



**Mangi v Green & 3 others (Civil Appeal (Application)
E001 of 2022) [2023] KECA 1190 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1190 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E001 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 6, 2023**

BETWEEN

JOE KAZUNGU YAA MANGI APPLICANT

AND

DAVID RODNEY GREEN 1ST RESPONDENT

DEBORA JANE GREEN 2ND RESPONDENT

THE LAND REGISTRAR, KILIFI 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 4TH RESPONDENT

(An application for stay of execution of the Judgment and decree of this Court (S. Gatembu Kairu, P. Nyamweya & J. Lesiit JJ. A) delivered on 23rd September 2022 in Civil Appeal No E017 of 2020 and for certification and leave to appeal to the Supreme Court of Kenya)

RULING

1. Joseph Kazungu Yaa Mangi, the Applicant herein, is by an application dated October 6, 2022, seeking leave to file an appeal to the Supreme Court against the judgment of this Court (Gatembu, Nyamweya & Lesiit, JJA) dated September 23, 2022, and orders of stay of the said judgment pending the hearing and determination of the intended appeal. The grounds for the application are that the intended appeal meets the threshold envisaged under Article 163 (4) of the Constitution for reasons that:
 - a. The appeal seeks an interpretation of the doctrine of legitimate expectation in so far as it touched on state actors, and the same is not limited to his private interest or peculiar to his appeal.
 - b. That appeal seeks an interpretation of the procedure of allocating land under the Agriculture Act and the regime under the Settlement Fund Trustee.



- c. The appeal seeks the apex Court to resolve the overlapping regimes between the Agriculture and Land Registration Acts.
 - d. The appeal seeks to address the issue of land grabbing and irregular acquisition of land that was meant for landless Kenyans by private individuals.
 - e. That the appeal seeks interpretation of section 26 of the [Land Registration Act](#) in so far that a party cannot plead indefeasibility of title as a statutory concept to defeat the Supreme law which is the [Constitution](#) under Article 40 of the [Constitution of Kenya](#).
 - f. That the foregoing matters are matters of public interest especially in Coast Region, where due to historical reasons these matters have not been resolved to date.
2. The Applicant is apprehensive that if the Court does not grant the orders of stay of execution, the intended appeal which is arguable shall be rendered nugatory and a mere academic exercise, and states that this Court has immense power to grant the orders sought. Further, that the 1st and 2nd Respondents do not reside on the suit premise and they will not suffer prejudice if the orders sought are granted, while the Applicant will be rendered homeless and a vagabond as has been living on the suit premises for 30 years.
 3. David Rodney Green and Debora Jane Green, the 1st and 2nd Respondents herein, opposed the application by way of a replying affidavit sworn on January 19, 2023 by the 1st Respondent. They aver that the application discloses no reasonable matter of general and public importance to warrant the relief sought. Further, that the application is non-compliant with the mandatory provisions of the [Court of Appeal Rules, 2022](#) and Supreme Court Rules, 2012 hence incompetent. They argue that the Applicant has not demonstrated service of a Notice of Appeal against the impugned decision, which non-service invalidates the said Notice of Appeal and divests this Court of jurisdiction to entertain the instant application.
 4. The 1st and 2nd Respondents urge that the application and draft memorandum of appeal did not satisfy the legal threshold as set out in the decision of this Court in [Hermanus Philipus Steyn vs Gnechi Ruscone](#) [2012] eKLR, as the Applicant is seeking leave to appeal to the Supreme Court on matters of fact and law in respect to a property known as Parcel No Kilifi/Mtondia/182 of which they are registered owners, and that the intended appeal or alleged issues raised by the Applicant is an attempt to rectify alleged errors cited in the draft Memorandum of Appeal. Further, there is no uncertainty or different decisions of concurrent Courts of Record on the issues of law or matters alleged in the application for determination by the Supreme Court. Additionally, that the issues alleged by the application in seeking leave to appeal to the Supreme Court are expressly provided for by relevant statutes, and the law on the said questions are settled by judicial precedent.
 5. The 1st and 2nd Respondent avers that the alleged issues or question of facts, law and/ or interpretation of the statute raised in the application are not issues arising from the judgment and cannot be issues for appeal. Similarly, the issues do not arise from the suit in the Trial Court and are neither pleaded or in dispute between the parties in Malindi ELC Case No 25 of 2018. Additionally, the Applicant is misleading this Court that the 1st and 2nd Respondents are foreigners and this was neither pleaded in the trial Court nor on appeal. The 1st and 2nd Respondents maintain that they are Kenyan citizens by birth and the reference of foreigners was not only vexatious but extraneous. They also detailed the claims in the trial Court and in this Court.



6. Lastly, the 1st and 2nd Respondents aver stated that this Court has pronounced itself that it had no jurisdiction to grant stay of execution of its own judgment after delivery and the proper forum for such an application should be the Supreme Court. Therefore, there was no basis in law or fact to grant stay of execution of the judgment pending alleged intended appeal to the Supreme Court, and that the stay orders sought are an abuse of the Court process to countenance the Applicant's trespass, nuisance and illegalities on the suit property particularly to destroy and waste away their fruit orchard/ farming thereon developed since 1999.
7. We heard the application on this Court's virtual platform on May 2, 2023, and there was no appearance for the Applicant even though his advocates on record, were duly served with the hearing notice, while learned counsel Mr. Litoro Oscar, appeared for the 1st and 2nd Respondents and relied on written submissions dated January 19, 2023, filed on behalf of the said Respondents, and learned counsel Ms. Lutta appeared for the 3rd and 4th Respondents and submitted that she would rely on the 1st and 2nd Respondents' submissions. This Court noted that the Applicant's advocates, Katsoleh & Company Advocates, had filed written submissions dated October 24, 2022, which we have taken into account.
8. The Applicant in his respect relied on Article 163 (4) of the Constitution and the Supreme Court of Kenya decision in Hermanus Philipus vs Giovanni Gnechhi Ruscone [2013] eKLR to submit that the intended appeal raised matters of public interest, namely, the interpretation of the doctrine of legitimate expectation, which doctrine was a matter of public interest as it is based on the promise by a public authority; whether the doctrine of legitimate expectation ought to rank pari pasu with adverse possession where it contradicted statute law, and whether allocation of land under the settlement adjudication schemes is available to foreigners.
9. On the orders for stay of execution of this Court's judgment, the Applicant submitted that the principles of granting stay of execution injunction or a stay of proceedings under Rule 5 (2) (b) of the Court of Appeal Rules were settled, restated and amplified by this Court in the decision of Multimedia University & another vs Professor Gitle N. Naitulu [2014] eKLR. It was the Applicant's submission that they met the first limb for granting an order under Rule 5 (2) (b) and annexed a draft memorandum of appeal raising 18 grounds of appeal which were arguable, and that if execution is done the process would be irreversible and would not be compensated by way of damages since the Applicant has sentimental value on the suit premise having lived there for over 30 years unlike the 1st and 2nd Respondents, and there is likelihood that the suit premise would be transferred to a 3rd party without the knowledge of the Applicant.
10. The 1st and 2nd Respondents' counsel on his part placed reliance on Rule 37 (1) of the Supreme Court Rules and Rule 79 of the Court of Appeal Rules and submitted that they were served with the Notice of Appeal on October 5, 2022, while the Applicant has not demonstrated service of the Notice of Appeal on the 3rd and 4th Respondents. Therefore, that since a valid Notice of Appeal was an essential pre requisite ingredient giving this Court jurisdiction in this matter, and the application has not complied with the Court of Appeal rules, it was incompetent.
11. The 1st and 2nd Respondents' counsel further submitted that the application does not disclose any matter of general public importance, and placed reliance on Article 163 (4) (b) of the Constitution and the criteria set out in Hermanus Philipus Steyn vs Gnechii Ruscone [*supra*] eKLR and Sammy Mwangi & 10 others vs Commissioner of Lands & 3 others [2021] eKLR. It is their assertion that this Court rightly ruled in the impugned judgment, which adopted judicial precedent of this Court and of the Supreme Court and relied on express and conclusive provisions of the Land Registration Act, and that the issues raised do not arise from the Court of Appeal or the Trial Court and are new issues The



decisions in *Langata Development Co. Ltd vs Mary Wanjiru* [2019] eKLR and *Malcom Bell vs Daniel Toroitich Arap Moi & another* [2013] eKLR were also cited in this respect.

12. The counsel opposed the prayer for stay of execution of this Court’s judgment, and placed reliance on this Court’s decision in *Dickson Muricho Muriuki vs Timothy Kagundu Muriuki* [2013] eKLR. It is their submission that this Court is *functus officio* and could not give stay of its final judgment. Additionally, that the discretion of the Court under Rule 5 (2) (b) as read with Rule 2 of the *Court of Appeal Rules* do not extend to appeals from this Court. They conclude that the Applicant had never been in possession of the land and there was no appeal or intended appeal as no leave had been granted hence no basis for granting the orders.

13. Three issues present for determination. The first is whether the instant application is competently filed; the second is whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave; and the third is whether stay of execution of the judgment should be granted. The applicable law in this respect is of Article 163 (4) of the *Constitution* which provides 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 this 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. Rule 42 of the *Court of Appeal Rules, 2022* further provides as follows:

“Where no appeal lies unless the superior court certifies that a point of law of general public importance is involved, an application for such a certificate may be made—

- a. informally, at the time when the decision against which it is desired to appeal is given; or
- b. by motion or chamber summons according to the practice of the superior court, within fourteen days after that decision”

14. The decision sought to be appealed against was delivered by this Court on September 23, 2022 and the instant application is dated October 6, 2022 and was lodged on the same date. The application is therefore incompetently before this Court, having been filed out of time, and the Applicant having failed to seek extension of time. It is also notable that the Applicant did not annex a copy of the decision appealed from as required by Rule 79 of the *Court of Appeal Rules of 2022*, although the same was annexed to the 1st and 2nd Respondents’ replying affidavit.

15. On the second issue, the criteria for certification of a matter as one of general importance was laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi Ruscone*, (2013) e KLR:

“...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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

16. The Supreme Court further enunciated the principles for determining whether a matter of general public importance thus:

- 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 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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

17. It is notable that the dispute in the trial Court and before this Court on appeal was one between the Applicant, who alleged to have been the lawful allottee of land parcel No Kilifi/Mtondia/182 through the Settlement Fund Trustees, and the Appellants, who were registered as lessees and held a Certificate of Lease with respect to the said parcel of land, after the lease was transferred to them by the original lessee. The dispute essentially involved private interests in land, and on which the law to be followed in impeaching title and determining the proper and legal allottee is settled by section 26 of the *Land Registration Act*, and various judicial decisions of this Court including *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR and *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] eKLR., and more recently by the Supreme Court of Kenya in *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).

18. In addition, the findings of this Court turned on the pleadings by the parties and evidence adduced at trial, on which the Court concluded as follows:

“Having considered this appeal we find that the learned trial Judge impeached the appellants’ title yet the same was not an issue before the court as it was not pleaded; that the court made findings of fact that the title of a party not invited to the suit was a nullity without any basis, as the same was not supported by the pleadings or evidence. Finally, the Court misapplied the doctrine of legitimate expectation elevating it above the law and overlooking the sanctity of a certificate of lease as provided under Section 36 of the *LRA*.”

19. The issues raised by the Applicant on the legality of the 1st and 2nd Respondents’ title cannot therefore be raised in the Supreme Court, which has consistently held that the question of law that an applicant



seeks to take to the Supreme Court must have arisen in the High Court or court of equal status, and in this Court, and must have been the subject of judicial determination- see the decisions of the Supreme Court of Kenya in Erad Suppliers & General Contractors Ltd. vs. National Cereals & Produce Board, [2012] eKLR and Peter Oduour Ngoge vs Hon. Francis Ole Kaparo, (2012) eKLR .

20. Arising from the foregoing reasons, we are not persuaded that the intended appeal raises an issue of general public importance which transcends the circumstances of the particular case and has a significant bearing on the public interest, nor that it raises any substantial point of law which will have a significant bearing on the public interest. In the result, the requested certification and/or leave is declined.
21. On the last issue as to whether this Court can stay execution of its own judgment pending an intended appeal to the Supreme Court, this Court in the decision in Dickson Muricho Muriuki vs Timothy Kagundu Muriuki & 6 others [2013] eKLR, while noting that there are no rules of procedure regulating the manner in which such an application should be filed and determined, held as follows:
- "The applicant urged us in the alternative to invoke our inherent jurisdiction and grant the order sought. It is settled principle of law that this Court has inherent power to ensure that justice is done. Rule 1(2) of the Rules provides:
- Nothing in these Rules shall be deemed to limit or otherwise be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
22. We cannot however invoke this Court's inherent jurisdiction in the instant application, having found that the application was not only incompetently filed, but does not also qualify for certification under Article 163(4) of the Constitution. We therefore adopt the position expressed in Dickson Muricho Muriuki vs Timothy Kagundu Muriuki & 6 others [*supra*] that once this Court has pronounced the final judgment, it is *functus officio* and in the absence of statutory authority, is prevented from re-opening a case.
23. The Applicant's Notice of Motion dated October 6, 2022 is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

