



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), WARSAME & SICHALE, JJA]

CIVIL APPLICATION SUP NO. 9 OF 2018 (UR 6/2018)

BETWEEN

SAMMY MWANGANGI.....1ST APPLICANT
MUSYOKA KAILIMA.....2ND APPLICANT
JOSEPH KARANJA.....3RD APPLICANT
PAUL KAMENYE.....4TH APPLICANT
BEN MUNYWOKI.....5TH APPLICANT
JOSEPH MUTHIANI.....6TH APPLICANT
KYULE MWIMBI.....7TH APPLICANT
FRANCIS MUSAI.....8TH APPLICANT
MICHAEL NDAKA.....9TH APPLICANT
PHILIP MAINGI.....10TH APPLICANT
NZULA MUEMA.....11TH APPLICANT

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT
JAMES KAMAU WAINAINA.....2ND RESPONDENT
RAPHAEL MUIGAL.....3RD RESPONDENT
PAUL KAHUTI KONDIAH.....4TH RESPONDENT

(Being an application to seek leave to appeal to the Supreme Court of Kenya

against the judgment of the Court of Appeal at Nairobi

(A. Visram, W. Karanja & M. Koome, JJA) dated 9th February, 2018

RULING OF THE COURT

The applicants **Sammy Mwangangi, Musyoka Ilima, Joseph Karanja, Paul Kimenye, Ben Munwoki, Joseph Muthiani, Kyule Mwimbi, Francis Musai, Michael Ndaka, Philip Maingi** and **Nzula Muema (the applicants)** filed a Notice of Motion dated **21st March, 2018** and sought the following orders:

“ (1) This Honourable Court do certify that the applicant’s intended appeal against the judgment delivered on the 9th February, 2018 involves a matter of general public importance

(2) This Honourable Court be pleased to grant the applicants leave to appeal to the Supreme Court against the decision of this Honourable Court delivered on 9th February, 2018 in Civil Appeal No. 30 of 2013

(3) This Honourable Court be pleased to grant an order of stay of execution of the orders following the judgment of this Honourable Court delivered on 9th February, 2018

(4) The applicants’ Notice of Appeal lodged on 12th February, 2018 be deemed as having been duly lodged

(5) The costs of this application be provided for”.

The application is supported by the affidavit of one, **Sammy Mwangangi**, the (1st applicant) sworn on **21st March, 2018** on behalf of all applicants herein, in which it was deponed that the applicants were aggrieved by this Court’s judgment (**Visram, Karanja & Koome, JJA**) delivered on **9th February, 2018**; that they have since filed a Notice of Appeal to the Supreme Court and that the respondents had committed acts of fraud, the effect of which was to alienate land belonging to the applicants. It was further deposed that the intended appeal to the Supreme Court raises a matter of general public importance as the judgment of **9th February, 2018** is likely to cause substantial miscarriage of justice. It was deposed that the intended appeal involves interpretation of the Constitution, in particular, as to whether the right to property can be arbitrarily taken away; whether one can be evicted from ancestral land where they have lived and developed; whether senior citizens can be made to suffer indignity by forceful eviction; whether eviction is in line with the principles of Kenya’s Land Policy and whether fraudulent acquisition of land can be protected by the Constitution.

In the Motion, the **Commissioner of Lands, James Kamau Wainaina, Raphael Muigai Mwangi** and **Paul Kahuti Kondiah** were named as the 1st, 2nd, 3rd and 4th respondents respectively.

On behalf of the 1st respondent, **Fatma Ali Abdurazak**, a State Counsel in the office of the Attorney General swore an affidavit dated **25th June, 2018**. She deponed that there were no issues of general public importance justifying certification of the matter to the Supreme Court; that there was no constitutional issue for consideration by the Supreme Court and finally, that the applicants are trespassers on private property.

The 4th respondent, **Paul Kihuti Kondiah** swore an affidavit dated **22nd June, 2018** on behalf of himself and on behalf of the 3rd respondent. He deponed that they are the registered owners of the suit land. He decried the fact that they have been litigating in court for over 20 years.

By way of a brief of background, the appellants lay claim on land parcel No. 209/11543 and LR No. 209/11546 situated in Embakasi area, (the suit land) on the basis that they and their ancestors have lived on the suit land and that in the year 1994, they were notified by the Area Chief that the suit land was

Government property. In their suit filed at the High Court, the appellants sought orders restraining the respondents (the then defendants), their agents, servants, employers and or proxies from evicting, threatening to evict them or in any way interfering with the applicants’ quiet possession of the suit land, a declaration that the suit land is the applicants’ ancestral land and hence belongs to them, an order compelling the 1st respondent to give priority to the applicants and register the suit land in the applicants’ names and an order compelling the 1st respondent to cancel all the grants or any allocation in respect of the suit land and particularly L.R. Nos. 209/11543, 11545, 11544, 11546, 18270 and 18278.

The 3rd and 4th respondents filed a counter-claim against the appellants claiming that they held an absolute and indefeasible title having purchased the property on **18th September, 1997** from Kimakwe Enterprises Ltd.

On **9th July, 2012**, **Okwengu, J** (as she then was) dismissed the applicants’ suit and ruled in favour of the 3rd and 4th respondents herein. Aggrieved, the applicants moved to this Court to appeal against the judgment of **Okwengu, J**.

In a judgment dated **9th February, 2018**, the Court of Appeal, (**Visram, Karanja & Koome, JJ.A**) rendered itself as follows:

“Having found that the respondents were allocated the suit property lawfully, their titles cannot be impeached. In view of the

fact that the appellants failed to prove the allegations of fraud in the acquisition of the title, consequently, they failed to prove their case on a balance of probabilities. For all the foregoing reasons, having re-evaluated the evidence before us, we are not persuaded that the learned judge erred in arriving at the conclusion she made. The judgment now impugned was based on sound law and evidence, and the same cannot be impeached”.

It is the above outcome that provoked the motion dated **21st March, 2018**.

On **26th February, 2020**, the application came up for plenary hearing before us. Learned counsel **Dr. Khaminwa** appeared for the applicants whilst Learned counsel **Mr Maina**, appeared for the 3rd and 4th respondents and **Mr. Gitonga** held brief for **Miss Fatma** for the 1st respondent. There was no appearance for the 2nd respondent in spite of service of a hearing notice upon his counsel, **Kinuthia Kahindi & Company Advocates** on **29th January, 2020**.

In urging the motion, **Dr. Khaminwa** contended that the main issues in the motion are, whether the more than 20,000 people including women and children living on the suit land should be evicted from their ancestral land; that entry to the suit land by the applicants was lawful; that on that land, stands a police station, schools, a mosque and churches. **Dr. Khaminwa** urged the Court to take into account that the Constitution of Kenya, 2010 is a revolutionary Constitution, a complete departure from the past, further that International Law and the

Security Council of the United Nations abhor eviction as eviction causes violence. **Dr. Khaminwa** posited that Article 40 of the Constitution recognizes possessory rights and that this is a matter of public importance calling for certification and subsequent consideration by the Supreme Court; that courts are seen to presume that if land is allocated by His Excellency, the President and by the Commissioner of Lands, then its hands are tied; that land allocation must be in consonance with the law and courts have a role to play in ensuring that evictions are done lawfully and that issues on whether the land is vacant or occupied by squatters have to be taken into consideration. He emphasized that there was need to canvass those issues in the Supreme Court as the applicants are still in occupation of the suit land.

Mr. Gitonga, learned counsel for the 1st respondents in opposing the application contended that the applicants are busy bodies whose interests are of a private nature; that there is no public interest falling under Article 163 (4) & 7 of the Constitution and Section 16 of the Supreme Court Act- as the applicants’ interests are of a private nature. Reliance was placed on the decisions of Benjoh

Amalgamated Limited v Kenya Commercial Bank Limited & another [2018] eKLR and Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscone [2013] eKLR in support of the contention that the applicants are underserving of the certification sought by them.

Mr. Maina, learned counsel for the 3rd and 4th respondents in opposing their motion pointed out that the applicants were not on the land in 1998; that there is no issue of general public importance and that the doctrine of adverse possession does not apply in respect to government land. Secondly, he contended that there is no uncertainty on the law in this matter.

In a brief response, **Dr. Khaminwa** maintained that squatters have rights and that adverse possession can operate against the government in certain instances.

We have considered the motion and its supporting and supplementary affidavits, the respondent’s replying affidavits, the rival oral arguments made before us, the authorities cited and the law.

For a start, Article 163 (4) of the Constitution provides that appeals from this Court lie to the Supreme Court in the following instances:

“(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)”.

The above constitutional provisions were elaborated in the decision of ***Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscone [2013] eKLR*** where the Supreme Court of Kenya in Paragraph 17 thereof stated:

“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).

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).

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.”

In the motion before us, we do not see any issue of general public importance.

The dispute between the applicants and the respondents was over ownership of land. It matters not that the applicants and their ancestors have lived on the land from 1926. With respect, the applicants’ interests are of a private nature and they do not transcend the circumstances of the parties herein. There is no significant issue that will have a bearing on the public interest generally. Again, there is no uncertainty on the law as regards occupation of government land by persons who would have otherwise acquired land under the doctrine of adverse possession. It is settled law that one cannot use this doctrine in respect to government land. In the premises, the test laid down in the *Hermanus* case have not been met.

We find no merit in the motion. It is hereby dismissed with costs.

Dated and Delivered at Nairobi on this 10th Day of July, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR