Ecobank Kenya Limited v Macharia Mwangi & Njeru Advocates (Civil Application SUP NO. E003 of 2024) [2024] KECA 1412 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KECA 1412 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP NO. E003 OF 2024

F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA

OCTOBER 11, 2024

BETWEEN

ECOBANK KENYA LIMITED ..... APPLICANT

AND

MACHARIA MWANGI & NJERU ADVOCATES ..... RESPONDENT

(An application seeking leave to appeal the judgment and decree of this Court (M'Inoti, Omondi, & Ngenye-Macharia, JJ.A) delivered on 8th December 2023 in Civil Appeal No. E474 of 2021)

RULING

1. By Notice of Motion application dated January 11, 2024, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No. E474 of 2021 (M'Inoti, Omondi & Ngenye-Macharia JJA.) delivered on December 8, 2023. The applicant also seeks a stay of execution of the judgment pending the hearing and determination of an intended appeal.

2. The application has invoked Articles 163 (4) (b) & 163 (5) of the *Constitution* of Kenya, sections 3A and 3B of the *Appellate Jurisdiction Act*, section 15 of the *Supreme Court Act*, rule 33 of the *Supreme Court Rules, 2020* and rules 1 (2), 5 (2) (b), 41, 42 and 43 of the *Court of Appeal Rules, 2022*.

3. To contextualize the application, we give an abridged background giving rise to it as follows: The respondent was retained by the applicant to provide legal services with respect to debt recovery and the realization of a security against Hashi Energy Limited. The debt owed stood at Kshs. 2, 907, 925, 561.00.

4. It is common ground that the respondent's instructions were to review the security documents and render a legal opinion. Subsequently, the respondent issued one demand letter and a dispute on fees arose before the settlement agreement could be signed with the debtor. This triggered the respondent to file its bill of costs dated July 22, 2019, in High Court Miscellaneous Application No. E298 of 2019. It calculated the instruction fees under paragraph 7 (b) schedule 5 of the *Advocates (Remuneration)*

(Amendment) Order at 1.5% of the 2.9 billion (the debt owed), translating to Kshs. 43, 688, 883.00. The respondent justified the claim for instruction fees on account of issuing a 90 – day statutory demand notice, preparing a legal opinion and provision of other services ancillary to the issuance of the statutory notice.

5. In her ruling dated January 15, 2020, the taxing master applied paragraph 7 to schedule 5 of the *Advocates (Remuneration) (Amendment) Order* to award instruction fees in the sum of Kshs. 43, 688, 883. 40. The applicant was dissatisfied with that decision. It filed a reference before the Nairobi High Court in Miscellaneous Application no. E298 of 2019.

6. The issue that arose for determination was the application of paragraph 7, Part II of Schedule 5 of the *Advocates (Remuneration) (Amendment) Order*. In its ruling dated April 14, 2020, the High Court (Majanja, J.), as he then was, found that for paragraph 7 to apply, an advocate and his or her client must enter into a general agreement applying the scale thereunder. Since that agreement did not exist between the parties herein, the learned judge opined that the applicable provision was paragraph 1, part II of Schedule 5. Consequently, the reference was allowed. It was directed that the bill of costs be drawn afresh before a different taxing master.

7. The respondent herein was dissatisfied with those findings. It filed before this Court, Civil Appeal No. E474 of 2021. The main issue before the bench revolved around the interpretation of paragraph 7 to schedule 5 of the *Order*. The learned judges in a majority decision, M'inoti, JA. dissenting, found that the agreement contemplated in that paragraph was not mandatory. Consequently, the Court reversed the decision of the High Court and upheld the decision of the taxing master as follows:

> " In our view, the main contestation revolves around the interpretation of the meaning of the word "may" in the provision, and whether it ought to be interpreted to mean that an agreement is one and the same as the word 'mandatory' requirement...
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> ... At this stage, even if the said provision is read in its full context as suggested by learned counsel Mr. Regeru, we are not of the mind that the word "may" as used connotes a mandatory duty. Firstly, in the said paragraph 7, more specifically sub- paragraphs (a) and (b), the word "shall" is used. The fact that the Legislature used 'may' and 'shall' in the same provision attests that 'may' and 'shall' are intended to convey a different meaning.
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> Secondly, if we were to hold that the word "may" is in this case to be construed as mandatory, it would create an absurdity, and cause inconvenient consequences for all advocates practicing within the boundaries of Kenya. For instance; what would be the consequence when an agreement is prepared but a client declines to sign? Would this not be prejudicial to the advocate(s) who would be placed, if not crucified, at the mercy and the whims of their clients? How then would an advocate execute an unsigned agreement?
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> These questions are answered to cure the mischief the word 'may' was intended to cure. We say so in the context that the agreement would be drawn after both the advocate and the client have agreed on its terms so that there does not arise a stalemate of one party declining to sign it. If that were to happen, such an agreement would just but be scripts on a paper, and not even worth mentioning for purposes of effectuating what is in it. Therefore, it cannot be said that it was the intention of the Legislature to have parties enter into a general agreement for every non-contentious debt collection matter. If it was, as the adage goes, nothing would have been easier for Parliament to do than to state so in clear words. And, in this case, it would have used the word "shall" as opposed to "may". We cannot then belabour to conclude that the word 'may' can only connote a discretionary mandate.

In conclusion, to reduce a legal nuance into simple English, the word 'may' in the context at hand means existence of discretion. In reference to the provisions applied in this case, we do not see any reason why the word 'may' in paragraph 7 Schedule 5, Part II should be read as 'must' or 'shall'.

From the above, it is evident that the learned Judge erred in finding that a general agreement was a required document for purposes of paragraph 7 in part II of Schedule 5 to apply to the appellant's Bill of Costs...

... Hence the taxing master properly addressed her mind to the correct Part, Schedule and paragraph that the appellant was obligated to charge their fees under. Respectfully, we do not agree with the learned Judge that, the parties not having entered into a general agreement, paragraphs 1 to 6 of Part II of Schedule 5 ought to have applied.

In the same vein, it follows that the Bill of Costs could not be taxed under Part I of Schedule 5... Clearly the matter in issue concerned non- contentious debt collection which is not covered under this part. Consequently, the taxing master had no choice but to tax the bill under the correct part of Schedule 5.

And having concluded in the foregoing that a general agreement was not a mandatory requirement under paragraph 7, it follows that the appellant was and is entitled to instruction fees pursuant only to this provision. For this reason, we find that the learned taxing master exercised her discretion properly and the superior court erred in interfering with her decision."

8. It is those findings that have precipitated the filing of this application. On the one part, the application seeks certification and leave to appeal to the Supreme Court on the following grounds:

   a. The applicant seeks interpretation, relevance and application of the provisions of paragraphs 1 – 6 Part II and paragraph 7 to schedule 5 of the A*dvocates (Remuneration) (Amendment) Order* 2014;

   b. By finding that the respondent was entitled to instruction fees as provided in paragraph 7, this Court rendered the application of paragraphs 1 – 6, part II of Schedule 5 superfluous;

   c. As a result of the judgment, the applicant was apprehensive that advocates in Kenya will issue one demand letter as provided in section 90 of the *Land Act*, to their instructing client, and proceed to charge a percentage of the debt owed pursuant to paragraph 7, even where no further steps have been taken;

   d. In light of (c) above, a vicious cycle will ensue since the clients' subsequent advocates appointed will conduct themselves in the same manner thereby exposing the client to untoward costs;

   e. The applicant seeks to delineate and understand the purpose and significance of the agreement contemplated in paragraph 7 to schedule 5;

   f. The applicant seeks to resolve which provision of schedule 5 applies to debt recovery and the condition(s) precedent (if any) to be satisfied by an advocate who wishes to rely on any of the charging provisions under schedule 5;

   g. By looking at a reading of paragraph 7, whether an advocate is permitted to charge a percentage of the debt owed for ancillary services in debt collection where the actual debt has not been recovered;

h. The client's costs will be met by borrowers countrywide and will thus be affected by the decision of this Court. Similarly, advocates countrywide will be affected by that decision;

i. The judgment, if left undisturbed, sets a bad precedent and will open a floodgate of disputes over the same circumstances given the principle of stare decisis;

j. The judgement violates the upheld aphorism that an award in taxation of bills of costs should not be excessive as to amount to an injustice.

9. The applicant further seeks a stay of execution of the judgment delivered on December 8, 2023 on the following grounds: the stay order will preserve the substratum of the matter; the appeal is arguable; the respondent is at liberty to execute at any given time; the appeal will be rendered nugatory if stay is not granted;

> the respondent will not suffer any prejudice if the orders sought are granted; and the intended appeal raises matters of general public importance.

10. The application is vehemently opposed. In its replying affidavit sworn on February 13, 2024, the respondent, through its senior partner, learned counsel Mr. Elijah Mwangi Njeru, deposed that the application was unmerited and ought to be dismissed with costs. We have summarized the grounds as follows: this Court lacked jurisdiction to stay its own orders and grant leave to appeal to the Supreme Court; the application fell short of the constitutional threshold for certification; the appellant failed to demonstrate that the issues were of general public importance; the application was hopelessly bad as the same sought to review and correct the decision of the learned judges; this Court aptly addressed and interpreted paragraph 7 of part II schedule 5 of the *Advocates (Remuneration) (Amendment) Order*; the issues raised lacked jurisprudential value; the issues framed by the appellant did not arise before the taxing officer; the issues raised neither address any ambiguity or uncertainty in the law nor a dichotomy or divergence of opinion in the relevant provision in contention; and that the taxing master exercised her discretion judiciously and hence her decision was upheld by this Court.

11. The applicant also filed two supplementary affidavits sworn on February 16, 2024 and April 30, 2024. It argued that this Court had inherent powers to stay its own decisions. It regurgitated that the issues raised were of general public importance and the issue was one calling for certification. Additionally, there was a need for the Supreme Court to intervene since the assessment of costs was premised on wrong principles. It annexed its notice of appeal dated December 21, 2023.

12. When this matter was called for hearing through a virtual platform, learned counsel Mr. Regeru appeared for the applicant and learned counsel Mr. Mwangi appeared together with learned counsel Mr. Kimani for the respondent. The parties relied on the written submissions that were orally highlighted.

13. The applicant has filed written submissions and a case digest both dated February 20, 2024 which reiterate the grounds in support of the application. We therefore need not rehash them. On its part, the respondent, filed written submissions dated February 28, 2024 together with its case digest similarly dated. It also laid emphasis on its replying affidavit praying that the application be dismissed with costs.

14. We have carefully considered the Notice of Motion, the respective affidavits, the documents in support thereof, and the submissions by the parties. We note that the application seeks two pertinent prayers: for certification and for stay of execution. We shall deal with the prayer for certification and leave and if merited, we shall sequentially deal with the question of stay of execution.

15. The provisions of Article 163 (4) of the *Constitution* provide that:

> " Appeals shall lie from the Court of Appeal to the Supreme Court—
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> a. as of right in any case involving the interpretation or application of this Constitution; and
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> 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)."

16. Although certification can be sought either from the Supreme Court or from this Court, the Supreme Court has held that it is good practice to originate the application in this Court. In *Sum Model Industries Ltd vs. Industrial & Commercial Development Corporation* [2011] eKLR, the Supreme Court said in part:

> "...it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the *Constitution*. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to abuse of the process of Court."

17. The principles enunciated in an application for certification are well settled. In Civil Application Sup No. 3 of 2016, *Mitubell Welfare Society vs. Kenya Airports Authority Limited & 2 Others*, the Court referred to the English case of *Compton vs. Wiltshire Primary Care Trust* (2008) ECWA Civil page 749,where Waller, LJ. outlined the prerequisites for determining a matter to be of general public importance as follows:

> " (i) that the matter involves the elucidation of public law by higher courts, in addition to the interests of the parties;
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> ii) that the matter is of importance to a general class, such as the body of tax-payers;
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> (iii) that the matter touches on a department of State, or the State itself, in relation to policies that are of general application."

18. Hermanus Phillipus Steyn Our Supreme Court in the case of vs. *Giovanni Gnecchi- Ruscone*, (2013) eKLR held *inter alia*:

> " 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."

19. In the case of *Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union (KEFHAU) represented by Its Promoters David Benedict Omulama & 9 others* [2018] KECA 760 (KLR), the Court stated as follows:

> "The principles set out in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*, (*supra*) to determine whether a matter is of general public importance included:
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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 significant bearing on the public interest;
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> 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;
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> 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;
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> 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*;
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> 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."

20. The applicant seeks certification on the interpretation of paragraph 7 to schedule 5 of the *Advocates (Remuneration) (Amendment) Order* justifying that the issues divergent therein transcend the entire profession and members of the public seeking debt collection services from financial institutions. It also seeks the audience of the Apex Court to interpret its proper application together with that of paragraphs 1 - 6 part II schedule 5 of the said *Order*. The applicant added that since this Court's decisions are of binding authority to other Courts, save the Apex Court, the decision as it stands sets a bad precedent and will open a floodgate of litigious dispute countrywide.

21. A cursory and in-depth inquiry into the grounds raised by the applicant reveals that it is dissatisfied with the decision of this Court. It is also clear that their main grievance is on the amount awarded by the taxing master. To the applicant the sum of Kshs. 43, 688, 883.00 amounts to an injustice when the work done by the respondent is taken into account. The applicant further argues that the interpretation of the word "may" by the learned judges is wrong and that it creates uncertainty in the law and thus renders paragraph 7 vulnerable to abuse against unsuspecting persons seeking debt collection services.

It therefore argues that the application raises issues of general public importance that transcends the interest of the parties in this application.

22. It is trite that in deciding this question, the test is not whether we would have reached a different conclusion on the same set of facts or on the merit or otherwise of the judgment of the Court. The test is whether the questions raised amount to issues of general public importance that transcend the dispute between the parties. It is incumbent on an applicant to demonstrate that the matter in question carries specific elements of real public interest and concern.

23. We find that other than the general statement that the impugned judgment raises matters of general importance, it is clear that the applicant is dissatisfied with the amount awarded by the Deputy Registrar when it considers the work done by the respondent. The facts of this case are specific to the parties and we do not see even one single point that can be termed as a point of general public importance that transcends the dispute between the parties. It is important for parties to note that every interpretation of a section or a rule affects the parties that are before the Court and any other party that relies on it in one way or the other. Therefore, when a party seeks certification, they must demonstrate how the impugned decision transcends beyond a dissatisfaction with the decision and has a bearing on the public interest. Therefore, the fact that a court has interpreted a section or a rule in a certain way is not enough to create an issue of general public importance. The argument that the decision of the Court renders paragraph 7 open to abuse against unsuspecting persons seeking debt collection services is speculative, to say the least.

24. In our view, the applicant is only dissatisfied with the findings of this Court and seeks a further audience before the Supreme Court. We find that no dichotomy or real issue has been demonstrated as to warrant certification. It has not been demonstrated by the applicant that the impact of the decision of this Court is substantial, broad-based, transcending the litigation-interests of the parties and bearing upon the public interest.

25. The upshot of our analysis is that the questions raised by the applicant are not of general public importance that transcends the dispute between the applicant and the respondent. Resultantly, the application has not met the test set in the celebrated case of *Hermanus Steyn*. Accordingly, we dismiss the application in its entirety for lacking merit even without having to reflect on whether we have jurisdiction to grant stay in this sort of circumstances with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

F. TUIYOTT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR