REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Tunoi; Ibrahim; Ojwang; Wanjala and Njoki, SCJJ)

APPLICATION NO. 1 OF 2014

—BETWEEN—

1. CHARLES KARATHE KIARIE.....
2. THOMAS WANYOIKE WAINAINA..... } APPLICANTS
3. KALANG ENTERPRISES.....

—AND—

1. THE ADMINISTRATORS OF THE ESTATE OF JOHN WALLACE MATHARE (DECEASED).....
2. THE ADMINISTRATORS OF THE ESTATE OF DENNIS WAWERU RIMUI (DECEASED) ..... } RESPONDENTS
3. THE ADMINISTRATORS OF THE ESTATE OF JOYSE WANJA GITAU (DECEASED).....
4. GEORGE HEZRON MWAURA.....

Being an application under Article 163(4)(b) of the Constitution for review of the Court of Appeal's decision (Kihara, Nambuye & Ouko JJ.A) delivered on 13th May, 2013 in Civil Application SUP No. 12 of 2013 denying leave to appeal to the Supreme Court.

RULING

A. INTRODUCTION

[1] The application before this Court is by way of a Notice of Motion, dated 7th February, 2014 and amended on 21st May, 2014, under Rule 30(2) of the Supreme Court Rules, and Article 163(4)(a) of the Constitution. The Applicants seek Orders that:

> *(i) a certificate do issue that the applicants' intended appeal raises a matter of general public importance, and that substantial miscarriage of justice may occur if an appeal is not lodged against the Judgment delivered by the Court of Appeal on 26th April, 2013 in Nairobi Civil Appeal No. 225 of 2006;*
>
> *(ii) the Court be pleased to review and set aside the Court of Appeal Ruling in Civil Application No. (SUP) 12 of 2013 dismissing the applicants' Notice of Motion dated 13th May 2013.*

[2] The 1st and 2nd respondents contend that the intended appeal does not fall under Article 163(4)(a), and neither does it meet the terms of Article 163(4)(b) of the Constitution. At the hearing of this application, both the 3rd and 4th respondents supported the applicants' position, even though they have not filed any written submissions.

B. BACKGROUND

[3] The facts of the case are that, the 1st and 2nd respondents had entered into an agreement dated 18th September, 1990 for the purchase of 2.5 acres of land, to be carved out of a larger parcel, LR. No. 2243/3, owned by the 3rd respondent. Following the subdivision of the land, the 3rd respondent transferred a portion

measuring 4.047 hectares to the 4th respondent (her son), who was now to transfer the portion already sold to the 1st and 2nd respondents. However, the 4th respondent re-sold the property to the *1st and 2nd applicants,* who had the title registered in the name of the 3rd applicant (their registered company).

[4] The 3rd applicant had effected further subdivisions of the land, into five plots registered as LR Nos. 13459/44, 13459/45, 13459/46, 13459/47, 13459/48, after which he sold two of these plots to James Maina and Erick Mwaniki who were, respectively, the 5th and 6th respondents in Court of Appeal Civil Appeal No. 225 of 2006. It is to be noted that the said two purchasers are not parties to this application, on account of an amendment to the application dated 21st May, 2014.

[5] Aggrieved by the actions of the 3rd applicant, the 1st and 2nd respondents herein filed a suit in the High Court seeking:

(i) a declaration that the sale agreement dated 2nd June 1992 between the 2nd 3rd and 4th defendants was fraudulently entered into, so as to defeat the plaintiffs' title and interest in LR. No. 13459/41(IR 53362), and that, consequently, the same was null and void;

(ii) a declaration that the transfer of land dated 19th October, 1992 and the registration of L.R 53362/4, and involving the 2nd defendant and the 7th defendant and L.R No. 13459/41, was fraudulent, and intended to defeat the plaintiffs' title and interest in the said piece of land, and consequently the same is null and void;

(iii) a declaration that the purported sale of the portions of the suit land by the 7th defendant to the 5th and 6th defendant, was null and void;

(iv) an Order for specific performance of the agreement dated 18th September, 1990 between the plaintiffs and the 1st defendant;

(v) costs of the suit;

(vi) any other or further relief deemed fit;

(vii) an Order for the transfer of the parcels of land known as LR Nos. 13459/44, 13459/45, 13459/46, 13459/47, 13459/48 from the 7th defendant to the plaintiff;

(viii) alternatively and without prejudice to prayers a,b,c,d & h above, Judgement against the 1st and 2nd defendants for special damages amounting to Kshs. 465, 850/=, and general damages for breach of contract;

(ix) interest at Court rate, until payment in full.

[6] The trial Court, upon hearing the matter on 16th August, 1999, thus held:

(i) the 1st and 2nd respondents (Mathare and Rimui) were entitled to specific performance;

(ii) the title in favour of the 3rd applicant, be cancelled due to fraud;

(iii) the property be transferred to the 1st and 2nd respondents;

(iv) there was an element of fraud in the case;

(v) the claim for special damages was not proved;

(vi) costs of the suit awarded to Mathare and Rimui (1st and 2nd respondent herein).

[7] Being dissatisfied with the Judgement of the High Court, the applicants moved the Court of Appeal, in Civil Appeal No. 225 of 2006, on the grounds that the trial Judge had erred in ordering specific performance; in overlooking the doctrine of privity of contract; and in ordering the cancellation of the title without evidence.

[8] On the 26th April, 2013 the Court of Appeal upheld the Judgement of the High Court, and further ordered payment of Kshs. 201,650 by the 1st and 2nd respondents herein, as the balance of purchase price payable to the 3rd respondent.

[9] Aggrieved by this decision the applicants made an application before the Court of Appeal, seeking certification for further appeal, on the ground that the matter involved issues of general public importance. By a Ruling dated 8th November, 2013, the Appellate Court declined to grant certification, and dismissed the application on the ground that "the question intended to be raised in the Supreme Court does not constitute a matter of general public importance but rather a protracted multiple sale transaction of one parcel of land to different parties". The Court of Appeal further observed that "there is no uncertainty in the law as regards what would constitute fraud and indefeasibility of title."

[10] Dissatisfied with the decision of the Court of Appeal declining certification, the applicants have now moved this Court for a review; hence the instant application.

C. THE PARTIES' RESPECTIVE CASES

(i) 1st and 2nd Applicants

[11] Learned Senior Counsel, Dr. Kamau Kuria submitted that this application seeks the review and setting aside the Court of Appeal decision declining to grant certification; he urged that the intended appeal raises a matter of general public interest, and that a substantial miscarriage of justice may occur if certification is not granted.

[12] Learned counsel submitted that the proposed appeal involves a matter of general public importance, in that in its Judgment, the Appellate Court had considered the doctrine of indefeasibility of title to land under Kenya's Torrens system, to be taken into account with the governing law found in the Land Registration Act, 2012, and the Constitution of Kenya, 2010. Counsel submitted that the doctrine of indefeasibility of title strikes a balance between the rights of a person in possession of land, and those of persons who acquire title to that land on the basis of registry records.

[13] It was counsel's submission that indefeasibility of title under the Torrens system, being so vital to the market economy — and this being the first case of its kind — was of vital interest to Kenyans in general.

[14] Counsel contended that a miscarriage of justice was likely to occur, unless the intended appeal was heard. In his estimation, the parcel of land in question stood at the substantial value of Kenya Shillings One Hundred Million. He further submitted that the High Court's evaluation of the evidence was influenced by a misdirection as regards indefeasibility of the title, and fraud. Learned

counsel contended that the Appellate Court's determination was incorrect in law, and was an unsafe outcome.

[15] Counsel submitted that the Judgement rendered by the Appellate Court was founded upon a concept of fraud that was not based on Kenya's Torrens system of land registration; and that the issue as to what kind of fraud vitiates title, is one of great public importance.

[16] Counsel submitted that the intended appeal raises arguable issues of law, in that the High Court had not discussed the doctrine of indefeasibility under Section 23 of the Registration of Titles Act, nor that of fraud, as defined in Section 2 of the repealed Registration of Titles Act; and neither had it considered the persuasive decisions of other Commonwealth countries presented in Court.

[17] Counsel submitted that the application satisfies the requirement of Section 16 of the Supreme Court Act, as well as and the principles established in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi- Ruscone,*** Sup Ct. Appl. No. 4 of 2012; and that of the objects of the Court, as set out under Section 3 of the Supreme Court Act.

(ii) 2nd and 3rd Respondents

[18] Learned counsel Mr. Nyaribo, for the 1st and 2nd respondents, submitted that the appellants had wrongly invoked the jurisdiction of this Court by relying upon Article 163(4)(a) of the Constitution; and that, besides, the issues raised by the applicants do not constitute a matter of general public importance (Article 163 (4)(b)), but rather is a case of protracted multiple-sale transactions affecting just one parcel of land. It was counsel's contention that this case did not meet the threshold set by this Court in the ***Hermanus Steyn case.*** Learned counsel

also urged that this Court lacks jurisdiction to hear an appeal on the ground of miscarriage of justice.

[19] Counsel stated that the issue of indefeasibility of title, and of fraud, are matters that the other superior Courts have properly dealt with, leaving no uncertainty or ambiguity in the relevant law.

[20] Counsel urged the Court to dismiss the application, as it did not raise any "cardinal issues of law or of jurisprudential moment" ***(Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR, para. 30) meriting the further input of the Supreme Court.

(iii) 4th Respondent

[21] Learned counsel Mr. Githinji, for the 4th respondent, supported the application. He submitted that there was no fraud in the transaction, as the applicant had paid the full price for the suit property.

D. ISSUE FOR DETERMINATION

[22] On the basis of proceedings herein, the main issue for determination is:

> *whether the intended appeal raises any matter of general public importance to warrant a review of the Court of Appeal's Ruling in Civil Application (SUP) No. 12 of 2013 delivered on 8th November 2013.*

[23] We would take note, as indicated by learned counsel for the 2nd and 3rd respondents, that the applicants moved this Court under Article 163(4)(a) of the

Constitution, which relates to appeals to the Supreme Court as of right, rather than under Article 163 (4)(b) which relates to "matters of general public importance".

[24] As we have indicated in the past, a party moving this Court under Article 163(4)(a) of the Constitution need not obtain certification from the Court of Appeal to come before this Court. In the instant matter, it is clear that the applicants ought to have moved this Court under Article 163(4) (b) and 163(5) of the Constitution.

[25] In the ***Hermanus Steyn case,*** this Court held that "*it is trite law that a Court has to be moved by the correct provisions".* However, in determining whether an omission was fatal to the case, the Court observed as follows (paragraph 23):

> *"We note that this Court is the highest Court in the land.* ***The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone.*** *The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite article 163(5) will not be fatal to the applicant's cause."* [emphasis added].

[26] So we may proceed to consider this application as if it had been filed pursuant to *Article 163(4)(b)* of the Constitution.

E. ANALYSIS

[27] This Court, in the ***Hermanus Steyn Case,*** considered the criteria for determining whether a given case involves a "matter of general public importance." The Court was alive to the fact that the meaning of "matter of general public importance" may vary, depending on the relevant context. After undertaking a comparative review of the practice in various jurisdictions, the Court pronounced itself on the significations contemplated in Article 163 (4) (b) of the Constitution, as follows (paragraph 58):

> ***"Before this Court a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."***

[28] The Court went further to lay down guiding principles for determining whether a matter was one of general public importance. These principles have been restated by the Court in other cases where the issue has come up for determination (see for example: ***Shabbir Ali Jusab v. Anaar Osman Gamrai and Others*** Supreme Court Petition No. 1 of 2013; and the ***Malcolm Bell case.***

[29] We will apply these principles to the instant case, to determine whether the intended appeal raises "matters of general public importance," so as to warrant a review of the decision of the Appellate Court declining certification.

(a) Does it transcend the particular case? Does it bear on the public interest?

[30] From the record, the facts of the case are that the 1st and 2nd respondents entered into an agreement for the purchase of land from the 3rd respondent. Following the subdivision of the land, the 3rd respondent transferred a portion of the land to the 4th respondent (her son) who was to transfer the portion sold to the 1st and 2nd respondents. However, the 4th respondent re-sold the property to the 1st and 2nd applicants, who then had the title registered in the name of the 3rd applicant (their registered company). The 3rd applicant further sub-divided the land into smaller portions, and sold off the same to other persons.

[31] There being a breach of the sale agreement of 2nd June, 1992 by the 3rd respondent, the 1st and 2nd respondents filed a suit at the High Court seeking *inter alia*:

(a) a declaration that the agreement for sale dated 2nd June, 1992 between the 2nd, 3rd and 4th defendants was fraudulently entered into, defeat the plaintiffs' title and interest in LR. No. 13459/41(IR 53362) and, consequently, the same was null and void;

(b) a declaration that the transfer of land dated 19th October, 1992 and registered as L.R 53362/4 made between the 2nd defendant and the 7th defendant for the transfer of L.R No. 13459/41 was fraudulently entered into, to defeat the plaintiffs' title and interest in the said piece

of land and, consequently, the same is null and void and should be struck out;

(c) a declaration that the purported sales of the portions of the suit land by the 7th defendant to the 5th and 6th defendant, are null and void;

(d) an order for specific performance of the agreement dated 18th September, 1990 between the plaintiffs and the 1st defendant.

[32] The High Court held that the 2nd and 3rd respondents were entitled to specific performance. Following this decision, the applicants appealed to the Court of Appeal on the grounds that the trial Judge erred in ordering specific performance, without taking into account the doctrine of privity of contract; and in ordering the cancellation of the title, without any evidence.

[33] From this sequence of events, it is clear that the issues canvased both at the High Court and the Court of Appeal, centred on breach of a sale agreement. Those affected were solely the parties; and the issues by no means transcended the circumstances of the instant case. The nature of the dispute is limited to the parties, and has no significant bearing upon the public interest.

[34] This conclusion, in our view, is duly incorporated in the decision of the Court of Appeal, when it declined to grant certification, by stating that *"the question intended to be raised in the Supreme Court, in our view, does not constitute a matter of general public importance but rather a protracted multiple sale transaction of one parcel of land to different parties the effect of whose determination does not and is not likely to go beyond the parties."*

(b) Any substantial point of law, bearing on the public interest? Any uncertainty in law, occasioned by inconsistent precedents?

[35] Counsel for the applicants submitted that the proposed appeal involves "the doctrine of indefeasibility of title to land under Kenya's Torrens system", in light of the enactment of the Land Registration Act, 2012, and the promulgation of the Constitution of Kenya, 2010. According to the applicants, the state of the law needs to be re-examined, as the issue of the land register is important to the economy. Counsel urged that, as this was the first dispute of its kind coming up before the Supreme Court, it was of interest to every Kenyan. He referred this Court to the cases of ***Frazer v. Walker [1967] 1 AC 569,*** and ***Williams and Glyn's Bank v. Boland*** **[1981] AC 487,** where the privy Council and the House of Lords acted on the view that the issue of the land register was crucial to the economy. The same position was taken by the 4th respondent.

[36] Counsel for the 1st and 2nd respondents, by contrast, submitted that the issue of indefeasibility of title, and fraud, are matters that the Courts have competently dealt with in the past, and there is no uncertainty or ambiguity in the law or the Court decisions. He urged that the question of fraud, and indefeasibility of title had not been in issue during the hearing of the dispute, in the High Court and the Court of Appeal.

[37] In dealing with this point, the Court of Appeal noted that *"there has never been a controversy with regard to the application of Section 23 of the Registration of Titles Act, and even though the phrase 'Torren system' may not have been used, there are numerous decisions in this country where it has been applied as demonstrated."* The Court of Appeal went further and concluded that "*it is erroneous to argue as learned counsel for the applicants did, that there is*

need for the Supreme Court to settle the law on fraud and indefeasibility of titles, [or] that 'fraud' ought to be defined by that Court".

[38] On the basis of the record before us, we are left with no option but to find that, the applicants have not demonstrated any inconsistency in the state of the law regarding the doctrine of indefeasibility of registered title to land, occasioned by contradictory decisions by either the High Court or the Court of Appeal. We are, thus, in agreement with the Court of Appeal's conclusions on this question.

(c) Any questions of law in the superior Courts, requiring interpretation?

[39] From the submissions of counsel set out above, and from the record of the Court, the original claim was based on allegations of breach of contract; fraudulent transfer of land; and a prayer was made for specific performance. The trial Court, upon hearing the matter found that the sales and transfers made subsequent to that in respect of 1st and 2nd respondents, were fraudulent; and it ordered for specific performance. On appeal, the Appellate Court set out the first issue for determination as (paragraph 69) *whether the learned trial Judge was right in ordering specific performance*. There was no issue in controversy regarding the principle of infeasibility of title to land.

(d) Issues "of general public importance": Any elements identified by the applicant?

[40] By the applicants' submissions, the issue of indefeasibility of title is one "of general public importance", as it raises a question as to when an investor's title stands to be invalidated on account of fraud, within the meaning of Section 26 of the Land Registration Act, 2012.

[41] Counsel for the 1st and 2nd respondents, on the other hand, were in agreement with the Court of Appeal's finding, that there has never been any controversy over the application of Section 23 of the (now repealed) Registration of Titles Act, and on its terms as regards fraud.

[42] Applying the principles set out by this Court in the ***Hermanus Steyn case***, we find no basis upon which we can interfere with the Appellate Court's decision denying certification to the applicant.

F. ORDERS

[43] The foregoing analysis, in our view, leads unavoidably to the following Orders:

(i) The application is hereby disallowed.

(ii) The costs of this application shall be borne by the applicant.

DATED and **DELIVERED** at **NAIROBI** this 16th **Day of October, 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