



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. E048 OF 2023

—BETWEEN—

JOSEPH SOMBO & OTHERS1ST APPLICANT
MWANDURI MERI.....2ND APPLICANT
BAHRU MWAGUNDU.....3RD APPLICANT
MWAHUI MWAJIRAMBA.....4TH APPLICANT
KAZUNGU KARISA.....5TH APPLICANT

(Suing on behalf of 15,000 individuals of Amwezi and Mrima Clans of the Duruma Community)

—AND—

NYARI INVESTMENTS (1998) LIMITED1ST RESPONDENT
MOCASH PROCESSORS LIMITED.....2ND RESPONDENT
COUNTY COUNCIL OF KWALE.....3RD RESPONDENT
NATIONAL LAND COMMISSION.....4TH RESPONDENT
DISTRICT COMMISSIONER, KINANGO.....5TH RESPONDENT
ZEHRANABU JANMOHAMMED (SC) (Sued as the Executrix of the Estate of the Late H.E DANIEL TOROITICH ARAP MOI.....6TH RESPONDENT

(Being an application for review of the Ruling and Orders of the Court of Appeal in Civil Appeal (Application) No. E050 of 2023 at Mombasa (Nyamweya, Lesiit & Odunga JJA) dated 24th November 2023 dismissing the Applicant's Application for grant of Certification.)

Representation:

Mr. Maina Njanga & Mr. Moses Chelanga for the Applicant
(*Maina Njanga & Co. Advocates*)

Ms. Detho for the 2nd Respondent
(*Oluoch Kimori Advocates*)

Mr. Andama for the 6th Respondent
(*Kiplenge, Andama & Makau Advocates*)

RULING OF THE COURT

[1] UPON perusing the Originating Motion by the applicant dated 1st December, 2023 and filed on 8th December, 2023 pursuant to Articles 159, 163(4)(b) and (5) of the Constitution, Sections 3A, 15, 15B and 21 of the Supreme Court Act, 2011 and Rules 33 (2) and (3) of the Supreme Court Rules, 2020 seeking inter alia: a review of the Court of Appeal decision declining to grant certification of the intended appeal as a matter of general public importance, and leave to appeal to the Supreme Court against the judgement of the Court of Appeal.

[2] UPON perusing the proposed issues for consideration, the grounds on the face of the application, supporting affidavit sworn by Maina Njanga, counsel for the applicants, and written submissions all dated 1st December 2023 and filed on 8th December 2023 wherein he submits that the intended appeal raises issues of general public importance and in particular;

- a. Whether the setting apart of the suit property, formerly a trust land under the repealed Constitution vested in the 3rd respondent to hold in trust for the communities ordinarily residing in the area, was done in accordance with section 118 of the repealed Constitution and whether, a community land under the said Constitution would be set apart without concurrence of the community and the local county council as trustee of the said land.
- b. Whether a public interest suit such as the instant one where the applicants have been found by the superior court below to have *locus standi* should be dismissed on the account that the applicants did not

seek written authority of all the community members represented pursuant to Order 1 Rule 13 of the Civil Procedure Rules and whether such requirement runs against Article 159 of the Constitution as read with Article 258 thereby depriving a community its proprietary rights in community land in the face of injustice.

- c. Whether trust land may be set apart in favour of a private company for private use and whether the private company is “*which shares are held by on behalf of the Government of Kenya*” under Section 118 (2) of the repealed Constitution and the information on the beneficial ownership of the shares is solely within the knowledge of the government officer (s), are the applicants still duty bound bear the burden of proof under Section 107 of the Evidence Act as opposed to shifting the burden to the Respondents under Section 112 of the Evidence Act?
- d. Whether decision of the Court of Appeal in the instant case contradicts another decision of the same Court of Appeal, ***Funzi Development Limited v. County Council of Kwale*** [2014] eKLR on the import of Section 2 (d) of the Registered Land Act (repealed) which provided that the Act is applicable to “*all land from which time to time is set apart under Section 117 and 118 of the Constitution*” and there is need for the Supreme Court to provide guide for the courts to avoid inconsistencies, uncertainty and conflicting decisions in the superior courts below on the issue.

[3] The applicant reiterates that there is contradiction as to whether a litigant can have *locus standi* to bring a suit in public interest and at the same time not have the same on account of lack of authority of the public or the group he or she is representing; the process of setting apart contemplated in Section 118 of the repealed constitution allowed setting apart to be made to a private company registered in Kenya and ‘*in which shares are held on behalf of the Government of Kenya*’, the burden of proof therefore shifted to the Respondents to prove that their shareholding of 1st Respondent is solely with the government of Kenya. Further, that under Section 2 of the Registered Land Act (RLA) the title to the 1st Respondent ought to have been issued under

RLA but was issued under R.T.A, the Court of appeal in upholding the indefeasibility of the title took a different approach from that taken by the same court (differently constituted) in **Funzi Development Limited vs. County Council of Kwale** Civ. Appeal No. 252 of 2005 [2014] eKLR. Lastly, that the Supreme Court ought to be given an opportunity to determine what ‘consultation’ means in setting apart of vast community land.

[4] UPON perusing the 2nd Respondent’s submissions dated 1st February 2024 and filed on 5th February 2024 wherein it is submitted that the issues herein are private and do not extend into the arena of general public importance; the applicants have failed to show that the issues they intend to raise relate to an uncertain area of law emanating from contradictory precedents thus requiring the Supreme Court to resolve the established uncertainty; the grounds and facts cited in the application were not pleaded before the trial court and the Court of Appeal. The issue before the Court of Appeal neither concerned the application nor the interpretation of the Constitution. The application is therefore without merit as it purports to, for the first time, mutate into a constitutional petition.

[5] The 2nd Respondent further submits that the applicants’ failure to file the application for certification in the Court of Appeal within the time prescribed by Rule 42 of the Court of Appeal Rules and having not sought extension as prescribed under Rule 4 of the Court of Appeal Rules, cannot now seek review of the Court of Appeal decision. Lastly, that the advocate for the applicant had sworn an affidavit on contested matters on behalf of the applicants and as such the affidavit is of no probative value. The 2nd Respondent cites this Court’s decisions in **Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another** SC Appl. No. 42 of 2014 as consolidated with SC Appl. No. 43 of 2014 [2016] eKLR and **National Bank of Kenya Limited (As the successor in business of Kenya National Corporation Limited) & Another vs. Basil Criticos** (Application 14 (E023) of 2022) [2023] KESC 60 (KLR) for the view that it is not sufficient for the applicant to state that the Court of Appeal misapplied the law, the applicant has to demonstrate the different determinations by different courts;

Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 Others [2012] eKLR to urge that a party ought to be bound by its own pleadings.

[6] UPON perusing the 6th respondent's grounds of opposition dated 15th January 2024 and filed of 12th February 2023, and written submissions dated 30th January 2024 and filed on 12th February 2024 raising similar submissions as that of the 2nd Respondent and further submitting that the intended appeal focuses narrowly on the interests of the applicants as a specific group namely the Amwezi and Mrima clans and fails to exhibit any public element with significant public implication. The applicants have violated the procedural requirements for representative suits by failing to demonstrate their lawful authority to institute and prosecute the suit and the present motion on behalf of the purported 15,000 individual members of the Amwezi and Mrima Clans. A party is bound by its pleadings and no party ought to be allowed to introduce a new element to the dispute especially at an appellate stage. In this regard the 6th Respondent urged the court to be guided by the case in ***Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others*** [2017] eKLR, and ***Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo*** [2012] eKLR. The 6th Respondent lastly urged the court to find the applicants accountable for the costs incurred during these proceedings citing the High Court's determination in ***Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant Ihururu Dairy Farmers Cooperative Society Ltd*** Judicial Review Appl. No. 6 of 2014

[7] BEARING IN MIND Article 163 (5) of the Constitution, Section 15B of the Supreme Court Act and Rule 33 (1) and (2) of the Supreme Court Rules, 2020 which grants this Court jurisdiction to review the Court of Appeal's Certification, and lack thereof, as one of general public importance; and this Court's guiding principles on certification of a matter as one involving general public importance set out in ***Hermanus Phillipus Steyn vs. Giovanni-Ruscione*** Sup. Application No. 4 of 2013 [2013] eKLR and the additional guidelines in ***Malcom Bell vs. Daniel Toroitich Arap Moi & Another***, SC Application No. 1 of 2013; [2013] ekLR

[8] We have considered the totality of the application, and submissions put forth, **WE OPINE** as follows:

- i. The Court of Appeal dismissed the application for certification upon the finding that the same was filed out of time. In its determination the Court held as follows;

“The Decision sought to be appealed was delivered by this Court on the 14th April 2023. The application is dated 23rd May 2023, which was way beyond the prescribed period to formally seek certification. The application is therefore incompetent having being filed out of time, and the applicants having failed to apply for extension of time under Rule 4 of this Court’s Rules.”

With this finding by the Court of Appeal, this Court cannot move to review an application determined incompetent for want of procedure. We have held in ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*** SC. Appl. No. 3 of 2014 [2015] eKLR that not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the appellate court’s mandate

- ii. Should the Court however have sought to review the application it would have arrived at the finding that the claim by the applicants in the trial Court was presented as a representative suit as opposed to public interest litigation. The Court of Appeal admonished the applicant for seeking to sneak in the representation at the appellate stage; one of the witnesses in the High Court denied being represented by the applicants. In ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** SC. Appl. No. 29 of 2014 [2014] eKLR Njoki SCJ in her concurring opinion held that evaluation

of *locus* (of a party acting in public interest) *ought* to be based upon the constitutional *considerations of capacity* (Articles 3, 22 and 258), *the nature of the suit* and the *enforceability of the Orders* sought. The distinction of who has locus to bring a suit in public interest has therefore been ascertained.

- iii. The suit in the High Court relates to the procedure in setting apart of Trust land which has clear provisions in Sections 117 and 118 of the repealed Constitution and the Trust Land Act. The applicant has not highlighted instances of inconsistencies in the interpretation of the procedure by the Superior Courts. The case in ***Funzi Limited*** relied upon by the applicant is distinguishable in various respects; first the Court of Appeal and the Supreme Court in the case arrived at a finding that the suit land therein was not Trust land. The mode of setting apart relied upon was within the provisions of Section 117 of the repealed Constitution; which is not the case herein; the provisions relied upon in setting apart fell within Section 118 of the repealed Constitution.
- iv. As pertains application of Section 107 and 112 of the Evidence Act. The Court of Appeal considered this submission and concluded that the applicant was bound by its pleadings. The application of Section 112 of the Evidence Act is not a novel issue and has been adequately explained by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** Petition No. 2B of 2014 [2014] eKLR.

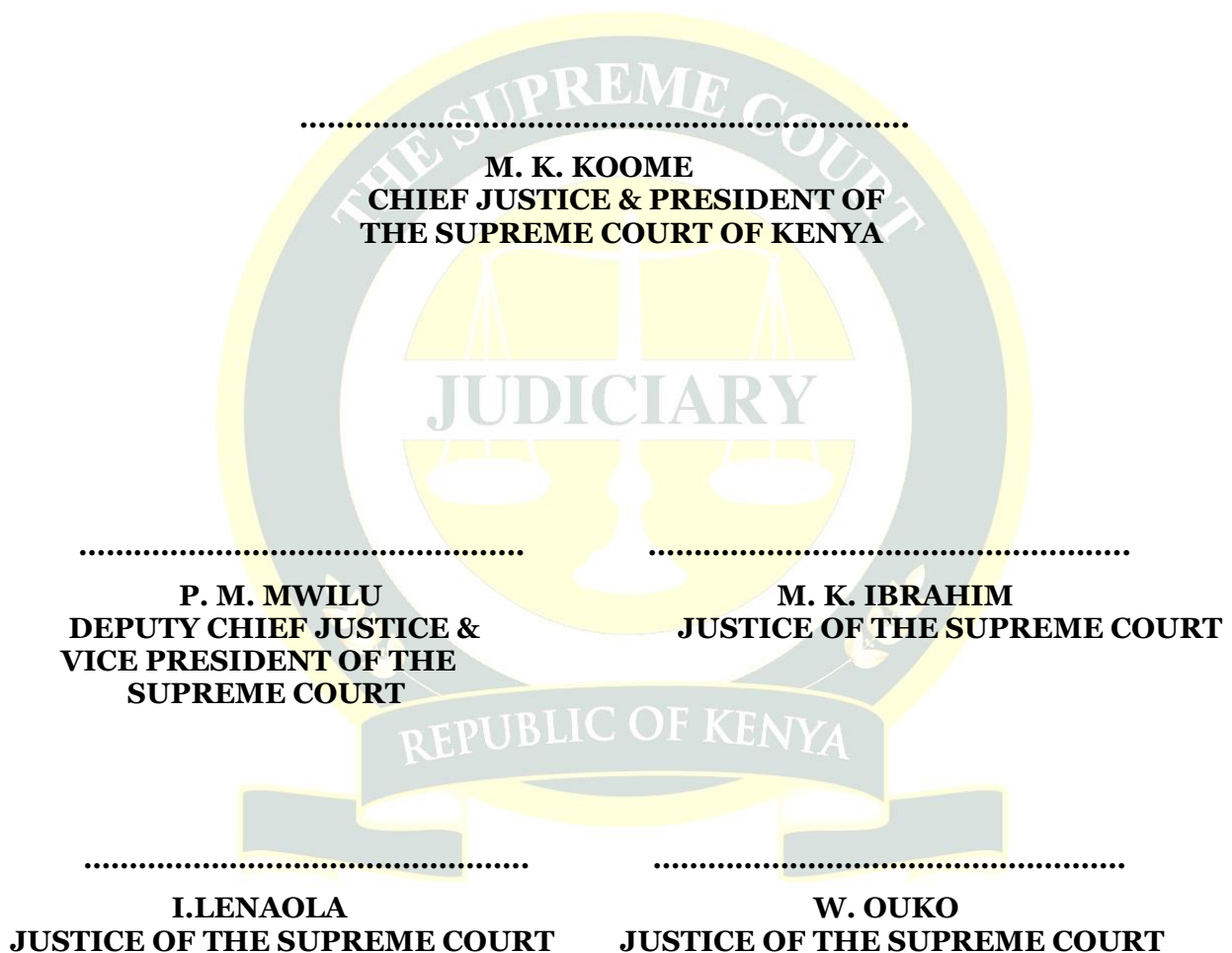
[9] On costs, award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other v. Tarlochan Singh Rai & 4 others*** SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. Given the nature of the dispute and the industry afforded by the parties we find this a proper case to issue costs of the application in favour of the 2nd and 6th Respondents, as the only ones who responded to the application.

[10] FOR THE AFORESTATED REASONS we make the following orders:

- i. *The Originating motion dated 1st December 2023 is hereby dismissed.*
- ii. *Costs of the application awarded to the 2nd and 6th Respondents.*

[11] Orders accordingly.

DATED and DELIVERED at NAIROBI this 12th day of April, 2024.



I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA