

**REPUBLIC OF
KENYA**

IN THE SUPREME COURT OF KENYA

(Coram: Tunoi, Ibrahim, Ojwang, Wanjala and Njoki SCJJ)

APPLICATION NO.47 of 2014

–BETWEEN–

DICKSON MURICHO MURIUKI..... APPLICANT

–AND–

1. TIMOTHY KAGONDU MURIUKI	}	RESPONDENTS
2. FRANCIS KIMONDO MURIUKI		
3. JANE WARIGIA MURIUKI		
4. WINFRID WAIRIMU MURIUKI		
5. DAVID WANJOHI MURIUKI		
6. REPUBLIC		
7. CENTRAL PROVINCE LAND DISPUTES APPEALS COMMITTEE		

*(An application for extension of time to apply for review of the Court of Appeal's decision (dated 7th November 2014 at Nairobi: Maraga, Mwera & Kariuki JJA) denying certification for appeal to the Supreme Court
(Civil Application No. 2 of 2014)*

RULING

A. BACKGROUND

[1] The instant application seeks a review of the decision of the Court of Appeal, which declined to certify the intended appeal as one raising matters of general public importance. The applicant filed at the Supreme Court, an originating motion dated 9th December, 2014 under certificate of urgency, supported by his affidavit of even-date. The motion is anchored upon Articles 163(4) and (5) of the Constitution of Kenya, 2010; Sections 13, 16, and 17 of the Supreme Court Act, 2011; and Rules 23, 24, and 53 of the Supreme Court Rules, 2012.

[2] The certificate of urgency application was heard before this Court, and was not granted.

[3] The history of the present application is made up of a plurality of suits instituted by members of one family—the mother, Susan Nyambura Wahome, and five of her children. The subject-matter is land. Susan’s father bequeathed to her a parcel of land measuring 10.07 hectares, registered as L.R RUGURU/GACHIKA/83. To avoid the prospect of a dispute over the property between her and her brothers, Susan had the property registered in the name of her son, Dickson. But this avoidance strategy proved unsuccessful, as Susan’s brothers disputed the registration of the property in Dickson’s name. The Karatina District Magistrate, and finally the High Court in Nyeri, dismissed the several claims to the property, and upheld the registration of the property in Dickson’s name.

[4] Thereafter, the dispute over the property became a contest between Susan and Dickson. Susan’s position was that, as legatee and head of the family, she had registered the property in Dickson’s name on the basis that it was to be shared with her and with all the children. Though initially willing to share the

land with other members of the family, the applicant subsequently changed his mind.

[5] Susan referred the dispute to the Land Disputes Tribunal, which Tribunal held that the property was to be shared between Susan and all her children. Being dissatisfied with the finding of the Land Disputes Tribunal, the applicant appealed to the Provincial Land Disputes Tribunal, which upheld the findings of the Land Disputes Tribunal. On 12th July 2007, the Magistrate's Court adopted these findings as a Judgment.

[6] The applicant then filed an *ex parte* application, *High Court Misc. Application No 288 of 2008*, seeking to prohibit the Chief Magistrate's Court from executing the decree. The High Court held that the Tribunal had acted *ultra vires*, and granted the prohibition Order. Dissatisfied with the findings of the High Court, the respondents appealed to the Court of Appeal (*Civil Appeal No. 195 of 2009*), which allowed the appeal. The applicant then filed an application for certification for an appeal to the Supreme Court— on the grounds that the matter is one of general public importance.

[7] The Court of Appeal declined to grant certification, on the ground that the question involved no matter of general public importance. That is the background to the instant application.

[8] The applicant proceeded to file an application in this Court, seeking to have the matter certified as one of general public importance. On 8th July, 2015 a 2-Judge Bench (*Ibrahim and Ojwang SCJJ.*) heard the application, for leave to file a petition out of time. The Court held that there was currently no time-limit within which to file an application for review of certification, or non- certification by the Court of Appeal. Therefore, it was not necessary for the applicant to file an

application for an extension of time.

B. PARTIES' SUBMISSIONS

(i) The Applicant

[9] Mr. Nyangayo, learned counsel for the applicant, urged the Court to review the Court of Appeal Ruling denying certification of the intended appeal on ground that the matter is one of general public importance. He submitted that there has been a state of uncertainty in the law, arising from contradictory precedents set by the Court of Appeal in two Judgments relating to the principle of *res judicata*. Counsel argued that the Court of Appeal had ignored an earlier Judgment of the same Court, on the same subject-matter. He submitted that there are two contradictory Court of Appeal Judgments on the same subject-matter, L.R. RUGURU/ GACHIKA/83, where members of the same family were the litigants. He expressed the apprehension that the High Court and lower Courts could rely on the jurisprudence espoused by the two contradictory Judgments.

[10] It was counsel's submission that even though the intended appeal arises from an individual case, it also touches on the general administration of law, in that the Judgment of the Court of Appeal seeks to overturn a previous Judgment of the same Court, where there was no appeal to the Supreme Court. He contended that the Judgment of the Appellate Court purports to make a Provincial Lands Tribunal decision superior to a decision by the Court of Appeal, the High Court and the Magistrates Court, on matters of land succession.

[11] Counsel submitted that there are two different Court of Appeal decisions, holding that the prohibition of execution is retroactive, but not prospective in effect. Counsel referred to the case of ***Kadamas v. Municipality of Kisumu***

(1985) KLR, in which it was held that an ongoing excess of jurisdiction was liable to being stopped by a higher Court. He then posed the question whether the judicial review writ of prohibition can be used to stop, or prohibit an inferior Court from proceeding with the enforcement of a decree, where excess of jurisdiction or authority is proved.

[12] To support his arguments, counsel sought reliance on this Court's decisions: ***Sum Model industrial Limited v. Industrial and Commercial Development Corporation*** Sup. Ct. Application No. 1 of 2011; [2011] eKLR; ***Malcolm Bell v. Daniel Toroitich Arap Moi & Another***, Sup. Ct. Application No. 1 of 2013; [2013] e KLR; and ***Hermanus Phillipus v. Giovanni Gnechi*** Application No. 4 of 2012; [2012] eKLR.

[13] Counsel urged the Court to find that this matter is one of great public importance, as it seeks to set a precedent which relates to the sanctity of the judicial process, and the design of Court process, right through from the Magistrate's Court to the Supreme Court.

(ii) Respondents

[14] Responding to the application, learned counsel Mr. Magee, urged that the matter before the Court was not one of general public importance. Counsel submitted that the law relating to the principle of *res judicata*, and to the judicial review writ of prohibition, is well settled by statutes and judicial precedents, and that there is no ambiguity or uncertainty in the law. He submitted that the applicant's case is that the Court of Appeal did not properly apply the facts of the case to the settled principles of law.

[15] Counsel submitted that the outcome of the appeal would not transcend the circumstances of this case, but would be limited to just the correction of errors, as

the law relating to *res judicata*, and to the grant of judicial review Orders, is settled.

[16] In response to the argument that there are two contradictory Court of Appeal Judgments, counsel urged that the parties in the two cases were different, and none of the respondents was a party to the earlier case. Further, the issues for determination in the two cases were different.

[17] Counsel urged the Court to dismiss the application, for lack of merits, and for raising no issue of general public importance.

C. ISSUE FOR DETERMINATION

(a) The Context

[18] In our view, there is just one issue for determination: *whether the intended appeal involves a matter of general public importance.*

[19] This Court in the ***Hermanus Steyn*** case, considered the criteria for determining whether a particular case involves a “matter of general public importance”. The Court was alive to the fact that the meaning of “matter of general public importance” may vary, depending on the relevant context, and it thus observed (paragraph 58):

“Before this Court a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad-based, transcending the litigation-interests 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.”

[20] The Court went further to lay down guiding principles for determining whether a matter was one of general public importance. These principles have been restated by the Court in other cases, where the issue has come up for determination. We will apply these principles to the instant case, to determine whether the intended appeal raises “matters of general public importance,” so as to warrant a review of the decision of the Appellate Court declining certification.

(b) Does it transcend the particular case? Does it bear on the public interest?

[21] From the record before us, the dispute is one between family members, and involves a privately-owned land parcel. The applicant has in our view, failed to demonstrate how the issues raised, both in the submissions and the draft petition of appeal, transcend the parties to this suit. We agree with learned counsel for the respondents that the dispute herein does not transcend the immediate interests of the parties to the suit. Indeed, there is no nexus between the issues raised, and the general public at large.

(c) Any substantial point of law, bearing on the public interest? Any uncertainty in the law, occasioned by inconsistent precedents? Any questions of law in the superior Courts, requiring interpretation?

[22] Counsel for the applicant submitted that the intended appeal raises issues of general public importance, and meets the principles set out in the ***Hermanus***

Steyn case. Counsel based his argument on two major points: that there are two inconsistent Court of Appeal decisions touching on the same subject- matter, with the same parties; he raised the issue of **res judicata**, and through the draft petition of appeal, asked this Court to determine whether this doctrine could operate to bar members of the same family or clan from litigating a dispute previously resolved in relation to their kin.

[23] In response, counsel for the respondents submitted that the two cases referred to by the applicant did not relate to the same parties, and that the facts of the cases and the issues for determination were different. Counsel concurred with the finding of the Court of Appeal, that *“the circumstances of the litigation in this case do not show that the principle of res judicata has given rise to any legal issue that requires determination or amplification or clarification by the Supreme Court.”*

[24] From the record before this Court, the applicant has not brought out the complex issues of *res judicata*, warranting the input of this Court. In our view, *bare allegations* do not qualify a matter as one of general public importance. The applicant urged that the Ruling of the Court in the dispute between him and his uncles rendered the dispute between him and his siblings *res judicata*. This with respect would be incorrect. For the parties, and the nature of the dispute, are different. *Res judicata* would only apply if another Court reached a conclusion on the same facts, between the same parties. We thus agree with the Court of Appeal, that the applicant has been unable to show how the principle of *res judicata* has given rise to a legal issue that requires determination, or amplification, or clarification by this Court.

[25] Counsel for the applicant also raised the issue whether the judicial review Order of prohibition can be used to stop, or prohibit an inferior Court from

proceeding with execution or enforcement of a decree, where excess of jurisdiction and authority is proved. Counsel urged this Court to determine whether execution is a process capable of being prohibited; whether prohibition and certiorari are mutually exclusive remedies; whether the superior Court was entitled to inquire into the validity of the decision sought to be impugned before granting an Order of prohibition; whether the Court of Appeal was entitled to depart from its decision in the **Kadamas** case, but without stating so, or giving reasons for doing so; and whether a litigant who prefers an appeal against a decision loses his or her right to apply for judicial review.

[26] Counsel for the respondents contested the application, urging that what the applicants intend to contest was the way the Court of Appeal interpreted and applied the established principles to the facts of their case, and not to question the principles. According to counsel, the outcome of any intended appeal by the applicants will not transcend party-interest, as it will be limited to a correction of imaginary errors. Counsel urged the Court to apply the principles set out in the **Hermanus Steyn** case, and to dismiss the application with costs.

[27] From the relevant issues, and the analysis herein, it is clear to us that the applicant's objective is to secure an interpretation of the law in the context of the facts of the case. He fails to demonstrate that: there is a substantial point of law bearing on the public interest; there is any uncertainty in law occasioned by inconsistent precedents, and there is any question of law arising from the decisions of the superior courts, and requiring interpretation.

[28] By the governing principles laid out in this Court's precedents, such is not a basis upon which we can interfere with the Appellate Court's decision declining to certify the appellant's cause for further appeal.

D. ORDERS

[29] The foregoing analysis, in our view, leads unavoidably to the following Orders:

(i) *The application is hereby disallowed.*

(ii) *The costs of this application shall be borne by the applicant.*

DATED AND DELIVERED AT NAIROBI *this 15th day of March, 2016*

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P.K. TUNOI
JUSTICE OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
S.N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true
copy of the original

REGISTRAR, SUPREME COURT OF KENYA