



Koinange Investment & Development Limited v Ngethe (Civil Application 1 of 2012) [2013] KESC 22 (KLR) (30 January 2013) (Ruling)

Koinange Investment & Development Ltd v Robert Nelson Ngethe [2013] eKLR

Neutral citation: [2013] KESC 22 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 1 OF 2012
PK TUNOI, SCJ
JANUARY 30, 2013**

BETWEEN

KOINANGE INVESTMENT & DEVELOPMENT LIMITED APPLICANT

AND

ROBERT NELSON NGETHE RESPONDENT

Dismissal of application challenging the Supreme Court Registrar's directive to seek leave from the Court of Appeal

The applicant sought an order from the Supreme Court to overturn the Acting Registrar's directive requiring them to first obtain leave from the Court of Appeal before filing an appeal. The Registrar relied on rule 30(2) of the Supreme Court Rules. The Supreme Court dismissed the application, supporting the procedure of initiating appeals in the Court of Appeal and noting no injustice as a similar application was already scheduled there.

Reported by John Ribia

Civil Practice and Procedure - leave to appeal - leave to appeal to the Supreme Court - powers of the Registrar of the Supreme Court - application for review of the orders of the Ag. Registrar of the Supreme Court ordering the applicant to seek leave from the Court of Appeal to lodge an appeal against the decision of the Court of Appeal of Kenya - whether the Registrar had exceeded her powers - Constitution of Kenya articles 159 (2)(d) and 163(5); Supreme Court Rules, 2011 (cap 9B Sub Leg) rule 30(2).

Brief facts

The applicant sought to have the Supreme Court review, discharge and set aside in their entirety the orders of the Acting Registrar of Supreme Court. The Acting Registrar had ordered the applicant to comply with rule 30(2) of the Supreme Court Rules and seek leave from the Court of Appeal to lodge an appeal against the decision of the Court of Appeal of Kenya in Civil Appeal no. 108 of 2003. The application was brought on the grounds that the Ag. Registrar had no such powers.



Issues

Whether the Acting Registrar of the Supreme Court acted properly in directing a party to first seek leave from the Court of Appeal before the Supreme Court could hear an appeal application that was before the Supreme Court for mention.

Held

1. Nowhere in the orders of the Supreme Court had it been stated that the Supreme Court would hear the application for appeal against the decision of the Court of Appeal. The orders made were merely directory and could be enforced by the Ag Registrar.
2. An application for leave, as a matter of good practice, should originate in the Court of Appeal, which would be better placed to certify whether a matter of general public importance was involved; and if the applicant should be dissatisfied with its decision in that regard, would be at liberty to seek a review under article 163(5) of the Constitution of Kenya 2010.
3. The Registrar could not usurp the powers of the court and could not disregard express orders of the court. In the instance before the court, the Acting Registrar could not be vilified or condemned for stating the obvious and the correct position in law.

Application dismissed.

Citations

Cases

Kenya

1. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] 3 KLR 199 - (Mentioned)
2. *Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Mentioned)
3. *Sum Model Industries Ltd v Industrial and Commercial Development Corporation* [2011] 2 KLR 122 - (Followed)

Statutes

East Africa

1. Constitution of Kenya article 159 (2)(d); 163 (5) - (Interpreted)
2. Supreme Court Rules, 2011 (cap 9B Sub Leg) rule 30(2) - (Interpreted)

RULING

1. The Applicant, Koinange Investment Development Ltd, moves the Court for orders that:-
 - “(i) This Honorable Court be pleased to review, discharge and set aside in their entirety the orders of the Ag Registrar Supreme Court issued on 11/10/2012 ordering the Applicant to comply with rules 30(2) of the Supreme Court Rules and seek leave from the Court of Appeal to lodge an appeal against the decision of the Court of Appeal of Kenya (Bosire, Karanja and Okwengu JJA) in its Civil Appeal No 108 of 2003, Koinange Investment Developers Limited v Robert Nelson Nge’the while she had no such powers.
- (11) That this Honorable Court be pleased to give directions to have the Applicant’s Notice of Motion dated 19/4/2012 fixed for hearing.”
2. The genesis of this motion is the application dated 19/4/2012, by which the Applicant sought leave to lodge an appeal against the decision of the Court of Appeal in its Civil Appeal No 108 of 2003.



3. On 3/7/2012, the application was placed before two Judges of this Court for directions and the following order was made:

“Order 1 .This application shall be mentioned on 17/7/2012 for the purposes of fixing a hearing date.

2 .The Respondent shall file and serve a replying Affidavit within 10 days hereof.

3 .The parties herein shall also file skeleton written submissions within 10 days hereof.

4 .Leave is granted to the Applicant to file a further Affidavit to annex the missing proceedings from the High Court record.

5 . Costs in the application.

6 .The Respondent undertakes not to execute the decree pending the hearing of the application.”

4. However, on 11/10/2012, the Ag Registrar of the Court during the mention of the application, brought the attention of Counsel to the court’s decision in the Sum Model Industries Ltd Industrial and Commercial Development Corporation Ltd Supreme Court Civil Application No 1 of 2011 the copies of which she supplied to Counsel. It is on record that after a brief hearing during which there were arguments both in concurrence with and in disagreement with the ratio decidendi of the case, the Ag Registrar held;

“In light of the provisions of rule 30(2) of the Supreme Court rules and the Court’s crystal clear directions in Sum Model Industries and article 159(2)(d) of *the Constitution*, the Applicant is directed to seek leave from the Court of Appeal first”.

5. Mr AB Shah, the learned Counsel for the Applicant, avers that the Ag Registrar exceeded her powers and usurped the jurisdiction of the full Court and purported to give orders inconsistent with the directions given by the Court on 3/7/2012. He contended that she had no powers to overrule the directions or orders of the Judges of the Supreme Court and that the said orders are unlawful and oppressive. He submitted that whether the Applicant should seek leave from this Court or the Court of Appeal can only be decided upon by this Court and not by the Ag Registrar.
6. Mr Shah further submitted that this Court and the Court of Appeal have concurrent jurisdiction to hear this application and there is nothing to stop the Applicant from coming to this Court if a substantial miscarriage of justice might have occurred or may occur unless the appeal is heard.
7. Mr Murugara, learned counsel for the Respondent, has countered these submissions by arguing that this Court has categorically held in the case of Sum Model that in view of the concurrent jurisdiction vested in the Court of Appeal and in this Court, such an application should first and foremost be made to the Court of Appeal. In any event, he argued, the matter in dispute relates to a private contract between the parties and there cannot be said to be any public interest in the matter. He saw no merit in the application and urged for its dismissal.
8. The orders made by this Court on 3/7/2012 are very clear. Nowhere is it stated that the Court shall hear the application. The orders so made are merely directory and could be enforced by the Ag Registrar.
9. Even if the application were to be prosecuted before the full Court, I have no doubt whatsoever in my mind that the same would have been dealt with in a similar manner as the Ag Registrar disposed of it since this Court has firmly held in the Sum Model case, Lawrence Nduttu and 6000 others v Kenya Breweries Ltd and another Supreme Court Petition No 3 of 2012 and SK Macharia and others



v Kenya Commercial Bank and 2 others that an application for leave, as a matter of good practice, should originate in the Court of Appeal, which would be better placed to certify whether a matter is of general public importance is involved; and if the applicant should be dissatisfied with its decision in that regard, would be at liberty to seek a review under article 163(5) of *the Constitution*.

10. Mr Shah's submission is, however, correct largely in law. The Registrar cannot usurp the powers of the Court and cannot disregard express orders of the Court. In this instance, the Ag Registrar, I would think, should not be villified or condemned for stating the obvious and the correct position in law.
11. In any case no injustice would be occasioned to the Applicant if this Court does not hear the application since the Applicant has lodged another similar application before the Court of Appeal. That application is scheduled to be heard on February 2013 and it should be allowed to proceed.
12. This application fails and is accordingly dismissed. I make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2013.

P.K. TUNOI

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SUPREME COURT JUDGE

I certify that this is a true copy of the original

REGISTRAR

