Kiragu v Mugambi & 2 others (Civil Application 10 of 2019)
[2020] KESC 77 (KLR) (7 February 2020) (Ruling)

Ananias N Kiragu v Eric Mugambi & 2 others [2020] eKLR

Neutral citation: [2020] KESC 77 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 10 OF 2019

DK MARAGA, CJ, PM MWILU, DCJ & VP, MK IBRAHIM & SC WANJALA, SCJJ

FEBRUARY 7, 2020

BETWEEN

ANANIAS N. KIRAGU ..... APPLICANT

AND

ERIC MUGAMBI ..... 1ST RESPONDENT

FRANKLIN MWIRIGI ..... 2ND RESPONDENT

MARTIN NJERU ..... 3RD RESPONDENT

(Being an application for Review of the Order of the Court of Appeal sitting at Mombasa (Visram, Karanja & Koome JJA) dated 14th March 2019 in Civil Appeal (Application) 59/2016 refusing certification and grant of leave to appeal against that Court's order dated 7th December 2017)

RULING

1. Before the Court is an Originating Motion brought under the provisions of Article 163 (4)(b) and (5) of *the Constitution* of Kenya, 2010 and Sections 15(1) and 16(2) of the *Supreme Court Act*, 2011. It seeks a review of the Court of Appeal's decision of 14th March, 2019 denying the applicant certification to appeal to this Court under the rubric of matter of general public importance (GPI).

2. The dispute giving rise to this matter pits a father (the applicant) against his sons (the respondents) on the occupation and ownership of a piece of land situate at La Marina area in Mtwapa Township and known as subdivision No. 655 (Original No. 539/39) Section III MN (the suit land). In Malindi ELC Case No. 101 of 2015, the applicant, who claims ownership of the suit land, sought a perpetual injunction to restrain the respondents from continuing to trespass on it and vacant possession.

Contemporaneous with the filing of that suit, the applicant applied for an interlocutory injunction to restrain the respondents from interfering with his access or entry on to the suit property.

3. In response to both the suit and that application, the respondents claimed they have occupied the suit land since childhood. They also filed a counter application for injunction to restrain the applicant from alienating or otherwise interfering with their quiet possession of the suit land. Angote J. heard the two applications together. In his ruling of 1st April 2016, the learned Judge dismissed the applicant's application and allowed the one by the respondents hence maintaining the prevailing status quo on the suit land.

4. When the applicant's appeal against that ruling came up for hearing on 23rd November 2016, by consent of the parties, the Court of Appeal referred the matter to an alternative dispute resolution forum – the National Supreme Council of Njuri Ncheke Ya Ameru Elders (Njuri Ncheke). In its award dated 21st February 2017, the Njuri Ncheke decreed the suit land to the applicant and directed each of the respondents to give a he goat to their father (applicant) as compensation for exposing him to court ridicule contrary to the Ameru customs. The respondents contested that award contending that it was biased and did not address pertinent issues they had raised. Acceding to that plea, the Court of Appeal held that as the arbitration was not sanctioned by the court but was at the initiative of the parties with no consent to be bound by the resultant award, the court could not impose it on either party. Moreover, the Court of Appeal further held that, it is the High Court which has jurisdiction to determine challenges to arbitral awards.

5. Aggrieved by that decision, the applicant sought the Court of Appeal's certification to appeal to this Court but the Court of Appeal dismissed that application thus provoking the one now before us.

6. This application is based on the applicant's contention that by submitting to the ADR process, the parties should be taken to have consented to be bound by the resultant award. In the circumstances, the Court of Appeal's said decision declining to enforce an award on the ground that the arbitration was not sanctioned by the court and was not based on a written consent transcends the dispute between the parties and is therefore a matter of general public importance as it impacts on the proper implementation of Article 159(2)(c) & (3) of *the Constitution*.

7. In opposing the application, the respondents urge that the issues raised do not meet the criteria for certification that this is a matter of general public importance. The respondents further argue that in any event the original matter before the ELC as well as the appeal before the Court of Appeal are still pending determination and the Applicant has not demonstrated any willingness to pursue those matters to their logical conclusion.

8. As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the Superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that had been canvassed right through from the High Court to the Court of Appeal even though the substantive matter is still pending before the High Court—Teachers Service Commission v Kenya National Union of Teachers & 3 others [2015] eKLR. See also Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2018] eKLR.

9. In this case, the issue canvassed before the High Court was an application for an interlocutory injunction. The Court of Appeal did not determine the issue of injunction. As stated, the parties, on their own initiative, referred it to ADR and when the Court of Appeal declined to adopt the ADR award, the applicant sought certification to appeal to this Court against that refusal. So there is no substantive determination by the Court of Appeal or even the High Court of a constitutional question. Moreover, the Court of Appeal's refusal to adopt an ADR award by Njuri Ncheke is a private

matter between the parties and does not satisfy the criteria of a matter of general public importance as enunciated in the cases of Malcolm Bel v Daniel Toroitich Arap Moi & Anor [2013] eKLR and Hermanus Phillipus Steyn v Giovanni Ruscone [2013] eKLR. In the circumstances, we dismiss the application with costs.

10. Flowing from the above determination, we make the following orders

(a) The applicant's Originating Motion dated March 26, 2019 is hereby dismissed.

(b) The respondents shall have the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2020.

D. K. MARAGA P. M. MWILU

CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE

OF THE SUPREME COURT PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM S. C. WANJALA

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

SUPREME COURT OF KENYA