



**Pioneer Holdings (Africa) Ltd v Francis Thuo and Partners Ltd & 2 others (Civil Application SUP 14 of 2019) [2024] KECA 1404 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1404 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION SUP 14 OF 2019  
DK MUSINGA, MSA MAKHANDIA & SG KAIRU, JJA  
OCTOBER 11, 2024**

**BETWEEN**

**PIONEER HOLDINGS (AFRICA) LTD ..... APPLICANT**

**AND**

**FRANCIS THUO AND PARTNERS LTD ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI SECURITIES EXCHANGE ..... 2<sup>ND</sup> RESPONDENT**

**CAPITAL MARKETS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for certification that a matter of general public importance is involved in the applicant's intended appeal to the Supreme Court from the decision of this Court (Okwengu, Musinga & Gatembu, JJ.A.) delivered on 24<sup>th</sup> May 2019 in Civil Appeal No. 34 of 2018)*

**RULING**

1. Before this Court is a Notice of Motion dated 6<sup>th</sup> June 2019, which is brought by the applicant pursuant to the provisions of Article 163 (4)(b) of *the Constitution*, sections 15 and 16 of the *Supreme Court Act*, rule 24 of the *Supreme Court Rules*, and rule 1(2) of the Rules of this Court. The principal orders sought are grant of leave to appeal to the Supreme Court from the judgment of this Court delivered on 24<sup>th</sup> May 2019 in Civil Appeal No. 34 of 2018, and certification that the intended appeal involves matters of general public importance.
2. The background to this application is that the applicant had for many years engaged the 1<sup>st</sup> respondent, a stock brokerage firm, to purchase, sell, and generally trade in shares in the Nairobi Stock Exchange on its behalf. According to the applicant, in the years 1993 and 1994, the 1<sup>st</sup> respondent failed to deliver to it shares that it had already paid for; that after protracted demands and follow-up, the 1<sup>st</sup> respondent availed some of those shares in the year 2004; that on 5<sup>th</sup> March 2007, the 1<sup>st</sup> respondent was placed under statutory management, by which time the applicant's investments purchased through it



- in several companies, valued at Kshs.74,898,960.00 had not been delivered. The dividends declared by the different companies amounting to Kshs.20,300,751.00 had also not been paid to the applicant.
3. By way of a plaint dated 31<sup>st</sup> July 2014, the applicant instituted proceedings against the respondents in the High Court seeking, inter alia, a declaration that there was breach of contractual, statutory and fiduciary duties owed to it by the respondents. It also sought judgment for Kshs.95,199,711.00 being the total of the value of the securities that had not been delivered, and for declared dividends that had not been paid.
  4. The respondents challenged the jurisdiction of the High Court to hear and determine the dispute in light of the provisions of the Capital Markets Act; that claims for pecuniary loss arising from alleged breach of contractual obligations ought to be determined pursuant to the mechanisms under that Capital Markets Act; and that the claim was statute barred under section 4 of the Limitation of Actions Act.
  5. In its ruling on the question of jurisdiction, the trial judge considered the provisions of the Constitution, the relevant provisions of the Capital Markets Act and the Regulations thereunder and concluded that the procedure set out in the Capital Markets Act ought to have been pursued before the jurisdiction of the court could be invoked. With regard to the question whether the claim was time barred, the learned judge held that the relationship between the applicant and the 1<sup>st</sup> respondent was a contractual relationship; and that whether or not the cause of action was founded on contract or tort, the suit was filed out of time.
  6. Aggrieved by those findings, the applicant preferred an appeal before this Court. It was contended, inter alia, that the Judge was wrong in concluding that the relationship between it and the 1<sup>st</sup> respondent was contractual when in fact it was that of a fiduciary and a beneficiary; that contrary to the holding by the learned judge, there is no time bar to claims arising from breach of trust; that the finding by the learned judge that the applicant should have pursued the dispute resolution mechanisms set out in the Capital Markets Act was also erroneous because the remedy provided under that mechanism is practically ineffective and non-existent in relation to it.
  7. This Court (Okwengu, Musinga & Gatembu, JJ.A.), vide its judgment dated 24<sup>th</sup> May 2019, held that based on the plaint, there existed, by agreement, a relationship of principal and agent between the applicant and the 1<sup>st</sup> respondent. The Court agreed with the findings of the trial court that the claim by the applicant was indeed time barred. On whether the applicant should have exhausted the mechanisms provided under the Capital Markets Act before approaching the High Court, it was held that the applicant should have utilized the mechanisms provided for under the Capital Markets Act and the Capital Markets (Licensing Requirements) General Regulations before it proceeded to court. Accordingly, the appeal was dismissed with costs.
  8. The applicant intends to lodge an appeal from the decision of this Court. Its application is supported by the grounds appearing on the face thereof, in the affidavit in support sworn by Shiraz Jeraj, one of its directors, and by a draft petition annexed to the affidavit in support. It is contended that the matters raised in the application are of great public importance since the decision of this Court means that trustees can hide behind time limitation to avoid having to account for trust funds; that the decision of this Court creates uncertainty over the meaning and application of section 20(1) of the Limitation of Actions Act in view of section 4(1) of the same statute; and that the applicant needs the Supreme Court to clarify the law on limitation of actions vis-à-vis a fiduciary in view of the evidence on record.
  9. It is averred that this Court erred by disregarding pleadings by the applicant through which the applicant sought to recover from the 1<sup>st</sup> respondent the shares, share bonuses, and dividends which the



latter held in trust for it; in failing to find that the applicant's action against the 1<sup>st</sup> respondent was an action to recover from a trustee trust property and proceeds thereof in possession of the trustee; and in applying section 4(1) of the Limitation of Actions Act to find the suit time barred, whereas section 20(1) of the same Statute provides that the period of limitation prescribed therein does not apply to actions concerning trust property.

10. The questions which the application shall be seeking determination by the Supreme Court are whether an action by a cestui qui trust against a trustee to recover trust property and proceeds thereof in possession of the trustee is not subject to time limitations prescribed under the Limitation of Actions Act pursuant to section 20(1) of the same Act; whether the applicant's action against the 1<sup>st</sup> respondent was an action by a beneficiary under a trust, which action is contemplated under section 20(1) of the Limitation of Actions Act; whether the applicant's action against the 1<sup>st</sup> respondent was subject to the periods of limitation provided for under the Limitation of Actions Act; and whether the applicant's action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was time barred under the provisions of the Limitation of Actions Act.
11. It is only the 3<sup>rd</sup> respondent who filed a replying affidavit opposing the application. The gist of its response as per the replying affidavit sworn by one Peter Munge, its advocate on record, is that the applicant has not satisfied the requirements for certification of the intended appeal as involving a matter of general public importance as none has been shown, and therefore this application ought to be dismissed with costs.
12. At the hearing, learned counsel Mr. Mwangi appeared for the applicant, while learned counsel Mr. Kiche was present for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent were represented by learned counsel Mr. Opole and Mr. Wafula respectively. Highlighting his client's written submissions, Mr. Mwangi urged us find that there exists two divergent views on the application of section 20 of the Limitation of Actions Act and its availability to assist a beneficiary to pursue a claim for breach of fiduciary duty. In support of this argument, counsel cited the decisions of this Court in *Ajay Shah vs. Deposit Protection Fund Board as Liquidator of Trust Bank Ltd (in liquidation)* (2016) eKLR and *Public Service Club Registered Trustees vs. Mary Wangechi Kethi Kariithi and 3 others* [2019] eKLR. In urging us to grant the leave sought, counsel contended that there was need for the Supreme Court to settle the law as far as applicability of that section of the law is concerned. Counsel further contended that the principles as per *Hermanus Phillipus Steyn vs. Giovanni Gneccchi- Ruscone* [2013] eKLR had been satisfied.
13. On their part, counsel for the respondents submitted that there was no uncertainty in the law as alleged by the applicant, and the principles laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscone* (supra) had not been satisfied. They urged us to dismiss the application with costs.
14. We have duly considered the application, the submissions by learned counsel, the authorities cited and the applicable law. Article 163(4) of the Constitution stipulates that appeals lie from this Court 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.”



15. It is trite law, as stated in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (supra)*, that to succeed in an application for certification under Article 163(4)(b) of *the Constitution*, an applicant has to demonstrate that the issue(s) to be raised in the intended appeal involve a matter of general public importance. A ‘matter of general public importance’ was defined in the said decision as follows:

“...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.”

16. This Court in *Kenya Plantation and Agricultural Workers’ Union v Kenya Export Floriculture, Horticulture and Allied Workers’ Union (Kefbau); represented by its Promoters; David Benedict Omulama & 9 others* [2018] eKLR stated thus:

“The principles set out in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (supra)* to determine whether a matter is of general public importance included:

- 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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

17. The issues raised by the applicant in this application do not, in our view, reveal any conflict as far as the interpretation and applicability of the provisions of section 20 of the *Limitation of Actions Act*



is concerned. The issues also do not, in our view, transcend the personal interests of the applicant. They are in their very nature ordinary issues that do not rise beyond the relationship (contractual or otherwise) between the applicant and the 1<sup>st</sup> respondent and the dispute emanating therefrom. We are not satisfied that there are any issues of general public importance involved, or that the applicant is raising novel issues of law for determination by the Supreme Court.

18. In the circumstances, we find that the application is without merit, and is hereby dismissed with costs to the respondents.

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

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

