REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ; Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ)

APPLICATION NO. 1 OF 2013

IN THE MATTER OF THE COURT OF APPEAL CIVIL APPLICATION NOs. 12 & 13 of 2012 (CONSOLIDATED)

-BETWEEN-

MALCOLM BELL .....APPLICANT

-AND-

HON. DANIEL TOROITICH ARAP MOI.....1ST RESPONDENT

THE BOARD OF GOVERNORS MOI HIGH SCHOOL KABARAK .....2ND RESPONDENT

(An application to review the decision by the Court of Appeal given at Nairobi (Maraga, Musinga & Sichale, JJA) dated 22nd February 2013 granting certificate of leave to file appeal to the Supreme Court in Civil Application No.s Nai 12 & 13 of 2012 (Consolidated))

RULING

A. BACKGROUND

[1] The applicant is the registered owner of property LR. No. 6207/2, located in the Kabarak area of Nakuru, adjacent to Moi High School Kabarak. The property was transferred to him pursuant to the will of his deceased father, Walter Bell, through a transfer and assent dated 11th April, 2000 and registered on *19th May, 2000*.

[2] The 2nd respondent, through Moi High School Kabarak, has been in occupation of the suit land since *1982,* but the circumstances under which this respondent came into possession of the suit land have been contested. According to the applicant, in or about 1981 his deceased father was "coerced" into surrendering possession of the suit land. Subsequently, it is alleged that the 2nd respondent, through agents, encroached onto and occupied a portion of the land measuring about 110 acres. No transfer of the land to this respondent's School was effected, and no compensation was made.

[3] The applicant claims that when the land was encroached upon, the 1st respondent was the President of the Republic of Kenya, and was protected by the Constitution from any civil or criminal proceedings during his term of office. Accordingly, it was only upon retirement from office of the 1st respondent, that the applicant was able to institute a suit against him.

[4] The respondents, on their part, contend that the suit property was gifted to the School by Walter Bell in *1993,* prior to his demise. In addition to this, they argue that the School's long occupancy of the land had conferred *adverse possessory rights* upon it effectively, in their view, rendering Malcolm Bell's claim against Kabarak High School time-barred.

[5] In *January 2004*, the applicant instituted proceedings in the High Court at Kericho asking that a perpetual injunction order be issued restraining the 1st

respondent (then defendant) from interfering with the applicant's use, enjoyment and ownership of the suit land. The plaint contained several assertions, *inter alia*:

> *"(i) The Hon. Daniel Moi is the proprietor of Moi High School Kabarak;*
>
> *(ii) Malcolm Bell is the registered owner of the parcel of land known as LR. No. 6207/02 measuring approximately 1028 acres situated in [the] Kabarak area of Nakuru District, having been thus registered on 19th May 2000 upon transfer to him by the executors of the will of his late father (Walter Bell);*
>
> *(iii) in about 1986, the Hon. Moi through his agents encroached on 110 acres of the said parcel of land by fencing and has continued to occupy and trespass on the suit property;*
>
> *(iv) the defendant had refused to vacate the suit property despite demand to do so;*
>
> *(v) Mr. Bell therefore sought an eviction order against the defendant as well as an order for damages, among other orders."*

[6] A defence was filed on 26th February, 2004 in which the Hon. Moi asserted that the late Walter Bell had *donated* 100 acres of the suit property *to him,* and that no coercion was used on the late Walter Bell or any of his family members in relation to that transaction, or in the occupation of the land.

[7] An *amended plaint* filed on, and dated 18th November, 2004 *enjoined the Board of Governors, Moi High School Kabarak as 2nd defendant*. Mr. Malcolm

Bell complained that the 2nd defendant had filed Nakuru High Court Civil Suit No. 303 of *2004* (O.S.) claiming adverse possession of the suit property, and yet, in his opinion, the 1st and the 2nd defendant were *one and the same entity*. This meant that there were two cases filed in the High Court, on the same matter, by different parties.

[8] The High Court consolidated these cases, and issued an order to that effect dated *16th November 2004*. The plaint was amended to bear a new joinder of parties; and the later cause, by Originating Motion was treated as a counterclaim against the applicant (Malcolm Bell), by the Board of Governors of the School, as well as a defence by the 1st respondent (Hon. Moi). On 31st October, 2005, the *High Court decreed that the Board of Governors of the School had legal capacity and had acquired title to the suit land through adverse possession*. The applicant, aggrieved by this decision, appealed to the Court of Appeal, in *Nakuru Civil Appeal No. 129 of 2006*.

[9] At the Court of Appeal, the matter was heard by a bench of three judges: Koome, Okwengu and Waki JJA. ***Six*** grounds of appeal were canvassed. These were: (i) whether there was indeed *adverse possession*; (ii) whether or not there was a *donation or gift* of the suit premises; (iii) whether or not there was a *contract of sale*; (iv) what was *the effect of section 14 of the former Constitution,* in relation to the case; (v) whether or not the 2nd respondent had the *capacity to*

institute the suit; and (vi) whether or not the *evidence should be re-evaluated*. The judgment was written pursuant to the provisions of *Rule 32 (2) of the Court of Appeal Rules, 2010* by Koome and Okwengu JJA.

[10] In its judgment the Court of Appeal considered the terms of section 38 (1) of the **Limitation of Actions Act** (*Chapter 22, Laws of Kenya*), and determined that it was the School that had the evidentiary burden of establishing that it had been in exclusive possession of the suit land for a continuous period of 12 years and so it should benefit from the law on possessory rights. Further, the Court found that on the basis of the evidence on the record, the late Walter Bell had *surrendered* or *donated the suit land* but only subject to certain conditions – the digging of a borehole to supply water to the farm, the supply of electricity, and the construction of a cattle dip. These conditions were never fulfilled.

[11] The Court considered that *even if the School was given a licence* to occupy the suit land, subject to certain conditions, that licence came to an end when the applicant made a demand for the return of the suit land. It is at this point in time, in *2003,* that the demand letter was issued by the second defendant beckoning adverse possession proceedings.

[12] The Court's perception was that even if the School viewed the suit land as a gift, it was an *incomplete gift*. Referring to ***Halsbury's Laws of England,***

Vol. 18, paragraph 755 (on page 396)**,** the Court held that a Court will not complete an incomplete gift, and that a gift can be revoked at any time; there is *locus poenitentiae,* so long as that gift remains incomplete. The Court determined, from the evidence on the record, that the suit land was neither given as a gift, nor was a donation. Further, the Court found that the applicant's deceased father *did not transfer* the suit premises, nor did he make a provision for such transfer in his will, in favour of the Board of Governors of Moi High School Kabarak.

[13] The Court further held, regarding the legal status of the School after evolving from a Public School to a Private School, that there was uncertainty, save that it was owned by a "Charitable Trust."

[14] The Court of Appeal, in its judgment, allowed the appeal and set aside the Orders of the High Court. Okwengu, JA in her separately written ruling, stated that she had had the opportunity to read the draft judgment of Koome JA., and she concurred in what now emerged as the Judgment of the Court.

[15] Aggrieved by the said judgment, the respondents sought leave of the Court of Appeal, to appeal further to the Supreme Court; and leave was granted in a ruling delivered on 22nd February, 2013 by Maraga, Musinga, and Sichale JJA: on the grounds that the *suit raised matters of general public importance, and also,*

that substantial miscarriage of justice had occurred or *would occur*, if the proposed appeal was not heard by the Supreme Court.

B. GRANT-OF-LEAVE JURISDICTION IN THE COURT OF APPEAL AND THE SUPREME COURT: CANVASSING OF MERITS

[16] Learned Senior Counsel, Mr. Muite for the applicant herein, recounted the history of this matter, underlining the key arguments on the Originating Motion dated 7th March, 2013 and filed before this Court. We summarize the questions posed before this Court for determination, as follows:

(a) whether this Court may review the decision of the Court of Appeal granting certification to appeal on the basis that this is a matter of general public importance;

(b) whether section 16 (1), (2)(b) of the Supreme Court Act (No. 7 of 2011), is unconstitutional, in light of Article 163 (4) of the Constitution, and whether the Court of Appeal erred in applying the provisions set out in this section in granting the certification to appeal further to the Supreme Court;

(c) whether the power granted to Parliament by Article 163(9) of the Constitution to make further provisions for the operation of the Supreme Court, allows for the extension of the jurisdiction of this Court beyond that stipulated under Article 163(3) of the Constitution;

(d) whether this Court can admit to appeal, a matter in which the legal capacity of the intended appellant is vague or unknown;

(e) whether this is a matter involving cardinal issues of law or of jurisprudential moment, so as to require the further input of this Court, and whether the Court of Appeal erred in failing to apply the test set by the Supreme Court for determining matters of general public importance;

(f) whether the Court of Appeal erred, in treating the case as unique when in fact it was not, and in failing to recognize that all issues relating to adverse possession had been fully settled, and there was no lacuna that required the further input of this Court;

(g)whether the costs of the motion should be borne by the respondents.

[17] Counsel argued that section 16(1) of the Supreme Court Act, 2011 which stipulates that the Supreme Court may not grant leave to appeal unless "*it is satisfied that it is in the interest of justice to hear and determine the proposed appeal*," and section 16 (2)(b) which provides that the Court may grant leave to appeal if "*a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard,"* are both unconstitutional since they fall outside the ambit of **Article 163(4)** of the Constitution.

[18] Mr. Muite contended that **Article 163(9)** of the Constitution does not confer power on Parliament to extend the jurisdiction of the Supreme Court, on the question as to when an appeal will lie to this Court under **Article 163(4)** of the Constitution. He submitted that the language of section 16 of the Supreme

Court Act introduces two new phrases: "*interest of justice*" and "*substantial miscarriage of justice*" – both being grounds not provided for in Article 163(4) of the Constitution (which provides for the parameters of the Court's jurisdiction).

[19] Counsel invited the Court to compare the language used in section 16 of the Supreme Court Act, 2011 and Article 163 (4), on the one hand, and that used in section 15 of the same Act and Article 163(5), on the other hand. In the latter set of provisions, section 15 uses the phrase 'leave to appeal,' while in the Constitution the phrase used is 'certification: both in use and context, these sets of wordings mean one and the same thing. Such, however, learned counsel urges, is not the case with section 16 as read together with Article 163(4) of the Constitution. He cited the case of ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others,*** [2012] KLR; *Sup. Ct. Appl. No. 2 of 2011*, in which this Court found *section 14* of the Supreme Court Act, 2011 to be unconstitutional, as it *purported to confer jurisdiction that was beyond that provided in Article 163 of the Constitution.* Counsel urged that the Court of Appeal erred in not applying this test, in respect of the provisions of section 16 (1) and (2) of the Supreme Court Act, 2011.

[20] Counsel further cited the decision of this Court in ***Peter Ngoge v Francis Ole Kaparo & 5 Others,*** *Sup. Ct. Petition No. 2 of 2012* [2012] eKLR, where it was held that although the jurisdiction of Courts in Kenya is regulated by the

Constitution, by statute, and by principles laid out in judicial precedents, a Court may not confer upon itself jurisdiction through the craft of interpretation, where the wording of the Constitution is clear and there is no ambiguity.

[21] This position is upheld also, learned counsel submitted, in ***Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another,*** *Sup. Ct. Petition No. 3 of 2012 [2012] eKLR***,** where it was affirmed that the substantive jurisdiction of the Supreme Court is donated only by the Constitution.

[22] Counsel argued that mere apprehension of *miscarriage of justice* is not a proper basis for granting certification for an appeal to the Supreme Court, especially in view of what would be considered a matter of general public importance, as established in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,*** *Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR*.

[23] Learned counsel was emphatic that this is not a matter of general public importance and, therefore, as held by this Court in ***Ngoge v Ole Kaparo,*** it does not deserve the further input of this Court. Counsel also cited cases from foreign jurisdictions, in which the courts have signalled what would be "matters of general public importance"; most of these being well reflected in this Court's decision in ***Hermanus Steyn***.

[24] Mr. Muite urged further that, neither the draft petition of appeal nor the supporting affidavits of the respondents disclose any issues transcending the facts of this particular case, and having a significant bearing on the public interest; and consequently, that this matter lacks a basis for being classified as a "matter of general public importance". Counsel concluded that the Court of Appeal had endeavoured to rescue the respondents by granting leave to appeal, when the matter at hand was not one of "general public importance". He urged the Court to review the certification by the Court of Appeal.

[25] In questioning the legal capacity of Moi High School Kabarak to claim proprietary rights, Mr. Muite relied on the decision of the Supreme Court of India in ***Dattaraj Nathuji Thaware v State of Mahashtra & Others*** *(2004) INSC 755***,** in which the following passage appears:

> *"The expression 'litigation' means a legal action including all proceedings therein initiated in a Court of law for the enforcement of right or seeking a remedy. Therefore lexically the expression 'PIL' [public interest ligation] means ... the legal action initiated in a Court of law for the enforcement public interest or general interest by which their legal rights or liability [are] affected... Be that as it may, it is mandatory, because the* ***legal capacity of the party*** *to any litigation whether in private or public action in relation to any specific remedy sought for has* ***to be primarily ascertained at the threshold****..."* [emphasis supplied].

He urged that the second respondent should not be allowed to appeal without its capacity being known, since it has no *locus* to appeal. He argued that granting

leave to appeal will be tantamount to allowing an abuse of the process of the Court: for both respondents had an opportunity both at the High Court and the Court of Appeal to present evidence as to who owns the School, and as to the legal capacity of the Board.

[26] Mr. A. B. Shah, learned counsel for the 1st and 2nd respondents, in his submissions thus stated the grounds on which the Court of Appeal allowed the application for leave to appeal to this Court:

> *(i) this Court needs to determine whether a claim of adverse possession holds in favour of any of the defendants if: (a) the land was a gift from the late Walter Bell; (b) the land was the subject matter of a barter trade; (c) the land was acquired by the defendant through coercion;*
>
> *(ii)this Court should consider the conflict in five previous decisions of the Court of Appeal (referred to at pages 289 and 290 of the Record of the current application);*
>
> *(iii) whether the contrasting decisions of the Court of Appeal and the High Court, on whether or not the late Walter Bell gave land to Hon. Daniel Moi or Moi High School Kabarak, occasioned a miscarriage of justice;*
>
> *(iv) whether the legal status of the School is a bar to the School claiming adverse possessory rights.*

[27] Learned counsel submitted that this Court was not bound by the decision of the Court of Appeal by which leave to appeal was granted, and was not limited to the considerations that guided that Court. He cited the recent decision of this Court in ***Hermanus Steyn,*** which specified the test to be applied in determining whether a matter was of "general public importance." He relied on the case of ***Murai v Wainaina,*** cited in ***Hermanus Steyn,*** in which Madan JA. stated thus:

> ***"The appeal is of public importance as it touches on the subject of land rights, and will not only affect the parties to the appeal, but will also affect a large number of original land-owners, by depriving them, causing economic and social upheaval …"***

[28] Counsel proceeded to argue that the Court of Appeal erred in *failing to take into account the issue of adverse possessory rights,* as accrued under the Land Control Act (Cap. 302, Laws of Kenya), when arriving at its determination. In his opinion it was the duty of the Court to look into *any substantial question of law* relevant to the matter at hand, and rule on it, even though counsel did not state it as an issue for determination.

[29] Counsel submitted that the issue of the legal status of the School had been canvassed as an afterthought: for the applicant had at all times considered the first respondent as the owner of the School. He urged that the status of the School had not in any way disadvantaged the applicant in making his claim against the

School; the Board of Governors could sue even though the School was registered as a Charitable Trust; and that was not fatal to the proceedings before the Court.

[30] Mr. Shah urged that Article 163 (4)(b) of the Constitution only required the matter brought before this Court to be of "general" public importance, rather than one of "great," or "exceptional" public importance. He was in agreement with the position of the Court of Appeal, in line with *section 16* of the **Supreme Court Act, 2011,** that this Court could consider the issue of *miscarriage of justice* in determining whether to grant certification to appeal, or not. He submitted that section 16 of the Supreme Court Act allows the Supreme Court to grant certification in circumstances in which "substantial miscarriage of justice may occur unless the appeal is heard."

[31] Counsel invited the Court to determine whether there was *miscarriage of justice* when the Court of Appeal failed to take into account the relevant provisions of the Land Control Act as read conjunctively with the Limitations of Actions Act, (Cap. 22, Laws of Kenya).

[32] Mr. Shah contested an element in the Court of Appeal's decision which reversed the High Court's judgment. While the said judgment was given by two Judges rather than three, by virtue of a specific provision of the law, learned counsel contended that this would be a case for two *separate opinions* rather

than one opinion concurring in the other. No established principle was invoked in support of such an argument, and no special provision of the law was canvassed.

C. ISSUES FOR DETERMINATION BY THE COURT

[33] This Court will come to its ultimate decision after considering the relevant issues that have emerged. These issues fall under specific heads, though for practical reasons they have been addressed compositely. They are as follows:

(a) certification for appeal before the Supreme Court: what are the respective roles of the Court of Appeal and the Supreme Court?

(b) jurisdiction: is there a conflict between section 16(1) and (2)(b) of the Supreme Court Act, 2011 on the one hand, and Article 163(4) of the Constitution on the other?

(c) does the proposed appeal to the Supreme Court raise a "matter of general public importance?"

(d) possibility of "substantial miscarriage of justice": will this be a relevant factor as the Supreme Court considers the question of certification for appeal – as a matter of law and of fact?

(i) "gift" was made in 1993; adverse possession claimed from 1982; does this bear significance, as a matter of legal inference?

(ii) date of "surrender" remains undetermined: has this no significance, in law?

(iii) licence: what significance? how does it relate to the notion of "gift", or "surrender?"

(iv) so, what, really, was the "property-relation" between the parties?

(v) second respondent's legal capacity – what relevance? What significance? what was the position?

(vi) three-Judge Bench, two-Judge Bench, and format of Judgment – what significance, in law?

(e) costs of the suit: don't costs follow the event, but for good cause?

D. ANALYSIS

[34] Article 163 (4)(b) requires that appeals lie from the Court of Appeal to this Court upon certification, on the basis that a matter is one of "general public importance". The certification can be done by the Court of Appeal itself, or by this Court.

[35] The Supreme Court Act, 2011 in section 16, permits the Supreme Court to grant leave to appeal to the Court, where the appeal involves "a matter of general public importance". Section 16 provides thus:

"(2) It shall be in the interest of justice for the Supreme Court to hear and determine a proposed appeal if –

a) the appeal involves a matter of general public importance; or

b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."

[36] Rule 24 of the Supreme Court Rules, 2012 provides as follows:

"(1) An application for certification shall first be made in the court or tribunal it is desired to appeal from.

"(2) Where the Court of Appeal has certified a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days.

"(3) The Court shall in granting the certification review matters that have been certified to be of general public importance."

[37] This Court held in ***Sum Model Industries Limited v Industrial and Commercial Development Corporation,*** *Sup. Ct. Civ. Appl. No. 1 of 2011,* that the application for certification should first be made in the Court of Appeal before a party seeks certification from this Court, as the former was privy to the proceedings and issues before it on first appeal, and would be aptly placed to determine whether the matter is one of general public importance. The Court stated thus:

"This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties.

Accordingly, the Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal would lie to the Supreme Court or not. If the applicant be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution."

[38] In yet another case, this Court affirmed its position on the instances in which its appellate jurisdiction may be invoked. One, on an appeal from the Court of Appeal, as a matter of right, in a matter involving the *application or interpretation of the Constitution;* and two, on an appeal from the Court of Appeal on a matter certified as involving a "matter of general public importance". This was in the case of ***Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another,*** *Sup. Ct. Petition No. 3 of 2012,* in which the Court held that:

> ***"The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court on grounds other than that the case is one which involves the interpretation or application of the Constitution, then such intending appellant must convince the Court that the case is one involving a matter of general public importance. If the Court of Appeal is convinced that such is the case and the certification is affirmed by the Supreme Court, then the intending appellant may proceed and file the substantive appeal."***

[39] This case was certified by the Court of Appeal on 22nd February, 2013 as raising matters of general public importance. That certification is now challenged

before this Court, by virtue of Article 163(5) of the Constitution, on the basis that it is *not* truly, a matter of general public importance and so does not require the further input of this Court. Counsel for the applicant cited the holding of this Court in ***Peter Ngoge v Ole Kaparo,*** in which the Court thus stated:

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

[40] The Court of Appeal, in the instant case, certified the matter as being of general public interest. The Court of Appeal based its certification on two grounds: that the matter is of *general public importance;* and that *substantial miscarriage of justice may occur* unless the appeal is heard.

[41] In the ***Hermanus Steyn*** case this Court had the opportunity to pronounce itself on the test applicable in determining whether a matter is of general public importance. The Court outlined the governing principles thus:

> ***(i) 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;***
>
> ***(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 [other] 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 themselves, a basis for granting certification for an appeal before the Supreme Court.

[42] In justifying the decision that the matter is of general public importance, the Court of Appeal noted that the suit property was *either* a gift from the late Walter Bell to the School, *or* was part of some barter-trade arrangement between the parties, though, apparently, none of such transactions was complete. The Court hypothesized that *if* the transaction was a barter trade, then the conditions

precedent had not been met. So apparently, the transaction was *incomplete,* and the School still had possession of the suit land with the *consent* of the respondent, in which case, for purposes of adverse possession, time started running after the respondent demanded possession of the suit land in *2003;* only from 2003 could the School be holding the land *without permission*.

[43] The Court of Appeal was guided by the holdings in ***Wambugu v Njuguna*** **[1983] KLR 172;** ***Sisto Wambugu v Kamau Njuguna*** **[1982-88] 1 KLR 217;** and ***Samuel Miki Waweru v Jane Njeri Richu,*** *Civ. Appeal No. 122 of 2001* – in which the Court held that where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession, *until the agreement is terminated*. The Court held in the ***Miki Waweru*** case that, where the sale agreement being subject to the Land Control Act became void under section 6(1), for lack of consent of the Land Control Board, time starts running from the moment the transaction becomes void.

[44] In a contrasting decision, ***Mbugua Njuguna v Elijah Mburu Wanyoike & Another,*** *Civil Appeal No. 27 of 2002* it was held that where the transaction for sale of land terminates by reason of failure to acquire the consent of the Land Control Board, then for purposes of adverse possessory rights, time starts running on the day the claimant is put in possession of the land, and not on

the last day when the application for the Board's consent ought to have been made.

[45] In principle, this Court believes, these Court of Appeal decisions should be aligned, to create consistency as to when time starts running, for purposes of adverse possessory rights. The Court of Appeal itself has the competence to deal with this question in its subsequent decisions. As stated in ***Peter Ngoge v Ole Kaparo,*** this Court ought to safeguard the respective jurisdictions of other courts in the hierarchy of Courts in Kenya, and should resist the temptation to encroach on their proper spheres of work. The Court, in that case, held as follows:

> ***"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case,*** *it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised* ***and exhausted."***

[46] It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and *not merely for the purpose of rectifying errors with regard to matters of settled law.*

[47] In the instant matter, the Court of Appeal alluded to the existence of *conflicting decisions* on the question: when does time begin running, in regard to

the emergence of rights of adverse possession? That is a straightforward issue, which lends itself to resolution on the basis of a review of *factual scenarios*, and a review of the *decisions of the superior Courts rendered over the years*; and on that basis the Court of Appeal has it in its power to canvass the legal principles and to settle the technicality of the law, for the time being. Such a scenario falls outside the profile of "*matter of general public importance.*"

[48] Such a position is consistent with this Court's holding in the ***Hermanus Steyn*** case, that "the question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination" – for them to become a "matter of general public importance" meriting the Supreme Court's appellate jurisdiction. By this test, matters only tangentially adverted to, without a trial focus or a clear consideration of facts in the other Courts, will often be found to fall outside the proper appeal cause in the Supreme Court.

[49] The Court of Appeal, in its Judgement of 9th August, 2012 held that the second respondent had a duty to establish having acquired an adverse-possession right, and that this obligation could only be discharged by showing exclusive possession of the suit land for an uninterrupted period of 12 years, without permission from the true owner, the late Walter Bell. The Court ascertained that from the evidence given by witnesses in the High Court, it had emerged that the deceased made a deal with the first respondent: to donate the suit land to the first

respondent if certain advantages were rendered to the donor. What legal concept would encapsulate such a transaction? Certainly not a gift, but rather, a contractual bargain. The Court of Appeal's perception of the evidence on record is that the conditions in the contractual arrangement remained unfulfilled; and consequently, the deceased declined to transfer the land to the first respondent.

[50] The contractual undertaking failed, as the Court of Appeal held; and the Court found it not falling to it (the Court) as a duty to complete an incomplete "gift", or an unfulfilled contractual intention. So in those circumstances, the Court of Appeal held that the evidence in the High Court had shown that the second respondent could not *by its might,* occupy the suit land; it occupied that land only on the basis of *permission* from the late Walter Bell. The Court of Appeal applied the settled law of adverse possession, namely, that user of suit-land as an entitlement, in order to found an adverse possessory right, must be *longus usus nec per vim, nec clam, nec precario* – meaning: *long use not by violence, stealth or permission.* And the Court of Appeal concluded that the second respondent came to occupy the suit land not by unrestrained, independent might, but by the clear *permission* of the late Walter Bell: and thus the respondents' claim founded on adverse possession lacked a legal basis.

[51] With adverse possession excluded, in the relationship between the respondents and the deceased, the remaining question was as to the merits of the

claim in regard to the parties herein: could an adverse-possession claim succeed as against Malcolm Bell, the heir to the late Walter Bell? The Court of Appeal drew what is, in our view, a logical conclusion: the claim could not succeed, as the "transaction" with the land had not conferred any adverse possessory rights.

[52] Not only is the adverse-possession question a subject sufficiently settled in law as to lend itself to *normal interpretation and disposal* by superior Courts other than the Supreme Court, but, as the foregoing analysis shows, the Court of Appeal conscientiously and judiciously applied its mind to the subject. It is no longer a proper subject on any account, and least of all as "a matter of general public importance," to be the subject of an appeal before the Supreme Court.

[53] The categories of questions that merit the appellate jurisdiction of the Supreme Court, on the basis that they are "matters of general public importance", have already been identified in their essence, in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone,*** Sup. Ct. Appl. No. 4 of 2012. These categories are to be found in paragraph 60 of the main Ruling of the Court and in paragraph 17 of the dissenting opinion. These, for convenience, may be set out as follows:

> *(i) 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;

(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 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 [at earlier levels of the] 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 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 final appeal in the Supreme Court.

[54] On the issue of adverse possession, it is clear to us that there is no matter qualifying for certification for appeal before this Court; and thus, were it the sole

basis of certification, the instant application would have merited sustenance instantly.

[55] The applicant contests section 16(1) and (2) (b) of the Supreme Court Act, 2011 (Act No. 7 of 2011) on grounds of constitutionality; he urges that the intended appeal cannot rightly be founded on those prescriptions of statute law. The said provisions read as follows:

> ***"(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.***
> ***(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if –***
> ***(a) ....***
> ***(b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."***

[56] Not only does the foregoing statutory provision appear to vest a diffuse kind of appellate competence in the Supreme Court, it runs out of fit with the mandatory appellate-jurisdiction clause in **Article 163(4)(b) of the Constitution** which thus provides:

> ***"(4) Appeals shall lie from the Court of Appeal to the Supreme Court –***

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

"(5) A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

[57] *What* "interests of justice" [Supreme Court Act, 2011, section 16(1)], and "interests of justice" as determined by *whom* – will confer ordinary appellate jurisdiction upon a Supreme Court which already has an appellate remit *specifically defined* in Article 163(4) of the Constitution? And is the question of rectifying what is referred to as "substantial miscarriage of justice," properly a question *within the jurisdiction of Supreme Court*?

[58] "Interests of justice" as a criterion of decision-making by the Supreme Court and other Courts, is already declared by the Constitution in the "national values and principles of governance" [Article 10]. Such values include [Article 10(2)]: the rule of law; human dignity; equity; social justice; equality; human rights; non-discrimination; and the protection of the marginalised. As the jurisdiction to render justice is, thus, clearly conferred by the Constitution, it is

not to be attributed to the provision of s.16(1) of the Supreme Court Act, 2011 (Act No. 7 of 2011).

[59] That the statute's elastic conferment of jurisdiction, in respect of "miscarriage of justice" stood to question, was foreshadowed in the ***Hermanus Steyn*** case in this Court, with the observation that the mischief contemplated has in practice been remediable before superior Courts at any level; but the provision, by its unlimited scope, has now been found to have a compromising effect on the Supreme Court's jurisdiction.

[60] The applicant herein urged that no proper matter for appeal was being brought by the respondents, as the Supreme Court lacked jurisdiction to entertain an appeal. The applicant urged that s.16(2)(b) of the Supreme Court Act was unconstitutional, as it purported to extend the basis for issuing certification for appeal beyond the terms set out in Article 163 of the Constitution.

[61] On a related question of jurisdiction, ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited and Two Others***, Sup. Ct. Appl. No. 2 of 2011, this Court had thus held:

> ***"The [Supreme] Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft***

or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution."

[62] Accordingly, we uphold the applicant's objection to the intended appeal as one invoking a jurisdiction that does not coincide with the Constitution's donation.

[63] The respondents rationalized their intended appeal on the ground that there had been a ceremonial impropriety in the Court of Appeal's reversal of their gains at the High Court: that only two, rather than three Justices of Appeal had been present and, between the two present, only one substantive opinion (concurred in by the second Judge) had been rendered. Is this an issue of legal materiality, and one which on the basis of the law of jurisdiction, justifies an ultimate appeal in the Supreme Court?

[64] The Court of Appeal Rules, 2010 – which establish the mode of disposal of appeals in that Court – thus stipulates in Rule 32, clause (3):

"In civil applications (other than applications heard by a single judge) and civil appeals, separate judgments shall be given by the members of the Court unless, the decision being unanimous, the presiding judge otherwise directs; but where one judge delays, dies, ceases to hold office, or is unable to perform the functions of his office because of infirmity of mind or body,

separate concurring judgments may be given by the remaining members of the Court."

[65] The matter before the Court of Appeal was heard by Justices Waki, Koome and Okwengu; but at the time of writing the judgment Waki, J.A. was unavailable, having been on authorized leave abroad. It fell to the remaining two Judges to write the judgement. For the respondents, it was contended, each Judge ought to have written a separate reasoned judgment, and there should have been no concurring opinion: and this was urged before this Court to bring the intended appeal under the category of "matters of general public importance", meriting a hearing before the Supreme Court.

[66] Of the writing of separate reasoned opinions by individual members of the Bench, Diane P. Wood in her article "When to hold, When to fold, and When to Reshuffle: The Art of Decision-making in a Multi-member Court", *California Law Review*, Vol. 100 (Dec. 2012), at page 1445, thus writes:

"The reasons why a judge writes separately vary, depending on whether the contemplated opinion will be a concurrence or a dissent. Judge Patricia Wald, who sat for many years on the U.S. Court of Appeals for the District of Columbia Circuit, has suggested that a judge who intends to dissent 'is driven publicly to distance herself from her colleagues out of profound

disagreement, frustration, even outrage.' 'Concurrences', she wrote, 'are a different matter....Though certainly not as threatening as dissents, concurrences raise more collegial eyebrows, for in writing separately on a matter where the judge thinks the majority got the result right, she may be thought to be self-indulgent, single-minded, even childish in her insistence that everything be done her way."

[67] Diana Wood in her article, suggests divers grounds which may motivate a judge on a collegiate Bench to write a separate concurring opinion: to reassure the losing party that the Court's decision is not all that bad; to indicate a divergence in the reasoning; to provide additional reasons to the majority decision; to send out the message that a different approach may, in the future, be appropriate; or to set the limits within which the majority decision is to be seen.

[68] Taking such scholarly opinion to reflect fairly the reality within which a concurring opinion emanates from a collegiate Bench, we would observe that the concurring opinion in question in the instant matter, by no means departs from the regulatory scheme of the Court of Appeal, as set out in Rule 32 of the Court of Appeal Rules 2010. These Rules do not prescribe the length of judgment, nor do they inhibit the rendering of a concurring opinion by a Judge. There was, thus, nothing judicially unbecoming for Lady Justice Okwengu to turn in a concurrence

which indicated she had read the opinion of Lady Justice Koome and agreed in full measure.

[69] Was it a matter of general public importance that one Judge concurred in the opinion written by the other Judge, and that one of the members of the original Bench was not present? We do not think so. Not only was the judgment-delivery procedure duly complied with; there would have been no justification in one Judge merely rehashing matters of detail already set out in the main judgment; and more importantly, no episode flared up in terms of the public interest in the due administration of justice, such as would raise a "matter of pubic importance."

[70] In our opinion, the question as to whether, in the absence of one Judge the remaining ones in a collegiate Bench must each formulate a fully detailed and reasoned Judgment, falls in an ordinary class, and does not raise any matter of general importance warranting the engagement of the Supreme Court's appellate jurisdiction.

[71] It is a principle embedded in this Court's decision in the ***Hermanus Steyn*** case, that:

> "***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."

In the instant matter, we are convinced that the point of law regarding the mode of rendering Judgement by the Justices of Appeal, is neither substantial, nor would it have a significant bearing upon the public interest.

[72] The applicant raised an issue as to the legal capacity of the second respondent, as a claimant of rights over the suit property. Learned counsel's contention was that the very claim of adverse possession was inconceivable, in respect of a party in the place of the second respondent.

[73] How does the question of the legal status of the second respondent arise, in this matter? The record shows that the Court of Appeal found to be unclear, the legal status of the second respondent, as from the moment the School ceased to be a public school, and devolved to the private domain, to ownership by a "charitable trust." The questions raised were: (i) when did the school cease to be a public school, and became a private institution? (ii) is the Education Minister responsible for the appointment of the members of the Board of Governors, in accordance with the terms of the Education Act? (iii) is the Board appointed under a charitable trust? (iv) is the charitable trust registered under the Land (Perpetual Succession) Act (Cap. 286, Laws of Kenya)? On account of these

unanswered questions, the Court of Appeal held it to have been right that the suit was in the first place filed against the first respondent.

[74] We do not find the foregoing set of questions to occasion such uncertainty as would compromise the perceptions we have developed on issues of legality and constitutionality. Consequently, we will determine the application on the lines set out below.

E. FINAL DETERMINATION

[75] The foregoing analysis shows substantially, in our opinion, that the respondents failed to establish a foundation for the lodgement of an ultimate appeal in the Supreme Court. As the cause raises no matters of general public importance, this Court's jurisdiction has not been properly invoked, and the Court of Appeal was in error, as a matter of law, in granting certification for a further appeal. The guiding principles for determining whether a question is one of general public importance and therefore merits such an appeal, have been elaborated in the ***Hermanus Steyn*** case: and the proposed appeal herein fails the test, notwithstanding that its subject-matter is landed property. All questions pertaining to claims under adverse possession, fell squarely within the Court of Appeal's jurisdiction, and there would be no basis for invoking the Supreme Court's jurisdiction in that regard. All the other considerations for admitting the case to final appeal, in our opinion, have no basis in law.

[76] Consequently, ***we allow the application, and overturn the certification for appeal.***

[77] The respondents shall bear the cost of the instant application.

THE CONCURRING OPINION OF RAWAL, DCJ & VICE-PRESIDENT

[78] I am in total agreement with the analysis and final determination in the majority Ruling, though I intend to make a few comments in aid of a clearer understanding of the appellate jurisdiction of the Court as prescribed under Article 163 (4) of the Constitution.

[79] Article 163(4) thus provides:

> ***"Appeal shall lie from the Court of Appeal to the Supreme Court:***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."***

It is not in doubt that Parliament enacted the Supreme Court Act, 2011 (No. 7 of 2011) in pursuance of Article 163 (9), which creates room for such legislation. I shall further observe, without any hesitation, that Sec. 16 of the said Act is

intended to clarify the provision of Article 163 (4).

[80] I will now concentrate on the provisions of Sec. 16(2) of the Act, reiterating that the Court has observed that the provision of Sec. 16(2)(b) is beyond the domain of the Court. That leaves Section 16 with Sub-sec. (1) and (2) (a), as the appropriate provisions.

[81] Considering closely the aforesaid provisions, it appears that it simply reiterates (i) the fundamental principle of "interest of justice", which is a pivotal aspect of the function of any Court; and (i) the "matter of public importance", which is in any event clearly stipulated in Article 163(4) (b).

[82] Retaining this provision, especially Section 16(1) and 2(a) will, in my humble opinion, restrict the meaning of "*interest of justice*", as well as the *discretion of the Court* to develop the scope of interest of justice, which inherently is a broad concept.

[83] In the premises, I would like to recommend to the Hon. The Attorney-General that an amendment be effected in the said provision of the Act.

DATED and **DELIVERED** at **NAIROBI** this 24th day of October, 2013

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KALPANA RAWAL
DEPUTY CHIEF JUSTICE/VICE-PRESIDENT OF THE SUPREME COURT

P. K. TUNOI M.K.
JUDGE OF THE SUPREME COURT

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IBRAHIM
JUDGE OF THE SUPREME COURT

J.B. OJWANG
JUDGE OF THE SUPREME COURT

.....

N.S. NDUNGU
JUDGE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT