REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Rawal DCJ, Tunoi, Ibrahim, Ojwang & Wanjala SCJJ)

CIVIL APPLICATION NO. 19 OF 2014

–BETWEEN–

GAUKO MOHAMED.....APPLICANT

–AND–

GITONGA MOHAMED.....RESPONDENT

(An application for review of the decision of the Court of Appeal (Visram, Koome, Otieno-Odek JJA), denying leave to appeal to the Supreme Court dated 18th September 2013, in Nairobi Civil App. 18 of 2012)

RULING

A. BACKGROUND

[1] The application before us is by Notice of Motion dated 31st March, 2014, stated to be anchored on Article 163(4) of the Constitution and all other enabling provisions of the law. The applicant seeks a review of the Court of Appeal's ruling denying her leave to appeal to the Supreme Court.

[2] The origins of this matter can be traced to Meru High Court *Succession Cause No. 294 of 1996*, a dispute between the applicant and the respondent over the inheritance of Mohamed Gatonge's (deceased) share of a piece of land known as Plot No. 6 Meru, situate at Makutano in Meru. The deceased had died

intestate. In the succession cause before the High Court, the applicant sought a grant of letters of administration on grounds that she was the sole survivor and beneficiary of the deceased's estate. The respondent objected to the grant of letters to the applicant asserting that contrary to the applicant's claim, the deceased had seven other children and that, as the deceased's only son, he was entitled to administer the deceased's estate.

[3]On 16th September 2002, a consent order was recorded before Kasanga, J. making the applicant and the respondent joint-administrators of the deceased's estate, and directing that the applicant was to give an account of income accrued, and expenditure incurred in respect of the estate. Two years later, the applicant disowned this recorded consent, and made two unsuccessful applications to have it set aside.

[4] The matter then proceeded to trial, the Court directing the parties to file affidavits outlining the prevailing mode of distribution of the property. Opposing claims were made before *Lenaola J,* by way of affidavits. The applicant averred that she was the sole party entitled to inherit the deceased's estate; while the respondent deposed that the two were entitled to equal share of the deceased's estate. On 17th October, 2007, *Lenaola J* ordered that the suit property be equally distributed between the two parties, other members of the family having not asserted any claim.

[5] Being aggrieved, the applicant appealed to the Court of Appeal, contesting the failure by the trial Court to set aside the consent which, as she averred, lacked her consent nor that of her counsel. She averred that she alone had prevented appropriation of the property by third parties; that the suit land had been bequeathed to her under Meru customary law; that the trial Court erred in failing to take *viva voce* evidence to determine whether the respondent was the biological son of the deceased; and that as she had lived on the suit property since 1978, the respondent's claims were statute-barred.

[6]The Court of Appeal (*Githinji, Nambuye, Maraga JJ.A*) found no merit in the appeal and, on 25th October, 2012 dismissed it. However, the applicant brought an application, seeking that Court's leave to appeal to the Supreme Court, on the basis that the intended appeal involved matters of general public importance. The application was heard by *Visram, Koome, Otieno-Odek JJA* who, while dismissing it, relied on the principles set out in Supreme Court's decision in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone,*** Civil Application No. 4 of 2012, to find that this matter was not one of general public importance, for the reason that the main issues in dispute revolved exclusively around paternity of the respondent, and the propriety of a consent order–issues which do not elevate this case to the wider plane of the public realm.

B. APPLICANT'S CASE

[7] The applicant asks this Court to review the said denial of certification. Her motion dated 31st March, 2014 comprises some five grounds, and together with the supporting affidavit, the applicant basically reiterates the same averments which were in issue before the trial and appellate Courts.

[8] At the hearing, the applicant appeared in person while the respondent did not turn up, despite the fact that he had been properly served. The Court directed that the matter proceeds, notwithstanding the non-attendance of the respondent.

[9] The applicant urged her own case, and asked the Court to review the decision of the Court of Appeal. This, she submitted, would eliminate the miscarriage of justice visited upon her by the High Court and the Court of Appeal, over a period of some thirty years. She stated that she foresaw the outcome of the appeal as turning out in favour of her six children, with whom she lives on the suit property.

[10]The applicant submitted that what qualifies this matter as one of general public importance is the fact that it would provide legal direction to other people in a similar fact-situation.

C. ANALYSIS

[11] The sole issue for determination is w*hether the instant application raises a matter of general public importance, in satisfaction of the basis for the appellate jurisdiction of this Court, in the terms of Article163(4) (b) of the Constitution.*

[12] The jurisdiction that the applicant invokes in this matter is prescribed by Article 163(4) (b) of the Constitution. It provides thus:

> ***"(4) Appeals shall lie from the Court of Appeal to the Supreme Court—***
>
> ***...***
>
> ***(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".***

[13] Whether or not a matter is one of general public importance is an issue to be decided by this Court on a case-by-case basis. In ***Hermanus Steyn***, this Court stated at 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 impacts 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".

[14] This holding has been revisited with approval by this Court in the case of ***Shabbir Ali Jusab v. Anaar Osman Gamrai & 2 Others,*** *Sup. Ct Petition No.1 of 2013.*

[15] What questions of fact or law does the applicant consider to be so substantial, in effect, as to bear upon the public, over and above the interest of the parties, in this case? Based upon the Notice of Motion, as well as her oral submissions before us, the applicant lamented the failure of the superior Courts to consider evidence of the paternity of the respondent, which would have disqualified him from inheriting a share of the deceased's estate. She further averred that the consent Order was procured by false evidence, though the High Court failed to consider this issue.

[16]This was a succession cause between two parties, in which the High Court after appraising the evidence on proof of paternity of the respondent, entered Judgment determining the distribution of the deceased's estate among the

lawfully-recognised beneficiaries. The applicant has not shown how such a finding by the High Court on the facts, or the application of the law even if erroneous, elevates the circumstances of this case to the plane of the general interest of the public. We therefore agree with the Court of Appeal, that this is not a matter of general public importance meriting certification for appeal to this Court.

D. DETERMINATION AND ORDERS

[17] Consequently, as the applicant has not demonstrated to the satisfaction of this Court that there exists specific elements of "general public importance" in her case to meet the test of Article 163(4)(b) of the Constitution, we determine that this matter lacks a basis for being classified as a "matter of general public importance".

[18] We would restate that the jurisdiction of this Court is not to be invoked save in accordance with the Constitution and the law. We decline to certify the matter for a further appeal to this Court. We consequently affirm the Court of Appeal's decision of 18th September 2013, dismissing the application.

[19] We dismiss the application. Each party shall bear their own costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 18th **Day of** March, **2015.**

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K.H. RAWAL	**P. K. TUNOI**
DEPUTY CHIEF JUSTICE &VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
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M. K. IBRAHIM	**J.B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

SMOKIN WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA