REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Mutunga, CJ & P; Tunoi, Ibrahim, Ojwang, Njoki, SCJJ)

MISC. APPLICATION NO. 49 OF 2014

-BETWEEN-

TOWN COUNCIL OF AWENDO.....APPLICANT

-AND-

1. NELSON ODUOR ONYANGO
2. MIJUNGU MISWETA
3. HEZRON OTIENO
4. ROSALINA NYAKURE
5. JAIRO OWINO ODERA
6. TIMOTHEO RAYMO OKWACH
7. OBIERO OMEDO
8. ELIUD OGUTU SIRAMA **RESPONDENTS**
9. JOSEPH OMONDI RONGO
10. JAMES OMONDI ANINDO
11. JOSEPH ODUOR OCHOME
12. JOHN ONYANGO DAWO
13. CHARLES OBUNGA OKOMBO
14. THE ATTORNEY-GENERAL

(*Being an Application for review of the Ruling and Orders of the Court of Appeal at Kisumu in Civil Application No. 5 of 2014 (Githinji, Mwera and Gatembu JJ.A) dated and delivered on 28th November, 2014*)

RULING

A. INTRODUCTION

[1] This is an application to review the decision of the Court of Appeal

(*Githinji, Mwera* and *Gatembu JJ.A*) in *Civil Application No. 5 of 2014,* declining to certify the appeal in this matter as one involving "matters of general public importance." The application is based on the assertion that the Court of Appeal did not evaluate all the material before it, in arriving at its decision. The application also seeks Orders of stay against the execution of the entire Judgement and Orders of the Court of Appeal (*Githinji, Mwera* and *Gatembu JJ.A*) sitting at Kisumu (*Civil Appeal No. 161 of 2010),* delivered on 18th October, 2013 (the main Judgement on appeal).

B. BACKGROUND

[2] The respondents herein filed a suit in the High Court *(*Civil Case No.133 of 2005 (O.S)), dated 14th October, 2005 challenging the compulsory acquisition of the suit properties (unutilised portions) by the applicant. They claimed that the suit properties were not subject to acquisition in their entirety, and that the portions not utilized for sugarcane farming should revert to them.

[3] In a Judgment dated 13th November, 2009 the High Court (*Musinga J,* as he then was) held that the unutilized parcels of land which were unfit for sugarcane farming ought to have reverted back to the original owners (in this case, the respondents). He ordered the Lands Registrar to re-survey the land and issue title deeds to the original owners, pursuant to Section 75 of the repealed (1969) Constitution, which gave safeguards for property rights. In addition, the learned Judge issued an injunction restraining the applicant from evicting or dispossessing the respondents, or interfering with their occupation and enjoyment of the unutilized portions of land, and directed the applicant to compensate them for any destruction to their properties.

[4] Aggrieved by the decision of the High Court, the applicant appealed to the Court of Appeal on the grounds that: the High Court's finding that the

acquired property was not meant to benefit the appellant was contrary to the pertinent *Gazette* notices of 1976, and was made in error; the Government had not been enjoined as a party to the suit, despite the adverse Orders against it; at the time of filing, the suit was barred by the statute of limitations, thus stripping the High Court of its power to entertain the claim; and finally, that the form used in lodging the claim (Originating Summons) was inappropriate for a case of the nature of the respondents' claim.

[5] In a Judgment dated 18th October, 2013 the Court of Appeal (*Onyango Otieno, Azangalala* and *Ole Kantai JJ.A*) upheld the Judgment of the High Court, and dismissed the appeal with costs.

[6] Consequently, the applicant applied to the Court of Appeal for leave to appeal against its decision to this Court, on the basis that it involved "matters of general public importance." In a Ruling dated 28th November, 2014, the Court of Appeal dismissed the application. Having analysed the pleadings and the submissions of counsel, the Court of Appeal declined to certify this matter as one of general public importance, solely on the basis that there were apprehensions of non-compliance with the Orders of the High Court. The Court of Appeal held that the law regarding reversion of unutilized portions of land compulsorily acquired by the Government had been settled by an Act of Parliament.

[7] Dissatisfied with the decision of the Court of Appeal denying certification, the applicant filed a review application pursuant to Article 163(5) of the Constitution, which is the subject of consideration on this occasion.

[8] On 16th December, 2014, the matter was heard by Rawal, D.C.J. & V.P., who gave interim relief to preserve the substratum of the appeal, pending hearing and determination. The matter was further heard by *Ibrahim* and

Wanjala, SCJJ who admitted the Originating Motion as duly filed, and cleared the matter for hearing.

[9] At the hearing of this application, the applicant was represented by learned Senior Counsel, Prof. Tom Ojienda, and learned counsel, Mr. Mwamu, while the 1st to 13th respondents were represented by learned counsel, Mr. Nyasimi, and the 14th respondent by learned counsel, Mr. Maroro.

C. THE PARTIES' RESPECTIVE SUBMISSIONS

(i) The Applicant

[10] Counsel for the applicant submitted that the matter was premised on *Gazette Notice* No. 2996 of 1976 (Legal Notice No. 47 of 1976), which allowed the acquisition of land for the development of South Nyanza Sugar Scheme, and *Gazette Notice* No. 3737 of 1976 (Legal Notice NO. 47 of 1976), which allowed the expansion of Awendo Township within the sugar-belt. According to counsel, the two notices related to two separate elements on the exercise of the power of acquisition of land, under the Land Acquisition Act (No. 47 of 1968). The exercise of this power, counsel urged, extinguished the rights of the respondents in this case – in respect of both elements in question.

[11] Counsel urged that while considering the application for certification, the Court of Appeal considered only one aspect of Legal Notice No. 3737 of 1976, and did not take into account the second aspect which mandated the expansion of Awendo Township. He submitted that the acquisition of land for the purpose of the said expansion, led to developments for the service of the public interest. Counsel urged that had the Appellate Court considered this aspect, it would have certified the intended appeal to the Supreme Court, as involving "matters of general public importance" – and therefore

meriting an ultimate appellate hearing.

[12] Prof. Ojienda gave an account of the establishment of Awendo Township: it was created in 1999 (by Legal Notice No. 104 of 1999), after which the Local Government (Town Council of Awendo) Order No. 3 of 1999 was published. The Township later became a Sub-County of Migori County. According to counsel, the "unutilised portions of land" were used in expanding the Township, in line with Legal Notice No. 47 of 1976. The Township constructed offices of the Sub-County Administrator, under the provisions of Section 50 of the County Governments Act (No. 17 of 2012), and issued letters of allotment to third-party private investors, who established schools, hospitals, churches, and financial institutions on the said property.

[13] Learned counsel submitted that in arriving at its decision, the Court of Appeal had not taken into account the fact that the respondents were already fully compensated for the lands that were later used in the expansion of the Township. The appellant's case at the hearing of the intended appeal will therefore cover a perceived error of the Appellate Court, in reasserting the respondents' title over the residual land, while the same had been duly committed for the expansion of Awendo Township, and had since been developed. Counsel urged that the Judgment of the Court of Appeal would have a prejudicial effect upon third parties who had developed the land in good faith, and on the basis of their true property rights; and that it would disrupt public developments and amenities established on the suit properties, such as schools, hospitals and financial services. Counsel was, besides, apprehensive that the Appellate Court's decision would disrupt the core functions of Migori County Government.

[14] Learned counsel submitted that the decision of the Court of Appeal carried the potential threat of dislodging more than 20,000 residents of

Awendo Sub-County, who are dependent on the functions of the Sub-County Administration. He thus prayed for the grant stay Orders in addition to certification for hearing, to preserve the substratum of the appeal. Counsel submitted that a significant question of law to be considered would be the notion of *extinction of title for compulsorily-acquired property, in instances where that acquisition affects other unrepresented third parties.*

[15] Learned counsel, Mr. Mwamu buttressed the applicant's case on the need to account for public monies expended in the development of Awendo Sub-County, in keeping with the terms of Article 201(d) of the Constitution. He urged that conservatory Orders be granted, as vacation notices had already been served upon some of the current occupants of the disputed property.

(ii) The 1st - 13th Respondents

[16] Learned counsel for the 1st - 13th respondents, Mr. Nyasami submitted that the instant application did not meet the threshold contemplated in Article 163(4)(b) of the Constitution, as elaborated in specific terms in this Court's decision in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone,*** Sup.Ct. Application No. 4 of 2012. (The relevant principles were later expanded in the case of ***Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another,*** Sup.Ct. Application No. 1 of 2013).

[17] Counsel urged that the Court of Appeal's decision that the unutilized parcels of land should revert to the original owners was in line with Section 110(2) of the Land Act (No. 6 of 2012). He submitted that the said finding was consistent with a settled principle of law, which gives the respondents pre-emptive rights to re-acquire residual portions of land compulsorily acquired by the Government. He argued that the Supreme Court's

jurisdiction was not to be invoked, merely for the purpose of correcting errors in respect of matters of settled law.

[18] Learned counsel contested the applicant's claims of breaches of fundamental rights and freedoms, urging that such issues had been raised neither at the High Court nor the Court of Appeal. He contended that such issues could only have been ventilated through the path of enforcement of fundamental rights and freedoms, as outlined under Articles 21, 22 and 23 of the Constitution, citing in reference this Court's decisions in ***Kenya Section of International of Jurists v. A.G & 2 Others,*** *Sup Ct Criminal Application No.1 of 2012,* and ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** *Sup. Ct. Petition No. 2 of 2012* [2012] eKLR.

[19] Learned counsel submitted that stay of execution was not merited in this matter because: the applicant had no arguable appeal under Article 163(4)(b); and there had been inordinate delay in seeking stay of execution of the Judgment delivered on 18th October, 2013. It was urged that, the Orders of the Court of Appeal had already been implemented – with the parcels in question having been re-surveyed, and new titles issued.

D. ISSUE FOR DETERMINATION

[20] From the pleadings filed and the submissions of counsel, the main issue for determination in this case is whether the intended appeal meets the threshold set under Article 163(4)(b) of the Constitution, and is in line with the principles stated in the ***Hermanus*** and ***Malcolm Bell*** cases, as a basis for this Court's exercise of its review jurisdiction by virtue of Article 163(5).

E. ANALYSIS

[21] This analysis is guided by certain specific principles, as elaborated in the ***Hermanus Steyn*** and ***Malcolm Bell*** cases. These may be set out as follows:

(i) 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;

(ii) 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;

(iii) 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;

(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;

(vii) determinations of fact in contests between parties are not, by and of themselves, a basis for granting certification for an appeal before the Supreme Court;

(viii) *issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis of certification for appeal to the Supreme Court;*

(ix) *questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;*

(x) *questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;*

(xi) *questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance,' justifying certification for final appeal in the Supreme Court.*

[22] In the instant matter, the Court of Appeal was faced with several issues for determination, as indicated in paragraph 24 of its Ruling of 28th November, 2014. In relation to such issues, and in essence, the applicant's position is thus marked out:

*(i) cardinal 'issues of jurisprudential moment', requiring input by the Supreme Court, are involved (see **Peter Oduor Ngoge v. Hon. Francis Ole Kaparo and Five Others**, Sup. Ct. Petition No. 2 of 2012);*

(ii) the matter involves the welfare of the public;

(iii) the interpretation of Section 75 of the 1969 Constitution and the Land Acquisition Act, as rendered by the Appellate Court, failed to balance the public interest under Articles 61, 62, 63 and 66 of the Constitution;

(iv) the Judgment of the Appellate Court affects the proprietary rights of persons who were not privy to the proceedings, and who have asserted their rights on the suit property since the 1980's, and their rights under Articles 61,62,63,and 66 of the Constitution have been compromised;

(v) the Judgment will, in contravention of Articles 28, 29, 40 and 43 of the Constitution, curtail the social and economic rights of the residents of the Awendo Town;

(vi) the Judgment will disrupt the applicant's current discharge of its functions in implementation of Articles 185, 186 and 187 of the Constitution, for it will be impeded in its ability to plan for

agriculture, health, transport services, and general County services.

[23] Although the foregoing are, in our opinion, weighty issues touching on good governance, the Appellate Court in its Ruling (paragraphs 28-29) considered as being relevant, only two matters raised before it. The first was*: where land is compulsorily acquired for a certain purpose, but it is not used for that purpose, should such land revert to the persons from whom it was acquired, notwithstanding that due compensation had been paid?* The second was: *what is the effect of the Judgment on the proprietary rights of a large number of residents who have since been allocated the residual lands, and of the resultant difficulties of execution?* The remaining issues clearly fell within the ambit of Article 163(4)(a), as they involved the interpretation and application of the Constitution; they had been canvassed neither at the trial Court nor in the Appellate Court – and so they had no place in this instance.

[24] The Appellate Court's position was that the potential issues for determination in the intended appeal before this Court, had been addressed by Section 110 of the Land Act, 2012 which allows the Land Commission to offer original owners, or their successors in title, pre-emptive rights to acquire unutilised land, upon restitution of the full amount paid in compensation, to the acquiring authority.

[25] By taking an inherently formal view of the issues in contest, vital elements of jurisprudential significance fell to a secondary place; and so the merits of the case for an ultimate appeal were not considered. (See ***Peter Oduor Ngoge v. Francis Ole Kaparo and Five Others,*** Sup. Ct. Petition No. 2 of 2012).

[26] Does the proposed appeal bear the 'general-public-importance' signal for certification for appeal? At the base of the suit were two *Gazette Notices* issued in 1976, proclaiming the acquisition of land for *two distinct purposes*: first, for the *development of the South Nyanza Sugar Scheme*, in the former South Nyanza District; and secondly, for the *expansion of Awendo Township* in that same "sugar-belt" – which has since been incorporated into the larger Migori County. The suit in the High Court was filed in the year 2005, by the respondents herein, seeking clarification on several issues, in particular:

(i) whether the Government of Kenya had compulsorily acquired the suit lands;

(ii) whether that acquisition was for the "sole purpose" of establishing the South Nyanza Sugar Scheme;

(iii) whether the government utilised the entire acquired portion of land;

(iv) whether some of the acquired land was left unutilised, after being marked as unfit for "the purpose for which it was acquired";

(v) whether the original owners had reversionary rights over the "unutilised portions";

(vi) whether the applicant in this case had any proprietary rights over the "unutilised portions", and whether such proprietary rights had been acquired through gazettement;

(vii) whether there had been any improper dealings with the said "unutilised parcels of land", by officers of the applicant;

(viii) whether the applicant herein had any rights or interest capable of being transferred to third parties.

[27] At the High Court, there was a contest as to the general implications of compulsory acquisition, where compensation had been fully rendered. According to the respondents in this case, despite being compensated for the acquired property, they felt entitled to enjoy occupancy over the "unutilised portions of land". Another issue in contention was the effect of "unutilised portions of land" compulsorily acquired, given the provisions of Section 19(4) of the Land Acquisition Act (Cap. 295, Laws of Kenya – repealed by the Land Act, 2012 (No. 6 of 2012), stipulating that compulsorily-acquired property vests in the Government free from any encumbrances.

[28] The High Court (*Musinga J*, as he then was) applied a new approach in determining the issues in controversy. The Court arrived at its decision on the basis of a novel concept, that was upheld by the Court of Appeal. At page 24 of the Judgement, the learned trial Judge thus remarked: "*between the plaintiffs and the defendant, who has a better claim over the remainder of the suit lands if the Government, the legal owner, is not interested in the same? Is it equitable for the defendant to evict the plaintiffs out of the land and cause the same to be divided and allocated to other people?"*

[29] Such questions touch on critical spheres of the administration of justice by the relevant organs of State; and the mode of resolution adopted, is set to affect a considerable number of people. The decision by the High Court that the applicant in this case had no proprietary rights over the "unutilised portions of the suit land"; the events stretching across the period of time since the parcels of land were compulsorily acquired by the Government; the supervening changes in the laws of property; the introduction of devolved governments, and the expansion of Awendo Township as a Sub-County of Migori County – all these factors, in our perception, are vital issues bearing

on the governance landscape, and have fundamental impacts on the *public interest*. There is, for instance, a clear case for *clarifying the state of the law relating to the compulsory acquisition* of land by Government, in a situation such as that pertaining to the intended appeal.

[30] The Court of Appeal examined the evidence on record, and determined that it was not apparent that the property compulsorily acquired was intended for the expansion of the applicant's urban set-up, in this case. The Court of Appeal's interpretation of *Gazette Notice* No. 3737 of 1976 was that it was intended for the "expansion of the South Nyanza Sugar Scheme", and that the expansion of Awendo Township was an integral part of that Scheme. The Court also noted that the Government was aware of the claims of the respondents, in view of the content of a letter by the Chief Land Registrar to the District Land Registrar, requiring urgent resolution of the dispute. And the Court went on to order the re-surveying and allocation of the unutilised property to the respondents.

[31] From the depositions and the submissions of counsel, it is clear that there has been substantial development on the disputed parcels of land, touching on *public utilities*, and on *County operations*. The decisions by the Court of Appeal and the High Court had taken into account neither these supervening developments, nor their *effect on the public*, and the *overall governance of Migori County*. The main issues of the intended appeal cut across the former and the current constitutional and land law regimes. It is important to reconcile these two regimes, and the instant case provides the occasion. The question *whether the respondents in this case are entitled to the reversionary interest in "unutilised portions of land,"* invokes critical sub-themes of jurisprudential significance and which, in every respect, touch on matters of public interest. For instance: *what are the parameters of compulsory acquisition under Kenya's constitutional and land laws? what are the rights and obligations of persons whose land has been acquired by the Government, by way of compulsory acquisition? what is the balance*

between private proprietary rights, and accrued public proprietary rights, after the process of compulsory acquisition?

[32] A due consideration and determination of these issues traverses the interests of the respondents, and affects third persons, as well as the public at large. It has been demonstrated that the resolution of the questions of law raised in this case will have a significant bearing on *the public interest*. These questions of law arose in other superior Courts, and were the subject of those Courts' determination and, as such, beckon the exercise of this Court's final, appellate jurisdiction. As determined in the ***Hermanus Steyn*** and ***Malcolm Bell*** cases, the proposed appeal satisfies these two salient principles:

> ***"for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ....questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court...."***

[33] The interpretation of the *Gazette Notices* in this case will be most material to the possible outcome of the proposed appeal, and would certainly affect the rights not only of the respondents, but also the applicant. Although the High Court did not apply the same interpretation of the

Gazette Notices as that adopted by the Court of Appeal, the proposed appeal seeks to show that the Appellate Court was in error, in its interpretation.

[34] The Appellate Court has in previous cases, rightly underlined the importance of *clarity* in notices issued in respect of compulsorily-acquired property (see ***Commissioner of Lands & Another v. Coastal Aquaculture Ltd,*** *Civil Appeal No. 252 of 1996).* It all signifies the centrality of property in the scheme of rights, under the former and the current Constitution, and its bearing on the social, political, cultural and economic entitlements of Kenya citizens; it is an issue that eminently lends itself to final determination by this Court. A subject of such considerable social stature fits well within the professional remit of the Supreme Court as provided in the Supreme Court Act, 2011 (Act No. 7 of 2011), to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth" (Section 3(c)).

[35] From the content of paragraphs 32 and 34, it emerges that while this Court did, in the ***Hermanus Phillipus Steyn*** and ***Malcolm Bell*** cases, set out an elaborate set of criteria for ascertaining "matters of general public importance" for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated. *Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of "matters of general public importance".*

[36] *Is the prayer for stay of execution meritorious*? The guiding principle comes from ***The Board of Governors, Moi High School Kabarak v. Malcolm Bell and Another****, Sup Ct. Petition No. 6 & 7 (Consolidated) of 2013,* in which this Court thus remarked:

"'Review' and 'possible reversal' are the constant objects in view, as a Court entertains an appeal from a lower Court; and so, in the instant case, the applicants' pending appeal is seeking these ends, upon the Supreme Court acting on the Court of Appeal's non-certification of the matter as proper for appeal. Does the Court have the capacity to achieve those ends, without the power to preserve the subject-matter?"

[37] The substratum of this appeal is the disputed residual suit-properties. The execution of the Orders of the High Court, upheld by the Court Appeal, may render the proposed appeal nugatory. In the circumstances, we will grant stay Orders, preserving the status of the suit-properties until the proposed appeal is heard and determined.

F. ORDERS

[38] This application is hereby granted, with the following specific Orders:

(1) The Ruling and Order of the Court of Appeal declining to certify this matter as one of general public importance is hereby set aside.

(2) The conservatory Orders issued by Rawal DCJ & V.P. on 16th December, 2014 and extended (by Ibrahim, Wanjala, SC.JJ.) on 20th January, 2015 preserving the status of the suit-properties, are hereby extended until the appeal is heard and determined.

(3) All activities based on previous Orders, that interfere with the status of the suit properties, as identified and as were in issue at the High Court and the Court Appeal, are hereby stayed, pending the hearing and determination of the proposed appeal.

(4) Liberty is granted to any others to file and serve, within 21 days henceforth, motions for interested-party status.

(5) The costs of this application shall abide the determination of the appeal.

DATED and **DELIVERED** at **NAIROBI** this 6th day of May, 2015.

.....
W. M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

....
P. K. TUNOI **M. K. IBRAHIM**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

....
J.B. OJWANG **S. N. NDUNGU**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA