Kiarie v Dyer & Blair Investment Bank Limited & another (Civil Application 7 of 2017) [2023] KECA 663 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 663 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 7 OF 2017

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JUNE 9, 2023

BETWEEN

JOHN KUNGU KIARIE ..... APPLICANT

AND

DYER & BLAIR INVESTMENT BANK LIMITED ..... 1ST RESPONDENT

CFC STANBIC BANK LIMITED ..... 2ND 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 against the decision of this Court (Visram, Karanja & Koome, JJ.A.) delivered on 28th July 2017 in Civil Appeal No. 78 of 2016 consolidated with Civil Appeal No. 62 of 2016)

RULING

1. By a notice of motion dated September 7, 2017 brought under the provisions of articles 50(1), 159(2) and 163(4) of the *Constitution*, rule 24(1) of the *Supreme Court Rules, 2012* and sections 3, 3A & 3B of the *Appellate Jurisdiction Act*, the applicant seeks certification that his intended appeal to the Supreme Court raises matters of great public importance.

2. The background to this application is that, vide an agreement dated March 28, 2003, the 1st respondent, an investment/stock brokerage firm, agreed to invest a sum of Kshs 100,000,000/= on behalf of the applicant. The investment was to be conducted in the name of a nominee known as Nomura Nominee Ltd.

3. Pursuant to the agreement, the 1st respondent bid for a treasury bond worth Kshs 99,000,000/=, but was awarded a bond worth Kshs 88,000,000/=. At the advice of the 1st respondent, the applicant sold this treasury bond at Kshs 91,630,807/= so as to invest in a new treasury bond which was to be issued by the Central Bank of Kenya. However, before the said investment could take place, the 2nd

respondent, who was the 1st respondent's banker, received warrants issued by the Chief Magistrates' Court at Nairobi, permitting the Central Bank's Anti- Banking Fraud Unit to investigate a Nomura Nominee Ltd, account number 0009xxx- xxx7 held by the 1st respondent. The account in question is where the applicant's funds were held pending the intended investment.

4. After conclusion of the investigations, the applicant was charged in Criminal Case No 1218 of 2003 with several counts of obtaining by false pretense a sum totaling Kshs 91,500,000/= contrary to section 313 of the *Penal Code*. The applicant's funds under the nominee account were frozen. During the pendency of the criminal case, the applicant, through his counsel, applied for an amount of Kshs 24,000,000/= which was no longer subject of the proceedings to be released to him, which order was granted. The applicant was acquitted by the Magistrates' Court for lack of evidence, and a subsequent appeal preferred by the State was withdrawn. The applicant obtained an order lifting the freezing of the amount held in the Nomura Nominee Ltd account number 000xxx/xxx7 and the interest accrued thereon.

5. The amount released to the applicant by the 1st respondent was Kshs 67,500,000/=, the principal amount and interest of Kshs 2,296,559.75/=. The applicant contested the low interest earned on his investment and requested the 1st respondent to furnish him with proper accounts, which it did, but the same was not to his satisfaction. He engaged the services of a certified accountant and a holder of an MBA in investments and portfolio management, who assessed the returns that his funds would have fetched if they had been properly invested at Kshs 465,500,000/=. The applicant demanded from the 1st respondent payment of the assessed returns, which demand led to the applicant's filing suit against the respondents seeking, *inter alia*, the perceived loss of income of Kshs 465,500,000/=, and interest thereon at the rate of 16% per annum to be calculated on a daily basis until payment in full.

6. The 1st respondent defended the suit. In its defence, it argued that it had settled its accounts with the applicant, and that there was no outstanding payment; that the contract between the parties had been frustrated by the orders that froze the applicant's funds, the consequence of which was that the 1st respondent could not invest the same. As a result, the funds were transferred into a call account earning an interest of 0.5% per annum. On its part, the 2nd respondent argued that no cause of action had been disclosed against it in the absence of privity of contract between it and the applicant.

7. The trial court held that the respondents had colluded to freeze the applicant's funds wrongfully and maliciously. They were held severally and jointly liable for the loss occasioned to the applicant. Accordingly, judgment was entered against the respondents in the sum of Kshs 310,333,333.30/=; interest at 16% per annum from October 21, 2007 to the date the entire sum is paid; and costs of the suit.

8. Dissatisfied with the orders of the trial court, the respondents filed two separate appeals, to wit, Civil Appeal No 78 of 2016 and Civil Appeal No 62 of 2016, which were later consolidated. The grounds of the appeals were, *inter alia*, that the learned judge erred in law and in fact by misapprehending the case before him thus arriving at an erroneous and unlawful decision; finding that the freezing of the applicant's account was initiated and unilaterally made by the 1st respondent contrary to the clear evidence in the criminal case; relying on the evidence of Mohammed Hassan, who was the 1st respondent's General Manager, as recorded in the criminal case, yet he had not been called as a witness in the matter before him; making findings on issues which were not pleaded; finding that the 1st respondent had breached its duty to invest the applicant's funds; assessing damages contrary to established legal principles and the terms of the contract; demonstrating apparent bias against the respondent; failing to give weight to the fact that there was no privity of contract between the 2nd respondent and the applicant; finding that the 2nd respondent had a duty to account to the applicant for

the interest earned on account held by the 1st respondent; holding that there was conspiracy between the respondents to defraud the applicant, and yet fraud and the particulars thereunder had not been pleaded by the applicant; finding that an action of freezing the account which was undertaken by the 1st respondent was actionable against the 2nd respondent; and for failing to consider the evidence given by the respondent's witnesses.

9. Vide a judgment dated July 28, 2017, this court (Visram, Karanja & Koome, JJ A) made the following key findings:

    a. The 1st respondent never participated in the criminal case and thus did not have an opportunity to cross- examine the applicant's General Manager on his evidence. For that reason, his evidence as recorded in the criminal case ought not to have been admitted by the trial judge.

    b. As per the terms of the agreement, the 1st respondent was required to invest on behalf of the applicant by purchasing treasury bonds. It failed to do so as evidenced in the preceding paragraphs of this judgment, hence it breached the terms of the said contract. It is settled law that every agent is responsible to his principal for any loss occasioned by his want of proper care, skill or diligence in the carrying out of his undertaking.

    c. The learned judge erred in assessing damages for a period of 4 years while the contract was clear on its duration. It was not within the learned judge's mandate to imply that the contract to invest had been renewed for the duration of four years. There ought to have been evidence of such extension as envisaged under clause 8 of the agreement dated April 23, 2003. The absence of such extension entitled the applicant to damages for the period of one year.

    d. As regards the 2nd respondent's liability, there was no privity of contract between the applicant and the said respondent, hence the 2nd respondent's liability could not be anchored on the investment contract; and there was no evidence that the 2nd respondent owed a duty of care to the applicant.

10. This court consequently set aside the assessment of damages and the interest applied thereon by the trial court. It substituted therefor an award of damages equivalent to the returns the applicant could have earned from the investment in treasury bonds for a period of one year, less the 1st respondent's commission and annual custody fees. The applicable rate of interest on treasury bonds in the year 2003 was 10%, hence the returns were to be computed at the rate of 10% of the principal amount of Kshs 91.5 million. The applicant was also entitled to interest at court rates on that amount from the date of judgment of the trial court until payment in full.

11. Regarding the appeal by the 2nd respondent, the court set aside the finding on liability entered against the 2nd respondent and substituted therefor an order dismissing the suit as against it with costs.

12. Dissatisfied with the decision of this court, the applicant intends to appeal to the Supreme Court. The applicant contends on the face of the motion and in the affidavit in support of his motion that the decision of this court in the consolidated appeals violated his fundamental constitutional rights under articles 10, 25, 48 and 50(1) of the *Constitution*; that this court dealt with extraneous matters leading to a wrong decision; that the decision by this court to ignore the law and evidence and to introduce and/or use un- pleaded evidence or evidence not adduced while deciding the appeals went against the law and public policy, and would erode the confidence in the judicial system and cause

public uncertainty; that the decision of this court demonstrates apparent bias against the applicant and had led to a miscarriage of justice; that the issues raised are significant, and are matters of great public importance as they transcend the applicant and have a bearing on public interest and hence require to be determined by the Supreme Court.

13. The application is opposed by way of a replying affidavit sworn by Jimnah Mwangi Mbaru, a director of the 1st respondent. It is deponed that the 1st respondent has already complied with the judgment of this court that is sought to be appealed against, and that the applicant has already accepted the decretal amount together with interest thereon, which has already been transmitted to him through his advocates.

14. As regards the merits of the application, it is contended that the grounds set out are for review of the decision of this court and do not satisfy the threshold for leave to appeal to the Supreme Court under the provisions of article 163(4) (a) & (b). It is further contended that the alleged violation of the applicant's constitutional rights under articles 10, 25, 48 and 50 was neither pleaded, and nor did it form part of the determination by the trial court; that the jurisdiction of the Supreme Court to determine this allegation is therefore denied; and that that the issues raised by the applicant do not transcend him, and do not in any way amount to issues of great public importance as alleged.

15. At the hearing of this application, Mr K'Bahati appeared for the applicant, while Mr Mbaluto and Mr Ajok were present for the 1st respondent. Mr Ogunde was present for the 2nd respondent. They all made brief oral highlights of their respective client's written submissions, which, to a large extent, was a reiteration of the grounds contained in their respective pleadings as set out hereinabove.

16. Highlighting the applicant's written submissions dated November 3, 2022, Mr K'Bahati submitted that they were matters of general public importance involved in the intended appeal, and that the principles laid down in *Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone* [2013] eKLR had been satisfied.

17. On his part, Mr Mbaluto urged the court to find that the threshold for certification had not been achieved; that the matters raised by the applicant do not in any way transcend the parties herein; and that there were no novel issues of law involved in the intended appeal. Mr Ogundo for the 2nd respondent fully associated himself with the submissions made on behalf of the 1st respondent.

18. 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.

19. It is trite law as stated in *Hermanus Phillipus Steyn vs Giovanni Gnecchi-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 to be raised in the intended appeal involves a matter of general public importance. A 'matter of general public importance' was defined in the said decision 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."

20. This court in *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] eKLR stated thus:

> " The principles set out in Hermanus Phillipus Steyn v 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 a 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;
>
> 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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

21. The issues raised herein by the applicant do not, in our view, transcend the applicant's personal interests. They are in their very nature ordinary issues that do not rise beyond the business relationship between the applicant and the 1st respondent and the dispute emanating therefrom. We are not satisfied that there are any issues of general public importance involved, nor is the applicant raising any novel issues of law for determination by the Supreme Court. There is no lacuna or uncertainty in law for which the Supreme Court can be called upon to pronounce itself. From the circumstances of this case, it is our considered view that there will be no jurisprudential value in having the Supreme Court address itself to the issues raised by the applicant.

22. In the circumstances, we find and hold that the application is without merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY 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