



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO. E010 OF 2023

-BETWEEN-

**CHRISTOPHER KIOI
& NANCY WAMBUI WAWERU** (Suing on
Behalf of the Estate of **MWANGI KIOI [DECEASED]**).....**APPLICANTS**

-AND-

WINNIE MUKOLWE & HOPE MUTUA
(Sued as Administrators of the Estate of **DAVID NYAMBU JONATHAN
KITURI [DECEASED]**).....**1ST RESPONDENTS**

**LUCY WANJIKU MUCHAI T/A
BELLAVIN INVESTMENTS**.....**2ND RESPONDENT**

*(Being an application for review of the Ruling and Orders of the Court of
Appeal in Civil Application No. 4 of 2018 given at Nairobi (Okwengu, J.
Mohammed & Kantai J.J.A) dated 17th February 2023 dismissing the
Application for grant of certification)*

Representation

Prof. Tom Ojienda & Associates for the Applicants
(Prof. Tom Ojienda & Associates)

Mr. Kiplangat for the 1st Respondents
(Oundo Muriuki & Co. Advocates)

Mr. Issa for the 2nd Respondent
(Kinyanjui Njuguna & Co. Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the applicants dated 3rd March, 2023 and filed on 12th March, 2023, anchored on Sections 15B, and 22 of the Supreme Court Act 2011 and Rules 3 (1), (2), (3), (4) & 5 and 33 of the Supreme Court Rules, 2020 seeking the following orders:

- (a) **THAT** a certificate do issue that the Applicants intended appeal raises a matter of general public importance, and that substantial miscarriage of justice may occur if an appeal is not lodged against the Judgment delivered by the Court of Appeal on 16th February 2018 in Civil Appeal No. 218 of 2017, **Christopher Kioi & Another v Winnie Mukolwe & 4Others [2018] eklr.**
- (b) **THAT** the Court be pleased to review and set aside the Court of Appeal Ruling in Civil Application No. (Sup) 4 of 2018 dated 17th February 2023 dismissing the Applicants Notice of Motion dated 27th February 2018;
- (c) **THAT** consequently, the Applicants be granted leave to appeal to the Supreme Court against the Judgment and Order of the Court of Appeal (Ouko, Gatembu & M'Inoti, JJ.A) delivered on 16th February 2018;
- (d) **THAT** the costs of the application be in the cause.

[2] UPON considering that the applicants instituted their claim in Nairobi ELC No. 544 of 2009 through an Originating Summons dated 23rd October 2009 where they sought orders under the doctrine of adverse possession in relation to property known as L.R. No. 10090/24 situated in Juja and measuring in area approximately 24.54 hectares. The High Court by a Judgment delivered on 27th January 2017 dismissed the applicants' action on the ground that it had failed to prove the claim of adverse possession. Subsequently, the applicants filed an appeal to the Court of Appeal, which after hearing, the learned Judges of Appeal upheld the

decision of the High Court and dismissed the appeal. The applicants aggrieved by the judgment of the Court of Appeal sought certification to appeal to this Court identifying the following as raising grave and substantive matters of law that are of public interest;

- (i) *The proper and sound meaning of the doctrine of adverse possession under Sections 7, 13, 17 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.*
- (ii) *The proper and sound interpretation of the parameters of the doctrine of adverse possession in relation to a purchaser of land where the purchase price under the sale agreement is paid in full but the sale is not completed.*
- (iii) *What constitutes adverse possession?*
- (iv) *Where a purchaser takes possession of a property pursuant to a sale agreement, when does the possession become adverse?*
- (v) *Does adverse possession amount to a right to the property under Article 40 of the Constitution of Kenya.*

[3] UPON considering the grounds on the face of the application and the supporting affidavit sworn on 3rd March 2023 by **Christopher Kioi**, one of the applicants herein, wherein it is contended that the Court of Appeal failed to appreciate the gravamen of the application; and that the main issue that is yet to receive a firm and jurisprudence-setting address by this Court is the interplay between the doctrine of adverse possession and entry into a property pursuant to a sale agreement that is not completed by no fault of the purchaser.

[4] The applicants further invite the Court to determine the following questions:

- (i) *Whether entry into land as a result of such contracts can be deemed adverse*
- (ii) *The correlation of such an agreement, entry and occupation of the land for the statutory minimum period and, the*

constitutional right to ownership of property enshrined in Article 40

- (iii) *Whether the manner of commencement of occupancy in adverse possession claims matter since the law in other jurisdiction such as the Philippines allows for any manner of commencement.*

[5] They urge that the matter is not trivial; and that it is of importance to a sufficiently large section of the public; the point of law transcends the facts of the individual case as there are numerous other cases that have had different outcomes and dealing with the same issue and has a significant bearing on the public interest; and,

[6] UPON perusing the applicants' written submissions dated 5th April, 2023 and filed on 12th April, 2023 wherein the applicants while appreciating this Court's holding in **Malcom Bell v Toroitich Arap Moi**, Sup. Ct. Appl. No. 1 of 2013 [2013] eKLR that, "*all questions pertaining to claims under adverse possession, fell squarely within the Court of Appeal's jurisdiction, and there would be no basis for invoking the Supreme Court's jurisdiction in that regard*" seeks to distinguish the decision by noting that the Court of Appeal had preferred conflicting jurisprudence on adverse possession; in **Wambugu v Njuguna** [1983];KLR 172; **Sisto Wambugu v Kamau Njuguna** [1982-88];1 KLR 217 and **Samuel Miki Waweru v Jane Njeri Richu** Civ Appeal No. 122 of 2001 [2007] eKLR where it was held that, where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession until the agreement is terminated. The Court of Appeal in the **Samuel Miki Waweru case** also held that, where the sale agreement, being the subject to the land Control Act, became void under section 6 (1) of the said Act for lack of consent of the Land Control Board, and, time starts running from the moment the transaction becomes void. In a contrasting decision, **Mbugua Njuguna v Elijah Mburu Wanyoike & Another** Civil Appeal No. 27 of 2002 [2004] eKLR, it was held that where the transaction for sale of land terminates by reason of

failure to acquire the consent of the Land Control Board, then for purposes of adverse possessory rights, time starts running on the day the claimant is put in possession of the land, and not on the last day when the application for the Board's consent ought to have been made.

[7] The applicants further submit that the present case raises novel issues that have not been determined in any previous decision of this Court and; it is a common problem experienced in Kenya among informal settlements and agricultural land. Furthermore, given that informal tenure is widespread, a determination of the question of commencement of adverse possession and the manner of occupancy will be of benefit that transcends the parties to this dispute and into the public realm; and.

[8] UPON perusing the 1st respondent's Replying Affidavit sworn by **Winnie Mukolwe** on 22nd March 2023 and filed on 29th March, 2023 contending *inter alia* that the genesis of the applicants' claim to their property before the superior court of the first instance in Nairobi ELC Suit No. 544 of 2009 was that they purchased the property from their late father and took possession in 1970; they thus claimed to have possession and title in the respondents name was extinguished by adverse possession. She pointed out that a site visit by the Deputy Registrar of the Environment and Land Court discounted the applicants' contention of notorious and uninterrupted possession for 12 years prior to commencement of the claim. Further, that the Superior Court of the first instance and the Court of appeal found that there was no evidence of sale or notorious occupation of the suit property as alleged.

[9] The 1st respondents on their part contend that, without faulting the two superior courts, this Court is being called upon to assume that there was a sale followed by occupation and to certify the matter for a second appeal to set the discourse on the interplay between an incomplete sale agreement and the doctrine of adverse possession. Further, that if the matter is admitted as proposed, the factual basis of the intended appeal will be completely different from the dispute before the Superior Courts; and even if this court

were to hold that there was a sale, then the doctrine of adverse possession would not come into play at all as it is settled law that possession pursuant to a purchase is not adverse; the issue of adverse possession took center stage and that this court has on numerous occasions affirmed that the doctrine of adverse possession is not a grey area that requires jurisprudential clarity.

[10] The 1st respondents further deponed that this court was emphatic in ***Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone***, SC Appl. No. 4 of 2012; [2013] eKLR that a contest of facts is not a basis to grant certification; the invocation of Article 40 of the Constitution has arisen in these proceedings, had it arisen in the Superior Courts then the appeal would lie as a matter of right under Article 163 (4) (a); the matter before the Court of appeal was a private dispute, the same did not transcend the private rights so as to have a bearing on the general public; and.

[11] UPON considering the 1st respondent's submissions dated 11th April, 2023 and filed on 13th April, 2023 reiterating the contents of the Replying Affidavit and further submitting that whereas this Court is not bound by its own decision by dint of Article 163 (7) of the Constitution, the applicants' have not suggested that the Court should depart from the ***Malcom Bell case*** and ***Paul Khakina Musungu v Joseph Chebayi Chesoli & another*** Sup. Ct. Appl No. 21 of 2017; [2018] eKLR decisions. Further that in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others*** Sup. Ct. Pet. No. 4 of 2012; [2013] eKLR this Court held that departure from past decisions should only be in exception circumstances where it is shown that the a past decision is made *per incuriam*; and the decision in the ***Malcom Bell case*** has not been shown to have been rendered *per incuriam* or to be informed by any error.

[12] On whether the case fits the test of certification as set out in the ***Hermanus Steyn case*** it is the 1st respondents' submission that the case has metamorphosed with a new angle introduced, that of the Land Control Board, which was not before the Superior Courts nor while the applicants were seeking certification. Similarly, there was neither controversy nor

construction of sections 7,13, 17 and 18 of the Limitation of Actions Act and their interplay with adverse possession.

[13] Additionally, the parameters of adverse possession in relations to a purchase in a Sale Agreement was not canvassed as the applicants abandoned their claim to the property pursuant to a purchase and focused on adverse possession. Likewise, the interplay between adverse possession and Article 40 of the Constitution was not canvassed; in any case the interplay between Article 40 and adverse possession is not a novel issue, the Court of Appeal having ruled in the case of **Mtana Lewa v Kahindi Ngala Mwachindi** Civil Appeal No. 56 of 2014; [2015] eKLR that whereas adverse possession is a limitation of the right to property, the manner of limitation passes the constitutional test of Articles 24 (1) of the Constitution as read with paragraph 7 of the Sixth Schedule. Lastly, that no error has been identified in the ruling of the Court of Appeal declining to certify the intended appeal for admission to this court; and

[14] UPON considering the 2nd respondent's replying affidavit sworn by **Lucy Wanjiku Muchai** on 6th April 2023 and filed on even date wherein she reiterated the submissions by the 1st respondents and further deponed that the invented issue of informal land sale agreement has been introduced for the first time in this application thus does not qualify consideration by this Court; and

[15] UPON also considering the 2nd respondents submissions dated 6th April, 2023 and filed on 11th April, 2023 urging the Court not to consider new issues raised by the applicants and which were not canvassed by the Superior Courts as urged by this Court in **Thika Coffee Mills v Rwama Farmers Co-operative Society Limited**, Sup. Appl. No. 11 of 2020, [2020] eKLR; she highlighted that that merely because the two previous Courts have found the applicants case as lacking merit does not translate their case to one raising a matter of general public importance citing this court's decision in **William Olotch v Pan African Insurance Company Limited** Sup. Ct. Appl. No. 25 of 2020 [2021] eKLR; and

[16] **APPRECIATING** that under Article 163 (4) and (5) of the Constitution appeals lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation and application of the Constitution; and, in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved. A certification by the Court of Appeal may be reviewed by the Supreme Court, and either affirmed, varied or overturned. Under Section 15B of the Supreme Court Act, 2011 as read with Rule 33 of the Supreme Court Rules 2020, an aggrieved party may apply by way of originating motion to the Court for review, within fourteen days.;

[17] **NOTING** that the applicants' claim in the trial court was initially premised on purchaser's interest occasioned vide the Sale Agreement entered into between Maina Kioi (deceased) and David Nyambu Jonathan Kituri (deceased) to which Maina Kioi filed **HCCC No. 199 of 2008** wherein he sought a permanent injunction against the Defendants, to bar them from alienating for sale, or in any manner interfering or dealing with the property known as L.R. No. 10090/24 (Title No. I.R 23758) and/or an order compelling the Defendants to execute all necessary papers to facilitate a transfer in the deceased's favour of the said LR No.10090/24. The applicants herein abandoned the claim in **HCCC No. 199 of 2008** and resorted to file the claim in Nairobi **ELC No. 544 of 2009**.

[18] **FURTHER NOTING** that the Court of Appeal held that this Court in **Malcom Bell v Toroitich Arap Moi**, Sup. Ct. Appl. No. 1 of 2013 [2013] eKLR had ruled that the adverse possession question is a subject that has been sufficiently settled in law and is no longer a proper subject or a matter of general importance appropriate for this Court's appellate jurisdiction. On the issue of whether adverse possession amounts to a right to property under Article 40 of the Constitution, the Court of Appeal held that the same had not been raised in the High Court or before it, thus the question does not meet the threshold to be a matter of general importance worthy of this Court's appellate jurisdiction.

[19] **TAKING INTO ACCOUNT** the guiding principles on certification of a matter as one involving general public importance arising from the decision in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscione*, SC Application No. 4 of 2012; [2013] eKLR.

[20] **HAVING CONSIDERED** the application, affidavits, submissions filed and the issues proposed to be certified as involving great public importance and **NOW OPINE** as follows:

- a. Upon perusal of the Originating Summons, decisions of the two superior courts below it is clear to this Court that the applicants' claim was solely premised on adverse possession.
- b. In the *Malcom Bell Case* this Court held that what constitutes adverse possession has been answered time and again by the Superior Courts. The Limitation of Actions Act at Sections 7, 13, 17 and 38 provides the procedure that an applicants should undertake to ascertain a claim for adverse possession. We hasten to add that adverse possession is also an issue that is normally proven through interrogation of evidence in a particular case therefore not a question to be set forth as a matter of general public importance.
- c. The applicants have cited the same set of cases as those cited in the *Malcom Bell Case* to submit that there were conflicting decisions by the Court of Appeal which ought to be aligned to create consistency as to when time starts running, for purposes of adverse possessory rights. While acknowledging that there is need to align past decisions with regard to that question so as to create consistency, this Court in the *Malcom Bell Case* held that it is a straightforward issue, which lends itself to resolution on the basis of a review of *factual scenarios*, and a review of the *decisions of the Superior courts rendered over the years*; and on that basis the Court of Appeal has it in its power to canvass the legal principles and to settle the technicality of the law, for the time being. Such a scenario falls outside the profile of "*matter of general*

public importance.” We have restated the same in ***Paul Khakina Musungu versus Joseph Chebayi Chesoli & Another***, Sup. Appl. No. 21 of 2017; [2019] eKLR

- d. The dispute at the trial Court and the Court of Appeal only related to the dispute between ***Kioi*** and ***Kituri***. The same did not encompass the prevalence of such agreements in informal settlements. It therefore cannot be said to be a matter of public interest. The Court of Appeal in its Judgment held that once ***Kioi*** took possession of the suit property pursuant to the alleged agreement for sale, that in itself negate a claim based on adverse possession because the possession would have been with the consent of ***Kituri***. This equally resolved the question on the parameters of the doctrine adverse possession where the purchase price under the Sale Agreement is paid in full but the Sale is not completed.
- e. The issue whether adverse possession amounts to a right to property under Article 40 of the Constitution of Kenya was not raised by the applicants in the trial court and the Court of Appeal, and, we therefore agree with the Court of Appeal that the said issue cannot be raised at this stage hence the question does not meet the threshold to be a matter of general public importance worthy of this Court’s appellate jurisdiction.
- f. We further find that this question has been skewed and or put differently to the question determined by the Court of appeal in ***Mtana Lewa Case***. In the case the main issue for contention was whether Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act were not in contravention of Article 40(2) (a) & (b) of the Constitution. The Court of Appeal in its determination held that the doctrine of adverse possession is neither an arbitrary nor an unconstitutional limitation of the right to property.
- g. The applicants have restated the same arguments set out in its application at the Court of Appeal. They did not seek to distinguish how the Court of Appeal erred and/or arrived at an incorrect determination.

[21] **FOR THE AFORESTATED REASONS** we find that the Court of Appeal correctly applied the principles in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (supra)* and entered a proper determination in dismissing the application.

[22] **ACCORDINGLY**, we are persuaded that in the circumstances, that, the instant application lacks merit and hereby make the following orders:

- a) *The Notice of Motion dated 3rd March, 2023 and filed on 12th March, 2023 seeking review of the Court of Appeal's Ruling delivered on 17th February 2023 in **Civil Application Sup No. 4 of 2018** be and is hereby dismissed.*
- b) *The Applicants shall bear the costs of the Application.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th day of June 2023.

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

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

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

.....
S.C. WANJALA
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