Karanja v Regnoil Kenya Limited (Civil Application 534 of 2019) [2023] KECA 550 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 550 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 534 OF 2019

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

MAY 12, 2023

BETWEEN

WINFRED NJERI KARANJA .... APPLICANT

AND

REGNOIL KENYA LIMITED .... RESPONDENT

(Application for certificate to appeal to the Supreme Court from the Judgment of the Court of Appeal at Nairobi (Karanja, Asike-Makhandia & J. Mohammed, JJ.A.) dated 3rd February 2023 in CA No. 4534 of 2019)

RULING

1. The applicant, Winfred Njeri Karanja, seeks, as a prelude to appealing to the Supreme Court, a certificate that a matter of general public importance is involved in her intended appeal. On February 3, 2023, this court (Karanja, Asike-Makhandia and Mohammed, JJ.A.) allowed an appeal by the respondent, Regnoil Kenya Limited, effectively reversing a judgment of the High Court in favour of the applicant.

2. The short background to the application is that, on November 2, 2011, the applicant and the respondent entered into an agreement by which the respondent agreed to sell to the applicant Maisonette No. 262 on LR No. 209/17918, Diamond Park, South B in Nairobi (the Suit Property) for Kshs 11, 700,000.00. The purchase price was payable in agreed instalments, and it is common ground that the applicant paid the purchase price save for the balance of Kshs 3,000,000. The applicant transferred the suit property in her name and charged the same to secure a loan. A dispute then arose between the parties which culminated in the applicant filing a suit against the respondent for general and special damages for breach of contract. It was the applicant's contention that the respondent had delivered the suit property with defects and not to the agreed standard.

3. The respondent filed a defence and counterclaim in which it contended that the suit property was completed to the agreed standard and prayed for an order for rescission of the contract and forfeiture of 10% of the purchase price as liquidated damages. In the alternative, the respondent prayed for the balance of the purchase price, mesne profits of Kshs 80,000 per month, general damages for breach of contract, costs and interest.

4. The suit was heard by Makau J. who, by a judgment dated September 27, 2018, allowed the applicant's claim and dismissed the respondent's counterclaim. The learned judge ordered the respondent to remedy the alleged defects to the tune of Kshs 2,150,694.52. In the alternative, the applicant was allowed to take delivery of the suit property, rectify the defects and recover the said sum from the purchase price due and owing to the respondent. In addition, the learned judge awarded the applicant general damages of Kshs 1,500,000.00 costs and interest.

5. The respondent was aggrieved and preferred an appeal to this court faulting the learned judge for, among others: awarding the applicant general damages for alleged breach of contract; finding the respondent in breach of contract and yet the applicant had not paid the balance of the purchase price; awarding the applicant Kshs 2,150, 694.52 for correction of defects, which amount was not strictly proved; ignoring the provision in the agreement for sale to the effect that variation of the specifications of the suit property could not invalidate the agreement; by re-writing the agreement between the parties to require a certificate of practical completion whilst the parties had agreed only on a certificate of occupation; and by dismissing the counterclaim.

6. Upon hearing the parties, the court identified four main issues for determination, namely:-

   a. whether there was a breach of contract;

   b. whether the trial court re-wrote the contract between the parties;

   c. whether the trial court erred in awarding special damages; and

   d. whether the trial court erred in awarding general damages for breach of contract.

7. On issue No. 1 the court found that the trial court erred by holding that the respondent was in breach of contract, whereas it had forwarded to the applicant all the completion documents required under the agreement of sale, and on the strength of which the applicant transferred the suit property to her name and charged the same. Further, that it was the applicant who was in breach by failing to pay the balance of the purchase price per the agreement, and that none of the parties had rescinded the contract.

8. As regards issue No. 2, the court found that the trial court erred and re-wrote the agreement between the parties when it made provision of a certificate of completion a condition for completion contrary to the express terms of clause 5:3 of the agreement for sale, which did not require such a document. On award of special damages, the court found that the applicant did not strictly prove the sum awarded as required by law because her witness conceded that the sum was a mere estimate which, in the court's view, was speculative.

9. Lastly, on award of general damages, the court held that the trial court had erred by making the award because, as a general rule, general damages are not awardable for breach of contract, since damages arising from such breach are quantifiable rather than at large. Accordingly, the court allowed the appeal, set aside the judgment of the trial court, but made no orders on costs.

10. In the motion that is before us, and in her written submissions, the applicant contends that her intended appeal raises matters of general public importance that require the input of the Supreme Court. Among the issues said to be matters of general public importance are whether a contract for sale should be read as a whole or not; whether a developer of property has an obligation to provide a product that matches the sample; whether developers of properties are subject to consumer protection laws under article 46 of the *Constitution* and bound by the Bill of Rights; whether a contract is voided by misrepresentation; whether the Court's finding that the applicant was in breach of contract, notwithstanding the existence of a professional undertaking should be further investigated by the Supreme Court; whether, in determining if a party has breached a contract, a material clause can be ignored; and whether the impugned judgment is unconstitutional for absolving property developers from the national values of integrity and transparency under article 10 of the *Constitution*.

11. The respondent opposed the application vide a replying affidavit sworn by its director, Mohamed Maalim Kulmia Adan, on February 24, 2023and written submissions dated March 9, 2023. The thrust of the respondent's answer is that the application does not disclose any matter of general public interest because the entire suit was based solely on the agreement for sale between the applicant and the respondent dated November 2, 2011. Further, that the dispute was a private commercial traction that did not transcend into the public realm. It was also the respondent's contention that many of the issues that the applicant has identified as matters of general public importance were never pleaded, argued or determined by thiscourt. As far as the respondent was concerned, the intended appeal to the Supreme Court is a mere attempt to re-litigate the dispute at one more court level. We have carefully considered the application. Article 163(4) (b) of the *Constitution* requires the applicant to satisfy us that a matter of general public importance is involved in her intended appeal before we can grant a certificate to appeal to the Supreme Court. The rationale for a certificate, as explained by this court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* [2012] eKLR, is to filter intended appeals so that only those with clear elements of general public importance are escalated to the Supreme Court. The Supreme Court was not intended to serve as an additional layer of appellate court where ordinary and routine dispute would end up for correction of perceived errors in the application of settled law.

12. In *Malcolm Bell v. Daniel Torotich Arap Moi & anothe*r [2013] eKLR, the Supreme Court explained as follows:

> "It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the *Constitution* and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law." (Emphasis added)

13. *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone* [2013] eKLR ended up in the Supreme Court where that court had the opportunity to lay down the criteria for determining whether an intended appeal to the Supreme Court involves a matter of general public importance. The applicant must demonstrate that the issues intended to be canvassed before the Supreme Court transcend the circumstances of the case and have a significant bearing on the public interest, and that the point of law involved is a substantial one, the determination of which will have a significant bearing on the public interest. The Supreme Court also added that mere apprehension of a miscarriage of justice without satisfying the requirements of article 163(4) (b) of the *Constitution* will not suffice and that the determination of contested facts between the parties is not, by itself a sufficient basis for certification.

14. Further, in *Peter Oduor Ngoge v. Francis Ole Kaparo & 5others* [2012] eKLR, the Supreme Court held thus:-

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court". (Emphasis added)

Applying those principles to the application at hand, it is plainly obvious to us that the dispute that gave rise to the judgment that the applicant intends to escalate to the Supreme Court was a commercial transaction between two parties. The central issue, both in the High Court and in this Court, was a straight forward issue of breach of contract, which required interpretation of an agreement for sale entered into between the parties and applying settled legal principles. Some of the issues that the applicant claims need to be determined by the Supreme Court are whether an agreement for sale should be interpreted as a whole or whether clauses therein should be read in isolation, and whether a product must satisfy the sample. The principles on how a contract is to be interpreted and sale by sample are settled law. We surmise that all the applicant is contending is that this Court misapplied those principles, which to our minds does not qualify a matter as one of general public importance deserving consideration by the Supreme Court.

15. The applicant has also identified a host of other issues that she contends make her intended appeal to the Supreme Court a matter of general public importance, among them the application of consumer protection law under article 46 of the *Constitution*, application of national values and principles of governance under article 10 of the *Constitution*, and application of the Bill of Rights. As properly pointed out by the respondent, those issues were never canvassed before the High Court or the Court of Appeal, and none of those courts determined them. A party cannot manufacture issues that were not before this court so as to create a matter of general public importance for determination by the Supreme Court. Indeed, in *Florence Nyaboke Machani v. Mogere Amosi Ombui & 2 others* [2015] eKLR, the Supreme Court emphasised that issues as framed by the applicant for determination by the Supreme Court should be the same issues that the High Court and the Court of Appeal determined in their substantive judgments. The Supreme Court held as follows:

> "(49) It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this court, ever considered, or determined by the superiorcourts.The issues now being associated with "matters of general public importance", have clearly not evolved through the judicial hierarchy, in the mode contemplated by this court in the *Peter Oduor Ngoge case*. Suffice it to say that if this court were to admit and determine such issues, the court would be determining them in the first instance—which would be contrary to established principle, and to the design of the judicial system.

As we have already pointed out, this court determined only four issues arising from the appeal, namely, breach of contract, re-writing of the contract by the trial court, award of special damages, and award of general damages. The issues framed by the applicant as matters of general public importance are completely extraneous to the issues determined by the court. A matter of general public importance cannot be built on such extraneous issues.

16. For all the foregoing reasons, we are satisfied that this application has no merit and we decline to certify that there is a matter of general public importance deserving the time and energy of the Supreme Court. The application is hereby dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR