REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang & Njoki, SCJJ.)

APPLICATION NO. 2 OF 2015

—BETWEEN—

FLORENCE NYABOKE MACHANI …… APPLICANT..

—AND—

MOGERE AMOSI OMBUI …….. 1ST RESPONDENT

SIMON TENGERI MOGERE …….. 2ND RESPONDENT

NELSON OMWENGA NYAKUNDI ..... 3RD RESPONDENT

(Application for leave to appeal to the Supreme Court against the Judgement and order of the Court of appeal at Kisumu (Onyango Otieno, Azangalala & Ole Kantai, JJA) delivered on 19th day of September, 2014)

RULING

I. INTRODUCTION

[1] The applicant filed her application dated 6th March, 2015 before this Court on 9th of March, 2015 seeking the following Orders:

(i) that leave be granted to the applicant to appeal further to the Supreme Court of Kenya, against the Judgement and Order of the Court of Appeal delivered on 19th September, 2014 in Civil Appeal No. 184 of 2011 between the parties herein;

(ii) that a certificate be issued certifying that the intended appeal involves matters of general public importance;

(iii) that the cost of, and incidental to this application abide the result of the intended appeal.

[2] The application is premised on the following grounds:

(a) the intended appeal involves matters of general importance, as it touches on the subject of land rights, and will not only affect the parties to the appeal but will also affect a large number of original land-

owners, by depriving them, and causing socio-economic hardship;

(b) substantial miscarriage of justice will occur, unless the appeal is heard;

(c) the intended appeal has a significant bearing on the public interest;

(d) the questions intended to be raised in the intended appeal arose in both the High Court and the Court of Appeal.

[3] The application is supported by an affidavit sworn by the applicant, Florence Nyaboke Machani on 6th of March, 2015.

II. BACKGROUND

[4] The litigation process began with *HCCC No. 139 of 2009,* in which one Naftali Machani Amosi (now deceased, and substituted by Florence Nyaboke Machani, the applicant herein), filed a plaint on 20th July, 2009 against the respondents. The deceased became a member of Kineni Farmers' Co-operative Society Limited in 1965, and through it, he acquired about 99 acres of land, later registered (around 2001) as parcel No. Isoge/Kineni/Block 1/70 [suit land]. Around 1974, the 1st respondent (the deceased's brother) was invited to that land by the deceased, and allocated about 8 acres thereof.

[5] In September, 2007 there was a Borabu Land Disputes Tribunal hearing, moved by the 1st respondent, and attended by the applicant, which resolved that 40 acres be excised from the suit land, in favour of the 1st respondent. By *Miscellaneous Application No. 18 of 2007,* filed by the 1st respondent at Keroka Magistrates Court, the Tribunal's award was adopted as a Judgement of the Court, in terms of the provisions of the *Land Disputes Tribunal Act (Cap 303, Laws of Kenya*) (now repealed). The 1st respondent proceeded and executed the decree, whereupon the suit land was subdivided, so that he now owned Isoge/Kineni 311, which was further sub-divided into Isoge/Kineni 686 and 687—allocated to the 2nd and 3rd respondents respectively.

[6] The said sub-division precipitated the deceased's (applicant's) action by way of *High Court Civil Case No. 139 of 2009,* seeking a permanent injunction against the respondents, to restrain them from dealing in the various parcels of land. He also sought eviction Orders against the respondents; an Order that the District Land Registrar, Nyamira do cancel the said titles; and a declaration that the decision of the Lands Disputes Tribunal was null and void, to the extent that it dealt, and interfered with his title to the suit land.

[7] The High Court acknowledged that it indeed had jurisdiction to nullify an award of a Tribunal, if such an award was made outside jurisdiction. However, it held that its jurisdiction is only applicable where the decision of the Tribunal has not been taken further; that is, before the Tribunal's decision is brought before the Magistrate's Court for adoption as a Judgement. Hence the award having been adopted by the Senior Resident Magistrate Court at Keroka, it ceased to stand on its own, and it could not be the subject of a declaration. Consequently, the applicant's suit was dismissed with costs to the respondents.

[8] Aggrieved by that decision, the applicant moved to the Court of Appeal, under *Civil Appeal No, 184 of 2011,* at Kisumu. The Court of Appeal, in a decision rendered on 19th September, 2014 dismissed the appeal, upholding the High Court decision.

[9] This aggrieved the applicant further, and she now seeks to appeal to the Supreme Court. She sought leave from the Court of Appeal, by *Civil Application No. 65 of 2014*. However, in a decision rendered on

25th February, 2015, leave was denied. The Appellate Court held that the intended appeal involved no matters of general public importance, since the issue whether or not the tribunals established under the Land Disputes Tribunal Act had jurisdiction to determine claims of land ownership, was already the subject of numbers of decisions of both the High Court and the Court of Appeal. Consequently, the appellate Court saw no need for any 'further input of the Supreme Court'.

[10] Not contented with that pronouncement, the applicant filed this application before this Court.

III. SUBMISSIONS

a. *The Applicant*

[11] This matter was canvassed before us on 16th July, 2015. Learned counsel for the applicant, Mr. Gichana, relied on submissions filed on 2nd June, 2015 in which the applicant had framed three issues for determination, as follows:

i. *does the intended appeal raise questions of general public importance"*
ii. *is the applicant entitled to be issued with a certificate to the effect that the intended appeal involves matters of general public importance"*
iii. *who should bear the costs of this application"*

[12] The applicant sought to rely on the principles set out in the case *of*

Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone, Supreme Court, Application No. 4 of 2012; she formulated the following as matters of general public importance, justifying certification by this Court:

(a) where the Tribunal or any other statutory body has acted without or in excess of its jurisdiction, can its decision properly be questioned in a suit seeking a declaration"

(b) whether or not Section 8 of the Land Disputes Tribunal Act (now Repealed) applied to decisions made without, or in excess of jurisdiction by the Land Disputes Tribunal"

(c) where the award of the Land Disputes Tribunal was made without jurisdiction, can any proceedings founded upon it, stand—including adoption and execution of the award by the subordinate court"

(d) where an issue of land-rights has been raised and heard by way of a counterclaim, do parties deserve a Judgement on the counterclaim"

[13] She further submitted the following, as questions of law that she considered to be substantial points of law, the determination of which will have a significant bearing on the public interest:

i. *does the Land Disputes Tribunal, established under the Land Disputes Tribunal Act (now repealed), have jurisdiction to deal with title to the land, and if not, what would be the effect of the proceedings and Judgement of such a tribunal, which confer jurisdiction upon it"*
ii. *can a decision made by a tribunal, without jurisdiction be challenged by way of a declaration"*
iii. *should a Court of law sanction a decision of the Land Disputes Tribunal which is in law a nullity, on the basis that no appeal to the Appeals Committee was preferred, nor was there an application for judicial review, leading to grant of certiorari"*
iv. *does the right to acquire and own land, or property, extend to such land or property acquired unlawfully"*

v. *whether or not Section 8 of the Land Disputes Tribunal Act (now repealed) applies when the relevant tribunal fails to act within its statutory jurisdiction"*
vi. *are parties to a suit entitled to a Judgement on a counterclaim, which touches on land rights"*

[14] These issues were analysed in oral submissions of counsel. Mr Gichana urged that questions touching on land rights may affect yet other matters, as land rights have a bearing on socio-economic situations. These questions of law, it was submitted, are set to affect a notable number of persons or litigants, who are destined to continually engage the working of the judicial organs, and/or have a bearing on the proper conduct of the administration of justice— these being ultimately, matters of general public importance.

[15] Counsel urged that this application meets the threshold laid in both the ***Hermanus*** and the ***Malcom Bell*** cases, and prayed that it be certified as one involving matters of general public importance, and so, leave to appeal to the Supreme Court, be granted.

b. *The Respondents*

[16] Contesting the motion, the respondents filed a replying affidavit dated 19th March, 2015, as well as written submissions dated 26th May, 2015, being represented by learned counsel, Mr. Abobo holding brief for Mr. Masese at the oral hearing.

[17] In the 2nd respondent's replying affidavit, the historical background to this matter was narrated in detail. It was averred that issues of jurisdiction had been considered in the Courts below, leaving no issue pending for the Supreme Court.

[18] The respondents in their submissions, have questioned whether the Constitution of Kenya, 2010 has conferred a concurrent jurisdiction in the Court of Appeal and the Supreme Court, for the certification of matters of general public importance. They urged that the motion did not involve any issue of interpretation of the Constitution, so as to engage the Supreme Court's jurisdiction as of right.

[19] The respondents urge that by Section 19 of the Supreme Court Act, where the Court of Appeal declines to certify a matter as being one of general public importance, the applicant's only recourse is to apply for a review of such decision. They urged that this application does not meet the threshold for certification, as the applicant had not even exhibited a draft of his intended appeal, for consideration by this Court.

[20] It was submitted that the application was frivolous, and was only seeking to correct errors regarding the application of settled law. It was urged that the question in the application did not fall within this Court's mandate, under Section 3 of the Supreme Court Act.

[21] Learned counsel, Mr. Abobo articulated these arguments in oral submissions, and urged that the applicant is wrongly before this Court. He submitted that the applicant having gone to the Court of Appeal, should have sought review, but not leave.

IV. **ANALYSIS**

[22] Two issues emerge for determination by this Court:

(a) *whether the Court has jurisdiction to determine this matter; and*

(b) whether or not the intended appeal raises issues of general public importance, so as to warrant certification, and leave to appeal to the Supreme Court.

a. *The Issue of Jurisdiction*

[23] Although the issue of jurisdiction was not raised by way of a preliminary objection, a substantial part of the respondents' submissions was devoted to it.

[24] The respondents submitted that an application for certification should first be filed in the Court of Appeal, before it comes to the Supreme Court on review. According to the respondents, the applicant is now seeking leave directly from the Supreme Court— which is premature, and should be dismissed. The applicant, for her part, submitted that the Court of Appeal had already certified the matter, which was now before this Court for review—and so was properly before the Court.

[25] We are in agreement with the respondents that in matters for certification, a party has to first go before the Court of Appeal, only coming before this Court for a review of that Court's decision. This is an issue which has come up before this Court previously; in the ***Hermanus*** case, in which we thus held:

"The other issue raised was as to the concurrent jurisdiction of both the Court of Appeal and the Supreme Court, in granting leave to appeal to the Supreme Court. The respondent averred that once the concurrent original jurisdiction has been exercised under article 163(4) (b) by the Court of Appeal, it was no longer tenable for the Supreme Court to exercise the same jurisdiction. Adopting the definition in Black's Law Dictionary on 'concurrent jurisdiction': 'Concurrent jurisdiction. (17c)1. Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action,' we would agree with counsel that, indeed, we have concurrent jurisdiction; and when one opts to exercise one's right under either of the entities with jurisdiction, one cannot again go before the other entity with the same subject matter. This is the reasoning behind the principle of res judicata in civil matters, in choosing the Court (forum) in which to institute a matter. This is the reasoning held sacrosanct in criminal matters under the doctrine of double jeopardy (especially with reference to international crimes like genocide, piracy and war crimes where all nations have jurisdiction)."

[26] However, while observing that this Court has concurrent jurisdiction, we took into account earlier decision in ***Sum Model Industries Ltd v. Industrial and Commercial Corporation [2011] eKLR,*** in which we had thus remarked:

"***This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not.***

If the applicant be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution."

[27] Hence the Court acknowledged that the Supreme Court and the Court of Appeal have a concurrent jurisdiction to certify an intended appeal to the Supreme Court, as one involving matters of general public

importance; save that, for orderly practice, one has to first go to the Court of Appeal, and only when dissatisfied by the Order of the Appellate Court, should one come before the Supreme Court under Article 163(5) of the Constitution, for a review.

[28] The respondents aver that the applicant has not moved the Court of Appeal. Is that so" We have examined the pleadings before this Court, and find that the respondents rely on the title of the motion: "A*pplication for leave to appeal to the Supreme Court against the Judgement and Order of the Court of Appeal at Kisumu delivered on 19th day of September, 2014"*. On the face of it, one could indeed argue that the application seeks leave directly from the Supreme Court. Such a perception is borne out by the law under which the motion is brought. The application is brought*: "pursuant to article 163(4) (b) of the Constitution of Kenya, 2010."* Article 163(4)(b) thus provides:

"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

…

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)".

[29] This is the constitutional provision that vests in the two Courts a concurrent jurisdiction to certify matters. On this basis, the respondents urged that there was a direct application to the Supreme Court for certification, and that it was pre-mature.

[30] In the ***Hermanus*** case, we observed that parties should move the Court by citing the correct legal provisions. In an almost similar instance, in ***Hermanus***, in which a party cited only Article 163(4)(b) of the Constitution, the Court held [paragraph 23 and 24]:

"It is unfortunate that the applicant has not cited Article 163(5) of the Constitution, as a basis for the proceedings. This is the provision of the law that clearly gives the applicant locus standi before this Court, by referring to 'review'. It states thus:

"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."

The question then is, whether this omission is fatal to the applicant's case. ***It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land.*** *The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite article 163(5) will not be fatal to the applicant's cause.*

"Further, it is worth noting that the applicant has moved the Court under article 163(4)(b). However, an objective reading of this provision shows that the same should be read conjunctively with Article 163(5). One reading Article 163(4)(b), therefore, should not stop there but go further and read article 163(5), noting the words in Article 163(4)(b) ***'…. subject to clause (5))'*** *It may thus be stated that by the very act of citing Article 163(4), the applicant still invoked the Court's jurisdiction under Article 163(5)" [emphases supplied].*

[31] Consequently, we invoke Article 159(2)(d) of the Constitution: to the effect that procedural technicalities may not override the substantive justice of a matter.

[32] It is noted that the respondents had participated in the proceedings in the Court of Appeal (*Civil Application No. 65 of 2014), where leave was* sought to appeal to the Supreme Court— such leave being denied by the Appellate Court on 25th February, 2015. That Ruling is part of the record before us, and confirms that the applicant, indeed, went before the Court of Appeal first. There is, thus, a basis in principle for overlooking her failure to expressly cite Article 163(5) of the Constitution. It is clear that what the applicant seeks, is a review of denial of certification by the Court of Appeal, which request if allowed, will culminate in the grant of leave to appeal to the Supreme Court.

[33] The respondents made an issue of the fact that the applicant had not exhibited a draft of her intended appeal, alongside her instant application. The respondents urge that, in making an application for certification and grant of leave, a party should attach a draft petition of the intended appeal, for the Court's perusal. There is, however, no such requirement in law. What is required, instead, is an *identification of issues that are considered to be of general public importance*. Attachment of a draft petition of appeal is a requirement where one seeks extension of time to file a notice of appeal, or appeal out of time (See ***Nicholas Kiptoo Arap Salat v. The Independent Electoral and Boundaries Commission & 7 Others****,* Application No. 16 of 2014), or where stay of execution pending appeal is sought.

[34] Consequently, we hold that the instant matter is properly before us, as it is an application for the review of a denial of leave by the Court of Appeal.

(b) Issue of General Public Importance: Does it arise"

[35] This is the crux of this application. The applicant is desirous of appealing to the Supreme Court. She believes her appeal to entail a matter of general public importance, and thus meriting a hearing at this Court. She has outlined matters she considers to be of general public importance, as well as questions of law which she believes to be substantial, and appropriate for further input of this Court.

[36] The principles for certification of a matter as one involving issues of general public importance have been set out by this Court in the ***Hermanus*** and ***Malcom Bell*** cases; and the parties have each taken account of these.

[37] Do the issues as framed by the applicant, meet the threshold for certification" The cause ought to be emanating from the Court of Appeal, and entailing matters that have come through the hierarchy of Courts: see ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others [2012] eKLR,*** where it was thus held:

"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court".

[38] The issues as framed by the applicant should, *prima facie,* be the same issues that the High Court and Court of Appeal had determined, in their substantive Judgements.

[39] The issues framed by the applicant as forming matters of general public importance, may be summarized as follows:

i. *does the Land Disputes Tribunal established under the Land Disputes Tribunal Act (now*

repealed) have jurisdiction to deal with title to the land, and if not, what would be the effect of the proceedings and Judgement of such a tribunal"

ii. *can a decision made by a tribunal without jurisdiction, be challenged by way of a declaration"*

iii. *should a Court of law sanction a decision given by the Land Disputes Tribunal, which is in law a nullity on the basis that no appeal to the Appeal Committee was preferred, or that there was no application for judicial review and for certiorari"*

iv. *does the right to acquire and own land, or property, extend to such land or property acquired unlawfully"*

v. *whether or not Section 8 of the Land Disputes Tribunal Act (now repealed) applies, when the relevant Tribunal fails to act within its statutory jurisdiction"*

vi. *are parties to a suit entitled to a Judgement on a counterclaim that touches on land rights"*

[40] Issues of such a kind, and in relation to the principle of "general public importance", would *prima facie*, call for judicial determination. However, it is a relevant question from the beginning, whether these issues were before the superior Courts, and these Courts made a determination upon them. The basic question is: *What was before the High Court that went up to the Court of Appeal"*

[41] In his plaint before the High Court, the deceased (now represented by the applicant) had sought: *a permanent injunction against the respondents, to restrain them from dealing in the various parcels of land; that they be evicted; that the District Land Registrar, Nyamira do cancel the said titles; and that a declaration be granted, that the decision of the Lands Disputes Tribunal was null and void.* The plaintiff's contention was that he was the sole registered owner of the land, and that as far as he was concerned, the award by the Tribunal was a nullity in so far as it interfered with his title to the suit land. The 1st respondent claimed that he was entitled to the land allocated to him, as he had contributed to its acquisition, and it is the applicant who had wrongly registered herself as a sole owner. The 2nd and 3rd respondents based their claim upon the fact that they were *bona fide* purchasers without notice.

[42] The High Court had thus framed the issues for determination:

i. whether the Borabu Land Disputes Tribunal award should be declared null and void;

ii. pursuant to the foregoing, whether the defendants should be evicted, and injunction to issue;

iii. whether the land register should be rectified back to the original Osoge/Kineni/Block 1/70, in the name of the plaintiff;

iv. damages/mense profits, if at all;

v. costs.

[43] The High Court held that it indeed had jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction. It set out the mandate of the tribunal thus*: to deal with disputes of a civil nature, concerning the division of land, or the determination of boundaries to land, including land held in common; a claim to occupy or utilize land; or trespass to land*. However, the Court held that its jurisdiction is only exercisable where such decision of the tribunal *has not transmuted into a judicial determination*, through adoption as a Judgment of the Court.

[44] Consequently, the High Court declined to grant the Orders sought, stating that the award of the Borabu Land Disputes Tribunal having been adopted by the Senior Resident Magistrate's Court at Keroka, ceased to exist on its own, and thus, could not be the subject of a declaration. The High Court

further observed that even if the declaration was to issue with regard to the Tribunal's award, it would have no effect as the decree that emanated from the lower Court's Judgement had not been challenged by the plaintiff. The learned Judge further held that, upon an award becoming a Judgement of a Court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings.

[45] Elaborating its finding, the High Court observed that the Senior Resident Magistrate's Court at Keroka, at which the award for adoption was filed, had no jurisdiction to question its regularity or otherwise, as its role was merely that of adoption and issuance of a decree. The learned Judge observed that the award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8(1) of the Lands Disputes Tribunals Act (which was not done). Alternatively, the plaintiff could have commenced judicial review proceedings in the nature of *certiorari*, to quash the award— but this was also not done.

[46] Consequently, the High Court (*Makhandia, J)* dismissed the applicant's suit with costs to the respondents, on 29th October, 2010.

[47] Aggrieved by that decision, the applicant moved the Court of Appeal at Kisumu, with *Civil Appeal No, 184 of 2011.* The appeal was premised on grounds that the High Court had failed to find that the Land Disputes Tribunal lacked jurisdiction to deal with title to land, and so its decision was null and void.

[48] The Court of Appeal, in a decision rendered on 19th September 2014, dismissed the appeal, upholding the High Court's position. The Appellate Court observed:

"The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation…"

[49] It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with "matters of general public importance", have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the ***Peter Oduor Ngoge*** case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance—which would be contrary to established principle, and to the design of the judicial system.

[50] As observed by the Appellate Court in it s decision denying certification, the issue whether or not the tribunals established under the repealed Lands Disputes Tribunal Act had jurisdiction to determine claims of land ownership, is by no means a "matter of general public importance," as is clear from the terms of Section 3 of the that Act. Moreover, the applicant has not demonstrated that the High Court or Court of Appeal, in this matter, held a view inconsistent with the recognized jurisprudence on this issue.

[51] Consequently, this motion must fail. The issues that the applicant intends to canvass before this Court in her appeal, are not issues that came up before the superior Courts. The applicant, in presenting her intended appeal as one involving matters of general public importance, intends to bring up entirely new matters for litigation before this Court. It is not permissible, as is clear from a good number of precedents laid by this Court.

V. **ORDERS**

[52] Consequently, we make the following Orders:

(i) ***The application by Notice of Motion, dated 6th March, 2015 is disallowed.***

(ii) Costs to the respondents.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of December, 2015.

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K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT

OF THE SUPREME COURT

…….. ……..

P. K. TUNOI M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURTCOURT

……..… ……

J.B. OJWANG S. NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

SUPREME COURT OF KENYA