Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 10 others (Civil Application Sup 57 of 2019) [2021] KECA 254 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 254 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP 57 OF 2019

W KARANJA, HM OKWENGU & S OLE KANTAI, JJA

DECEMBER 3, 2021

BETWEEN

GITAMAIYU TRADING COMPANY LTD ..... APPELLANT

AND

NYAKINYUA MUGUMO KIAMBAA CO. LTD ..... 1ST RESPONDENT

WARIARA NJENGA ..... 2ND RESPONDENT

MUMBU GICHURU ..... 3RD RESPONDENT

ESTATE OF JAMES NJENGA KARUME ..... 4TH RESPONDENT

J R NJENGA ..... 5TH RESPONDENT

THE COMMISSIONER OF LANDS ..... 6TH RESPONDENT

THE ATTORNEY GENERAL ..... 7TH RESPONDENT

ZEPHANIA MWANGI NYORO ..... 8TH RESPONDENT

JOHN NJOROGE MUGANIA ..... 9TH RESPONDENT

PETER KIMANI NJUGUNA ..... 10TH RESPONDENT

HAROUN MUCHAI KAMAU ..... 11TH RESPONDENT

(An Application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Nairobi (Ouko, Makhandia, Musinga, JJ.A.) dated 5th February, 2019 in Civil Appeal No. 84 of 2013)

RULING

1. Two land-buying companies disagreed over the ownership of some 16 parcels of land comprising LR Nos. 89/4-9 and 89/11-20 (the suit property) measuring approximately 512 acres in Kiambu County. The land was eponymously known as Fanros Estate, from the name of the vendor. The appellant maintained that on 18th February, 1977 it entered into an agreement with Gopal Dass Pall, an agent of Fanros Limited, to buy the suit property at Kshs. 4,200,000; that they paid this sum; that its shareholders, who were workers and labourers on the estate went into occupation; that in 1979, the shareholders were forcefully evicted by the local and provincial administration from the suit property in favour of the 1st respondent, (Nyakinyua Mugumo Trading Company Limited) as well as the 2nd to 5th respondents; that the 6th to 7th respondents jointly, fraudulently and illegally caused the suit property to be transferred to the 1st to 5th respondents whilst knowing that the land belonged to the appellant; that this was done without the latter presenting proof that they had purchased the suit property and also without proof that they obtained consent in compliance with the *Land Control Act*.

2. The case was canvassed before Muchelule, J. who in his determination observed that the sale agreement between the appellant and Fanros Ltd did not culminate in a transfer of title; that the suit property was agricultural land whose sale was subject to the consent of the Land Control Board; that no such consent was obtained and neither was the appellant exempted; and that in the absence of a consent the agreement was void and unenforceable.

3. On the complaint that the caveat registered by the appellant against the title was irregularly removed by the 5th respondent, the learned Judge held the view that since the agreement upon which the appellant based its claim was void, it had no right or interest in the suit property capable of being protected by the caveat. The learned Judge observed that the appellant's members had been in possession for only two years between 1977 and 1979 when they were forcefully removed from the suit property; that, apart from the failure to show they had been on the suit property for a period of 12 years, the appellant did not provide any evidence that it had been in continuous, open and uninterrupted occupation of the suit property; and that contrary to the provisions of Section 7 of the *Limitation of Actions Act* the action by the appellant against the respondents was brought after 15 years.

4. The appellant was aggrieved and lodged an appeal which is predicated on 13 grounds alleging, inter alia, that the learned Judge: erred in finding that the appellant did not have an enforceable right over the suit property; misdirected himself in failing to appreciate that the sale agreement was executed by the appellant and Fanros Limited and that there was consideration paid; misdirected himself as to the law on fraud by failing to consider the irregular transfer of title; erred in holding that the transaction was null and void for lack of consent despite there being evidence to show that the 4th respondent obstructed the sellers from signing the consent forms; and ignored the irregular manner of removal of the caveat and disregarded the provisions of Section 3(3) of the *Law of Contract Act* which was violated in effecting the transfer of the suit property to the 1st respondent.

5. This Court dismissed the appeal having thoroughly considered all the germane issues raised by the parties. We shall rehash the Court's findings in order to place this application in context. Like the learned Judge, the Court was persuaded that the date of accrual of the cause of action was 1979 when the appellant's shareholders were evicted and that being the case, the suit was filed 15 years later hence outside the 12year statutory period. That ground thus failed.

6. The next issue for the Court was whether the sale of the suit property by Fanros Limited and the registration of the 1st respondent as the owner was fraudulent. It was alleged that the respondents

colluded and illegally caused the suit property to be transferred to the 1st -4th respondents while they knew that it belonged to the appellant; that there was no sale agreement between Fanros Limited and the 1st respondent; that the indenture dated 7th December 1979 was not executed by Fanros; and that the stamp duty was not paid. For these reasons, it was alleged that the transfer of the suit property was fraudulent.

7. The Court noted that from the record, it was not in doubt that on 20th December, 1979 the collector of stamp duty marked the indenture as

> "not chargeable to stamp duty"; that the exemption to stamp duty by the President was communicated in a Legal Notice No. 96 of 25th May, 1979 and consequently, on 9th February, 1980 the indenture was registered transferring the suit property to the 1st respondent. The Court held that the burden was on the appellant to demonstrate, on a preponderance of evidence that as a matter of fact the stamp duty was not paid.

8. On the dual issues of removal of the caveat and lack of consent of the Land Control Board, the Court noted that it was not in dispute that the suit property was agricultural land whose sale was subject to the provisions of the *Land Control Act*; that the requisite consent of the relevant Land Control Board was not obtained in the transaction involving the appellant and Fanros Limited. The Court noted that the appellant appeared only to have been aggrieved by the failure of the learned Judge to make a determination that the 4th respondent obstructed Fanros Limited from signing the consent forms; and for ignoring the irregular manner of removal of the caveat.

9. The Court held that without any specific evidence of how the 4th respondent blocked or frustrated Fanros Limited from obtaining the consent, the reasonable assumption was that the Board exercised its discretion in accordance with the above principles. In any case Fanros Limited had not been a party to the proceedings giving rise to this appeal. Where, in either case no appeal was preferred, the decision of the Land Control Board was final and conclusive and could not be questioned in any court.

10. The appellant lodged a caveat against the title to the suit property in 1977 claiming a purchaser's interest. The Court found that there was evidence that consequent upon lodgment of the caveat, Fanros Limited applied for its removal on the ground that it had entered into a sale agreement with the appellant. There was therefore a basis for the removal which was proper in law.

11. On the accusation that there was no evidence that the 1st respondent did not pay for the suit property, the Court found that on 24th September 1978, the 1st respondent applied and obtained a loan of Kshs. 3 million from Agricultural Finance Corporation for the purchase of the suit property and the cheque transmitted to Fanros Limited. The Court found that in any case Fanros Limited had not complained that no consideration was paid and that the appellant ought to have joined it in the suit to clarify whether it received the purchase price of Kshs. 3,300,000 from the 1st respondent.

12. The Court found no merit in the appellant's claim to the suit property by adverse possession. The appellant was evicted from the suit property hardly two years after occupying it. There was no proof that the title holder, Fanros Limited had been dispossessed or continued its possession for the statutory period. The temporary occupation of the suit property by the appellant was with the permission of Fanros Limited.

13. The Court found no substance in the appeal and dismissed it with costs to the 1st to 7th respondents.

14. The applicants were aggrieved by the judgment and want the matter ventilated further before the Supreme Court, hence the instant application in which the applicants aver that their appeal involves

a matter of 'General Public Importance' and that a substantial miscarriage of justice may occur unless the appeal is heard by the Supreme Court.

15. The application was canvassed through written submissions with no oral highlights by learned counsel.

16. In the written submissions filed in support of the application, the applicant states that there has apparently been an assumption that simply because the suit property was in the general vicinity of Kiambu it was agricultural land and therefore, subject to a Land Control Board Consent to validate their Agreement for Sale. They pose the question; is that assumption valid and can the courts continue making this assumption?

17. The applicant submits that any finding on this question transcends the litigation interest of the parties; its impact and consequences are substantial and have a bearing upon the public interest; it will affect the jurisdiction of the Land Control Board and avoid the assumption that simply because a particular parcel of land falls within the rural areas it is automatically assumed to be agricultural; it is common notoriety that properties within certain municipalities, such as Ruiru are still being subjected to the requirements for Land Control Consent whereas they are indeed commercial properties.

18. On removal of caveat, the appellant submits that the Court of Appeal was told that simply because Fanros Ltd applied for removal of the caveat, and on the assumption that the appellant did not have any enforceable right to the suit property, the removal of the caveat was proper in law; a question therefore is whether the owner of the land can move the registrar to remove a caution without involving the person who procured the registration of the caution leaving the person in the false belief that caution is still in place; that will the general public sit pretty anymore on the false belief that they have lodged a caveat to protect certain interest if the Registrar, moved by the land owner, can simply remove it without involving the one who placed the caveat only to justify the process by saying the end justifies the means. The applicant posits that this is a question that transcends the litigating parties.

19. On the issue of the indenture not being executed contrary to Section 3(3) of the Contract Act, the applicant asks whether having the backing of "a powerful politician" who managed to get a waiver on stamp duty and allegedly a waiver on Land Control Board Consent (assuming it was required), can authorize the Registrar to register a Transfer Deed and issue a title when the transfer deed is not executed by the Vendor.

20. They further submit that 1st respondent did not exhibit a signed Sale Agreement, and the Indenture was not signed; that there was total contravention of Section 3(3) of the *Law of Contract Act*; that the respondents submitted that the said provision was not applicable; that this is a matter whose impact and consequences are substantial, broad based, transcends the interests of the litigating parties and has a direct bearing on future land transactions by the general public and future interpretation of Section 3(3) of the *Law of Contract Act*.

21. The application is opposed by the 1st - 4th respondents through their written submissions filed in Court. They submit that the subject matter of the appeal was land parcels Nos. 89/4 - 89/20; that these parcels of land no longer exist; that the 1st respondent who was the registered proprietor thereof subdivided the land and created 1,312 Title Deeds which had already been transferred to the 1st respondent's shareholders/members; that the intended appeal to the Supreme Court would not affect the 1st respondent as it was no longer the registered proprietor of the parcels of land that would be the subject matter in the proceedings intended to be filed by the applicant and that the intended appeal has been overtaken by events.

22. They further submit that the points of law and/or fact intended to be urged by the applicant before the Supreme Court (if leave is granted) were fully dealt with by the High Court and the Court of Appeal

and the decisions of both courts were supported by statute law and case law; that no more can be done by any other court; that there is no matter of general public importance raised by the intended appeal; that the matter in both this Court and the High court concerned a dispute over ownership of land between two land buying companies (the applicant and the 1st respondent) operating within a small area within the County of Kiambu; and that for a matter to qualify to be of general public importance/ interest, it must be a matter that affects/impacts the greater population in the entire country and not on an identifiable group of few individuals trading under two limited liability land -buying Companies.

23. We have carefully considered the application before us the rival submissions by learned counsel and the findings of the two courts leading to this application as analysed above in detail. We now come to the crux of this application, which is whether the application merits escalation to the Supreme Court for determination.

24. The applicant holds the position that its appeal raises matters of general public importance and invokes Article 163 (4)(b) of the *Constitution* which provides as follows:-

> " (4) Appeals shall lie from the Court of Appeal to the Supreme Court-
>
> a. ....
>
> 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)."

The applicant therefore needs this Court to certify the issues it has identified, which we have outlined earlier, as matters of general public importance to give it legs to move to the Supreme Court.

25. The Supreme Court set the test for granting certification and leave to appeal to the Supreme Court in Hermanus Phillipus Steyn vs Giovanni Gnecchi – Ruscone, Supreme Court Application No. 4 of 2012 where the Court held that the meaning of "matter of general public importance" may vary depending on the context. The Supreme Court considered Article 163(4)(b) of the Constitution and stated 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."

26. The Supreme Court crystalized the principles to guide this Court in determining whether an intended appeal raises matters of General public interest in *Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone* (supra) as hereunder:-

> " 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."

28. We will now apply the above guidelines to the issues identified by the applicant as raising issues of general public interest and determine if the application pass muster. Do the identified issues transcend the interests of the parties herein or were they peculiar to and confined to the disputed transaction entered into by the parties herein?

29. The first issue identified by the applicant as one requiring the intervention of the Supreme Court is what in the applicant's view is a misconception or wrong assumption that the suit premises was agricultural land just because it is in the general vicinity of Kiambu area. According to the applicant there is a wrong assumption that all land in the vicinity of Kiambu is agricultural land.

30. Apart from the suit property the applicant has not demonstrated which other parcel of land has been wrongly identified as agricultural and, and further that the said assumption has affected or will continue to affect other parties. Whether a plot in Kiambu area is agricultural land or not has nothing to do with general public interest and is a matter to be addressed in respect of each specific property where such a question arises. It is not an issue that requires the Supreme Court to address.

31. The second issue identified by the applicant is the procedure of removal of a caveat; whether the owner of the property the subject of a caveat can move the Land Registrar for the removal of a caveat in absence of the owner. Again, the procedure of removal of a caveat is a mundane issue which is clearly spelt out in the relevant laws and which in our view is not one for the Supreme Court to determine.

32. The third issue identified by the applicant is what the applicant referred to as the role of a "Powerful politician" in giving waiver of consent of the Land Control Board. They also raised the point that the indenture was not signed. We have weighed these issues vis a vis the parameters we have set out above and in our view these are matters that were peculiar to the specific transaction and do not transcend the interest of the parties. The identified issues do not raise any novel issues that have not been determined before nor is there in existence conflicting decisions arising from similar situations which will require the Supreme Court to address.

33. We hold the view that the applicant feels that there could have been miscarriage of justice in this matter, which it would want the Supreme Court to rectify. However, as stated by the Supreme Court in *Town Council of Awendo vs Nelson Oduor Onyango & 13 others* [2015] eKLR,

> " 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."

34. We think we have said enough to demonstrate that this application does not meet the required threshold for the matter to be certified for escalation to the Supreme Court for consideration. In the circumstances, this application fails and is hereby dismissed with costs to the 1st to 4th respondents, being the ones who opposed the application.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR