Stanbic Bank Kenya Limited v Santowels Limited (Civil Application Sup E196 of 2022) [2023] KECA 188 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KECA 188 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP E196 OF 2022

DK MUSINGA, HA OMONDI & PM GACHOKA, JJA

FEBRUARY 17, 2023

BETWEEN

STANBIC BANK KENYA LIMITED ..... APPLICANT

AND

SANTOWELS LIMITED ..... RESPONDENT

(Being an application seeking certification and leave to appeal the Judgment of this Court (Okwengu, Asike-Makhandia & Mohammed, JJ. A.) delivered on 28th April 2022 in Civil Appeal No. 160 of 2018)

RULING

1. By a notice of motion dated June 9, 2022, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No 160 of 2018 (Okwengu, Asike-Makhandia & Mohammed, JJA.) delivered on April 28, 2022.

2. The application is brought under Article 163 (4) of the Constitution of Kenya, sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rule 33 (I) of the Supreme Court Rules. Article 163(4) of the *Constitution* states as follows:

> " 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)."
>
> Although certification can be sought either from the Supreme Court or from this Court, the Supreme Court has held that it is a good practice to originate

the application in this Court. In *Sum Model Industries Ltd v 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."

3. By way of background, Stanbic Bank Kenya Ltd (hereinafter referred to as the applicant), was the respondent in Civil Appeal No 160 of 2018, in which Santowels Ltd (herein the respondent) was the appellant. The appeal was against the judgment delivered on March 27, 2018 in HCCC No 648 of 2004, Nairobi, Commercial & Tax Division (O. Sewe, J). The main bone of contention in the High Court related to the rate of interest that was charged by the applicant, who was the respondent's banker. Upon hearing the parties, the High Court held at the time of the bank-customer relationship, there was a legal regime vide section 39 of the *Central Bank of Kenya Act* that allowed the Governor of the Central Bank of Kenya to fix interest rates that the banks and financial institutions could charge. The Court held that at the time the rate was capped at 16.5% calculated on the reducing balance method, and that the applicant charged the respondent interest beyond what was provided by the statute. The High Court therefore held that the overcharged interest was recoverable and entered judgment in the sum of Kshs 8,978,813.63 plus interest at the court rate from the date of filing of the suit until payment in full.

4. The respondent being aggrieved by the judgment of the High Court filed an appeal in this Court. The main ground of the appeal was how the High Court dealt with the issue of the rate of interest that was applied by the applicant. It prayed that this Court do vary the judgment of the High Court and award a sum of Kshs 68,986,536.28 plus interest at bank rates from the date of the overcharge.

5. The applicant was equally dissatisfied with the judgment of the High Court and it filed a cross-appeal. The applicant attacked the judgment of the High Court on among other grounds that; the court failed to find that the suit was statute barred by dint of section 4(3) of the *Limitation of Actions Act*; failure to distinguish the rate of banking and contractual interest rate as governed by sections 44 and 52 of the *Banking Act*; failing to hold that the contract between the parties allowed variation of interest ; and awarding the respondent a sum of Kshs 8,978,813.63 which was against the law and the weight of evidence.

6. Upon hearing the parties, this Court pronounced itself in part as follows:

> "On the 2nd issue, the appellant in its further amended plaint averred that on or about the year 1993 it appointed the respondent as its banker and thus it owed it a contractual duty to accurately and honestly account for all the transactions in its accounts. Between the years 1993 and 1997 it had applied for overdraft facilities which were granted at aggregate rates as

follows: Base +3% p.a from 01/4/1993; base + 4% p.a from 17/6/1993; base + 6% p.a from 6/7/1995 and base+3% from 31st December 1996.

However, according to the appellant in the year 1997, the maximum interest that banks were supposed to charge was 16.5% on a reducing balance as per the directives and Gazette notices of CBK. Further that the banks and in this case, the respondent was supposed to seek and obtain approval from the Minister of Finance before it could enhance the interest chargeable beyond that stipulated by law. Therefore, any amount charged on it from the 18th April 1997 above the stipulated rate and without the minister's sanction was thus unlawful.

The appellant had a duty to prove that the facts it asserts exist. Of course the burden of proof as to any particular fact lies with who wishes the court to believe in its existence pursuant to sections 107(1) and 109 of the *Evidence Act*. We think that the appellant discharged this burden going by the evidence on record. Indeed, PW2 in his evidence stated that he recalculated the interest due by applying the prevailing rates at the material time. In one of the reports, he used the contractual rates agreed by the parties and on the other he used the legal rate of 16.5% per annum that the respondent ought to have applied based on the gazette notices issued from time to time by CBK. Therefore, the sum due to the appellant was either Kshs 10,449,411.74/= or Ksh. 68,986,536.28/= based on either of the two scenarios. It is also instructive that in its letter dated 26th June 1996, addressed to the respondent the appellant confirmed that indeed it had overcharged the respondent on the three accounts and offered to refund Kshs 283,145.60/= so overcharged. With this kind of evidence how can both parties accuse the trial court of not evaluating the evidence presented judicially or at all or that it did not pay due regard to the legislative framework put in place by the CBK to cap interest rates. Having carefully gone through the judgment, we must point out at once that the trial court did a sterling job in the consideration and evaluation of the evidence presented before it before reaching the conclusions it reached. The accusations to the contrary by both parties are farfetched and have no basis at all.

.... The respondent was governed by this Act being one of the banks in Kenya till when the same was repealed by section 17 of the *Central Bank (Amendment) Act* No 9 of 1996. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR, this Court held that the bank had the duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. Further, that the burden remained with the respondent to prove that the rate of interest that was being charged was with the consent of the Minister. This is so because section 44 of the *Banking Act* places the burden on the bank to seek such approval. Therefore, the respondent was quite aware that the rate of interest was capped and it required the approval of the Minister for any variation of the bank interest rates or interest adjustments from time to time. The respondent was similarly governed by Section 44 of the *Banking Act*, which provided that no institution was allowed to increase its rate of banking or other charges except with the prior approval of the Minister.

Besides the foregoing the respondent at one point had to refund the appellant the interest overcharged and therefore the respondent cannot run away from the fact that it unlawfully increased the interest chargeable on the appellant's accounts without the necessary consent and approval from the Minister. Further, the argument that the appellant executed the letters of offer with specific stipulations regarding the interest chargeable cannot be used to override specific provisions of the law. We therefore do not fault the trial court's finding that the respondent had not provided any evidence that it applied for or obtained the approval

of the minister to charge interest rates above the applicable rate at the time of 16.5% between 1991 and 1997. Thus the interest charged by the respondent was unlawful.

It cannot be gainsaid that where money is paid out to another under the influence of mistake or unlawfully as is in this case, such money is recoverable as already stated elsewhere in this judgment. Two scenarios were presented to the trial court. The amounts recoverable were either Kshs 10,449,411.74 or Kshs 68,986,536.28 depending on the mode of calculation adopted.

The trial court in awarding the appellant the sum of Kshs 8,498,764.03 as the overcharge stated:

"Having given consideration to the two scenarios, it is noted that in the premises, and going by the principle that it is ordinarily no part of equity's function to allow a party to escape from a bad bargain; and considering that the court's function is to give effect, within the confines of law to the wishes of the parties as expressed by the terms of their contract, I would adopt the scenario presented by Mr. Onono in the recalculation contained in the plaintiff's exhibit No5 which was premised on the parties' contractual documents, that the plaintiff was unlawfully overcharged interest by the defendant to the tune of Kshs 8,498,764.03, and I so find. It is further my finding that the sums are recoverable by the plaintiff from the defendant."

We have no reason to fault this reasoning by the trial court. However, we hasten to add that the trial court got it wrong on the final figure. The figure should have read Kshs 10,449,411.74 plus interest from the date of filing in the High Court instead of Kshs 8,498,764.03. In the upshot the appeal succeeds to that limited extent, that is, that the appellant shall be paid Kshs 10,449,411.74 instead of Kshs 8,498,764.03. However, the cross-appeal fails and is dismissed. Each party shall bear their own costs of the appeal."

7. The applicant is aggrieved by the judgment of this Court and seeks certification and leave to appeal to the Supreme Court on the following grounds:

   A. That the application for certification raises the following fundamental points of general public importance:

      a. Does Section 44 of the *Banking Act* that restricts financial institutions from increasing the rate of banking or other charges except with the prior approval of the Minister apply to interest rates?

      b. Does Section 52 of the *Banking Act* allow contractual freedom to financial institutions to contractually vary interest without ministerial authority?

      c. Does the rate of banking refer to interest rates?

      d. Can a third party rewrite a contract between a financial institution and its customer by relying on Section 44 of the *Banking Act*?

      e. Does it amount to unjust enrichment for a bank customer to claim a refund on the basis of a third-party recomputing interest on time-barred claims on the basis of misapplying Section 44 of the *Banking Act*?

      f. Does the application of Section 44 of *Banking Act* apply retrospectively to revive time-barred claims?

B. That there is uncertainty on points of law as the Court of Appeal relied on one case on interest interpretation that held that ministerial authority was required and did not take into account the majority of High Court cases that determined that ministerial authority was not required for interest variation.

8. It is the applicant's submission that there is uncertainty in the law and that there are several contradicting decisions in the High Court and this Court on the question of rate of banking and interest variation and when ministerial consent is required.

9. On its part, the respondent has no quarrel with the applicable principles in an application for certification that have been laid down by this Court in various decisions, but that is where the concurrence with the applicant ends. The respondent states that this application does not meet the threshold for certification as prayed. The respondent in its submissions states that the primary matter between the parties is a contract that does not raise any issue of general public importance. To the respondent, the issues in dispute do not transcend the interest of the parties. The respondent submits that the application of section 44 of the *Banking Act*, cannot be said to be substantial and that the said section has not been amended to reflect the allegations of the applicant.

Regarding section 55, the respondent submitted that there were no arguments on the said section in the High Court or this Court. Finally, the respondent submitted that on the interpretation of the *Limitation of Actions Act*, the court considered all the facts before it dismissed the applicant's arguments.

10. We have carefully considered the notice of motion, the rival affidavits, the documents, and the submissions by the parties. We note that the parties are now walking on a path that is now well-trodden. In the last ten years or so this Court has set out the principles applicable in an application for certification and leave to appeal to the Supreme Court in various decisions. In Civil Application Sup No 3 of 2016, *Mitubell Welfare Society v Kenya Airports Authority Limited & 2 Others, the Court referred to an English case of The Queen on the Application of Cromptom v 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;

ii. that the matter is of importance to a general class, such as the body of tax-payers;

iii. that the matter touches on a department of State, or the State itself, in relation to policies that are of general application."

In Supreme Court Application No 4 of 2012, *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone*, the Court 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".

In the case of *Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau)*

eKLR, the Court stated as follows:

> " The principles set out in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, 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 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 [at earlier levels of the] 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 [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;
>
> viii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become "matters of general public importance", so as to be a basis for appeal to the Supreme Court;
>
> ix. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;
>
> x. questions of law that are destined to continually engage the workings of the judicial organs, may become "matters of general public importance", justifying certification for final appeal in the Supreme Court;

xi. questions with a bearing on the proper conduct of the administration of justice, may become "matters of general public importance," justifying final appeal in the Supreme Court."

11. We have also considered the applicant's grounds in support of certification and in our view, the intended appeal primarily revolves around the proper interpretation and application of sections 44 and 52 of the *Banking Act*. As we understand it, the applicant is saying that the courts have given different interpretation on instances when the consent of the minister in charge of finance is required and instances when the parties have freedom of contract to agree on the rate on interest, including the right to vary that rate.

12. Having considered the issue, we find there is uncertainty in the law arising from the contrary views in the High Court and this Court on the question of the rate of interest and banking charges which requires certainty. The battle on whether banks have a free hand to change any rate of interest and banking charges and whether customers can wake up many years after signing contractual documents to challenge the rate of interest has been ranging in our courts for a long time and requires clarification. This question has arisen for determination in the following cases as submitted by the applicant:

i. *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR

ii. *John Gatu Nderitu v Kenya Commercial Bank Ltd* (2011) EKLR

iii. *Sammy Japheth Kavuku v Equity Bank Limited & another* [2014] eKLR

iv. *Daniel Kamau Mugambi v Housing Finance Company of Kenya Ltd* [2006] eKLR

v. *St Elizabeth Academy- Karen Limited v Housing Finance Co of Kenya Limited* [2013] eKLR

vi. *Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited* [2016] eKLR

13. We note that the respondent in its submissions and authorities has not specifically dwelt on the question of whether there are different decisions on section 44 of the *Banking Act*. It has addressed, and rightly so in our view, the principles that are applicable in an application for certification, such as the one we are dealing with. The point we do not agree with the respondent is that the dispute is primarily a matter based on a contract between the applicant and the respondent, which raises no issue of general public importance.

14. In our view, the interpretation of sections 44 and 52 of the *Banking Act* transcends the interest of the parties that are before us. A determination of this issue will bring certainty to this question once and for all. Banks are entitled to know whether the ghosts of the past on interest rates that were applied years back can reincarnate. Bank customers are also entitled to an answer as to whether the signing of security documents amounts to granting banks a blank cheque on the question of interest.

15. For the foregoing reasons, it is our considered view that the questions raised by the applicant are certainly of general public importance that transcend the dispute between the applicant and the respondent. It is therefore our holding that the application has met the test set in the now-famous Hermanus Steyn case. We, therefore, grant leave to the applicant to file the intended appeal in the Supreme Court within the next 14 days. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTR