REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: P.K Tunoi & M.K Ibrahim SCJJ.)

CIVIL APPLICATION NO. 3 OF 2014

–BETWEEN–

DANIEL KIMANI NJIHIA.....APPLICANT

–AND–

1. **FRANCIS MWANGI KIMANI.....**
2. **THIKA DISTRICT LAND REGISTRAR.....**

RESPONDENTS

(Being an Application for review of denial of leave to appeal the to the Supreme Court, from the Judgment and decision of the Court of Appeal at Nairobi, in Civil Appeal No. 146 of 2010)

RULING

I. BACKGROUND

[1] This matter began in the High Court by way of a plaint dated 25th April 2002, in which the applicant (plaintiff therein) alleged that the 2nd respondent (the District Land Registrar, Thika) had altered the Registry Index Map on the boundary between two plots, and unlawfully hived off some portion of the applicant's land known as LOC 1/MUKARARA/253 and added it to the 1st

respondent's land known as LOC 1/MUKARARA/960. *Osiemo, J* heard the case and, in a Judgment delivered on 7th June, 2006, dismissed the suit.

[2] Aggrieved by the High Court's decision, the applicant on 15th June, 2006 lodged a notice of appeal in the Appellate Court. However, over the succeeding period of four years, the applicant took no step to file the intended appeal. He then moved that Court, of Appeal, seeking an extension of time to file an appeal and a record of appeal, on the premise that his default had arisen from the fact that his counsel had left private practice, and become an employee of the Kenya Anti-Corruption Commission; as well as the claim that he had been unable to raise legal fees; and the averment that he had been taken ill between May 2007 and December, 2008.

[3] The application was heard and dismissed by *Nyamu, JA* on 12th November, 2010. The learned Judge found no explanation for the inordinate delay; no certificate of delay had been produced, even though the record of proceedings had been available earlier; and the fact of illness did not justify the four years' delay.

[4] Aggrieved by the said decision, the applicant filed a reference before a three-Judge Bench of the Court of Appeal, under Rule 55(1)(b) of the Court of Appeal Rules. He sought a review of the single Judge's Orders declining to extend time to file a record of appeal. On 12th April, 2013, *Visram, Makhandia* and *Ole Kantai*

JJA. ruled that the single Judge had properly exercised his discretion to disallow the application, and dismissed the reference with costs. They held as follows:

> ***"The learned single Judge, in dismissing the motion, was exercising an unfettered discretion under Rule 4 of the Court's rules. He took into account relevant factors; he did not take into account any irrelevant factor and there is absolutely nothing on the record to show that he failed to appreciate any part of the evidence or law essential to his discretion. With respect, the applicant did not point out to us any single thing from which we could conclude that the learned single Judge had improperly exercised his discretion. Even on merits, both the motion and the reference were bound to fail".***

[5] To further advance his cause, the applicant filed an application seeking leave from the Appellate Court to appeal to the Supreme Court against the said Ruling. He urged that the intended appeal 'involves a matter of general public importance, in that it raises an important question of law as to whether the Land Registrar can arbitrarily transfer land without the consent of the registered owner.'

[6] The Court of Appeal *(Kihara Kariuki, Maraga & Ouko JJA)* ruled that there was no substantive decision of the Appellate Court on this question, and what was before them was only a denial of extension of time to lodge an appeal to it, from the High Court; and that such was only an issue calling into question the propriety of the exercise of judicial discretion. This, it was held, was not a matter

falling within the category of "a matter of general public importance". Dismissing the application, the learned Judges thus remarked:

> ***"Strictly speaking the issue that the applicant seeks to take to the Supreme Court is merely the exercise of judicial discretion by this Court. In our view, that is not a matter of general public importance transcending the circumstances of this case, and with a significant bearing on public interest, or one that raises a substantial point of law the determination of which will have a significant bearing on the public interest."***

II. APPLICATION BEFORE THE SUPREME COURT

[7] Subsequently, the applicant moved to this Court, and filed a notice of motion dated 11th March, 2014 seeking Orders as follows:

> *(i) the Court be pleased to review its decision denying the applicant leave to appeal to the Supreme Court made on the 14th February 2014;*
>
> *(ii) the Court be pleased to grant such other or further relief as it may deem fit and just to grant;*
>
> *(iii) costs of this application be provided for.*

[8] Acting in person, the applicant filed what he termed 'plaintiff's submissions', dated on 15th May 2014. At the hearing, he stated that he was seeking to have his appeal heard by this Court. However, in the written submissions which he

expressly adopted, nothing at all beckoned, even remotely, the scenario of an issue "of general public importance". The written submissions, we would observe, merely give an account of the preceding history of the dispute, and recount how the other Courts had resolved the contested issues.

[9] At paragraph 6 of the applicant's supporting affidavit, however, he depones thus:

> *"THAT I wish to appeal to the Supreme Court the decision to deny me leave to appeal the Judgment by Osiemo J. dismissing my suit which was even then touching on a matter of general public importance in that the actions of the Defendants in dealing with my land only without finding that the same was larger than what was indicated in my title and also not causing the registry index map to be amended across the neighbouring parcel."*

This stament is significant as it makes the only mention of *'a matter of general public importance'*. The applicant's crucial prayer is that the Court do grant him leave to file his appeal, so that the "Court may know the truth."

[10] Mr. Kaai, learned counsel for the 1st respondent, submitted that the applicant had not demonstrated that there was any uncertainty in the law, in the light of the Appellate Court's Ruling, nor that the application had raised any matter of general public importance. He urged that the application is frivolous, aside from not meeting the test laid down by this Court in ***Hermanus***

Phillipus Steyn v. Giovanni Gnecchi Ruscone, Application 2 of 2012 and in ***Malcom Bell v. Daniel Torotich Arap Moi & Another*** [2013] Eklr.

[11] For the 2nd respondent, learned counsel submitted that the substantive appeal had not come up before the Court of Appeal, and that the task of extending time fell exclusively within the ambit of discretionary power, and that this question fell outside the category of "matter of general public importance". He urged that this case does not satisfy the criteria set in the ***Hermanus*** and ***Malcom Bell*** cases.

III. ANALYSIS AND DETREMINATION

[12] Prayer No. 1 of the motion erroneously indicates that the decision in respect of which the applicant seeks a review, was made by this Court. This is noted by the 1st respondent in his submission thus*:* 'prayer (i) of the application is worded as if the decision you are being asked to review was made by yourselves'. From the record, this matter has not previously been before this Court; but it had been before the Court of Appeal, where the last Orders were made on 14th February, 2014.

[13] We have found still another impropriety. The Notice of Motion has been brought under Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya), and Rules 39, 42 and 43 of the Court of Appeal Rules, 2010. These are

not the right provisions of law under which the applicant should move the Supreme Court, where a review of denial of certification is sought.

[14] This Court's jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law. The operational rules for this Court (Supreme Court Rules, 2012) are made pursuant to the Constitution, Article 163(8) of which provides:

> ***"The Supreme Court shall make rules for the exercise of its jurisdiction".***

[15] Consequently, the only applicable sources of law when moving the Supreme Court are the Constitution, the Supreme Court Act, and the Supreme Court Rules, 2012. The Appellate Jurisdiction Act is not applicable when moving this Court. Neither is the Civil Procedure Code. In the ***Hermanus case***, this Court had indicated how it should be moved, thus [paragraph 23]:

> ***" ... It is trite law that a Court of law has to be moved under the correct provisions of the law."***

Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out.

[16] We are, indeed, cognizant of the fact that the applicant drew the application documents himsef, and has personally conducted this matter. Objections to the recourse to improper legal provisions did not come from the other parties. However, the extraordinary standing of this Court would demand that, in

principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution. The guiding principle emerges from this Court's single-Judge Bench observation in ***Yusuf Gitau Abdalla v. The Building Centre (K) Ltd & 4 Others***, Petition 23 of 2014, as follows:

> ***"Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy. It is also bound by the law and more so the Constitution which binds all. The Petitioner cannot be excused even on the pretext that he did not know this jurisdictional boundaries. A reading of the documents he has submitted to this Court shows that he describes himself*** *inter alia* ***as a printing consultant by profession with the ability to speak seven languages. Be it as it may, it is a legal principle that ignorance of the law is no defence. Hence the petitioner cannot with any iota of excuse, claim he did not know this…."***

[17] The applicant, thus, though representing himself, is to be deemed to have appreciated the legal parameters within which this Court operates. The relevant question now is: should we review the Ruling of the Appellate Court, refusing to grant the applicant leave to file an appeal to this Court? The answer to this question will determine whether or not this application is for striking out.

[18] Article 163(5) of the Constitution provides:

"A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

[19] This Court stated in the ***Hermanus case*** that, for an appeal to lie to the Supreme Court, under the rubric of "matter of general public importance", there will be a question of law that has arisen, and has been determined in the Courts below(see paragraph 60):

"In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions."

[20] Now, coming up before the Court of Appeal was an application for extension of time to file an appeal and record of appeal out of time. This was dismissed by a single Judge, a decision affirmed by a three -Judge Bench of that Court. It is after this decision that the applicant then sought leave to appeal to the Supreme Court, on the basis that a "matter of general public importance" is involved. Leave was denied on the basis that there had been no determination by

the Appellate Court, of the question that the applicant wanted to refer to this Court. The Court of Appeal ruled that the applicant had failed to satisfy the test that governs the certification of appeals to the apex Court, given that he merely intended to challenge an exercise of judicial discretion — an issue falling outside the purview of the concept of "matter of general public importance".

[21] We are in agreement with the Court Appeal. For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject- matter of judicial determination. It is clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.

[22] Besides, on the terms of the applicant's case, even if we assume that the intended question "of general public importance" is whether the Land Registrar can transfer land without the consent of the owner, we would still not admit the plea before us, for the reason that such a question has at no time been the subject

of appeal before the Appellate Court, neither has there been any decision upon such an issue, before that Court.

[23] It is plain to us that the applicant's case is for dismissal.

IV. DETERMINATION

[24] The applicant's motion, therefore, fails, and is hereby dismissed. We also order that the parties shall bear their own respective costs.

DATED AND DELIVERED AT NAIROBI THIS 27th DAY OF MAY 2015.

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P.K. TUNOI	**MOHAMMED IBRAHIM**
SUPREME COURT JUDGE	**SUPREME COURT JUDGE**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA