



**Mwangi Stephen Muriithi v Daniel Toroitich arap Moi & Raymark Limited  
(Application 45 of 2014) [2018] KESC 19 (KLR) (5 October 2018) (Ruling)**

*Mwangi Stephen Muriithi v Daniel Toroitich arap Moi & another [2018] eKLR*

Neutral citation: [2018] KESC 19 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**APPLICATION 45 OF 2014**

**DK MARAGA, CJ & P, PM MWILU, DCJ & V-  
P, JB OJWANG, SC WANJALA & NS NDUNGU, SCJJ**

**OCTOBER 5, 2018**

**BETWEEN**

**MWANGI STEPHEN MURIITHI ..... APPLICANT**

**AND**

**DANIEL TOROITICH ARAP MOI ..... 1<sup>ST</sup> RESPONDENT**

**RAYMARK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**The issues of whether a habeas corpus application barred proceedings for enforcement of fundamental rights and freedoms deemed to be a matter of general public importance warranting an appeal to the Supreme Court.**

*An applicant seeking certification had to satisfy the court that the issue to be canvassed on appeal was one that the determination transcended the circumstances of the particular case. If it was a point of law, he had to demonstrate that such point was a substantial one, the determination of which ought to have a significant bearing on the public interest.*

Reported by Chelimo Eunice

**Jurisdiction** – jurisdiction of the Supreme Court – review – jurisdiction of the Supreme Court to review a decision of the Court of Appeal with respect to certification of a matter for appeal to the Supreme Court – where the Court of Appeal had dismissed an application for leave to file an appeal to the Supreme Court – constitutional provision for review by the Supreme Court in respect of matters of general public importance in an intended appeal – whether the application had merit – Constitution of Kenya, 2010 article 163(4) (b); Supreme Court Rules, 2012, rule 24(1).

**Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction of the Supreme Court on matters of general public importance – prerequisites for a matter to be certified as one of general public importance – whether a court order in a habeas corpus application could determine the legality of a detention under the provisions the Preservation of Public Security Act (now repealed) to be matters of general public importance – Constitution of Kenya, 2010 article 163(4) (b); Supreme Court Rules, 2012, rule 24(1).



## **Brief facts**

The applicant filed the instant application seeking for review of the decision of the Court of Appeal dismissing the applicant's notice of motion which sought certification from the Court of Appeal to appeal to the Supreme Court on the ground that the intended appeal would raise matters of general public importance. The applicant sought for the review of that decision and certification to appeal to the Supreme Court.

## **Issues**

What were the prerequisites for a matter to be certified as one of general public importance?

## **Held**

1. An applicant seeking certification had to satisfy the Court that the issue to be canvassed on appeal was one that the determination transcended the circumstances of the particular case. If it was a point of law, he had to demonstrate that such point was a substantial one, the determination of which ought to have a significant bearing on the public interest.
2. The issues of whether a *habeas corpus* application barred proceedings for enforcement of fundamental rights and freedoms and a court order in a *habeas corpus* application could determine the legality of a detention under the provisions the Preservation of Public Security Act (repealed) to be matters of general public importance transcended the circumstances of the instant case.

*Application allowed.*

## **Orders**

- i. *Court of Appeal's decision of November 7, 2014 reviewed.*
- ii. *Applicant granted leave to file his appeal under article 163(4)(b) of the Constitution.*
- iii. *The costs of the Application to abide the outcome of the intended appeal.*

## **Citations**

### **Statutes**

None referred to

### **Advocates**

*Messrs Mwangi & Guandaru Advocates*

## **RULING**

### **Background**

- (1) On 22<sup>nd</sup> May 1982, the applicant was arrested by police and upon failure to trace him for three days, his wife filed an application in the High Court for an order of Habeas Corpus under Section 389 of the Criminal Procedure Code. Chesoni J (as he then was) issued a summons to the Director of the Criminal Investigations Department to appear before court and show cause why the applicant could not be released forthwith. On the date set for the hearing of the application, that is on 28<sup>th</sup> May 1982, the High Court was served with a detention order of even date placing the applicant under preventive detention. In those circumstances, the High Court dismissed the Habeas Corpus application holding that the police had discharged their burden of showing cause why the applicant could not be released immediately as he had been detained.
- (2) On 23<sup>rd</sup> October 2009, the applicant invoked the provisions of Section 84 of the repealed Constitution and filed a petition in the High Court (Petition No. 625 of 2009) against the 1<sup>st</sup> respondent in which he alleged that, in abuse of his powers as President of the Republic of Kenya, the 1<sup>st</sup> respondent had caused the applicant to be placed under detention without trial "for the purpose of illegally and unconstitutionally depriving the ... [applicant] of his property rights." The applicant further claimed



in that petition that during his detention and thereafter, the 1<sup>st</sup> respondent disposed of and ravaged the applicant's interest in various properties he had jointly owned with the 1<sup>st</sup> respondent and others. He therefore sought, inter alia, a declaration that his fundamental right to freedom under Section 72 and to property under Section 75 of the repealed Constitutions had been violated; and an order for compensation for the properties the 1<sup>st</sup> respondent had allegedly deprived him of. The 2<sup>nd</sup> respondent as the registered owner of one of those properties was later joined in that petition.

- (3) After hearing the case, Gacheche, J. (as she then was) granted the applicant the declarations that the 1<sup>st</sup> respondent had, in abuse of his powers, caused the applicant's detention to deprive him and did deprive him of his property. Consequent upon those declarations, she awarded the applicant Kshs. 50 million as punitive damages for unlawful detention and Kshs. 80 million (odd) as the value of his interest in the properties the 1<sup>st</sup> respondent illegally disposed of plus compound interest on both sums.
- (4) On appeal by the respondents, the Court of Appeal (Civil Appeal No. 240 of 2011), reversing the High Court decision, held that with no appeal from Chesoni, J's decision that the applicant's detention was lawful under the then existing law, the matter was res judicata and the trial judge had no basis for awarding damages on that detention. As regards the award of damages for alleged lost property, the Court of Appeal held that the same had not been proved to the required standard. Consequently, the Court of Appeal set aside both awards and the entire judgment with costs to the respondents.

### **Application**

- (5) Aggrieved by that decision, the applicant sought certification from the Court of Appeal under Article 163(4)(b) and Rule 24(1) of the Supreme Court Rules, 2012 to appeal to this Court on the ground that the intended appeal would raise matters of general public importance. In its ruling of 7<sup>th</sup> November 2014, in Civil Application No. 10 of 2014, the Court of Appeal at Nairobi (Nambuye; Gatembu and M'Inoti, JJA), dismissed that application. This application seeks a review of that ruling and certification to appeal to this Court against the Appellate Court's decision of 9<sup>th</sup> May 2014 dismissing the applicant's appeal.
- (6) As this Court stated in the case of *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione*, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR, a decision it had also made in *Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others* [2012] eKLR (Supreme Court Petition No. 2 of 2012) and reiterated in many other subsequent decisions, an applicant seeking such certification "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...." If it is a point of law, he "must demonstrate that such point is a substantial one, the determination of which will have a significant bearing on the public interest." The question is whether or not this threshold has been satisfied in this case.
- (7) In their written submissions, Messrs Mwangi & Guandaru Advocates, counsel for the Applicant argued that the rights of a person detained under the former Constitution and the legality of such detention are matters of general public importance.
- (8) In response counsel for the respondents argued in their written submissions that the intended appeal is premised on matters of narrow commercial and private interests of the Applicant which have no significant bearing on public interest. On the issues of the law on res judicata, habeas corpus and burden of proof that the applicant intends to raise, counsel argued that these are ordinary principles of law that have previously arisen and have been settled by the Court of Appeal and the High Court in many cases and need no further input from this Court. They concluded that this application does not therefore meet the criteria of a matter of general public importance and in the circumstances, this Court has no jurisdiction to entertain the matter.



- (9) Upon consideration of these rival submissions, we find that the issues of
- (i) whether or not a habeas corpus application bars proceedings for enforcement of fundamental rights and freedoms; and
  - (ii) a court order in a habeas corpus application could determine the legality of a detention under the provisions the Preservation of Public Security Act (now repealed) to be matters of general public importance, which transcend the circumstances of this particular case.
10. Consequently, we review the Court of Appeal’s decision of 7<sup>th</sup> November 2014 and grant the applicant leave to file his appeal under Article 163(4)(b) of the Constitution. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER, 2018**

.....

**D. K. MARAGA P. M. MWILU**  
**CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VP**  
**SUPREME COURT OF KENYA SUPREME COURT OF KENYA**

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**J. B. OJWANG S. C. WANJALA**  
**JUSTICE OF THE SUPREME JUSTICE OF THE SUPREME**  
**COURT COURT**

.....

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

I certify that this is a true copy of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**

