Kenya Civil Aviation Authority & another v Njuguna & 4 others (Civil Application 18 of 2014) [2024] KECA 1186 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1186 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 18 OF 2014

DK MUSINGA, PO KIAGE & M NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

KENYA CIVIL AVIATION AUTHORITY ..... 1ST APPLICANT

C.A KUTO ..... 2ND APPLICANT

AND

RUFUS NJUGUNA ..... 1ST RESPONDENT

RURIANI MICHENI ..... 2ND RESPONDENT

DANSON KIMANI ..... 3RD RESPONDENT

ALLAN MUKINDA ..... 4TH RESPONDENT

PAMELA OWITI ..... 5TH RESPONDENT

(An application for certification and leave to appeal to the Supreme Court against the judgment of the Court of Appeal (Nambuye, G. B. M Kariuki & Ouko, JJ.A.) dated 4th April, 2014 in Nairobi Civil Appeal No. 67 of 2010)

RULING

1. By a notice of motion dated 9th September 2014, the applicants seek orders that;

    1. "The Court do certify that the applicants' intended appeal against the judgment delivered by this Court on the 4th of April 2014 in Civil Appeal No. 67 of 2010 involves a matter of general public importance.

    2. Out of an abundance of caution, the applicants be granted leave to file their notice of appeal against the judgment in Civil Appeal No. 67 of 2010, upon

determination of whether the intended appeal involves a matter of general public importance.

2. The application is based on grounds that this Court erred in;

   a. Holding that the limitation on commencing proceedings against the appellant, imposed by section 7E(b) of the *Civil Aviation Act*, was not applicable, even though it was in force when proceedings were commenced against the applicant.

   b. Failing to hold that the claims against the applicants arose from individual contracts of employment and alleged torts against individuals and could therefore, not be properly pursued as a class action.

   c. Failing to take into account the applicable law on quantum of damages to be awarded for breach of contracts of employment yet the root of the matter was an employment dispute.

3. The applicants aver that the intended appeal involves matters of public importance since it raises the following questions;

   i. Whether all actions instituted after a statute of limitation comes into force, are subject to that statute even if the cause of action accrued before the statute came into force.

   ii. Whether claims for unlawful termination of employment contracts can properly be presented in a class suit.

   iii. Whether the courts can maintain or direct awards to be made in respect of alleged unlawful termination of employment contracts, even though characterised as breach of constitutional rights, without regard to settled principles of determining the award or statutory limits on such awards.

4. The application is supported by an affidavit sworn on 9th September 2021 by Cyril Wayongo, the legal officer of the 1st applicant. He swore the affidavit on behalf of both applicants. Besides reiterating the grounds of the application and the questions they deem touch on matters of public importance, the applicants depose that judgment was supposed to be delivered on notice but they did not receive the notice. They attach a letter from the Registrar of the Court informing them that judgment in the matter was delivered on 4th April 2014. The applicants express their intention to lodge an appeal in the Supreme Court against the decision of this Court in the matter.

5. During the hearing, learned counsel Mr. Wafula appeared for the applicants while Ms. Ngesa appeared for the 1st respondent. There was no appearance for the 2nd to 5th respondents and neither had they filed written submissions. Counsel for the applicants and the 1st respondent chose to rely on their respective filed written submissions. In the applicant's written submissions dated 26th February 2024 drawn by the law firm of Walker Kontos, it is reiterated that the intended appeal raises questions of general public importance that transcend the circumstances of the parties herein and have a bearing on public interest. Counsel submit that the issue of limitation on commencing proceedings was not canvassed in the High Court but arose in this Court of Appeal and thus it is susceptible to certification as one involving great public importance. For this proposition, counsel rely on this Court's decision in Standard Chartered Financial Services Limitedvs. Manchester Outfitters(Suiting Division) limited now calledKing Woolen Mills Limitedand 2 Others, Civil Application No. SUP. E001 of 2023.

6. Further, this Court is faulted for finding that section 7E(b) of the *Civil Aviation Act* was not applicable to the dispute. It is contended that the Court's finding contradicts previous precedents like the decision in Kenya Civil Aviation Authorityvs. WK & 2 Others[2019] eKLR, where this Court was of the view

that a cause of action that arose before the commencement of section 7E(b), but which was filed after commencement of that section, was statute barred. Consequently, it is urged that there is uncertainty on the import of the said section that requires clarification by the Supreme Court. Further, such a determination will settle with finality the legal uncertainty surrounding new statutory enactments that introduce a limitation on causes of action without making provision for causes of action accruing before commencement of those statutes, but filed after their commencement.

7. Counsel contend that the decision of this Court is contradictory to section 49(1)(c) of the Employment Act and previous court decisions on quantum of damages to be awarded to an employee for a claim of unfair termination, the maximum compensation payable having been limited to 12 months of gross wages. It is urged that for the benefit of the general public, there is need for clarification on this position. Moreover, counsel argue that the intended appeal is of general public importance because it touches on payment of a colossal sum of money by a public body, a situation that will affect all tax payers in the country. In the end, we are implored to allow the application as prayed.

8. For the 1st respondent, the law firm of Gitobu Imanyara & Company Advocates through submissions dated 3rd March 2024, addressed the questions presented by the applicants as relating to issues of general public importance. On whether all causes of action that are instituted after a statute of limitation comes into force are subject to that statute, even if the cause of action accrued before the statute was in operation, counsel contended that this issue has no bearing on public interest. It was submitted that a statute will generally be construed as operating prospectively unless the legislature has expressed a contrary intention. Consequently, an action that happens before the commencement of the law cannot be governed by a statute enacted long after the said action occurred. Further, the limitation prescribed by section 7E(b) of the Civil Aviation Act, only applies to action taken by the 1st applicant in execution of the Act.

9. On whether claims of unlawful termination of employment contracts can properly be presented in a class suit, counsel submitted that there is no uncertainty on this issue because Order 1 rule 1 of the *Civil Procedure Rules* provides that all persons may be joined in one suit as plaintiffs in whom any right to relief arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if such persons brought separate suits, any common question of law or fact would arise. It was urged that in this case, there was a common question of law which is, whether the dismissal of the respondents was wrongful and a nullity. Concerning the quantum of damages awarded, it was explained that the dismissal of the respondents was declared a nullity thereby returning them to their original positions as employees of the 1st applicant. However, since they could not go back to their previous positions because they had been filled, the court opted to compensate them for loss of salary arrears dating back to 18th April 2002. To counsel, the court did not make an award for wrongful dismissal. In any event, the Employment Act provides for various remedies other than the 12 months' salary. Section 49(4)(f) provides that a Labour Officer shall, in deciding whether to recommend the remedies specified in sub-section (1) and (3), take into account various factors including, the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination. In the end, counsel urged that the instant application was unmerited and should be dismissed with costs to the 1st respondent.

10. We have considered the application, the grounds in support thereof, the submissions by parties, and the law. An appeal from this Court to the Supreme Court arises in only two instances as set out in Article 163(4) of the Constitution;

> 163(4) 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)."

11. An intending appellant is obliged to demonstrate that the matter in question carries specific elements of real public interest concern. The Supreme Court authoritatively set down the governing principles in the determination of what entails a matter of general public importance in *Steynvs. Ruscone*(Application 4 of 2012) [2013] KESC 11 (KLR) as follows;

60. ...

(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. (See also *Malcolm BellvsDaniel Toroitich Arap Moi & Another*[2013] eKLR)

12. Before going to the merits of the application, we must address the glaring, indeed spectacular delay apparent on the face of the record regarding prosecution of the same. Pursuant to rule 41(2) of the Rules of this Court, an application such as the one before us, seeking certification that a matter of general public importance is involved is expected to be made within 30 days after delivery of the decision sought to be challenged. The decision against which the applicants intend to lodge an appeal at the Apex Court is dated and was delivered on 4th April 2014. The application for certification is dated 9th September 2014 and was lodged on 22nd September 2014. The applicants contend that judgment was supposed to be delivered on notice but they did not receive notice hence the delay in lodging the application. On record is also evidence that the instant application was dismissed on 28th February 2022, for non-appearance, but was later reinstated vide an application made 20 days shy of a year later, on 8th February 2023. The applicants have not given any explanation as to the steps they took, if any, to prosecute the application between 22nd September 2014, when the application was lodged and 28th February 2022 when it was dismissed. That period of about 8 years is inordinately long. Without saying more, we are of the considered view that the application is hopelessly out of time and consequently incompetent.

13. Even if we were inclined to evaluate the merits of the application, we are not persuaded that the application satisfies the test prescribed by the Apex Court in Steyn(supra). As observed by this Court in the decision the applicants seek to challenge, the issue of limitation of action or the respondents being non-suited was not raised before the High Court. The Court stated thus;

> "We note from the content of the rival pleadings filed before the High Court, directions taken before Makhandia CJ (as he then was) and the then Hon. the Chief Justice E. Gicheru CJ as well as the rival submission before the trial Judge and the entire ruling resulting therefrom that the issue of limitation of action or the respondents being non suited was not raised before the High Court. It is therefore being raised before us on appeal for the first time."

14. The said issues having not been canvassed at the High Court, as readily admitted by the applicants, upon applying the test in STEYN (supra) that, 'such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination,' we find that those issues are not matters of general public importance.

15. The applicants further express their dissatisfaction with the quantum of damages awarded to the respondents claiming that pursuant to section 49(1)(c) of the *Employment Act* and previous court decisions on quantum of damages that should be awarded to an employee for a claim of unfair termination, the maximum compensation payable is limited to 12 months of gross wages. To our mind, that is not a question the determination of which would transcend the circumstances of this particular case with the effect that it has a bearing on public interest. Our reading of section 49 of the Employment Act elicits that quantum of damages for wrongful dismissal and unfair termination are awarded by courts on a case by case basis, taking into account various factors as stipulated in section 49(4) of the same Act. Ultimately, the instant application falls short of the test established by the Supreme Court.

16. The upshot is that we find that the application is unmerited and we disallow it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR