IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & KOOME, JJ.A.)

CIVIL APPLICATION SUP. NO. 23 OF 2019

BETWEEN

MAINGI MBINZU AND 314 OTHERS..... APPLICANT

AND

COUNTY COUNCIL OF KITUI.....1ST RESPONDENT

SOUTH EASTERN UNIVERSITY COLLEGE.....2ND RESPONDENT

(An application for leave to appeal the decision of this Court to the Supreme Court (G.B.M, Kariuki, F. Sichale & S. ole Kantai JJ.A.) dated 15th day of December, 2017, in CA No. NO. 6 of 2017)

RULING OF THE COURT

The 315 applicants who were residents of three villages in Yatta Division in today's Kitui County claimed proprietorship of a parcel of land known as L.R. No. 13629 situate within Kwa-Vonza Location and measuring in size about 10,000 acres. They asserted that the 1st respondent had set apart this land for use by Ukamba Agricultural Institute; that the said Ukamba Agricultural Institute having collapsed, the land reverted to the 1st respondent; and that, upon representations by local leaders, the then President of the Republic of Kenya directed that the applicants be settled and they were indeed settled on 9,500 acres of the said land leaving 500 acres to the collapsed institute.

There was further pleading to the effect that the 2nd respondent, which was established on 15th July, 2008 as a constituent college of the University of Nairobi acquired the assets of Ukamba Agricultural Institute which included, according to the , 500 acres of the said parcel of land but that on 18th January, 2010, the 2nd respondent published a notice in the newspapers stating that it was the owner of the entire parcel of land. The applicants moved to the court below and prayed that they be declared the lawful owners of individual and distinct parcels of land comprising, in aggregate 9500 acres comprised in the title L.R. 13629, among other reliefs.

In its defence and counter-claim, the 2nd respondent denied the applicants' claim to any part of the suit land and also that the entity called Ukamba Agricultural Institute had collapsed at all or that the parcel of land had at any time reverted to the 1st respondent.

Instead, the 2nd respondent maintained that Ukamba Agricultural Institute was managed by a Memorandum and Articles of Association and that Legal Notice No. 102 of 2008 published on 15th July, 2008, all its assets and liabilities were automatically and fully transferred to the 2nd respondent.

That being the 2nd respondent's position, it counter-claimed that, since the applicants were trespassers over the suit land where they had erected temporary structures; and that having ignored various warnings to vacate the said land, and their plaint having failed to disclose any reasonable cause of action, it should be struck out and the applicants evicted.

Determined to realize this desired outcome, the 2nd respondent took out a Chamber Summons for the striking out of the plaint and an order for the immediate removal of the applicants from the land.

Jaden, J., found that the applicants had trespassed upon the 2nd respondent's land and had no proprietary interest in it. She allowed the application with the suit being struck out and the applicants being ordered to vacate the suit land.

Apart from lodging a Notice of Appeal against that ruling, the applicants also filed a Notice of Motion in the court below to review, vary or set aside the ruling in question on the ground, among others, that there was an error apparent on the face of the record

Jaden, J. once again rendered a ruling in which she found that what the application was seeking was tantamount to asking her to sit on appeal against her own ruling. Finding no merit in the Motion, she dismissed it prompting an appeal to this Court.

We should state here that the 1st respondent appears to have had no interest in the proceedings in this Court and also in the High Court. In dismissing the appeal, this Court, differently constituted said;

> **"What was before the learned Judge was essentially an application for review. The learned Judge was being asked to review the ruling and orders she had made when she ordered the appellants' suit to be struck out whose effect would lead to the eviction of the appellants from the suit land.**
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> **The learned Judge considered the application before her and reviewed past cases on the point particularly Nancy Wangari & 5 others vs. Michael Mungai [2014] eKLR where this Court considered what constitutes an error on the face of the record. The learned Judge reached the conclusion that no error had been identified to entitle her to review her ruling and, in the event, the motion failed.**
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> **……**
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> **The appellants filed a suit claiming rights to land but it was demonstrated by the 2nd respondents to the satisfaction of the court that the 2nd respondent was the registered owner of the land and was in occupation of the same……Waweru, J. had found that the appellants were trespassers without any identifiable rights or interests to the land at all. There was no challenge to that ruling or those findings at all.**
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> **…...**
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> **Section 80 of the said Act and order 45 of the said Rules did not permit the appellants to file an appeal and at the same time apply for review of the said ruling. The two remedies could not be taken simultaneously and the appellants were required in law to file an appeal or apply for review. They could not do both.**
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> **……**
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> **We find no merit in this appeal and we order it be and is hereby dismissed with costs to the second respondent".**

This conclusion ought to have brought the applicants desire to own the land to the end of the road. They are, however, determined to exhaust the appellate system, seeking in the present application, leave to appeal to the Supreme Court.

It is their belief that, by the above decision, this Court sanctioned the denial by the court below of their right to be heard on a matter involving land, from which they have been unlawfully evicted; that what they intend to challenge in the Supreme Court would affect many people beyond the parties in this litigation;and that, as a whole, the appeal to the Supreme Court will be raising a matter of public importance as other persons in the applicants' situation may be evicted from their habitat on an interlocutory application.

Responding, the 2nd respondent submitted that the application does not meet the threshold for the grant of leave to appeal to the Supreme Court; that it does not raise any matter of public importance; that no specific provision of the Constitution has been cited as having been violated; that the dispute does not transcend the parties to this litigation; and that the application has been brought after an inordinate delay of two years and is therefore an abuse of the court process.

By **Article 163(4) (b)** of the Constitution, leave to appeal to the Supreme Court will only be granted where this Court certifies that a matter of general public importance is involved in the intended appeal. This provision has been the subject of numerous decisions of this Court and the Supreme Court.

Article 163(4) (b) has been described by the Supreme Court itself in its very first decision on the question in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone** [2013] eKLR as **"the fulcrum around which the Supreme Court's jurisdiction on appeal turns, in matters other than the interpretation or application of the Constitution"**.

The Court stressed that "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".**

If there is such a point of law, then it must have been raised and considered by the Court or Courts below.

Our view of this application is that what was before this Court, whose outcome is intended to be appealed to the Supreme Court, was an appeal to challenge the exercise of judicial discretion by the learned Judge of the High Court in refusing to review her orders striking out the appellant's suit. Applications for review are an everyday affair in courts; fairly ordinary matters are decided through the legitimate exercise of discretion.

Though the categories of what constitutes a matter of general public importance are not closed, the burden fell on the applicants to prove that the matter in question indeed "carried specific elements of real public interest and concern".

While we are alive to the fact that the underlying subject matter of the dispute was land, the intended appeal will not be on the ownership of the land, but rather on whether the Court properly applied its mind to the question of the actual dispute which was the subject of determination.

In a nutshell, the application does not meet the requisite threshold for the grant of leave or certificate to appeal to the Supreme Court. We accordingly dismiss it with costs to the 2nd respondent.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO, (P)

JUDGE OF APPEAL

R.N. NAMBUYE

JUDGE OF APPEAL

M.K. KOOME

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR