



REPUBLIC OF KENYA



**Mwangangi & 10 others v Commissioner of Lands & 3 others (Application  
28 of 2020) [2021] KESC 67 (KLR) (17 March 2021) (Ruling)**

*Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2021] eKLR*

Neutral citation: [2021] KESC 67 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**APPLICATION 28 OF 2020**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**MARCH 17, 2021**

**BETWEEN**

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

**AND**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT**  
**JAMES GAMAU WAINAINA ..... 2<sup>ND</sup> RESPONDENT**  
**RAPHAEL MUIGAI MWANGI ..... 3<sup>RD</sup> RESPONDENT**  
**PAUL KAHUTU KONDIA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for review of the Ruling of the Court of Appeal (Ouko, Warsame & Sichale, JJA) in Civil Application No. 9 of 2018, delivered at Nairobi on 10th July, 2020, denying grant*



***of certification to appeal to the Supreme Court against the Court of Appeal Judgment (Visram, Karanja & Koome, JJA) in Civil Appeal No. 30 of 2013 delivered on 9th February, 2018.)***

**Supreme Court declines to grant leave for an appeal to be instituted as one that involves matters of general public importance.**

*The main issue for determination was whether questions about the jurisprudence on an unalienated government land and any rights of priority in allotment arising from long possession of such land, were of general public importance and they therefore warranted the exercise of the Supreme Court's jurisdiction. The Supreme Court declined to grant leave for the appeal to be instituted as one that involved matters of general public importance.*

Reported by Beryl Ikamari

***Jurisdiction*** - jurisdiction of the Supreme Court - certification and leave to appeal to the Supreme Court - factors considered by the Supreme Court in determining whether a matter warranted certification as one that raised matters of general public importance - whether the Supreme Court would grant leave allowing a party to lodge an appeal on grounds that the appeal raised matters of general public importance - Constitution of Kenya 2010, article 163 (4)(b).

**Brief facts**

An application was made for a review of a Court of Appeal judgment denying the applicants certification and leave to appeal to the Supreme Court. The applicants also sought orders for a stay of execution of the Court of Appeal's judgment pending hearing and determination of the application and intended appeal.

The applicants claimed that they had occupied various parcels of land since the year 1923 and that the Supreme Court should determine whether long possession of land entitled them to a right to priority in allotment. The applicants also wanted the court to make its decision about jurisprudence on unalienated government land in relation to section 41 (a) of the Limitations of Actions Act on the doctrine of adverse possession and the rights and privileges of citizens with long possession. The respondents stated that the claim was about property rights that did not transcend the private interests of the parties and it did not involve matters of general public importance.

The High Court, which was the trial court, had made determinations to the effect that the applicants had failed to prove any interest with respect to various parcels of land and it also made the determination that the 3<sup>rd</sup> and 4<sup>th</sup> respondents proved that they were duly registered as proprietors of part of the land that the applicants claimed. The court held that the applicants' continued occupation of the suit premises was trespass.

**Issues**

Whether questions about the setting of jurisprudence on an unalienated government land in relation to section 41 (a) of the Limitations of Actions Act and any rights of priority in allotment arising from long possession of such land, were of general public importance and they therefore warranted the exercise of the Supreme Court's jurisdiction.



## Held

1. For the Supreme Court to grant certification to the effect that a case involved matters of general public importance, the following factors were relevant: -
  - a. the intending appellant had to satisfy the court that the issue to be canvassed on appeal was one whose determination transcended the circumstances of the particular case, and had a significant bearing on the public interest;
  - b. where the matter in respect of which certification was sought raised a point of law, the intending appellant had to demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest;
  - c. such question or questions of law had to have arisen in the court or courts below, and to have been the subject of judicial determination;
  - d. where the application for certification had been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court could either resolve the uncertainty, or refer the matter to the Court of Appeal for its determination;
  - e. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, was 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, had to fall within the terms of article 163 (4)(b) of the Constitution;
  - f. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributed to the matter for which certification was sought.
2. The issues raised before the High Court included questions as to whether the applicants or their forefathers lived on the suit property prior to the purchase of the property by the 2<sup>nd</sup> to 4<sup>th</sup> respondents and whether the applicants’ entry to the land was lawful. The issues raised at the Court of Appeal were whether the occupation of the suit property by the applicants amounted to adverse possession and whether the suit property was lawfully allotted to the 2<sup>nd</sup> to 4<sup>th</sup> respondents. The findings of the High Court were affirmed by the Court of Appeal which stated that the doctrine of adverse possession was well settled and it was clear that it could only be raised against a registered proprietor of land but not public land.
3. The issues raised by the parties did not transcend the circumstances of the case. They related to private claims. There were no significant questions of law which required the input of the Supreme Court or a state of uncertainty in law arising from contradictory precedents.

*Application dismissed.*

### Orders

- i. *The originating motion application dated July 22, 2020, was dismissed.*
- ii. *The decision of the Court of Appeal delivered on July 10, 2020, declining leave to appeal to the Supreme Court was affirmed.*
- iii. *The costs of the application were to be borne by the applicants.*

### Citations

#### Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

#### Advocates

None mentioned



## RULING

### A. Introduction

1. Before the Court is a Motion dated 22nd July 2020 and lodged on 16th October 2020. It is brought pursuant to Articles 163 (4) (b) and 163 (5) of *the Constitution*, Sections 15 (1) and 16 (1) of the *Supreme Court Act*, 2011, Rule 24 of the Supreme Court Rules, 2012 (now repealed) and all other enabling provisions of Law.

### B. The Application

2. The application seeks to review the Ruling of the Court of Appeal (Ouko, Warsame & Sichale, JJ.A) in Civil Application No. 9 of 2018, delivered on 10th July 2020, denying certification and leave to appeal to this Court against the Court of Appeal Judgment (Visram, Karanja & Koome JJ.A) in Civil Appeal No. 30 of 2013 delivered on 9th February, 2018. It also seeks to stay execution of the impugned Judgment pending the hearing and determination of the application and the intended appeal.
3. In the impugned decision, the Appellate Court affirmed the trial court's (Okwengu, J) decision by which the latter had dismissed the applicants' suit and found that they had failed to prove any registered or unregistered interest in Land Reference Nos. 209/11543, 11544, 11545, 1546, 18276 and 18290 (the suit property) recognised in law. The trial court also allowed the 3rd and 4th respondents' counterclaim on grounds that the applicants had failed to prove fraud in the acquisition of the titles and that the two respondents had proved they were duly registered as owners of LR No. 209/11543 and LR No. 209/11546 (part of the suit property), hence the applicants' continued occupation amounted to trespass.
4. The application is based on the applicants' Supporting Affidavit sworn by Sammy Mwangangi on 22nd July 2020. The applicants submit that they have lived on the suit property since 1923 and have substantially developed the land by building churches, mosques and schools. It is the applicants' case that this Court needs to determine whether, long possession of the suit property guarantees citizens in occupation, the right of priority in allotment. They also submit that the question as to what privileges accrue to citizens in long possession of unalienated Government land needs to be authoritatively determined.
5. The 3rd and 4th respondents oppose the application based on the Replying Affidavit sworn by Paul Kihuti Kondiah on 22nd October 2020. They submit that the suit property was legally allotted to them and that the applicants did not prove anything to the contrary before the two Superior Courts. The respondents further argue that the main issue before the High Court and Court of Appeal, was whether the title to the suit property was legally or fraudulently acquired. As such, the respondents contend, the claim before the courts has always been a private matter whose determination does not transcend the interests of the parties.

### C. The Applicants' Case

6. The applicants submit that by dint of Article 163 (4) and (5) of *the Constitution*, this Court has jurisdiction to review a Decision by the Court of Appeal declining to grant certification and that the Court has laid down the principles for exercising this review jurisdiction in *Malcom Bell v. Hon. Daniel Toroitich Arap Moi & Another Sup Ct Application No 1 of 2013*, [2013] eKLR; *Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone*; *Sup Ct Application No. 4 of 2012* [2013] eKLR (*Hermanus*



Case) and in *Town Council of Awendo v. Nelson Oduor Onyango & 13 Others*; Petition 37 of 2014 [2015] eKLR.

7. The applicants urge that they have met the threshold to warrant certification of their application as one involving a matter of general public importance. According to the applicants, the intended appeal revolves around the eviction of over 20,000 men, women and children from unalienated government land, that they have occupied for over a period of 100 years. They add that the intended appeal highlights clear violations of the socio-economic rights and freedoms enshrined under *the Constitution*.
8. They invite the Court to determine the following questions, which they urge are of general public importance and transcend the circumstances of the appeal;
  - (i) Whether long possession of unalienated government land guarantees citizens in long occupation the right of priority in allotment; and
  - (ii) The jurisprudence on unalienated government land in relation to Section 41 (a) of the Limitations of Actions Act on the doctrine of adverse possession and the rights and privileges of citizens with long possession.

#### **D. The Respondents' Case**

9. The 1st respondent filed its submissions dated 23rd November 2020 on 24th November 2020. It acknowledges the Court's jurisdiction under Article 163 (4) (b) and (5) of *the Constitution* but argues that the application does not meet the threshold for grant of Certification because the applicants have failed to show that the matters raised are of general public importance, transcending the circumstances of the case. It relies on this Court's decision in *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney-General & 2 others*; SC Ct Petition No. 45 of 2018 [2020] eKLR and the *Hermanus Case*.
10. Regarding the interpretation of Section 41(a) (i) of the Limitations of Actions Act, the respondents submit that there is no uncertainty in law, as the provision is clear as drafted. They add that the High Court and the Court of Appeal exhaustively interpreted and applied the Section.
11. The 3rd and 4th respondents filed their submissions dated 22nd September 2020. They rely on this Court's Decision in the *Hermanus Case* to submit that the intended appeal does not raise a substantial point of law. It is also their argument that there is no uncertainty in law because the issues raised have been sufficiently addressed by the courts below and by statute.
12. Urging the Court to dismiss the application, the respondents add that the applicants are inviting the Court to re-open the case and make findings of fact on disputed matters, an exercise that is not contemplated by Article 163 (5) of *the Constitution*.

#### **E. Issues For Determination**

13. As the parties have not argued or submitted on the issue of Stay of Execution, only a single issue falls for this Court's consideration, i.e. whether the application herein, involves matters of general public importance as envisaged under Article 163(4)(b) of *the Constitution*.

#### **F. Determination**

14. The applicants set out two issues to be of general public importance, warranting determination by this Court, these are:



- (i) Whether long possession of unalienated government land guarantees citizens in long occupation the right of priority in allotment; and
  - (ii) Whether the jurisprudence on unalienated government land in relation to Section 41 (a) of the Limitations of Actions Act should be further developed.
15. The 3rd, 4th and 10th respondents on the other hand, submit that the intended issues are not matters of general public importance, but rather a dispute between parties claiming ownership of the suit property. They also argue that the proposed issues do not raise a substantial point of law requiring the further input of this Court.
16. The question to consider then is, whether the application before us can be sustained on the basis of Article 163 (4) (b) of *the Constitution*. Are the proposed issues of such a nature and importance as to warrant the exercise of this Court’s Appellate jurisdiction under Article 163 (4) (b) of *the Constitution*?
17. In *Hermanus Case*, this Court declared that for a case to be certified as one involving a matter of public importance,
- “(i) 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 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.”
18. It is indisputably clear from the record that the issues raised in the suit before the High Court were:
- 1. whether the parties had locus standi to institute the suit and the counter claim;
  - 2. whether the applicants had complied with the provisions of Section 13A of the Government Lands Act;
  - 3. whether the 3rd and 4th respondents’ titles were obtained by fraud;



4. whether the applicants or their forefathers lived on the suit property prior to the purchase of the property by the 2nd to 4th respondents; and
  5. whether the applicants' entry to the land was lawful and whether the parties were entitled to the prayers in the plaint and counterclaim.
19. The High Court made several findings of fact and law, the main one of which was that respondents had lawfully acquired the suit property. Their title, held the Court, could not be questioned on grounds of fraud as alleged by the applicants.
20. Aggrieved by this decision, the applicants lodged an appeal in the Court of Appeal, where two issues were preferred, to wit, whether the occupation of the suit property by the applicants amounted to adverse possession and whether the suit property was lawfully allotted to the 2nd to 4th respondents. After hearing the parties, the Court of Appeal affirmed all the main findings by the High Court. The Appellate Court also held that the doctrine of adverse possession is well settled and that the same can only be raised against a registered proprietor and not against public land.
21. Flowing from the above, we see no reason to allow a second appeal to this Court. The issues as determined by the Appellate Court in our view, do not transcend the circumstances of this particular case. The issues arise from a private claim between the parties. By the same token, we do not see any significant question of law that requires the further input of this Court or any state of uncertainty in the law arising from contradictory precedents. The finding of this Court on jurisdiction consequently disposes of the issue of stay of execution, which in any case was not canvassed by the parties.

#### **G. Orders**

22. The foregoing conclusion triggers the following Orders.
- (i) The Originating Motion Application dated 22nd July 2020, is hereby dismissed;
  - (ii) The decision of the Court of Appeal delivered on 10th July 2020, declining leave to appeal to this Court is hereby affirmed;
  - (iii) The Costs of this Application shall be borne by the Applicants.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2021.**

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**M. MWILU**

**Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT**

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**M. K IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....



**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**ISAAC LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**

