**Kimweli & 46 others v National Social Security Fund (Civil Appeal (Application) E002 (SUP) of 2023) [2024] KECA 202 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 202 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL (APPLICATION) E002 (SUP) OF 2023**

**FA OCHIENG, PM GACHOKA & WK KORIR, JJA**

**FEBRUARY 23, 2024**

**BETWEEN**

**PETERKEEN MWIU KIMWELI & 46 OTHERS ..... APPLICANT**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT**

***(Being an application for certification and leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nakuru (Sichale, Achode, & Korir, JJ.A.) dated 30th June 2023inCACA No. E020 of 2021)***

**RULING**

1. The application before us is dated 21st July 2023. The application is brought under Article 163(3)(b) & (4) of *the Constitution*, rules 24 and 26 of the *Supreme Court Rules* and rule 40 of the *Court of Appeal Rules*. The applicant prays for orders that:

> " a) The court be pleased to grant the applicants certification to lodge their appeal against the judgment of this court delivered on 30th June 2023 at the Supreme Court because it raises a point of law of general public importance concerning the employees' right to lawful expectation as provided for by Articles 27, 41 and 47 of *the Constitution*, Section 14 of the Labour Relations Act}}, and Section 5 of the *Employment Act*.
>
> b. Costs be provided for."

2. The application is premised on the grounds that:

> " a) The court's judgment was not supported by the law.

b. The court's judgment was grounded on presumptions and the individual opinion of the judges and relates to a matter of public interest in so far as the terms of the PWC report and its adoption, approval, and implementation by the board vis a vis the terms of the Human Resource Manual and Article 41 of *the Constitution* is concerned.

c. The court's judgment is unconstitutional and a violation of the applicants' rights."

3. The application is supported by the affidavit of Peterkeen Mwiu Kimweli sworn on 21st July 2023. He states as follows:

"a) The applicants were aggrieved by the judgment dated 30th June 2023 and they therefore, lodged a notice of appeal dated 13th July 2023.

b. The applicants want to appeal concerning their right to lawful expectation and the right to protection against discrimination relating to employment, and the terms of exit from employment, which is a matter of public interest as it affects employees who have been in the employment of the respondent.

c. If the court denies the applicants leave, they stand to suffer great irreparable loss as they stand to lose their accrued lawful benefits under the updated terms of employment."

4. There was no response from the respondent.

5. When the application came up for hearing on 20th November 2023, Mr. Museve, learned counsel appeared for the applicants.. Counsel relied on his written submissions, which he highlighted orally. There was no appearance by the respondent though they had been duly served with the hearing notice

6. The applicants submitted that the impugned judgment negatively affects their right to enjoy fair labour practices like every other employee in the country. The applicants relied on the cases of *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone* [2013] eKLR, *Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others*, Petition No. 10 of 2013, and *Kenya Plantation & Agricultural Workers Union v David Benedict Omulama*, Civil Application No. 5 of 2017 in support of this submission.

7. We have carefully perused the application, the affidavit in support thereof, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the application has met the threshold for certification as a matter of general public importance.

8. Article 163(4) of *the Constitution* succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of *the Constitution* and in any matter where it is certified that the appeal involves a matter of general public importance. The article provides thus:

9. The matter at hand is to determine whether the applicants have raised a matter of general public importance. In the case of Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, (supra), the Supreme Court stated thus:

"The requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court."

10. In the said case, the Supreme Court defined a matter of general public importance as follows:

> "In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members

11. The court also laid down the following principles to be what constitutes matters of general public importance:

> " 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."

12. What then constitutes a matter of general public importance was answered by the same court when it held 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 concern."

13. In the present application, the applicants have not identified the questions that they intend to raise in their appeal or demonstrate that their intended appeal raises a matter of general public importance. They have merely stated that the impugned judgment was not based on sound legal provisions as

provided for by Articles 27, 41, and 47 of *the Constitution*, Section 14 of the *Labour Relations Act*, and Section 5 of the *Employment Act*.

14. We find that it is not enough for the applicants to merely state that the impugned judgment affects all the employees of the respondent, and fail to demonstrate how the decision affects other employees other than the respondent's employees. The applicants have also not demonstrated how the impugned judgment had taken a trajectory of constitutional interpretation or application. In any event, even if the matters in issue could be said to affect other employees of the respondent, that would still have been insufficient to elevate the matter to the level where it could be construed as a matter of general public importance.

15. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR the court held:

> "That where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. The import is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

16. It follows therefore that the applicants have failed to demonstrate that the court's reasoning took a trajectory that warrants constitutional interpretation. It is trite that all litigation must sooner than later, come to an end and its conclusion must have a finality. A matter cannot be reopened before the Supreme Court simply because a litigant is of the view that the decision should have been different or a certain weight ought to have been given to a particular piece of evidence. To our minds, that is exactly what the applicants are trying to do.

17. Having carefully considered the grounds in support of certification, we cannot deduce any substantial issue of law to be determined or any matter that affects the general public interest.

18. In the result, we find that the applicants have not made out a case to warrant the certification that the intended appeal to the Supreme Court involves a matter of general public importance so that they may be granted leave to appeal to the Supreme Court.

19. In the result, we find that the application lacks merit and it is dismissed. Each party to bear their own costs.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF FEBRUARY, 2024.**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**