



**Kenya Agricultural Research Institute v Commissioner of Lands & another  
(Civil Application 5 of 2018) [2023] KECA 552 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 552 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 5 OF 2018  
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA  
MAY 12, 2023**

**BETWEEN**

**KENYA AGRICULTURAL RESEARCH INSTITUTE ..... APPLICANT**

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for certification to appeal from the Judgment  
and Decree of the Court of Appeal of Kenya at Nairobi (Visram and J.  
Mohammed JJ.A.) dated 26th January, 2018 in Civil Appeal No. 183 of 2011)*

**RULING**

1. By a Notice of Motion dated March 2, 2018 brought pursuant to Article 163 of the Constitution, section 3A of the Appellate Jurisdiction Act and rules 2, 41, 42 and 43 of the Court of Appeal Rules, and supported by the affidavit of Dr. Jane Wachira, the applicant prays that this matter be certified as fit for appeal to the Supreme Court; and that leave be granted to the applicant to file an appeal to the Supreme Court from the judgment and decree of the Court of Appeal at Nairobi (Visram, G B M Kariuki and J Mohammed, JJ A) in Civil Appeal No 183 of 2011.
2. The application is premised on grounds that the proposed appeal involves a matter of general public importance, namely: how the issue of ownership of competing claims to land can be resolved, and whether a summary procedure such as Judicial Review is the appropriate method of resolving such a dispute. The applicant also states that the proposed appeal involves a matter of general public importance i.e. ownership, possession, use and disposal of public land; and that a substantial miscarriage of justice has occurred, and may continue to occur, unless the proposed appeal is certified for hearing before the Supreme Court.



3. The application is opposed through the replying affidavit dated June 12, 2018 sworn by George Kanyingi, the ex parte applicant's director, who states that the suit property was not, and has never been, government land or un-alienated government land; that the application does not raise any matters of general public importance in that illegal alienation of private land is a simple matter touching on the sanctity of an individual's constitutional right to property and fair administrative action; that there is no demonstration under what constitutional or statutory regime such allocation could be done, without following due process; and that there has been no demonstration of any substantive point of law with a significant bearing on public interest.
4. This matter begun in the High Court where Renege Project Limited had an application for Judicial Review against the applicant and the 1<sup>st</sup> respondent herein, seeking an order of certiorari in relation to a title issued as grant in respect of LR No 27628; an order of *mandamus* to compel the 1<sup>st</sup> respondent herein, to cancel and delete the certificate of title in respect of the named parcel of land; and an order to prohibit the applicant and the 1<sup>st</sup> respondent through their servants or agents from interfering with, occupying or alienating the said parcel of land. The grounds were that the 1<sup>st</sup> respondent had illegally allotted to the applicant herein the suit property, despite it being registered in the name of Renege Projects Ltd.
5. The application for judicial review was opposed on the basis that the cause of action lay in private law as opposed to public law; and that the application was in breach of the provisions of the Government Lands Act as regards the acquisition of the said parcel.
6. The learned Judge (Msagha, J) as he then was) found that there were competing interests revolving around issues of possession, ownership and acquisition of land under the Registration of Titles Act *visa vis* compliance with the Government Lands Act; and the validity of title, all of which required calling evidence and cross - examination of witnesses, which could not be advanced by way of Judicial Review. The learned Judge held that he did not have jurisdiction in the matter and dismissed the application as misplaced because the remedy sought could only be properly ventilated in a full hearing under private, and not public, law.
7. Aggrieved by the outcome, Renege Project Ltd (who was the ex parte applicant in the High Court) filed an appeal to this Court, on grounds which we broadly summarize as being that the learned trial Judge: failed to determine the dispute which was fully argued before him; erred in holding that the dispute could not be determined through Judicial Review as the remedy sought lay in private law, and not public law; and in not appreciating sufficiently the legal nature of the evidence tendered by the parties. The applicant urged this Court to set aside the ruling by the High Court and substitute therefore orders allowing the prayers in its Motion.
8. In a judgment dated January 26, 2018, this Court, held that the appeal was merited, and set aside the ruling of the High Court substituting it for an order allowing the Motion dated May 20, 2010, as well as awarding costs of the Judicial Review proceedings to the appellant. The Court pointed out that the suit before the High Court disclosed substantive and rivalled facts revolving around the issue of ownership and possession of land, and legality of title; that the learned Judge should not have downed his tools merely because the remedy sought lay in private law, without considering the merits of the Judicial Review Application, and that, in any event, the question as to whether a public servant could allocate land that was privately owned, was in the domain of public law as opposed to private law.
9. It is this outcome that has aggrieved the applicant and prompted it to request for certification to appeal to the Supreme Court.



10. This Motion was canvassed through written submissions. The applicant submits that the proposed appeal involves a matter of general public importance, regarding how the issue of ownership of competing claims to land can be resolved, and whether a summary procedure such as Judicial Review is the appropriate method of resolution of such a dispute; and that it involves a matter of general public importance, namely, the ownership, possession, use and disposal of an interest in public land. The applicant laments that a substantial miscarriage of justice has occurred, and may continue to occur unless the proposed appeal is filed for determination on merits.
11. Urging us to allow the application, the applicant contends that it meets the governing principles set out by the Supreme Court of Kenya in the case of *Hermanus Phillipus Steyn v Giovanni Gnechi - Ruscone*, [2013] eKLR, and *Malcolm Bell v Daniel Toroitich arap Moi and Anor* [2013] eKLR in determining whether a matter is of general public importance. The applicant has highlighted these principles as:
- i. 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. the matter raises a substantial point of law, the determination of which will have a significant bearing on the public interest;
  - iii. Such question(s) of law must have arisen in the court or courts below and must have been subject to judicial determination;
  - iv. the application 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. the matter must fall within the terms of Article 163(4) (b) of the *Constitution*;
  - vi. the intending appellant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;
  - vii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become "matters of general public importance" so as to be a basis for appeal to the Supreme Court;
  - viii. questions of law that are, as a fact, or as appears from the very nature of things, set to effect considerable numbers of persons in general, or as litigants, may become "matters of general public importance" justifying certification for final appeal in the Supreme Court;
  - ix. questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance" justifying certification for final appeal in the Supreme Court; and
  - x. questions with a bearing on the proper conduct of the administration of justice, may become "matters of general public importance" justifying final appeal to the Supreme Court.
12. Urging us to decline the request for certification, the 2<sup>nd</sup> respondent reiterates, that a matter of illegal alienation of private land carried out by the Commissioner of Lands, the 1<sup>st</sup> respondent herein, is an affront to Articles 40 and 47 of the *Constitution*; and that this Court has had occasion to conclusively ventilate on the two conflicting and fundamental principles on the right to private property and public interest in the case of *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR, while citing *Chemei Investments Limited v The Attorney General & Others*, Nairobi Petition



- No 94 of 2005 [UR] to the effect that one can only raise the question of public importance where there is fraud attributable to the proprietor in acquisition of the challenged title, and that the applicant has therefore not met the test set out in the Steyn case (*supra*); and that the *ultra vires* action of the 1<sup>st</sup> respondent herein do not transcend the particular case, nor seep out as to affect the general public.
13. The crux of this application is anchored on Article 163(4) of the [Constitution](#), which provides that:
    4. Appeals shall lie from the Court of Appeal to the Supreme Court-
      - a. as of right in any case involving the interpretation or application of this Constitution; and
      - b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved subject to clause (5).
  14. What constitutes general public importance was addressed by the Supreme Court in the case of [Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone](#) [*supra*] thus:

“... “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.”
  15. The *Black’s Law Dictionary* links “general importance” to “public interest”. It defines public interest as “... the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation.”
  16. As Madan, JA (as he then was) observed in [Murai v Wainaina](#) [1982] KLR p 38 at p 49 para 1:

“A question of general public importance is a question which takes into account the well-being of a society in just proportions.”
  17. The principles set out in the afore-cited case of *Hermanus Phillipus Steyn v Giovanni Gneccchi – Ruscone* (*supra*), to determine whether a matter of general public importance include:
    - a. 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;
    - b. 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;
    - c. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
    - d. 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;
    - e. 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;

- f. 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;
  - g. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.
18. The applicant has argued that this application raises an issue of general public importance which it identifies as ownership of competing claims to land can be resolved, and whether a summary procedure, such as Judicial Review, is the appropriate method of resolution of such a dispute; and that it involves a matter of general public importance, namely, the ownership, possession, use and disposal of an interest in public land. Whereas the nature of the issues raised have been specifically singled out by the applicant, the circumstances of this matter remain undeniably, a private dispute over ownership of a property affected by the ultra vires actions of the 1<sup>st</sup> respondent. We are not so persuaded.
19. We are aware of the applicant’s lamentation that a substantial miscarriage of justice has occurred and may continue to occur unless the proposed appeal is filed for determination on merits. The best we can say in reaction to this is to echo this Court’s sentiments in Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and allied Workers’ Union (Kefbau) represented by its Promoters David Benedict Omulama & 9 others [2018] eKLR that:
- “...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.”
20. Consequently, it is our finding that the present application is without merit, and it is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

