

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome: CJ & P, Mwilu: DCJ & VP, Wanjala, Njoki & Lenaola, SCJJ)

MOTION NO. 17 (E025) OF 2021

BETWEEN

GITAMAIYU TRADING CO. LTD..... APPLICANT

AND

NYAKINYUA MUGUMO KIAMBAA CO. LTD.....1ST RESPONDENT

WARIARA NJENGA.....2ND RESPONDENT

MUMBU GICHURU.....3RD RESPONDENT

ESTATE OF JAMES NJENGA KARUME.....4TH RESPONDENT

J.R. NJENGA.....5TH RESPONDENT

COMMISSIONER OF LANDS6TH RESPONDENT

THE ATTORNEY GENERAL..... 7TH RESPONDENT

ZEPHANIA MWANGI NYORO.....8TH RESPONDENT

JOHN NJOROGE MUGANA.....9TH RESPONDENT

PETER KIMANI NJUGUNA.....10TH RESPONDENT

HAROUN MUCHAI KAMAU.....11TH RESPONDENT

(An Application for review of the Court of Appeal ruling on application for certification and leave to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal dated 5/2/2019 and delivered on 8/2/2019 in Civil Application No.57 of 2019)

RULING OF THE COURT

[1] UPON perusing the Originating Motion application dated 16th December 2021 and filed on 20th December 2021 by the Applicant, pursuant to Article 163(4)(b) of the Constitution, sections 15, 16 and 17 of the Supreme Court Act, Rule 33 of the Supreme Court Rules, 2012 (sic) and any other enabling provisions of the law seeking to review the refusal by the Court of Appeal (*Karanja, Okwengu and Kantai*, JJA) to certify that the intended appeal raises matters of general public importance;

[2] UPON perusing the affidavit sworn on 16th December 2021 by Joseph Kamau Kiburu, a director of the applicant, in support of the motion and the grounds on the face of the application: that the intended appeal involves matters of general public importance and that a substantial miscarriage of justice may occur unless the intended appeal is heard;

[3] UPON considering the applicant's written submissions filed on 20th December 2021 in which, guided by the provisions of Article 163(4)(b) of the Constitution and the principles set out in *Hermanus Phillipus Steyn v Giovanni Gnechi – Ruscone* SC Application No. 4 of 2012 [2013]eKLR, the applicant avers that the intended appeal to this Court raises matters of general public importance and in particular on the following three issues:

- a) The upholding by the Court of Appeal that the suit premises was agricultural land in the absence of any evidence transcends the present litigants. That courts should not proceed on the assumption that all property within the general vicinity of Kiambu is agricultural land requiring Land Control Board consent to validate the agreement.
- b) Whether the owner of land can move the registrar to remove a caution without involving the person who procured the registration of the caution. In this case, the Court of Appeal held that simply because Fanros Limited applied for removal of caveat, and on the assumption that the applicant did

not have any enforceable right to the suit premises, its removal was proper in law.

- c) Having the backing of a “powerful politician” who managed to get a waiver on stamp duty and consent, can the Registrar of Lands register a deed of Transfer of Land and issue a title when the transfer deed is not executed by the Vendor? That by upholding the said transfer, the Court of Appeal has set a dangerous precedent that can be applied to bind all the courts below it to uphold registration or even compel Registrars of Lands to register deeds that are not executed by the vendor or land owner. That this transcends the litigants and has a direct bearing on future land transactions by the general public and future interpretation of section 3(3) of the Law of Contract Act.

[5] AND UPON TAKING INTO CONSIDERATION the directions issued by the Hon. Deputy Registrar of the Court on 28th December 2021, the applicant was to serve the respondents with the application and the written submissions upon which the respondents were to file their written submissions within seven days. The filing was to be done both electronically and by way of hard copies.

[6] UPON NOTING that no submissions had been filed by any of the respondents whether physically or electronically;

[7] WE HAVE considered the background of the case as stated by the applicant, which is a public limited company with more than 1,000 members and that it purchased 16 parcels of land comprised in LR No.89/4-9 and 11-20 measuring approximately 512 acres from M/s Fanros Limited in 1977, paid the purchase price and took possession of the suit premises. In 1979, the applicant was evicted by the provincial administration and embarked on a process to recover the said premises and obtain a transfer in its favour. It is during the intervening period that the 1st respondent, **Nyakinyua Mugumo Kiambaa Co. Ltd**, obtained a transfer to itself. That the applicant filed suit in the High Court being **HCCC No.4496 of 1994** seeking declarations that it was the legal owner of the property either as

purchaser or by adverse possession; that the transfer to the 1st respondent was null and void on account of fraud, injunction and general damages. The suit was dismissed by *Muchelule J*, in his judgment delivered on 13/2/2012. The applicant lodged an appeal being **Civil Appeal No.84 of 2013**. By a judgment delivered on 8/2/2019 (*Ouko(P), Makhandia & Musinga JJA*) the appeal was dismissed. The applicant's application seeking the grant of certification and leave to appeal to this Court was dismissed prompting the present application.

[8] In the above context, **WE OPINE** as follows:

- a) The learned Judges of Appeal thoroughly considered the judgment by the Court of Appeal in relation to the applicant's grievance against the decision by the High Court. The onus remains on the applicant to satisfy that the Court of Appeal did not adhere to the principles set out in ***Hermanus Phillipus Steyn case*** which both the applicant and the Court of Appeal rightly appreciated was applicable to the matter at hand.
- b) The Court of Appeal in its ruling addressed itself to the three issues raised by the applicant. On the first issue relating to the assumption on the land being agricultural land, we note that the appellate court, rightly so, noted that the issue is specific to the land in question and does not transcend beyond the specific litigants. Whether a given parcel of land is agricultural or not is in our view a matter of fact that can be addressed as and when the situation arises and cannot be addressed by the Supreme Court generally. The applicant has not placed any specific matter that calls for this Court's intervention beyond stating that the court may proceed on assumptions.
- c) On the second issue relating to the removal of the caveat, the Court of Appeal in its impugned ruling found that it is a mundane issue spelt out in the relevant laws. This finding resonates well with our position. The applicant had the option of challenging the removal of caveat as he did before the Court. The mere fact that the applicant disagrees with the decision of the

Court does not, in and of itself warrant the appeal to this Court in the proposed manner.

- d) As for the third issue relating to the role of a “powerful politician” in obtaining a waiver of consent of the Land Control Board and the indenture not being signed, the appellate court found that this was peculiar to the specific transaction at hand.
- e) Beyond the context of the three issues framed and addressed above, the applicant did not buttress the argument that there will be a miscarriage of justice. The applicant merely stated that it is a public limited company with more than 1,000 members. The number of members of the applicant, does not in and of itself satisfy the public interest threshold as public interest must be demonstrated in the effect of the decision beyond the applicant and the respondents. In ***Town Council of Awendo v Nelson Oduor Onyango & 13 others*** SC Misc. Application No.49 of 2014 [2015]eKLR we stated that:

“[32] A due consideration and determination of these issues traverses the interests of the respondents, and affects third persons, as well as the public at large. It has been demonstrated that the resolution of the questions of law raised in this case will have a significant bearing on the public interest. These questions of law arose in other superior Courts, and were the subject of those Courts’ determination and, as such, beckon the exercise of this Court’s final, appellate jurisdiction

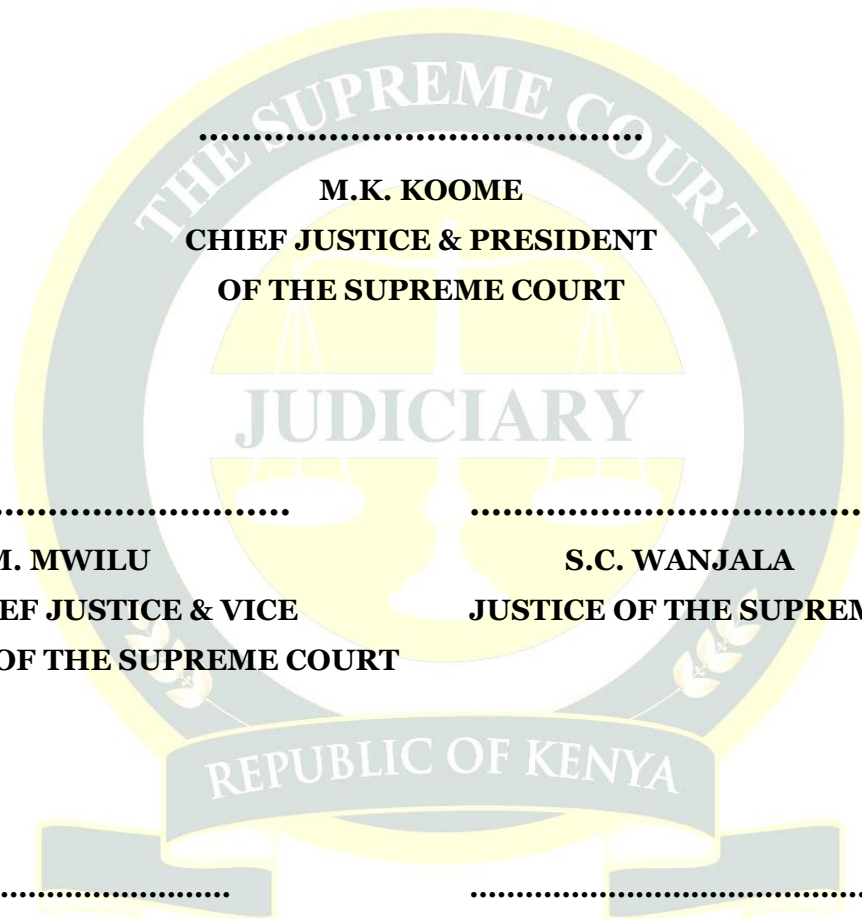
- f) There is no compelling reason to disturb the finding by the appellate court that the identified issues do not raise any novel issues that have not been determined before nor is there in existence conflicting decisions arising from similar situations which require this Court to address

[9] CONSEQUENTLY, having made the foregoing determinations, we make the following orders:

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

Orders accordingly.

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



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M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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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

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

REGISTRAR
SUPREME COURT OF KENYA