IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, VISRAM & KARANJA, JJ.A)

CIVIL APPLICATION NO. 11 OF 2017 (UR 11/2017)

BETWEEN

RAJAB KATEKE MUTUNGA ..... 1ST APPLICANT

ABDILLAHI HAMISI DAHAB ..... 2ND APPLICANT

ANDREW MBUGUA KINYANJUI ..... 3RD APPLICANT

HASTINGS THUKU ..... 4TH APPLICANT

SAID AWADH ..... 5TH APPLICANT

JAMES ONYANGO KHANDA ..... 6TH APPLICANT

RAPHEAL GONDI ..... 7TH APPLICANT

AND

MUNICIPAL COUNCIL OF MOMBASA ..... 1ST RESPONDENT

PHRABHULA SHAH ..... 2ND RESPONDENT

JITENDRA M. KANABA ..... 3RD RESPONDENT

MR. SUTHIR ..... 4TH RESPONDENT

OMICRON INVESTMENTS LIMITED ..... 5TH RESPONDENT

(An application for leave to appeal to the Supreme Court against the whole Judgment of the Court of Appeal of Kenya at Nairobi (Okwengu, Makhandia & Sichale, JJ.A) dated 31st January, 2014

in

Civil Appeal No. 48 of 2011)

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RULING OF THE COURT

The motion before us dated 20th March, 2017 invokes ***Article 163 (4) (b)*** of the Constitution, ***section 15*** of the Supreme Court Act and ***Rules 21*** and ***24*** of the Supreme Court Rules, in seeking the following orders:

> ***"2. THAT this Court do certify that the proposed appeal to the Supreme Court as well as this Appeal raise matters of general public importance as contemplated under Article 163 (4) (b) of the Constitution.***

3. THAT this honorable court be pleased to restore status quo Anthe** (sic)**,and stay any other consequential orders arising from the Judgment dated 31st January 2014 pending the hearing and determination of this application or further orders of this Honourable Court.

4. THAT Leave be granted to the Appellants/Applicants to appeal to the Supreme Court against the whole of the Judgment of Hon. Lady Justice H. M. Okwengu, Hon. Asike Makhandia & F. Sichale JJ.A delivered on 31st day of January 2014."

Those prayers are rather puzzling. In the first place, there is no provision in our procedure requiring this Court to ***"grant leave to lodge an appeal in the Supreme Court."*** *Where a matter does not raise issues of* constitutional interpretation or application, which the apex Court deals with as of right, the *role of this Court is to certify whether it is of "general public importance"* to warrant escalation to the apex Court. It is only the Supreme Court under ***section 15*** of the Supreme Court Act which has the power to grant leave to appeal. Prayer 4 in the application is therefore misguided. Secondly, there is doubtful jurisdiction for this Court to grant injunctions pending an intended appeal to the Supreme Court. Only the Supreme Court has express power donated under ***section 24*** of the Act. It is no wonder therefore, that learned counsel for the applicants, **Dr. John Khaminwa,** did not press prayer 3 of the application. That leaves only prayer 2 for our consideration.

In the case of ***Mary Wanjiku Kamonde vs Daniel Muriithi Kamonde [2017] eKLR,*** this Court stated as follows:

"***The principles applicable in considering certification for matters to be heard by the Supreme Court are now well settled. The starting point is Article 163 of the Constitution which not only established the Supreme Court but also delineated its jurisdiction. Article 163 (4) (b) requires that appeals lie from the Court of Appeal to the Supreme Court upon certification, on the basis that a matter is one of "general public importance". The certification can be done by the Court of Appeal itself, or by the Supreme Court. In Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone [2013] eKLR, one of the earliest cases to define that jurisdiction, the Supreme Court carried out extensive comparative survey on the matter before concluding thus:***

"Before this Court, '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."

In the end, the Supreme Court outlined the governing principles in determining whether a matter is of general public importance, which principles have been applied in numerous subsequent decisions, as follows:

"(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 [other] 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."

Clearly, there is no longer any difficulty in defining what amounts to *'general public importance'* which the apex Court has done for us, and it is puzzling that parties continue to be ill-advised in making applications that border on abuse of court process.

Take this case.

The impugned judgment of this Court was made on 31st January, 2014 while this application was filed three years later. The subject matter considered by both the High Court and this Court was the adequacy of compensation for various houses built by the applicants on land which did not belong to them. This is the common phenomenon known only in the coastal region and dubbed *"house without land."* The applicants averred that they happened on the land way back in 1975 in a contractual relationship with one 'Bin Gadin' who owned the land and that they had constructed residential structures thereon. The respondents on the other had contended that the land was compulsorily acquired by the Government from the original owner and ceded to the 1st respondent, the Municipal Council of Mombasa **(the Council),** in the 1980s. The property has since changed hands three times and the residential structures demolished before other permanent developments were made.

The Council contended that adequate compensation was made for the structures found on the land before it took over, but the applicants contested the figures paid to them as inadequate and filed suit in the year 2005 seeking:

> ***"(a) Full compensation for their buildings erected on Plot NO.740/V/MN Mikindani Mombasa plus interest per paragraph 7 - Kshs.968,000/-.***
>
> ***(ai) Alternative plot to be provided by the 1st Defendant.***
>
> ***(b) Injunction restraining the defendants from demolishing or destroying the plaintiffs and their tenants and defendants*** *(sic)* ***until proper assessment for compensation has been made.***
>
> ***(c) Costs of this suit plus interests*** *(sic).*
>
> ***(d) Exemplary damages."***

The trial court which heard several witnesses found that only two of the applicants had proved occupational rights on the property through their agreement with 'Bin Gadin'; that there was no evidence tendered by the other five applicants and so their claims were for dismissal; that the applicants had sued the wrong parties as there was no privity of contract with, or cause of action against, the respondents. After reviewing the evidence on first appeal, this Court found no reason to disturb the findings of fact made by the trial court. The Court also considered constitutional issues raised by the applicants' counsel in relation to alienation of the property by the Council to a private individual, one Ramadhan Kajembe, who subsequently sold it to the 2nd, 3rd and 4th respondents, who in turn sold to the 5th respondent. The constitutional issues related to prioritization of allotment of the land to the applicants who were already in possession, rather than allotting it to Kajembe who was allegedly a Councillor in the Council; legitimate expectation by the applicants that they would be allotted the land; the protection of the applicants' constitutional right to housing; the arbitrariness of the Land Acquisition Act; reasonableness in handling the issue; and the promotion of the rule of law. This Court, however, dismissed those constitutional issues as irrelevant as they did not arise from the pleadings filed by the parties.

Dr. Khaminwa now seeks to persuade us that those constitutional issues are still alive and ought to be agitated before the Supreme Court. The specific elements of 'general public importance' are stated in the application as follows:

> ***"3. THAT the issues contained in the petition are grave concern and of public interest, such that, the public officers in cahoots with busy bodies and/or land grabbers have so far*** *(sic)* ***themselves, cronies or unsuspecting buyers without the knowledge or acquiescence of the owners as is the case herein.***
>
> ***4. THAT the corrupt activities are injustices to land owners, of which the public officers who are mandated to protect the citizens and their property are in gross abdication of responsibility aimed at an unjust enrichment.***
>
> ***5. THAT the Honourable Court is vested with the power to intervene against such nefarious and egregious action which has continued unabatedly."***

Before us in oral submissions, Dr. Khaminwa rehashed the arguments earlier made before this Court that the suit land was public land which had reverted to the Council and which ought not to have been allotted to Kajembe; that public land is held in trust and cannot be given to an individual; that allocating public land to an individual amounts to corruption; that the applicants stand to be evicted from the property thus threatening violence which is abhorred by international law; and that it was inhuman not to allow the applicants to retain the suit property.

In response, learned counsel for the Council, **Mr. Apollo Muinde** submitted that the applicants were merely seeking public sympathy by belatedly raising issues which were not before the trial court; that the concurrent finding by the two Courts that there was no cause of action against the respondents was not challenged; that the issues raised before the Court of Appeal did not arise before the trial court; that in any event, the issues before the trial court did not involve a broad section of the population; that there was no evidence of corruption; that there was no issue of general evictions of a wide population; and generally that the applicants did not satisfy the principles set out in various authorities including the Supreme Court decision of ***Hermanus Phillipus Steyn (supra).***

We have carefully considered the application and have reached the conclusion that it falls short on the threshold set by the Supreme Court in the authority cited above. We are particularly not satisfied that the applicants have discharged the onus thrust on them to, firstly, *identify and concisely set out the specific elements of "general public importance" which they attribute to the matter. The three elements listed in the application amounting to 'land grabbing', 'corruption', and 'egregious actions' are generalized and did not arise from the pleadings. Secondly, the applicants have not shown that the questions of law intended to be urged in the Supreme Court had arisen before the two courts below and were determined. Thirdly, it is not* shown that the *intended appeal transcends the circumstances of the parties herein and have a significant bearing on the public interest and finally, it is not shown that there is a state of uncertainty in the law, arising from contradictory precedents for resolution by the Supreme Court.*

We form the above view after examining the pleadings filed before the trial court and the prayers made before that court as reproduced above. None of the constitutional issues alluded to by Dr. Khaminwa before this Court was pleaded or raised before the trial court. The applicants were specifically concerned about inadequacy of compensation for developments made on land which they admitted was not theirs. That is the matter they placed before the trial court for determination. On the evidence, they failed to satisfy the trial court, and this Court on appeal, that they had a cause of action against the respondents. As always, parties are bound by their pleadings and a court of law has no business meandering away from the issues placed before it for determination. With respect, there is nothing in the submissions of learned counsel for the applicants that persuades us that the *issues to be canvassed in the intended appeal are of general public importance.*

On that finding, the application fails and we order that it be and is hereby dismissed. Considering that the applicants do not appear to be as financially endowed as the respondents and that the matter in issue is an emotive subject, we make no order as to costs.

Dated and delivered at Mombasa this 11th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR