IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (OKWENGU, MAKHANDIA & MURGOR, JJ.A)

CIVIL APPLICATION SUP NO. 3 OF 2016

BETWEEN

MITU - BELL WELFARE SOCIETY.....APPLICANT

AND

KENYA AIRPORT AUTHORITY LTD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

(Being an application for a certificate on the basis that a matter of general public importance is involved in the intended appeal to the Supreme Court against the decision and orders of the Court of Appeal (Githinji, Karanja, Otieno-Odek, JJA) delivered on 1st July 2016)

in

Civil Appeal No. Nai 218 of 2014

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RULING OF THE COURT

This Notice of Motion dated 11th August 2016 is made under ***Article 163(4) (b)*** of ***the Constitution*** following a decision of this Court (Githinji, Karanja, Otieno-Odek, JJA), delivered on 1st July 2016 where the applicant seeks for certification to appeal against that decision to the Supreme Court.

As a brief background ***the applicant, Mitu Bell Welfare Society*** is a society registered under the Societies Act, Cap 108, Laws of Kenya, and its members are residents of a slum dwelling community known as Mitumba Village, situated adjacent to Wilson Airport. ***The 1st respondent, Kenya Airports Authority***, is a body corporate established by the Kenya Airports Authority Act, while the ***2nd and 3rd respondents*** are the ***Attorney General*** and ***the Commissioner of Lands*** respectively.

In their petition dated 21st September, 2011 the applicant stated that on or about 1992, its members were relocated by the Government to occupy and reside on the 1st respondent's property, following which they constructed slum dwellings, schools, and churches as well as business premises. Thereafter, they requested the 3rd respondent to issue them with title documents for the portions that they occupied.

On 15th September 2011, the 1st respondent, issued notices in the local daily newspapers giving the residents of Mitumba Village seven (7) days notice within which to vacate its property. The notice expressly stated that upon expiry of the notice period, any buildings, installations, or structures thereon would be demolished and or removed, and any human activity within the area terminated without further reference.

In response to the eviction notice, the applicant on behalf of the residents filed a constitutional petition in the High Court against the respondents. Contemporaneously, it also sought conservatory orders to restrain the respondents or any state officer or organ from evicting and /or demolishing any buildings, installations or structures situated within the property, which orders

were granted by the High Court (Gacheche, J.) on 22nd September, 2011 pending the interpartes hearing and determination of the interlocutory application. Despite existence and service of the conservatory order, the residents' of Mitumba Village comprising some 3065 households or approximately 15, 325 men, women and children were evicted from the property, and their structures, houses, churches, schools and other amenities accordingly demolished.

The applicant further contended that the demolition and eviction was carried out by the 1st respondent, and the State as represented by the 2nd and 3rd respondents; that their household goods and building materials were all destroyed during the demolition, thereby rendering them homeless; that their fundamental rights and freedoms as guaranteed under the 2010 Constitution were violated, as were their rights to education, human dignity, equality and freedom from discrimination, security of their persons, freedom of movement and residence, protection of right of property, economic and social rights and their right to fair administrative action. It was claimed that they were forcefully evicted without being provided with alternative land where they could relocate or compensated for the losses suffered.

In the amended petition, the applicant sought the following reliefs;

> *a) A declaration that the demolitions by the 2nd respondent (1st respondent) were illegal, irregular, unprocedural and contrary to Articles 26, 27(2) (4) & 6, 28, 29, 39,40,43,47 & 56 of the Constitution hence null and void.*
>
> *b) A declaration that any forceful eviction and demolition without a relocation option is illegal, oppressive and violates the rights of the petitioners.*
>
> *c) A declaration that the residents of Mitumba Village are legally entitled to plot number 209/12921 under filed number 226958 and plot number 209/12908 under file number 176952 and in the alternative they are entitled to compensation and reallocation to another land or alternative shelter with access to education facilities, clean water, healthcare and food at the state's expense.*
>
> *d) Compensation for the violations of the rights of its members."*

Upon hearing the parties, the trial court granted prayers (a) and (b) above and in the decree dated 7th April, 2014 granted further orders and directions thus;

> *i) That the demolitions by the 2nd respondent of the petitioner's houses situated in Mitumba Village near Wilson Airport was illegal, irregular, un-procedural and contrary to Articles 26,27(2) (4) & (6), 28,29,39,40,43,47 & 56 of the Constitution.*
>
> *ii) That any forceful eviction and or demolition without a relocation option is illegal, oppressive and violates the rights of the petitioners.*
>
> *iii) That the respondents do provide, by way of affidavit, within 60 days of today, the current state of policies and programs on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements.*
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> *iv) That the respondents do furnish copies of such policies and programmes to the Petitioners, other relevant state agencies, Pamoja Trust (and such other Civil Society organizations as the Petitioners and the Respondents may agree upon as having the requisite knowledge and expertise in the area of housing and shelter provision as would assist in arriving at an appropriate resolution to the Petitioner's grievances) to analyze and comment to the policies and programs provided by the respondents.*
>
> *v) That the respondents to engage with the Petitioners, Pamoja Trust, other relevant state agencies and Civil Society organizations with a view to identify an appropriate resolution to the Petitioner's grievances following their eviction from Mitumba Village.*
>
> *vi) That the parties to report back on the progress made towards a resolution of the Petitioners grievances within 90 days from today.*

The 1st respondent was aggrieved by the trial court's judgment, decree, orders and directions aforesaid, and lodged an appeal to this Court upon grounds summarized to the effect that, the learned Judge erred in law and in fact by:-

> *i) Finding that the appellant had not filed any response to either the petition or the amended petition hence failed to consider the appellant's response thereof.*
>
> *ii) Delegating her judicial functions and powers to Pamoja Trust, other unnamed state agencies and Civil Society organizations and by directing that the parties should engage with those third parties in identifying appropriate remedies.*
>
> *iii) Making findings and issuing orders not sought or contemplated by law.*
>
> *iv) Failing to appreciate that the appellant had issued earlier notices to the residents to vacate the suit property and holding that the*

notice issued was short.

v) By holding that the appellant had a constitutional and legal obligation to make policies and programmes on provision of shelter and access to housing for marginalized groups and further failing to consider that the appellant had a specific statutory mandate that does not include settlement of landless Kenyans.

vi) Issuing contradictory orders incapable of compliance.

vii) Issuing composite orders applying to the appellant, the 2nd and 3rd respondents jointly whereas their actions and obligations differ.

viii) Failing to appreciate that the 1st respondent had not demonstrated the entitlement to the reliefs sought and shifting the burden to the appellant, 2nd and 3rd respondents contrary to the law.

ix) Failing to appreciate the progressive nature of social economic rights under the Constitution.

In allowing the appeal in the 1st respondent's favour, this Court determined amongst other issues that, the trial court fell into error when it found the Attorney General, as the legal representative of the Government to be liable to the applicant and issued directives and orders against him yet, the relevant Government ministry was not joined as a party to the petition; that despite finding that the 3rd respondent had not committed any wrong, the court made enforceable orders against him, though he was under no legal obligation to allocate or alienate land already alienated and allocated to the 1st respondent;

It was further found that the trial court abdicated and delegated its judicial function to Pamoja Trust and entities not vested with the constitutional mandate to identify appropriate relief and resolve disputes between parties; that the trial court over stepped its mandate by granting orders that were neither sought nor prayed for in the amended petition, including making it a requirement for the respondents to provide policies and programs on provision of shelter and access to housing for marginalized groups such as residents of informal and slum settlements, and further requiring the respondents to engage with Pamoja Trust and other civil society organizations to resolve the applicant's grievance; and embarking on post – judgment supervision for which there is no provision under Kenyan law. It was also concluded that the trial court failed to evaluate the evidence on the issue of whether the Mitumba Village and the structures thereon were on the Wilson Airport flight path thereby threatening the safety and security of the aerodrome.

On the right to private property and socio- economic rights, though this Court appreciated that those rights are recognized and justiciable, it was observed that their enforcement and implementation could not confer proprietary rights in the property of another, and that in the absence of a legal framework, courts have no right under the guise of constitutional interpretation to re-engineer, take away and re-distribute property rights.

The applicant was aggrieved by the decision of this Court and has filed this application seeking certification to the Supreme Court on the premises that the intended appeal involves questions of general public importance thus;

a) "That the Applicants herein represent over 15,000 members of public who were resident of Mitumba village and whose rights were violated.

b) That this is the only matter revolving around wrongful and illegal demolitions of houses of slum dwellers and people of lower class in the society that has been adjudged by the court of appeal and there is need to set progressive precedent.

c) That the decision on the interpretation of the social economic rights should be progressive and not retrogressive.

d) That whether the state can provide its current state of policies and programmes on provision of shelter and access to housing for the marginalized group such as residents of informal and slum settlement as Mitumba Village?

e) Can the Civil Society Organizations participate and contribute in identifying appropriate resolutions in cases of public interests as this?

f) Can the High Court use its unlimited original jurisdiction in Criminal and Civil matters such as fundamental freedom in the Bill of Rights by exercising its power of interim orders, supervisory and directions as presented in this Case?

g) Can the Constitution provision of socio-economic rights be entitled to all citizens as of facts and law as the circumstances of this case is?"

The application was supported by the affidavit of ***Ruth Isiavuka Onzere***, the vice Chairperson of the applicant and sworn on 11th August 2016, who deponed that the representatives of the applicant constituted 3065 households and total population of 15,325 members whose houses had been demolished, and that Mitumba Village was

situated on the property with the knowledge of the Government and local authority. It was further deponed that this was a matter of general public importance which required interpretation of the law and Constitution on the matters concerning the irreparable losses suffered by the inhabitants of Mitumba Village from the threatened and actual demolition of their structures, and where no provision was made for alternative land to which they could relocate or compensation provided for the destruction of their property or their socio- economic rights as envisaged under the Constitution.

In the written submissions filed on 30th March 2017, which were relied upon by learned counsel for the applicant, ***Mr. S.M. Kinyanjui***, it was submitted that the intended appeal concerned a matter of general public importance as it involved, 3000 persons or the equivalent of 15,000 residents of Mitumba Village whose houses were demolished, yet the existence of the village had been acknowledged by the Government and the local authority; that the community had been rendered homeless without any consideration or issuance of alternative land upon which they could relocate; that they were not compensated following the destruction of their property, all of which was in total disregard of their socio-economic rights enshrined in the Constitution 2010.

It was also submitted that the jurisprudence on the issue of forceful eviction was *novelle* and had yet to be developed in this country and there was a need for the Supreme Court to make a pronouncement on the same.

Mr. E. Mutua, learned counsel for the 1st respondent filed written submissions on 18th July 2017, in which it was submitted that the instant application was not a matter of general public importance as its determination did not transcend the circumstances of the particular case. It was pointed out that, since the impugned decision by this Court, the Land Laws (Amendment Act), 2016 had come into operation on 21st September 2016, wherein provision was made to regularise evictions from private and public land, thereby releasing the observations of this Court that, *"…It is within the competence of the legislative to enact a law that governs evictions and resettlement and until that is done; court must interpret and apply the law as it stands."* As a consequence, the issues sought to be determined by the Supreme Court including interpretation of socio-economic rights and evictions were effectively crystallized in an Act of Parliament with the result that the determination of the intended appeal no longer transcended the circumstances of the case; that the law was no longer uncertain, and nothing remained for the Supreme Court to clarify.

It was also asserted that the number of petitioners or applicants to a suit did not demonstrate public importance, and that though the application specified that the evictions affected over 15,000 squatters, in fact only 3000 petitioners signed the application. It was finally argued that the applicant had not demonstrated how the determination of the issues concerning consultations between the State and civil society organizations, or the provision of reports to resolve the applicant's members grievances were matters of significant interest to the public. Consequently, we were urged to dismiss the application.

Mr. M. Eredi, learned counsel for the 2nd and 3rd respondents also filed written submissions upon which they relied. It was submitted that, where general public importance is contended, the applicant must show that the appeal originated from this Court. Counsel cited the case of ***Lawrence Nduttu & 6000 others vs Kenya Breweries Limited & Another SC Petition No. 3 of 2012*** in support of this proposition. Citing ***Peter Ngoge vs Francis Ole Kaparo and 5 others, Supreme Court Petition no 2 of 2012*** counsel argued that the intended appeal did not raise any issues that required constitutional interpretation as no cardinal issues of law or of jurisprudential moment had been raised; furthermore it lacked any public interest elements; and the points of law did not transcend the facts of the individual case. In view of these shortcomings, Mr. Eredi urged that we dismiss the application.

We have considered the application, the replying affidavits and the parties' submissions, and in our view at the core of the application is the issue of whether the intended appeal to be lodged in the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such. This application is brought under ***Article 163 (4)*** of ***the Constitution*** and ***sections 15 and 16*** of the ***Supreme Court Act***. ***Article 163(4)*** of the Constitution provides the criterion for grant of leave to appeal to the Supreme Court. It states that:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court--***
>
> ***(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...."*** (Emphasis supplied**).**

In the Matter of Hermanus Phillipus Steyn vs Giovanni Gnecchi- Ruscone, Civil Application No. Supreme Court 4 of 2012 (UR 3/2012) the Supreme Court set out the following guidelines for determining whether a matter is of general public importance;

> ***i) for a case to be certified as one involving a matter of general public importance, the intended appellant must satisfy the Court that the issue to be canvassed 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 significant bearing on the public interest;

iii) such question or questions of law must have arisen in the court or courts below, and must 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) Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

The 1st respondent has argued that a matter of general public importance does not arise in this case as the issues the applicant has raised do not transcend the circumstances of the particular case and that no point of law has arisen. It was submitted that the Land Laws (Amendment Act), 2016 that came into operation on 21st September 2016, comprises provisions governing the process of evictions from private and public land, and therefore any future evictions would be governed by provisions stipulated by law.

That may be so, but in so far as the facts of this case are concerned, we doubt that the provisions of the recent legislation would have retrospective effect so as to address the applicant's grievances. We say this because in ***Shroud's Judicial Dictionary of words and phrases Fourth Edition, Vol 3, London Sweet & Maxwell Limited, 1973*** it is stated that;

"Nova constitutio faturn forman imporere deber, non" i.e. unless there be clear words to the contrary, statutes do not apply to a past but to a future, state of circumstances." (emphasis ours**).**

And in the case of ***Municipality of Mombasa vs Nyali Limited [1963] E.A. 371*** Newbold JA observed that;

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

While in the case of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR*** the Supreme Court set out the principle to be applied in considering when a non-criminal law may be applied retrospectively when it stated that;

"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

But having said that, it is important to observe that matters of general public importance are not limited to those set out in ***Hermanus Phillipus Steyn vs Giovanni Gnecchi- Ruscone (supra)***.

In the English case of ***The Queen on the Application of Cromptom vs Wiltshire Primary Care Trust (2008) ECWA Civil page 749***, Waller LJ outlined the prerequisites for determining a matter to be of general public importance as;

"(i) that the matter involves the elucidation of public law by higher courts, in addition to the interests of the parties;

(ii)that the matter is of importance to a general class, such as the body of tax-payers;

iii) that the matter touches on a department of State, or the State itself, in relation to policies that are of general application."

In addition, in their dissenting judgment in the case of ***Hermanus Phillipus Steyn vs Giovanni Gnecchi- Ruscone (supra)*** Ojwang and Ibrahim, SCJJ opined that criteria to determine general public importance should be expanded to include; issues of law of repeated occurrence in the general course of litigation; 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 of litigants; questions of law that are destined to continually engage the workings of the judicial organs; questions bearing on the proper conduct of the administration of justice.

This additional criteria was later to be adopted by the Supreme Court in ***Malcom Bell vs Hon. Daniel Torotich Arap Moi & another [2013] eKLR*** in the following terms;

> ***"…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;***
>
> ***ix 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;***
>
> ***x. 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;***
>
> ***xi. 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."***

When this is considered in terms of the conclusion reached by this Court that the inhabitants were evicted from Mitumba Village, together with the acknowledgment of the 1st respondent that no less than 3,000 persons signed the instant application as persons affected by the evictions which was no mean number of persons, but, a large community of slum dwellers who were rendered homeless in an instance, following the evictions in tandem with the destruction of their structures, houses, churches, schools and other property, it could well be that instances such as this were the matters contemplated by the Supreme Court to be of general public importance when it stated in ***Malcom Bell vs Hon. Daniel Torotich Arap Moi (supra)*** that *"…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…,"*.

Furthermore, the issues for which the applicant seeks the Supreme Court's determination include interalia, where wrongful and illegal demolitions of houses of slum dwellers or people of lower class in the society occupy, whether appropriate precedent on the progressive interpretation of social- economic rights requires to be set down. Having regard to the circumstances of the case, this brings into focus the question of socio-economic rights, and whether this can be considered a matter of general public importance.

In case of ***Town Council of Awendo vs Nelson Oduor Onyango and 14 others, SC. App. 49 of 2014***, the Supreme Court added a further criterion in ascertaining a matter of general public importance thus;

> ***"Issues of controversy that emerge from transitional political-economic-social-cum-legal factors with impacts on current rights and entitlements of suitors, or on public access to common utilities and services will merit a place in the category of 'Matters of general public importance".***

In view of the above stated position, we need not say more on the issue. Suffice to state that, we consider this to be a case befitting of certification, and hereby grant the applicant leave to appeal to the Supreme Court. As this is an appeal with leave, pursuant to ***rule 30 (3)*** of the ***Supreme Court Rules 2011***, we direct that the applicant shall file a notice of appeal within fourteen days of the date hereof and serve it as provided under ***rule 31*** of the ***Supreme Court Rules 2011***. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of February 2018.

H.M. OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR