Magic Chemicals Inc v Pradip Enterprises (E.A) Limited (Civil Application 18 of 2019) [2022] KECA 640 (KLR) (24 June 2022) (Ruling)

Neutral citation: [2022] KECA 640 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 18 OF 2019

W KARANJA, HM OKWENGU & F SICHALE, JJA

JUNE 24, 2022

BETWEEN

MAGIC CHEMICALS INC ..... APPLICANT

AND

PRADIP ENTERPRISES (E.A) LIMITED ..... RESPONDENT

(An application for certification and leave to appeal to the Supreme Court of Kenya from Judgment of the Court of Appeal at Nairobi (Makhandia, Kiage & Prof. Otieno-Odek, JJ.A) dated 21st June 2018 In Civil Appeal No. 206 of 2018)

RULING

1. The dispute herein relates to sale of goods by sample and description. By a plaint dated 20th December, 2013 and amended on 3rd February, 2017, Pradip Enterprises (E.A) Limited (the respondent) filed a suit against Magic Chemicals (the applicant) seeking rescission of contract and refund of the sum of US$59,130 together with interest at court rates from the 19th April, 2013 until payment in full and which sum be set off together with interest from the sum of US$70,350 owed to the applicant. The respondent prayed for, inter alia, the sum of Ksh. 126,182 being the balance after set-off together with interest from the date of filing suit until payment in full and special damages for loss of profit in the sum of Ksh. 1,990,881.60 along with punitive and exemplary damages.

2. It was the respondent's case that it entered into an agreement with the applicant for the supply of Eucalyptus Oil 80%, the applicant submitted samples of Eucalyptus Oil which was approved on 11th October, 2012. It was a condition in the sale agreement that the bulk of Eucalyptus Oil to be supplied would correspond with the sample in quality and would be merchantable and that on or about the 19th April, 2013 the respondent duly paid the applicant the sum of US$59,130 as per proforma invoice dated 17th December, 2012.

3. It was the respondent's case that contrary to the above specification, the applicant supplied Eucalyptus oil that was not as per sample and description. The oil that was supplied had a strong "Dettol" odour which raised complaints from the respondent's customers. This was made known to the applicant who apologised and agreed to compensate the respondent. The respondent averred that it incurred costs for engaging an expert to conduct an analysis to determine the quality of the Eucalyptus oil, and that the applicant was in breach of section 15 of the *Sale of Goods Act*.

4. The applicant in its amended defence denied liability and averred that it submitted a sample of Eucalyptus Oil 85% that was approved by the respondent and it denied the allegation that the Eucalyptus Oil 85% supplied was not as per express specification of the approved samples. In addition to this the applicant averred that the respondent unilaterally procured services of experts to test the goods in question without notice.

5. The matter was heard by Sewe J. who found no merit in the respondent's claim and dismissed it with costs to the applicant. Aggrieved by the said decision, the respondent (in the appeal) lodged an appeal before this Court faulting the Judge for among other things: failing to find the respondent supplied goods that were not as per express specifications and sample that had been approved; failing to find the respondent had admitted in writing by e-mail on 3rd July, 2013 having bought the product from a different source as a cost cutting measure and agreed to compensate the appellant; failing to find that the three appellant's expert evidence was not rebutted and the expert's opinion corroborate the respondent had supplied a sub-standard product; failing to consider Article 46 of *the Constitution* which guarantees consumers a right to goods and services of a reasonable quality and compensation for defects in goods; failing to find that INCOTERMS (International Commercial Terms) cannot override Article 46 of *the Constitution* and failing to award damages for loss of profit and special damages that had been pleaded and proved. The respondent's prayer was to have the judgment of the High Court dated 14th May, 2015 set aside and judgment entered in it's favour.

6. Having heard the appeal, this Court in its judgment dated 21st June, 2018 allowed the appeal and granted the following orders:

    a) Judgment be and is hereby entered in favour of the appellant in the sum of US$59,130 with interest thereon at court rates with effect from the 19th April, 2013.

    b) Judgment be and is hereby entered for the appellant in the sum of Ksh. 1,105,740 being the cumulative total in respect of insurance, IDF application fees, V.A.T, IDF entry, Merchant Ship Levy, MCT Charges Agility invoice and transport charges. Interest on this sum with effect from the date of filing suit namely 20th December, 2013.

    c) The prayer for set off in the sum of US$70,350 owed by the appellant to the respondent be and is hereby dismissed.

    d) The prayer for judgment in the sum of Ksh. 26,645 and Ksh. 44,300 as prayed in the amended plaint be and is hereby dismissed.

    e) The prayer for exemplary and punitive damages be and is hereby dismissed.

    f) An order that the respondent collects the drums of eucalyptus Oil supplied to the appellant within 90 days of this judgment. No storage or demurrage charges is to be levied. If the respondent fails to collect the product within the stipulated time line, the appellant be at liberty upon 14 days' notification to

the respondent to forthwith destroy the product and bill the respondent the cost of destruction.

g) Each party to bear its own costs of the appeal and before the High Court.

7. Being aggrieved by this decision the applicant has preferred an appeal to the Supreme Court vide a Notice of Appeal dated 28th June, 2019. The draft memorandum of appeal has 6 grounds of appeal which we replicate hereunder:

a) The honourable Court erred in law and in finding and holding that the sale of goods, Eucalyptus Oil 80% by the appellant to the respondent was a sale by description within the meaning of the *Sale of Goods Act*, Chapter 31 Laws of Kenya as opposed to a sale by sample within the meaning of the said act;

b) The honourable Court erred in law and misdirected itself by refusing or failing to consider and find and hold that in a sale by sample within the *Sale of Goods Act*, the seller's legal obligation to the buyer ceases once the buyer has had a reasonable opportunity to inspect the goods;

c) The honourable Court erred in law by making a finding and holding that the appellant was in breach of contract in failing to supply Eucalyptus Oil 80%;

d) The honourable court misapprehended and misapplied the provisions of Article 46 of *the Constitution* of Kenya (2010) , the provisions of the *sale of Goods Act* and the *consumer Protection Act*;

e) The honourable Court erred in law by making a finding in favour of the respondent for special damages where there was no claim for special damages;

f) The honourable Court erred in law by finding that a contract which had been completed more than 6 months ago could be rescinded as it held.

8. The applicant has moved this Court vide a notice of motion dated 23rd August, 2019. The motion is filed under Article 163(4)(b) of *the Constitution*, section 3A and 3B of the Appellate Act, section 15, 16 of the *Supreme Court Act* and Rule 24(1) of the *Supreme Court Rules, 2012* seeking in the main an order of certification that the applicant's intended appeal to the Supreme Court raises matters of general public importance.

9. The motion is premised on the grounds that: the intended appeal raises matters of general public importance including the interpretation of sections 15, 16, 17, 35 and 36 of the *Sale of Goods Act*; the interpretation of a Sample and Sale by Description within the provisions of the *Sale of Goods Act*, the interpretation of Article 46 vis a vis the Incoterms rules of trade, whether the *Consumer Protection Act* which came into force after the sale by Sample had been completed could be applied retrospectively to the sale in issue and that the issue was in regard to the dispute arising out of International Commercial disputes which are determined on the basis of interpretation of the *Sale of Goods Act*.

10. The application is supported by an affidavit dated 22nd August, 2019 sworn by Mr. Gurvinder Bawa in which he mainly reiterates the grounds and the contents of the impugned orders. He further deposes that the intended appeal is arguable with high chances of success as demonstrated in the draft memorandum of appeal.

11. The application is opposed by the respondent through the replying affidavit of Manoj Shah, a director of the respondent. He deposes that in regard to an International Trade transaction governed by Incoterms which had been fully performed and completed, the same could not be rescinded; that this issue was comprehensively addressed by the Judges; the determination by this Court was based

on evidence on record and therefore the applicant was raising non-issues; the pleadings were between Pradip Enterprises (E.A) Ltd and Magic Chemicals and the applicant did not raise any issue in regard to the wrong description of the parties, therefore the Court did not err when it referred to Osho Chemicals as ipso facto referring to Pradip Enterprises; this Court in its judgment did not consider the issue of the *Consumer Protection Act* since it was raised in submissions by both parties, therefore the issue in regard to misinterpretation of Article 46 and the *Consumer Protection Act* cannot be raised now; the ground on misapprehension of facts that what was ordered by the respondent was Eucalyptus oil 80%, the applicant is estopped from contradicting the evidence and his witness statement where he confirmed on oath the Eucalyptus oil was 80%; the intended appeal does not raise any matters of general public importance; no valid reason has been raised that the *sale of goods Act* and International Trade Law had been incorrectly interpreted; further that a matter on general public importance should be one that substantially goes beyond the facts of the case, not whether there was a point of law but rather whether the point of law transcends the facts of the individual case; the question of law should stand in a state of uncertainty; the intended appeal is not of a cardinal nature involving issues of jurisprudential moment and that the applicant had failed to adduce evidence to demonstrate that there was a state of uncertainty in the law on the *Sale of Goods Act*.

12. In support of the application, the applicant has urged this Court to find that it has satisfied the threshold required for it to be granted leave to appeal to the Supreme Court. We have been referred to the decision in *Hermanus Phillipus Steyn v Glovanni Gnechi – Ruscone* [2013] eKLR.

    According to the applicant, the sale of the Eucalyptus Oil was an international sale governed by the terms of the sale provided in the Incoterms rules of trade, therefore, once the Intercoms has been fully performed a contract falling under it cannot be rescinded. This is a matter that raises issues of public interest. Further that this Court, on appeal failed to interpret and apply the provisions of Article 46, section 15, 16, 17, 35 and 36 of the *Sale of Goods Act*, which need correct interpretation.

13. The applicant also contends that the Court awarded the respondent special damages where the same was not specifically pleaded and proved going against the law, as was held by this Court in *Richard Okuku Oloo v South Sugar Co. Ltd* [2013] eKLR, and that is an issue that requires to be addressed by the Supreme Court. The applicant posited that in addition to the above, there is need to seek the interpretation of section 16(b) vis a vis section 35 of the *Sale of Goods Act*. This Court on appeal in its judgment held that the *Sale of Goods Act* did not apply to the dispute between the parties, yet the respondent was given the opportunity to examine the goods delivered to it, but failed to do so. Finally, this Court has been urged to allow the application since it would serve the ends of substantive justice, fairness and equity.

14. The respondent on the other hand urges this Court to apply the Hermanus test, which provides that the threshold is whether the intended appeal raises issues of general public importance. According to the respondent, the issues raised herein do not meet the threshold set in the Hermanus case (supra), for the reason that the dispute at hand was on breach of contract and failure to supply merchantable goods. This Court on appeal framed issues and determined that the product supplied did not correspond to description as provided by sections 15, 16, 17, 35 and 36 of the *Sale of Goods Act*.

15. On whether the application raises any substantial point of law bearing on public interest, the Court is being urged to find that the applicant has not demonstrated any inconsistency in the state of the law regarding uncertainty of any provisions of the *Sale of Goods Act*. Further, that the reliance on the Incoterms rules of trade by the applicant was a way of avoiding liability occasioned by a breach of contract. The contractual terms could not override the *Sale of Goods Act* or Article 46 of *the Constitution* on protection of the rights of consumers to goods of reasonable quality and to compensate for loss from any defect. It is the respondent's case that this Court on appeal did not make any finding

of law that is inconsistent with any provision of the *Sale of Goods Act* and the intended appeal amounts to an appeal against the finding of the primary facts, on whether the goods were fit for purpose. To buttress its arguments, the respondent has placed reliance on various decisions of this Court: In *Johnson Githaiga Mwaniki v Daniel Githaiga Mwaniki* [2015] eKLR, it was held that a matter of "general public importance" should be one of exceptional public significance; In *Glencore Energy (U.K) Limited v Kenya Pipeline Company Limited* [2016] eKLR, this Court dismissed an application for certification after determining that the appellate Court had rejected the factual setting as pleaded and arrived at its own independent finding of facts on the true character of the transactions. Finally, the respondent urged this Court to dismiss the application with costs.

16. When the application came up for plenary hearing before us on 29th November, 2019, learned counsel Ms. Elizabeth Onyango and Mr. Gachuhi appeared for the applicant and the respondent respectively. They informed the Court that they were fully relying on their written submissions, and made no oral highlights. We have considered the Notice of Motion, the grounds in support thereof as stated on its face, the rival affidavits and submissions of both parties and the law, especially as espoused by the authorities cited to us.

17. Our jurisdiction to hear and determine this application is drawn from Article 163(4)(b) of *the Constitution* which provides as follows:

> " 4) Appeals shall lie from the Court of Appeal to the Supreme Court-
>
> a. ....
>
> 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)."

The principles applicable in an application for leave and certification to appeal to the Supreme Court are well settled and the same has been addressed in various cases. The Supreme Court, in one of the earliest applications for certification and leave to appeal to the Court, Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone, (supra), held that the phrase "matter of general public importance" varies depending on the context. The Supreme Court considered Article 163(4)(b) of *the Constitution* and expressed as follows:

> " ... 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 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 closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern." (Emphasis supplied).

The above holding has been dissected and distilled to encompass several guidelines to be applied when addressing these applications. These include:-

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;

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;

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;

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*;

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."

18. The first question we need to ask ourselves is whether the applicant has raised a point of law arising from the determination of the issues raised before this Court and demonstrated that such point of law is substantial and has a significant bearing on public interest. We have perused the applicant's grounds in support of the application and the pertinent questions that it seeks the Supreme Court to determine. The main issue arising from the applicant's application is whether the learned Judges erred in finding that a contract determined by terms of sale provided under the Incoterms rules of trade could be rescinded. The applicant also seeks interpretation of Section 15, 16, 17, 35 and 36 of the *Sale of Goods Act* vis a vis Article 46 of *the Constitution*.

19. The applicant urges that the appellate Judges erred in finding that the contract for sale of Eucalyptus Oil 80% was a sale by description and not a sale by sample. Section 15 of the *Sale of Goods Act* requires goods supplied to correspond to the description and the sample needs to be fit for the intended purpose as provided by Section 16 of the *Sale of Goods Act*. According to the applicant, its rights to consumer protection were violated, hence the invocation of Article 46 of *the Constitution*.

20. Our understanding of the matter is that the contract culminating in this application was between the two parties where one party is said to have supplied merchandise that fell short of the quality agreed upon by the parties, as per the sample availed and approved earlier. In our view, whether the merchandise was fit on unfit was an issue within the confines of the particular contract.

21. Indeed, after the dispute over the quality of the merchandise supplied arose, the parties discussed it and even explored ways of remedying the situation. The Court of Appeal dealt with the issue and held that the product supplied did not match the sample provided earlier. The Court also addressed Sections 15, 16, 17, 35 and 36 of the *Sale of Goods Act* and did not find any ambiguity in them. There is no doubt that those are statutory provisions whose interpretation is not within the remit of the Supreme Court, which should only be burdened with interpretation and application of *the Constitution* by dint of Article 163 (4)a of *the Constitution*. There is no suggestion that these sections of the *Sale of Goods Act* have been the subject of contradictory or ambivalent interpretations either by the High Court or

by this Court for them to attract the Supreme Court's intervention. An appeal to the Supreme Court within the terms of Article163 (4) should be founded on cogent issues of Constitutional controversy, as was held in *Hassan Ali Joho & Another vs Suleiman Said Shabhal & 2 Others*, (2014) eKLR. See also Johnson Githaiga Mwaniki vs Daniel Githaiga Mwaniki (supra) where it was held that a matter of public importance should be one of exceptional public significance, which in our view, this one is not.

22. Secondly, the question in regard to whether a contract governed by incoterms or otherwise can be rescinded after full performance, cannot in our view be said to be an issue that transcends the interest of the parties herein for it to qualify to be a matter of general public importance.

23. The other issue raised as to whether special damages should be specifically pleaded and proved before they are awarded, is an issue that is well settled and beyond contestation. It is not one that needs to be interpreted by the Supreme Court.

24. On Article 46 of *the Constitution*, does it need interpretation by the Supreme Court? It stipulates that the consumers have a right to goods and services of reasonable quality. That is unambiguous and need to be applied as is within the peculiar circumstance of each transaction. In this case that provision is not disputed; and was in our view not misinterpreted. The issue here was quite straightforward and pertained to whether the quality of the merchandise supplied matched the sample that had been approved and agreed on by the parties. We think the applicant is trying to overstretch the applicability of Article 46 of the Constitution, but even elasticity can only be stretched to a certain extent otherwise it will snap.

25. Ultimately, our conclusion is that the application does not fall within the parameters we expounded above to qualify to be escalated to the Supreme Court for determination. Accordingly, the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR