SAJ v AOG & another; ZOG (Interested Party) (Petition 1 of 2013) [2013] KESC 19 (KLR) (1 August 2013) (Ruling)

S A J v A O G & 2 others [2013] eKLR

Neutral citation: [2013] KESC 19 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 1 OF 2013

WM MUTUNGA, CJ & P, PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

AUGUST 1, 2013

BETWEEN

SAJ ..... APPELLANT

AND

AOG ..... 1ST RESPONDENT

ATTORNEY-GENERAL ..... 2ND RESPONDENT

AND

ZOG ..... INTERESTED PARTY

Principles for determining certification of a matter as one of general public importance

The application arose out of the decision of the Court of Appeal allowing the appellant leave to file a final appeal at the Supreme Court. The court pointed out what constituted a matter of general public importance warranting the exercise of the appellate jurisdiction of the Supreme Court. The Supreme Court further highlighted the principles for determining if a matter merited certification as one of general public importance.

Reported by Kakai Toili

Civil Practice and Procedure *– appeals – appeals to the Supreme Court – appeals in matters certified as being of general public importance - what constituted a matter of general public importance warranting the exercise of the appellate jurisdiction of the Supreme Court - what were principles for determining if a matter merited certification as one of general public importance - of Kenya, 2010, article 163(4).*

Brief facts

The appellant, a citizen of the United Kingdom (UK), and the 1st respondent, a Kenyan citizen, were married and had taken up residence in the UK. They were blessed with a child. On November 30, 2007, the 1st respondent left the UK with the child and came to Kenya. In July 2008, the 1st respondent moved to the

children's court in Nairobi and sued the appellant seeking custody of the child and a permanent injunction to restrain the appellant from taking custody of the child, or removing him from the jurisdiction of the court.

While the matters were still pending, the appellant filed an application for custody at Kiambu Chief Magistrate's Court which resulted in an *ex parte* order being issued restraining the 1st respondent from interfering with the appellant's custody, care and control of the child. However, the children's court in Nairobi, upon an *ex parte* application by the 1st respondent, restrained the appellant from removing the child from its jurisdiction, and granted interim custody to her. The appellant later withdrew the case at the Kiambu Chief Magistrate's Court.

On January 15, 2009, the appellant lodged proceedings before the High Court of Justice in the United Kingdom seeking the return of the child to his custody. The court ordered that the 1st respondent return the child to the UK. The 1st respondent, however, did not obey that order. Subsequently, the appellant moved to the High Court seeking return of the child to the UK, as well as enforcement of the order issued by the UK court. On the same date, the appellant further filed an interlocutory application seeking *ex parte* orders for, *inter alia,* stay of proceedings in children's court and the return of the child to the UK. The High Court ordered the return of the child to the UK.

Aggrieved, the 1st respondent appealed to the Court of Appeal. The Court of Appeal quashed the orders of the High Court in their entirety and directed that the matter pending before the children's court be set down for hearing and determination in accordance with the law. Consequently, the appellant filed an application at the Court of Appeal seeking certification and leave to appeal to the Supreme Court, the certificate was granted. The instant application arose out of the decision of the Court of Appeal allowing the appellant leave to file a final appeal. In granting a certificate of leave, the Court of Appeal agreed with the appellant that the appeal raised matters of general public importance. By a preliminary objection, the 1st respondent objected to the petition of appeal on among other grounds that; the issues raised in the petition were not canvassed in either the High Court or the Court of Appeal.

Issues

i. What constituted a matter of general public importance warranting the exercise of the appellate jurisdiction of the Supreme Court?

ii. What were principles for determining if a matter merited certification as one of general public importance.

Held

1. The applicant, who was the 1st respondent on record, was the party who had filed the application of preliminary objection. However, during the oral arguments before the court, submissions were made in reverse order, such that the 1st applicant submitted after the appellant. The court was alive to the fact, however, that despite that unusual approach, the burden remained on the applicants to show that the matter was not one of general public importance, the appellant having already discharged that burden in obtaining the Court of Appeal's certification, that the case met the required threshold.
2. The meaning of matter of general public importance may vary, depending on context. 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 were substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest were not closed, the burden fell on the intending appellant to demonstrate that the matter in question carried specific elements of real public interest and concern.
3. The principles for determining if a matter would merit certification as one of general public importance were as follows;
    1. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal was one the

determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest;

2. where the matter in respect of which certification was sought raised a point of law, the intending appellant must demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;
3. such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
4. where the application for certification had been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
5. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, was not a proper basis for granting certification for an appeal to the Supreme Court;
6. the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163(4)(b) of the ;
7. the intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;
8. determinations of fact in contests between parties were not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

4. The instant matter raised the following issues for determination;
    1. deprivation of the child of his nationality (UK), which was a constitutional right;
    2. choice of forum for the adjudication of custody issues in respect of alleged international child abduction;
    3. timeline for the determination of alleged international child abduction cases;
        i. procedure and manner of determining international child abduction cases in Kenya;
        ii. the application of international instruments, such as the , and the ;
        iii. rights of the parent-"victims" of alleged international child abduction.
5. From the preceding listing, it could be assumed that, *prima facie*, those were issues potentially transcending the circumstances of the instant case, and would have a significant bearing on the public interest. There appeared, *prima facie*, to be a number of potentially significant points of law of great jurisprudential value.
6. The appellant had indeed, in his petition and submissions, set out the matters perceived to be of general public importance, revolving around alleged international child abduction. The issues which counsel for the appellant cited, as placing the matter on the platform of general public importance, were exhaustively outlined in the petition which was still pending in the High Court. From a perusal of the relevant files, the petition was yet to be determined and the parties had not exhausted the forum accorded to them by the law. The Court of Appeal ought to have referred the matter back to the High Court for the determination of the questions it flagged as matters of general public importance.
7. If the court were to consider the matters raised, the court would not be providing its further input, but merely undermining the role of the other courts, and encroaching on the unlimited original jurisdiction of the High Court, which was provided for under article 165(3)(a) of the . The substantive matters in the appellant's petition remained unanswered, as they had not yet been canvassed in the proper forum. As a court not furnished with facts, the court ran the risk of perpetuating an injustice, as both parties should first be heard in the appropriate court, before preferring an appeal either to the Court of Appeal or to the instant court. It was such initial hearing on facts that constituted the centerpiece of the right to be heard, and to fair trial.

8. From a review the file pending at the High Court, on the basis of which the entire matter originated. There were, in fact, no determinations of fact that had been made in the matter, and that question was moot.
9. Since the application failed to meet the test, under several of the governing principles, the matter did not fall within the jurisdiction of the Supreme Court, as stipulated by the Constitution. The court was not inclined, on an ordinary appellate cause, to pronounce itself on an issue that had not been canvassed and determined by the courts or tribunals below, as provided by law. The High Court had not heard the petition before it, on that matter, and neither had the matter before the children's court (on custody of the child) been determined. Those courts ought to have an opportunity to hear the matters before them, and make a finding, before the stage was reached for an appeal to the court, as contemplated under article 163(4) of the Constitution.
10. For the purposes of section 16(3) of the , it was important for the Court of Appeal, in certifying that a matter was ripe for appeal to the Supreme Court, to consider the proceedings of the High Court, and ascertain whether any conclusive rights of the parties had crystallized; and that court would then indicate whether the Supreme Court, in entertaining a proposed appeal, would be rendering or denying justice to any party. The Court of Appeal's role in that respect was crucial, because it was in a position to consider both law and fact, and thus arrive at a just outcome. Such an outcome supplied the requisite basis for granting a certificate of leave to appeal to the Supreme Court.
11. The court was deeply concerned by the protracted course which the matter had taken, all through from July, 2008 to-date, with the consequence that the best interests of a child had been exposed to uncertainty and prejudice. The court found counsel remiss, having without cause, repeatedly moved different courts without the commitment to have the relevant questions resolved with expedition and finality.

Application dismissed.

Orders

i. *The notice of appeal together with the record of appeal struck out;*
ii. *The certificate of leave granted by the Court of Appeal was quashed.*
iii. *The matter pending before the children's court (Case No 439 of 2008 shall be set down for hearing and determination in accordance with the law.*
iv. *The petition before the High Court shall be set down for hearing and determination on the basis of priority.*
v. *The appellant to bear the costs of the application.*

Citations

Cases

1. Ngoge v Kaparo and 5 others (Petition 2 of 2012; [2012] eKLR) — Explained
2. Steyn v Ruscone (Application 4 of 2012; [2013] KESC 11 (KLR)) — Explained
3. Sum Model Industries Ltd v Industrial & Commercial Development Corporation (Civil Application 1 of 2011; [2011] eKLR; [2011] 2 KLR) — Explained
4. Dellway Ltd & others v National Asset Management Agency, Ireland & the Attorney-General (IEHC 375) — Explained
5. R v Secretary of State for Trade and Industry, ex parte Eastaway ([2001] 1 All ER 27) — Explained

Statutes

1. Children Act, 2001 (Act No 8 of 2001; Repealed) — section 3, 6(3), 13(1), 22(2) 145 — Interpreted
2. Constitution of Kenya, 2010 — article 2(6), 15, 53, 163(4)(b), 162(2), 165 (3)(a) — Interpreted
3. Foreign Judgments (Reciprocal Enforcement) Act (Cap 43) — section 3(3)(e) — Interpreted
4. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3, 16(3) — Interpreted
5. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg; Repealed) — rule 24(1), 31(1), 37(1), — Interpreted

6. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 9, 33, 42 — Interpreted

International Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 — In general
2. Convention on the Civil Aspects of International Child Abduction, 1980 — In general
3. United Nations Convention on the Rights of the Child (UNCRC), 1989 — In general

Advocates

None mentioned

RULING

Background

[1] The appellant, a citizen of United Kingdom, and the 1st respondent, a Kenyan citizen, are first cousins. They were married under muslim law, and took up residence in the United Kingdom. They were blessed with a child (ZAJ), born on the 5th of May 2005, the subject of the proceedings herein. On November 30, 2007, the 1st respondent left Bolton, United Kingdom, with the child and came to Kenya, under circumstances contested by both parties. Between February and April, 2008, the appellant came to Kenya and stayed at the 1st respondent's parents' home, but he was unable to persuade the 1st respondent to return to the United Kingdom.

[2] In July 2008, the 1st respondent moved to the Children's Court in Nairobi and sued the appellant, in Children's Case No 439 of 2008, seeking custody of ZAJ, on grounds that the best interests of the child lay with the mother at that stage of his development. She also sought a permanent injunction to restrain the appellant from taking custody of the child, or removing him from the jurisdiction of the court. The 1st respondent also moved to the Family Division of the High Court, and filed divorce proceedings, by High Court Divorce Petition No [Particulars Withheld].

[3] On November 12, 2008, while the above matters were still pending, the appellant filed an application for custody at Kiambu Chief Magistrate's Court, in CC No34/2008. On the strength of the appellant's affidavit and pleadings, an *ex parte* order was issued by that court, restraining the 1st respondent from interfering with the appellant's custody, care and control of Z.A.J. However, the Children's Court in Nairobi, upon an *ex parte* application by the 1st respondent, restrained the appellant from removing the child from its jurisdiction, and granted interim custody to the 1st respondent, pending the hearing and determination of Civil Case No 439 0f 2008. The appellant later withdrew the case at the Kiambu Chief Magistrate's Court, on March 3, 2009.

[4] On January 15, 2009, the appellant lodged proceedings before the Family Division of the High Court of Justice in the United Kingdom (Case No FD08P02541), seeking return of the child to his custody. The Court declared that the child ZAJ was a ward of the English Court, and ordered that the 1st respondent return the child to the United Kingdom (UK). The 1st respondent, however, did not obey the said order. Subsequently, on March 4, 2009, the appellant moved to the High Court of Kenya at Nairobi, and filed an Application (Miscellaneous Civil Application No 15 of 2009), seeking return of the child to the UK, as well as enforcement of the wardship order issued by the UK court. On the same date, the appellant further filed an interlocutory application, by way of notice of motion, in which he sought *ex parte* orders for, *inter alia,* certification of urgency; stay of proceedings in Children's Court Case No 439 of 2009; and return of the child to the UK. On March 17, 2009, the High Court (Rawal J), gave a decision on the Notice of Motion, and ordered the return of the child to the UK, as a ward of the High Court in that country. It is worth noting that the decision of the court is titled

'judgment' and not 'ruling', even though it was a decision pursuant to an interlocutory application. The Court of Appeal noted this and held that it ought to have been a 'ruling'. No order was given as to the proceedings before the Children's Court, in Case No 439 of 2008.

[5] The 1st respondent, being aggrieved by the High Court decision, filed an appeal in the Court of Appeal at Nairobi (Civil Appeal No 188 of 2009). She also made an application for stay of the High Court order; and on November 26, 2009 the Court of Appeal granted a stay of execution of the High court's orders of March 17, 2009, and all other consequential orders including those for the enforcement of the order of the UK court, pending hearing and determination of the appeal. The appellant, on his part, filed an application to strike out the proceedings in the Children's Court, on the ground that the High Court had issued orders for the return of the child to the UK and, therefore, the proceedings were an abuse of court process. However, the court declined to strike out the proceedings and instead, issued a stay of those proceedings pending the outcome of the appeal filed by the 1st respondent in the Court of Appeal. On June 10, 2011, the Court of Appeal (*O'Kubasu, Aganyanya & Waki JJA),* in Misc Civil Application No 15 of 2009), quashed the orders of the High Court in their entirety, and directed that the matter pending before the Children's Court be set down for hearing and determination in accordance with the law. Consequently, on January 24, 2013, the appellant filed an Application at the Court of Appeal seeking certification and leave to appeal to the Supreme Court (Civil App No Sup 1 of 2012 (UR 1/2012). The certificate was granted.

[6] The application now before this Court arose out of the decision of the Court of Appeal (Githinji, Onyango Otieno and Koome JJA), delivered on November 9, 2012, allowing the appellant leave to file a final appeal, challenging the decision of the Court of Appeal in Civil Appeal No 188 of 2009. The certificate was given on the basis of article 163(4)(b) of the *Constitution*, which provides that an appeal shall lie to the Supreme Court from the Court of Appeal, where a matter of general public importance is involved; it was also based on the decision of this court in *Sum Model Industries Ltd vs Industrial & Commercial Development Corporation*, SC Civil Application No 1 of 2011. In granting a certificate of leave, the Court of Appeal (at page 14 paragraph 22 of the ruling) agreed with the appellant, who identified several issues arising in Civil Appeal No 188 of 2009, as matters of general public importance:

(ii) choice of forum between two competing jurisdictions for the adjudication of the custody issues, in respect of international child abduction (in this case, Kenya and the United Kingdom);

(iii) time lines for the determination of international child abduction cases;

(iv) the procedure and manner of determining international abduction cases, when Kenya is not a signatory to the *Convention on the Civil Aspects of International Child Abduction (Hague Convention), 1980*;

(v) the import and application of international instruments, and of the *African Charter on the Rights and Welfare of the Child*, and the *United Nations Convention on the Rights of the Child*, in international child abduction cases;

(vi) the rights of the "victim" – parent of international child abduction cases.

[7] Following the issuance of certificate of leave by the Court of Appeal, the appellant filed a notice of appeal before the Court of Appeal on November 20, 2012, notifying the court of his intention to appeal against the entire judgment and order of the Court of Appeal in Civil Appeal No 188 of 2009, dated June 10, 2011. Thereafter, on February 5, 2013, he filed a petition of appeal dated January 28, 2013 brought under rule 9, 33 and 42 of the *Supreme Court Rules*, and the inherent powers of the

court. The petition of appeal seeks the court's consideration of the law of international child abduction in Kenya, and more specifically:

[8] By a preliminary objection dated March 11, 2003, the 1st Respondent objected to the petition of appeal on the following points of law:

i) the notice of appeal, as filed, was bad in law, as the same was filed out of time;

ii) the petition and record of appeal were filed out of time,contrary to the mandatory provisions of the law;

iii) the issues raised in the petition were not canvassed in either the superior court or the Court of Appeal.

[9] Further, by notice of motion dated March 19, 2013 anchored upon article 163 of the *Constitution* and section 3 of the *Supreme Court Act* (Act No 7 of 2011), and rules 37(1), 31(1), 24(1) of the *Supreme Court Rules, 2012*, the 1st respondent sought the striking out of the notice of appeal and petition and record of appeal. The application was premised upon five main grounds:

[10] On April 17, 2013, the parties addressed this court(Wanjala, Ndungu SCJJ) on the preliminary objection dated March 11, 2013, and by a ruling dated April 23, 2013, the court dismissed the same. Notably, the court was of the opinion that (para. 14 of the ruling):

> "(14) This court is yet to pronounce itself on what constitutes a matter of general public importance under article 163(4)(b) of the *Constitution of Kenya*. The matter at hand is one where the Court has been called upon to determine if the questions raised are of general public importance. Allowing the preliminary objection would deny the court an opportunity to determine this important question of law and examine the substantive issues raised by this appeal, [as a basis for reaching] a jurisprudential finding on whether issues of child custody are indeed matters of general public importance."

[11] On May 7, 2013, the parties addressed the court on the remaining three grounds of preliminary objection, which were:

II. Issues of Merit: Submissions for the parties

(a) Preliminary note

[12] It is understood that the applicant, who is the 1st Respondent on record, is the party who has filed this application of preliminary objection. However, the court takes note that during the oral arguments before it, submissions were made in reverse order, such that the 1st applicant/respondent submitted after the appellant. This is reflected in the verbatim record of the court. The court is alive to the fact, however, that despite this unusual approach, the burden remained on the applicants/respondents to show that the matter was not one of general public importance, the appellant having already discharged this burden in obtaining the court of appeal's certification, that the case meets the required threshold.

(b) Abduction case, citizenship rights, issues of public importance: The appellant's case

[13] Counsel for the appellant, Mr Kinyanjui, in his oral and written submissions, argued that the instant matter involved questions of general public importance, with particular reference to international child abduction. He recalled the facts of the case, which he urged to be relevant in determining whether this was a matter of general public importance. Counsel submitted that the appellant and the 1st respondent were husband and wife with issue, ZAJ, who was at the time of hearing this application, a minor. The

child was born in the United Kingdom and, therefore, according to counsel, a subject of the United Kingdom. However, the appellant and 1st respondent had been resident in Kenya since the year 2008. Counsel stated that because of acrimony between the two parties, and turbulence in their marriage, the appellant moved to the High Court in the United Kingdom, seeking an order that the child be returned to that country. The court granted the application, and ordered that the child be made a ward of that court. Thereafter, the appellant moved the High Court of Kenya to have the child returned to the United Kingdom, in line with the orders of the court in that country.

[14] Mr Kinyanjui contends that a critical issue for determination is whether the child had a right to exercise, enjoy and experience to the fullest extent, the rights of a UK Citizen. He urged that the citizenship of the child had neither been annulled nor waived; and he referred to article 15 of the *Constitution of Kenya*, which provides:

> "15. (1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.
>
> "(2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.
>
> "(3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.
>
> "(4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.
>
> "(5) This article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date."

[15] Counsel emphasized that the instant matter presented an opportunity for this court to establish principles of law applicable in a case where a child's citizenship is different from that of a parent accused of abduction. For greater effect, counsel asked the court to take judicial notice of the increase in marriages or interactions between people of different nationalities, out of which children were born; and of the likelihood of more such cases coming up before Kenya's courts. He also called on the court to determine the question, "what procedure would be adopted by the courts to ensure that a child's right to nationality, and the right to parental control [within the country of the child's nationality] were enforced?"

[16] Relying on section 13(1) of the *Children Act* (cap 8 of the Laws of Kenya), counsel submitted that the resolution of the instant case presented the court with an opportunity to ascertain the legal dimensions of international child abduction. He contended that the matter before the court transcended the private interests of the parties, and was a matter of public interest.

Section 13(1) of the *Children Act* provides:

> "13. (1) A child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person."

[17] Counsel also submitted that the court had an opportunity to consider the application of article 2(6) of the *Constitution*, in respect of conventions and treaties ratified by Kenya regarding international child abduction, but which have not been addressed expressly in the *Children Act*. Counsel was particularly concerned with the procedure to be followed in matters of child abduction, particularly where the

same were brought under the *United Nations Convention on the Rights of the Child*, and the *African Charter on the Rights and Welfare of the Child*.

[18] Counsel submitted that the absence of rules envisaged under section 22 of the *Children Act*, presented the court with occasion to create jurisprudence on the application of the relevant conventions and treaties. Counsel lamented that Kenya had not ratified the *1980 Hague Convention on Civil Aspects of International Child Abduction*. It was urged that in this case, a child who was the subject of the court proceedings was a citizen of the United Kingdom, a country which had ratified the *Hague Convention*; and that this made the question one of public interest. Counsel called upon the court to determine whether Kenya was bound by the principles of the *Hague Convention*, by dint of article 2(5) and (6) of the *Constitution*, even though it had not ratified the same.

The said article provides as follows:

> "(5) The general rules of international law shall form part of the law of Kenya.
>
> "(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

[19] Counsel further urged the court to consider the matter as one of public interest because it concerned the law of domicile; the court should articulate principles that would be universally applied in matters of international child abduction. He asked the court to seize the opportunity presented by the instant matter, as one of jurisprudential moment, and one that presented occasion for declaring an issue as one of public interest.

(c) No matter of general public importance, and no instance of abduction: First respondent's case

[20] Counsel for the 1st respondent, Ms. Janmohamed submitted that the matter was not one of general public importance, because there appeared to have been a misapprehension of the law in both the High Court and the Court of Appeal. Counsel submitted that in granting the certificate of leave, the Court of Appeal considered questions that were not before it, and took into account irrelevant matters. On that account, the Supreme Court lacked jurisdiction. Counsel referred to the content of the petition in the High Court; what had been sought was: the enforcement of the child's rights under the various provisions of the *Children Act*. Counsel then addressed the court on the point made by Mr Kinyanjui, that this court ought to determine the procedure to be employed under section 22 of the *Children Act*. She urged that the formulation of the rules under this section was the task of the Chief Justice, and not the Supreme Court. This, she stated, was not a matter of jurisprudential importance, as the court was only being asked to define a procedure, and clarify a law already in place. She referred the court to the provisions of section 3(3)(e) of the *Foreign Judgments (Reciprocal Enforcement) Act* (cap 43 of the Laws of Kenya):

> "This Act does not apply to a judgment or order –
>
> .....
>
> (e) in proceedings in connection with the custody or guardianship of children."

She submitted that section 145 of the *Children Act* was clear as to the procedure; it provides:

> "(1) It shall be lawful for the Minister, with the approval of the National Assembly, to enter into an agreement with the government of any other country or territory on such terms and conditions as he may think fit, whereby a child who has been ordered by a court under the provisions of this Act to be sent to a rehabilitation school or other institution or committed

to the care of a fit person, may be received into that country or territory and then placed in a rehabilitation school or other institution approved under the relevant legislation of that country or territory or received into the care of a fit person or returned to his parent or guardian.

"(2) Any child who has been ordered under the provisions of this Act to be placed in a rehabilitation school or any other institution, or committed to the care of a person, may, while still subject to such order, by warrant signed by the Minister, be removed from custody of such an institution or person into any other country or territory with which an agreement has been concluded under subsection (1), and placed in a rehabilitation school or other institution, placed in the care of a fit person, or of his parent or guardian, in accordance with the law in force in the country or territory authorising such placement until the expiration of the order or until such child is sooner released according to law.

"(3) An order of a court of a country or territory with which an agreement has been entered into in accordance with the provisions of subsection (2) which could lawfully have been made by a court in Kenya if the person had been within its jurisdiction, shall upon the person being received in Kenya have the same effect and be enforceable as if the order had been made by a court in Kenya."

[21] Ms. Janmohamed submitted that the matter of child abduction had not, so far, been an issue before any court of competent jurisdiction. It was her submission that this court would not be properly sitting, in determining matters that were being brought before it for the first time. Counsel urged that unresolved matters of fact could not become matters of jurisprudential moment. She urged that the matter could not rightly come before this court, because the same had not arisen at the High Court; and the Court of Appeal had already referred the matter back to the Children's Court, to determine the best interests of the child, pursuant to article 53 of the *Constitution*. She submitted that the Children's Court was the proper forum to determine the best interests of the child. Counsel noted that what the Court of Appeal had done, was to quash the interlocutory orders of March 17, 2009, but that the substantive matter was still live in the High Court.

[22] Referring to the case of *Dellway Ltd & others v National Asset Management Agency, Ireland & the Attorney-General*, [2010] IEHC 375, Ms Janmohamed submitted one of the guidelines for certification of a matter for appeal before the Supreme Court is: if the law in question stood in a state of uncertainty, and it was for the common good that such law be clarified so as to enable the courts to administer that law, for now and in the future. Counsel submitted that there was no uncertainty of the law in need of clarification, as the issue of abduction had not been raised in any other court. Another Dellway guideline was that, a point of law must have arisen out of the decision of the High Court, and not from bare discussions or considerations of a point of law during the hearing.

[23] Ms. Janmohamed cited section 16(3) of the *Supreme Court Act*, which provides:

> "The Supreme Court shall not grant leave to appeal against an order made by the Court of Appeal or any other court or tribunal on an interlocutory application unless satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded.."

Counsel submitted that the matters decided by the Court of Appeal arose out of an interlocutory application and, therefore, an appeal based on the ruling of that Court could not be referred to the Supreme Court, unless the court was satisfied that it was necessary to hear the matter in the interest of justice. Learned counsel submitted that both parents (the appellant and the 1st respondent) had rights

in relation to the child, but the best interests of the child first had to be determined in the Children's Court.

(d) The hague convention is not pertinent; this is not a matter of general public importance: The second respondent's case

[24] Counsel for the 2nd respondent, Mr Mutinda adopted the submission made for the 1st respondent, that Petition No 15 of 2009 was still pending in the High Court, and had to be determined there, before this Court could address itself to the present matter. He called attention to the fact that the Court of Appeal had restrained itself from considering the merits of the petition, at this stage.

[25] Mr Mutinda submitted that article 2(6) of the *Constitution* did not apply to the Hague Convention, as Kenya had not ratified the same. Counsel urged that article 35 of the Convention was clear, that it only applied to contracting parties, with article 44 thereof stating that the treaty would be in operation between the contracting parties for five years, subject to renewal. He urged that the Convention prescribed limitations to its operations as regards the best interests of the child. Counsel submitted that the intended appeal did not raise matters of general public importance. He urged it to be imperative that the matters raised be canvassed at the High Court, before exhausting the appellate mechanism.

This is not a true child-abduction case: Third respondent's case

[26] Counsel for the 3rd respondent, Mrs Wambugu commenced her submissions by contesting the assertion made for the appellant, that this was a matter of general public importance. She drew the court's attention to page 34 of the record of appeal, where the Court of Appeal found that the matter of abduction had not been conclusively determined, and the same ought to have been referred to the Children's Court for determination. She further referred to the judgment by the Court of Appeal (page 421 – 451, at page 448 of the record of appeal). She drew the court's attention to the holding by the Court of Appeal that the issue of child abduction had not been considered independently, but only expressed in depositions which were not tested in cross-examination. Counsel urged that the matter before the court was not even one of fact, as the facts had not even been tested. They were mere allegations at this point, because no court had set itself to determine the same conclusively. she drew the court's attention to a determination by the Court of Appeal in its ruling, that the issue of child abduction had been superseded by an order of the Family Division of the High Court of Justice of England, dated January 15, 2009. She submitted that this order (at page 104 of the record of appeal) reads thus:

> "It is ordered:
>
> 1. The child ZA SAJ be a ward of this court during his minority or until further order of the court.
>
> 2. The defendant mother AOG, shall cause the return of the child forthwith to England and Wales and following his return shall not remove him from jurisdiction without an order of this court or without the permission of the court".

Counsel's submission, in the light of this order, was that even the High Court in England had not found as a fact that the child had been abducted.

[27] Counsel urged that the appellant's request to have the Supreme Court set the procedure for adjudication on matters of international child abduction, was merely anticipatory in nature, and ought

not to be entertained. Counsel submitted that the *Children Act* was a self-contained statute, with provisions on matters of international reciprocity (section 145).

[28] Counsel submitted that in this matter, even the English Court had not considered its jurisdiction to be in competition with that of Kenya. The order by the English Court (annexed at page 75 of the record of appeal) thus makes the recognition:

> "The plaintiff is at liberty to collect the child from Kenya and to bring him to this jurisdiction if permitted by the Court in Kenya".

She submitted that there could not have been competing forums, as the Court in England acknowledged that the appellant would need the permission of the court(s) in Kenya, to remove the child from the Kenyan jurisdiction. Counsel submitted that the intended subject of appeal bore no matter of general public importance.

(f) A Case of abduction: The appellant's response

[29] In response, Mr Kinyanjui submitted that the court, if it benefited from this occasion by setting the principles on international child abduction, would be settling an issue of public interest. Counsel urged the court to find that an issue of international child abduction was at the heart of the intended appeal, and set the procedure to settle such matters. The issue of procedure, counsel submitted, was one of public interest.

[30] Counsel contested the submission that the issue of child abduction had not been presented for determination at the Children's Court. He faulted the Court of Appeal's decision to sustain the proceedings before the Children's Court, contending that the proper forum was the High Court.

Matters of General Public Importance: The applicable criteria

[31] Counsel for the 1st respondent raised a pertinent question: whether the intended appeal raises matters of general public importance. The Court of Appeal held that the intended appeal raised matters of general public importance. Since then, the Supreme Court, in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,* Supreme Court Application No 4 of 2012, has considered this criterion of certification for appeal. In that decision, the court was alive to the fact that the meaning of "matter of general public importance" may vary, depending on context. The court, after a comparative review of the practice in various jurisdictions, pronounced itself on the significations contemplated in article 163(4)(b) of the *Constitution*. The 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".

[32] The court also set the following principles for determining if a matter would merit certification as one of general public importance (at paragraph 60):

> "(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

"ii) where 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;

"iii) such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

"iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

"v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the atter to be certified for a final appeal in the Supreme Court, must still fall within the terms of article 163(4)(b) of the *Constitution*;

"vi) 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;

"vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

We will apply these principles in the instant case, to determine if the requirements set out have been met.

IV Compliance with the Supreme Court's criteria

[33] Firstly, is the issue to be canvassed on appeal, one that transcends the circumstances of this particular case, and has a significant bearing on the public interest? This matter raises the following issues for determination:

i. deprivation of the child of his nationality (United Kingdom), which is a constitutional right;

ii. choice of forum for the adjudication of custody issues in respect of alleged international child abduction;

iii. time line for the determination of alleged international child abduction cases;

  i. procedure and manner of determining international child abduction cases in Kenya;

  ii. the application of international instruments, such as the *African Charter on the Rights and Welfare of the Child*, and the *United Nations Convention on the Civil Aspects of International Child Abduction*;

  iii. rights of the parent-"victims" of alleged international child abduction.

From this listing, it can be assumed that, *prima facie*, these are issues potentially transcending the circumstances of the instant case, and would have a significant bearing on the public interest.

[34] Secondly, has the appellant raised a point of law and demonstrated that such point of law is substantial, having a significant bearing on the public interest? There appear, *prima facie*, to be a number of potentially significant points of law, of great jurisprudential value.

[35] Thirdly, did the intending appellant identify and concisely set out the specific elements of "general public importance" which he intends to rely on? We find that the appellant has indeed, in his petition and submissions, set out the matters perceived to be of general public importance, revolving around alleged international child abduction.

[36] Fourthly, did the questions of law in this matter arise in the courts below, and have they been subjected to judicial determination? From the submissions of counsel and from the record of the court, it is clear that several different causes have been filed previously in other courts, with regard to different aspects of this case. Counsel for all the respondents state that the matter before the Children's Court, and the petition filed in the High court are still live, while counsel for the appellant maintains that there are no proceedings pending in the High Court under Miscellaneous Application No 15 of 2009. Both counsel confirm that no court has dealt with the issue of the best interests of the child. Details of the petition in the High Court are to be found at pages 49-62 of Volume 1 of the Record of Appeal. It was filed by the appellant on March 4, 2009, and mainly focused on the alleged abduction of the child, as well as alleged denial of his right to nationality. The appellant acknowledged the jurisdiction of the High Court to hear claims on the rights of the child (para. 21 of Petition):

> "Sections 3, 6(3) and 22(2) of the *Children Act* enjoins this honourable court to ensure the protection of the minor's rights and the enlisting of Government agencies and departments that will secure the protection of the said rights, hence the pleas sought herein for the enforcement of the minor's rights, which is the sole purview of the 2nd respondent."

[37] The appellant, in the High Court, stated [paragraph 22 of the petition]:

> "There is no specified procedure under the *Children Act, 2001* for the institution of 'Abduction Proceedings' within the Family Court Division and Kenya is at the moment not a signatory to the *Hague Convention on the Civil Aspects of International Child abduction* (herein below referred as "The Hague Convention").
>
> "As such, Kenya does not have a Central Authority such as would liaise with the Child Abduction Unit in the United Kingdom from which the minor has been abducted.
>
> "Your petitioner did report the abduction to the United Kingdom's Central Authority, and due to Kenya's default in acceding to the said Convention, the Central authority there has been unable to assist the petitioner as envisaged under the Hague Convention.
>
> "Consequently, the only avenue envisaged under sectionion 13(1) of the *Children Act* for adjudicating abduction proceedings such as this is by way of proceedings as now lodged. Notwithstanding, the court is enjoined to enforce the spirit of the Hague Convention."[Emphasis supplied]

[38] The appellant then went ahead to formulate the prayers and orders sought, together with questions for determination by the High Court. We note that the issues which counsel for the appellant cited, as placing this matter on the platform of general public importance, are exhaustively outlined in the petition which is still pending in the High Court. From a perusal of the relevant files, it is clear to us that the petition is yet to be determined and the parties have not exhausted the forum accorded to them by the law. The Court of Appeal ought to have referred the matter back to the High Court for the determination of the questions it flagged as matters of general public importance. This would be in accordance with the directions of this court in *Sum Model Industries Limited v. Industrial and*

Commercial Development Corporation, Sup Ct Civil Application No 1 of 2012, in which we stated (at page 3):

> "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 Courtor not."

[39] If this court were to consider the matters raised, we would not be providing our further input, but merely undermining the role of the other courts, and encroaching on the unlimited original jurisdiction of the High Court, which is provided for under article 165(3)(a) of the *Constitution* as follows:

> "165 (3) Subject to clause (5), the High Court shall have —
>
> (a) unlimited original jurisdiction in criminal and civil matters;".....
>
> (5) The High Court shall not have jurisdiction in respect of matters—
>
> (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
>
> (b) falling within the jurisdiction of the courts contemplated in article 162(2)."

[40] Further, the substantive matters in the appellant's petition remain unanswered, as they have not yet been canvassed in the proper forum. As a court not furnished with facts, we run the risk of perpetuating an injustice, as both parties should first be heard in the appropriate court, before preferring an appeal either to the Court of Appeal or to this court. It is such initial hearing on fact that constitutes the centerpiece of the right to be heard, and to fair trial. We underline this point by restating the decision of the Supreme Court in Petition No 2 of 2012, *Peter Oduor Ngoge v Francis Ole Kaparo and 5 others* [2012] eKLR, in which the court relied on the decision of the House of Lords in *R v Secretary of State for Trade and Industry, ex parte Eastaway* [2001] 1 All ER 27, and held that:

> "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."

[41] Fifthly, has the application for certification been occasioned by a state of uncertainty in the law, arising from contradictory precedents, such that the Supreme Court may either resolve the uncertainty as it may determine, or refer the matter to the Court of Appeal for its determination? There are assertions that there is uncertainty in the law, but these are short of categorical, as this matter has not

yet been determined by a superior court. In any case, even if an uncertainty exists, it is not occasioned by contradictory precedent, but rather, by lack of precedent. Counsel for the 1st respondent rightly submitted that no court has ever made a determination on a case of this nature. We find, therefore, that this prerequisite has not been met.

[42] Sixthly, should determinations of facts in contest be a basis for an appeal before the Supreme Court? We have taken the liberty to review the file pending at the High Court, on the basis of which this entire matter originates. We find that there are, in fact, no determinations of fact that have been made in this matter, and that this question is moot.

[43] Lastly, does the matter fall within the jurisdiction of the Court as stipulated in article 163(4)? Since the application fails to meet the test, under several of the governing principles above-mentioned, we must conclude that this matter does not fall within the jurisdiction of the Supreme Court, as stipulated by the Constitution. This court is not inclined, on an ordinary appellate cause, to pronounce itself on an issue that has not been canvassed and determined by the courts or tribunals below, as provided by law. The High Court has not heard the petition before it, on this matter, and neither has the matter before the Children's Court (on custody of the child) been determined. Those Courts ought to have an opportunity to hear the matters before them, and make a finding, before the stage is reached for an appeal to this court, as contemplated under article 163(4).

[44] For the purposes of section 16(3) of the *Supreme Court Act*, it is important for the Court of Appeal, in certifying that a matter is ripe for appeal to the Supreme Court, to consider the proceedings of the High Court, and ascertain whether any conclusive rights of the parties have crystallized; and that court would then indicate whether the Supreme Court, in entertaining a proposed appeal, will be rendering or denying justice to any party. The Court of Appeal's role in this respect is crucial, because it is in a position to consider both law and fact, and thus arrive at a just outcome. Such an outcome supplies the requisite basis for granting a certificate of leave to appeal to the Supreme Court.

[45] The court is deeply concerned by the protracted course which this matter has taken, all through from July, 2008 to-date, with the consequence that the best interests of a child have been exposed to uncertainty and prejudice. We find counsel remiss, having without cause, repeatedly moved different courts without the commitment to have the relevant questions resolved with expedition and finality.

V Determination, and orders

[46] In view of the foregoing, the intended appeal, in our opinion, fails the test established in the *Hermanus Steyn* Case. The matters before the High Court and the Children's Court remain undetermined. The issues raised by the appellant form the basis of the petition pending in the High Court, and the High Court is the proper trial forum; hence that court is to be allowed the opportunity to hear and determine the matter.

[47] We strike out the notice of appeal, together with the record of appeal, and we quash the certificate of leave granted by the Court of Appeal.

[48] We order that the matter pending before the Children's Court (Case No 439 of 2008)shall be set down for hearing and determination in accordance with the law.

[49] The petition before the High Court shall be set down for hearing and determination on the basis of priority.

[50] The appellant shall bear the costs of this application

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF AUGUST, 2013

.....

WILLY MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT COURT

.....

P. K. TUNOI

JUDGE OF THE SUPREME

.....

M.K. IBRAHIM

JUDGE OF THE SUPREME COURT

.....

J.B. OJWANG

JUDGE OF THE SUPREME

.....

S. WANJALA

JUDGE OF THE SUPREME

.....

N.S. NDUNGU

JUDGE OF THE SUPREME

I certify that this is a true copy of the original

REGISTRAR

Supreme Court of Kenya