Kioi & another (Suing on behalf of the Estate of Mwangi Kioi (Deceased).) v Mukolwe & 2 others (Sued as the Administrators of the Estate of David Nyambu Kituri - Deceased) & another (Civil Application 4 of 2018) [2023] KECA 141 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 141 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 4 OF 2018

HM OKWENGU, J MOHAMMED & S OLE KANTAI, JJA

FEBRUARY 17, 2023

BETWEEN

CHRISTOPHER KIOI .... 1ST APPLICANT

NANCY WAMBUI WAWERU .... 2ND APPLICANT

SUING ON BEHALF OF THE ESTATE OF MWANGI KIOI (DECEASED).

AND

WINNIE MUKOLWE, JULIAH KIRIRA & HOPE MUTUA (SUED AS THE ADMINISTRATORS OF THE ESTATE OF DAVID NYAMBU KITURI - DECEASED) .... 1ST RESPONDENT

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

(Being an application for leave to appeal to the Supreme Court against the Judgment and decree of the Court of Appeal at Nairobi (Ouko, Gatembu & M'Inoti, JJ.A.) delivered on 16th February 2018 in Civil Appeal No. 218 of 2017)

RULING

1. What is before us is a notice of motion dated 27th February 2018 brought under Article 163 (4)(b) of *the Constitution*, section 3A & 3B of the *Appellate Jurisdiction Act*, Rule 24(1) of the *Supreme Court Rules*, and Rules 5(2)(b), 42 and 43 of the *Court of Appeal Rules*. The applicants Christopher Kioi & Nancy Wambui Waweru suing on behalf of the estate of Mwangi Kioi seek orders to have their intended appeal to the Supreme Court certified and leave granted for them to appeal to the Supreme Court.

2. The applicants also seek orders of injunction restraining the respondents, their servants, or agents from alienating, disposing of, or in any other manner dealing with the title in property known as LR No

10090/24 located in Juja (hereinafter referred to as the suit property), or interfering with the applicants' possession of the said property, pending the hearing and determination of the intended appeal.

3. The application is anchored on grounds stated on the face of the motion and an affidavit sworn by Christopher Kioi on 27th February 2018. In brief, litigation was ignited by an Originating Summons filed by the applicants in the High Court in which they sought various orders against the respondents, including, a declaration that title held by David Nyambu Jonathan Kituri (deceased) over the suit property has been extinguished by adverse possession, that the applicants are entitled to be registered as the legal and beneficial owners of the suit property, and that an injunction order do issue restraining the 1st respondents from alienating, disposing or in any other manner interfering with the applicants' possession of the suit property.

4. The High Court by a judgment delivered on 27th January 2017 dismissed the applicants' action, on the grounds that they had failed to prove adverse possession. Subsequently, the applicants appealed to this Court, and this Court having heard the appeal, upheld the decision of the High Court and dismissed the appeal.

5. The applicants who are aggrieved by the judgment of this Court wish to appeal to the Supreme Court. They contend that the intended appeal raises grave and substantive matters of law that are of public interest, some of which they identify as follows:

    i. The proper and sound meaning of the doctrine of adverse possession under sections 7, 13, 17 and 38 of the *Law of Limitation Act* (sic).

    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 2010?"

6. The applicants argue that Mwangi Kioi (deceased) had been in possession of the suit property for over 39 years and therefore the respondents would not suffer any irreparable harm or damage if an order of injunction is granted, nor would the respondents suffer any prejudice.

7. In their written submissions dated 31st March 2022, the applicants submit that there is need for clarity on what amounts to adverse possession and statutory interpretation, in light of section 7, 13, 17 and 38 of the *Limitation of Actions Act*, and urge the Court to take the opportunity of the appeal to clarify the position of adverse possession as juxtaposed with the right to property, provided in Article 40 of *the Constitution*. They argue that the intended appeal meets the threshold of a matter of general public importance as per the definition and the test set out by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR (Hermanus Phillipus Steyn decision).

8. Further, the applicants submit that due to the sentimental and emotive nature of the value attached to land in Kenya, sections 7, 13, 17 and 38 of *Limitation of Actions Act* should be examined in light of Article 40 of *the Constitution*, so as to come up with sound interpretation of the parameters of the doctrine of adverse possession where a purchaser of land has paid the purchase price in full but the sale is not completed.

9. The applicants relied on *Murai v Wainaina* (No 4 Civil Application No Nai 9/1978), that was cited in the *Hermanus Phillipus Steyn* decision, that an appeal touching on the subject of land rights, is of public importance as its outcome will not only affect parties to the appeal, but will also affect a large number of original land owners by depriving them, causing them social and economic upheaval; that Article 40 on ownership of rights bears a public law connotation and it is to be treated as such; and that the phraseology employed in Article 163(4)(b) of *the Constitution* "matter of general public importance" places on the Supreme Court a broad discretion, which includes a point of law of general public importance.

10. The applicants pointed out that the question of adverse possession arose in the High Court and was a subject of determination in both the High Court and the Court of Appeal. Finally, the applicants urged that if leave was granted, it would be in the interest of substantive justice for the Court to grant an injunctive order to prevent the wasting away of the suit property.

11. The 1st and 2nd respondents who are the administratrix of the estate of David Nyambu Kituri (deceased), opposed the application through an affidavit sworn by Winnie Mukolwe, and written submissions that were duly filed. Their position was that the Supreme Court has fully pronounced itself on the issue of adverse possession in *Malcolm Bell v Daniel Toroitich Arap Moi & Anor* [2013] eKLR (Malcolm Bell decision), and categorically ruled that the subject of adverse possession has been sufficiently settled in law and does not require the intervention of the Supreme Court. This position was reiterated in *Paul Khakina Musungu v Joseph Chebayi Chesoli & Anor* [2019] eKLR.

12. The 1st respondent argued that in any case, the applicants' motion does not meet the test for certification set out by the Supreme Court in the Hermanus Phillipus Steyn decision. They argued that the appeal before the Court is a contest over ownership of the suit property which is registered in the names of the 1st respondents as administratrix of the estate of David Jonathon Nyambu Kituri; that the applicants' suit for adverse possession in regard to the suit property was dismissed by the High Court as the applicants failed to prove that they had dispossessed the 1st respondents from the suit property, or that they had uninterrupted possession of the property for a period of 12 years, and this finding was upheld by the Court of Appeal. The 1st respondents pointed out that the applicants' contention that they have been in occupation of the suit property since 1969, raises a contest on the issue of facts which contest cannot be a basis for granting certification.

13. The 1st respondents argued that there was no controversy on the construction of section 7, 13, 17 and 18 of the *Limitation of Actions Act* or their interplay with adverse possession in the superior courts, nor were the parameters of adverse possession in relation to a purchase in a sale agreement canvassed, as the applicants abandoned their claim to the property pursuant to a purchase, and focused on adverse possession; that the interplay between adverse possession and Article 40 of *the Constitution* was also not canvassed in the superior courts; and that the issues raised by the applicants were neither determined by the Court of first instance nor this Court, but have been raised as:

> "a journey of legal innovation so as to clothe a straightforward and private dispute as one involving matters of general public importance meriting admission on appeal to the Supreme Court."

14. Further, the 1st respondents argued that the applicants have failed to demonstrate how the dispute transcends the facts of the case before the Court, and how public interest will be served by admitting the appeal. This is in light of the fact that the only error identified by the applicants in the judgment of the Court, is the failure by the Court to address itself on the applicability and parameters of the doctrine of adverse possession. That as pointed out by the Supreme Court in its Malcolm Bell decision

(*supra*), the appellate jurisdiction of the Supreme Court cannot be invoked merely for the purpose of rectifying errors with regard to matters of settled law.

15. Finally, on the prayer for an injunction, it was submitted that the same was misconceived and untenable in law as this Court has no jurisdiction before certification to issue an injunction after delivery of a judgment, as the Court is functus officio on the matter, save for the sole question of certification. In this regard, the 1st respondents relied on *Dickson Muricho Muriuki v Timothy Kagondu Muriuki & 6 others* [2013] eKLR and *Rose Jebor Kipngok v Kiplagat Kotut* [2019] eKLR. The Court was urged to note the fact that the respondents have never enjoyed their inheritance on the suit property for over 25 years, and therefore dismiss the motion.

16. The 2nd respondent who had been joined in the proceedings in the High Court as an interested party because she had entered into an agreement with the 1st respondents to purchase the suit property, also filed written submissions in an effort to protect her purchaser's interest in the suit property. She maintained that the intended appeal does not raise any issues of general public importance; that the applicants have failed to fulfill the seven governing principles in determining a matter of general public importance as set out in the *Hermanus Phillipus Steyn* decision; and that the issue of what constitutes adverse possession is one that is expressly set out in statutes and has been subject of countless judicial pronouncements.

17. The 2nd respondent further argued that the question regarding when a purchaser takes possession of a property pursuant to a sale agreement, and when possession becomes adverse, does not require the intervention of the Supreme Court as it is obvious that a claim for a purchaser's interest and a claim for adverse possession are separate and distinct. In addition, no substantial point of law has been raised by the applicants whose determination would have a significant bearing on the public interest, nor is there any uncertainty created by the impugned judgments of the High Court and the Court of Appeal, that would necessitate the Supreme Court to clarify for the benefit of the general public.

18. The 2nd respondent argued that the Supreme Court in its *Malcolm Bell* decision ruled out questions touching on adverse possession, from qualifying as questions of general public importance. Finally, the 2nd respondent urged that all the five points which the applicants claimed disclose matters of general public importance revolve on the issue of adverse possession, which has already been conclusively determined by two competent courts.

19. In the *Hermanus Phillipus Steyn* decision, the Supreme Court at paragraph 60 of the decision set out the following criteria for identifying a case as one involving a matter of general public importance under Article 163(4) (b):

> " In summary, we would state the governing principles 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 one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
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> 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;
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> 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."

20. We have already set out at paragraph 5 above what the applicants believe are substantive matters of law that are of general public importance, that in their view merit certification of the intended appeal as worthy of the Supreme Court's appellate jurisdiction under Article 163(4)(b). We find it necessary to examine these issues in light of the judgment of the Court of Appeal to determine whether they meet the threshold set in the Hermanus Phillipus Steyn decision.

21. Our starting point is the originating summons that was filed in the High Court a copy of which was annexed to the applicants' motion under consideration. We reproduce herein verbatim the core of the applicants' claim as pleaded in the originating summons, and captured in the substantive prayers as follows:

" (i) A declaration that the title held by David Nyambu Jonathan Kituri (deceased) over all that parcel of land comprised in title No IR 23758 being LR No 10090/24 measuring approximately 20.12 Hectares has been extinguished by adverse possession.

ii. A declaration that we (the plaintiffs) are entitled to be registered as the legal and beneficial owners of all that parcel of land comprised in title No IR 23758 being LR No 10090/24 measuring approximately 20.12 Hectares.

ii. An order of injunction to restrain the defendants by themselves, their agents, servants, or whomsoever from alienating, disposing, or in any manner interfering with the plaintiffs' possession of all that parcel of land comprised in title No IR 23758 being LR No 10090/24 measuring approximately 20.12 Hectares pending determination of this suit.'

22. The applicants sought a declaration that the title of Kituri (deceased) to the suit property had been extinguished by adverse possession of the suit property by Mwangi Kioi (deceased), and that the applicants were entitled to be registered as the legal and beneficial owners. The facts relied on were that Mwangi Kioi (deceased) entered into a sale agreement with Kituri (deceased) for the sale of the suit property, and obtained the land control board consent after paying the full purchase price. However, the property was never transferred to Mwangi Kioi (deceased) because Kituri (deceased) did not have

a grant. In 1970 Mwangi Kioi (deceased) dispossessed Kituri (deceased) from the suit property and thereafter, publicly and as of right exercised all acts of ownership until he died and his estate took over.

23. The High Court in its judgment identified the issues for determination as follows:

> “This is a case of adverse possession and I note that the parties did not file any agreed issues. However, the Court finds that the issue for determination herein is;
>
> i. Did the Plaintiffs specifically Mwangi Kioi (Deceased) and /or the administrators of his estate enter into the suit property and dispossessed the late David Nyambu Jonathan Kituri and/or his administrators for a period of over 12 years, to entitle them (Plaintiffs) to be registered as the owner of the suit property?
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> ii. Were the rights of the registered owner David Nyambu Jonathan Kituri extinguished by virtue of the plaintiffs’ possession of the suit property?
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> iii. Should the Defendants be injuncted from interfering with the suit property?
>
> iv. Did the Defendant have a right to sell the suit land to the interested party?
>
> v. Who should bear the costs of this suit?”

24. The High Court considered the law governing a claim for adverse possession as provided under sections 7 and 38 of the *Limitation of Actions Act*, adverse possession as defined in *Blacks’ Law Dictionary*, and case law including *Wambugu v Njuguna* [1983] KLR 172, *Teresa Wachuka Gachira v Joseph Mwangi Gachira* [2009] eKLR, and *Kimani Ruchine v Swift Rutherford & Co Ltd* [1980] KLR.

25. The High Court also considered the issue of sanctity of title stating in part as follows:

> “The certificate of title to this parcel of land was issued under the *Registration of Titles Act*, Cap 281 Laws of Kenya. In the said Act Cap 281 (now repealed) Section 23(1) states that:
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> ‘The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained thereon, or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party’.
>
> The above possession emphasizes on the sanctity of the title. The Defendants herein being the registered proprietors of the suit property by virtues of transmission, then *prima faciely* (*sic*) as provided by Section 23(1) of Cap 281(now repealed) are held to be the absolute and indefeasible owners of the suit property.
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> However, Section 38(1) of the *Limitation of Actions Act* grants leave to a person who claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of that Act that he may apply to the High Court for an order that he be registered as the proprietor of that land in place of the person then registered as the proprietor of the land. Cap 281 is one of the Acts referred to in Section 37 of Cap 22.
>
> Though the Defendants are the registered proprietors of LR No 10094/24 through transmission, the plaintiffs have applied to Court to have the said parcel of land registered in their names by virtue of adverse possession.”

26. Upon applying the law to the facts before it, the High Court concluded in part as follows:

> "Having now carefully considered and analyzed the available evidence, the court finds that the plaintiffs did not demonstrate on the required standard that they had dispossessed the Defendants the use and enjoyment of the suit property for a period of over 12 years and that the said plaintiffs were in exclusive and uninterrupted possession of the said suit land to warrant them obtain registration by adverse possession.
>
> On the second issue, having found that the plaintiffs have not acquired title to the suit land by virtue of adverse possession and having found that the suit land is now registered in the names of administrators of David Nyambu Jonathan Kituri, the Court finds that the Defendants are the absolute and indefeasible owners of the suit property by virtues of Section 23(1) of Cap 281 (now repealed) and the said right has not been extinguished. This was the finding in the case of *John Mwatela Shede v Vitahhbhai Bhulabhai Patel* (2010) eKLR where the court held that;-
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> 'In the absence of evidence to the contrary, the owner of the land with the paper title is deemed to be in possession of the land'.
>
> On the third issue having found that the defendants are the absolute and indefeasible owner of the suit property as provided by Section 23(1) of Cap 281 (now repealed) and later replicated by Section 26(1) of the *Land Registration Act* 2012, and the fact that the Plaintiffs have not acquired title to the suit land by adverse possession, the court finds that it cannot injunct the defendants from dealing with the suit land as they so wish since they are the absolute owner of the suit property and their rights cannot be defeated through an order of injunction".

27. In their appeal to this Court against the judgment of the High Court, the applicants raised 12 grounds that were captured by this Court in the judgment of 16th February 2018 as follows:

> "...the appellants compressed their 12 grounds of appeal into four grounds, contending that the learned judge erred by failing to find that Kioi and the appellants were in adverse possession of the suit property for a period of or more than 12 years; by failing to hold that Kituri's title to the suit property was extinguished in 1981 and that the 1st respondents held the suit property in trust for the appellants; by ignoring the evidence that was adduced and relying on irrelevant considerations; and lastly by failing to hold that the 2nd respondent had no proprietary interest in the suit property."

28. This Court in its judgment of 16th February 2018, rendered itself as follows in regard to the interpretation of sections 7, 13, 17 and 38 of the *Limitation of Actions Act*:

> "The appellants' claim to be entitled to be registered as owners of the suit property, which was initially registered in the name of Kituri and subsequently in the names of the 1st respondents, finds statutory expression in sections 7, 13, 17 and 38 of the *Limitation of Actions Act*. Section 7 prohibits the registered owner of land from instituting action for recovery of land after the expiry of 12 years from the date when the cause of action accrued. By dint of section 13, a right of action to recover land does not accrue unless a person in whose favour the period of limitation can run is in possession of the land (adverse possession). In section 17, it is further provided that once the period of 12 years of adverse possession prescribed by the Act has expired without an action to recover the land, the title

of the registered owner of the land stands extinguished by the operation of the law. Lastly section 38 allows a person who claims to be entitled to land by adverse possession to apply to the High Court to be declared as registered as proprietor of the land."

29. As expounded by the Court in its judgment, the provisions of sections 7, 13, 17 and 38 of the *Limitations of Actions Act* are clear. Those sections are not complicated nor do they require any serious argument or interpretation to deduce that they address the issue of adverse possession, and when a registered owner can be dispossessed of land by adverse possession. There is no grey area arising from those provisions in regard to the proper meaning of the doctrine of adverse possession.

30. The issue before the High Court and the Court of Appeal was simply whether the applicants had acquired the suit property by adverse possession, and conversely, whether the respondents' title had been extinguished. Both the High Court and this Court addressed the issue of adverse possession as affecting the rights of the respondents as the registered owner of the suit property, and the applicants as the alleged legal and beneficial owner of the suit property by virtue of adverse possession. The issues that the applicants have listed as matters of law that are of public interest revolve on rights arising under adverse possession.

31. The Supreme Court in the *Malcom Bell* decision addressed the issue whether a claim involving the question of adverse possession could be the basis for certifying a matter as being of general public importance to warrant certification of an appeal arising therefrom. The Supreme Court 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 public importance appropriate for that Court's appellate jurisdiction. The Supreme Court concluded 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".

32. One of the issues the applicants have raised as a substantial issue of law that they intend to canvas in the Supreme Court is whether adverse possession amounts to a right to property under Article 40 of *the Constitution*. In the *Hermanus Phillipus Steyn* decision (*supra*), the Supreme Court held that an issue intended to be raised before it as a substantial point of law having a significant bearing on public interest must be one that arose in the courts below and has been the subject of judicial determination. We have perused the originating summons, the judgment of the High Court and the judgment of this Court, and do find that this issue was not canvased in any of the two courts, nor did the two courts render their opinion or determination on the issue. Thus, the question does not meet the threshold to be a matter of general public importance worthy of the Supreme Court's appellate jurisdiction.

33. We come to the conclusion that the applicants have not convinced us that there is any substantial question of law or matter of general public importance, the determination of which transcends the dispute between the applicants and the respondents. For these reasons, we find that the applicants have not met the threshold for certification of the appeal as appropriate for consideration in the Supreme Court.

34. Accordingly, we decline to certify the intended appeal as one raising a matter of general public importance fit for appeal in the Supreme Court. The application is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

S. OLE KANTAI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR