



**Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & Isack Ntongai M’Lintari
(Application 46 of 2014) [2015] KESC 28 (KLR) (16 July 2015) (Ruling)**

Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & another [2015] eKLR

Neutral citation: [2015] KESC 28 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION 46 OF 2014

MK IBRAHIM, PK TUNOI, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

JULY 16, 2015

BETWEEN

ISACK M’INANGA KIEBIA APPLICANT

AND

ISAYA THEURI M’LINTARI 1ST RESPONDENT

ISACK NTONGAI M’LINTARI 2ND RESPONDENT

(Being an application for review of the refusal of certification by the Court of Appeal (Visram, Koome and Otieno Odek, JJA) by the Ruling of 19th November, 2014 in Nyeri Court of Appeal Civil Application No. SUP.5 of 2014)

Questions regarding intergenerational trusts or trusts in Customary Law deemed to be matters of general public importance for purposes of Supreme Court appeals

The applicants sought a review of a Court of Appeal decision which effectively denied them leave to lodge an appeal at the Supreme Court. The court held that questions regarding inter-generational trusts or trusts in customary law were deemed to be matters of general public importance for purposes of Supreme Court. appeals

Reported by Beryl A Ikamari & Robai Nasike Sivikhe

Jurisdiction – jurisdiction of the Supreme Court – appeals- certification of appeals as matters of general public importance-threshold to be met for a matter to be considered to be of public importance- whether issues raised regarding generational trusts or trusts in customary law fulfill the threshold considered regarding matters of general public importance- Constitution of Kenya, 2010, article 163 (4) (b); Supreme Court Act, No. 7 of 2011, section 3; Registered Land Act, Cap 300, section 28 & 30 (g); Land Registration Act, No 3 of 2012, section 28 (b).

Land Law – interests in land- overriding interests in land- intergenerational trusts or trusts in customary law- precedents set regarding intergenerational trusts or trusts in customary law - whether questions regarding intergenerational trusts or trusts in customary law required extensive explication by courts- Registered Land Act, Cap 300, section 28 and 30; Land Registration Act, No. 3 of 2012, section 28 (b).



Brief facts

The applicants sought a review of a Court of Appeal decision which effectively denied them leave to lodge an appeal at the Supreme Court. The leave had been sought pursuant to article 163(4) (b) of the Constitution of Kenya . Under article 163(4)(b), an appeal could be lodged at the Supreme Court after the issuance of certification that the intended appeal raised matters of general public importance.

The subject of the intended appeal was a land dispute in which it was successfully claimed that the applicants held title to the land in trust for the descendants in their clan. The claim was that the land was ancestral land owned by members of the Athimba clan and that during consolidation and demarcation in 1963, the title was issued to the applicants in trust for the descendants of the clan. The 1st applicant died and the 2nd Applicant was an uncle to the two Respondents who were brothers.

The High Court found that the titles were subject to overriding interests which included the rights of trustees. The court also found that the fact that the property was ancestral land, passed on from generation to generation, meant that there was a trust which qualified as an intergenerational trust. An appeal at the Court of Appeal was dismissed as the appellate Court found that the land was subject to a trust.

The applicants sought certification for purposes of lodging a further appeal at the Supreme Court. The Court of Appeal found that the issues raised in the appeal neither transcended the circumstances of the case nor did they have a bearing on public interest. Therefore, they did not warrant certification as matters of general public importance. The applicants sought a review against the Court of Appeal decision on certification at the Supreme Court.

Issues

- i. Whether questions regarding intergenerational trusts or trusts in customary law could be considered matters of general public importance for purposes of an appeal to the Supreme Court.

Relevant provisions of the Law

Constitution of Kenya

Article 163 - Supreme Court

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

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, subject to clause (5).

Supreme Court Act (cap 9B)

Section 3 - Object of the Act

3) The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things—

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;

(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;

(e) improve access to justice; and

(f) provide for the administration of the Supreme Court and related matters.

Registered Land Act (repealed)

Section 28 - Rights of proprietor

28) The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be



held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Section 30 - Overriding interests

30) Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

Land Registration Act (cap 300)

Section 28 - Overriding interests

28) Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

b) trusts, including customary trusts.

Held

1. The major factor considered at leave stage was whether an intended appeal met the appellate yardstick founded upon article 163(4) (b) of the Constitution. Diverse principles were already formulated for guidance in relation to matters of public importance. The following principles were set as particularly important in those matters;
 - a. For an intended appeal to be certified as one involving a matter of general public importance, the intending appellant was to satisfy the Court that the issue canvassed on appeal was one whose determination transcended the particular case, and had a significant bearing on public interest.
 - b. Where the matter raised a point of law, the intending appellant was to demonstrate that such a point was a substantial one, whose determination would have a bearing on public interest.
 - c. Such questions of law must have arisen in the courts below and must 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 contradicting 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 was not a proper basis for getting certification for an appeal to the Supreme Court. For the matter to be certified for a final appeal at the Supreme Court, the matter had to fall within the terms of article 163 (4) (b) of the Constitution.
2. The High Court and Court of Appeal had, over the years, determined numerous matters relating to acquisition of title, trust in land and other competing interests in land. Land was of constant interest to the people due to its standing as the very foundation of the economy, in an agrarian setting, and as a physical framework for all social intercourse.
3. The main questions raised in the intended appeal were; first, the connection between possession, occupation and customary trust and second, inter-generational equity. The concepts and the essential relationships entailed had not been the subject of elaborate or conclusive treatment. Therefore, the nature of undefined land interests which appeared in sections 28 & 30 of the Registered Land Act (repealed) and were covered under section 28 of the Land Registration Act have not received full explication by the Courts.



4. The questions raised were weighty questions of law and the interpretation of the unspecified interests under sections 28 and 30 of the repealed Registered Land Act and currently provided under section 28 of the Land Registration Act, presented complex issues of law which had not been sufficiently addressed by the High Court or the Court of Appeal.
5. Despite the question of customary trusts or generational trusts being determined from time to time, the resulting body of precedent was not clear on the singular question on whether a claimant of trust in customary law needed to prove actual physical possession or occupation. Despite an overhaul and repeal of previous land laws and enactment of new ones, that question was affecting pending as well as future matters. The issue, therefore, was continually engaging the working of judicial organs.
6. The intended appeal satisfied the threshold for admission set under article 163 (4) (b) of the Constitution. The applicant demonstrated that the matter in question had specific elements of real public interest and concern and that its due consideration would give certainty to the law.

Application allowed. (The ruling of Court of Appeal declining the application for leave to appeal was set aside. The appeal was found to be one which raised matters of general public importance & conservatory orders were granted.)

Citations

East Africa

1. *Bell, Malcolm v Daniel Toroitich arap Moi & another* Application No 1 of 2013 – (Considered)
2. *Esiroyo v Esiroyo* [1973] EA 388 – (Distinguished)
3. *Hermanus Philipus Steyn v Giovanni Gnecci-Ruscone* Civil Application No 4 of 2012 – (Considered)
4. *Kanyi v Muthiora* [1984] KLR 712 – (Considered)
5. *Kiama, Alan v Ndia Muthunya & others*, Civil Appeal No 42 of 1978- (Mentioned)
6. *Mukangu v Mbui* CA [2004] 2 KLR 256 (Explained)
7. *Mureithi 2 others* (for Mbari Ya Murathimi clan) *v Attorney General & 5 others* [2006] 1 KLR 443 – (Explained)
8. *Obiero v Obiero* [1972] EA 227 – (Distinguished)
9. *Wangulu Enterprises Limited v Kugotwa & 6 others* Civil Case No 745 of 2001 (OS) – (Considered)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 162, 163(4) (b) (5) – (Interpreted)
2. Environment and Land Court Act, 2011 (Act No 19 of 2011) – (Interpreted)
3. Land Adjudication Act (cap 284) - In general
4. Land Consolidation Act (cap 283) - In general
5. Registered Land Act (cap 300) Repealed sections 27, 28, 30(g) - (Interpreted)
6. Supreme Court Act, 2011 (Act No 7 of 2011) section 3 – (Interpreted)
7. Trust Land Act (cap 288) - In general

RULING

Introduction And Background

1. The instant application seeks leave to lodge an appeal before this Court, pursuant to Article 163 4 b of *the Constitution*. The applicant seeks that we certify the intended appeal as one raising matters of general public importance. The application comes by way of Notice of Motion dated 2nd December, 2014, supported by an affidavit of even date sworn by the applicant. It seeks a review pursuant to Article 163 5 of the Ruling of the Court of Appeal, dismissing an application for certification. The



application also seeks conservatory orders preserving the suit-property against the execution of current Orders, pending the hearing and determination of the intended appeal.

- 2 The foundation of the intended appeal emanates from a land dispute involving members of the same family, and a claim in the beneficial interest in land titles: Njia Kiegoi Scheme/70 [Plot 70 and Njia Kiegoi Scheme/86 [Plot 86]. The respondents at the Court of Appeal and in this appeal, are brothers; they were the plaintiffs at the High Court. The applicant on the other hand is the respondents' uncle, and was the 2nd defendant at the High Court, and 2nd appellant at the Court of Appeal. The first defendant at the High Court is deceased, and his cause thus abated.
- 3 The claim by the respondents at the High Court was that they were members of the Athimba clan, which owned a large parcel of ancestral land in Njia Location, Nyambene District, in 1963 during the process of land consolidation and demarcation. The respondents' claim was that it had been agreed that the land would be distributed to the various households, but held in trust for descendants by the applicant. The respondents claimed that the applicant held the interest in Plot 70 in trust for their deceased father, Musa Lintari who was entitled to a third-share in the property, according to the family agreement. At the High Court, the respondents urged that they had lived on the said property, were in possession of it, and had made substantial developments on the same.
- 4 The High Court found in favour of the respondents, holding that Plots No. 70 and 86 were ancestral lands. Kasango J. found that the suit properties were protected under Section 27 of the Registered *Land Act* Cap 300, Laws of Kenya now repealed . The Court also held that the rights in the registered titles were subject to the rights recognized under Sections 28 and 30 g of the Registered *Land Act* – rights protecting trustees – as well as other overriding interests. Kasango J. relied on the precedents set by the Court of Appeal in earlier cases, Alan Kiama v. Ndia Muthunya & Others, Civil Appeal No 42 of 1978; Kanyi v. Muthiora [1984] KLR 712; and a decision of the High Court, Mbui Mukangu v. Gerald Mutwiri Mbui HCCA No. 281 of 2000. The learned Judge held that the claim of interest by the respondents was one of trust, emanating not as a result of possession or occupation of the suit property, but from the fact that the property was ancestral land, passed on from generation to generation, thus qualifying as an intergenerational trust. The Court ordered that the applicant do transfer 3 acres of the suit properties to each of the respondents, after which the trust would be extinguished.
- 5 The Court of Appeal upheld the decision of the High Court, dismissing the appeal in its entirety. It considered the matter under five specific themes:

that the learned trial Judge erred in ignoring the fact that the respondent's father had been given another portion of land being L.R No. Njia/Kiegoi/117 ;that the learned Judge unduly relied on the minutes of meetings of local elders;that the learned Judge erred in holding that the respondents had been in possession of both parcels of the suit properties;that the learned Judge erred in holding that there was a trust, proved to the required standard, on a balance of probability;that the learned Judge erred in upholding the claim that Plot 70 was ancestral land.PARAGRAPH 7.

- 6 The Appellate Court considered the issue of overriding possessory rights, and whether the respondents had any such rights. The finding was that the respondents had not established on a balance of probability, that they had been in possession of Plot No. 70. The Court held that in these circumstances, the respondents had neither possessory nor occupational interests over Plot No. 70, which could be protected as an overriding interest, by virtue of Section 30 g of the Registered *Land Act*. The Court, however, held that one needed not be in actual physical possession and occupation of land, to prove the existence of a trust. The Court affirmed the High Court's position that a trust, indeed, existed over the suit properties.



- 7 Dissatisfied with the said decision, the appellant filed an application seeking certification that the intended appeal involved matters of general public importance, and was therefore appealable to this Court, pursuant to Article 163 4 b of *the Constitution*. The Court of Appeal considered the application on the basis of principles that have been developed by this Court: in *Hermanus Philipus Steyn v. Giovanni Gnecci-Ruscione*, Sup. Ct. Civil Application No. 4 of 2012 and *Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another*, Sup.Ct. Application No. 1 of 2013.
- 8 According to the applicant's submissions before the Appellate Court, that Court's decision on the substantive appeal had created uncertainty as to the relationship between the existence of a trust, and the fact of actual possession. It was the applicant's contention that, going by precedent, a party ought to have been in possession of the contested property, to be able to claim trust in land. The Court of Appeal, however, held that one needed neither to be in possession, nor in occupation of the land in question, to establish the existence of a trust.
- 9 Does the Appellate Court's decision create an uncertainty, as to the state of the law? Does it necessitate further consideration by this Court? Will such further consideration have a significant bearing on the public interest? The Court of Appeal found its own decision to be in agreement with that of the High Court – both being consistent with precedent. The effect, as the Appellate Court perceived it, was that the issues in this case neither transcended the circumstances of the case itself, nor had a bearing on the public interest.
10. The applicant was apprehensive that a miscarriage of justice would be occasioned, if the Court of Appeal declined to certify the intended appeal as raising matters of general public importance. The Appellate Court, however, determined that mere apprehension of miscarriage of justice was not a critical factor in determining an application for leave to appeal. The application having been refused, the applicant filed the instant application.
- 11 The respondents contested the application by way of a replying affidavit, sworn by the 1st respondent. The respondent averred that the matter did not involve any issues of public interest, but only concerned personal and family issues.

Issue For Determination .

- 12 The issue for determination in the application before us is: whether a matter of general public importance is involved in the intended appeal.

Submissions Of The Parties

The Applicant

- 13 The applicant was represented by learned Senior Counsel, Mr. Nowrojee appearing with learned counsel, Mr. Wandabwa. Mr. Nowrojee submitted that only one plot was relevant in this matter, namely, Plot No. 70. He urged that the Court of Appeal had found that the respondents did not prove, on a balance of probability, that they had been in possession or occupation of the said property; and that there would be no occupational or possessory rights, unless the existence of a trust was proved. He submitted that the Court of Appeal had found in favour of the respondents, purely on the ground that they belonged to the family that owned the ancestral land now under claim – not because they were in occupation or possession of the land. On that basis, counsel sought to have two issues certified as being “of general public importance”:

whether the Registered *Land Act* now repealed or any part thereof, in applying the common law of England as modified by the doctrines of equity, allows the recognition of one's



right to ancestral land, where one is not and has not been in possession of the subject property. Whether the mere existence of ancestral land at Independence in 1963, would in fact and law, amount to proof of a trust; and whether ancestral land results in an inter-generational trust in favour of clan members and their descendants.

- 14 Counsel submitted that the profile of precedent in notable cases, such as *Esiroyo v. Esiroyo*, [1973] EA 388, *Obiero v. Obiero*, [1972] E.A. 227; and *John Peter Mureithi & Others v. The Attorney General & Others*, Misc. Applic. No. 158 of 2005 – was to the effect that the promulgation of the Registered *Land Act* Cap. 300, the *Land Adjudication Act* Cap 284, the *Land Consolidation Act* Cap 283, and the Trust *Land Act* Cap 288, extinguished “customary rights” altogether. Thereafter, counsel urged, overriding interests in land were carved out of Sections 28, 30 g and 126 of the Registered *Land Act*, by the Courts, notably in the case of *Mbui Mukangu v. Gerald Mutwiri Mbui*, C.A. No. 281 of 2000. The Courts, it was urged, found the existence of a trust only when the parties were in occupation and possession of the suit property.
- 15 Counsel urged that the creation of a trust, on an abstract conception of inter-generational trust – there being no element of possession or anything else to suggest the actual existence of a trust – would create uncertainty. Counsel argued that the introduction of inter-generational trust, without the factor of possession, had the effect of reinstating concepts that were outlawed by statute. Counsel noted that Section 28 b of the *Land Registration Act* Cap 300 recognized customary trusts in respect of land, but did not clarify the nature of their span, thus beckoning the input of this Court, to avert any mischief such as may occur in the future, under the current legislation. Counsel urged that the resolution of the intended appeal, bore implications for land-holding, with the economic, social and emotional interests in it, on the part of a large number of Kenyans; and to that extent, the matter fell within the purview of Article 163 4 b of *the Constitution*.
- 16 Counsel submitted that the intended appeal satisfied the third principle of *Hermanus*, requiring that the pertinent question of law should have arisen in the Courts below. It was submitted that the relevant issue had come up before the High Court and the Court of Appeal, before arriving at this Court. Invoking the fourth *Hermanus* principle, learned counsel submitted that the decisions of the High Court and the Court of Appeal were in this case, in conflict with previous cases decided by those very Courts in *Obiero*, *Kanyi*, *Mukangu* and *John Peter Mureithi*. Counsel submitted that there was need to ascertain the law and, in this way, avert any future instances of uncertainty in the tenor and effect of precedent.

The Respondents

- 17 Learned counsel Mr. Ondieki, for the respondents, submitted that the intended appeal did not raise any issues of general public importance. He urged that the Appellate Court had duly resolved the matter, and reopening it at this stage would only amount to improper use of judicial time. He submitted that the dispute, which has been running for years, merited a final resolution. Counsel submitted that, arising from the death of the 1st appellant, only Plot No. 70 was in contention; and that the respondents only held possession over Plot No. 86, even though they cultivated Plot No. 70.
- 18 Counsel submitted that the execution of the Appellate Court’s Judgment would not affect a large section of the community, or the public at large, because it was confined to the individual litigants before the Court.
- 19 Learned counsel submitted that the applicant had been registered to hold the suit-property in trust for the respondents’ father whose share they were entitled to. He urged that the issues entailed in this



matter fell short of the criteria in Articles 163 4 b and 163 5 of *the Constitution* for a review by this Court. He urged the Court to dismiss the same with costs.

The Applicant in response

20. Learned counsel Mr. Wandabwa, submitted that the Courts, in the past, had only protected the customary rights of those in possession of property, under Sections 28 and 30 of the Registered *Land Act* now repealed ; but in the instant case, the Court of Appeal had gone further, and conceived the concept of inter-generational equity, which stood independently of possession, or occupation, in the creation of a trust. He urged that the “inter-generational trust,” in that Court’s perception, was a conception of merit, that should be sustained. Advancing that argument, counsel submitted that customary land rights were usufructuary in nature, and property-in-land was essentially customary or ancestral, as the person claiming rights either lived on it, grazed on it, cultivated on it, or used it for cultural purposes.
21. Learned counsel submitted that the span of issues in this matter exceeded the confines of a family dispute, as the Appellate Court’s findings touched on the application and interpretation of the law relating to customary land rights.

Analysis

22. The applicant urges that the intended appeal raises points of customary, statutory and constitutional law, “of general public importance”, as regards national values and principles, equality before the law; and land rights – which are of broad application to the Kenyan public. In particular, the applicant categorises certain issues as being “of general public importance”, insofar as they arise in the intended appeal, and to the extent that their resolution will cast impacts upon other land-owners. The following issues were said to fall in such a category:

whether the Registered *Land Act* now repealed or any part thereof, in applying the common law of England as modified by the doctrines of equity, allows the recognition of one’s right to ancestral land, where one is not and have not been in possession of the subject property?whether the mere existence of ancestral land, at the date of Independence in 1963, would in fact and in law, amount to proof of a trust?whether ancestral land results in an inter-generational trust, in favour of clan members and descendants?who bears the burden of proving, or disproving a trust in respect of land, where a trust is alleged by a person not in possession of the suit property?whether letters of administration are necessary to commence an action to recover ancestral land which accrued to a claimant’s father?whether the Court, in sub-dividing ancestral land, may only consider land held in the names of those forming part of the household, and exclude that held by other members of the household? whether the customary rights under the *Land Registration Act, 2012 Act No. 3 of 2012* have retrospective effect dating back to 1963, or earlier?whether limiting rights-to-land to a particular tribe, and granting land rights on the basis of ethnic identity, is tenable under Kenya’s constitutional law today – especially in view of the terms of *the Constitution* of Kenya, 2010?

23. Our task, at this leave-stage, is to consider whether the intended appeal meets the appellate yardstick founded upon Article 163 4 b of *the Constitution*. The threshold of analysis is already indicated in this Court’s decisions in *Hermanus*, and *Malcolm Bell*. In the *Hermanus* case, paragraph 47 , we upheld the principle laid out by the Appellate Court in *Koinange Investment & Development Ltd. v. Robert Nelson Ngethe*, that “the requirement for certification under Article 163 4 b is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme



Court.” Divers principles have been formulated for the guidance of matters in this category; but in this instance, we find the following to be particularly relevant:

for an intended appeal to be certified as one involving a “matter of general public importance,” the intending appellant is to 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; where the matter in respect of which certification is sought raises a point of law, the intending appellant is to demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest; such question or questions of law is/are to have arisen in the Court or Courts below, and must have been the subject of judicial determination; 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; 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*.

- 24 Do the issues arising in this case transcend the circumstances of this particular case, and do they have a significant bearing on the public interest? It is clear from the record that the claim leading up to the intended appeal, dates back to the year 1997. The dispute had, indeed, been placed before traditional elders earlier, in 1993 and 1994. It is not in dispute that the applicant did not purchase the property which is now in contest. By the record, the land was assigned to the applicant by way of family agreement, to hold in trust for the family.
- 25 From the grounds of the application, and the submissions of counsel, the main issue of law urged for resolution is: the legitimacy of recognizing an inter-generational trust, or a trust in customary law, where neither occupation nor possession of the land has been proved. By the submission of counsel, the finding of trust by the Appellate Court and the High Court, notwithstanding want of possession or occupation, occasions uncertainty, as regards customary land-rights, and the trust concept.
- 26 A related question is, whether the issue raised is a substantial question of law, the determination of which is destined to have a significant bearing on the public interest.
- 27 The High Court and Court of Appeal, over the years, have determined numerous matters relating to acquisition of title, trust in land; and other competing interests in land. Given the standing of land as the very foundation of the economic, in an agrarian setting, and as the physical framework for all social intercourse – it is of substantial, constant interest to the people. For this very reason, one High Court decision, *Wangulu Enterprises Limited v. Kugotwa & 6 Others*, Mombasa HCCC No. 745 of 2001 O.S Ojwang, J as he then was held that the main issues of land-rights, ought to be resolved on the basis of primary evidence, formally adduced.
- 28 In the instant case, the question of possession and use of land was treated as one of fact, to be ascertained by way of formal evidence. It is such evidence taken at the trial Court, that was subsequently reappraised by the Court of Appeal: and that Court found that, on a balance of probability, the respondents herein had not proved their possession of Plot No. 70.
- 29 Such centrality of land in the full range of litigious questions, and the fact that express legislation had not anticipated the forms of disputes in that sphere, are precisely what led to the Courts resorting to the well-known common-law remit: to mould the relevant terms and principles of the law as appropriate,



in any given case. Such law-making has progressed upon the beacons of precedent, thus carrying binding effect, dependent on the hierarchical position of a particular Court. Such is the practical essence of the common law on the question of landrights, as it stands today. It is no longer just an element of history, but is a practical dimension of judicialism, well integrated into *the Constitution* of Kenya, 2010 – especially Chapter Five on “Land and Environment.”

30. Land and Environment have a special public importance, and have now been entrusted to a special category of Courts, established under Article 162 of *the Constitution* – operationalised by way of the *Environment and Land Court Act* Cap 12A, Laws of Kenya .
31. It is in this context that the main questions in the instant matter are to be seen: i the connection between “possession”, “occupation” and “customary trust”; ii “inter-generational equity.” These concepts, and the essential relationships entailed, were not, in the instant matter, the subject of elaborate or conclusive treatment. This leaves somewhat blurred, the nature of the undefined land-interests which had appeared under Sections 28 and 30 of the Registered *Land Act*, and are currently covered under Section 28 of the *Land Registration Act*. Such elements have not had the benefit of a full explication by the High Court or the Appellate Court – even though they may recur in the future, in cases touching on land-rights and customary trusts.
32. We find these questions weighty in law, and note that interpretation of the unspecified interests under Sections 28 and 30 of the Registered *Land Act* currently covered under Section 28 of the *Land Registration Act* presents a complex issue of law, that has not been sufficiently addressed by the High Court or the Court of Appeal. The further input of this Court is therefore necessary, in accordance with the remit outlined in Section 3 of the *Supreme Court Act*, 2011 *Act No. 7 of 2011*.
33. The applicant brought before the Court a relevant list of authorities highlighting some of the cases of merit. The Obiero, Esiroyo and John Peter Mureithi cases were determined by the High Court – thus leaving room for further settlement by the Appellate Court. In the Kanyi case, the Court of Appeal held that a registered proprietor of land was not relieved of such obligations as attached to him or her as trustee. That case also took into account the competing interests, and the settled practices under Kikuyu customary law. The Court held that trusteeship, under the Registered *Land Act*, did not necessarily exclude trusteeship under customary law. This precedent effectively upset the position taken in earlier decisions of the High Court, in the Obiero and Esiroyo cases. The two decisions were thereafter distinguished on the facts, in the Mukangu case. There was no contention, however, that customary trusts were not overriding interests; and this position has since been clarified in law, effectively recognising customary trusts as overriding interests Section 28 of the *Land Registration Act*, Cap 300 .
34. The Court of Appeal, in the Mukangu case, remarked that although the language of Sections 27 and 28 of the Registered *Land Act* was categorical, they were subject to qualifications, for the protection of other persons. That Court also held that trust, in the case of the land in question, arose from possession and occupation of part of the registered land, and was protected under Sections 28 and 30 g of the Act. But in the matter now before us, the Appellate Court held that one needed not be in actual physical possession, or occupation of a parcel of land, to prove customary trust. An issue thus arises, as to the valid position at law.
35. Is there a state of uncertainty in the law, arising from contradictory precedents, and warranting this Court’s resolution of the doubt? While the question of customary, or generational trust has been determined from time to time, the resulting body of precedent is not clear on the singular question, whether a claimant of a trust in customary law needs to prove actual physicalpossession, or occupation. Despite an overhaul of the previous land laws, and the enactment of a new *Land Registration Act* 2012,



to consolidate and rationalize the registration of titles, the manner of resolution of the said question will affect pending matters, as well as matters to be heard in the future pursuant to Section 28 b of the [Land Registration Act](#). The issue, therefore, will continually engage the workings of the judicial organs.

36 We are, therefore, satisfied that the intended appeal satisfies the threshold for admission, set under Article 163 4 b of [the Constitution](#). The applicant has demonstrated that the matter in question bears specific elements of real public interest and concern; and that its due consideration and resolution, will give certainty and predictability in the law.

Orders

37 As we certify that the intended appeal cause bears elements of general public importance, we will set out specific Orders as follows:

The Ruling by the Appellate Court delivered on 19th November, 2014 declining leave to appeal to this Court, is hereby set aside. It is hereby certified that the intended appeal raises a matter of general public importance. Upon the appeal being duly filed, this matter shall be set down for hearing on the basis of priority. Conservatory Orders are hereby granted, to sustain the status of the contested property, pending the filing of the appeal in the terms of the other Orders herein. Costs shall be in the cause. DATED and

DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2015.

P. K. TUNOI

JUSTICE OF THE SUPREME COURT

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya

