Kwanza Estates Limited v Jomo Kenyatta University of Agriculture & Technology (Civil Application E053 of 2023) [2023] KECA 1516 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1516 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPLICATION E053 OF 2023

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

DECEMBER 15, 2023

BETWEEN

KWANZA ESTATES LIMITED ..... APPLICANT

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY ..... RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nakuru, (Sichale, Achode & Korir, JJ. A) dated 16th June, 2023 in Civil Appeal No. 64 of 2022)

RULING

1. The application before us is dated 30th June, 2023and is brought pursuant to Article 159, 163(4)(b) of *the Constitution*, Sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 41(2), 42(b), 44(1) and 45 of the *Court of Appeal Rules*, 2022. The applicant prays for orders that:

   " a) The court be pleased to certify that the intended appeal to the Supreme Court against the impugned judgment raises matters or points of general public importance.

   b. The court be pleased to grant leave to the applicant to appeal to the Supreme Court against the impugned judgment.

   b. The respondent to bear the costs of this application."

2. The brief facts giving rise to the application are that the applicant and the respondent entered into a lease agreement on 1st May, 2010. The terms of the lease were that the applicant agreed to lease to the respondent, Nakuru Municipality Block 9/90 and the building erected thereon, hereinafter "the suit

premises" for a period of six (6) years, which expired on 30th April, 2016. After the expiry of the said lease, the parties entered into another lease agreement of the suit premises for a period of six (6) years, from 1st May, 2016 to 30th April, 2022.The respondent was to pay rent and service charge quarterly in advance, clear of all deductions, and a 5% late payment would be incurred if the sum was not paid within 14 days.

3. On 10th July, 2020 the respondent purported to terminate the lease by issuing a three (3) months termination notice, and thereupon filed a suit on 16th November 2020 seeking to terminate the lease agreement on the ground of frustration. The applicant in turn filed a counterclaim on 24th November, 2020 seeking orders that the lease remained in force as it did not have a break clause. The respondent's suit was dismissed by the Environment and Land Court at Nakuru, which prompted the respondent to lodge an appeal before this court, which appeal was allowed, hence the present application.

4. The application is supported by the affidavit of Geoffrey Makana Asanyo, the managing director of the applicant; and it is premised on the following grounds which we shall reproduce verbatim for full effect:

> " 1. By a judgment delivered on 16th June 2023, the Court of Appeal at Nakuru (Sichale, Achode, Korir JJ.A.) held inter alia that-
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> i. The Lease Agreement between the Applicant and the Respondent contained a break clause.
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> ii. The Respondent herein was entitled to terminate the Lease Agreement.
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> iii. The Lease Agreement was frustrated due to the financial difficulty faced by the Respondent when higher learning institution were closed by the government to curb the spread of Covid- 19.
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> iv. The Covid 19 pandemic was a force majeure event that caused the Respondent undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed.
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> v. Ordered the Respondent to pay the cost of restoration or the suit premises to its original state at an all-inclusive price of forty million (Kshs. 40,000,000/=-) and each party to bear its on costs.
>
> 2. The Honorable Judges of the Court or Appeal found that the Commercial Lease Agreement between the Applicant and the Respondent was terminable despite the fact that it intentionally as it is standard, lacked an express termination clause.
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> 3. The Court also held that the Covid-19 pandemic was a Force Majeure event that caused the Respondent undue difficulty in continuing with the lease agreement thereby being entitled to complete discharge of its obligations.
>
> 4. Aggrieved by these findings, the applicant seeks leave to appeal to the Supreme Court and a certification that the intended appeal involves a matter of general public importance "

5. The Applicant further elaborated that the issues in the intended appeal that go beyond this particular case and bear a considerable significance for the general public interest for the following reasons:

   i. Its determination will provide an important and significant guidance to the interpretation of Force Majeure clauses in relation to Covid-19.

   ii. Whether a party to a contract can be permitted by the court to trigger a non-existent Force Majeure clause in a contract.

   iii. Whether a contracting party can be discharged from its obligation simply because of the decline in revenue, that makes the contract economically disadvantageous as opposed to, impossible to perform.

   iv. Whether the occurrence of a loss of business coupled with the failure by the business to acquire a business interruption insurance cover, should be meted out on an innocent party to the contract.

   v. Whether a Force Majeure clause can be imposed upon contracting parties who intentionally opted to exclude it from their contract or whether it can be implied.

   vi. Whether a notice to terminate that is not justified or contemplated by the contract can be used as a basis for termination of the contract; it will have a significant bearing on the lawful and ineffective termination of contracts between members of the general public.

   vii. Whether the court can infer the intention of, including a termination clause in a lease, where there is no express termination clause based on phrases found on unrelated "parties covenant clause" or "the lessee hereby further covenants with the lessor".

   viii. Whether in the event that the doctrine of frustration is successfully invoked, the court ought to delay or restrict the party's obligation, or to completely discharge the party to the detriment of the counterparty.

   ix. What legal principles are applicable when a lease does not have a clause permitting any party to terminate the lease before the expiry of the term created; what interpretation should the term "or sooner determination" be given in such leases; what principles of law are applicable when dealing with the doctrine of frustration; is Force Majeure part of the doctrine of frustration; what legal principles govern contracts which do not have a Force Majeure clause and when can it be invoked; what legal principles govern termination of contracts affected by Covid-19 pandemic; is Covid-19 a Force Majeure event; and whether Covid-19 justifies the invocation of the doctrine of frustration of contracts, completely discharging a contracting party from its contractual obligations.

6. Additional grounds that were proffered by the Applicant were as follows:

   a. The applicant stands to suffer irreparable loss as its current tenants might rely on the impugned judgment to abrogate their lease obligations, on the mere ground of financial difficulty.

   b. Landlords of commercial leases stand to suffer prejudice and injustice in the event that their tenants would rely on the impugned judgement to claim frustration, on the basis of tough economic times and abrogating payment on their obligations for the remainder of the lease period.

c. The decision is binding on the superior court and subordinate courts, and also contradicts the decision of the Court of Appeal in the case of Kenya Commercial Bank Limited v Popatlal Madhavji & Another [2019] eKLR and other cases.

d. The impugned judgment will have a wide effect on all commercial leases and contracts in general, as it serves as a precedent to discharge parties from their contractual obligations during the prevalence of Covid-19.

e. The impugned judgement will bind courts to rewrite contracts because of unfavourable decline in business; and for contracting parties to terminate their contracts due to Force Majeure, even where the contract does not have an express clause to that effect.

f. The decision is likely to invite a floodgate of cases in the employment, banking and other public sectors, with contracting parties being completely discharged from their obligations by relying on the doctrine of frustration and Force Majeure due to financial difficulties.

g. Disputes arising from contracts have a bearing on the economy of any society and their just resolution goes to the root of the society's economic wellbeing."

7. The Applicant reiterated these grounds in its supplementary affidavit sworn on 4th August, 2023.

8. In a replying affidavit sworn by Richard Wokabi Kariuki, the respondent's chief legal officer, the respondent in response stated as follows:

a. The applicant had failed to demonstrate the flaws in the impugned judgment.

b. The annexed lease agreement, "GMA1" contained a break clause; in that the inclusion of the phrase "or on sooner determination" meant that termination of the lease before expiry was permitted.

c. The applicant invoked its right to "or on sooner determination" to terminate the lease by issuing a three (3) months' notice; and also undertook to restore the suit premises to a tenable state of repair.

d. There is no evidence that the impugned judgment was circulated on social media, and in any event, such publications were not before this court for determination.

e. The observation by this court that Covid-19 was a Force Majeure event took the form of a general statement and it was not made in reference to any clause in the lease.

f. The applicant did not contend that it was denied an opportunity to address the other issues raised in support of the claim for frustration, before the trial court.

g. For a matter to be certified as being of general public importance, the applicant ought to demonstrate that a substantial point of law is involved, the determination of which has a significant bearing on public interest.

h. The applicant has failed to meet the threshold for the grant of the orders sought, for reasons that:

i. The issues raised in the intended are confined to the parties in the present suit as the applicant is seeking to invite the court to interpret the terms of the lease agreement.

ii. Whereas general questions of law may apply to contracts, when a dispute arises, courts will look at the dispute within the terms of the contract and it does not result in the decision transcending the special and private relationship between the parties.

iii. The applicant had not demonstrated that there is uncertainty in the law relating to the issues raised, such that the contradictory precedents warrant the invitation of the Supreme Court.

iv. The applicant seeks re-evaluation of evidence, and for the Supreme Court to reach a different decision.

v. The mere dissatisfaction with the decision of this court cannot be the basis for granting certification to appeal to the Supreme Court.

i. The applicability of Force Majeure and whether the same can be implied in a contract in relation to Covid -19 was not an issue for determination before the trial court or this court.

j. Termination of the lease was not premised on any Force Majeure clause, but on the doctrine of frustration and the break clauses in the lease.

k. The impugned judgment did not discharge the respondent from its contractual obligation, the court properly invoked the doctrine of frustration.

9. When the application came up for hearing on 9th October, 2023, Mr. Konosi, learned counsel appeared for the applicant. There was no appearance by the respondent. The counsel for the applicant relied on his written submissions, in which the grounds on the face of the application and the supporting and supplementary affidavit were reiterated, The counsel submitted that the real question for seeking certification of this matter as one of general public importance is whether or not Covid-19 was a Force Majeure, which excuses a party from complying with its contractual obligation. Counsel submitted further that when frustration is pleaded and proved, it discharges parties from their contractual obligations, but the court held that frustration only partially discharges parties from their contractual obligations.

10. The applicant' counsel supported its submissions with the decisions in the cases of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* [2013] eKLR; *Porter Airlines Inc. v Nieuport Aviation Infrastructure Partners GP*, 2022 ONSC 5922; 1140 *Broadway LLC v Bold Food*, LLC, 2020 NY; 35 *East 75th Street Corp v Christian Louboutin*, LLC, 2020 NY; *The Gap Inc. v Ponte Gadea New York*, LLC, 2021 NY; and Bank of New York Mellon v Cine- UK Limited [2022] EWCA Civ 1021 in emphasizing that the effect of the Covid-19 pandemic in relation to contracts is that it did not engage the Force Majeure Clause such as to entitle a party to relief from its obligations under an agreement.

11. We have carefully perused the application, the affidavits by both parties, submissions by counsel, the authorities cited and the law. The issue for determination is whether or not the application before us is merited. Article 163(4) of *the Constitution* succinctly states that appeals shall lie to the Supreme Court from this Court as of right in any case involving the interpretation or application of *the Constitution*, and in any matter where it is certified that the appeal involves a matter of general public importance. The article provides thus:

> " 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)."

12. The issue before us is to determine whether indeed the applicant has raised a matter of general public importance. The Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone*, (supra), the stated thus:

> " 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."

13. It is common ground that the applicant seeks to have this matter certified as one of general public importance. The Supreme Court in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, (supra), laid down the following principles to be what constitutes matters of general public importance:

> " 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;
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> 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*;
>
> 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 themselves, a basis for granting certification for an appeal before the Supreme Court."

14. What then constitutes a matter of general public importance?

The court in *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone*, (supra), held that:

> "... "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."

15. The Supreme Court also defined what a matter of general public importance is, in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,* (supra), as follows:

> " In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerningpeople as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."

16. We have considered the nine (9) questions identified by the applicant to demonstrate that this matter is of general public importance, and to be determined by the Supreme Court cited hereinabove. The applicant places emphasis on the question of whether Covid-19 pandemic is a Force Majeure event capable of discharging a party from its contractual obligations, and whether frustration only acts to partially discharge a party from its obligations as was held by this court. The applicant has in this regard met its obligation to identify and concisely set out the specific elements of "general public importance" which it attributes to the matter for which certification is sought.

17. In our view, the issue of Covid-19 pandemic and its effect on parties and their contractual obligations is one that requires the intervention and input of the Supreme Court, as it transcends the applicant, determination of which has a significant bearing on the public interest, the pandemic having affected the general public. We also find that there is a substantial question of law raised that the Supreme Court needs to clarify and settle the jurisprudence on the legal effects of Covid 19 on contractual obligations, in light of the various positions taken in the decisions determined in comparative jurisdictions that were cited by the Applicant.

18. For the foregoing reasons, it is our considered view that the present application has met the test established in the Hermanus Steyn case by reason that it has demonstrated to the Court's satisfaction the existence of specific elements of general public importance which are attributed to this matter, and we therefore certify the same as such, and grant leave to the Applicant to appeal against the judgment delivered herein on 16th June 2023 to the Supreme Court.

18. In the result, the application is allowed. As costs follow the event, the applicant shall have the costs of this application.

19. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR