

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
Coram: Owiny - Dollo, CJ; Mwendha; Tibatemwa-Ekirikubinza; Tuhaise &
Chibita, JJSC

Miscellaneous Application No. 41 of 2020

(Arising from Court of Appeal Civil Appeal No. 89 of 2019)

(Arising from High Court Civil Appeal No. 0010 of 2017)

1. Olal Mark

2. Olal Jimmy

3. Taban Paul

4. Oola Peter

5. Komakech Mario

6. Ocan Charles

7. Anjelina Atto

.....

Applicants

Versus

Kaggwa Michael

.....

Respondent

Ruling of Court

This application was brought by way of Notice of Motion under Rule 39 of the Judicature (Supreme Court Rules) Directions SI 13-11. The Applicants seek orders, that:-

1. The intended appeal raises issues of great public and or/general importance.

2. Leave to lodge an appeal in the Supreme Court against the Judgement and Orders of the Court of Appeal in Civil Appeal No. 89 of 2019 be granted to the Applicants.
3. Costs of this application be provided for.

The application was supported by the sole affidavit of the 4th Applicant, Oola Peter, as authorized by some of the Applicants. The grounds of the application, are:-

1. That the applicants are dissatisfied with the whole judgement of their Lordships delivered on 25/06/2020 in CACA No. 89 of 2020.
2. The applicants filed an application to obtain leave to appeal to this honourable court and the same was denied by the Court of Appeal.
3. That the intended appeal involves questions of great public importance and/or general importance with regard to *bona fide* occupancy in Uganda.
4. That it is in the interest of justice that the application is allowed.

Background

The Applicants filed Civil Suit No. 51 of 2011 against the Respondent before a magistrate grade 1 in the Chief Magistrates Court of Gulu, for a declaration that they are joint owners of a plot of land at, Kanyagoga "A" sub ward, Kanyagoga "A" Parish, Bar-Dege Division, Gulu, general damages for trespass to land, *mesne* profits, a permanent injunction, interest, and costs. The magistrate's court declared the Applicants to be the lawful owners of the suit land, in addition to granting an eviction notice and a permanent injunction against the Respondent.

The Respondent appealed to the High Court against the decision of the trial magistrate. The High Court overturned the trial court's decision and declared the Respondent to be the rightful owner of the suit land. The High Court accordingly granted the Respondent vacant possession of the suit land, a permanent injunction, and Uganda shillings 20,000,000/= (twenty million) in general damages with interest at the rate of 8 percent per annum, and costs of the appeal in that court and the court below, against the Applicants. This was based on the court's finding that there was no evidence of occupancy by Okumu Lagwee, from whom the 1st Applicant claimed to derive interest on the land on the suit land prior to 2009; and that the 3rd to 7th Applicants were refugees, hence non-citizens of Uganda who were precluded by Article 237 (2) (c) of The Constitution of the Republic of Uganda and section 40 of the Land Act, from holding land in Uganda under customary tenure.

The Applicants, being dissatisfied with the decision of the High Court, appealed against the decision to the Court of Appeal *vide* Civil Appeal No. 89 of 2019. The Court of Appeal, which was the second appellate court, dismissed the appeal for lack of merit and dismissed it with costs.

The Applicants were aggrieved by the judgement and orders of the Court of Appeal. In a bid to file a third appeal, they first filed Miscellaneous Application No. 125 of 2020 before the Court of Appeal, for leave to lodge an appeal to the Supreme Court. The application was dismissed with costs. They have now filed the instant application for the orders as prayed above, in effect, seeking this Court to grant them a certificate of public importance,

and an order of leave to appeal to the Supreme Court on a third appeal against the judgement and orders of the Court of Appeal.

Representation

At the hearing of this application, the Applicant was represented by Mr. Kafeero Alexander. The Respondent, Mr. Kaggwa Michael, represented himself. The parties filed written submissions.

Applicants' submissions

Learned Counsel for the Applicants submitted that the issue in the application concerns a question of law regarding the law governing nationality and *bona fide* occupancy of land in Uganda. He submitted that it was clearly brought before all the lower courts that the 1st Applicant, Olal Mark, was born to the late Okumu Peter Lagwe in 1946. He lived on the suit land from then until he buried his father Okumu Peter Lagwe on the said land; that the 4th Applicant Mr. Oola Peter was born on the suit land in 1977 and lived there throughout his teenage and adult life, bearing witness to many burials of his relatives on the said land unchallenged by anyone; and that the 5th Applicant was born on the suit land in 1978 and has since lived there and even raised a family on the same land. Counsel also submitted that the Respondent only attempted to challenge the occupancy of the said applicants in 2009, fourteen years after the coming into force of the 1995 Constitution of Uganda; that at the time of challenging the same, the suit property was already developed by the Applicants who had enjoyed rights over it without any form of challenges from the Respondent or any person.

Counsel further submitted that both the first and the second appellate courts restricted their judgements to the question of nationality of the Applicants when they held that they were Sudanese Refugees who could not own land customarily in Uganda. He argued that this was in total disregard of the fact that all the said Applicants were born on the said land, which in its self would make them Ugandans owing to the fact that their great grandfather Mr. Okumu Peter Lagwe was an indigenous Ugandan of the Acholi tribe, and all the Applicants derived their equitable interest on the said land through him.

Counsel contended that the Applicants, by virtue of living on, and developing the said land unchallenged for more than the required 12 years, automatically acquired fundamental rights over the said property, and that losing the property by reason of a questionable point of nationality would have some problematic consequences that transcend the facts of the dispute between the present parties.

Counsel submitted that the decision and interpretation by the first and second appellate courts may have dire consequences for *bona fide* occupants who may have been as a result of immigration but have been born and raised on a piece of land unchallenged; that from that perspective, the lower courts' interpretation is a point of law of public importance which merits reconsideration by the Supreme court as a final appellate court.

Counsel submitted that this Court has a wider scope within which it can act in regard to such an application compared to the Court of Appeal; that Section 6 (2) of the Judicature Act gives this Court the mandate to grant

leave, if in its overall duty to see that justice is done, it is of the view that the appeal should be heard. He relied on the cases of **Namuddu Christine V Uganda, Supreme Court Civil Application No. 3 of 1999** to support his submissions.

Counsel submitted further, that the Constitution of the Republic of Uganda provides rights to all persons among which includes the right to life, which extends to that of livelihood. He contended that in this particular case, the ownership of the land and the developments thereon extends to the applicants' right to life. He implored this Court to find it just to grant them one more chance to reclaim the property they have known their entire life, and thus protect their right to life.

Counsel cited the decision in the case of **Kasaala Growers Co-operative Society V Jonathan Kalemera & Anor, Supreme Court Civil Application No. 24/2010**, and submitted that this Court correctly stated that in land cases, it is proper to allow parties to exhaust their proper legal rights of appeal. He submitted that, in that context and in the interest of justice, the Applicants' application meets the threshold for the grant of leave to appeal to this Court. He prayed that this Court be pleased to grant the orders sought in the application.

Respondent's submissions

The Respondent submitted **in reply** that the issue of nationality and *bona fide* occupancy of land in Uganda cannot be issues of great public importance when the Constitution of the Republic of Uganda, the Land Act, and the

Refugees Act clearly state how non-citizens of Uganda can acquire land under leasehold tenure system only. He further submitted that it is not enough for the 4th Applicant to state in his affidavit that a question of great public or general importance arises without showing this Court how it arose.

In addition, he submitted that the 4th Applicant changed the two issues he raised in the Court of Appeal for consideration and determination to be issues of nationality and *bona fide* occupancy of land in Uganda, which were not the issues for consideration and determination by the Court of Appeal. He contended that, therefore, issues of nationality and *bona fide* occupancy of land in Uganda cannot be raised in the Supreme Court now since they were not raised in the Court of Appeal. He submitted that the determination of fact in contest between parties is not by itself a basis for granting a certification for an appeal before the Supreme Court.

Consideration of the application

The record shows that the matter before this Court originated from the Chief Magistrate's Court of Gulu, presided over by a magistrate grade 1. It went on appeal, first to the High Court, and then the Court of Appeal where the Applicants were not successful. The Applicants' subsequent application to be granted leave by the Court of Appeal to lodge a third appeal to this Court was also dismissed by the Court of appeal, which is the reason, through the instant application, they require this Court to allow them present it in this Court on a third appeal. The Applicants maintain that the intended third appeal to this Court raises a matter of great public importance and a matter of law of general importance.

The law governing third appeals to this Court in civil matters is the Judicature Act, section 6 (2) of which provides that where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade 1 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.

This position is specifically captured in Rule 39 (1) (b) of the Judicature (Supreme Court) Rules, which would apply to the circumstances of the instant application, and it provides as follows:-

"if the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the court within fourteen days after the refusal to grant the certificate by the Court of Appeal for leave to appeal to the court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done."
(underlined for emphasis).

Thus, in determining this application, the issues to address is whether or not the Applicants have, in their application, raised such matters as contemplated by section 6 (2) of the Judicature Act and Rule 39 (1) (b) of the Judicature (Supreme Court) Rules, that is, that the intended appeal raises

one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done.

It was emphasized by this Court in the case of **Namuddu Christine Vs Uganda, Supreme Court Civil Application No. 03 of 1999** (Wambuzi CJ, that:-

"Under subsection (5) of s.6, this Court will grant leave if the court, in its overall duty to see that justice is done, considers that the appeal should be heard. In other words, this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied: (a) that the matter raises a question or questions of law of great public importance; or (b) that the matter raises a question or questions of law of general importance.

On the other hand, this Court will grant leave if it considers that in order to do justice, the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.

It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal. We have power to consider other matters. In that respect we do not...agree...that the applicant must necessarily show that a certificate should be given." (underlined for emphasis).

Similarly, in **Farook Aziz (Administrator of Estate of Salma Kabasingo) Vs Abdalla Abdu Makuru, Supreme Court Civil Appeal No. 04 of 2002**, Odoki

CJ, regarding section 7 (2) of the Judicature Statue, now 6 (2) of the Judicature Act, also observed that:-

“The purpose of this provision is to limit the right to lodge a third appeal to only cases where questions of great public or general importance which have far reaching consequences on the society and the general development of the law are involved. It is not sufficient that the grounds of objections raise questions of law, or that the parties have consented to the granting of certificate to the appellant to leave to appeal. The appellant must state the matter of great public or general importance.”

The Supreme Court of Kenya, in **Hermanus Phillipus Steyn V Giovanni Gneccchi-Ruscione, Application No. 4 of 2010 (Supreme Court of Kenya)**, defined the phrases, “*great public importance*” and “*general importance*”, which we find persuasive, that:-

“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 Courts’ scope for dispensing redress or the mode of discharge of duty by public officers.”

We shall be guided by the foregoing principles and definitions when considering or resolving the instant application. To that extent, we would agree with the submissions by the applicants’ Counsel that this Court has a

wider scope within which it can act in regard to this application, compared to the Court of Appeal.

We have carefully considered the adduced evidence on record, the circumstances of the case from which this application arises, and the submissions from both sides, alongside the applicable laws and principles stated above.

In the instant application, the Applicants contend that the question of public or general importance in this case is in regard to a question of law regarding the law governing nationality and *bona fide* occupancy of land in Uganda. The land in question is located at Kanyagoga "A" sub ward, Kanyagoga "A" Parish, Bar-Dege Division, Gulu. It is not in dispute that the land is held under customary tenure.

The Applicants maintain that they have lived on the suit land unchallenged for 12 years, and that, as such, they qualify to be *bona fide* occupants; but that, however, the first and second appellate courts dismissed their appeals on the basis of nationality. It was submitted for the Applicants that both the first and the second appellate courts restricted their judgements to the question of the Applicants' nationality when they held that the 3rd to the 7th Applicants were Sudanese Refugees who could not own land customarily in Uganda. The Applicants' argument is that this was in total disregard of the fact that all the said Applicants were born on the said land, which, in its self, would make them Ugandans, owing to the fact that their great grandfather Mr. Okumu Peter Lagwee was an indigenous Ugandan of the Acholi tribe; and that all the Applicants derived their equitable interest on the said land

through him. According to the Applicants' Counsel, since section 29 of the Land Act is silent on the nationality of a *bona fide* occupant, there should be no bar to the Applicants to qualify to be *bona fide* occupants, having stayed on the land unchallenged for 12 years.

We have perused the judgments of the lower courts and found nothing to suggest that the said courts addressed or deliberated on the question regarding the law governing nationality and *bona fide* occupancy of land in Uganda, which the Applicants have chosen to present to this Court as a matter of public importance.

In his judgment at page 16, last paragraph, the first appellate court Judge stated:-

"Being refugees and hence non-citizens, the third to seventh respondents are precluded by article 237 (2) (c) of The Constitution of the Republic of Uganda, 1995 and section 40 of the Land Act, from holding land in Uganda under customary tenure. They are restricted to holding land under leasehold tenure only. It was therefore erroneous of the court below to have decided in their favour when the land in dispute is held under customary tenure."

This clearly shows that the High Court's finding that the 3rd to 7th Applicants were refugees and hence non-nationals, was the basis upon which the said court found they could not be the owners of the suit land which was held under customary tenure.

At the Court of Appeal, the grounds of appeal were that:-

1. *The learned trial judge erred in law when he failed to re-evaluate the evidence on record hence arriving at a wrong decision that the Plots 65/91 and 117 are one and the same whereas not and thereby occasioning a miscarriage of justice.*
2. *The learned justice of the High Court erred in law when he awarded the remedies sought by the Respondent.*

The question of the law governing nationality and *bona fide* occupancy of land in Uganda; or even that of the nationality of the 3rd to 7th Applicants (appellants then), as can be deduced from the foregoing two issues above, as well as the record, are not part of the grounds of appeal at the Court of Appeal. Though the first appellate court had deliberated on the issue of the nationality of the 3rd to 7th Applicants, the record shows that the Applicants did not appeal against the decision. Indeed, in the determination of Miscellaneous Application 125 of 2020, the Court of Appeal categorically stated that the question of nationality was not canvassed as a ground of appeal and could not be the subject of a decision of the Court of Appeal whether or not to grant a certificate of importance to the Applicants therein.

The record indeed shows that the Court of Appeal, when sitting as a second appellate court, after noting that the only ground argued in the appeal, and the decision on which the second ground revolved, was ground 1.

Thus, based on the foregoing findings, we find it to be misleading on the part of the Applicants to submit before this Court that the Court of Appeal's decision was based on nationality. The issue on nationality was clearly neither raised, nor litigated upon, at the Court of Appeal.

Secondly, based on the adduced evidence on record, it is clear that the issue regarding the 3rd to 7th Applicants' claims to holding land in Uganda under customary tenure through *bona fide* occupancy was clearly determined by the two lower appellate courts, that, being refugees and thus non-citizens of Uganda, they cannot own land under customary tenure. Regarding the 1st and 2nd Applicants who claimed to be Ugandans by virtue of being lineal descendants of the late Okumu Lagwee, the first appellate court found no evidence of occupancy by Okumu Lagwee, through whom the 1st Applicant claimed to derive interest on the suit land prior to 2009. These findings of the first appellate court were not faulted by the second appellate court. The issues at stake in the matter were clearly wholly disposed of by the said courts.

Further, with respect, we find the submissions by the applicant's Counsel, maintaining that all the Applicants are Ugandans, to be contrary to the decision of the High Court which, based on adduced evidence, found the 3rd to 7th Applicants to be Sudanese refugees. This finding, as the record shows, was not appealed against by the Applicants. Besides, we also find it to be a contradiction for the Applicants' Counsel to insist in his submissions that all the Applicants are Ugandans, and at the same time seek this Court to decide a matter on whether nationality is a consideration for one to become a *bona fide* occupant.

The Applicants' Counsel's further, in his submissions, contends that, since section 29 of the Land Act is silent on the nationality of a *bona fide* occupant,

there should be no bar to the Applicants to qualify to be *bona fide* occupants, having stayed on the land unchallenged for 12 years.

Section 29 (2) of the Land Act Cap 227 defines a *bona fide* occupant, that:-

(2) "*Bona fide occupant*" means a person who before the coming into force of the Constitution

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

(b) (underlined for emphasis).

It is clear from the foregoing provisions that the definition of *bona fide* occupant under the law makes no specific reference to any nationality. It is probably on that basis that learned Counsel for the Applicants argues, and correctly so, that nationality is not a prerequisite for a person to qualify as a *bona fide* occupant.

Learned Counsel for the Applicants called upon this Court to handle the issue of the nationality of a *bona fide* occupant as a matter of public importance, that in the event that this Court does not handle it, it would have some problematic consequences that transcend the facts of the dispute between the present parties.

In our considered opinion, while the provisions of the Land Act, Cap 227, do not specify that nationality matters regarding who can be a *bona fide* occupant, when determining the rights of parties on any land, the said provisions have to be read with the Constitution of the Republic of Uganda

which not only sets out the tenure systems, but also defines who qualifies to acquire what interest in land in Uganda.

Article 237 (1) on land ownership, states that:-

"Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."
(underlined for emphasis).

In addition, Article 237 (2) (c) states that:-

"non-citizens may acquire leases in land in accordance with the laws prescribed by Parliament, and the laws so prescribed shall define a noncitizen for the purposes of this paragraph." (bolded and underlined for emphasis).

The foregoing constitutional provisions are clearly to the effect that non-citizens cannot own land in Uganda by other means other than a leasehold. Since the case from which the instant application arose evolved around ownership of land under customary tenure, that was the perspective within which the two lower appellate courts considered the matter. It would have been speculative and uncalled for, in our considered opinion, for the two lower appellate courts to address questions of whether the said Applicants, being non-citizens, could hold land under other forms of land tenure, other than customary land tenure, through *bona fide* occupancy. This was simply because the facts of the case before them did not present such issues.

It would thus be a misdirection for the Applicants to stretch the issue from ownership of land under customary tenure by non-Ugandans based on *bona fide* occupancy to such land, which was before the two lower appellate courts and which was clearly determined by the said courts, to general questions regarding the law governing nationality and *bona fide* occupancy of land in Uganda, which were not issues before the said courts. In that connection, this Court would be put on a wild goose chase by the Applicants if it proceeded to address such general questions to do with the issue of the nationality of a *bona fide* occupant as a matter of public importance, yet the same were not the issues before the two lower appellate courts.


Thus, on basis of the definition of a *bona fide* occupant under section 29 of the Land Act, when read together with Article 237 (2) (c) of the Constitution of the Republic of Uganda and section 40 of the Land Act, and when applied to the circumstances of the case from which the instant application arose, this Court finds that, not only did the lower courts properly determine the matters raised before them, there were also no questions of public or general importance raised by the Applicants which would be proper for this Court to review in order to see that justice is done.


In conclusion, we find that the Applicants have not satisfied this Court to make a finding that the question of *bona fide* occupancy for refugees/immigrants is a prevalent issue bearing on the public interest of Uganda. As such, it is our finding that there is no issue of great public importance raised in the application.


In that regard, we decline to allow the application. It is accordingly dismissed with costs to the Respondent.


Dated at Kampala this 19th day of January 2024.



Alfonse Owiny-Dollo
Chief Justice


Faith Mwendha
Justice of the Supreme Court


Prof. Lillian Tibatemwa-Ekirikubinza
Justice of the Supreme Court


Percy Night Tuhaise
Justice of the Supreme Court


Mike Chibita
Justice of the Supreme Court

Delivered by the Registrar on the
19th / 1 / 2024
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