out for instance, the following grounds:

> "(ii) It's a matter of general public importance, having 62 people involved whom I take care of.
>
> (iii) It is right to be reviewed by the Supreme Court . . . Naliaka has been using big people in authority to oppress me. I'm amazed that the court used the wrong information, with Naliaka not producing legal documents.
>
> ...
>
> "(ix) I am blaming the Court of Appeal for refusing my application . . .
>
> ...
>
> (xiii) I blame the Court of Appeal for ignoring my application by relying on the wrong information.
>
> . . .
>
> ("xvi) I have a right to [pursue] justice [seeking] recovery of my property (land) despite [the delay] . . .
>
> (xvii) I pray that judgement [delivered] on 22.02.2013 be set aside, and that I be permitted to proceed [to] the Supreme Court so that justice be done.
>
> (xix) This is oppression. I pray the Supreme Court to help, for I have said the truth to the best of my knowledge. . . ."

19. The application is supported by an affidavit in which, unfortunately again, he depones to matters touching on the chronological context of the suit, while entirely overlooking the elements that would qualify the matter as one of general public importance.

20. During the hearing, the applicant reiterated most of the averments in his motion, and the affidavit on record. His case was categorical, that he purchased the suit land but Naliaka stole it from him. He further submitted that he has been intimidated over the suit land, and blames the Court of Appeal for not paying due attention to his grievance. He claimed that Naliaka invariably fails to turn up in Court, while her advocate, Mr. Onyinkwa who always turns up, is in the habit of insulting him during those occasions. He further submitted that at his age of about 60, he was rendered incapable of providing support for his dependants including his grandchildren who no longer go to school. He urged the Court to compel the respondent to appear in Court in person, and to produce her documentation for the suit land, while he also produces his.

Respondent's case

21. In response, the respondent filed a replying affidavit on 10th July, 2013 through her counsel, M/s Onyinkwa & Co. The essence of the respondent's case is captured in the following paragraphs:

> " 5. That I have been informed by my advocates . . . that the Court of Appeal decision made on 2nd February 2001 in Court of Appeal Civil Appeal No. 14 of 1999 between me and the applicant was final and that the applicant has no legal right to appeal to the current Supreme Court of Kenya over this same matter after a period of over 11 years.
>
> 6. That I have been advised by my advocates on record . . . that there was no matter of general public importance involved in this suit between me and the applicant, which advice I also believe to be correct and true, [as] this dispute only involved me and him, regarding a piece of land known as Uasin Gishu/ngenyilel/333 which he wanted to snatch from me unfairly but which the High Court at Kakamega and the Court of Appeal at Kisumu decided legally belongs to me.
>
> 7. That I have also been advised by my advocates . . . that the Supreme Court came into being after 27th August 2010 and, as it did not exist before that time, it has no jurisdiction to handle my appeal, . . . as the final court in 2011 was the Court of Appeal of Kenya.
>
> 8. That I know that the Court of Appeal in its ruling dated the 22nd of February 2013 refused to allow the applicant to resurrect this matter, and I agree with the said ruling . . . and . . . support the reasons given by the said court."

22. Learned counsel, Mr. Onyinkwa, during the hearing on 23rd October, 2013 affirmed that the respondent relies fully on the affidavit. He averred that the applicant has chosen to ignore the respondent's advocates on record, by not serving them with pleadings and documents.

23. On the merits of the application before the Court, it was counsel's submission that the matter was finally decided by the Court of Appeal in 2001, at a time when it was the ultimate Court in the country. Counsel submitted that the applicant was, in effect, endeavouring to revive an appeal that was decided when the Supreme Court was not in existence. It was his case that this Court has no jurisdiction.

24. Counsel was emphatic that the applicant should not take advantage of the new constitutional dispensation, which has created the Supreme Court. It was his case that if the Supreme Court reopens this case, then it will open the door for many cases of this kind — a prospect which would cause grave

damage to the litigation process in the country. The Registry of the Court would be strained beyond measure, and it would not be able to handle these cases.

25. Counsel further submitted that *the Constitution* establishing the Supreme Court, takes effect as from 27th August, 2010, and is in essence, forward-looking. As authority in this regard, counsel cited the case of Samuel Kamau Macharia v. Kenya Commercial Bank, Supreme Court Application No. 2 of 2011; [2012]eKLR.

26. As to whether the case involves "a matter of general public importance", counsel noted that on 22nd February, 2013 the Court of Appeal declined such a submission, and consequently refused to grant a certificate. Counsel agreed with the Court, maintaining that the cause involves land matters, and also involves just the applicant and his family on one side, and the respondent on the other — the public interest being by no means contemplated.

27. Counsel submitted that the applicant having been refused leave, needed to lay before this Court adequate reasons for reviewing and overturning that decision; he should have raised some new matter, in invoking the Supreme Court's jurisdiction

28. Finally, Counsel urged this Court to confirm the decision of the Court of Appeal. He urged that even were this Court to be inclined to grant leave, the applicant's appeal is not arguable, and he was still destined to lose.

III.Analysis

29. The main issues for determination by this Court are two:

    (i) whether this Court has jurisdiction to determine this matter; and

    (ii) whether, if the Court has jurisdiction, the issues forming the subject- matter of this case are "of great public importance" and so meet the threshold of Article 163(4) (b) of *the Constitution*.

(a) Jurisdiction

30. The question of jurisdiction is one that comes up before this Court ever so many times. A number of Rulings and Judgments of this Court have addressed this issue. However, we recognize that this is a comparably new Court, and the law of jurisdiction before it will probably settle only in the course of time.

31. Jurisdiction has been regarded as the proverbial Chinese first step, in a Court's litigation journey. The words of Nyarangi J (as he then was) in Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR1 at 14 continue to illuminate the special dimensions of jurisdiction:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

32. This element has been recognised by this Court in previous decisions (see Samuel Kamau Macharia & Another v. Kenya Commercial Bank; Jasbir Singh Rai & Others v. Tarlochan Singh Rai and Others, Petition No. 4 of 2012).

33. The jurisdiction that the applicant has sought to invoke in this case is prescribed by Article 163(4) (b) of *the Constitution*, which provides:

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) ...

(b) in any 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 certificate by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned".

34. It was the respondent's case that this Court has no jurisdiction, since this matter was heard and determined by the Court of Appeal in 2001, twelve years before the Supreme Court came into existence. On the contrary, the applicant contended that the Supreme Court "came to save people like him from past injustices."

35. The objectives of the Supreme Court are set out in Section 3 of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*. One of the objects is to "improve access to justice". With respect to the applicant, we recognise that the Supreme Court will always strive to deliver justice to all. However, the Court will only do this in matters in which it is rightly seized of jurisdiction. It will not usurp jurisdiction where there is none, so as 'to do justice'. Justice as a concept also connotes rightful assumption of jurisdiction. Jurisdiction is given by law: *the Constitution*, or statute; and one cannot exercise what is not properly bestowed.

36. Further, it is a general principle that laws, where enacted or promulgated, are progressive in nature. Where the Legislature intends a law to apply retrospectively, it will expressly say so. While *the Constitution* is not, in its essence, to be interpreted like a statute, if and where it intends a particular provision to apply retrospectively, the makers will expressly have stated so.

37. Consequently, the Supreme Court upon its establishment became functional with effect from 23rd June, 2011 when the *Supreme Court Act* entered into force. The Court will not reopen matters that were finalised under the valid judicial structure in place before the promulgation of *the Constitution* of 2010. We agree with counsel for the respondent that, in the spirit of the principle of finality to litigation, the Supreme Court is not to embark upon a journey of re-opening matters closed by the apex Court of the earlier period.

38. This Court has held in Samuel Kamau Macharia & Others v. Kenya Commercial Bank thus:

> "The Supreme Court is a creature of the new Constitution. Before then, decisions of the Court of Appeal were final. The parties to the Appeal derived rights and incurred obligations from the judgments of that Court. If this Court were to allow appeals from the cases that had been finalized by the Court of Appeal before the Commencement of *the Constitution* of 2010, it would trigger a turbulence of unmanageable propositions in the private legal relations of the citizens of this country. Every party, against whom the Court of Appeal delivered judgement in the past, however far in history, would be entitled to approach the Supreme Court and seek a reversal of the same.
>
> A final judgement by the highest court in the land at the time vested certain property rights in and imposed certain obligations upon the parties to the dispute. We hold that article 163(4) (b) is forward-looking and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the Commencement of *the Constitution*" (emphasis provided).

39. We note that the Samuel Kamau Macharia case, for its binding effect, was cited with approval by the Court of Appeal, in refusing to grant the certification. Counsel for the respondent in his oral

submission, fully adopted this decision when he urged that, were the Court to be inclined to grant a certification in this matter, it would open a floodgate such as would be apt to outstrip the Court Registry's operational capacity.

40. The decision in the Samuel Macharia case was delivered by this Court on 23rd October, 2012, just over a year ago. With due respect to the applicant, the application before the Court, besides being inadmissible, notably lends validity to the concerns which the Court expressed at that time. Though the Supreme Court is not bound by its own decision (Jasbir Singh Rai & Others v. Tarlochan Singh Rai & Others), Petition No. 4 of 2012), this is not an appropriate case for it to depart from its previous decision. Consequently, the principle laid down in the Samuel Macharia case still holds.

41. In exercise of its review jurisdiction, this Court has considered the proceedings of the Court of Appeal, and its final decision. We find nothing to warrant an overturning of the Court of Appeal's decision. We have noted the apposite words of the Court of Appeal in dismissing the application now under review:

> " Accordingly, it is our finding that the application is incompetent, as it seeks leave to reopen a matter in the Supreme Court which was determined long before the Supreme Court came into being — which *the Constitution* does not permit. The Supreme Court in Samuel Kamau Macharia (supra) held that cases finalised by the Court of Appeal before the commencement of the 2010 Constitution cannot be reopened through appeals to the Supreme Court. That is the law".

42. In the result, this application fails, and should be dismissed, as the Court lacks jurisdiction to grant leave to reopen a matter that was heard and determined by the Court of Appeal, which was the apex Court before the promulgation of *the Constitution* of Kenya, 2010.

43. On the foregoing ground alone, this application fails. However, it is worth examining the other issue framed for determination, as it was canvassed by both the applicant and the respondent's counsel: the question as to whether the subject-matter of this suit involves matter(s) of general public importance, so as to warrant leave to appeal to the Supreme Court.

44. Whether or not a matter is of general public importance, this Court has held in Hermanus Phillipus Steyn v. Giovanni Gnecchi- Ruscone, Application No. 4 of 2012, is an issue to be determined on a case-to-case basis. However, in determining such suitability, the Court went further to lay down guiding principles:

(i) for a case to be certified as one involving a matter of general 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;

(ii) 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;

(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) 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; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

(vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

45. These principles were further emphasised by this Court in the case of Shabbir Ali Jusab v. Anaar Osman Gamrai & 2 Others, Petition No.1 of 2013: the issue to be canvassed on appeal must be one that transcends the circumstances of a particular case, and has a significant bearing on the public interest.

46. In the Shabbir case, this Court indicated the manner in which an applicant's case should be framed:

> " Thirdly, did the intending appellant identify and concisely set out the specific elements of 'general public importance' which he intends to rely on?"

IV Conclusion

47. Applying this test to the present application, we hold that the applicant has failed to meet the prescribed criteria. None of the grounds proffered by the applicant has any bearing on "a matter of great public importance". The only averment that 'tends' to lean towards third parties is the claim by the applicant that he has other sixty persons who depend on him. This claim fails, as the applicant has not even tendered the names or identities of these persons. He has not shown the 'public' element of these persons. Even after taking judicial notice of Kenyan traditional family ties, involving the extended family, the objective position, in our view, is that one party's own family members and dependants do not, per se, represent the phenomenon typified as "the public interest".

48. It is this Court's conclusion that the issues forming the subject-matter of this case do not transcend theparties. There is no issue of law, or of jurisprudential moment, that warrants this Court's determination upon it. Hence, on the question whether this matter raises issues of great public importance, this Court holds that it does not. Consequently, on this ground, the application would fail.

49. Since the application stood struck out on the first ground, for lack of jurisdiction, the upshot is that this application for review is dismissed.

50. In view of the family relationships of the parties herein, and the fact that they must have incurred substantial legal expenses over the years, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 27 th day of March 2014.

...

KALPANA RAWAL

DEPUTY CHIEF JUSTICE/VICE PRESIDENT OF THE SUPREME COURT

...

P.K TUNOI MOMAMMED

JUSTICE OF THE SUPREME COURT

...

K. IBRAHIM

JUSTICE OF THE SUPREME COURT

...

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

...

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

Certified as a true Copy of the original

REGISTRAR,

SUPREME COURT OF KENYA