Standard Chartered Financial Services Limited v Manchester Outfitters (Suiting Division) Limited now called King Woolen Mills Limited & 2 others (Civil Application E001 of 2023) [2024] KECA 200 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 200 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E001 OF 2023

MA WARSAME, K M'INOTI & JM MATIVO, JJA

FEBRUARY 23, 2024

BETWEEN

STANDARD CHARTERED FINANCIAL SERVICES LIMITED ..... APPLICANT

AND

MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED NOW CALLED KING WOOLEN MILLS LIMITED ..... 1ST RESPONDENT

GALOT INDUSTRIES LIMITED ..... 2ND RESPONDENT

AD GREGORY & CD CAHILL ..... 3RD RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court of Kenya against the Judgment and Orders of this Court at Nairobi (Asike-Makhandia, Kantai and Nyamweya, JJ.A). dated 16th December 2022 in Nairobi Civil Appeal No.88 of 2000)

RULING

1. The Court rendered its judgment in Appeal No. 88 of 2000 on 16th December 2022 and allowed the appeal (Asike-Makhandia, Kantai and Nyamweya JJ.A). It was thought that this would mark the end of the checkered matter spanning close to three decades in the corridors of justice. Barely a month after the judgment, the applicant, vide Notice of Motion application dated 20th January 2023, moved this Court and filed on 23rd January 2023, moved this Court seeking certification and leave to appeal to the Supreme Court against the said judgment and orders, arising from Nairobi Civil Appeal No. 88 of 2000 arguing that the intended appeal raises questions of general public importance.

2. The application is filed pursuant to the provisions of Articles 159 and 163(4)(b) of *the Constitution* of Kenya 2010; section 3B of the *Appellate Jurisdiction Act*; and Rules 1(2) and 42 of the Court of Appeal Rules 2022. It is supported by the affidavit of Dr. Davidson Mwaisaka, Head of Legal

(Kenya & East Africa) of Standard Chartered Bank Kenya Limited. In his affidavit, the deponent gives the background, both factual and on litigation, giving rise to the application, concluding with the issues that he contends constitute matters of general public interest that warrant determination by the Supreme Court. He avers that the determination of the issues raised will not only have a direct and substantial impact on the manner in which financial institutions secure facilities advanced to their customers but will also lead to a determination on the scope of this Court's jurisdiction when sitting on appeal.

3. For context, there was a loan agreement for a eurocurrency loan (1,300,000 Deutsche Marks and 1,050,000 Swiss Francs) advanced by Standard Chartered Merchant Bank (SCMB) to the 1st respondent. The loan was secured by charges over the 1st respondent's property and a debenture dated 5th April 1982 granted by the 1st respondent to the applicant. At the request of the 1st respondent, the said eurocurrency loan was paid by the applicant who instead advanced the amount locally to the 1st respondent, to be secured by the existing charges and debenture. This was contained in the Letter of offer dated 29th June 1987 (the Localisation Agreement) for a loan of KShs.9,000,000/= which Agreement expressly provided that the Kenya Shillings loan was to be secured by "the securities held."

4. Following default on the Kenya Shillings loan by the 1st respondent, the applicant invoked the debenture and appointed the 3rd respondents as Receiver-Managers over the affairs of the 1st respondent. This prompted filing of Nairobi HCCC No.5002 of 1990 by the 1st and 2nd respondents seeking revocation of the appointment of Receiver – Managers. The 1st and 2nd respondents contended that the debenture was discharged upon settlement of the eurocurrency loan. The applicant, in its statement of defence, not only denied the claim but also counterclaimed for an amount it claimed was then due (Kshs.24,837,999/= plus interest at the rate of 19% per annum) and prayed for a declaration that the debenture was a valid and subsisting security for the 1st respondent's indebtedness under the Kenya Shillings loan.

5. The High Court dismissed the 1st and 2nd respondent's claim and allowed the applicant's counterclaim. The judgment affirmed the validity of the Debenture as subsisting security and the resultant appointment of the 3rd respondents as Receiver Managers. On appeal, this Court by its judgment dated 16th December 2022, allowed the appeal, dismissed the applicant's grounds for affirming the decision as well as its counterclaim, and remitted the matter to the High Court for assessment of damages only. The upshot of the judgment is that the Court found that no charge or debenture was registered in respect of the localisation agreement with the result that there were no securities in place to secure the Kshs.9,000,000/=. In the lead judgment by Kantai JA, the Court acknowledged that volume 5 of the Record of Appeal could not be traced and the online version of the said record was not of much help. The judgment was therefore prepared as agreed by the parties in the absence of the said volume 5 of the record.

6. From the application and written submissions dated 12th May 2023, the applicant raises three issues, which it contends to be matters of general public importance requiring intervention of the Supreme Court in line with the Supreme Court decision in Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR and Malcolm Bell vs. Hon Daniel Toroitich Arap Moi [2013] eKLR. These are – existence of a debenture, financier's rights of recovery and incomplete or illegible record of appeal.

7. On the existence of debenture, the applicant argues that the finding by the Court that a fresh charge and debenture ought to have been created, executed and registered in accordance with section 65 of the repealed Registered *Land Act* and section 96 of the repealed *Companies Act* was ignored the terms of the localisation agreement providing for the grant of the Kenya Shillings Loan on the basis of "securities held." The applicant refers to Habib Bank AG Zurich vs. Rajni Khetshi Shah [2018] eKLR

and Mwambeja Ranching Company Limited & Another vs. Kenya National Capital Corporation [2019] eKLR recognising the nature of a continuing security over a legal charge until the debt is paid and the security is discharged.

8. This position, the applicant argues, is anchored on statute by section 92(3) of the repealed *Companies Act* and section 580(1)(b) of the *Companies Act*, 2015 and has been the consistent law and practice in Kenya. The applicant also cites section 101 of the repealed *companies Act* and section 81 of the repealed Registered *Land Act* required that a discharge of securities only following de- registration. The applicant further argues that the judgment of this Court requiring new advances to be secured by the registration of fresh securities throws the law and practice of banking into confusion, contradicts previous precedents and creates uncertainty in the financial sector.

9. On the financier's right of recovery, the applicant submits that the decision creates uncertainty and is contradictory to the earlier decisions of this court, transcending the interest of the parties. The applicant adds that the law as applied by the Court as far back as 1978 has been that a party may not retain money or a benefit which is against conscience to keep and further that money paid under an illegal contract is recoverable by way of restitution in a claim of for unjust enrichment. The applicant cites Chase International Investment Corporation and Another vs. Laxman Keshra and 3 Others [1978] KLR 143 and Jordan Properties Limited vs. Margaret Njoki Mwigi [2020] eKLR in support of that submission.

10. On the incomplete record, the applicant submits that it is a matter of general public importance that the Supreme Court intervenes and establishes principles upon which defects on the record can be addressed, whether on a case by case basis and how that impacts the right of access to justice. The argument is made on the backdrop of Rule 13(2) of the Court of Appeal Rules, 2010 on the provision of clear and legible documents and Rule 87(1) that requires that the record contains an index of all documents with the numbers of the pages at which they appear.

11. The applicant draws the attention of the Court to its jurisdiction to reconsider evidence, evaluate it and draw its own conclusions in an appeal as enunciated in Selle and Another vs. Associated Motorboat Company Limited & Others (1968) EA 123. The applicant also points out that the Court has in the past addressed the defects by striking out the appeal as was the case in Pharmacy & Poisons Board vs. Sipri Pharmaceuticals Limited & Another [1999] eKLR and Paul Murunga t/a Splinter Tours & Travel vs. J. N. Wafubwa T/A Red Impex General Services [2001] eKLR.

12. The applicant filed a further affidavit sworn by the aforenamed Dr. Davidson Mwaisaka. This affidavit responds to the replying affidavit to the application for certification sworn by Mohan Galot on 14th April 2023 and clarifies some of the averments made in the affidavit by Mohan Galot. Of note is that the letter dated 27th November 1981 referred to in paragraphs 9,10 and 11 of Mohan's affidavit did not form part of the Court's reasoning within its judgment and reliance on the said letter amounts to misrepresentation and an attempt to mislead the Court. That indeed, communication between the Advocates representing the 1st respondent and the applicant at the time, as found in volume 4 of the record of appeal confirms that the debenture was not intended to be limited to securing the sums payable by the applicant under the guarantee advanced to SCMB.

13. In opposition to the application, the 1st and 2nd respondents filed a replying affidavit sworn by Mohan Galot on 14th April 2023. They also filed joint submissions dated 30th June 2023. The respondents submit that the application does not meet the threshold contemplated under Article 163(4)(a) and (b) of *the Constitution*, section 15B of the *Supreme Court Act* 2011 and as explained in the locus classicus case of Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2012] eKLR. Specifically, they argue that the issues raised by the applicant do not transcend the circumstances of the parties, have

no impact to the society in any way and have no bearing on public interest. That indeed, the issues are not of any special jurisprudential moment to warrant the intervention of the Supreme Court as by law provided.

14. On the existence of debenture, the 1st and 2nd respondent posit that the judgment delivered was a determination on facts contested by the parties relating to the validity of the debenture, the charge and the appointment of Receiver-Managers with respect to the localization of the eurocurrency loans. That this is, therefore, solely a matter that does not go beyond the parties herein. Further, that the finding bob the Court did not contradict the law and decided cases set out and relied upon by the applicant. That, the applicant has not demonstrated how the law and practice of banking has been thrown into confusion and uncertainty. The respondents agree with the findings of this Court that the intention of the parties was to have fresh securities in place and that the appointment of the 3rd respondent as Receiver Managers was unlawful, unprocedural, improper, null and void.

15. Similarly, on the second issue, the 1st and 2nd respondents submit that the Court was well within its mandate to arrive at the decision it did and that faulting it is tantamount to appealing their claim on factual matters, a situation not contemplated in Article 163(4)(a) of *the Constitution*. They maintain that the question of the financier's right of recovery does not extend beyond the parties herein.

16. As for the allegation on faded and unclear or missing documents, the 1st and 2nd respondents submit that of the four issues for determination framed in the appeal, none of the parties raised any issue relating to faded or unclear documents in the record. This cannot therefore be a ground for certification. On the other hand, the respondents accuse the applicant of attaching terribly ineligible and/or extremely faded copies thereby creating the impression that the record comprised such documents. That it suffices to note that the missing volume was an issue prior to the parties filing submissions, none of the parties raised issue with it and the volume was not available to any of the parties. Consequently, the respondents contend that the applicant has failed to demonstrate any prejudice suffered regarding the missing volume and the faded/ unclear documents. The respondents invite the Court to consider that the matter having been in court for over 33 years, nothing of general public importance turns on the record of appeal. In the end, the 1st and 2nd respondents urge the Court to find the application hopelessly incompetent and to dismiss it with costs.

17. Having summed up the respective positions as adumbrated by the parties, the sole issue for our determination is whether the issues framed by the applicant satisfy the threshold for certification of the intended appeal as involving a matter of general public importance under Article 163(4)(b) of *the Constitution*.

18. It is common ground that the Supreme Court has established guidelines for certification of a matter as one involving general public importance. In Hermanus Phillipus Steyn case, the guidelines were summarized as follows:

> " 60. ... In summary, we would state the governing principles as follows:
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> 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;
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> 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."

19. From the application, three issues have been framed for certification, the basis upon which arguments have been made by both parties. These are:

a. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged.

b. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, as submitted by the applicant, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan.

c. Whether this Court can proceed to enter judgment on its own discernment and interpretation of a Record of Appeal which is inconsistent, illegible, incomplete and/or portions of the same are missing. Under this ground, the applicant argues that the Supreme Court will be called upon to determine whether an incomplete record of appeal which obscures evidence denies a party a right to fair hearing (as protected by Article 25 of *the Constitution*) and access to justice (as protected by Article 48 of *the Constitution*).

20. The facts in the dispute between the parties as we perceive them, are largely uncontroverted. An advance was made in Eurocurrency as against the securities created. A subsequent advance was made in local currency on the basis of the existing securities. This means that no fresh securities were created and the existing ones had not been discharged. The applicant defaulted on the subsequent advance and

the 1st respondent, invoking the existing security, proceeded to appoint the 3rd respondents as Receiver-Managers. It is this appointment of receiver managers that resulted in the litigation calling upon the courts to determine the validity of the securities in relation to the subsequent facilities comprising the Kenya Shillings loan.

21. While this may appear to be a dispute only between parties to the application, we are mindful that it is a situation that banks and financial institutions grapple with. It is not uncommon that the financial institutions are called upon to make additional advances on the basis of securities already perfected in their favour. It is clear to us, just from the finding of the High Court and that of this Court that two schools of thought on this issue. The first school of thought is that the securities should be discharged and fresh securities perfected as regard the fresh advance. The other school of thought favours accommodating the fresh advance within the limits of the securities already perfected.

22. This is a situation that we are persuaded needs to be conclusively addressed by the Supreme Court in the intended appeal as a matter involving general public interest. Moreover, there is statutory underpinning of the arguments advanced by the parties. Among the provisions of statutes relied upon by the parties are section 92(3) of the repealed *Companies Act* and section 580(1)(b) of the *Companies Act*, 2015. We are persuaded that the import of these provisions in relation to the question as framed needs to be determined with finality.

23. The question on the correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution will be answered once the main question on security is answered. This is because the financial institution can only be in position to enforce its securities, if at all they are perfected. In the event that the securities are found not to be invalid, the Supreme Court will have an opportunity to conclusively determine this question as framed by the applicant.

24. Unlike the first two questions which were central to the determination of the dispute before the High Court and this Court, the issue on the illegibility of the record, came out post hearing. The lead judgment of Kantai, JA captures the situation as follows:

> "At the conclusion of hearing the appeal we reserved judgment to be delivered on 22nd October 2021. It was then discovered that of the 7 volumes of the record of appeal where there is also a supplementary record of appeal volume 5 of that record was missing. The Court Registry could not trace its copy; counsel for the parties did not have it and this led to delay in preparing this judgment where the matter had to be mentioned several times to ascertain whether that volume had been traced. An online version of the record was provided by the High Court Registry but this was not of much help. This judgment has been prepared as agreed by the parties in the absence of the said volume 5 of the record of appeal which it is agreed cannot be found or traced. We finally deferred judgment to be delivered on 9th December 2022."

25. This issue did not emanate from the High Court as a contest between the parties for the Court's determination. However, it was central to the determination of the appeal before the Court noting that as the first appellate court, it has an obligation to reappraise all the evidence and make its own inferences. It is therefore an issue that has arisen from the Court of Appeal, which is a court below the Supreme Court under the Court hierarchy as established under our constitutional design and is susceptible to being certified as involving great public importance. Again, it is not far-fetched that records may disappear or become illegible over time especially for matters that have been on the corridors of justice for a number of years. This is not a situation that is unique to the present litigants.

This may not have been an issue for determination before the Court but is one which occasions uncertain and requires settlement.

26. Taking into consideration the parameters set out in Hermanus Phillipus Steyn case, we believe that the applicant has persuaded us that it has satisfied the test. It has been demonstrated that the issues to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest; that the issues raise points of law, which we are persuaded are substantial, the determination of which will have a significant bearing on the public interest; that questions of law raised arose in the Court or Courts below the Supreme Court, and were the subject of judicial determination; and that the issues raised have been occasioned by a state of uncertainty in the law, arising from contradictory precedents, and are not actuated by mere apprehension of miscarriage of justice. In addition, the applicant has concisely identified the specific elements of "general public importance" for which certification is sought and the intended appeal is not merely for determinations of fact in contests between parties.

27. The upshot of our finding is that the application is with merit and is allowed. In view of the issues raised hinging towards settlement of the law, we make no order as to costs.

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

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

.....

. JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR