

appeal emanated from a decision of a Chief Magistrate's Court, any further appeal to the Supreme Court does not lie as of right, but only with leave of this Court.

The applicant has applied to this Court for leave on ground that the intended appeal against the decision of this Court in Civil Appeal No. 46 of 2016 would raise questions of law of great public importance and or general importance. These questions, which he sets out in his application, will be considered later. The applicant has also applied for stay of execution of the judgment in the relevant appeals until his intended appeal to the Supreme Court is disposed of.

The respondents oppose both applications. They state that the appeal to the applicant's intended Supreme Court would not raise any questions of law of great public importance and or general importance, and that as a result this Court ought not grant leave to bring the said appeal. With regards to the application for stay of execution, the respondents state that this Court has no jurisdiction to stay execution of the relevant judgment because there is no pending appeal against it in this Court or any other Court.

Representation

At the hearing, the applicant was represented by Mr. Najib Mujuzi, learned Counsel. Mr. Kidandaire Joel Israel, learned counsel holding brief for Mr. John Matovu and Mr. E. Kakenga, both learned counsel, represented the respondents. The Court gave the parties a schedule for filing written submissions, which was adhered to by the applicant. No submissions were filed for the respondents.

We have carefully studied the Court record comprising of the respective applications, the affidavits in support and those in opposition to the application. We have also considered the submissions of counsel for the applicant and the law and authorities cited, and others not cited but relevant to the decision.

We shall begin with the application for leave to appeal to the Supreme Court from a decision of this Court which emanated from a decision of a Chief



Magistrate's Court, as in the present case. Such applications are necessitated by **Section 6 (2)** of the **Judicature Act, Cap. 13**, which provides:

"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."

It must be stressed that in an application for leave to appeal, this Court will not be sitting on appeal from its own decision. However, it will be necessary for this Court to make reference to its decision so as to satisfy itself as to the questions which may arise on fair and proper reading of the said decision.

The decision of this Court in the present case is attached to the applicant's affidavit in support of the leave application. Musota, JA who wrote the lead judgment laid down the facts of the case which were briefly as follows. The applicant Mr. Paddy Musoke, and the respondents, Mr. John Agard, Andrea Doery and Ms. Eva Winfred Mayanja owned land in the same location. The respondents used to access their land using a road which went through part of the applicant's land ("the suit land"). In 2011, the applicant excavated on the part of the suit land where the relevant road passed, and resultantly, the respondents were unable to use the said road to access their land. The respondents sued the applicant claiming that they were entitled to use the relevant road on the suit land and that the applicant had unlawfully interfered with their right to use the suit land. The trial Chief Magistrate's Court made a finding of fact that the respondents were entitled to use the portion of the relevant land where the road passed and that by excavating on it, the applicant had unlawfully interfered with their right on the said land. The High Court on first appeal, and this Court on second appeal, each upheld the decision of the trial Court. This was the primary finding and one on which the decision of this Court in Civil Appeal No. 46 of 2016, turned.

There was also a secondary finding relating to an issue concerning whether the trial Court wrongfully expunged from the record, part of the evidence for

the applicant at the trial. This evidence, given by Mr. Sam Kiwanuka, whom the applicant granted powers of attorney for purposes of the suit was expunged on grounds that the applicant could not lawfully appoint an attorney in the suit.

In our view, however, there was sufficient evidence to support the findings of fact, even had Mr. Kiwanuka's evidence been considered.

From the two findings referred to above, the applicant, claims that there arises the following questions of law of general or public importance, set out at paragraph 7 of his affidavit in support of the application:

- "(a) Whether a person whose lease has expired automatically loses his proprietary interest in the land even when the lease is subject to extension.**
- (b) Whether a witness of a defendant/plaintiff whose lease has expired requires a power of attorney to act as such.**
- (c) Whether a failure to make correct findings and appreciations of facts by the court of appeal amounts to gross miscarriage of justice against which a third appeal may lie.**
- (d) Whether the expunging of evidence of a defendant based on a technicality necessitated the trial Court to require the defendants to regularize the power of attorney and or appear in person before proceeding ex parte without his evidence being considered.**
- (e) Whether a person can grant a lawful and binding power of attorney before becoming a registered proprietor or pending regularization and or extension of his lease.**
- (f) Whether Section 146 (1) of the Registration of Titles Act, Cap. 230 can be selectively applied to expunge evidence or make a determination of lack of locus standi to defend a suit in isolation of Section 164 (4) that permits dealing in land even before being registered.**
- (g) Whether the expunging of evidence based on a technicality and denial of reasonable opportunity to the applicant to rectify the alleged anomaly amounted to derogation from the right to fair trial and also a judgment that is contrary to Article 126 (2) (e) of the 1995 Constitution.**

- (h) **Whether the decision of the lower courts is contrary to a binding precedent of the Supreme Court in Habre International Trading Co. Ltd vs. Francis Butagira SCCA No. 3 of 1999 that is to the effect that when a lease expires and the lessee applies for its extension for all intents and purposes the lease continues to subsist pending regularization by the controlling authority."**

We must now survey the applicable principles. In applications like the present one, this Court will be considering whether the relevant questions are of the nature that may be said to be "questions of law of great public or general importance". Such questions must be "sufficiently general or public in application, as would need settlement or clarification by a higher appellate Court" See: *Namuddu Christine vs. Uganda Supreme Court Criminal Appeal No. 3 of 199 (unreported)* cited in the decision of this Court in **Butera David vs. Mutalemwa Godfrey [2019] UGCA 2069.**

In the Butera David case, this Court (per Cheborion, JA) cited with approval applicable principles articulated in the Kenya Supreme Court decision in **Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione [2013] eKLR.** In the latter case, the following principles were articulated:

- "(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;**
- (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."**

It must be stated that the above mentioned principles are only illustrative and not exhaustive. This Court will consider the unique circumstances of each case, and reach a judicious decision.

In the present case, the primary finding in the relevant judgment of this Court was that the lower Courts, which had reached concurrent findings of fact on the point, were right to hold that there was evidence supporting the respondents' case that the applicant had unlawfully interfered with their right to use a road going through the applicant's land, to access their respective homes. This road constituted an easement on the land, which the respondents were entitled to use, and that in interfering with their entitlement, the applicant had to be held liable for trespass. This was a finding of fact. The applicant, challenges this finding in question (c) in his affidavit where he claims that this Court made an incorrect finding of fact in a manner "amounting to gross miscarriage of justice against which a third appeal may lie." In our view, this claim must fail. Under Section 6 (2) of the Judicature Act, Cap. 13, only questions of law and not those of fact, may warrant certification for a third appeal to the Supreme Court. Moreover, on the authority of the **Hermanus Phillipus Steyn case (supra)**, "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". We form the view that the issues of fact in the present case have been sufficiently investigated in three Courts, and

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it would be improper to certify them to be raised in the Supreme Court. The applicant's misapprehension that there was a miscarriage of justice in this Court's findings of fact does not persuade us to certify question c to the Supreme Court.

With respect to questions a, b, d, e, f and h which the applicant claims to also raise questions of law of general or public importance, we note that the said questions relate to a secondary finding in the decision of this Court, which, even assuming it were resolved in favour of the applicant, would not, in our view, change the said decision.

However, the applicant is of the view that, if answered in the affirmative, the relevant questions could change the relevant decision. Counsel for the applicant submitted that in expunging the evidence of the applicant's witness Sam Kiwanuka from the record, on erroneous grounds of illegality, the trial Court proceeded to only consider the respondents' evidence in reaching its decision, which was a legal error. In counsel's view, the relevant questions all relate to the said legal error.

We reject the applicant's claims on this point. We observe that Musota, JA who wrote the lead judgment, made reference to the evidence of the case as found by the trial Court. He stated that the evidence for the respondents as to use of the road in issue on the suit land was confirmed by the evidence of the area L.C.1 Chairman (PW1), the evidence given by the respondents themselves, the evidence of a neighbour (PW4), and the trial Court's observation at the locus in quo. On the other hand, the applicant's evidence was a mere denial that the respondents were not entitled to utilize the road in issue. It was in view of that evidence that this Court upheld the findings of fact of the lower Courts. This means that retaining the evidence of Sam Kiwanuka on record, would have made no difference to the decisions in the present case.

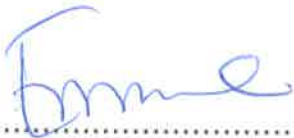
Questions a, b, d, e, f, g and h even if answered in the affirmative would not lead to reversal of the decision of this Court. If this Court were to certify the said questions for the Supreme Court's decision, it would be asking the Supreme Court to consider academic questions. For those reasons, we would

find that questions a, b, d, e, f, g, and h are not worthy to be certified for the Supreme Court's consideration in the present case.

Accordingly, we hereby dismiss Civil Application No. 0341 of 2020 for leave to appeal to the Supreme Court with costs to the respondents. Civil Application No. 0359 of 2020, seeking to stay execution of this Court's decision is also dismissed with costs to the respondents, given that no appeal lies from the decision of this Court whose execution, the said application seeks to stay. The order of this Court in Civil Application No. 0360 of 2020, staying the status quo with regards to execution of the decision of this Court in Consolidated Civil Appeals No. 46 of 2016 and No. 134 of 2017 shall also immediately lapse on delivery of this Ruling.

We so order.

Dated at Kampala this 22nd day of July 2021.



Elizabeth Musoke

Justice of Appeal



Stephen Musota

Justice of Appeal



Remmy Kasule

Ag. Justice of Appeal