Otieno v National Cereals & Produce Board (Civil Appeal (Application) 143 of 2017) [2024] KECA 145 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KECA 145 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL (APPLICATION) 143 OF 2017

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 16, 2024

BETWEEN

MICHAEL BENHARDT OTIENO OTIENO ..... APPLICANT

AND

NATIONAL CEREALS & PRODUCE BOARD ..... RESPONDENT

(Being an application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nakuru, (Karanja, Okwengu, & Gatembu Kairu, JJ.A) dated 23rd September 2021 in Civil Appeal No. 143 of 2017)

RULING

1. The application before us is dated 25th April 2022. The application is brought under the provisions of Articles 10, 20(3), 25(c), 35, 40, 41, 50, 159(2)(a)(b), 163(4)(b) and 259(1) of *the Constitution* and Sections 20 and 42(1)(k) of the *Limitation of Actions Act*. The applicant prays for orders that:

    a). The court be pleased to certify and grant leave to the applicant to lodge an appeal to the Supreme Court against the decision delivered on 23rd September 2021.

    b). Costs be in the cause."

2. The application for certification is supported by the applicant's affidavit and it is premised on the following grounds:

    a). The court's findings in the impugned judgment were not supported by law, or sound legal provisions.

    b. The court's findings were based on presumptions and the individual opinion of the Judges and relate to a matter of public interest in so far as the duty of the employer is to furnish their

employees with records, including those on terms and conditions of employment, and the management of the provident fund.

c. The intended appeal will address trusts created and managed by employers on behalf of employees.

d. The intended appeal transcends the parties as it will address the question as to whether Section 42(1)(k) of the *Limitation of Actions Act* accords both a public entity seeking to recover lost public property.

e. The matter involves a large segment of the population of employees being denied employment documents.

f. The court will determine whether an employer can appropriate funds or property it holds as a trustee and pay itself without a court order or the employee's consent.

g. The impugned judgment is regressive."

3. The respondent in its replying affidavit sworn by John K. Ngetich, the corporation secretary of the respondent, stated as follows:

a). The application was filed more than 7 months after the judgment was delivered contrary to Rule 41(2) of the Court of Appeal Rules.

b. Despite the inordinate delay, the applicant has neither sought leave to have the application heard out of time nor explained the delay.

c. Litigation must come to an end and the respondent's legitimate expectation is that since the application was not filed within statutory timelines, the same should be dismissed.

d. The intended appeal does not raise any matter of general public importance.

e. The issues raised in paragraph 3 of the supporting affidavit were contractual issues between an employer and an employee which were properly resolved by the court.

f. The court explained the reason for not granting the applicant an extension of time to be that his claim was time-barred by the *Limitation of Actions Act* and the court had no discretion to grant such an extension 6 years after the cause of action arose.

g. The issues raised in paragraphs 5 and 6 of the supporting affidavit are not of general public importance, but private issues arising from an employer-employee relationship.

h. The applicant had constructive knowledge of the Human Resource Manual.

i. The nature of the applicant's claim was private and he could not therefore invoke the provisions of Section 42(1)(k) of the *Limitation of Actions Act* for an extension of time.

4. When the application came up for hearing on 1st November 2023, Mr. Amondi, learned counsel appeared for the applicant whereas Ms. Opondo learned counsel appeared for the respondent.

Counsel relied on their respective written submissions, which they briefly highlighted.

5. Mr. Amondi pointed out that there were four issues deserving of consideration by the Supreme Court. The issues were: whether an employee who holds a pension as a trustee can be allowed to benefit from the funds; whether there was fraudulent concealment of the Human Resource Policy Manual; whether the employer should have disclosed the terms of the manual to the employee; and whether the employer fraudulently concealed the schemes it held in trust for the employee.

6. Counsel submitted that there was a need to interpret Section 42(1)(k) of the *Limitation of Actions Act* as the respondent intends to recover Kshs. 340,000/- from the applicant, yet the claim is based on documents that were not disclosed to the applicant. Counsel also pointed out that under Section 43 of the Act, the statute applied to both the Government and private individuals.

7. Counsel submitted that the pension fund is public property and therefore it is exempt from the *Limitation of Actions Act*.

8. In his written submissions, the applicant relied on the case of Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR in submitting that he had demonstrated that the intended appeal raises matters of general public importance under the laid down principles.

9. The applicant argued that if the impugned judgment was left unchallenged, it would occasion a miscarriage of justice and erode public confidence in the administration of justice as the applicant represents a large spectrum of society.

10. Ms. Opondo submitted that the application was not properly before the court as there was no notice of appeal as provided for by the mandatory provisions of Rule 36 of the Supreme Court Rules. Relying on the case of Teachers Service Commission v Simon P. Kamau & 19 Others [2015] eKLR, counsel submitted that the application ought to be struck out as the applicant disclosed that the notice of appeal had been withdrawn.

11. Counsel reiterated that the application was filed 7 months after the judgment was delivered contrary to Rule 42 of the Court of Appeal Rules which requires the application to be filed within 14 days. Counsel pointed out that the applicant obtained the proceedings in March 2022, and filed this application, 19 days later. He did not apply for an extension of time, as provided for by Rule 41(3) of the Court of Appeal Rules.

12. Counsel was of the view that this was not a matter of general public interest. The applicant was appointed by the letter dated 1st December 2012. The letter referred to the terms and conditions of employment, which he could have obtained from his head of station. Counsel noted that the applicant had resigned according to the terms of employment in the manual hence he was aware of the manual.

13. Counsel submitted that the relationship between the parties was contractual and therefore the *Employment Act* was applicable. The applicant's salary and benefits were not public property.

14. The respondent submitted that Rule 36(1) of the Supreme Court requires a person who intends to appeal, to file a notice of appeal 14 days from the date of judgment, while sub-rule 4 provides that it is not mandatory to obtain certification before filing a notice of appeal.

15. Also relying on the case of Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, (supra), the respondent submitted the issues raised by the applicant were not issues of general public importance to warrant certification. They were issues arising from a contractual relationship between an employer and an employee; no constitutional or issues of general public importance arose.

16. In his rejoinder, Mr. Amondi submitted that the applicant filed a notice of appeal on 30th October 2023. Citing the case of Teachers Service Commission v Simeon Kamau & Others, (supra), counsel pointed out that the court had determined that there was no time limitation for seeking certification. Therefore, a notice of appeal cannot precede certification. The certification has to come first before the notice of appeal.

17. We have carefully perused the application, the affidavits by both parties, submissions by counsel, the authorities cited, and the law. The issues for determination are whether or not this application

is properly before this court, and if so, whether or not the application meets the threshold for certification.

18. Article 163(4) of *the Constitution* provides 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:

> " Appeals shall lie from the Court of Appeal to the Supreme Court—
>
> a. as of right in any case involving the interpretation or application of this Constitution; and
>
> b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

19. The applicant has brought this application on the basis that the issues raised are matters of general public importance. The principles governing what constitutes matters of 'general public importance' were set out by the Supreme Court in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, (supra), 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*;

20. Before we can determine if the application meets the threshold, we must first establish if it is competent. The respondent contends that the law mandates a party who intends to appeal to the Supreme Court to file a notice of appeal within 14 days after the delivery of the judgment.

21. Rule 31(2) of the Supreme Court Rules provides that:

> " Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the Notice of Appeal."

22. The applicant did not refute the claim that he had withdrawn his notice of appeal. The Supreme Court: in Teachers Service Commission v Simon P. Kamau & 19 Others, (supra), held that:

> "We find that a notice of appeal, as a prelude to the filing of an appeal, was a requirement both in the 2011 rules and under the current (2012) Rules of the Supreme Court; and that the Appellate Court while it acted as the Supreme Court, had a long-standing practice as regards notice of appeal."

23. Given that there was no notice of appeal on the record, we find that this application is fatally defective. A notice of appeal is a jurisdictional requisite, and the lack of it cannot be bailed out by the invocation of Article 159 of *the Constitution*. The court cannot assume jurisdiction where there is no notice of appeal.

24. The respondent contended that the application was lodged out of time. Article 259(8) of *the Constitution* provides that:

> " If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises."

25. Rule 41 of the Court of Appeal Rules provides that:

(2) An application seeking certification that a matter of general public importance is involved shall be made within thirty days after the delivery of the decision.

(3) Despite sub-rule (2), an application brought out of time shall be marked as "lodged out of time" under rule 12 with liberty to apply for extension of time."

26. We have perused the application and found that this application was filed on 25th April 2022, which is about seven months after the delivery of the impugned judgment dated 23rd September 2021. The applicant claimed that the delay was caused by a delay in obtaining proceedings. However, time does not begin to run from the date proceedings are obtained but rather from the time judgment is delivered. In Teachers Service Commission v Simon P. Kamau & 19 Others, (supra), the court held:

> " An application seeking certification for leave to proceed to the Supreme Court, does not require a documentation of matters of fact, to support the case. The Supreme Court has already established guiding principles for determining whether an application raises 'a matter of general public importance.' But if we were to assume that the data in question here was relevant, we would still find the three-year delay to be unreasonable, for a litigant seeking justice. It is well known that equity comes in aid of the vigilant, and not the indolent. We cannot fail to take into account the pain of the successful respondents waiting for the fruits of the Judgment for as long as three years, only to be confronted with a fresh cycle of litigation. We would restate the wisdom of the old principle of the common law that litigation must come to an end: This has been adopted as a vital principle in constitutional and statutory laws that prescribe timelines to guide the pursuit of justice in the Courts."

27. It follows therefore that the applicant ought to have filed his application within 30 days after the delivery of the judgment.

Failure to do so, he was at liberty to apply for an extension of time. However, he has not made any application to that effect. We also find that this application has been brought after a period of inordinate delay and ought to be struck out.

28. In any event, we have perused the grounds in support of certification. The Supreme Court in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, (supra), answered the question of what constitutes a matter of general public importance as follows:

> "..'a matter of general public importance'warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provised only that; its impacts and consequences are substantials, broad-based,transcending he liigaion-interests of the parties, and bearing upon the public interest. as the categories constituting the public interst are not closed, the burden falls on the intending appellant to demostrate that the matter in question carries specific elemnts of real public

29. The Supreme Court also defined what a matter of general public importance is, in the said case 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 of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."

30. The cause of action arose from a contract of employment between an employer and an employee. The trial court found that the applicant's claim was statute-barred and dismissed the same. The applicant's appeal was dismissed because the claim was filed after the lapse of statutory limitation. To our minds, the applicant has not set out in any form why these elements of settled law require consideration by the Supreme Court and how they impact third parties or other cases.

31. The applicant stated that there was a need for the Supreme Court to interpret Section 42(1)(k) of the *Limitation of Actions Act* as a matter of general public importance. We find that the mere fact that the applicant was not satisfied with the said provision does not mean that the provision needs a different interpretation.

32. It is not enough for the applicant to state that the Supreme Court is to interpret a certain statute, to determine that his was a matter of general public importance. In the case of Gatirau Peter Munya vs. 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."

33. In this instance, the applicant has not demonstrated that the court's reasoning justifies constitutional interpretation. Be that as it may, this court considered all the issues raised by the appellant on appeal and found no merit in the issues raised. 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 applicant is trying to do.

34. 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.

35. In the result, we find that the applicant has 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 he may be granted leave to appeal to the Supreme Court.

36. 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 16TH DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR