



to the High Court and the appeal was likewise dismissed, whereupon he filed the above appeal.

- (b) The appeal was heard and judgment delivered on 14<sup>th</sup> November 2011, was allowed with costs, whereupon the Court issued an eviction order in favour of the respondent.
- (c) The applicant bought the suit land from one Freddie Kaggwa in 1996, Kaggwa having in turn bought the land from one Kapere in 1974.
- (d) Being aggrieved by the decision of the Court, the applicant has since filed a notice of appeal

### **Grounds of the application**

The grounds of the application as set out in the Notice of Motion are that:

- (e) The intended appeal concerns questions of law of great importance as they touch on the property interest of thousands of kibanja occupants, relates to a decision based on what appear to be errors manifest on the record which has grave consequences and tends to offend public policy.
- (f) The decision appealed against has drastic consequences on the party directly affected and on the general public
- (g) It is in the interest of justice that the application be allowed.

The Motion is supported by the affidavit of the applicant, ASUMANI MUGYENYI sworn on the 24<sup>th</sup> day of November, 2011. The relevant paragraphs of that affidavit are 8 and 9 which are set out as follows:-

- 8. That I have been informed and/or advised by my Advocate Benson Tusasirwe, my lawyer whose information/advice I believe to be correct that the intended appeal concerns a matter of law of great public or general importance, to wit:-
  - a. The finding at page 12 of the judgment of the learned Mpagi Bahigaine, DCJ, with which the other Justices concurred, that "it is thus crystal clear that the law applicable to the transaction between Kaggwa and Kapere is the Land Reform Decree 1975" which was based on the erroneous finding that the transaction took place in 1994, which led the Court to the conclusion that the said transaction by which Kaggwa, my predecessor in title, acquired the kibanja interest was void.
  - b. The finding, which also resulted from the erroneous finding above, that since I acquired the kibanja interest from a person whose acquisition was

also void, my title was also likewise void and that in those circumstances, I was not a bonafide or lawful occupant, protected by Section 29(2) of the Land Act, 1998.

- c. The question of whether failure to obtain consent of the Kabaka of Buganda and/or to give notice to the prescribed authority when Freddie Kaggwa purchased the suit kibanja from Kapere, rendered the purchase void, and the related question of whether my purchase of the land, without seeking the consent of the Registered Proprietor of the mailo interest or giving notice and/or seeking consent of the prescribed authority rendered the purchase by myself void. I am informed by the said Benson Tusasirwe, whose information I verily believe to be correct that the Court's finding that the transactions were void is in conflict with existing precedents.
- d. The finding, at page 9 of the judgment aforesaid, that "all acquisitions (of land) before the Land Act 1998 derive validity from the 1975 Decree (and that they have the authority and consent of the registered proprietor under Section 4 (2) of the Decree..." which I believe to be erroneous, considering that Section 4(1) of the Decree only requires the parties to kibanja transactions to be given "notice", not seek "authority" or "consent" of the registered proprietor
- e. The finding, at page 14 of the said judgment that "it was erroneous to investigate the pre-sale process", which finding I believe to be erroneous, considering that the existence of the genuine customary occupants, entitled to protection under the law, could only be established by looking at the state of affairs before the respondent acquired title.
- f. The question of whether, even if the sale of the suit kibanja by Kapere to Kaggwa, and by Kaggwa to me was void, that would entitle the registered proprietor to obtain an eviction, or whether the sale being void, the kibanja interest would revert to the previous kibanja holder.
- g. The question of whether the withdrawal of an application to strike out an appeal filed out of time rendered the appeal competent, when it was filed out of time.
- 9. That I verily believe that the above questions of law are of public or general importance because:-
  - a) They affect thousands of kibanja occupants who are in a similar position as myself, namely who innocently acquire interest from well

*established occupants, and proceed to put up costly developments on the land, only to be told that their acquisitions were void and should pass to the registered proprietor. Indeed there are over 50,000 residents of similar nature on the land held by the respondent, which is about one square mile.*

- b) The decision was based on a material error manifest on the record, and the consequences of the error on property rights are very grave.*
- c) It would be prejudicial to the society generally for a decision based on error, and which is at odds with existing precedents, to remain on the law books as decision of a Court of record, and it is the public interest as set the record straight.*
- d) It is against public policy for the Court to confer a windfall on the respondent in form of kibanja and developments thereon, and would amount to unjust enrichment.*

The respondent filed an affidavit in reply contending that there is no merit in this application, as there is no question of law of great public importance that arises from the intended appeal for the Supreme Court to consider.

### **Representation**

At the hearing of this appeal, Mr. Tusasirwe Benson (counsel for the applicant) appeared for the applicant while Mr Kabundama Kizza and Mr Iga Stephen (together counsel for the respondent) appeared for the respondent. Both parties were in Court.

Counsel for the respondent sought leave of Court to validate an additional authority which he had filed the previous day. Counsel for the parties applied to adopt their respective conferencing notes as submissions. They, in addition, addressed Court orally.

### **Counsel for the applicant's submissions**

Counsel for the applicant submitted that this Court was misled by a typographical error as to the date of purchase, (1994 instead of 1974) of the suit kibanja by Kaggwa, the successor in title to the applicant and, having done so, it came to a finding that the law applicable to that purchase was the Land Reform Decree of 1975. That, the Court misread S.4 of the said Decree, to come to the holding that the seller of land under that law was required to seek the authority and consent of the Prescribed Authority. Yet the section only requires the seller to give prior notice to the Prescribed Authority. That the requirement

of notice has been held not to nullify a transaction according to the Supreme Court decision in **Tifu Lukwago v Samuel Mudde Kizza, SCCA No.13 of 1996** contrary to the case of **Paul Kisekka Saku v Seventh Day Adventist Church, SCCA No.8, 1993** which this Court relied on.

That these conjoined errors became the determinants in the Court reaching the decision that the applicant's purchase from Kaggwa in 1996 was invalid as Kaggwa had nothing to sell to him. This was made worse by the further erroneous finding that the purchase by Kaggwa "clearly flouted the provisions of the Land Act", when that Act was not yet in force even by the time Kaggwa sold in 1996 leave alone when he bought.

That the consequences of these errors were drastic because they determined the validity of the applicant's ownership and they conferred a windfall on the respondent through an eviction order; because Court found that necessary consents were not obtained, when none were required by law.

Counsel for the applicant contended that the judgment of this Court has the effect of depriving about 50,000 people of their bibanja holdings on the respondent's title which covers over a square mile, thus making the intended appeal of great public importance.

#### **Counsel for the respondent's submissions**

In response, counsel for the respondent submitted that the only issue for resolution is whether the applicant has demonstrated in this application that his intended appeal raises questions of law of great public or general importance to warrant the grant of a certificate of importance by this honorable Court, which, he contended the applicant had failed to do.

Counsel argued that there was no evidence in this application to support the argument that the suit land was purchased in 1974, and not 1994. He contended that even if it were true that the purchase was in 1974, the applicant had not demonstrated that he obtained the required consent according to S.8(2) of the Busuulu and Envujjo Law of 1928. That payment of Busuulu did not amount to consent and did not give anyone permission to transfer their kibanja interest but only allowed them to settle on the same.

Regarding the **Tifu Lukwago** case supra, Counsel submitted that it is distinguishable from the **Paul Kisekka** case supra because the dispute was between two people who had purchased the same piece of land from one person, not whether consent was necessary or not. That the issue in the **Tifu** case supra was whether the custom had been complied with during the

purchase of the suit land which was not the case in the present application and the holding that counsel for the applicant referred to was *obiter dicta* which were contrary to existing statutory provisions.

Counsel submitted that the Prescribed Authority under the Land Reform Decree was the Uganda Land Commission.

Regarding the 50,000 people affected by the judgment, counsel submitted that the judgment cannot be enforced against non parties and that there was no evidence to prove the allegation that there were 50,000 people on the suit land.

On being deprived of property, Counsel contended that the respondent is equally being deprived of his land as a registered proprietor. That the applicant used his position as DPC to forcefully construct on the respondent's land.

### **Submissions in rejoinder**



In rejoinder, Counsel for the applicant reiterated his submission that the Prescribed Authority was not known and that Counsel for the respondent referred to the Controlling Authority which was not the same as the prescribed authority. That the holding in **Tifu Lukwago** case supra on lack of consent not being fatal was not *obiter dicta* and that, the Land Reform Decree required notice to the prescribed authority, not consent.

### **Court's resolution**

We listened carefully to the submissions both counsel and read the Court record including the Judgment of this Court which was availed to us subsequently. We have carefully considered both.

Section 6(2) of the Judicature Act Cap 13 under which this application is brought stipulates as follows:

**“Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard”.**



From the foregoing, this Court may only issue a certificate under the above law when satisfied of the following instances:-

- i. ***Where the intended appeal to the Supreme Court concerns a matter of law of great Public importance.***
- ii. ***Where the intended appeal raises a matter of law of general importance”***

Put in another way, for this Court to grant a certificate sought by the applicant herein, it must be satisfied that the intended appeal to the Supreme Court concerns a matter of law and the said matter of law must be either of great public importance or of general importance. It is trite that the onus is on the applicant to satisfy Court that indeed the question intended to be determined on appeal is one of great public or general importance.

The law does not define the terms 'great importance and or general importance' referred to in Section 6(2) of the Judicature Act. We have sought guidance in this matter from a recent decision of the Supreme Court of Kenya in ***Hermanus Phillippus Steyn vs Giovanni Gneccchi-Rusccone Application No. 4 of 2010 (Supreme Court of Kenya)*** in which that Court whilst dealing with a similar matter stated as follows:-

***“A matter of general public interest could take different forms for instance, an environmental phenomenon involving the quality of air or water which may not affect all people, yet it affected an identifiable section of the population, a statement of law which may affect a considerable number of people in their commercial practice or in their enjoyment of fundamental or contractual rights or a holding on law which may affect the proper functioning of public institutions of governance or the Court's scope for dispensing redress or the mode of discharge of duty by public officers”.***

Their Lordships listed the following principles that should exist before a Court can grant a certificate of importance:

- i. ***for a case to be certified as one involving a matter of general public importance, the intending appellant ought to have satisfied the Court that the issue to be canvassed on appeal was one the determination of which transcended the circumstances of the particular case and had a significant bearing on the public interest;***
- ii. ***where the matter in respect of which certification was sought raised a point of law, the intending appellant ought to have demonstrated that such a point was a substantial one, the***

**determination of which would have a significant bearing on the public interest;**

- iii. such question or questions of law must have arisen in the lower Courts and must have been the subject of judicial determination;**
- iv. where the application for certification had been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court could 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 in a matter most apt for resolution in the lower superior Courts was 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 ought to fall within the terms of Article 163 (4) (b) of the Constitution;**
- vi. the intending applicant had an obligation to identify and concisely set out the specific elements of general public importance which he or she attributed to the matter for which certification was sought;**
- vii. determinations of fact in contests between parties were not by themselves, a basis for granting certification for an appeal before the Supreme Court”.**

We are persuaded by the above authority and would adopt the reasoning of that Court.

We note from the Judgment of this Court that the issue of the year of purchase of the suit land and the law applicable were in contention. Counsel for the appellant (now the respondent) submitted that all purchases took place before the 1998 Land Act and therefore the applicable law at the time the respondent (now the applicant) and his predecessor acquired the land was the Land Reform Decree. Counsel for the respondent/applicant submitted that Kaggwa acquired the kibanja in 1974, not 1994 thus the seller to the respondent bought the kibanja in 1974 at which time the Land Reform Decree did not apply. In the Judgment of this Court, it was held that “...According to section 17, the Land Reform Decree No.3 1975 came into force on 07/05/1975 whereas the Land Act 1998 commenced on 02/07/1998. It is crystal clear that the law applicable to the transaction between Kaggwa and Kapere is the Land Reform Decree 1975”. This is the issue in the intended Appeal.



We are of the considered view that the 50,000 people that may be affected by the impugned decision is a considerable number. In **Belinda Murai & 9 others v Amos Wainaina [1978] KLR**, Justice E.J.E Law, JA, held that **"There is evidence that about 30% of all Kikuyu homelands is occupied by Ahoi (the plural of Muhoi) and that if the decision in the suit is upheld a large number of Kikuyu land owners will be liable to lose land which by custom cannot pass to a Muhoi by adverse possession. This, to my mind, is a question of general public importance in that it would affect a large number of citizens of Kenya and not merely the parties to the intended appeal".** [Emphasis added]. We are persuaded by this authority and are of the view that this application qualifies as a matter of general public importance as it may affect about 50,000 people who claim to have their bibanja holdings on the respondent's titled land though may not necessarily be parties to the intended Appeal.

We therefore, consider that the issues in the intended Appeal are points of law of considerable public importance with novelty and warrant certification to the Supreme Court. The Application is allowed and the applicant is hereby granted a certificate of importance. Costs of the application shall abide the outcome of the Appeal.

We so order.

Dated this..... day of..... 2016

HON. MR. JUSTICE S.B.K KAVUMA, DCJ

HON LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

22/5/2016  
Simon Kirga for Respondent  
Applicant present  
D. M. S. B. K. Kavuma C/C  
in Court