



REPUBLIC OF KENYA



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**Kenya Marine & Fisheries Research Institute v Okemwa (Civil Appeal (Application)
109 of 2019) [2023] KECA 1062 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1062 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 109 OF 2019
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

KENYA MARINE & FISHERIES RESEARCH INSTITUTE APPELLANT

AND

DR. EZEKIEL NYANGOYA OKEMWA RESPONDENT

(Being an application for grant of certification and leave to appeal to the supreme court on grounds of general public importance under Article 163 (4) (B) of the Constitution of Kenya in Respect to Ruling delivered by the Court of Appeal on the 23rd September 2022 at Mombasa in Civil Appeal Application No. 109 of 2019)

RULING

1. Kenya Marine & Fisheries Research Institute (KEMFRI), the Applicant herein, in a Notice of Motion application dated 19th April 2022, sought before this Court leave to adduce more evidence, being salary cards for 1981 to in order to show that Dr. Ezekiel Nyangoya Okemwa, the Respondent herein, was earning a monthly salary of Kshs 31,880/= per month as opposed to the one of Kshs 218,664/= awarded by the Court.
2. By a ruling delivered on 23rd September, 2022, this Court, differently constituted, found that Motion unmerited as the Applicant did not bring any evidence to demonstrate the difficulties it faced, and due diligence it undertook to access and produce the Respondent's salary cards that it sought to introduce as new evidence, particularly as the Respondent was its employee and the said records were in its custody and control. In addition, the Applicant did not dispute the averments that it did not participate at the hearing of the suit in the trial court nor tender any evidence thereat, and therefore there was a risk that the additional evidence was an attempt to have a second bite at the cherry and was intended to set out a new case and fill the gaps in the Applicant's pending appeal.



3. The Applicant by a Motion dated 6th October, 2022, expressed to be brought pursuant to Articles 159(1), (2) (b) & 163 (b) and 259 (1) of the Constitution, Rule 24 of the Supreme Court Rules and Sections 3, 3A & 3B and Rule 42 of the Court of Appeal Act (*sic*) and Rules seeks in substance that this court certifies that matters raised herein are of general public importance and grants leave and certification to the Applicants to appeal to the Supreme Court against that ruling; and that in the event that Certification and leave to appeal is granted this Court be pleased to order a stay of further proceedings pending the filing, hearing and determination of the intended Appeal to the Supreme Court.
4. The Motion was supported by an affidavit sworn by Prof. James Njiru, the Applicant's Director General.
5. According to the deponent, the evidence sought to be adduced had a direct impact to the Appeal, is weighty and is crucial, urgent and important owing to the importance of the subject matter in question. The Applicant's concern was that this appeal was set to be heard in December, 2022 but the evidence in question is fundamental and necessary for the Court to arrive at a considered Judgment. It was averred that this Court erred in law by not granting the Appellant an opportunity as by law required to avail the evidence exonerating the Applicant and that this Court assumed that the evidence was meant to give the Applicant a second bite at the cherry yet, the evidence was material to the subject appeal.
6. According to the deponent, the Applicant was not adequately represented before the trial court in 2013, and that at one given moment, the Attorney General was on record, while at the other hand the external legal counsel was on record and that this led to confusion as a result of which the Applicant was denied a chance to advance its case hence the failure to file the evidence sought to be adduced. It was disclosed that the Applicant is seeking a re-tabulation of the Respondent's salary in order to reopen the wrong finding of the trial Judge who arrived at a finding on the basis of wrong salary cards and applied the Claimant's last monthly salary at Kshs. 218,664 as opposed to his salary at the time of his dismissal which was Kshs. 31,880.00
7. It was urged that there is a huge public interest and importance on the basis that the appeal seeks to reopen factual matters that the Respondent was drawing funds from exchequer even after leaving employment at KEMFRI, and that these jobs were full time jobs and that the alleged date of termination or reasons thereof were not disclosed to the Superior Court. According to the deponent, the additional evidence would have therefore re-opened the credibility of the matters at hand including contravention of clear provisions of Section 49(1)(c) of the Employment Act where an employee is entitled to be paid for work done and not what he/she has not worked for.
8. The Motion was opposed by the Respondent's replying affidavit sworn on 23rd June, 2023, the gist of which was that the application does not meet the threshold for certification that the matter is of general public importance and that the issues raised do not raise any element of public interest and are matters which were dealt with by this court and sufficiently determined.
9. We heard this Motion on 4th July, 2023 vide this Court's virtual platform on which day Learned Counsel, Mr Ham Lagat appeared for the Applicant while Mr Wameyo appeared for the Respondent. Both counsel had filed their written submissions which they substantially relied on.
10. On behalf of the Applicant it was submitted that the public interest elements in the current Application warranting the Supreme Court attention are that the Applicant has in possession critical documents contradicting the evidence that led to the conclusive award that was granted to the Respondent. It was submitted that the Respondent herein was an employee of the Kenya Marine & Fisheries Research Institute which is a public entity that is governed by laws that are clearly stipulated



and available in the public domain. According to the Applicant, a director in his capacity is regarded as a public officer and the office he holds is a public office hence any proceedings or matters arising from his office can be deemed rightfully so as a matter of public interest.

11. According to the Applicant, issues of disputes arising from work related errors of omissions and commissions have become highly prevalent in the society ranging from negligence, abuse of power and resources and that this application contains new issues of law which needs to be addressed to set precedence and direction in dealing with officers who may use their positions to take advantage and misuse resources for their own personal gain.
12. To the Applicant, a clear set out guideline and insight should be put in place to guide advocates, litigants and even the superior courts on how to proceed and prosecute such cases, where there is no room to openly argue on matters that may have been overlooked or undermined due to inconsistencies and silent manipulation of justice.
13. It was submitted that this Court did not give a global examination to the matters in this application and that should this Court exercise its discretion by allowing this matter advance to the Supreme Court, the Respondents will suffer no prejudice whatsoever but will have a chance to argue their case before the Court. On the other hand, the Applicant stands to irredeemably suffer if the application is denied as he would have hit a cul de sac with no point of return. He will have had his efforts towards gaining justice all but scattered to the wind. According to the Applicant, it is in the interest of justice that the orders sought are granted and that failure will amount to denying the Applicant the opportunity to exhaust all its legal remedies, including seeking this Court's determinations hence the balance of convenience weighs in favour of the Applicant in this matter and the Court ought to exercise its unfettered discretion in its favour having filed this Application without undue delay.
14. On behalf of the Respondent it was submitted that the issues raised in this application do not meet the threshold prescribed for certifying a matter of general public importance.

Analysis And Determination

15. Article 163(4)(b) of *the Constitution* clothes the Supreme Court with appellate jurisdiction in matters certified as being "of general public importance". This is the provision pursuant to which this application is brought. In effect, we are invited to determine whether the intended appeal raises issue(s) of general public importance. In order for the application to succeed, the Applicant must satisfy the set criteria and as was held in Hermanus *Philipus Styen v Giovanni Gneccchi- Ruscone* Civil Application No. Nai. Sup 4 of 2012 that:

"The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for granting leave to appeal to an intermediate court-for example, from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course. (See *Machira t/a Machira & Company advocates v Mwangi & ano* (2002) 2KLR 391 and *The Iran Nabuvat* (1990)3 ALL ER 9) In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court. The role of a Supreme Court was succinctly stated by the House of Lords in *R v Secretary of State Exp. Eastaway* (Lord Bingham) (2001) 1 ALL ER 27."



16. The Supreme Court in *Malcolm Bell v Hon Daniel Toroitich arap Moi and another*, Supreme Court Application No. 1 of 2013 set out the criteria that must be met for a matter to satisfy the test by laying down the governing principle as follows:

“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;

- i. 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;
- ii. Such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iii. 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;
- iv. 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*;
- v. 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;
- vi. 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;
- vii. 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;
- viii. 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;
- ix. 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;
- x. 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.”



17. Our duty is therefore to consider and evaluate if the foregoing principles have been met in this case. For starters, there is no submission before us that there are conflicting decisions of this Court that raise a substantial point of law the determination of which will have a significant bearing on the public interest. The only ground cited is that the issues raised in the application are matters of general public importance. On identification of specific elements of general public importance, the mere enumeration of issues as matters of general public importance does not suffice; there must be cogent demonstration that the issues identified are within the ambit and definition of matters of general public importance.
18. The Supreme Court in the *Hermanus Steyn* case (*Supra*) at para. 58 stated:
- “...Before this Court, “a matter of general public importance” warranting the exercise of 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 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.”
19. In *Strouds Judicial Dictionary*, Volume 4 (IV Edition), 'public interest' is defined thus:
- “Public Interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.”
20. In *Black's Law Dictionary* (6th Edition), "public interest" is defined as follows:
- “Public Interest is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national government.”
21. In *Dhanjal Investment Limited v Cosmos Holidays PLC* [2021] eKLR, the Supreme Court clarified that evidentiary matters are specific to the parties involved and, therefore, are not grounds for grant of certification. Likewise, in *Housing Finance Company Limited & another v Sharok Kher Mohamed Ali Hirji & another* [2021] eKLR, the Supreme Court held that it cannot resolve factual disputes.
22. The Applicant herein intends to appeal against a decision by this Court declining its application to adduce further evidence in this appeal. Such applications are common place and principles guiding their grant have been well laid down. There is nothing inherently of general public importance in such applications. However, in this case, the basis upon which the Applicant contends that the issues involved are of general public importance is that the Applicant has in possession critical documents contradicting the evidence that led to the conclusive award that was granted to the Respondent; that the Respondent, a public officer, was an employee of the Kenya Marine & Fisheries Research Institute, a public entity governed by laws hence any proceedings or matters arising from his office can be deemed rightfully so as a matter of public interest; and that there is a need to set precedence and direction in dealing with officers who may use their positions to take advantage and misuse resources for their own personal gain.



- 23. Starting with the first ground, we do not see how a matter revolving around adduction of further evidence will set precedence in the manner alleged. As for the positions held by the parties herein being in the public service, we do not subscribe to the view that where a dispute involves public officers or public institutions then they automatically satisfy the criteria for certification. In our view, it is the issues involved rather than the status or personalities involved that determine whether or not a matter is to be certified.
- 24. In this case no attempt was made to address us on the matter of law involved. As for factual matters, mere possession of documents that were not adduced at the trial does not satisfy the criteria. The Applicant has not addressed and satisfied us that the impacts and consequences of the factual issues surrounding the court’s decision to decline its prayer to adduce further evidence are substantial, broad based, transcending the litigation interests of the parties, and bearing upon the public interest.
- 25. Flowing from our analysis of the facts of this case, the law and the conclusions arrived at above, we are not satisfied that the Applicant has identified and concisely set out the specific elements of general public importance to merit the leave sought to lodge an appeal to the Supreme Court. The dispute between the parties was an employer/employee dispute and that Applicant has not shown how the decision declining leave to adduce further evidence on appeal in such a dispute is a matter of general public importance for the purposes granting certification for an appeal before the Supreme Court.
- 26. We have said enough to show that the Notice of Motion application dated 6th October, 2022 has no merit. Accordingly, it is dismissed with costs to the Respondent.
- 27. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

