



REPUBLIC OF KENYA



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Kinyua Muyaa & Co Advocates v Kenya Ports Authority Pension Scheme & 8 others (Civil Appeal (Application) 69 of 2020) [2022] KECA 1119 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KECA 1119 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 69 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

KINYUA MUYAA & CO ADVOCATES APPLICANT

AND

**KENYA PORTS AUTHORITY PENSION SCHEME & 8
OTHERS RESPONDENT**

(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 of judgment delivered by the Court of Appeal on 6th May 2022 at Mombasa in Civil Appeal No. 69 of 2020 by Gatembu, Nyamweya & Lesiit, JJ.A)

RULING

1. In an application dated May 19, 2022 made under Article 163(4)(b) and (9) of the Constitution of Kenya, 2010, Section 16(2)(a) & (b) of the Supreme Court Act, Sections 3(2) & 3A of the Appellate Jurisdiction Act, Rule 40 of the Court of Appeal Rules, 2010 and Order 41 Rule 6 of the Civil Procedure Rules, the firm of Kinyua Muyaa & Co Advocates, the applicant (the respondent in the appeal) seeks certification that its intended appeal to the Supreme Court of Kenya against part of the judgment of this Court delivered on May 6, 2022 involves matters of general public importance.
2. In that judgment, this Court dismissed the applicant's application to strike out the respondent's appeal; allowed the respondent's appeal and set aside a ruling of the Employment and Labour Relations Court (ELRC) dated July 17, 2020 in which the ELRC had upheld taxation of the applicant's advocate and client bill of costs in the amount of Kshs. 87,139,560.45; and ordered the applicant's bill of costs to be remitted back for re-taxation of instructions fees, getting up fees and award of interest and VAT by a different taxing officer of the ELRC. The background to this matter is fully set out in the judgment and we need not repeat it here.



3. The grounds on which the applicant seeks certification as set out in sixteen pages of the application and in the supporting affidavit of F. Kinyua Kamundi Advocate, a partner in the applicant law firm, were urged before us on July 4, 2022 when both Mr. Kamundi and Miss. Muyaa (partners in the applicant firm appearing in person) addressed us and orally highlighted their written submissions. The applicant submitted that a major issue in the litigation between the parties hereto was whether the ELRC has jurisdiction to tax advocate/client bill of costs; that the issue was resolved in the applicant's favour by ELRC which held that it has jurisdiction to do so; and that this Court, in the impugned judgment, upheld that decision and affirmed the jurisdiction of the ELRC in that regard.
4. However, the applicant submitted, this Court erred in its judgment: in setting aside the ruling of ELRC of 17th July 2020 in its entirety; failing to deliver itself on the grounds whether any appeal lies from matters previously determined and not appealed; in reversing decisions of the ELRC that had not been appealed against; failing to determine grievances the applicant had raised in the application to strike out the appeal; violating the applicant's right to a fair hearing as the Court was duty bound to determine all issues and all grounds raised in the application by the applicant; and in failing to consider grounds raised in the application.
5. It was submitted that the Court wrongly overturned a ruling of the ELRC delivered on 13th October 2017 which determined the value of the subject matter "as much higher than Kshs. 201,981,424.50 but less than Kshs. 6,982,340,602" when there was no appeal against that ruling; that despite holding that the question whether ELRC has jurisdiction to tax advocate/client bill of costs was *res judicata* having been determined in a ruling of ELRC of October 13, 2017, it is not clear why the Court failed to extend the doctrine of *res judicata* to the mode of determination of the value of subject matter which had also been determined in the ruling of October 13, 2017; that it is therefore necessary for the Supreme Court to determine the scope of the application of the doctrine of *res judicata*, a matter which according to counsel is one of public importance and transcends the litigation between the parties hereto and goes to the root of the rule of law and administration of justice.
6. It was urged that there are conflicting decisions and there is uncertainty in the law, which the Supreme Court should resolve, regarding the question whether, where there is a certificate of costs in respect of party and party costs, the determination of advocate/client costs is simply a matter of increasing the certified party and party costs by 50%.
7. As regards the question of award of interest, it was submitted that the final orders of the Court cannot be reconciled with the judgment; that it is evident from the judgment that the Court did not read or consider "the most important document in the entire dispute" namely the bill of costs; that had the Court done so, it is patently clear, contrary to the finding of the Court, that interest was claimed; that there are contradictions in the separate judgments rendered by the Court; that the appeal on the question of interest was not determined; that the final orders requiring the taxing officer to retax items 1 and 2 of the bill of costs and award any interest and VAT claimed in the bill of costs places the taxing officer and the parties in "an impossible position" on whether interest was sought or should be adjusted and a clear decision is required from the Supreme Court on how judgments should be interpreted, which is a matter that transcend the interests of the parties.
8. In support of the prayer for stay of execution, it was submitted that if the bill of costs is taxed based on the judgment of this Court, it will trigger another round of unending references and appeals, and the taxing officer should not be made to choose between the final orders of this Court and those of the ELRC in its ruling.
9. The applicant urged that the specific issues the Supreme Court will be invited to resolve include: whether this Court has jurisdiction to hear and determine appeals in the absence of a notice of appeal



or in the absence of a record of appeal; whether the final orders of the Court are in consonance with the separate judgments of the members of the bench; whether the judgment is valid having been delivered “without reading the record”; whether the applicant has a legitimate expectation that applicant’s application dated October 14, 2020 would be fully heard and determined and whether it was in fact fully heard and determined.

10. In opposing the application, learned counsel Mr. Oyoo holding brief for Mr. Gachuhi for the respondent relied on a replying affidavit sworn by Vincent Oweya on May 31, 2022 and to the respondent’s written submission which he orally highlighted.
11. It was submitted that the applicant has failed to discharge its burden to demonstrate that matters of general public importance are involved; that matter is purely an advocate/client matter relating to the principles of taxation of advocate/client bill of costs in a matter where the ELRC lacked jurisdiction to determine the primary dispute; that the issues which the applicant intends to refer to the Supreme Court are not issues of general public importance; that the issues involved are issues of law governed by general provisions of the law which are not substantial to warrant certification.
12. Counsel referred to the Supreme Court decision in *Hermanus Phillipus Steyn vs. Giovanni Gnechi Ruscone* [2013] eKLR where governing principles governing applications of this nature were enunciated. It was submitted that the issues raised by the applicant do not transcend the circumstances of this case and have no bearing on public interest; that all that remains is for the applicant’s bill of costs to be re-taxed; that the contention that the Court did not read or consider the appeal is not supported; that there is no ambiguity in the orders given by the Court and the applicant has in fact already extracted the draft Order in accordance with the judgment which the respondent has approved. In counsel’s view, the present application is no more than an expression of the applicant’s frustration disguised as miscarriage of justice. It was urged that litigation must come to an end.
13. We have considered the application, the affidavits, and the submissions. The standard for certification that a matter of general public importance is involved was set out by the Supreme Court of Kenya in *Hermanus Phillipus Steyn vs. Giovanni Gnechi Ruscone*(above) 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 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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”
14. Expounding further on the principles for determining whether a matter is one of general public importance the Supreme Court went on to state in that case that:
 - 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.”
15. Those principles were again reiterated by the Supreme Court in *Town Council of Awendo vs. Nelson Oduor Onyango & 13 others* [2015] eKLR. With those principles in mind, does this matter meet the criterion? The burden lies with the applicant to demonstrate that the criterion is met.
 16. As to whether the Court has jurisdiction to entertain an appeal in the absence of a notice of appeal, an issue the applicant has framed as one of general public importance, it has not been shown that there is any uncertainty in that regard. It is established that a notice of appeal is a prerequisite for the exercise of jurisdiction by this Court. See for instance *Equity Bank Limited vs. West Link Mbo Limited* [2013] eKLR and, also *Nguruman Limited vs Shompole Group Ranch*, Nairobi Civil Application No. NAI. 90 of 2013 [2014] eKLR.
 17. As for the contention that it is necessary for the Supreme Court to determine the scope of the application of the doctrine of res judicata, a matter which according to applicant is one of public importance, the Supreme Court has already done so and there is no uncertainty in that regard. See for instance the decision of the Supreme Court in *Kenya Commercial Bank vs. Muiri Coffee Estate Limited & another* [2016] eKLR; and in *Florence Maritime Services Ltd vs. Cabinet Secretary Transport, Infrastructure & 3 others* [2021] eKLR; Decisions of this Court on the subject are also many. See for instance *Uhuru Highway Development Ltd vs. Central Bank of Kenya* [1999] eKLR; decision, *William Koross vs. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR; *Independent and Electoral Boundaries Commission vs Maina Kiai & 5 others* [2017] eKLR.
 18. As whether the final orders of the Court are in consonance with the separate judgments of the members of the bench; whether the judgment is valid having been delivered “without reading the record”; whether the applicant has a legitimate expectation that applicant’s application dated October 14, 2020 would be fully heard and determined and whether it was in fact fully heard and determined; and the question “how judgments should be interpreted” in our view represent an apprehension by the applicant of miscarriage of justice without demonstration that matters of general public importance are involved.
 19. Lastly, there is the contention that “there is uncertainty in the previous holdings by the Court of Appeal with some justices of appeal holding that a certificate of costs in a party & party bill is binding in an



advocate/client bill of costs and that the taxing master need only increase that certificate with 50%”. There is merit in this contention. In *Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited & another* [1972] E.A 162, the Court expressed that taxation of costs is not a mathematical exercise, but a matter of opinion based on experience. In *Otieno, Ragot & Company Advocates vs. Kenya Airports Authority* [2021] eKLR the majority of the Court held that where party and party costs have been taxed, the role of the taxing officer in assessing the advocate/client costs is simply to increase the party and party costs by one half. That said, this in our view is a matter that did not directly arise in this appeal and the principle involved can, in our view be resolved, in the first instance, by an expanded bench of the Court before which the issue should be specifically framed when the opportunity presents, before it is escalated to the Supreme Court.

20. In effect, although the applicant has framed issues which it contends the Supreme Court should address in the intended appeal, the gravamen of the dispute between the parties is the quantum of the advocate/client fees payable by the respondent to the applicant for services rendered in representing the respondent in a suit before the ELRC and the principles of taxation of advocate/client bill of costs that should apply. That is a matter of remuneration between the parties, and it is not clear that it is a matter transcending the circumstances of the case.
21. In conclusion therefore we are not satisfied that the applicant has demonstrated that this matter meets the criteria for certification under Article 163(4)(b) of *the Constitution* of Kenya. No proper basis has been laid to warrant the grant of the prayer for stay of execution.
22. All in all, the application fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

