

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Mwilu (DCJ & V.P), Ibrahim, Ojwang, Wanjala, Njoki, SCJJ)

APPLICATION NO. 21 OF 2017

BETWEEN

PAUL KHAKINA MUSUNGU.....APPLICANT

AND

JOSEPH CHEBAYI CHESOLI.....1ST RESPONDENT

PEPELA KHATIELI.....2ND RESPONDENT

(Application for review of the decision by the Court of Appeal given at Eldoret (Musinga, Gatembu & Murgor, JJA) dated 25th May, 2017 refusing to grant a certificate to file an appeal to the Supreme Court in Eldoret Civil Application No. 68 of 2016)

RULING

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 14th November, 2017 seeking a review of the decision of the Court of Appeal (*D.K Musinga & S. Gatembu Kairu JJA & A.K Murgor*) dated 25th May, 2017 which refused to certify the cause as a matter of general public importance The application seeks the following substantive orders:

- a. THAT this Honourable Court be pleased to review and/or set aside the Court of Appeal Ruling in Eldoret Civil Application Number 68 of 2016;***
- b. THAT this Honourable Court be pleased to grant leave to the Applicant to lodge an appeal against the judgment of the Court of***

Appeal given on 29th July, 2016 in respect of Eldoret Civil Appeal No. 58 of 2013;

- c. THAT a certificate does issue on the basis that a matter of general public importance is involved and a substantial miscarriage of justice shall occur to the Applicant unless the intended appeal to this Honourable Court against the judgment of the Court of Appeal dated 29th July, 2016 in Eldoret Civil Appeal Number 58 of 2013 is heard;***
- d. THAT a stay of execution of the Bill of Costs of the Court of Appeal be extended until this matter is determined by this Honourable Court;***
- e. THAT status quo of the High Court judgment where it is the Applicant to remain in the suit land is maintained until this Honourable Court determines this matter;***
- f. THAT an inhibition Order is put on the Title Ndivisi/Ndivisi/64 to avoid any transaction on this title until this Honourable Court determines this matter;***
- g. THAT the Director of Public prosecution investigates the fraudulent acquisition of the Title Ndivisi/Ndivisi/64 to the 1st Respondent herein and reports back to this Honourable Court;***
- h. THAT the Land Registrar avails to this Honourable Court all documents used to issue title No. Ndivisi/Ndivisi/64 to the 1st Respondent herein; and***
- i. THAT the costs of this application be in the cause.***

[2] The application is premised upon forty (40) grounds in the body of the application and the supporting affidavit of Paul Khakina Musungu sworn on 14th November, 2017. In opposing the application, the 1st Respondent filed grounds of opposition, a replying affidavit and written submissions dated 11th January, 2018.

B. BACKGROUND

i. Proceedings at the High Court

[3] The Applicant herein filed a suit *HCCC No. 102 of 1994* at the High Court in Bungoma which was later consolidated with the 1st Respondent's *HCCC no. 12 of 1998* filed at the High Court in Kitale whereby the following orders were sought:

- a. A declaration that he had been, since 1979, in open continuous and uninterrupted possession of parcel no. NDIVISI/NDIVISI/64 (the suit land).*
- b. A declaration that the purported registration of the 2nd Respondent as proprietor of the said parcel was fraudulent hence the same be cancelled.*
- c. The Applicant be registered as the proprietor by adverse possession.*
- d. The costs be borne by the 2nd Respondent.*

The Respondent's counter-claim sought the following orders:

- a. A declaration that the suit property was legally in the 1st Respondent's name.*
- b. Eviction of the Applicant from the suit land.*
- c. Permanent injunction, and*
- d. Costs of the suit.*

[4] The High Court (*Muchelule J*) in its Judgment delivered on *20th December, 2012*, allowed the Applicant's claim to the suit land under the doctrine of adverse possession and cancelled the 1st Respondent's title to the suit land. The Court found that when, *on 20th September, 1994*, the 2nd Respondent purported to transfer the suit land to the 1st Respondent, he had no legal claim to the same as his title to it had been extinguished. The Court also found that the title the 2nd Respondent held was in trust for the Applicant and was incapable of being transferred.

ii. Proceedings at the Court of Appeal

[5] The 2nd Respondent being aggrieved by the High Court's judgment, filed before the Court of Appeal *Civil Appeal No. 58 of 2013* appealing against the whole decision of

the High Court on the ground that the trial Court: failed to determine whether the 2nd Respondent (*now deceased*) who allegedly sold the land to the Applicant died prior to the 4th January, 1980(*the date of the sale agreement*); failed to carefully analyze the evidence adduced; misconstrued the Respondent's claim regarding adverse possession; and erred in finding that the 1st Respondent's Registration to the suit land was irregular and fraudulent.

[6] The Court of Appeal (*Maraga, JA* (as he then was), *Musinga & Gatembu, JJA*) in its Judgment delivered on *29th July, 2016* allowed the Appeal, set aside the judgment of the trial Court and substituted the High Court's judgment with an order dismissing the Applicant's suit in the High Court and reverted the suit land to the 1st Respondent together with the costs of the High Court and Court of Appeal.

Application for certification before the Court of Appeal

[7] Subsequently, the Applicant filed an application by way of a Notice of Motion dated *23rd August 2016* seeking certification pursuant to Article 163(4)(b) of the Constitution.

[8] The Court of Appeal (*Musinga, Gatembu & Murgor. JJA*) on *20th May, 2017* dismissed the application on the grounds that there was no matter of general public importance warranting further appeal to the Supreme Court. Further, that the Supreme Court has previously pronounced itself that the issue of adverse possession falls outside the profile of "general public importance in the Case of ***Malcom Bell vs. Daniel Toroitich Arap Moi and another [2013] eKLR.***

iii. Proceedings at the Supreme Court

PARTIES SUBMISSIONS

a. The Applicant's case

[9] The Applicant filed written submissions dated 18th December, 2017 urging that it is in the interest of the general public to know who can refuse to give consent and when it is deemed to have been denied under Section 9 of the Land Control Board Act. The

Applicant Submits that the decision of the Court of Appeal based on consent was contrary to the decision made by the same Court in ***Public Trustee v Wandaru*** [1984] KLR 314 and that therefore, the contradictory precedent has caused uncertainty in the law that requires settlement and clarification by this Court.

[10] While citing the Case of ***Wambugu vs. Njuguna Civil Appeal No. 10 of 1982***, the Applicant submits that this Court needs to determine how to account for five years since 1980 up to 1985 when the Applicant was in occupancy of the land as it pertains to adverse possession. He adds that it is in the interest of the public to know how a civil matter that also contains criminal matters is determined and the different ways of determining the 12 years period element in the doctrine of adverse possession.

[11] Further, the Applicant submitted that the Court of Appeal has caused insecurity, which is a matter of general public importance by reverting land without eviction proceedings to the 1st Respondent hence, the public needs to know how the same person can have two identifications and how a dead person could come from the grave to give a title as a gift. The Applicant cited several cases in support of his application including ***the Malcom Bell Case, Public trustee vs. Wanduru Civil Appeal No. 73 of 1982***, and ***Murai vs. Wainaina (No. 4) Civil Application No. NA19 of 1978***.

b. 1st Respondent

[12] In opposing the application, the 1st Respondent submits that the application does not disclose any matter that is of great public nature or importance. That the issues raised were effectively and conclusively dealt with at the Court of Appeal. In urging this Court to dismiss the application, the 1st Respondent cited the cases of ***Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone, SC Application No 4 of 2012 (Hermanus Steyn Case)*** and ***the Malcom Bell Case***. The 1st Respondent urges this Court to dismiss the application with costs.

C. ISSUES FOR DETERMINATION

[13] The application raises one issue for determination by this Court, namely, *whether this matter is of general public importance warranting further consideration by this Court.*

D. ANALYSIS

[14] Appeals from the Court of Appeal to this Court lie upon certification, on the basis that a matter is one of general public importance as per Article 163(4)(b) of the Constitution.

[15] Further, Section 16 of the Supreme Court Act, permits the Supreme Court to grant leave to appeal to the Court, where the appeal involves “a matter of general public importance”. Section 16 provides thus:

“(2) It shall be in the interest of justice for the Supreme Court to hear and determine a proposed appeal if –

a. the appeal involves a matter of general public importance”

[16] Additionally, Rule 24 of the Supreme Court Rules, 2012 provides as follows:

“(1) An application for certification shall first be made in the court or tribunal it is desired to appeal from.

“(2) Where the Court of Appeal has certified a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days.

“(3) The Court shall in granting the certification review matters that have been certified to be of general public importance.”

[17] This Court has set the test applicable in determining whether a matter is of general public importance in the *Hermanus Steyn Case*. The Court outlined the governing principles as follows:

- 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 [other] superior courts, is 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, 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.”*

[18] We have considered the Notice of Motion, alongside the submissions made before this Court, the Replying affidavit and grounds of opposition by the 1st Respondent, and the governing law on such a matter, the principles set down by this Court in ***Hermanus Steyn Case***, and concluded that the proposed appeal is not one fit for admission before this Court. We have already decided in the ***Malcom Bell Case*** that questions of adverse possession fall outside this Court’s Appellate jurisdiction. We therefore see no basis at all for admitting the appeal for further consideration and are persuaded to agree with the Court of Appeal’s ruling of 25th May, 2017.

[19] The effect of the above is that we are inclined to disallow the application dated 14th November, 2017.

E. ORDERS

[20] Consequently, we make the following Orders;

i. The applicant’s Notice of Motion dated 14th November, 2017 be and is hereby dismissed.

ii. The Applicant shall bear the costs of the 1st Respondent.

[21] Orders accordingly.

DATED and DELIVERED at NAIROBI this 25th day of October, 2019.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT
OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C WANJALA
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