



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**APPLICATION NO. E011 OF 2025**

**-BETWEEN-**

**RICHARD NYAMWANGE .....1<sup>ST</sup> APPLICANT**  
**MONICA NYAMWANGE ..... 2<sup>ND</sup> APPLICANT**

**—VERSUS—**

**SAMUEL KIMANI GATHEMBA .....1<sup>ST</sup> RESPONDENT**  
**DANIEL GATHEMBA KIIRU ..... 2<sup>ND</sup> RESPONDENT**  
**KIMANI KAHIRO T/A KIMANI KAHIRO**  
**& CO ADVOCATES ..... 3<sup>RD</sup> RESPONDENT**  
**CHEGE WAINAINA T/A CHEGE WAINAINA**  
**& CO ADVOCATES ..... 4<sup>TH</sup> RESPONDENT**  
**PETER MUNGAI ..... 5<sup>TH</sup> RESPONDENT**  
**VEMA AGENCIES LIMITED ..... 6<sup>TH</sup> RESPONDENT**  
**LIVINGSTONE GITONGA MUCHUNGI ..... 7<sup>TH</sup> RESPONDENT**  
**JAMES MUSAU KIMEU ..... 8<sup>TH</sup> RESPONDENT**  
**CHARLES KAMARI ..... 9<sup>TH</sup> RESPONDENT**  
**JORETH LIMITED ..... 10<sup>TH</sup> RESPONDENT**  
**THE REGISTRAR OF TITLES AND**  
**COMMISSIONER OF LAND ..... 11<sup>TH</sup> RESPONDENT**

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*(Being an application for review of the ruling of the Court of Appeal (Musinga (P), Mumbi Ngugi, Odunga J.J.A.) in Civil Application No. Nai E303 of 2024 dated 11<sup>th</sup> April, 2025 dismissing the applicants' application for grant of certification and leave to appeal to the Supreme Court)*

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Representation:

Ms. Wanjiku Waithera h/b for Mr. Shadrack Wambui for the Applicants  
*(Musyoki Mogaka and Co. Advocates)*

Issa & Company Advocates for the 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> Respondents

Ms. Magdalene Njueini for the 10<sup>th</sup> Respondent  
*(Nyiha, Mukoma & Company Advocates)*

No appearance for the 1<sup>st</sup> - 6<sup>th</sup> & 11<sup>th</sup> Respondents

## **RULING OF THE COURT**

**[1] UPON PERUSING** the Notice of Motion dated 15<sup>th</sup> April, 2025 and filed on 25<sup>th</sup> April, 2025 pursuant to Article 163(5) of the Constitution, Section 15B of the Supreme Court Act and Rule 33(1) of the Supreme Court Rules 2020, seeking a review of the Court of Appeal's ruling declining to grant certification of the intended appeal as raising substantial points of law and matters of general public importance; and an order of temporary injunction against the respondents from evicting the applicants or in any manner dealing with the property known as L.R. No. 13330/142 (suit property) pending the hearing and determination of the intended appeal; and

**[2] UPON PERUSING** the applicant's grounds on the face of the application, and the supporting affidavit of the 1<sup>st</sup> applicant sworn on 15<sup>th</sup> April, 2025 on his own behalf and on behalf of the 2<sup>nd</sup> applicant, contending that its intended appeal raises matters of general public importance as the decision of the Court of Appeal:

- a. has created bad law whose effect is contradictory and a departure to the provisions of Sections 3(3) of the Law of Contract Act by finding that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents were entitled to the orders in the counterclaim and effectively agreeing with the trial court that their production of a copy of the instrument of transfer was equivalent to a contract of sale;*
- b. unless the judgment is reviewed, it will entrench the wrong application and understanding of Section 3(3) of the Law of Contract Act and the fundamental distinction between a contract of sale and transfer documents in conveyancing transactions;*
- c. in effect, has created a perilous precedent that permits the unjust enrichment of fraudulent registration or acquisition;*
- d. created a perilous precedent that permits the unjust enrichment of fraudulent vendors by allowing the 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup> respondents' counterclaim while still being aware that the 3<sup>rd</sup> respondent has previously received adequate consideration from the applicants on behalf of the 10<sup>th</sup> respondent in compliance with the consent order in **HCCC No. 6206 of 1992.***
- e. consciously guarantees the 10<sup>th</sup> respondent judicial immunity from its fraudulent dealings that resulted to the issuance of a title deed in favour of the 7<sup>th</sup>, 8<sup>th</sup> & 9<sup>th</sup>*

*respondents against public policy and the need to guard against instances of unjust enrichment;*

- f. created a conflicting and contradictory position in the area of understanding the plain meaning of the legal term 'adverse possession' by finding that despite the applicants' clear indication in their amended plaint that they had taken possession of the subject property in the year 1989 and lived for a continuous period of over 15 years, they had not pleaded adverse possession to entitle them to a right over the subject property;*
- g. created bad law in direct conflict and contradiction with settled law by other courts of concurrent jurisdiction that the claim of adverse possession, a legal term of art, can be adequately pleaded in a plaint other than Originating Summons and effectively addressed;*
- h. created bad law in contradiction with settled precedence from this Court that a court can and should, address and determine issues that arise in the course of trial that are relevant to the dispute though unpleaded;*
- i. created bad law that fails to take account of the development of law by failing to appreciate that the circumstances of this case permitted the applicants to contemporaneously seek enforcement of their contractual rights as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their right to adverse possession as against the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> & 10<sup>th</sup> respondents; and*
- j. unfairly deprives the applicants their right to property under Article 40 of the Constitution over land known as L.R No. 13330/142 and consequently puts them at risk of eviction and their many yearlong investments at peril of destruction; and*

**[3] UPON CONSIDERING** the applicants' submissions dated 15<sup>th</sup> April, 2025 and filed on even date where it is submitted that: they challenge the registration of the suit property in favour of the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents on the basis of fraud; that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents did not have, nor did they produce a Sale Agreement in compliance with Section 3(3) of the Law of Contract Act; and the determination of the courts below created contradictory interpretations of Section 3(3) of the Law of Contract by finding that the production of instruments of transfer is equivalent to a contract of sale. The applicants aver that the 10<sup>th</sup> respondent received a settlement fee

of Kshs. 200,000 from the applicants in compliance with a consent order issued in **HCC. No. 6202 of 1992**, and subsequently received a further consideration from the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents and therefore their rights over the subject property came first and ranked superior; and

**[4] FURTHER CONSIDERING** the applicants' contention that: their uninterrupted possession of the suit property for 15 years was expressly raised in their amended plaint, sustaining a claim of adverse possession as against the 10<sup>th</sup> respondent or the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents; that assuming the same was not pleaded, they cite the Court of Appeal decisions in **Ann Wairimu Wanjohi Vs James Wambiru Mukabi** [2021] eKLR; **G.K. Macharia & anor Vs Lucy N. Mungai** [1995] eKLR and **Gulam Miriam Noordin Vs Julius Charo Karisa** [2015] eKLR to urge that, where a plaint makes no specific plea of adverse possession, the plea can nonetheless be granted; and

**[5] UPON READING** the applicants' further averments that: there exists contradicting jurisprudence from the Court of Appeal that would warrant an intervention from this Court; the determination of the matter before the superior courts has resulted in interpretation and implementation of the law in a manner that now transcends the circumstances of the parties; it has a significant bearing on public interest; if the decision of the superior court is not disturbed, it will negatively influence the practice of conveyancing in Kenya; and that the Court of Appeal ruling of 11<sup>th</sup> April, 2025 was made in error and is therefore amenable to review pursuant to Article 163(5) of the Constitution; and

**[6] UPON READING** the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents' replying affidavit sworn on 13<sup>th</sup> May, 2025 and filed on 15<sup>th</sup> May, 2025 by the 8<sup>th</sup> respondent, **James Musau Kimeu** on his own behalf and behalf of the 7<sup>th</sup> and 9<sup>th</sup> respondents where, in opposition to the application, he avers that: the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents are the registered owners of the suit property having purchased it from the 10<sup>th</sup> respondent; there was no evidence that the 10<sup>th</sup> respondent, who was the vendor and former registered owner of the suit property, entered into any agreement for sale of the suit property to the applicants; and that the issues raised in the application do not flow

from the pleadings, and were not a subject for determination in the superior courts below; and

**[7] FURTHER CONSIDERING** the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents' averments that: the applicants have not concisely set out the provisions of the law which would require input from this Court; the claim for adverse possession did not arise at all during the course of trial; the Court of Appeal upheld previous decisions of the court in holding that adverse possession has to be pleaded; and that the dispute before the superior courts below was determined on the basis of two rival positions. They additionally contend that they have been denied the right to enjoy their proprietary rights for over 10 years due to the pendency of the litigation; and that it is in the interest of justice that the Court declines the invitation to certify the matter as it is without merit and dismiss it with costs; and

**[8] TAKING INTO ACCOUNT** the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents' submissions dated 13<sup>th</sup> May, 2025 and filed on 15<sup>th</sup> May, 2025 where they submit that: the applicants have not met the criteria established by this Court in the *Hermanus Phillipus Steyn Vs Giovanni- Ruscone* (Application 4 of 2012) [2013] KESC 11 (KLR) (*Hermanus case*); the Court does not have jurisdiction to consider any new issues beyond what was considered by the Court of Appeal in the initial application for certification; the applicants have not demonstrated any conflicting decisions of the Court of Appeal requiring this Court's input; the appellate court's decision was in line with settled law; and that none of the issues raised transcend the interests of the parties herein, citing this Court's decisions in *Malcolm Bell Vs Moi & another* (Application 1 of 2013) [2013] KESC 23 (KLR) (*Malcolm Bell case*); and

**[9] UPON READING** the 10<sup>th</sup> respondent's replying affidavit of **Dr. Jonathan Ciano**, its Manager, sworn on 21<sup>st</sup> May, 2025 and submissions dated 21<sup>st</sup> May, 2025 both filed on 22<sup>nd</sup> May, 2025 wherein it is urged that: the dispute arose from the ownership, sale and transfer of the suit property; the applicants are merely seeking leave to further appeal the decision of the Court of Appeal while disguising the same as matters of general public importance; the appellate court's judgment was decisive as to the ownership of the suit property and should therefore bring the present suit to a close; the grounds set out in the application at paragraph 4(a)–(j) do not disclose

any matters of fact or law that transcend the parties to the case; and that it is a veiled attempt by the applicants to file a further appeal of the present case to this Court; and

**[10] TAKING INTO ACCOUNT** the 10<sup>th</sup> respondent's averments that: the applicants are inviting the Court to interpret the doctrine of adverse possession and its application in the present suit; the law on adverse possession is a well settled principle of law; adverse possession must be stated explicitly and directly, and that a claim for adverse possession cannot co-exist with one of purchase of land; and that it is settled that parties are bound by their pleadings. To buttress its arguments the 10<sup>th</sup> respondent cites the *Malcolm Bell case* and the Court of Appeal decision in *Koinange Investment & Development Ltd Vs Robert Nelson Ngethe*, Civil Appl. No. Sup.15 of 2012 (UR9/2012) urging that the application ought to be dismissed with costs; and

**[11] NOTING THAT** the 1<sup>st</sup> -6<sup>th</sup> and 11<sup>th</sup> respondents, despite service of the application neither filed a response, submissions nor participated in these proceedings; and

**[12] BEARING IN MIND** the provisions of Article 163(4)(b) and (5) of the Constitution, Section 15B of the Supreme Court Act and Rule 33 of the Supreme Court Rules 2020 and this Court's guiding principles on grant of certification and leave to appeal to the Supreme Court as set out in the *Hermanus Case*; and

**[13] HAVING CONSIDERED** the application, responses and submissions filed by the parties, **WE NOW OPINE** as follows:

- (i) The genesis and the gravamen of the dispute is the ownership of LR. No. 13330/142, the suit property. The applicants instituted the suit vide an amended plaint dated 24<sup>th</sup> October, 2012 founded on allegations of fraud and breach of a sale agreement dated July 1989. The applicants averred that they entered into an agreement for the sale of the suit property with the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who had previously purchased the suit property from Thome Farmers No.5 Limited (Thome) with the approval of the 10<sup>th</sup> respondent. They sought the following orders: a permanent and mandatory injunction against the respondents; specific performance of the agreement dated July 1989; an injunction against the

respondents to restrain them from interfering with quiet possession of the suit property; cancellation of the certificate of title to the suit property in the names of the 7<sup>th</sup> - 9<sup>th</sup> respondents; damages and costs. The 7<sup>th</sup> - 9<sup>th</sup> respondents on their part filed a defence and counterclaim seeking an order to compel the applicants to vacate the suit property.

- (ii) In the judgment dated 5<sup>th</sup> May, 2020 the Environment and Land Court established *inter alia* that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' beneficial interest in the property was conditional upon Thome obtaining a legal title to the property from the 10<sup>th</sup> respondent. It also noted that the agreement for sale between Thome and the 10<sup>th</sup> respondent was not completed, as Thome failed to pay the full purchase price. It therefore held that neither the 1<sup>st</sup> and 2<sup>nd</sup> respondents, nor Thome Farmers No. 5 Limited had a valid proprietary interest in the suit property capable of being transferred to the applicants. The court further held that the applicants did not prove that the transfer of the suit property by the 10<sup>th</sup> respondent to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents was fraudulent or un-procedural. Concerning adverse possession, the trial court found that the applicants did not plead adverse possession in their amended plaint, or as a defence to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents' counter-claim. That the issue only arose at the point of submissions and consequently, it determined that they were not entitled to a relief in that respect. In the judgment dated 7<sup>th</sup> June, 2024 the Court of Appeal upheld the trial court's findings.
- (iii) This Court has in several of its decisions determined that an intending appellant 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. Further, it is for the intending appellant to demonstrate that the point of law to be raised is a substantial one whose determination has a significant bearing on the public interest. From the application and submissions, we note that the appellant takes issue with the Court of Appeal's finding on the allegations of fraud; Section 3(3) of the Law of Contract Act; and the determination on adverse possession.
- (iv) The applicants assert that the 7<sup>th</sup> - 9<sup>th</sup> respondents did not produce a sale agreement in compliance with Section 3(3) of the Law of Contract Act, and that their title was fraudulently acquired. An allegation of fraud is a factual issue, and

is specific to the circumstances prevailing between the parties to the dispute. The superior courts below determined the issue based on the contested facts between the parties. This is therefore a private dispute that does not transcend the parties. Moreover, the applicants have not presented to this Court contradictory decisions by the superior courts below on the interpretation of Section 3(3) of the Law of Contract Act to warrant this Court's further input.

- (v) On adverse possession, the applicants seek to have this Court determine, “*whether the reference in their amended pleadings to having lived on the suit property for a continuous and uninterrupted period of 15 years gave them a right to adverse possession against its registered owner, the 10<sup>th</sup> respondent*” and “*whether a court can and should, address and determine issues that arise in the course of trial that are relevant to the dispute though unpleaded.*” We note that the courts below disallowed the claim on adverse possession as it was not pleaded in the applicants’ amended pleadings. The determination by the trial court was on the question of whether the applicants had beneficial interest on the suit property.
- (vi) The question on whether parties are bound by their pleadings is settled law. We emphasize that a decision of this Court is intended to settle a substantial question of law, and it can only depart from it after a sufficient ground has been established. Moreover, the applicants have not presented any ambiguities or uncertainties in the law to warrant the exercise of this Court’s jurisdiction under Article 163(4)(b) of the Constitution. As was held in the ***Hermanus case***, mere apprehension of miscarriage of justice, a matter most apt for resolution, at earlier levels of the superior courts below, is not a proper basis for granting certification for an appeal to the Supreme Court.
- (vii) In the end, the matter to be certified for a final appeal in the Supreme Court, must fall within the terms of Article 163(4)(b) of the Constitution. None of the issues framed by the applicants have met the threshold for certification. We are satisfied that the Court of Appeal aptly applied itself to the application and the parameters for certification and correctly declined to certify the matter.
- (viii) In the absence of certification, the prayer relating to injunction falls and we say no more on it.

