



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Rawal, DCJ; Tunoi, Ojwang, Wanjala & Ndungu, SCJJ)*

**PETITION NO. 33 OF 2014**

**BETWEEN**

**JOHNSON GITHAIGA MWANIKI.....PETITIONER**

**AND**

**DANIEL GITHAIGA MWANIKI.....RESPONDENT**

*(Application for leave to appeal to the Supreme Court from the Judgment of the Court of Appeal at Nyeri (Visram, Kairu & Otieno-Odek, JJA) delivered on 28<sup>th</sup> May 2014)*

**RULING**

**A. INTRODUCTION**

[1] The application before the Court is by way of Notice of Motion dated 18<sup>th</sup> August, 2014, brought under certificate of urgency. In summary the applicant seeks Orders that:

- i. *the intended appeal be held to involve weighty issues of law, and of general public importance;*
- ii. *leave be given for an appeal to this Court, from the Judgment and Order of the Court of Appeal;*
- iii. *stay of further execution be granted; and a temporary injunction and conservatory Orders be granted, to restrain the respondent from executing the decree issued in the Chief Magistrate's Court, in Nyeri Civil Case No. 787 of 2002, on 14<sup>th</sup> June, 2004; and from taxing his costs at the Court of Appeal in Civil Appeal No. 3 of 2014;*
- iv. *the cost of the application be borne by the respondent.*

**B. BACKGROUND**

[2] It is averred, in this matter, that in the year 2001, the respondent illegally attempted to acquire public land. It is alleged that the members of public demolished the timber structures which the respondent had put up at Mweru Trading Centre, on the said property. The plot constituted part of trust land, under the former Constitution of Kenya; and so it fell under the jurisdiction of the County Council of Nyeri, now

replaced by the County Government of Nyeri.

[3] The respondent reported the said incident to the police, leading to the arrest of nine persons, who were arraigned in Mukurwe-ini District Magistrate's Court, on a charge of malicious damage to property.

[4] The matter was heard and three of the accused persons, including the applicant, convicted and sentenced. The three appealed against the conviction; and Judgment was delivered on 31<sup>st</sup> May, 2004 quashing the said convictions, and setting aside the sentences.

[5] Meanwhile, the respondent had on the strength of the said convictions, instituted civil proceeding against the said three persons, seeking compensation for the destroyed structures. Specifically, the respondent sought: Kshs.557,500; loss of earnings at Kshs.1,500 per month from 3<sup>rd</sup> February, 2001 till the determination of the suit; costs of the suit at Court rates; and, any such other relief as the Court may deem fit to grant.

[6] On the date of hearing of the said suit the applicant was absent, but his co-defendants were heard. The two produced in evidence, the Judgment of the High Court in which they had been acquitted. The matter was concluded without the applicant giving evidence.

[7] On 24<sup>th</sup> June, 2004 the High Court entered Judgment in favour of the respondent, and against the applicant for Kshs.557,500; for loss of earnings at Kshs.1,500 per month from 3<sup>rd</sup> February, 2011 till 14<sup>th</sup> June; and for costs with interest. The Court dismissed the case against the two other co-defendants with costs. The applicant did not appeal against the said decision.

[8] However, in 2009 the applicant sought review of the Judgment and decree of the Magistrate's Court, but this was disallowed in a Ruling delivered on 5<sup>th</sup> February, 2009. Being dissatisfied with that Ruling the applicant appealed to the High Court at Nyeri, which allowed the appeal on 31<sup>st</sup> October, 2013.

[9] The respondent was aggrieved by that decision of the High Court (*Wakiaga, J.*), and appealed to the Court of Appeal (*Visram, Gatembu and Otieno-Odek JJA*) at Nyeri, which allowed his appeal on 28<sup>th</sup> May, 2014. The intended appeal before the Supreme Court will contest the Appellate Court's decision.

[10] On 13<sup>th</sup> June, 2014 the applicant filed an application for certification before the Court of Appeal (*Visram, Koome and Otieno-Odek JJA*) at Nyeri, which disallowed the same, in a Ruling delivered on 30<sup>th</sup> July, 2014. The Appellate Court held *that the applicant had failed to demonstrate any issue of general public importance that is substantial, broad-based and transcending the litigation-interests of the parties*. The application currently before this Court seeks a review, albeit indirectly, of the said Ruling declining certification.

## C. SUBMISSIONS OF THE PARTIES

### i. Applicant

[11] Learned counsel for the applicant, Mr. Muthoni, stated that on 14<sup>th</sup> May, 2015, directions had been taken in this matter, and proposed that the petition be deemed as argued, and disposed, of by way of written submissions. He urged that the current application was uncontested, and should be allowed.

[12] Counsel urged that the petition raises the following weighty issues of law, of general public importance:

- i. *the application for execution for the sum awarded in the civil Court for the demolition by the members of public, of the respondent's structures erected on public property/plot, the burden being shouldered by the applicant as a private citizen;*
- ii. *the provisions of the law on acquisition of public land by a private citizen, and the status of a citizen's developments on such property, which has been acquired in gross violation of the law;*
- iii. *the law should not aid the respondent following his unlawful attempt to acquire public property, and then his developments on the property were demolished by angry members of public;*
- iv. *the respondent's prolonged litigation over a period of about 15 years is an abuse of Court process;*
- v. *the applicant who had not appealed against the Judgment and decree of 14<sup>th</sup> June, was not precluded from subsequently seeking review of the Judgment and Decree issued in Civil Case No. 787 of 2002, in the Chief Magistrates' Court at Nyeri.*
- vi. *the Court of Appeal at Nyeri failed to consider the applicant's arguments fully, and to find that weighty issues of law, of general importance were involved.*

[13] Counsel urged that this Court has jurisdiction, under Article 163 (4)(b) as read together with Article 163(5) of the Constitution, to entertain the appeal. He cited Sections 3, 15(1), 16(1), 21(1) & (2) and 26(1) of the Supreme Court Act, 2011 as well as Rule 2 of the Supreme Court Rules, 2012 as relevant enabling provisions. He reinforces his argument with the decisions of this Court in **Hermanus Phillipus Steyn v. Giovanni Gneccchi Ruscone**, Application 2 of 2012, [2013] eKLR, and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, Sup.Ct. Petition No. 2B of 2014; [2014] eKLR.

#### ii. Respondent

[14] The respondent in his written submissions, urges that the intended appeal does not satisfy the criterion laid down under Article 163(4)(b) of the Constitution, and so the application should be disallowed. He submits that the applicant had made a similar application at the Court of Appeal (*Visram, Koome and Otieno-Odek, JJA.*), but it was dismissed. He submits that the reason for that dismissal was that the applicant failed to raise any point of law, or demonstrate that such point of law was substantial, and having a significant bearing on the public interest.

[15] The respondent submits that the substance of the current application is identical to the application which had come up before the Court of Appeal. He urged that the Judges of the Appellate Court had correctly applied their mind to the relevant principles of law, and arrived at a just and duly - considered decision. Counsel asks this Court to dismiss the application with costs, urging that the applicant should not be given room for abuse of Court process as he would frustrate a respondent who wants to enjoy the fruits of his Judgment. He submits that litigation must come to an end.

#### D. ISSUE FOR DETERMINATION

[16] One single issue stands out for determination, in this application, namely:

*whether the intended appeal raises matters of general public importance.*

[17] There are several decisions of this Court, on the governing principles relating to issues 'of general public importance'. In **Hermanus Phillipus Steyn v. Giovanni Gneccchi Ruscone**, Sup.Ct. Application 2 of 2012, [2013] eKLR (**Hermanus**), and **Malcolm Bell v. Hon. Daniel Toroitich arap Moi &**

**Another**, Sup.Ct. Application No. 1 of 2013, [2013] eKLR (**Malcolm Bell**), this Court indicated the governing principles, one of which is that the person seeking certification is to demonstrate that the issues for determination in an intended appeal, transcend the circumstances of the case, and have a bearing on the public interest.

[18] In this respect, the Court cited with approval (paragraph 57) the English case, **Glanicare Teorada v. A. N. Board Pleanala** [2006] FEHC 250, which holds that:

**“[A] matter of general public importance should be one of exceptional public significance, in that:**

- i. **the matter goes substantially beyond the facts of the case, and the appropriate test is not whether there is a point of law, but whether the point of law transcends the facts of the individual case;**
- ii. **the law in question should stand in a state of uncertainty- so that it is for the common good that such law be clarified, so as to enable the Courts to administer the law, not only in the instant case, but also in future cases...**”

[19] This Court held in **Hermanus** (paragraph 50) that:

**“[W]here 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...”**

[20] It is therefore, clear that for a matter to merit certification, it must relate to issues the determination of which will transcend the circumstances of the case. That has been explicated by this Court to mean that the matter must *substantially go beyond the facts of the individual case*.

[21] The intended appeal in this instance, arose from a criminal matter involving the applicant as one of the accused persons, on a charge of malicious damage to property. The criminal case subsequently gave rise to a civil matter between the parties to this application, among others. The respondent sought monetary compensation from the applicant and two other persons who had been accused of malicious damage to property.

[22] *It is our considered opinion that the issues raised in the intended appeal do not in any way transcend the circumstances of the case.* It is incumbent upon the applicant to demonstrate that *the issue to be raised is a substantial one, the determination of which will have a significant bearing on the public interest.* In this regard, the decision in **Hermanus** is instructive, as the Court thus held (paragraph 58,):

**“Before this Court, a matter of general public importance warranting the exercise of appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interest of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern”** [emphasis supplied].

[23] Further contribution to that principle was made by this Court in **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. and Another**, SC Petition No. 3 of 2012 in which it was held, with regard to appeals under Article 163(4)(b) of the Constitution, that ( paragraph 21):

“... The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that **where a party wishes to invoke the appellate jurisdiction of this Court ... then such intending appellant must convince the Court that the case is one involving a matter of general public importance**” [emphasis supplied].

[24] Learned counsel Mr. Muthoni, for the applicant, has alluded to the fact that the piece of land on which the demolished structure had been built belonged to the County government of Nyeri, but has by no means demonstrated that the determination of the issues raised in the appeal *will have a bearing on the public interest*. We are convinced that the issues to be raised in the intended appeal are confined to the parties to the suit, and do not in any way transcend the interests and circumstances of the parties.

[25] Another principle in **Hermanus**, is that *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*. In his submissions, learned counsel for the applicant has set out, what clearly emerge as the grounds of the intended appeal; and he urges that those are the issues “of general public importance”.

[26] The applicant was required to meet the terms of yet another governing principle set out in **Hermanus**, namely, that *the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination*.

[27] We are of the opinion that, none of the issues alluded to by counsel meet the criteria set out in **Hermanus** and **Malcolm Bell**. None of those issues manifests the nature of a “matter of general public importance,” as contemplated in **Hermanus** and **Malcolm Bell**.

[28] We take cognizance that the intended appeal seeks to contest the Judgment of the Court of Appeal dated 28<sup>th</sup> May, 2014, which reversed the decision of the High Court dated 31<sup>st</sup> October, 2013. The High Court had allowed the appeal against the decision of the Magistrate’s Court, dated 5<sup>th</sup> February, 2009 dismissing the application for review of a decision dated 24<sup>th</sup> June, 2004. In view of the antecedents of this matter, it is apparent that the intended appeal is not related to *merits* – specifically, the monetary compensation awarded to the respondent – but rather, to the resulting application for review of that Judgment.

[29] Counsel for the applicant has failed to demonstrate that the issues to be raised in the intended appeal, relating to the review of the Magistrate’s Court’s decision, *have a bearing on the public interest*, or that there is *uncertainty in the law* on that issue, hence deserving the input of this Court.

[30] This Court, in **Peter Ngoge v. Francis Ole Kaparo and 5 Others**, Supreme Court Petition No. 2 of 2012, held that (paragraphs 29-30):

**“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.**

**“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.”***

**[31]** *It is clear to us that the issues arising in the intended appeal have been sufficiently determined by the Courts within the established hierarchy, and they deserve no further input of this Court.*

**[32]** Parenthetically, we would observe that from the record, the applicant was found culpable by the High Court and ordered to compensate the respondent in the civil proceedings, despite general acquittal in the criminal proceedings for malicious destruction to property. The applicant was held liable in the civil proceedings, while his two co-accused were absolved. In the scheme of judicial perceptions, we would record our trepidations as regards the scale of attention which the cause had received in the lower Courts.

**E. ORDERS**

**[33]** In all the circumstances, there is no basis for us to disturb the decision of the Court of Appeal denying certification. We will make Orders as follow:

- i. The application dated 18<sup>th</sup> August, 2014 seeking the certification of the intended appeal as raising issues of general public importance, is disallowed.***
- ii. The applicant shall bear the costs of this application.***

**DATED and DELIVERED at NAIROBI this 4th day of December, 2015**

**K. H. RAWAL**

**P. K TUNOI**

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**DEPUTY CHIEF JUSTICE &**

**JUSTICE OF THE SUPREME COURT**

**VICE-PRESIDENT OF THE**

**SUPREME COURT**

**J.B. OJWANG**

**S. C. WANJALA**

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**JUSTICE OF THE SUPREME COURT  
COURT**

**JUSTICE OF THE SUPREME**

**N. S. NDUNGU**

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**JUSTICE OF THE SUPREME COURT**

I certify that this is a true

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**SUPREME COURT OF KENYA**



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