REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ &VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. 16 (E026) OF 2021

BETWEEN

THOMAS MUKA MAULO..... 1ST APPLICANT

WALTER WASHINGTON BARASA NYONGESA .....2ND APPLICANT

AND

ROBERT OUMA ODUORI.....RESPONDENT

(An application to review the decision by the Court of Appeal given at Nairobi (Kiage, M'Inoti & Ngugi JJA) dated 3rd December 2021 declining to grant certificate of leave to file appeal to the Supreme Court in Kisumu Civil Application No.25 of 2021)

RULING OF THE COURT

[1] UPON perusing the Originating Motion application by the applicants dated 16th December 2021 and filed on 20th December 2021 pursuant to Articles 40, 159(2)(d), & 163(4)(b) of the Constitution, section 15 and 16 of the Supreme Court Act, Rules 32 and 33 of the Supreme Court Rules, 2020 and all other enabling provisions of the law, sections 3, 3A and 3B of the Appellate Jurisdiction Act seeking the following orders:

i) *THAT this Honourable Court be pleased to review the Court of Appeal's decision declining to grant certification of leave to appeal against its judgment delivered on 19th February 2021 (Karanja, Okwengu &*

Sichale, JJ.A) in Kisumu Civil Appeal 76 of 2016 and certify the application for leave.

ii) *THAT the Applicants be granted leave to file this application excluding the certified copies of the judgment and ruling of the Court of Appeal in the first instance.*

iii) *THAT the Applicant's Notice of Appeal lodged on 23rd February 2021 be deemed as having been duly filed.*

iv) *THAT there be stay of execution of the judgment dated 19th February 2021 in Kisumu Civil Appeal No.76 of 2016 and decree therein pending hearing and determination of this application and the intended appeal.*

v) *THAT the Court be at liberty to make any order in the interest of justice.*

vi) *THAT the costs of and incidental to this application abide the result of the intended appeal.*

[2] UPON perusing the grounds on the face of the application that substantial loss may result to the applicants and that the application and intended appeal rendered nugatory unless a stay of execution is granted; that the respondent, Robert Ouma Oduor, transferred the title to the parcel No.BUKHAYO/ MATAYOS/ 3116 to his name despite a pre-existing stay of execution pending appeal; that the respondent caused an unlawful sale by auction in respect of the applicants' moveable property despite a pre-existing stay of execution pending the Kisumu Court of Appeal Civil Appeal No.76 of 2016; that the matters raised by the applicants are of utmost general public importance as it involves land property rights and questions of law regarding the thresholds of adverse possession.

[3] UPON considering the affidavit in support by the 2nd applicant on his own behalf and on behalf of the 1st applicant, the applicants' filed submissions dated 20th December 2021, further affidavit dated and filed on 17th January 2022 in response to the respondent's grounds of opposition and further submissions dated 23rd January 2022 and filed on 25th January 2022, we note that it is the

applicants' case that the following issues of alleged general public importance arise as specifically set out in their pleadings:

a) *Whether there is a conflict in adverse possession principles.* Among the areas of conflict is whether the finding by the superior courts below contradicts the principle that "both an intruder and the registered owner cannot be in possession of title at the same time without the registered owner's consent" as the survey report on record shows the 1st applicant surveyed and subdivided the property in 1996 while the respondent was on the land; that it is in public interest as to whether an adverse title is transferable to consecutive succeeding titles; whether regard must be put on substance over form of occupation as brought out by this matter that the 1st applicant had control by surveying and subdividing while the respondent was a mere witness; and whether to conveyance a title is to enjoy ownership rights and the principle that "acknowledgement of the owner's title is not adverse possession" is manifested when the registered owner surveys and subdivides a parcel in the presence and witness of a prospective adverse possession claimant on the same land.
b) *Whether the intention to possess is determined by mere long period possession*. The applicants raise the question as to whether a minor has intention to possess and exclude the owner which is against the common law criteria that a minor does not have intention to possess on entry to an owner's land in an adverse possession claim. This stems from the evidence that the respondent entered the 1st applicant's land in 1970 as a 15 year old.
c) *Whether a manifest error by the superior courts by failing to appreciate evidence on record is not a matter involving cardinal issues of law*. The applicants contend that there was uncontested evidence at trial relating to 1st applicant's replying affidavit and defense statement, 1996 official survey report for parcel 943, respondent's testimony and the 2003 sale agreement for parcel 2431 showing the respondent as a witness in a sale

agreement which is an acknowledgment that he was a licencee; that the above evidence was unappreciated and raises cardinal issues of law in regard to evidence justifying a finding in any matter, and therefore this matter was not fully settled and whose determination is of interest to the public as to how to handle such issues; that the Court of Appeal failed to uphold the ideals of Article 40 of the Constitution and that the matter presents an actual controversy on the law of adverse possession where it is a regular occurrence for land owners in Kenya to accommodate a landless relative and therefore should know the guiding principles. The applicants rely on the case of ***Murai v Wainaina*** cited in ***Hermanus Phillipus Steyn v Giovanni Gnecchi – Ruscone*** SC Application No. 4 of 2012 [2013]eKLR on the public importance touching on subject of land rights that not only affect the parties to the appeal but a large number of original land owners.

d) Whether the judgment and decree sought to be appealed justifies the general public interest as to whether, within the meaning of Articles 25(c), 27(1), 48 and 50(1) of the Constitution, a litigant is entitled to; a fair trial; access to justice, equal protection and equal benefit of the law when the Court of Appeal fails to appreciate pleadings, evidence and testimonies on record that have a direct bearing on the matter as exemplified by the application.

[4] UPON CONSIDERING the Grounds of Opposition dated 27th December 2021 on 5th January 2022 that:

a) *The judgment and decree sought to be appealed against does not raise a matter of general public importance to warrant the intervention of this Court;*
b) *The judgment and decree sought to be appealed against has not occasioned substantial miscarriage of justice.*

c) *The application does not raise any point of law as the principle of adverse possession is applied on facts in issue;*
d) *The application is devoid of any merit and ought to be dismissed with costs.*

[5] UPON FURTHER CONSIDERING the respondent's submissions dated 27th December 2021 and filed on 5th January 2022 through his advocates in which the respondent only addresses the first two issues. On the first issue, the respondent submits that the decree by the High Court from which the appeal accrued affected only the rights of the applicant and not the general public as the title for the suit property is currently registered to the 2nd applicant. On the second issue, the respondent contends that the applicants were heard by both the Environment and Land Court and the Court of Appeal. Further, that the Court visited the suit land to establish that the respondent was in possession of the land. Accordingly, that there was no miscarriage of justice occasioned to the applicants and the application should be dismissed with costs.

[6] UPON TAKING INTO ACCOUNT the background of this matter that the dispute arose out of a parcel of land known as Bukhayo/ Matayos/3116, its title having been created after subdivision of parcel 2431 in the year 2003 into parcels 3115, 3116 (suit land) and 3117 (disposed of by the 1st appellant); that parcel 2431 was a subdivision of parcel 943 in 1996 into parcels 2431 and 2432 (disposed of by the 1st applicant); that the respondent sought a declaration of entitlement by adverse possession to the suit land which originally belonged to the 1st applicant who is also the 2nd applicant's father, who alleged that he entered the suit land in 1970 with permission from the 1st applicant and established his homestead and planted food crops: that he lived thereon with his 10 children and 13 grandchildren and when his mother died, she was buried on the suit property.

[7] UPON FURTHER TAKING INTO ACCOUNT that by a judgment made by the Environment and Land Court at Busia, the respondent succeeded with the court declaring the respondent as the lawful proprietor under the doctrine of adverse possession and that he ought to be registered as the sole proprietor of the same; that the applicants' appeal to the Court of Appeal and application for certification and leave to appeal to this Court were unsuccessful.

[8] WE NOW OPINE as follows:

a) Before delving into the merits of the prayer for certification, the applicants have sought leave to file the application excluding the certified copies of the judgment and ruling of the Court of Appeal in the first instance. We do not think this application is necessary as there is no provision under the Act or the Rules of the Court that mandates the inclusion of such documents in an application such as that before the Court. Rule 40 provides for the contents of a record of appeal from the Court of Appeal under which the Court may on application of any party direct certain documents to be excluded from the record. As that is not the case of the applicants, we say no more on that issue.

b) On considering the impugned ruling by the Court of Appeal, it is apparent to us that the Court distilled eight primary questions that the applicant pointed out as raising questions of general public importance. These questions form the gist of the application and they all relate to the doctrine of adverse possession. The main grievance by the applicants is that the Court of Appeal in its judgment ignored crucial evidence and facts on record thereby arriving at a decision that will amount to conflicting principles of adverse possession

c) While the applicants urged the Court to look at the totality of administration of justice in the matter beyond the present litigants, their support of this clarion call leads us back to the appraisal of evidence

before the superior courts. The applicants have fallen short of making any arguments beyond the specific evidence to demonstrate how the questions framed as involving general public importance transcend the present litigation. Their argument is replete with how the superior courts ignored this or that evidence.

d) As the apex court, our jurisdiction under Article 163(4)(b) of the Constitution as presently sought goes beyond resolving factual contestations as between the parties. In any event, the principles of adverse possession are settled and the applicants have not demonstrated any inconsistency of findings by the Court of Appeal on this doctrine.

e) It is apparent that the applicants, having been the defendants at the first instance before the Environment and Land Court filed their pleadings, witness statements and evidence including calling witnesses. They were also allowed to cross examine the respondent and his witnesses and make submissions. In addition, the trial court visited the suit land before making its decision. Dissatisfied with the decision of the trial court, the applicants pursued their appeal without any constraints. We have looked at the matter with circumspection and are not convinced that there was any miscarriage of justice or violation of any constitutional provisions as alleged by the applicants or at all. The applicants are merely in disagreement with the ultimate court determination and that does not suffice to invoke our jurisdiction or amount to a miscarriage of justice.

[9] FROM THE FOREGOING, the applicants have failed to exhibit that they meet the threshold for certification of the intended appeal as raising a matter involving general public importance as enunciated in the ***Hermanus Phillipus Steyn case***. With the above finding, it is unnecessary for the Court to consider and determine the rest of the prayers sought in the application. As for costs, we see no need to sustain the dispute at this Court on the limited question of costs.

[10] In the end, we make the following orders:

i. ***The Originating Motion Application dated 16th December 2021 and filed on 20th December 2021 is found to be unmeritorious and is hereby disallowed.***
ii. ***There shall be no order as to costs.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of **May 2022**

..... **.....**

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

S.C. WANJALA
JUSTICE OF THE SUPREME COURT

..... **.....**

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR
SUPREME COURT OF KENYA