Lelli v Kenya Medical Training College & 2 others (Civil Application E023 of 2022) [2023] KECA 619 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KECA 619 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E023 OF 2022

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

MAY 26, 2023

BETWEEN

ROBERT MUTISO LELLI ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA MEDICAL TRAINING COLLEGE ..... 2ND RESPONDENT

COMMISSIONER OF LANDS ..... 3RD RESPONDENT

(Application for certificate to appeal to the Supreme Court from the Judgment of the Court of Appeal at Nairobi (Karanja, Murgor & Sichale, JJ.A.) dated 9th July 2021 in CA No. 555 of 2019)

RULING

1. The protagonists in this dispute are the applicant, Robert Mutiso Lelli, and the 1st respondent, the Kenya Medical Training College. The applicant, a citizen of the Republic of Kenya, claims to be the lawfully registered owner of the property known as LR No. 209/14272, Matumbato Road, Nairobi, (the suit property). He contends that his ownership of the suit property is guaranteed and protected by the laws and *the Constitution* of Kenya. On its part, the 1st respondent is a public institution and a body corporate established by the *Kenya Medical Training College Act* (cap 261 of the Laws of Kenya) to provide training and facilities for college education to meet national health manpower requirements. The 1st respondent also stakes claim to the suit property and maintains that its registration in the applicant's name was procured unlawfully and is therefore illegal, null and void.

2. By his motion on notice dated January 25, 2022, the applicant, has moved this court for a certificate that a matter of general public importance is involved in his intended appeal, so as to enable him challenge the judgment of this Court (Karanja, Murgor & Sichale, JJ.A.) dated July 9, 2021 in the Supreme Court. By that judgment, this Court dismissed the applicant's appeal and upheld the judgment of the

Environment and Land Court (ELC) at Nairobi (Bor, J.) dated May 24, 2019. On its part, the ELC held that the allocation of the suit property to the applicant by the 3rd respondent, the Commissioner of Lands, was illegal, null and void. The ELC further found that, at the material time, the suit property was reserved for the 1st respondent as a public institution and, therefore, did not constitute un- alienated Government land that the 3rd respondent could validly allocate and alienate to private individuals like the applicant. By a further order, the ELRC directed the 3rd respondent to allocate the suit property to the 1st respondent. By way of background, on or about October 2, 2009, the applicant filed a suit against the 1st respondent for trespass to the suit property. The applicant averred that he was the registered owner of the suit property, and that the 1st respondent had trespassed thereon and erected a perimeter wall. The applicant prayed for a permanent injunction, general damages for trespass, costs and interest. The 1st respondent resisted the applicant's claim through a defence and counterclaim. The 1st respondent denied the applicant's claim and pleaded that the registration of the applicant as proprietor of the suit property was obtained illegally, and was null and void because the suit property was irregularly excised from land already allocated and reserved for the 1st respondent as a public institution. Accordingly, the 1st respondent prayed for: a declaration that the registration of the applicant as proprietor of the suit property was illegal; an order for cancellation of the applicant's title and registration of the suit property in the 1st respondent's name; and a permanent injunction to restrain the applicant from interfering with the suit property. The applicant duly filed a reply and defence to the counterclaim.

3. In the fullness of time, the applicant's suit was dismissed for want of prosecution, and the ELC proceeded to hear the 1st respondent's counterclaim. Five witnesses, including the applicant, testified. Among those witnesses, Timothy Waiya Mwangi took the court through the procedure of changing public land to private land. He confirmed that the land from which the suit property was hived was within Kenyatta National Hospital, was occupied by the 1st respondent since 1960, and was allotted and reserved for the 1st respondent as a public institution on December 18, 1996. He added that the land, having been so assigned for a function or use during planning, was not available for alienation. He also confirmed that records at the Physical Planning Department did not show the approval for subdivision of the land reserved for the 1st respondent to create, among others, the suit property.

4. The other witness of note, Gordon Odeka Ochieng, a senior Assistant Director of Land Administration, informed the trial court that the applicant was allocated the suit property on August 22, 2000 in compensation for a parcel of land that he had purchased in Malindi, which turned out to be bang in the Indian Ocean! However, it later transpired that even the suit property that was allocated to the applicant fell within land reserved for the 1st respondent, a fact which the Ministry of Lands was not aware of because the 1st applicant had given wrong information. On her part, Priscilla Njeri Wango, an officer from the Ministry of Lands and Physical Planning likewise confirmed that the land from which the suit property was hived had been reserved for the 1st respondent, and was not available for alienation.

5. In his evidence, the applicant confirmed that he was allocated the suit property as compensation for the Malindi plot and maintained that the allocation and his subsequent registration as proprietor in December 2000 was lawful. It was his position that his registration, being a first registration, could not be challenged, and that the 1st respondent was a trespasser on the suit premises.

6. The learned judge identified two issues for determination, namely:-

    i. whether the applicant acquired the suit property irregularly and illegally; and

    ii. whether the applicant's title to the suit property should be revoked.

Upon evaluating and considering the evidence, the learned judge held that the suit property formed part of the land reserved for the 1st respondent for public purposes; that at the time the suit property was allocated and registered in the applicant's name, the 1st respondent was in actual possession and occupation of the same; that the suit property was not un-alienated Government land available for allocation to the applicant; that under the Government Lands Act (repealed) the power to make grants over un-alienated public land vests in the President rather than the 3rd respondent; that the 3rd respondent had no power to allocate the suit property to the applicant; and that article 40 (6) of *the Constitution* did not protect illegally acquired title to property. Accordingly, the Court found that the applicant did not obtain good title to the suit property and allowed the 1st respondent's counterclaim with costs.

7. The applicant was aggrieved and lodged in this Court Civil Appeal No. 555 of 2019. The applicant's specify grievance was that the Court erred by holding that he acquired title to the suit property illegally and unlawfully; by finding that he was allocated public land which was not available for alienation; by allowing the 2nd and 3rd respondents to participate in the suit whilst they had not filed any defence; by holding that the 1st respondent was issued with title to surrendered parcels of land that, like the suit property, had been hived from the land allocated to it; by finding that the applicant had voluntarily surrendered a title to one of the parcels hived from the land allocated to the 1st respondent; by holding that the 3rd respondent had no power to allocate the suit property to the applicant; by holding that the 1st respondent had proved its case on a balance of probabilities; and by awarding costs against the applicant.

8. After hearing the parties, the Court framed four issues for determination, namely:-

   i. whether the applicant acquired the suit property legally and procedurally;

   ii. whether the title to the suit property should be surrendered or cancelled;

   iii. whether the 2nd and 3rd respondents were properly joined as parties in the proceedings; and

   iv. whether the trial court erred by awarding costs to the 1st respondent.

9. On the first issue, the Court found that the parcel of land from which the suit property was hived was allocated first in time to the 1st respondent, and that the Government Lands Act vested the power to allocate un-alienated Government Land in the President rather than the 3rd respondent, who purported to allocate the suit property to the applicant. In addition, the property having been allocated to the 1st respondent, it was not available for allocation to the appellant. Like the trial court, the Court concluded that the appellant did not obtain a good title to the suit property.

10. On the second issue, the court found that, although article 40 of *the Constitution* guaranteed the right to property, that protection did not extend to property found to have been unlawfully acquired. Consequently, a title obtained unlawfully was liable to be cancelled. On the participation of the 2nd and 3rd respondents in the suit, the Court found that the trial court granted those respondents leave to file their statements and documents, which they duly did without any protest or objection from the applicant. Having allowed the hearing to proceed till conclusion without as much as a whimper, it was too late in the day to raise the complaint. Lastly, on costs, the Court noted that costs follow the event, and that the 1st respondent, having succeeded in its counter-claim, was entitled to costs.

11. The record indicates that, on August 21, 2021, the applicant lodged a petition directly in the Supreme Court to which the 1st respondent took objection founded on jurisdiction. On October 7, 2021, the applicant applied to withdraw the petition, which application was granted by the Supreme Court on

December 3, 2021. Thereafter, the applicant came back to this court with the application presently before us.

12. The applicant, in both his affidavit in support of the application and written submissions, argues that the intended appeal to the Supreme Court raises matters of general public importance because this court failed to appreciate the conceptual and constitutional distinction between a fresh allocation of land by the 3rd respondent and compensation by the State, which are governed by distinct constitutional and statutory provisions. The applicant further contended that the evidence he adduced established that he was a beneficiary of compensation by the State, but that the Court treated him as a beneficiary of allotment of the suit property by the 3rd respondent. In all, the applicant submitted that the following issues which he would like to be canvassed at the Supreme Court, are matters of general public importance, namely:-

    i. whether the applicant was the beneficiary of State allocation in the conventional sense;

    ii. what are the obligations of the State with regards to a compensation scheme where detriment has been suffered by a citizen?

    iii. whether the applicant had any legitimate exception having been offered the suit property by the State as compensation;

    iv. whether the trial court and the Court of Appeal could treat the applicant as an allot in light of the evidence adduced which showed that the suit property was offered to the applicant as compensation;

    v. whether it is justifiable in the circumstances to ignore the Torrens principles that underpin issuance of title to land in Kenya; and

    vi. what would be the fate of land law and land law principles should the judgment and orders of this court be enforced.

13. It was the applicant's further submission that a matter of general public interest is one whose impacts and consequences are substantial, broad-based and transcends the interests of the parties, and bears on the public interest. He added that the categories of public interest are not closed and that it behoves an applicant to demonstrate specific elements of public interest. For those propositions, he relied on the decision of the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR. The applicant further argued that his title to the suit property was issued by the Government and had not been revoked; that the Court erred in holding that the suit property was excised from public property whilst the evidence on record indicated that the land was private land and not part of Kenyatta National Hospital, or the property of the 1st respondent; that the Court failed to give the dispute a global view; and that the answers to the questions he had framed for consideration by the Supreme Court would impact the general public in terms of land administration, security of land rights, and the principles underpinning the land registration system. The applicant also argued that the judgment of the Court had created uncertainty, and that it was a matter of general public importance for the Supreme Court to give guidance on the procedure and parameters for compensation in similar cases.

14. The 1st respondent opposed the application vide grounds of opposition dated January 31, 2023, a replying affidavit sworn by David Ondeng', its administrative manager, on March 7, 2023, written submissions and a digest of authorities. The substance of the 1st respondent's submissions is that the issues identified by the applicant for consideration of the Supreme Court are matters of the applicant's own private concern and interest over the suit property, which do not implicate any public interest

so as to render them matters of general public importance. The decision of this court in *Patel Lagat* [2022] KECA 509 KLR was cited in support of the proposition that mundane issues arising out of a private dispute over property are not matters of general public importance. It was further submitted that the applicant had not identified any novel or uncertain issues of law deserving clarification by the Supreme Court.

15. On their part, the 2nd and 3rd respondents joined in opposition to the application relying on a replying affidavit sworn by Oscar Eredi on 14th April 2022 and written submissions dated 13th April 2022. They submitted that the applicant's intended appeal to the Supreme Court does not raise any cardinal issues of law or jurisprudence, and does not involve any matter of general public importance deserving the attention of the Supreme Court. These respondents cited the decisions of the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (supra) and *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others* [2012] eKLR regarding the principles that should guide the Court in determining whether or not to certify a matter as one raising matters of general importance, and submitted that the applicant had woefully failed to satisfy the principles.

16. As we turn to consider the merits of this application, we remind ourselves that by dint of article 163(4)(b) of *the Constitution*, the applicant must satisfy us that a matter of general public importance is involved in his intended appeal to justify a certificate to appeal to the Supreme Court. As this court explained in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2012] eKLR, the purpose of a certificate as a condition precedent to appealing to the Supreme Court is to filter intended appeals, so that only those with clear elements of general public importance are escalated to the Supreme Court. In philosophy, orientation and design, *the Constitution* did not create the Supreme Court as an additional appellate tier in our judicial system where routine disputes would ultimately end for correction of what parties perceive to be errors in the interpretation or application of the law by courts below the Supreme Court. Indeed, in *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* (supra), the Supreme Court warned of the limits to its jurisdiction thus:-

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court". (Emphasis added).

17. In *Malcolm Bell v. Daniel Torotich Arap Moi & another* [2013] eKLR, the Supreme Court further explained as follows:

> "It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of *the Constitution* and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law." (Emphasis added)

18. When the dispute in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* was escalated from this Court to the Supreme Court, the latter enumerated the considerations for determining whether an intended appeal to the Supreme Court involves a matter of general public importance. The applicant must demonstrate that the issues intended to be canvassed before the Supreme Court transcend the circumstances of the case and have a significant bearing on the public interest, and that the point of law involved is a substantial one, the determination of which will have a significant bearing on the public interest. Mere apprehension of a miscarriage of justice without satisfying the requirements of

article 163(4) (b) of *the Constitution* will not suffice. Furthermore, the determination of contested facts between the parties is not, by and of itself, a sufficient basis for certification.

19. Taking into account the above principles, the dispute that the applicant intends to escalate to the apex court was for all intents and purposes a straightforward dispute between the applicant and the 1st respondent on ownership of a parcel of land and the validity of the applicant's title thereto. We must reiterate that what the trial court determined and what was addressed by this Court was the 1st respondent's counterclaim, the applicant's suit having been dismissed for want of prosecution. Indeed, the applicant's claim was a straightforward claim for trespass to land. The counterclaim involved issues of evidence to determine the status of the suit property at the material time, and whether the same was validly allocated to the 1st respondent. It further involved interpretation of the repealed Government Lands Act to determine whether the 3rd respondent had powers to allocate the suit property to the 1st respondent. A further issue was whether under the repealed Registration of Titles Act, the applicant had obtained indefeasible title to the suit property, or whether that title was vitiated by fraud, misrepresentation or mistake to which he was party. Lastly, it involved consideration of whether under article 40(6) of *the Constitution*, which by virtue of the decision of the Supreme Court in *Samuel Kamau Macharia & another v. Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, has prospective and retrospective perspectives, the acquisition of the suit property by the applicant was unlawful.

20. The trial court considered the evidence that was adduced. It had the opportunity to see and hear the witnesses as they testified, and were subjected to cross-examination. Other than the applicant, all the witnesses who testified were consistent that the suit property had already been allotted to the 1st respondent by the time the 3rd respondent purported to allocate it to the applicant. Even the 3rd respondent itself took the position that the allocation of the suit property to the respondent was by mistake. As it was entitled to do, the trial court preferred one version of the evidence over the other, and gave reasons therefor. On appeal, this Court, as the first appellate court, re-evaluated the evidence as it was duty bound to do and reached a concurrent finding with the trial court. Now, the applicant wishes to proceed to the Supreme Court to urge that the Court erred in its consideration of the evidence and arrived at a wrong conclusion. With respect, that is not a legitimate basis for certification under Article 163(4)(b) of *the Constitution*. As the Supreme Court has stated, it is not to be bogged down by pleas to rectify perceived errors in evidence or application of settled law.

21. A distinct point eloquently urged by the applicant is that the court conflated fresh allocation and compensation, which has created such confusion that the Supreme Court must be afforded an opportunity to set the record straight. To say the least, that is a clear recalibration of the applicant's case from the dispute that was submitted to the trial and the first appellate courts. True, the applicant led evidence of the background to the allocation to him of the suit property, but he did not invoke in his pleadings, evidence and submissions the State power of eminent domaine under article 40 (3) of *the Constitution*, and neither did the other parties or the Court address the issue. There was no pleading or evidence that the State compulsorily acquired the applicant's land in Malindi for a public purpose or interest. On the contrary, the evidence on record merely showed that the applicant had purchased a parcel of land that ultimately ended up being in the Ocean rather than on terra firma. Exactly who he purchased it from is not clear from the record, but arising from that, the parties agreed on compensation. That by and of itself did not involve issues of eminent domain under Article 40(3) of *the Constitution* or under the repealed *Land Acquisition Act*, (cap 295, Laws of Kenya) and, absent pleadings and evidence, the two courts below the Supreme Court could not have been expected to fashion the issue from thin air and determine it.

22. The Supreme Court has unequivocally stated that a party is not allowed to introduce new issues that were not before or determined by this court so as to create a matter of general public importance. Thus, in *Florence Nyaboke Machani v. Mogere Amosi Ombui & 2 others* [2015] eKLR, the Supreme Court held as follows:

> "[49] It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with "matters of general public importance", have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoge case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance—which would be contrary to established principle, and to the design of the judicial system." (Emphasis added).

Having carefully considered the notice of motion dated January 25, 2022, we are persuaded that it does not satisfy the requirements for certification under article 163(4)(b) of the Constitution. The same is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR