



**Gatuma v Kenya Breweries Limited & 3 others (Civil Application  
180 of 2018) [2023] KECA 714 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 714 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 180 OF 2018  
HA OMONDI, KI LAIBUTA & KI LAIBUTA, JJA  
JUNE 9, 2023**

**BETWEEN**

**SYMON WAIROBI GATUMA ..... APPLICANT**

**AND**

**KENYA BREWERIES LIMITED & 3 OTHERS ..... RESPONDENT**

*(Being an application to seek leave to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Nairobi (W. Karanja, G.B.M Kariuki & J. Mohammed, JJ.A.) dated 14th July 2017 in Civil Appeal No. 172 of 2013)*

**RULING**

1. The applicant's Notice of Motion dated June 20, 2018 and supported by the affidavit of even date sworn by Symon Wairobi is brought under Articles 10, 20(3), 25(c), 40, 50, 159(2) (a), (d) and 163(4) (b) and 259(1) of the Constitution, Sections 3A & 3B of the Appellate Jurisdictions Act, rule 1(2) of the Court of Appeal Rules, Sections 15(1) of the Supreme Court Act, rule 24 of the Supreme Court Rules, 2020 rules 42 and 43 of the Court of Appeal Rules, seeks leave to lodge an appeal to the Supreme Court against this Court's judgment of July 14, 2017 in Nairobi Civil Appeal No 172 of 2013; and that Costs be provided for.
2. It is the applicant's contention that the appeal raises matters of general public importance namely: whether it is fair labour practice for employers operating holding and subsidiary companies to transfer employees from one subsidiary unit to another and change their terms of engagement, including arbitrary reduction of remuneration; whether, for purposes of employment, there is a difference between a holding company and its subsidiary, especially where an employee has been in continuous employment with the holding company and its subsidiaries; and that there have been a state of uncertainty arising from the extremely divergent opinions by the Industrial Court and the Court of Appeal in so far as addressing the rights of employees visa vis the legal personalities of companies and their subsidiaries to the extent that the matter needs to be settled by the Supreme Court.



3. The brief background to the intended appeal began on November 3, 1986 when the applicant was employed by Kenya Breweries Limited as an Artisan attached to the Engineering Department, Maltings Section. In April 2023, the 1<sup>st</sup> respondent informed the applicant and his fellow employees of an intended delinking from Maltings beer production alleging that all positions in the malting division had been declared redundant.
4. The 1<sup>st</sup> respondent made payments to the applicant on the basis that he had been retrenched, while, in actual fact, his services had been terminated. The 1<sup>st</sup> respondent then created a subsidiary company known as Kenya Maltings Limited and offered the applicant a letter of employment to that subsidiary. Having no capacity to bargain, the applicant accepted the offer of employment which had drastically reduced his gross salary from Kshs 66,064 to Kshs 29,865, but, apart from varying the applicant's salary downwards, nothing else changed.
5. Ultimately, the applicant filed suit in Industrial Cause No 1011 of 2020 where he sued the 4 respondent companies seeking a declaration that, all through, and until the time of his retirement, he was continuously an employee of the 1<sup>st</sup> and 2<sup>nd</sup> respondent, working in the specialized malting department; that there was no lawful severance of employment between him and the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the year 2003; and that he was therefore entitled to recover the reduced salary as well as entitlements for long service.
6. The respondents denied the claim and explained that prudent commercial considerations necessitated the separation of the brewery company from its barley growing operations so as to ensure survival of the two entities, leading to the registration of the subsidiary; and that the redundancy declaration was procedurally done, and the applicant willingly received an exit package and the differential payment arising from de-linking.
7. On January 25, 2021, the trial court delivered a decision in favour of the applicant declaring, inter alia:- that the applicant was an employee of all the 4 respondents to the date of termination; that the subsidiaries were departments of East African Breweries Ltd, the 2<sup>nd</sup> respondent, which was the parent company; and that the subsidiaries were a facade formed to avoid liability or escape obligation as an employer under the existing labour law and fair labour practices; that there was no legal severance of his contract of employment, and that he remained in continuous employment; that the reduction of his salary was unlawful; and that he was entitled to the underpayment of salary and other related benefits for the period recognized by the court as continuation of his employment.
8. The respondents filed an appeal in this Court and the trial court's decision was overturned with a finding that the redundancy notice was properly issued, and that it was a legitimate ground of terminating a contract of employment; that the applicant was duly paid his severance redundancy dues according to the employment and labour laws; that the subsidiary companies were separate legal entities with rights and liabilities appropriate to themselves; that the applicant acquiesced to the new terms of employment between the years 2003-2009, and paid his dues while in employment; and that the applicant was not entitled to long service award as he had not worked for the applicants for more than 20 years. Each party was ordered to bear its own costs.
9. It is that decision that has given impetus to the present application, which the applicant contends, in his written submissions, that it meets the principles espoused in the case of *Herminus Phillipus Steyn vs Giovanni Gnecci Ruscone [2013]eKLR*, as the determination of the appeal transcends the circumstances of the particular case and has significant bearing on the public interest, namely how liability is to be apportioned and the fate and rights of employees who end up being engaged in the subsidiaries formed at their work places; and whether the veil of incorporation protects the holding



company against unfair practices occasioned to common employees to subsidiary companies formed under them.

10. According to the applicant raises an important point of law as to whether Holding Companies with subsidiaries are governed by the [Employment Act](#) 2007 or the Law or principles of Company Law.
11. The respondents have filed grounds of opposition dated February 20, 2023, which in essence is to the effect that the application does not raise any matter of general public importance. In their written submissions, the respondents point out that the crux of the issues raised concern private citizens and private entities who, by law, are entitled to enter into any legitimate transaction as they please; that the Supreme Court is being asked to regulate free trade; and that a mere apprehension of injustice should not warrant certification for appeal.
12. The crux of the application is the issue of general public importance. And does it arise? The applicant has outlined matters that he considers to be of general public importance, as well as questions of law which he believes to be substantial and appropriate for further input of this court. Do the issues as framed by the applicant meet the threshold for certification?
13. The Black's Law Dictionary links 'general importance' to 'public interest'. It defines public interest as:  

' The general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation.'

Madan, JA (as he then was) observed in [Murai v Wainaina \[1982\] KLR](#) p 38 at p 49 para 1:

' A question of general public importance is a question which takes into account the well-being of a society in just proportions.'
14. The Supreme Court gave the test for granting certification and leave to appeal to the Supreme Court in the case of Hermanus Phillipus Steyn vs Giovanni Gnechi- Ruscone, [2013] eKLR, and held that the meaning of 'matter of general public importance' may vary depending on the context. The Supreme Court considered Article 163(4) (b) of the [Constitution](#) stating that:  

' A matter of general importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact 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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.'
15. In addition, the Supreme Court stated that the intended appellant must raise a point of law and demonstrate that such point of law is substantial and has a significant bearing on the public interest, and that such question(s) must have arisen in the court(s) and must have been the subject of judicial determination below.

The Supreme Court in the case of Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [supra] stated thus:

' 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. Having carefully considered the grounds in support of the Motion for certification, we find that the application raises several substantial issues of law, one being whether it is fair labour practice to change terms of employment especially as refers to remuneration while retaining basic tenets of said employment. Prima facie, this issue transcends the circumstances of this case and may have a bearing on public interest.
17. Secondly, the applicant has been able to identify and concisely set out the specific elements of 'general public importance' he intends to rely on. He has set out what it terms issues for consideration by the Supreme Court. The main issue revolves around the unilateral reduction of salary yet retaining the basic tenets of employment. In our considered view, this issue is a matter of general public importance.
18. In the case of *Peter Oduor Ngogwe vs. Francis Ole Kaparo & 5 others, Supreme Court Petition No 2 of 2012 [2012] eKLR*, the Supreme Court stated that a petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave to appeal to a meritorious theme involving the interpretation of the *Constitution*, such that it becomes a matter as of right falling within the appellate jurisdiction of the Supreme Court.
19. From the foregoing, we find that the application has met the test established in the Steyn case by showing the existence of specific elements of general public importance. Accordingly, the application dated June 20, 2018 is merited and is hereby allowed.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

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

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

