



Mwangi & 5 others (As Duly Elected Officials of Gachagi Land Committee Representing Residents of Gachagi) v Thika Garissa Road Developers Limited & 5 others (Civil Appeal (Application) 287 of 2019) [2024] KECA 1334 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 287 OF 2019
MSA MAKHANDIA, S OLE KANTAI & A ALI-ARONI, JJA
SEPTEMBER 27, 2024**

BETWEEN

**SIMON KIBE MWANGI 1ST APPLICANT
JOSEPH NDUNGU 2ND APPLICANT
WAIRIMU GEORGE 3RD APPLICANT
KIMANI NGANGA JOYCE 4TH APPLICANT
WANJIRU THUO MARY 5TH APPLICANT
WAIRIMU MUIRURI 6TH APPLICANT
AS DULY ELECTED OFFICIALS OF GACHAGI LAND COMMITTEE
REPRESENTING RESIDENTS OF GACHAGI**

AND

**THIKA GARISSA ROAD DEVELOPERS LIMITED 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT
THE NATIONAL LAND COMMISSION 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
THE COUNTY GOVERNMENT OF KIAMBU 5TH RESPONDENT
KENNEDY GATHOGO, ROBINSON KINYA GICHOHI & MICHAEL KAMADE
(SUED AS THE CHAIRMAN, SECRETARY AND VICE CHAIRMAN
RESPECTIVELY OF THIKA MUNICIPALITY BLOCK 31 WELFARE
GROUP) 6TH RESPONDENT**



(Being an application for grant of leave to appeal from this Court to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (Okwengu, Ochieng & Mativo, JJ.A) dated 17th March 2023 in Page 2 of 14 Civil Appeal No. 287 of 2019)

RULING

1. Before us is a Motion on Notice dated 26th April 2023, in which Simon Kibe Mwangi, Joseph Ndungu Wairimu, George Kimani Nganga, Joyce Wanjiru Thuo and Mary Wairimu Muiruri, (“the applicants”), seek in the main two prayers; stay of execution of the judgment and order of this Court dated 17th March 2023 and for leave to appeal to the Supreme Court of Kenya against the said judgment and order.
2. The application made is pursuant to the provisions of Articles 10, 24, 25 (c) 48, 50 (1), 159 & 163 (4) (b) of *the Constitution* of Kenya, sections 3, 3A, 3B, of the *Appellate jurisdiction Act*, rules 41 (2) 49, 61, (A) of this *Court’s Rules*, sections 3 & 36 of the *Court Of Appeal (Organization and Administration) Act*, Rule 36(4) of the *Supreme Court Rules* and any other emanating provisions of the law.
3. A brief background to this application is that on 2nd May 2019, the Environment and Land Court (“ELC”) at Thika (L. Mbugua, J.) delivered a judgment in which it held among others that the applicants had acquired L.R No. 4953/1855 (“the suit property”) by way of adverse possession. Dissatisfied with the judgment and decree aforesaid, the 1st respondent filed an appeal to this Court. The appeal was heard and determined by a bench consisting of Okwengu, Ochieng & Mativo, JJ.A. in a judgment delivered on 2nd May 2019, the Court concluded thus:

“From the foregoing, we find that the appeal must fail on the following grounds:

- a. A right of action for eviction arose in favour of the appellant against the 1st respondent from the time the appellant acquired the suit property. However, at the time of the institution of the eviction suit in 2005, the appellant’s title to the suit property had been extinguished by virtue of section 7 of the *Limitation of Actions Act*;
 - b. The 1st respondent was in continued occupation of the suit property after it was allotted to the appellant for a period of more than 12 years without the appellant’s permission. They proved adverse possession;
 - c. The 1st respondent did not acquire the suit property as a gift from the company, it was government land which was later allotted to the appellant;
 - d. The specific people entitled to the suit property are the first 40 families who occupied the suit property and their generations;
 - e. The inconsistencies in facts were immaterial to the outcome of this case; and
 - f. The 1st respondent had proved on a balance of probabilities that they were entitled 20 acres of the suit property by adverse possession.
92. Consequently, the appeal is dismissed and the judgment of the trial court upheld save that the orders will only apply to the 20 acres occupied by the 1st respondent. Each party to bear their own costs.”



4. It is the rider in paragraph 92 above that has aggrieved the applicants, hence their intention to appeal to the Supreme Court. The applicants contend that the finding on adverse possession should have applied to the entire suit property and not the paltry 20 acres. They had also argued that during the hearing of the appeal, the 1st and 6th respondents had not opposed their claim. Indeed, the 1st respondent had testified that it had since disposed off the suit property to the 6th respondent and no longer had any interest in it. That position notwithstanding, the 1st respondent had nonetheless preferred an appeal to this Court against ELC judgment. At the hearing of the appeal, the applicants took the position that the 1st respondent, because of the foregoing, lacked requisite *locus standi* to bring the appeal as it could not possibly have been aggrieved by the judgment and decree. That its interest in the suit property was extinguished upon the sale of the suit property to the 6th respondent. Despite the issue of *locus standi* being ardently and fervently urged by the applicants, this Court did not include it as an issue for determination. This too will be an issue to be canvassed in the intended appeal to the Supreme Court. It is the contention of the applicants that the issues aforesaid involve matters of general public importance as it will raise the following pertinent issues:
- i. Can a party not aggrieved by a decision of the Court have *locus standi* to bring an appeal against such a decision?
 - ii. Does the Court of Appeal have jurisdiction to hear and determine an appeal brought by a Party without *locus standi* to bring such an appeal?
 - iii. Does adverse possession exclusively crystalize where settlement and/or occupation of land for the requisite period is proved so that continuous use without actual settlement precludes one from claiming under adverse possession?
 - iv. Does continuous use of land amount to continuous occupation of land or are the two distinct propositions of law particularly within the meaning of Article 162
- (2) (b) of [the Constitution](#), 2010 and the [Environment and Land Court Act](#)?
- v. Does communal use of land as a public utility such as a road/footpath, borehole, church, nursery school, hospital e.t.c not give rise to adverse possession of the subject land to members of that community if all the elements of adverse possession are satisfied?
5. The applicants further posit that the intended appeal transcends the interests of the parties to the proceedings for reasons that the judgment of this Court:
- i. Casts into the realm of uncertainty the hitherto well- settled principles governing the acquisition of prescriptive rights over land;
 - ii. Casts into the realm of uncertainty the hitherto well- settled principles that a party without *locus standi* is without audience before the Court and that the Court is stripped off jurisdiction to hear, determine or otherwise entertain a matter brought by such a Party;
 - iii. Exerts confusion on the land regime, particularly on the question whether adverse possession exclusively crystalizes where settlement and/or occupation of land for the requisite period is proved so that continuous use without actual settlement precludes one from claiming under adverse possession.
 - iv. Exerts confusion on the land regime, particularly on the question of whether continuous use of land amounts to continuous occupation of land or are the two distinct propositions of law, particularly within the meaning of Article 162 (2)(b) of [the Constitution](#), 2010 and the [Environment and Land Court Act](#).



- v. Exerts confusion on the land regime, particularly on the question of whether communal use of land as a public utility such as a road/footpath, borehole, church, nursery school, hospital e.t.c not give rise to adverse possession of the subject land to members of that community if all the elements of adverse possession are satisfied.
6. The application was opposed by the respondents through the replying affidavit of Francis Gachau Reuben, a director of the 1st respondent dated 9th August 2023. He depones that the application is fatally defective, having been brought under Rules of this Court that were revoked by rule 122 of the Court of Appeal Rules, 2022. That this Court does not have jurisdiction to stay its own final decision. That the issues the applicants seek to have addressed by the Supreme Court are particular to the case and do not transcend it. That issues regarding an aggrieved party, *locus standi* and the law on adverse possession are all well settled and are no longer of jurisprudential moment. That the applicants have not availed any inconsistent judgments and or decisions rendered by this Court to those issues that it intends to have adjudicated in the Supreme Court. That considering the circumstances of this case and the issues raised in their totality, the Motion does not meet the threshold for a grant of leave to appeal to the Supreme Court.
7. The application was canvassed by way of written submissions with limited oral highlights. During the plenary hearing of the application on 26th June 2024 Mr. Kimani, learned, counsel appeared for the applicants whereas Mr. Muturi Njoroge, learned counsel appeared for the respondents. Relying on the cases of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR and Steyn vs. Ruscone [2013] KESC 11 (KLR), counsel for the applicants submitted that they had demonstrated that the application meets the threshold for certification. That the issue of land use in the context of claims for adverse possession as pronounced by the Court of Appeal in the decision alters the concept of adverse possession. That the issue of whether or not the use of land (without occupation) may give rise to a claim in adverse possession as dealt with by this Court had ultimately brought the nation to a jurisprudential moment that is of sweeping general public importance. By itself, it is a matter deserving audience at the Supreme Court. Equally, the issue of whether a party that admittedly has no interest in the subject of a suit has the requisite *locus standi* to appeal against the decision rendered in such a suit speaks to the right of audience of parties not aggrieved or affected by a decision before an appellate Court. It transcends the interests of the litigants herein and permeates into all other judicial processes on who has the right to appeal.
8. On behalf of the respondents Mr. Muturi Njoroge, submitted that the application was a non-starter having been filed under 2010 Court of Appeal Rules, which had been repealed expressly by rule 122 of this Court's Rules, 2022. That all proceedings filed after 10th June 2022, including the instant application, could only be brought under the current Rules. This application was accordingly void ab initio. On stay of execution, the respondents while relying on the cases of Mukesh Kumar Kantilal Patel vs. Charles Langat [2021] eKLR and Everton Coal Enterprises vs. Geoffrey Chege Kirundi and 5 Others (UR), submitted that the prayer must fail for the reasons that this Court has no jurisdiction to stay its judgment and orders.
9. Relying on the cases of Steyn vs. Ruscone (*supra*) and Malcolm Bell vs. Daniel Toroitich Arap Moi & Another [2013] eKLR, counsel submitted that the issues that the applicants intend to pursue on appeal in the Supreme Court are not issues of public importance. That what was in issue before this Court was not who had the *locus standi* to file an appeal but rather whether the 1st respondent was an aggrieved party. That what the applicants had couched as an issue of *locus standi* is a factual issue of whether the appellant was aggrieved by the judgment and decree of the court. It does not therefore transcend the circumstances of this case and it is not a matter of public interest.



10. On adverse possession, counsel submitted that the Supreme Court had continuously held that principles of adverse possession are well settled in law and do not give rise to a matter of general public importance. That the intended appeal will therefore neither raise any matter of public importance nor transcend the circumstances of the case. It only seeks a determination of facts in the contest between the respondents and the applicants which cannot form a basis for granting certification. That at best, the applicants can seek a review of the Court’s judgment before this very Court.
11. We have considered the application, the grounds, and the affidavits sworn in support thereof and in opposition to the application, the able submissions of both parties and the law. This Court has been moved to determine whether the intended appeal to the Supreme Court raises issues of general public importance transcending the circumstances of the case and having a significant bearing on the public interest as a pre-requisite for the grant of the certificate.
12. Before we delve in the substance of the application, we wish to address the preferal issues of whether the application is incompetent for being filed pursuant to the rules of this Court that have since been retired, and whether this Court has jurisdiction to stay its judgment and order. Yes, it is common ground that indeed the application was filed pursuant to pre-2022 *Court of Appeal Rules*. Is this omission to cite the current *Court of Appeal Rules* fatal to the application? We do not think so. The respondents were not prejudiced at all by the omission. The respondents were well aware of the case they were to meet well in advance, indeed adequately prepared for it if the pleadings and submissions were anything to go by. Secondly, Article 159 (d) of *the Constitution* commands us to administer justice without undue regard to procedural technicalities. This is one of those procedural omissions that can be ignored in favour of substantive justice.
13. As for stay of execution, this Court has in several decisions held that it had no jurisdiction to stay the execution of judgment and order as it is functus officio. See for instance *Mukesh Kumar Kantilal Patel vs. Charles Langat* [2021] eKLR, in which this Court categorically stated that the relief of stay of execution:

“Was strictly to apply to matters that are yet to be heard and determined with finality by this Court. It was not envisioned to apply once this Court has issued its final orders. Hence this Court has no Jurisdiction to issue orders staying its final decision...”

This remains the position of this Court to date.

14. The rationale for certification to the Supreme Court by this Court was stated in the case of *Koinange Investment & Development Ltd vs. Robert Nelson Ngethe* [2013] eKLR, thus:

“.... There is a distinction between leave to appeal to this Court [i.e. the court of appeal] from the High Court and from this Court to the Supreme Court... the requirement for Certification under Article 163(4) (b) is a genuine filtering process to ensure that only appeals with elements of general Public Importance reach the Supreme Court, as was observed in R. vs. Secretary of states, Ex Parte East way)] per Lord Bingham] that this court cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist...”



15. Further, the Supreme Court in the case of *Steyn vs. Ruscone* (supra) set out the principles that should guide this Court when considering whether or not to grant a certificate and or leave to appeal to the Supreme Court. The Supreme Court observed:

“.....a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that its impacts and consequences are substantial, broad-based, transcending the litigation- interests of the parties and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

The Court went on to state that:

- 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 one 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 a 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.

We have therefore to apply the above tenets and parameters to the specific circumstances of this application. First, is this a matter where the issue to be determined can be said to transcend the circumstances of the particular case and have a significant bearing on the public interest? The dispute whose judgment the applicants seek to reverse in the Supreme Court, arose out of a land dispute where parties were litigating as to who should be declared the rightful owner and whether adverse possession had been proved to the extent required by the law.

16. The pleadings clearly disclose one irrefutable fact that this was a contestation over ownership of L.R No. 4953/1855 within Thika town measuring 15.44 hectares between the applicants, representatives of a community of squatters and the 1st respondent a bona fide allottee of the suit property. This being a dispute between the two parties, how the dispute therein transcends to a matter of public importance or raises issues of such a nature as to warrant the intervention of the Supreme Court is



difficult to discern. We are unable to see how the determination of question of fact and evidence would have a significant, (if any), bearing upon the public interest in Kenya save to the parties therein. The apprehension by the applicants that there is a real and imminent risk that the judgment may be relied on as a basis for depriving the applicants of the entire suit property is neither here nor there.

17. We are satisfied that the applicants’ contention that the appeal to the Supreme Court will determine matters touching on *locus standi*, jurisdiction, sound land administration regime, proper administration of justice, and the general public at large to be farfetched and wild, given the fact that these are not what was before the trial court and this Court for determination. Furthermore, the issue of adverse possession is not new in the Supreme Court as the court has made several pronouncements on the same for instance, in the case of *Kioi & Another (Suing on behalf of the Estate of Mwangi Kioi (Deceased) vs. Mukolwe & Another (sued as administrators of the Estate of David Nyambu Jonathan Kituri (Deceased) & Another* [2023] KESC 53 (KLR), the Supreme Court stated:

“We have considered the Notice of Motion, alongside the submissions made before this Court, the Replying affidavit and grounds of opposition by the 1st respondent, and the governing law on such a matter, the principles set down by this Court in *Hermanus Steyn Case*, and concluded that the proposed appeal is not one fit for admission before this Court. We have already decided in the *Malcom Bell Case* that questions of adverse possession fall outside this Court’s appellate jurisdiction. We therefore see no basis at all for admitting the appeal for further consideration and are persuaded to agree with the Court of Appeal’s ruling of 25th May 2017.”

The Supreme Court proceeded in the said case to state that:

“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 vs. Joseph Chebaya Chesoli & Another*, Sup Appl No 21 of 2017 [2019] eKLR.”

We are in the premises satisfied that the applicants have not demonstrated the uncertainty in the regime of adverse possession that the Supreme Court will need to clear and clarify. Neither have the applicants demonstrated how the determination of an issue affecting the ownership, allocation, and transfer of the suit property becomes a matter of general public importance. Accordingly, we are not persuaded that the applicants have made out a case for the grant of a certificate to appeal to the Supreme Court.

18. In the end, the order that commends to us is the application dated 26th April 2023, is for dismissal with costs to the respondents.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



S. OLE KANTAI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

Deputy Registrar

