IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MARAGA, MUSINGA & SICHALE, JJA)

CIVIL APPLICATION NOS. NAI. 12 & 13 OF 2012 (CONSOLIDATED)

BETWEEN

THE BOARD OF GOVERNORS,

MOI HIGH SCHOOL, KABARAK ..... 1st APPLICANT

HON. DANIEL TOROITICH ARAP MOI.....2nd APPLICANT

AND

MALCOLM BELL..... 1ST RESPONDENT

(Being an application to seek leave to appeal to the Supreme Court against the judgment (Orders) of this Court (Koome & Okwengu, JJ.A.) dated 9th August, 2012 at Nakuru

in

C.A. Civil Appeal No. 129 of 2006)

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RULING OF THE COURT

1. On 9th August 2012, this Court (Koome and Okwengu JJA) allowed the respondent's appeal against the judgment of the High Court which had dismissed the respondent's claim to the 100 acres portion of LR No. 6207/02 Nakuru District but had granted the first applicant's claim of adverse possession over the same land. We shall herein after refer to the 100 acres portion as "the suit land." The two learned Judges had heard the appeal with the Hon. Justice Waki JA but because the latter took sabbatical leave soon thereafter, he did not render his judgment on the matter. In the circumstances, the remaining two Judges delivered their judgments under **Rule 32(3)** of the **Court of Appeal Rules** which allows two of the three judges of appeal to deliver their separate but concurring judgments *"where one delays, dies, ceases to hold office, or is unable to perform the functions of his office because of infirmity of mind or body…."*

2. Aggrieved by that decision of this Court, the applicants wish to appeal against it to the Supreme Court. They have now come to this Court with two applications under Article **163(4)(b)** of the **Constitution, Sections 15** and **16** of the **Supreme Court Act** as well as **Rule 1(2)** of the **Court of Appeal Rules 2010** for leave to appeal to the Supreme Court. They also seek orders that their

notices of appeal filed on 21st August 2012 be deemed ad duly lodged.

3. The first applicant filed Civil Application No. NAI 12 of 2012 while the second applicant filed Civil Application No. NAI 13 of 2012. Both applicants seek word for word similar orders that:

> **"1. This Honourable Court be pleased to grant leave to appeal to the Supreme Court against the decision of this Honourable Court delivered on the 9th day of August, 2012 by Koome and Okwengu JJA.**
>
> **2. That this Honourable Court do certify that the matters in issue (as concerning land occupied by Moi High School Kabarak) are of general public importance and/or it is likely that a substantial miscarriage of justice may have occurred (based on the ratio of the case of Erinford Properties Ltd v Cheshire County Council (1974) 1 ALL ER 448) and/or that the law relating to adverse possession needs to be considered by the Highest Court of Kenya.**
>
> **3. The Applicant's notice of Appeal lodged on 21st day of August, 2012 be deemed as having been duly lodged."**

4. Grounds (a) and (b) upon which the two applications are based are also word for word similar. Application No. NAI 13 of 2012 has, however, three additional grounds. The first two similar grounds appearing on the face of both applications are:-

a. **This Honourable Court has jurisdiction to certify that the proposed appeal to the Supreme Court (by the Respondent) (sic) is a matter of utmost public importance as it involves land on which the said school carries on agricultural activities for the benefit of the school and its students, since 1981.**
b. **The law relating to adverse possession of agricultural land in possession of the said school since 1981 has to be properly canvassed, in view of the evidence on record.**

The additional grounds in application No. NAI 13 of 2012 are:-

c. **The provisions of Section 14 of the repealed Constitution were misconstrued and misapplied as a result of which substantial miscarriage of justice has occurred.**
d. **That it is a matter of public importance for the highest court in the land to settle the law as regards adverse possession in view of the divergent views taken by this court in instances involving contracts subject to Land Control Act Cap 302, Laws of Kenya.**
e. **That it is a matter of public importance for the Supreme Court to clarify the applicability of the provisions of Rule 32(2) (sic) of the Court of Appeal Rules."**

5. Henry Kiptiony Kiplangat, swore the affidavit in support of application No. NAI 12 of 2012 while the former President, Hon. Daniel Toroitich Arap Moi, swore the one in support of application No. NAI 13 of 12012. Both affidavits recount the history of the litigation in this matter before the High Court. Briefly, it is that the respondent filed a suit in the High Court against Hon. Daniel Toroitich Arap Moi (Moi) seeking to recover the suit piece of land which he claimed his late father, Walter Bell, had been threatened by Moi to surrender to Kabarak High School (the School) in 1981. He later changed and claimed that his late father had donated the land to the School on condition that the School supplied him with electricity and sunk a borehole and constructed a cattle dip for him. Upon becoming aware of that suit, the Board of Governors of the School filed another suit claiming title to the same land by adverse possession, having occupied the same since 1981.

6. The two suits were consolidated and heard together. In his judgment, Apondi J dismissed the respondent's claim against Moi but granted the declaration that the School had acquired the suit land by adverse possession. On appeal, as stated, this Court (Koome and Okwengu JJA) reversed that decision thus provoking the two applications before us for leave to appeal to the Supreme Court against it.

7. Besides the recapitulation of the grounds in the proposed appeal, the only other averments of significance in those affidavits are assertions to the effect that recovery of the suit land from the School, which is catering for many students from all over the country, is a matter of great public importance and that the residents of Kabarak and its environs loudly protested the decision of this Court necessitating the action of Moi himself to pacify them.

8. At the commencement of the hearing, as both applications seek the same orders, by consent of counsel for all the parties, we consolidated them. We shall hereinafter deal with them as one.

9. As stated, 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)**

10. Under **Article 163(4)(b)** of the Constitution therefore applications for leave to appeal to the Supreme Court can be made either to the Court of Appeal or to the Supreme Court itself. Under that provision, the application can be made on only one ground: if *"a matter of general public importance is involved."* Section 16 of the Supreme Court Act, however, provides one additional ground: that *"a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."*

11. Going by the preamble to the Supreme Court Act that the Act makes *"provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution, and for connected purposes,"* one can argue that the additional ground in Section 16(2)(b) of the Supreme Court Act only applies to applications for leave made to the Supreme Court itself. If that argument is accepted, it can be further argued that that additional ground is therefore not available to applicants who make their applications to the Court of appeal. It would be further argued that applications for leave made to this Court can only be gauged upon the single criterion provided in Article 163(4)(b) of the Constitution that *"a matter of general public importance is involved."* We, however, do not think that this would be a sound argument as we cannot have two criteria for presenting one application in the two courts. In our view therefore, both this Court and the Supreme Court have to consider such applications on both the above criteria and that is what we wish to do in this matter.

12. Before we go into the factual aspects of this matter and consider the grounds upon which the application is premised, we wish to set out the legal principles governing these types of applications. For instance it is important to be clear on which matter is of *"general public importance"* or in what situations is *"a substantial miscarriage of justice [likely to] have occurred or may occur unless the appeal is heard?"*

13. To the best of our knowledge, these provisions have been interpreted in only a few cases. In a well considered ruling of this Court (Githinji, Onyango Otieno and Koome JJA) delivered on 6th November, 2012 in **Hermanus Phillipus Steyn v Giovanni Gnecch-Ruscone,** reference was made to the principles governing such applications in other jurisdictions with provisions of law in *par materia* with ours. In that case the Court referred to **Section 33(2)** of the **English Criminal Appeals Act** of 1968 which permits appeals to the House of Lords as the Supreme Court of England only with a certificate by the Court of Appeal that *"a point of law of general public importance is involved."* In Ireland, a similar provision allows appeals to the Supreme Court of

that country against decisions involving points of law of *"exceptional public importance,"* while the Ugandan counterpart talks of a matter that *"raises a question or questions of law of great public importance."*

14. We want to believe that the drafters of our Constitution were cognizant of such provisions from other jurisdictions before coming up with the one in our Constitution that only matters of *"general [not great or exceptional or only points of law] of public importance"* deserve further consideration by the Supreme Court. In our view this distinction is significant. As our Constitution does not limit appeals to the Supreme Court to only points of law of great or exceptional importance, we are of the view that **Article 163(4)(b)** of our Constitution is broader than is the case in other jurisdictions and should therefore be understood as allowing both points of law and fact to reach the Supreme Court as long as they are of *"general (not great or exceptional) importance"*. In this regard therefore, we should be careful in the use of authorities from jurisdictions whose provisions of the relevant statutes are not in exact *pari materia* with ours. In this regard therefore authorities like **R v. Secretary of State Exp. Eastaway** which denied the English Supreme Court the opportunity to even *"correct errors in the application of settled law, even where such [errors] are shown to exist"* should be considered with great circumspection.

15. Granted that the jurisdiction of the Supreme Court is limited and for good reason, it is a matter of public policy that litigation must come to and end. So if litigation commences at the Subordinate Court, by the time it reaches and is decided by the Court of Appeal, all the issues in controversy should have been adequately addressed. That is what the Supreme Court must have had in mind when it stated in **Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & Others** that:

> **"the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or jurispudential moment, will deserve the further input of the Supreme Court."**

16. This Court must also have had in mind the same view when it stated in the case of **Hermanus Phillipus Steyn v Giovanni Gnecch-Ruscone** (supra) that *"the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court."* This is because, as it further stated, the Supreme Court *"must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal [and factual] questions of general public importance."*

17. The above restriction notwithstanding, while we must not allow every grievance arising from each Court of Appeal decision to reach the Supreme Court as that will flood it with unmanageable volume of work and defeat the whole purpose of the filtering process, we should nevertheless give **Article 163(4)(b)** of the **Constitution** read with **Section 16(2)(b)** of the **Supreme Court Act** a liberal interpretation and allow matters of general public importance to reach it. That is in consonance with the generally accepted principle of constitutional interpretation that a constitution is a living and durable document which must be allowed to develop in line with the developments and aspirations of the people taking into account new social and political realities. The liberal interpretation of the constitutional provisions, especially those that touch on the fundamental rights and freedoms, is not a preserve of only our jurisdiction. It is a worldwide approach. This is how Lord Diplock rendered himself on this point in the case of **Attorney v Momodou Jube [1984] AC 689 at p. 700** which was an appeal to the Privy Council from the Court of Appeal of Gambia:-

> **"A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given generous and purposeful construction. The interpretation should be generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charger's protection. See Republic**

v Big M Drug Mart Ltd (other intervening) [1986] LRC (Const) 332 (Supreme Court of Canada per Dickson J)".

In **Unity Dow v. Attorney-General of Botswana [1992] LRC 623** it was stated that a generous construction means that:-

> **"…you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous provisions such interpretation is compelling".**

The question then that begs for an answer at this stage is which matters are or are not of *"general public importance?"*

18. Neither the Constitution nor the Supreme Court Act define what the phrase *"a matter of general public importance"* means. To the best of our knowledge, the Supreme Court has not defined it either. Resort must therefore to be had to case law and legal literature on its meaning. In the case of **Murai v. Wainaina** the late Justice Madan JA gave what in his view was a matter of general public importance. He said *"[a] question of general public importance is a question which takes into account the well being of a society in just proportions…[like where]…the subject matter affects the land rights of a large number of people and not merely the portion of the appeal."* In the English case of **Dellway Investments Limited & Others v. National Asset Management Agency & Others** it was held that:-

> **"If the [point of] law in question stands in a state of uncertainty, it is for the common good that such law be clarified so as to enable the courts to administer the law not only in the instant, but in future such cases."**

In the other English case of **Arklow Holidays v. An Bord Plean'ala** the court stated that the uncertainty in the law must be:-

> **"in respect of a point which had to be of exceptional importance [and that] the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case."**

Both of these English cases have been cited with approval in two recent decisions of this Court in applications for leave to appeal to the Supreme Court, **Hermanus Phillipus Steyn v Giovanni Gnecch-Ruscone** (supra) and **Shabir Ali Jusab v. Anaar Osman Gamrai & Another**. In the former, this Court reiterated this point in the following words:-

> **" The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to [properly] administer that law, not only in the case at hand, but also in such cases in future."**

19. It is clear from these authorities that for a point of law to be of general public importance (in our case not necessarily of exceptional importance), it must be one whose significance or applicability transcends the facts of the case at hand and involves the welfare of the general public at large.

20. With these principles in mind, we can now turn to the facts of the matter at hand. The applicants' contention that this matter involves land on which Kabarak High School carries on agricultural activities for the benefit of the school and its students, since 1981 does not of itself make it a matter of general public importance. Although Kabarak High School may be catering for students from all over the country, so are many other schools. The matter cannot also be of general public importance because one of the judges of Appeal did not render his decision. **Rule 32(3)** of the

Court of Appeal Rules authorizes two judges to determine an appeal if the third one is, on account of delay, death or inability for any reason whatsoever to perform the functions of his office, unable to render his judgment. As pointed out, Waki, JA went on sabbatical leave soon after hearing the appeal. Waiting for him to render his judgment would have indefinitely delayed the determination of the appeal.

21. We are, however, of the view that in this matter leave to appeal to the Supreme Court should be granted on two grounds. One, that the case involves a point of law of great general public importance, and secondly, that substantial miscarriage of justice may occur unless the appeal is heard.

22. On the first ground of a point of law of great general public importance, this Court found that the suit was either a gift or a donation from the respondent's late father to the School on some barter trade arrangement but neither of the two, whichever was the case, was complete. If it was a barter trade arrangement, this Court further held, as the conditions precedent were not fulfilled, that is analogous to an incomplete and un rescinded sale and the School remained in possession of the suit land with the respondent's consent in which case time, for purposes of adverse possession, did not start to run until the respondent demanded possession in 2003. In support of that reasoning, this Court relied on its three previous decisions, **Wambugu v. Njuguna Sisto Wambugu v. Kamau Njuguna** and **Samuel Miki Waweru v. Jane Njeri Richu,** in all of which it was held that, for purposes of adverse possession, time does not start to run in favour of a purchaser who enters land with the vendor's permission until the sale agreement is terminated. A second holding in the **Samuel Miki Waweru case,** which appears not to have been brought to the attention of this Court, is that:

> **"where a purchaser of land or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction thereafter becomes void under section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction became void."**

23. Further support for the latter holding is to be found in the case of **Mbugua Njuguna v. Elijah Mburu Wanyoike & Another** which also was apparently not brought to the attention of this Court. In that case it was also held that:

> **"where an abortive sale of agricultural land is due to non compliance with land control law, the limitation period for purposes of adverse possession begins to run on the day the claimant is put in possession and not the last day when the application for consent of the land Control Board should have been made."**

See also the recent decision in the case of **Joseph Mutafari Situma v. Nicholas Makhanu Cherongo**

24. Agricultural land, which we are dealing with in this case, being a major, if not the most important resource in this country, the law as to when, for purposes of adverse possession, time starts to run in favour of a purchaser in possession of purchased land needs to be clarified for the general good of the country. We therefore find that this matter should be considered by the Supreme Court and the law clarified.

25. On the second ground of there being a likelihood of miscarriage of justice if the appeal is not heard, both the High Court and this Court are divided on whether or not the respondent's father gave the suit land to Moi, in which case time did not start running until he ceased to be the President of this country or he gave it to Kabarak High School in which case time started running from the time the School took possession. There is also the issue of the legal status of the School which featured in this Court's judgment which issue the applicants claim was not raised at the trial but only surfaced on appeal. Is the School an entity independent of Moi or not? In that uncertainty

a substantial miscarriage of justice may have occurred or is likely to occur if the applicants are not granted leave to pursue the intended appeal to the Supreme Court.

26. For these reasons, we allow this application and hereby grant the applicants 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 applicants shall file a notice of appeal within fourteen days of the date hereof and serve it as provided under **Rule 31**. The costs of this application shall abide the outcome of the intended appeal.

DATED and delivered this 22nd day of February 2013

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

…….

JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEA

certify that this is a true

copy of the original

DEPUTY REGISTRAR