



REPUBLIC OF KENYA



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**Machuke & 3 others v Ngare & 6 others (Civil Application
E001 of 2024) [2025] KECA 27 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KECA 27 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E001 OF 2024
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
JANUARY 17, 2025**

BETWEEN

ERASTUS NDEGE MACHUKE 1ST APPLICANT
JONATHAN NYAGA NJERUH 2ND APPLICANT
BENSON NTHIGA MACHUKE 3RD APPLICANT
JOHN MURIUKI MACHUKE 4TH APPLICANT

AND

JOHN KIURA NGARE 1ST RESPONDENT
GISOVI WA MUNYI 2ND RESPONDENT
JOHN NJIRU JULIUS 3RD RESPONDENT
EZEKIEL NYAGA 4TH RESPONDENT
DAVID MWANIKI NGUKU 5TH RESPONDENT
JACOB NJUE MUTEMBEI 6TH RESPONDENT
JAMES NYAGA NGARI 7TH RESPONDENT

(Being an application for certification to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal at Nyeri (W. Karanja, J. Mohammed & Kimaru, JJ.A.) delivered on 8th December 2023 in Nyeri Civil Appeal No. E011 of 2021)



RULING

Background

1. Erastus Ndege Machuke, Jonathan Nyaga Njeruh, Benson Nthiga Machuke and John Muriuki Machuke, (the 1st to 4th applicants respectively), vide Notice of Motion dated 15th January, 2024 brought pursuant to the provisions of Articles 48, 50(1), 159(1), (2)(e) and 163(3)(b)(i), (4)(b) of *the Constitution* of Kenya, 2010 and Rules 42(b), 44(1)(2), 45(1)(2), 47, 49, 51, 55(1) and 56(1) of the Court of Appeal Rules, 2022) (this Court's Rules) sought for certification that matters of general public importance are involved in the intended appeal to the Supreme Court. The intended appeal is against the judgment of this Court (W. Karanja, Jamila Mohammed & L. Kimaru, JJ.A.) in Nyeri Civil Appeal No. E011 of 2021 dated 8th December 2023 dismissing the applicants' appeal and allowing the 1st respondent's counter-claim.
2. John Kiura Ngare, John Njiru Julius, Gisovi Wa Munyi, Ezekiel Nyaga, David Mwaniki Nguku, Jacob Njue Mutembei and James Nyaga Ngari are the 1st to 7th respondents, respectively.
3. The application is premised on the grounds on the face of it that:
 - i. The points of law to be canvassed on appeal transcend the circumstances of the case between the applicants and the respondents and have a significant bearing on the public interest in general, the Mbeere Community and the specific seventeen clans of Mbeere community;
 - ii. Land parcel number Mbeere/Kirima/2244 (Land Parcel No. 2244) is community land for all intents and purposes of Article 63(1)(2)(d)(ii) of *the Constitution* of Kenya; 2010 and Section 12(a)(b) of the *Community Land Act*; 2016;
 - iii. Land Parcel No. 2244 as community land is vested in Mbeere Community and held under the customary tenure system for purposes of Section 4 of the *Community Land Act*;
 - iv. Land Parcel No. 2244 was not adjudicated in accordance with Sections 5, 8 and 11 of the *Community Land Act*; and Sections 23(2),(3)(b)(iii)(c),(5) of the *Land Adjudication Act*;
 - v. Seventeen (17) Clans which were registered as proprietor of and which disposed of Land Parcel No. 2244 are not a group representative or community for purposes of Article 63(2)(a) of *the Constitution* of Kenya; Section 7 of the *Community Land Act*; and Section 23(5) of the *Land Adjudication Act*;
 - vi. Land Parcel No. 2244 was not disposed of and lawfully transferred to specific clans of Mbeere community by any process of law as required under Article 63(2)(b) of *the Constitution*; Section 8 of the *Land Registration Act*; and Section 10 of the *Community Land Act*;
 - vii. Land Parcel No. 2244 was unconstitutionally and unlawfully converted from community land to private land by virtue of Article 63(2)(b)(c) of *the Constitution* and Section 21 and 23 of the *Community Land Act*;
 - viii. Land Parcel No. 2244 was unconstitutionally and unlawfully registered in Seventeen (17) Clans, which was an unregistered group representative or community contrary to Article 63(2)(a) of *the Constitution*; Section 8 of the *Land Registration Act*; and Section 7 of the *Community Land Act*;



- ix. The registration of Seventeen (17) Clans as proprietor of Land Parcel No. 2244 under the Registered [Land Act](#) was unconstitutional and unlawful by virtue of Article 63(3) of [the Constitution](#); Section 8 of the [Land Registration Act](#); and Section 6 of the [Community Land Act](#);
 - x. Land Parcel No. 2244 was unconstitutionally and unlawfully disposed of to various individuals including the respondents or used as private land by virtue of Article 63(4) of [the Constitution](#); Section 12, 19 and 29 of the [Community Land Act](#); and Section 8 of the [Land Registration Act](#);
 - xi. Land Parcels Numbers Mbeere/Kirima/3683, 3684, 3685, 3686, 3687, 3697, 3698, 3688 and 3699 (the suit properties) are null and void by virtue of Article 40(6) and 63(4) of [the Constitution](#); Section 12 and 19 of the [Community Land Act](#); and Section 8 of the [Land Registration Act](#);
 - xii. The disposal of Land Parcel No. 2244 was discriminatory against the applicants and it was therefore unconstitutional and unlawful by virtue of Article 10(2)(b), 27 and 63(4) of [the Constitution](#) and Section 14 and 30 of the [Community Land Act](#);
 - xiii. The disposal of Land Parcel No. 2244 in general and the registration of the suit properties negated customary rights of use and occupancy of community land that are recognized and protected by Section 23 of the [Land Adjudication Act](#); and Section 14 of the [Community Land Act](#);
 - xiv. The Environment and Land Court (ELC) and this Court failed to settle the question whether the conversion of Parcel No.2244 from community land to private land, its disposal or use as private land contravened Article 63 of [the Constitution](#) of Kenya; the [Community Land Act](#); and Section 23(3)(5) of the [Land Adjudication Act](#);
 - xv. The ELC and this Court failed to settle the question whether the subdivision of Land Parcel No. 2244 into multifarious private lands including the suit properties contravened Article 63 of [the Constitution](#) of Kenya; the [Community Land Act](#); and Section 23(3)(5) of the [Land Adjudication Act](#);
 - xvi. The issues impact third parties and other cases that involve the conversion of Land Parcel No. 2244 from community land to private land, its subdivision, use, disposal and registration of multifarious private lands including the suit properties;
 - xvii. The ELC and this Court's reasoning eschewed the question whether Parcel No. 2244 and by extension the suit properties are community land or private land which question warrants the constitutional interpretation by the Supreme Court;
 - xviii. The reasoning of the ELC and this Court eschewed the question as to whether the customary rights of use and occupancy of community land that are recognized and protected by Section 23 of the [Land Adjudication Act](#) and Section 14 of the [Community Land Act](#) apply to Land Parcel No. 2244 in general and to the suit properties in particular.
4. The motion is supported by an affidavit sworn by the 1st applicant, Erastus Ndege Machuke on his own behalf and that of the other applicants rehashing the grounds on the face of the application and annexing a copy of the impugned judgment and a notice of appeal.
 5. The motion was opposed vide a replying affidavit sworn by John Kiura Ngari, the 1st respondent on his own and that of the 2nd, 5th and 7th respondents who deponed inter alia that the application is an abuse of the court process as it does not raise matters of general public importance and has not met



the threshold for certification. That the questions of law raised in the application were not in issue in the ELC or in this Court and it is therefore too late to raise them now; that Parcel No. 2244 was not the subject of litigation and does not exist, the dispute was between the parties herein over the suit properties which are owned individually and not communally. The 1st respondent averred further that the applicants' claim was that the respondents being the registered owners of the suit properties held them in trust for the applicants; that the applicants are introducing a new cause of action on the constitutionality of the land adjudication process contrary to the claim of existence of customary trust which was the subject of litigation.

6. Contextually, the appellants moved ELC vide case Embu ELC Case No. 240 of 2014 claiming that the suit properties registered in the name of the respondents were excised from parcel number Mbeere/Kirima/3394 which was a subdivision of original Land Parcel No. 2244. That Land Parcel No. 2244 measuring about 7000 acres was owned by seventeen (17) clans including the applicants' Marigu clan and the respondents' Ikambi clan and that during land adjudication, it was agreed that the land be subdivided and shared among the 17 clans. According to the applicants, the Ikambi clan portion of land was subdivided and allocated to the respondents' Marigu clan leaving them out despite their families having lived thereon from 1912. On this basis, the applicants sought for a declaration that the respondents held the suit properties in trust for them;
and for an order that the suit properties be registered in their names.
7. The respondents denied the applicants' claim and averred that Parcel No. 2244 belonged to the 17 clans. It was their contention that each clan including the applicants' Ikambi clan was allocated its portion of land to be shared out among its members and that each clan was directed to relocate to their respective portions. It was the respondents' case that they were residing on land allocated to them by their clan. That the 3rd and 6th respondents were not members of Marigu clan but purchased their land from members of Marigu clan. The 1st respondent counterclaimed against the 1st applicant over land parcel number 3683 claiming that the 1st applicant occupied the said parcel of land illegally.
8. Upon hearing the case, the ELC (Angima, J.) found in favour of the respondents that the applicants had failed to prove existence of customary trust. On appeal, this Court found that the suit properties were a subdivision of parcel number 3394 allocated to the respondents Marigu Clan as per the title documents produced and not the applicants' Ikambi Clan. Conclusively, this Court found that the applicant failed to establish that the respondents were registered as proprietors of the suit properties in trust for the applicants and thus dismissed the appeal and allowed the 1st respondent's counterclaim by ordering the 1st applicant to vacate the land parcel Mbeere/Kirima/3683.

Submissions by counsel

9. At the hearing of the application, learned counsel Mr. Gachuba represented the applicants while Mr. Duncan Okwaro represented the 1st, 2nd, 5th and 7th respondents. Both counsel had filed written submissions, which they highlighted. The applicants' submissions filed by Messrs. Mwaniki Gachuba Advocates in respect of the instant application are that the applicants are members of Mbeere community in Embu County which community had 17 clans whose land was vested in the County Council of Embu (now County Government of Embu) in trust for the 17 clans. That the 17 clans' land was purportedly consolidated and registered under the Registered *Land Act* (repealed) as private land under title deed number Mbeere/Kirima/2244 issued to the 17 clans as absolute proprietors. That the consolidation of the said clan land as private land and registration thereof as one block private land was contrary to Section 116 of the Constitution (repealed) and the *Land Consolidation Act*. That the said consolidation and conversion of trust land to private land and subsequent subdivision to



various parcels including the suit properties led the applicants to be deemed trespassers and in unlawful occupation of the suit properties, throwing out the Mbeere customary law.

10. Further, that the applicants lost their right to occupy the suit properties under the Mbeere customary law contrary to Section 69 of the Trust Land Act (repealed), Article 63 of *the Constitution* and the Community Land Act, 2016. The applicants' counsel submitted further that for the above reason there is need for the matter to be determined in a substantive appeal to the Supreme Court in public interest. That the application raises 18 points of law that were before the ELC and this Court but which were not settled conclusively. That the points of law raised bear self-revealing public interest not only to the 17 clans but to the entire Mbeere community noting that there are many land cases of similar nature and settlements of the points of law would guide other courts on dealing with the cases of community land and private rights and interests accrued from occupation of community lands.
11. The applicants' counsel relied on the Supreme Court decision in *Hermanus Philipus Steyn vs Giovanni Gnechchi-Ruscone* [2013] eKLR;

Issack M'Inanga Kiebia v Isaya Theuri M'Linrai & another (2015) eKLR and *Malcolm Bell v Daniel Toroitich Arap Moi & Another* (2013) eKLR to buttress their proposition. Counsel urged us to allow the application with costs.
12. Conversely, the respondents, through the firm of Messrs. Duncan Muyodi & Co Advocates, submitted in their written submissions that the application has not met the threshold for certification set out in Article 63(4) of *the Constitution* and the criteria set out by the Supreme Court and this Court. That the dispute between the parties was on the question of the existence of otherwise of a trust in favour of the applicants over the suit properties yet the intended appeal seek to challenge the constitutionality of the adjudication process which is a departure from the issues litigated before the High Court and this Court. That subdivision of the community land or registration of the clan land into individual private proprietors was not litigated before and is being introduced at this stage as an issue of appeal before the Supreme Court in contravention of the jurisdiction of the Supreme Court as an appellate court. Counsel urged this Court to dismiss the application and cited the authorities on certification of matters of general public importance in the Supreme Court case of *Hermanus Philipus Styn* (supra) and *Thika Coffee Mills vs Rwama Farmers' Co-operative Society Limited* [2020] eKLR that :

“... the Court of Appeal's reasoning was that those questions did not come through the Court hierarchy and were therefore not subject to decisions the basis upon which the intended appeal could lie.”

Determination

13. We have considered the application; the grounds in support thereof, the reply, the authorities cited and the law. The issue for determination before us is whether the applicants' application merits the grant of certification of the intended appeal to the Supreme Court on ground that it involves issues of general public importance as provided under Article 163(4)(b) of *the Constitution*.
14. The guiding principles for certification under Article 163(4)(b) of the Constitution were laid out by the Supreme Court in the case of *Hermanus Phillipus Steyn* (supra) that:

“60. ... In summary, we would state the governing principles 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 a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

1. What constitutes a matter of general public importance was explained by the Supreme Court in the same case of Hermanus Phillipus Steyn (*supra*) that:

“... 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 impacts 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 concerns.”

16. The applicants’ main grounds in support of the application and arguments are that the ELC and this Court failed to settle the questions:

- i. whether the conversion of Land Parcel No. 2244 from community land to private land, its disposal or use as private land contravened Article 63 of *the Constitution* of Kenya, 2010; the *Community Land Act*, 2016 and Section 23(3)(5) of the *Land Adjudication Act*, Cap 284;
- ii. whether the subdivision of Land Parcel No. 2244 into multifarious private lands including the suit properties contravened Article 63 of *the Constitution* of Kenya, 2010; the *Community Land Act*, 2016 and Section 23(3)(5) of the *Land Adjudication Act*, Cap 284 and
- iii. whether the customary rights of use and occupancy of community land that are recognized and protected by Section 23 of the *Land Adjudication Act*, Cap 284 and Section 14 of the *Community Land Act*, 2016 apply to Land Parcel No. 2244 in general and to the suit properties in particular.



1. A perusal of the claim before the ELC and this Court as highlighted above indicates that the applicants did not raise any constitutional issue for determination during trial or on the appeal to this Court. The applicants' contention of the constitutional violation of Article 63 of *the Constitution* as regards conversation of Land Parcel No. 2244 is a new matter raised in the instant application. The applicants' claim before the ELC was that the respondents were holding the suit properties in trust for them, which claim they failed to substantiate as held by the ELC and affirmed by this Court.
18. The Supreme Court in *Thika Coffee Mills v Rwama Farmers Co- Operative Society Limited* (supra) pronounced itself as follows:

“As for certification, we reiterate that the Applicant has to demonstrate satisfactorily that there is, inter alia, a legal question the subject matter of which transcends the present litigants.”
19. Further, the Supreme Court in the case of *Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone* [2013] eKLR held as follows:

“ In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below...”
20. By parity of reasoning, it is our finding that the issues raised by the applicants have no bearing on the public interest noting that the issue of the dispute is based on land ownership between the applicants and the respondents with no effect to the entire Mbeere community as alleged by the applicants. Further, the applicants have not raised a legal question the subject of which transcends the current litigants.
21. In the circumstances, we find that the applicants have failed to meet the required threshold and to satisfy this Court that the intended appeal raises issues of general public importance to warrant certification to appeal to the Supreme Court. The upshot is that the notice of motion dated 15th January, 2024 has no merit and is dismissed with costs to the 1st, 2nd, 5th and 7th respondents. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

