**Mabavu & 6 others v Bahati Properties Limited (Application E052 of 2023) [2024] KESC 8 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KESC 8 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**APPLICATION E052 OF 2023**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ**

**APRIL 12, 2024**

**BETWEEN**

**SAID M. MABAVU ..... 1ST APPLICANT**

**ANNA W. DEREVA ..... 2ND APPLICANT**

**ABDALLA MWACHIBULO ..... 3RD APPLICANT**

**FATUMA NCHIZUMO ..... 4TH APPLICANT**

**OMAR MASHAKA ..... 5TH APPLICANT**

**MAHFUDHI MOHAMED MWAMTUKU ..... 6TH APPLICANT**

**RAMA MATANO MWARINDA ..... 7TH APPLICANT**

**AND**

**BAHATI PROPERTIES LIMITED ..... RESPONDENT**

***(Being an application for review of the Ruling of the Court of Appeal at Mombasa (Murgor, Laibuta & Odunga, JJ. A) dated 8th December 2023 in Civil Application No. 141 of 2019 denying certification to appeal to the Supreme Court against the Court of Appeal Judgment (Warsame, Musinga & Murgor, JJ.A) in Civil Appeal No. 141 of 2019 dated 4th June 2021)***

**RULING**

**Representation:**

Mr. Omiti for the Applicants (Ngeri, Omiti & Bush Advocates)

Mr. McCourt for the Respondent(Kairu & McCourt Advocates)

1. Upon reading the Originating Motion taken out by the Applicants dated 21st December 2023 and filed on 6th February 2024 pursuant to Articles 159(2)(a), (d) & (e), 163(4)(b) & (5) and 259(1) of

*the Constitution*, Section 15B of the *Supreme Court Act* 2011 and Rule 33 of the *Supreme Court Rules* 2020 for orders that this Court; be pleased to review the Ruling of the Court of Appeal (Murgor, Laibuta & Odunga, JJ.A) delivered on 8th December 2023 declining to certify the intended appeal by the applicants to this Court from the judgment of the Court of Appeal in Civil Appeal No. 141 of 2019 as constituting a matter of general public importance; to certify the intended appeal as constituting a matter of general public importance and grant leave to the applicants to file a petition of appeal against the judgment of the Court of Appeal; and that costs of the application be provided for; and

2. Upon perusing the grounds on the face of the application, the supporting affidavit sworn by Said M. Mabavu, on his own behalf and on behalf of the 2nd to 7th applicants, as well as their submissions filed on 6th February 2024, in which the following twelve issues arising from the decision of the Court of Appeal are raised as involving matters of general public importance:

    i. The perennial topic or irregular registration of proprietary interest at the coastal strip which has left many indigenous communities as squatters in their ancestral land resulting in historical injustices is yet to be addressed since the promulgation of *the Constitution* of Kenya, 2010;

    ii. Whether the applicants' constitutional right to property in the suit property arose before the registration of the same and issuance of a lease by the colonial Government in 1914 was to the disenfranchisement of the applicants' ancestors.

    iii. The issue of historical land injustice visited upon, not only the applicants but a majority of residents of the coastal region of Kenya by disenfranchisement of their ancestral property as indigenous people by the colonial Government;

    iv. Whether a person has a legitimate expectation that once allotted and issued with a title deed over a parcel of land, the State had powers to do so, and the person acquires property rights in the same (sic);

    v. Whether the State's negligence in the issuance of multiple title deeds over the suit property should be visited on either of the parties, especially where none of the parties has engaged in fraudulent conduct;

    vi. Whether the State's negligence in the issuance of multiple title deeds over the suit property should be borne by the State and if the applicants are to be compensated if the Court were to come to the conclusion that the suit property belonged to the respondent;

    vii. Whether land that was previously compulsorily acquired by the government for a particular purpose or a portion of it can be subsequently put to a different use or even allotted to private individuals for their use;

    viii. Whether private property that is acquired through compulsory acquisition and only a portion of it is put to public use, it can be found that only the portion put to public use was properly acquired;

ix. Whether a title to land that has been acquired by the government through compulsory acquisition in public interest can still be available for renewal of lease and sale to a third party and the process to be followed when such a title is challenged;

x. The value that members of the public should place on documents that originate from public offices and particularly how to deal with a situation where two title deeds both of which are genuinely processed and obtained from the land registry in relation to the same property;

xi. Whether it is proper to render a community as squatters on their own property despite the fact that they are holding a title deed to the property; and

xii. Whether or not the suit property was properly acquired by the Government, whether or not it was public land at the time of allocation to the applicants, and whether or not it was available for allocation; and

1. Bearing in mind the following facts which precipitated this land dispute wherein the parties have competing interests over land that was previously registered as Kwale/ Diani Beach Block/59 but is now known as Kwale/Diani Beach Block/149 (the suit property). On the one hand, the applicants contend that they are the rightful owners of the suit property on the basis that prior to the first registration by the British Colonial Authorities in 1914, the suit property belonged to their forefather, one Mwachimwindi Diya, who was forcefully evicted from it by the colonial government without any compensation. Given the historical injustice, they petitioned the late President Daniel Arap Moi who directed the Commissioner of Lands to allot to them the suit property which was vacant and undeveloped in 2001. On the other hand, the respondent contends that it is the rightful registered proprietor of the leasehold interest in the suit property, having bought it in 1992 from Prince Sadruddin Aga Khan, a 99-year lessee of the Government of Kenya from 1st January 1914. It was the respondent's case that it purchased the suit property at a consideration of Kshs.11,000,000 and the lease dated 18th September 1992 was subsequently transferred to it by Prince Sadruddin Aga Khan. In the circumstances therefore, the land was not available for allocation to the applicants as claimed; and

2. Given the competing claim over the ownership of the suit property by the applicants, the respondent filed a suit in the Environment and Land Court (ELC) at Mombasa, ELC No. 31 of 2015, against the Attorney General, the Land Registrar, Kwale, and the applicants challenging the purported allotment and subsequent

   issuance of title over the suit property to the latter as illegal, fraudulent, and null and void; and

5. Upon evaluating the two competing claims, the ELC (Omollo, J.), found in favour of the respondent and granted all the prayers sought, finding, inter alia, that Kwale/Diani Beach Block/ 59 and Kwale/Diani Beach Block/149 refer to one and the same parcel of land; that since the suit property had been leased to the respondent and there was in existence a valid lease at the time the applicants sought allotment of the suit property under the provisions of the

repealed Government Lands Act, the property was not available; and therefore, the allotment to the applicants was illegal, null and void; and

6. Dissatisfied, the applicants challenged this outcome in the Court of Appeal contending that parcel Kwale/Diani Beach Block/ 59 was compulsorily acquired by the Government in 1975 and therefore in 1992 it was not available for sale by Prince Sadruddin Aga Khan to the respondent. The appellate court (Warsame, Musinga & Murgor JJ.A), found that there was only partial acquisition of parcel Kwale/Diani Beach Block/ 59, which reduced its size from 25 acres to 23.25; and that it is the remaining portion that was given parcel No. Kwale/Diani Beach Block/149, the suit property. Moreover, they observed that ideally, the title for Kwale/ Diani Beach Block /59 ought to have been cancelled, but somehow was not. Consequently, Prince Sadruddin Aga Khan remained in actual possession of the land, until he sold and transferred his leasehold interest thereto to the respondent, albeit as Kwale/Diani Beach Block/ 59. Ultimately, in dismissing the appeal, the appellate court found that neither the President of Kenya nor the Commissioner of Lands had the power to allot the suit property to the applicants; and

7. Aggrieved once again by this determination, the applicants sought before the Court of Appeal an order for stay of execution and a certification that its intended appeal to the Supreme Court raised a matter of general public importance in terms of Article 163(4)(b) of *the Constitution*. The Court of Appeal in the impugned ruling rejected that argument and found instead that the questions of allocation of alienable and unalienable land together with the powers of the President of Kenya and Commissioner of Lands to allot land are not novel issues to place before the Supreme Court for determination. What was more, it found that the applicants had neither specified the elements of law that remained unsettled nor had they specified how the conclusions would impact third parties. In the end, the appellate court dismissed the application for failure to meet the threshold for certification; and

8. Upon considering the applicants' submissions dated 6th February 2024 where they reiterate that the issues which they intend to raise before the Supreme Court, and which we have set out in paragraph 2 above; that they, transcend the circumstances of this matter; will affect a considerable section of the populace; touch on the subject of land rights; the powers of public bodies to alienate and allocate public land; have a significant bearing on the public interest; and that the question of proof and validity of compulsory acquisition, has been the subject of conflicting decisions of the Court of Appeal. They have cited, in this regard, the decisions in *Commissioner of Lands & another v. Coastal Aquaculture* [1997] eKLR, and *Kenya National Highway Authority v. Shalien Masood Mughal & 5 others* [2017] eKLR. They urge in that context that, on the facts of this case, both superior courts below erred in finding that the government had not compulsorily acquired the suit property, hence the need for this Court to settle the opposing views expressed by the Court of Appeal on the test for compulsory acquisition. In their view, therefore, the test enunciated in He*rmanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone*, SC App. No. 4 of 2012; [2013] eKLR has been met; and

9. Noting the respondent's grounds of opposition, replying affidavit of Sheba Mohamed, the respondent's Company Secretary, and the submissions filed on its behalf, all dated 12th February 2024, to the effect that the Motion: raises new issues that were not raised, canvassed and determined before both superior courts below; does not set out the specific elements of general public importance; does not disclose any uncertainty on points of law that need clarification by this Court for the common good; and does not identify the lacuna in law to be filled, since the law on the questions intended to be raised is settled and clear. In any case, that

the issue of partial compulsory acquisition of private property was conclusively determined by this Court in *Town Council of Awendo v. Nelson Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)* [2019] eKLR. Similarly, the test for proving the validity of compulsory acquisition was the subject of this Court's judgment in *Attorney General v. Zinj Limited*, [2021] KESC 23 (KLR); and

10. Guided by principles enunciated by this Court in *Hermanus Phillipus Steyn (supra) and Malcolm Bell v. Daniel Toroitich Arap Moi & Another*,SC Appl. No. 1 of 2013 [2013] eKLR; and

11. Having considered the totality of the application, affidavits, and rival arguments by the parties on both sides, we opine as follows:

    i. The issues proposed to be certified as constituting matters of general public importance revolve around the perennial subject of irregular registration of proprietary interests at the coastal strip, allocation of alienable and inalienable land, compulsory acquisition, issuance of multiple title deeds by the government over the same property and the claim by local residents of disenfranchisement of ancestral land. According to the applicants, there are conflicting decisions by the Court of Appeal on the question of the test of compulsory acquisition, which requires from this Court a final pronouncement. To begin with, this question was never raised, argued and determined by the Court of Appeal in both the appeal and the application for certification.

    ii. On the peculiar facts in the *Commissioner of Lands & another v. Coastal Aquaculture (supra) and the Kenya National Highway Authority v. Shalien Masood Mughal & 5 others* (supra) the Court of Appeal, respectively, merely emphasized the importance of ensuring that the procedure for compulsory acquisition is strictly complied with and declared that parties cannot challenge a process of compulsory acquisition that preceded their alleged acquisition of land. The dispute and the determination in the two decisions are distinguishable and we are unable to see the apparent conflict between them.

    iii. Moreover, the question of reversionary interests in or pre-emptive rights over compulsorily acquired land have long been settled by this Court in Town Council of Awendo v. Nelson O Onyango (supra), just as has been the question of the process of compulsory acquisition as affirmed by this Court in *Attorney General v. Zinj Limited (supra)*.

    iv. Consequently, we find that the applicants have not satisfied the now firmly established test for certification under Article 163(4)(b) of *the Constitution*. We are also not persuaded that there are conflicting decisions that deserve the Supreme Court's further or final pronouncement.

    v. Like the appellate court, we find that this is a spirited and ingenious attempt by the applicants to have a second bite at the cherry by seeking to revisit factual findings and conclusions already resolved by the superior courts below. Mere apprehension of miscarriage of justice and determinations of fact in contests between parties are not, by themselves, a basis for granting certification to appeal to the Supreme Court.

    vi. Ultimately, we find no fault in the Court of Appeal's conclusion that the proposed issues do not meet the threshold set out in *Hermanus Phillipus Steyn* (supra) and Malcolm Bell (supra).

vii. As costs are discretionary and follow the event, the applicants shall bear the costs of this application.

12. Accordingly, we make the following orders:

i. The Originating Motion dated 21st December 2023 and filed on 6th February 2024 is hereby dismissed.

ii. The Ruling of the Court of Appeal delivered on 8th December 2023 denying leave to appeal to this Court is hereby upheld.

iii. The costs of this application shall be borne by the applicants.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.**

**.....**

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA**

**.....**

**M. K. IBRAHIM**

**.....**

**JUSTICE OF THE SUPREME COURT**

**.....**

**S.C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

**.....**

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

**.....**

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**