Mabavu & 6 others v Bahati Properties Limited (Civil Application 141 of 2019) [2023] KECA 1525 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KECA 1525 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION 141 OF 2019

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

DECEMBER 8, 2023

BETWEEN

SAID M MABAVU ..... 1ST APPLICANT

ANNA W DEREVA ..... 2ND APPLICANT

ABDALLA MWACHIBULO HEMA ..... 3RD APPLICANT

FATUMA S NCHIZUMO ..... 4TH APPLICANT

OMAR MASHAKA ..... 5TH APPLICANT

MAHFUDH MOHAMED MWAMTUKU ..... 6TH APPLICANT

RAMA MATANO MWARINDA ..... 7TH APPLICANT

AND

BAHATI PROPERTIES LIMITED ..... RESPONDENT

(An application for Certificate to appeal against the judgement of the Court of Appeal at Mombasa (Warsame, Musinga & Murgor, JJ. A.) on 4th June, 2021 on a matter of general public importance and for stay of execution of the judgment in Civil Appeal No. 141 of 2019)

RULING

1. By a Notice of Motion dated 28th November, 2022 brought pursuant to Articles 159(2) (b) and 164(3) of the *Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act*, rules 5(2) (b), 42 and 47 of the *Court of Appeal Rules*, 2022 the applicants are seeking orders for:

    (i) stay of execution of the judgment, orders or decree of this Court pending the hearing and determination of an intended appeal to the Supreme Court and

(ii) certification of the intended appeal to the Supreme Court as constituting a matter of general public importance, and for leave to be granted to the applicants to file an appeal against the judgment of this Court to the Supreme Court.

2. The motion is brought on the grounds set out on its face, and is supported by the sworn affidavit of Said Mabavu, the 1st applicant, who contended that the applicants are the bonafide registered proprietors of the parcel of land known as Kwale/Diani Beach/Block 149 *(the "suit property")* measuring about 22 acres, situated at Diani location within Msambweni District of Kwale County. It was contended that the applicants were enjoying peaceful possession of the suit property until 2014 when the respondent instituted a suit against them claiming that the property belonged to it, pursuant to its acquisition from one Prince Sadrudin Aga Khan; that the Environment and Land Court in Mombasa found in favour of the respondent, thereby divesting them of their proprietary rights over the suit property. Aggrieved by the decision of the ELC, they filed an appeal to this Court, which dismissed the appeal. Dissatisfied with the outcome of their appeal, they intend to lodge an appeal to the Supreme Court and have filed a Notice of Appeal in this Court.

3. The 1st applicant averred that the intended appeal is arguable with very high chances of success; that the determination of the issues to be canvassed in the Supreme Court will transcend the circumstances of the applicants' case, and will have a significant bearing on the public interest; and that the appeal raises questions of law that affect the public generally, and will consider the decisions of public bodies and their effect on both private and public rights. It was contended that the main issue for determination is the perennial subject of irregular registration of proprietary interests on the Coastal strip, which has left many indigenous communities as squatters in their ancestral land, and resulted in historical injustices. It was also contended that, the suit property having been public land at the point of allocation, gave rise to a matter of general public importance, given that public land is regulated by the *Constitution*.

4. Lastly, the 1st applicant deponed that this Court ordered that the applicants be permanently restrained from entering, occupying, using, taking possession of, damaging, wasting, selling, leasing alienating, transferring, charging, mortgaging or in any way dealing with the suit property which order, if executed before the intended appeal is heard and determined, will result in the applicants being rendered homeless; and that if the orders sought are not granted, the substratum of the intended appeal will be lost and render the appeal nugatory.

5. Annexed to the application was a draft petition to the Supreme Court setting out 22 grounds substantive of which are, *inter alia*: whether the applicants' constitutional right to the suit property arose before the registration and issuance of a lease by the Colonial Government in 1914; whether the property previously registered as Kwale/Diani Block 59, but now known as Kwale/Diani Beach Block/149 was irregularly and unlawfully expropriated by the colonial government in violation of the applicants' right to property; whether Prince Sadruddin Aga Khan had an interest in the suit property as at 1992 when it was sold and transferred to the respondent; whether it is proper to render a community squatters on their own property despite the fact that they hold a title to the property.

6. Submitting on behalf of the applicants, learned counsel Mr. Omiti stated on the question of certification that the intended appeal seeks pronouncement by the Supreme Court on the question whether the State was negligent in the issuance of multiple title deeds over the suit property, which negligence should be borne by the State; whether the applicants' constitutional rights in the suit property arose before the registration and issuance of the lease by the colonial government in 1914; whether or not the suit property was properly acquired by the government; whether or not it was public land at the time of allocation to the applicants; whether or not it was available for allocation

to the applicants, and whether it is proper to render a community as squatters on their own property despite the fact that they hold a title deed to the property.

7. Counsel went on to submit that the intended appeal also seeks a determination of whether private property can be said to have been properly allocated if it concerned compulsorily acquired property, and only a portion of it was converted to public use; and that these were issues that have been the subject of conflicting decisions by this Court, and are matters of general public importance as they touch on the subject of land rights, public interest, the rights of public bodies to alienate and allocate public land.

8. Counsel further stated that the intended appeal was arguable as it raised substantial legal issues for determination by the Supreme Court, such as whether a person has a legitimate expectation to be guaranteed ownership over a parcel of land pursuant to an allotment and issuance of a title deed by the State.

9. On the nugatory aspect, counsel asserted that the applicants are currently in occupation of the suit property, and that, unless the judgment and consequential orders and decree of this Court are stayed, the respondent may have their title to the suit property cancelled and have them evicted, which would render the appeal nugatory were it to succeed.

10. In reply, Mr. McCourt, learned senior counsel for the respondent submitted that this case did not give rise to any legal uncertainty, and neither did it transcend the circumstances of the case; that no consequences have been set out that go beyond the private parties to this dispute, and that there is no lacuna in the law that requires to be remedied, or provisions that require to be clarified. Counsel submitted that the law on the questions raised were settled, and that the verdict of this Court was unlikely to have any ramifications on the general public; that as a consequence, the issues in respect of the dispute could not be termed as a matter of general public importance.

11. Counsel further submitted that the applicant's motion did not disclose any arguable issues; that the questions of whether the State was negligent in the issuance of multiple title deeds over the suit property and the applicants' constitutional right to ownership of the suit property prior to registration and issuance of a lease by the colonial government in 1914 were fresh issues, which were neither raised nor canvassed by the applicants in this Court or the Environment and Land Court; that those were matters that ought to have been canvassed through the hierarchy of courts before being escalated to the Supreme Court for determination.

12. In brief, the facts as they pertain to the intended appeal are that the respondent filed a suit against the applicants in the Environment and Land Court seeking orders that they are the rightful owners of the suit property having bought it from Prince Sadruddin Aga Khan, who held a 99-year lease from the Government of Kenya from 1st January 1914 through a transfer of lease dated 18th September 1992, and on payment of a consideration of Kshs.11,000,000. It contended that a purported allotment and subsequent issuance of title over the suit property to the applicants was illegal, fraudulent, null and void, and sought declaratory orders and an order directing the Lands Registrar, Kwale, to rectify the registers for Kwale/Diani Beach Block/59 and Kwale/Diani/149, and issue it with a certificate of lease for the suit property.

13. On their part, the applicants asserted that they were the rightful registered owners of the suit property as it belonged to their forefather, one Mwachimwindi Diya, who was forcefully evicted from the land by the colonial government in 1948 without payment of any compensation; and that, in 1999, the family petitioned the Government of Kenya for allotment of the suit property, and were subsequently issued with a letter of allotment and Certificate of Lease over the suit property.

14. Upon considering the facts on the contested ownership of the suit property, the trial judge found in favour of the respondent and granted all the prayers sought in the plaint. The court held, *inter alia*, that Kwale/Diani Beach/Block 59 and Kwale/Diani Beach Block/149 referred to one and the same parcel of land; that, since the suit property had been leased to the respondent, a valid lease existed by the time the applicants sought to have the property allocated to them; and that under the provisions of the repealed *Government Lands Act*, the property was not available for allotment to the applicants.

15. Aggrieved by the judgment, the applicants preferred an appeal to this Court and faulted the learned judge for misapplying the provisions of the *Government Lands Act* to find that the suit property was not available for allotment to them, and in disregarding the provisions of the repealed *Land Acquisition Act*.

16. As earlier stated, this Court dismissed the appeal which prompted this application for certification of an intended appeal to the Supreme Court.

17. After consideration of the application, the response, the rival submissions and the law applicable, we find that the issues that fall for determination are:

    i) whether this matter qualifies for certification to the Supreme Court; and

    ii) whether this Court should stay execution of its judgment under rule 5(2) (b) of the *Court of Appeal Rules*.

18. On the question of certification, Article 163(4) (b) of the *Constitution* grants this Court the mandate to certify a matter for determination by the Supreme Court if it considers it to be one of general public importance.

19. In the case of *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2013] eKLR, the Supreme Court identified the principles governing the determination of a matter as one of general public importance, in the following terms:

> " (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 on 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;
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> 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. These principles were reiterated in the case of *Malcolm Bell v Hon.Daniel Torotich arap Moi and Another*,Supreme Court Application No. 1 of 2013 thus:

> "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 on the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
>
> i. 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 significant bearing on the public interest;
>
> ii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
>
> iii. 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;
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> iv. Mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] 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*;
>
> v. 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;
>
> vi. Determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;
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> 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 affect 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;

x. Questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance', justifying final appeal in the Supreme Court."

See also *Kenya Plantation and Agricultural Workers' Union v Kenya Export Floriculture, Horticulture and Allied Workers' Union (Kefhau);represented by its Promoters; David Benedict Omulama & 9 others* [2018] eKLR.

21. In a nutshell, the Supreme Court's guidance is that matters of general public importance are those that, *inter alia*, raise a substantial point of law, or occasion a state of uncertainty in the law, or arise from contradictory precedents, or will affect a considerable number of persons in general or as litigants.

22. On substantial issues of law, this Court in *Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation* [2023] KECA 660 (KLR) held that:

> " This Court has the duty to ensure that the case does not involve a mere question of law, but a substantial question of law. Hence, an applicant must satisfy this test to assume jurisdiction under Article 164 (4) of the *Constitution*. (See Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* [1962] AIR 1314, [1962] SCR Supl. (3) 549).
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> 71. To qualify as a question of law arising from the case, there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by the court so as to make it necessary to determine that question of law and arrive at a just and proper decision. If the question is settled by the highest court, or if the general principles to be applied in determining the question are well settled, and there remains the question as to the application of those principles, or that the plea raised is palpably absurd, the question ought not to be viewed as a substantial question of law."

23. In determining the appeal, this Court upheld the finding of the High Court that, by the time the Letter of Allotment was issued to the 2nd to 6th applicants, the suit property was already leased out to a private person for a term of 99 years with effect from 1st January 1914 and was due to expire in 2013. What this meant was that:

> " .... in 2001, the land was already allocated to a private person and was therefore not available for allocation or alienation to the 2nd– 6th Defendants. Put differently, there was no un-alienated government land capable of being allotted to the 2nd – 6th Defendants."

24. From the foregoing, the question is: what substantial issue of law requires to be determined, and what is the nature of the public interest that can be said to arise? In our considered view, the allocation of alienable and unalienable land together with the powers of the President of Kenya and the Commissioner of Lands to allot land are not novel issues for determination by the Supreme Court. Furthermore, the applicants have not specified what elements of law remain unsettled and require consideration by the Supreme Court. Neither have they specified how the conclusions will impact third parties or other litigants. If anything, it is clear to us that the applicants merely seek to dispute the decision of this Court on the basis that they, and not the respondent, are entitled to

ownership of the suit property. This, in our view, cannot amount to a matter that transcends the public interest, particularly since they ultimately seek to benefit from ownership of the suit property as private individuals. In effect, the applicants have not satisfied us that the intended appeal involves matter(s) of general public importance so as to warrant certification to the Supreme Court.

25. Now turning to whether this Court should stay execution of its judgment. The applicants have invoked rule 5(2) (b) of the *Court of Appeal Rules* which provides:

> " in any civil proceedings where a Notice of Appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just"

26. In the case of *Mukesh Kumar Kantilal Patel v Charles Langat* [2021] eKLR this Court held:

> " It is trite that an application for stay by dint of Rule 5(2)(b) of the *Court of Appeal Rules* gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order to ensure its just and effective determination. This relief 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 delivered on 3rd October 2019. This position was well articulated by the Court in *Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & Another* [2014] eKLR:
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> > " An application under Rule 5(2)(b) presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under Rule 75 and is pending in this Court. The application under Rule 5(2)(b) contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes *functus officio*."

27. In the case of *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others* [2022] KECA 494 (KLR) this Court held:

> " This brings us to the question whether this Court can stay execution of its own judgment pending an intended appeal to the Supreme Court. This issue was the subject of a detailed ruling in *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 others* [2013] eKLR, where a similar issue arose before this Court, and while noting that there are no rules of procedure regulating the manner in which the application should be filed and determined, the Court held as follows:
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> > 17. Rule 5(2)(b) confers power to this Court to hear interlocutory applications before the main appeal that is pending before the Court is heard and determined. The Rule does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment. The jurisdiction of this Court to entertain any application after its final judgment is granted by the Article 163(4)(b) of the *Constitution* and such jurisdiction is restricted to certification of matters that ought to proceed on appeal to the Supreme Court .... We therefore adopt the position expressed in *Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 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."

28. The afore-cited cases are clear that the prayers for stay of execution of this Court's judgment pending hearing of the intended appeal to the Supreme Court are incapable of being granted since it is *functus officio* and lacks jurisdiction to grant such orders. See also *Karanja v Ndirangu & another* (Civil Application 5 of 2021) [2021] KECA 57 (KLR).

29. In sum, the applications for certification and stay of execution lack merit and are hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER, 2023

A. K. MURGOR

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JUDGE OF APPEAL

Dr. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR