Kakuzi Limited v Makuyu Club (Suing through Joel Wanyoike, Irungu Ndirangu & SK Kirubi as Trustees of the Club) ((Suing through Joel Wanyoike, Irungu Ndirangu & SK Kirubi as Trustees of the Club)) (Civil Appeal (Application) 78 of 2020) [2025] KECA 1212 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KECA 1212 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 78 OF 2020

W KARANJA, P NYAMWEYA & GV ODUNGA, JJA

JULY 4, 2025

BETWEEN

KAKUZI LIMITED ..... APPELLANT

AND

MAKUYU CLUB ..... RESPONDENT

(SUING THROUGH JOEL WANYOIKE, IRUNGU NDIRANGU & SK KIRUBI AS TRUSTEES OF THE CLUB)

(An application for certification and grant of leave to appeal against the judgment of the Court of Appeal at Mombasa by (Hon. Mr. Justice Gatembu Kairu, Hon. Lady Justice Lesiit, & Hon. Lady Justice Ngenye-Macharia JJA) delivered on 14th April 2023 in Civil Appeal No. 78 of 2020)

RULING

1. On 8th November 2024, this Court (Gatembu Kairu, Lesiit and Ngenye-Macharia, JJA) delivered a judgement in an appeal lodged by Kakuzi Limited (hereinafter "Kakuzi") against a judgment and decree of the Environment and Land Court (the ELC) at Thika (Angote, J) delivered on 18th October 2019 in ELC Suit No. 115 of 2017. The ELC found that an Originating Summons filed by the Trustees of Makuyu Club (hereinafter "Makuyu Club) was merited, and held that Kakuzi's title to a portion of its land LR No. 11674 IR 20386/2 measuring approximately seventy (70) acres had been extinguished by Makuyu Club's adverse possession thereof, who had consequently acquired title to the said land by its adverse possession for a period of more than twelve (12) years from 1934 to date. The ELC accordingly ordered that Makuyu Club be registered as absolute owner of the portion of 70 acres of LR No. 11674 IR 20386/2, and that Kakuzi pays the costs of the suit.

2. In its appeal to this Court in Civil Appeal No. 78 of 2020, Kakuzi raised two issues namely, whether Makuyu satisfied the conditions necessary to acquire title to the suit property by way of adverse possession, and whether the learned judge of the ELC failed to consider that Kakuzi asserted its right over the suit property. In determining the appeal, this Court upheld the findings of the ELC and made three key findings in this regard. Firstly, that Makuyu Club entered the land in 1934 and exclusively used it as a golf course, and remained on the land up to and beyond 1967 when Kakuzi bought the suit property and had it registered in its name. and even if time may not have to start running in 1934, it started running in 1967 and continued running until 2002 when the Kakuzi filed the suit in the ELC, which was a period of 35 years during which Makuyu Club was in possession of the suit property, and utilized it as a golf course, openly, peacefully and without interruption

3. Secondly, that the contention by Kakuzi that it asserted its right to the suit property by writing to the Kenya Power and Lighting Company informing it not to supply electricity to the suit property as the land belonged to it, preventing Makuyu Club from fencing the land, and stopping the supply of water, grass mowers, and payment of workers and donations to it did not amount to assertion of rights, as it did not have the effect of dispossessing Makuyu Club of the suit property, nor did it have the effect of terminating or interrupting its possession. Lastly, that the learned trial Judge considered all the issues in the case and gave his finding on each of them, and in particular considered that time started running in 1934, and either way, whether time is considered to have run from 1934 or 1967 to 2002, the time required by statute to support a claim for title to land by adverse possession was met.

4. Kakuzi is aggrieved by the said decision and intends to appeal to the Supreme Court. It accordingly lodged an application dated 21st November 2024 in this Court, in which it seeks certification that its intended appeal to the Supreme Court involves matters of public importance, and that leave be granted to appeal to the Supreme Court of Kenya against part of the said judgment. This application is the subject of this ruling.

5. The application was heard on this Court's virtual platform on 4th March 2025, and Senior Counsel Mr. Fred Ojiambo appearing together with learned counsel Mr. Oyoo appeared for Kakuzi, while learned counsel Mr. David Mereka appeared for the Makuyu Club. Mr. Ojiambo SC and Mr. Mereka highlighted their respective written submissions dated 19th December 2024 and 20th December 2024. It is notable that the application is brought pursuant to the provisions of Article 163(4) of the *Constitution* that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the *Constitution*; and in any other case where the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.

6. The issue for determination in this application therefore is whether the intended appeal to the Supreme Court raises a matter of general public importance. The Supreme Court identified the principles governing the determination of a matter as one of general public importance in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* (2013) eKLR as follows:

    i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

    ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the *Constitution*;

vi. the intending applicant 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;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

7. These principles were reiterated by the Supreme Court in the case of *Malcolm Bell v Hon. Daniel Torotich arap Moi and Another*, Supreme Court Application No. 1 of 2013, which also noted that for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest.

8. Mr. Ojiambo SC submitted in this respect that the intended appeal by Kakuzi raises an important matter of general importance on land rights and land tenure, and meets the threshold set out in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* (*supra*). Senior Counsel made reference to the itemised points of law set out in the supporting affidavit filed by Kakuzi that it seeks answered by the Supreme Court. These points of law were summarised into three questions, namely whether informal arrangements for the use of land, including the charitable right to the use of land, a key feature of Kenya's land use system, would give rise to a claim for adverse possession; whether landowners who have not revoked their consent will be liable to lose their properties in adverse possession claims; and whether the absence of an adverse incident can trigger the running of time for purposes of a claim on adverse possession. According to Senior Counsel, these issues remain unsettled and would potentially create uncertainty in the law on adverse possession. Furthermore, that the impact of the judgment stands to impact a considerable class of persons being landowners whose rights to property are at risk.

9. With respect to its application for stay of this Court's judgment pending the intended appeal, Senior Counsel submitted that the points of law of general importance sought to be canvassed before the Supreme Court disclose an arguable appeal, and on the nugatory limb, that should stay not be granted, Kakuzi stands to lose 72 acres of its land without just cause. It was also submitted that Article 259 of the *Constitution* enables this Court to promote the values and course of justice and it is therefore not functus officio.

10. On his part, Mr. Mereka submitted that the said issues do not meet the threshold as required by *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* (*supra*), are novel, vague and have no bearing on the Court of Appeal's judgment or of the trial Court. Specifically, that the issue of informal arrangement for the use of land is a new issue and which was not before the Court of Appeal for

determination. In addition, there was no such informal arrangement between Kakuzi and Makuyu Club since the suit property was donated by white settlers as a golf course in 1934, and Kakuzi bought it in 1967 and did not make any efforts to assert its rights. Likewise, that Kakuzi also introduced a new term being "charity", that was not available during the hearing at the Court of Appeal.

11. With respect to the issue of non-revocation of consent and absence of an adverse incident, learned counsel submitted that Kakuzi has also introduced the words "consent", "non• revocation of the consent", and "adverse incident" in this application. Further, that a consent cannot be revoked if it was not given in the first instance, since the suit property was a donation by the white settlers and neither was a license agreement executed, and Kakuzi cannot claim that the occupation by Makuyu Club was by its consent. Further, that the introduction of the word "adverse incident" is unknown in Kenyan law and authorities and was not available at the trial Court or the Court of Appeal. Nevertheless, that the Court of Appeal and trial Court found that Makuyu Club had fulfilled the requirements for a claim of adverse possession hence the issue of "adverse incident" was dealt with.

12. Lastly, that the nature of a claim for adverse possession is usually determined by introduction of evidence on a case-by-case basis and determined on merit and the decision of the Court of Appeal in this matter cannot be applied to the wider public and does not affect land use and tenure systems in Kenya or have an impact of the general public transcending the litigation interest of the parties. On the prayer for stay of execution, counsel submitted that this Court is "functus officio" and made reference to the decision to this effect in *Dickson Muricho Muriuki v Timothy Kagondu Muriuki & 6 Others* (2013) eKLR.

13. We have considered the submissions made by learned counsel in support of and in opposition of the instant application. As indicated before, the Supreme Court's guidance is that matters of general public importance are those that inter alia, raise a substantial point of law, or occasion a state of uncertainty in the law or arise from contradictory precedents, or will affect a considerable number of persons in general, or as litigants. We however, in applying this test need to eschew getting into the merits of the intended appeal to the Supreme Court and in this respect are also alive to the holding by this Court in *Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation* [2023] KECA 660 (KLR) that:

> " This Court has the duty to ensure that the case does not involve a mere question of law, but a substantial question of law. Hence, an applicant must satisfy this test to assume jurisdiction under Article 164 (4) of the *Constitution*. (See Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* 1962 AIR 1314, 1962 SCR Supl. (3) 549).
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> > 71. To qualify as a question of law arising from the case, there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by the court so as to make it necessary to determine that question of law and arrive at a just and proper decision. If the question is settled by the highest court, or if the general principles to be applied in determining the question are well settled, and there remains the question as to the application of those principles, or that the plea raised is palpably absurd, the question ought not to be viewed as a substantial question of law."

14. Given the foregoing, while the principles of law that apply in determining adverse possession are settled and their application will be determined by the facts of each particular case, we are persuaded that a novel question has been raised by Kakuzi as regards the elements of adverse possession where initial occupation of land is by consent or donation by an owner without any transfer, and particularly where

there is a subsequent change of ownership. It was noted by the Court of Appeal in this respect on this finding:

> The respondent entered the land in 1934 and exclusively used it as a golf course, and remained on the land up to (and beyond) 1967 when the appellant (Kakuzi) bought the suit property and had it registered in its name. The time can be considered to have started running in 1934, however, there was evidence, though vague, that the Sisal Ltd was getting payment from the respondent (Makuyu Club) for the use of the land. If that be the case, the time started running in 1967 and continued running until 2002 when the respondent filed the suit in the ELC. That is a period of 35 years. During that period the respondent was in possession of the suit property, and utilized it as a golf course, openly, peacefully and without interruption.

15. The Court also noted in various parts of the judgment that the said land had been donated to Makuyu Club by Sisal Ltd. Our understanding of the question posed by Kakuzi of what is the adverse incident in such circumstances, is the nature of possession that is adverse to the interests of a subsequent owner of such a property, within the settled principles on adverse possession. In our view this is a substantial issue of law that requires to be determined by the Supreme Court that not only arises from the facts of the appeal; but one which is likely to affect a substantial number of members of the public and in particular buyers of land that is in possession or occupation by third parties; and which will also clarify the application of the principles on adverse possession.

16. It is therefore our view that this application meets the test set out in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* (*supra*) and warrants certification. As regards the second prayer of stay pending the intended appeal to the Supreme Court, it is settled that this Court has no jurisdiction to grant such an order. In *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 others* (*supra*) it was emphasised that Rule 5(2)(b) of the *Court of Appeal Rules* confers power to this Court to hear interlocutory applications pending the hearing and determination of the main appeal before it, and does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment. This Court further explained as follows:

> 20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding."

17. We are in agreement with the above holdings, and find that we are functus officio in so far as any further proceedings in this appeal are concerned. We can only add that any interpretation we employ under

Article 259 of the *Constitution* or any other laws can only be within the context of matters properly arising within our jurisdiction.

18. We accordingly find the application dated 21st November 2024 merited only to the extent that the intended appeal by Kakuzi is certified as raising matters of general public importance, and we accordingly grant Kakuzi leave to appeal to the Supreme Court against the judgment of this Court (Gatembu Kairu, Lesiit and Ngenye-Macharia, JJA) delivered on 8th November 2024 in Civil Appeal 78 of 2020. The prayer for stay of execution of the said judgment is however declined. Each party shall bear their respective costs of the application.

19. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025

W. KARANJA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR