THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN

AT KAMPALA

CIVIL APPLICATION NO. 125 OF 2009

CHARLES LWANGA MASENGERE……APPLICANT

VERSUS

1. **GOD KABAGAMBE**
2. **SAM KASAMUNYIGE**
3. **SIRAJ KANAMUGIRE ……**

RESPONDENTS

CORAM:

HON. MR. JUSTICE RUBBY AWERI OPIO, JA
HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

RULING OF THE COURT

This is an application by notice of motion brought under Section 6(2) of the Judicature Act and Rule 40(2), 41, 42(2) and 43(1) of the Rules of this Court

The applicant seeks the following orders.

(a) A Certificate be granted to the applicant to appeal to the Supreme court.

(b) Costs of the application be provided for

The grounds of the application as set out in the motion are that:-

(1) The applicant has filed a notice of appeal against the decision of the Court of Appeal.

(2) Questions of law of great public importance and or general importance arise in the appeal.

(3) It is just and proper that the Supreme Court should hear the appeal.

The motion is supported by the affidavit of the applicant.

The relevant paragraphs of that affidavit are 4, 5 and 6 which are set out as follows:-

4. That I have been advised by my lawyers M/s. SSEGUYA & CO.ADVOCATES that the intended appeal involves inter alia the determination of the following questions of law, namely;

a. "What extent of land can be occupied under customary tenure or whether there is a limit as to the size of land that can be occupied under customary tenure.

b. Whether a lease offer is a system of land ownership,

c. What happens to the interest of a customary tenant who does not accept a lease offer, or where the offer is a nullity in law.

d. Whether a party to an appeal can rely on new facts that arose after the judgment/decision being appealed against.

e. Whether or not failure to make correct findings and appreciation of facts by the Court of Appeal amounts to gross miscarriage of justice against which a third appeal may lie.

5. That I am further advised by the said lawyers that the determination of the said questions of law is of great public or general importance.

6. That also in the interest of Justice an appeal must lie against a mistake of fact by the Appellate Court (Court of Appeal)

that the respondents averred in their Written Statement of Defence that they held a Certificate of Title to the disputed land (copy of the WSD is attached hereto as annexture WSD).

Godfrey Kabagambe, the 1st respondent to this application filed an affidavit in reply contending that there is no merit in this application, as there is no question of law of great public importance that arises from the intended appeal for the Supreme Court to consider.

At the hearing of this appeal, **Mr. Denis Kwizera** learned counsel, appeared for the applicant. Neither the respondent nor his counsel were in court. There is evidence on record that they had been duly served. Court allowed the application to proceed in their absence.

Mr. Kwizera applied to adopt his conferencing notes as submissions which leave was granted. He, in addition addressed court orally.

The applicant case is set out in his conferencing notes as follows:-

"The Application arises because the Applicant being dissatisfied with the decision of their Lordships in Court of Appeal No. 58/2008 wherein his Appeal was dismissed with Costs, is desirous of making a third appeal to the Supreme Court.

This case originated in Mityana Chief Magistrates Court (Civil Suit No. 34/2001 (before Magistrate Grade I). The Applicant (then Plaintiff) sued the respondent (then the defendant) for trespass on his land. In his Plaint he described himself as "owner" and also alleged that his late father had a lease offer on the land the subject hereof. He got judgment in his favour, against which the respondent / defendant appealed, and won (High Court Nakawa Civil Appeal No. 27/ 04).

The Applicant then appealed to the Court of Appeal on the issues inter alia, that the Appellate High Court Judge failed to appreciate the nature of the Plaintiff's claim and cause of action; failure to evaluate the evidence on record, and as to whether he had any claim in the suit land.

Their Lordships on Appeal dismissed the Appeal finding that; the Applicant/Appellant's claim was based on a lease offer that was never accepted; if he were to be a customary tenant, he was at sufferance, and the land was available for leasing to the occupier or to anyone else. It was also held that his claim over 3,000 Acres of land was too big to be called a customary holding; Further that the respondents were granted only 200 hectares of land which left a balance."

The applicant then went on to contend in his written submissions as follows:-

"***That the appellate Court (Court of Appeal) did not at all properly evaluate the evidence, and as a result there was failure of Justice. That it is therefore just and proper that the Supreme Court should hear the Appeal.***

That this Court did not fully appreciate the respondent's case when it made a finding that the respondents had pleaded that they had a Certificate of Title, which was not correct. That the effect of this was to legitimize the respondents as owners of the land in dispute, without evidence to that effect, and that this occasioned a miscarriage of justice. That the Certificate of Title in possession of the Respondents was obtained under different proceedings and by Mubende District Land Board, not by the Uganda Land Commission, and that, that was not the basis of the Applicant's complaint in this original suit.

That there is no specific law to regulate the size of customary tenancy. That this court having determined so, raises a question of law that requires to be determined by the Supreme Court.

That a customary tenant who is deprived of land by a lease offer to someone else is entitled to notice and adequate compensation. That this issue makes it just and proper for the Supreme Court to hear the Appeal.

6. The Applicant shall contend that the 200 hectares curved off from his occupancy were the part he developed as homestead and physically occupied. The Respondent's acquisition of a lease offer thereto and or a Certificate of Title entitled him to challenge it as trespass."

In his oral submissions in court Mr. Kwizera contended that the main ground of this application is that there is a question of law which is of great public importance that the Supreme Court should determine on a third appeal. That question, he stated is as follows:-

"***Whether 3000 acres of land is too big to constitute a customary holding".***

We have listened carefully to the applicant's counsel. We have also read the court record including the Judgment of the High Court which was availed to us subsequently.

Section 6(2) of the **Judicature Act CAP 13** under which this application is brought stipulates as follows:-

6(2) "Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory

matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard." (Emphasis added)

It appears that this Court may only issue a Certificate under the above law in the following instances.

"(i) Where the intended appeal to the Supreme court concerns a matter of law of great Public importance.

(ii) Where the intended appeal raises a matter of law of general importance"

For this court to grant a Certificate sought by the applicant herein, it must be satisfied that the intended appeal to the Supreme Court concerns a matter of law. That, that matter of law must be either of great public importance or of general importance.

The law does not define the terms *'great importance* and or *general importance'* referred to in Section 6(2) of the Judicature Act. The authorities cited by counsel were unhelpful in this regard.

Guidance in this matter may be sought from a recent decision of the Supreme Court of Kenya in the case of ***Hermanus Phillippus Steyn vs Giovanni Gnecchi-Ruscone Application No. 4 of 2010(Supreme Court of Kenya)*** in which that Court whilst dealing with a similar matter stated as follows:-

13. "A matter of general public interest could take different forms for instance, an environmental

phenomenon involving the quality of air or water which may not affect all people, yet it affected an identifiable section of the population, a statement of law which may affect a considerable number of people in their commercial practice or in their enjoyment of fundamental or contractual rights or a holding on law which may affect the proper functioning of public institutions of governance or the Court's scope for dispensing redress or the mode of discharge of duty by public officers.

14. The governing principles that a matter before court merited certification as one of general public importance were:

i for a case to be certified as one involving a matter of general public importance, the intending appellant ought to have satisfied 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;

ii. where the matter in respect of which certification was sought raised a point of law, the intending appellant ought to have demonstrated that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the lower courts and must have been the subject of judicial determination;

iv. where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court could 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 in 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. The matter to be certified for a final appeal in the Supreme Court ought to fall within the terms of Article 163 (4)(b) of the Constitution;

vi. 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;

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

We would adopt the reasoning of that court. We would wish also to add that the onus is on the applicant to satisfy the Court that indeed the question intended to be determined on appeal is one of great public or general importance. No evidence whatsoever was adduced to prove this fact.

The question set out by the applicant referred to above appears to be a question of fact, which is not provided for under Section 6(2) above in respect of an application before this court.

As to what constitutes a customary tenure has been defined by the Supreme Court and this Court in a host of decisions. See: ***Kampala District Land Board and George Mutale Versus Venansio Babweyaka and others, Supreme Court (Civil Appeal No. 2 of 2001)*** and ***Mr. Isaaya Kalya and Other Vs Moses Macekenyu Ikagobya Court of Appeal (Civil Appeal No. 82 Of 2012)*** (Unreported).

Customary tenure is also defined in Section 1(1) of the Land Act.

What constitutes a customary tenancy must be proved as a fact.

We find that the question raised herein is not a question of law as required by Section 6(2) of the Judicature Act.

Be that as it may, we note that the court of appeal did not determine the matter, the subject of the intended appeal, on the basis of the question raised in this application. The question of customary tenancy or the occupation of 3000 acres of land does not form the *ratio decidendi* in the Judgment of this court which the applicant seeks to appeal from. It was not a subject of judicial determination in the lower courts.

This fact was conceded by Mr. Kwizera. The original suit was based on lease offer and not on issues related to customary tenure.

The other questions raised by the applicant in his submission cannot be a basis upon which court can exercise its power under Section 6(2) of the Judicature Act.

Unlike the Supreme Court the power of the Court of Appeal in an application of this nature are restricted.

In the case of ***Namudu Christine vs Uganda Criminal Appeal No. 3 of 1999 (Supreme Court)*** (Unreported). Wambuzi CJ noted as follows:-

> ***"Under subsection (5) of S.6, this Court will grant leave if the court, in its overall duty to see that just is done, considers that the appeal should be heard. In other words this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied:***
>
> ***(a) that the matter raises a question or questions of law of great public importance ;or***
>
> ***(b) that the matter raises a question or questions of law of general importance.***
>
> ***On the other hand, this Court will grant leave if it considers that in order to do justice the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.***
>
> ***It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have power to consider other matters."***

This Court therefore cannot consider other matters outside the ambit of Section 6(2) of the Judicature Act as counsel for applicant has requested.

We find that the applicant has not demonstrated to the satisfaction of the Court that the intended appeal raises a question or questions of law of great public importance or of general importance as defined by the law.

This application therefore must fail as it has no merit.

It is accordingly dismissed with costs.

Dated at **Kampala** this **16th** day of **February** 2015.

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HON. MR. JUSTICE RUBBY AWERI OPIO
JUSTICE OF APPEAL

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL