Airtel Networks Kenya Limited v Africa Management Communications Limited (Civil Application 10 of 2020) [2021] KECA 294 (KLR) (26 November 2021) (Ruling)

Neutral citation: [2021] KECA 294 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 10 OF 2020

PO KIAGE & AK MURGOR, JJA

NOVEMBER 26, 2021

BETWEEN

AIRTEL NETWORKS KENYA LIMITED ..... APPLICANT

AND

AFRICA MANAGEMENT COMMUNICATIONS LIMITED ..... RESPONDENT

(An application for certification that a matter of general importance is involved with respect to the proposed appeal against the judgment of the Court of Appeal (Ouko, Karanja & Okwengu, JJ.A) dated 8th May, 2020 in CIVIL APPEAL NO. 211 OF 2016)

RULING

1. This Court seized with an appeal challenging the High Court's (Ochieng, J.) exercise of discretion in setting aside the summary judgement entered on 30th June, 2014 in favour of the respondent, delivered its judgment on 8th May, 2020 reinstating that summary judgment with costs. The main issue in the appeal was whether the learned Judge was right in setting aside the judgment on the ground that the defence and counterclaim, filed out of time, raised triable issues and that in the interests of justice parties should be given an opportunity to canvass their respective cases.

2. It is against that decision that the applicant filed a Notice of Motion dated 5th June, 2020, brought under Article 163(4) of the *Constitution*, section 15 of the *Supreme Court Act*, 2011, Rule 33 of the *Supreme Court Rules*, 2020, the inherent jurisdiction of the Court, sections 3A and 3B of the *Appellate Jurisdiction Act* and all enabling provisions of law. The application seeks certification that matters of general importance are involved in the intended appeal against the judgment of this Court. The said matters of general public importance are listed as follows;

   Whether the Court of Appeal breached the applicant's rights under Article 50 of the Constitution in that:

i. The appeal was determined on the basis of a ground neither raised in the Memorandum of Appeal nor urged in argument i.e. the learned Judge (Ochieng J.) mixed up two forms of judgment, judgment in default of appearance under Order 10 of the Civil Procedure Rules, 2010 and summary judgment before appearance is entered under Order 37 of the Civil Procedure Rules, 2010, and thus fell into error.

ii. The Applicant was deprived of the opportunity to show that notwithstanding the mistaken reference in its application dated 13th June, 2016 to the defunct Order XLI, rule 4, the learned Judge was correct to overlook that and determine it on the basis that it was an application under Order 10 of the *Civil Procedure Rules*, 2010.

The appropriate standards of appellate review across the entire curial hierarchy:

i. The basis upon which the Court of Appeal may review discretionary decisions of the High Court especially where it does not have the records of the proceedings before the Superior Court;

ii. The circumstances under which the Supreme Court (and what standards it applies), can the review decisions of the Court of Appeal be reviewing (either reserving or affirming) the discretionary exercise of power by the Superior Court;

The circumstances under which jurisdictional objections to a judgment entered in default of appearance can be taken for the first time on an appeal to the Supreme Court, despite not having been explicitly raised before either the High Court or the Court of Appeal;

Whether a non-party to a contract can obtain relief under it due to blunders by a Defendant's advocates or a Court of Law is duty-bound to correct such a fundamental failure of justice;

The extent of as well as proper application of two ubiquitous principles upon which the Courts have acted in excusing lapses by parties i.e.

i. Parties should not be penalized for errors of their advocates unless party to them;

ii. So far as possible, unless it would cause irreparable prejudice, cases should be determined on their merits;

The legal implication, of the Court of Appeal reinstating a judgment of the High Court which in fact was not made;In noting that a claim for loss of business is a liquidated claim, the Court of Appeal has in effect made a decision that conflicts with other decided cases on what constitutes a liquidated claim and hence the need to settle the ambiguity by the Supreme Court.

3. The application is supported by the affidavit of Joy Nyaga, the Director, Legal & Regulatory Affairs for the appellant, sworn on 5th June, 2020. The affidavit recounts the context of the matter in addition to replicating the aforementioned grounds of the application.

4. In opposition to the application, the respondent filed a lengthy replying affidavit sworn by Emmanuel Mwaba, as Managing Director, on 22nd June 2020. He avers that the central issue in this matter is how the High Court and the Court of Appeal applied the principles for setting aside an ex-parte judgment, principles which have been set out and reaffirmed in numerous judicial decisions, notably, *Mohamed & Anor -vs- Shoka [1990] KLR 463*. On the issue of whether this Court breached the applicant's rights under Article 50 of the Constitution, the respondent contends that the applicant merely seeks to question the alleged errors of the Court of Appeal and does not demonstrate how correction of those errors, which are unique to this case, have a bearing on public interest. For instance, the respondent deposes, resolution of the applicant's claim that the appeal was determined based on an issue not

pleaded does not transcend this matter; if the Supreme Court were to render a different opinion on the same issue, it would only affect this case and the parties herein.

5. Concerning whether an issue not raised either in the High Court or Court of Appeal can be raised and determined in the Supreme Court for the first time, such as that, the respondent was not party to the agreement in question and could not therefore commence proceedings against the applicant, the respondent deposes that the applicant had consistently pleaded in the High Court and in this Court that it had entered into agreement with the respondent. The contention, according to the respondent, arose from the fact that the respondent described itself in the contract as AMC International Limited, and not Africa Management Communications Limited which commenced proceedings in the High Court. AMC is an abbreviation for Africa Management Communications, a company that also trades as AMC International by virtue of its trade mark, therefore the two names refer to the same entity, a fact that the applicant was well aware of, explained the respondent. Further, the respondent asserted, the question of identity of a party was a question of fact unique to this case and not a matter of general public importance.

6. On the question of whether the respondent's claim before the High Court was a liquidated claim, another matter that the applicant seeks to raise at the Supreme Court for the first time, the respondent protests that the applicant never raised it at the High Court nor at the Court of Appeal, and that even if it were to be determined by the Supreme Court based on established principles, that determination would be unique to the instant case and cannot transcend it.

7. With respect to the ground seeking the Supreme Court's determination of the proper application of the principles upon which courts have acted in excusing lapses by parties, the respondent asserts that there exists settled constitutional and statutory provisions which explain and expand the jurisdiction of the Court of Appeal to make orders aimed at meeting the ends of justice and preventing abuse of the court process. As regards the inquiry on the legal implication of the Court of Appeal reinstating a judgment of the High Court which in fact was not made, the respondent deposes that the legal implication of a factual determination is not a substantial point of law which has a significant bearing on the public interest. Moreover, determination of the issue by the Supreme Court, if at all, cannot transcend this case.

8. Regarding the ground seeking the Supreme Court to determine the basis upon which the Court of Appeal may review the discretionary decisions of the High Court and circumstances under which it can review decisions of the Court of Appeal, the respondent argues that seeking standards that the Supreme Court would use to determine a question before it is not a substantial point of law for its determination pursuant to sections 20 - 23 of the *Supreme Court Act*, 2011 which provide for the powers of the Supreme Court in determining appeals. Further, the respondent points out, the law relating to setting aside or affirming ex parte judgments is well settled in statutes and judicial precedents and there exists no ambiguity or uncertainty in law that the Supreme Court should pronounce itself on.

9. On the aspect of whether the Court of Appeal can review decisions of the High Court where it does not have the record of proceedings, the respondent avers that the appeal before the Court of Appeal was an interlocutory one and according to Practice Note No. 2(c)(iv) of the Court of Appeal Practice Directions 2015, the judge's notes are not normally necessary and parties are advised to consider excluding such notes. In any case, argues the respondent, pursuant to Rule 92(1) of the Court of Appeal Rules a party is permitted to lodge a supplementary record of appeal if in its opinion the record of appeal is either defective or insufficient for the purposes of the case.

10. Both parties filed written submissions. The firm of Majanja Luseno & Company Advocates lodged submissions for the applicant on 5th June, 2020 citing the two Supreme Court leading authorities

enunciating principles to be considered in applications for certification that proposed appeals raise matters of public importance, namely, *Hermanus Phillipus Steyn -vs- Giovanni Gnecchi-ruscone [2013] eKLR* and *Malcolm Bell -vs-daniel Toroitich Arap Moi & Another [2013] eKLR*. Counselin particular outlines the matters that qualify for certification as identified in MALCOLM BELL (supra) para. 54. The matters are as follows;

> " (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 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 [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;
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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;
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> (vii) 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;
>
> (viii) 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;
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> (ix) 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;
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> (x) 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;

(xi) 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".

11. Counsel argues that at all stages in the exercise of judicial power sight must not be lost of the justice of the matter, relying on the case of *Synergy Industrial Credit Limited -vs- Cape Holdings Ltd [2019] eKLR* for this proposition. According to Counsel, each of its outlined grounds of appeal for the intended appeal identifies a legal issue that has a bearing on the public interest. He further contends that this Court adjudicated upon matters not raised, by distinguishing between default judgment under Order 10 of the Civil Procedure rules and summary judgment under Order 36 of the same rules, thus violating his rights under Article 50 of the Constitution. Counsel faults this Court for determining the appeal without the benefit of certified copies of the proceedings; the request for Judgement made in the High Court; and the Judgement of the High Court, in effect arguing that the issue of a missing court record is of public importance warranting certification. For this contention, Counsel relied on the case of *Kenya Commercial Bank Limited -vs- Muiri Cofee Estate Limited & Another [2016] eKLR*.

12. On the question of whether at the appeal stage a party can raise an issue that was not raised in the 1st instance court, counsel argues that a jurisdictional objection can be raised an any stage, to wit, that the Deputy Registrar had no jurisdiction to enter final judgment in the sum of US $ 250,000 under Order 10 rule 5 of the Civil Procedure Rules, 2010. The other objection is that the respondent was not and is not a party to the contract upon which it sued and obtained default judgment. Counsel contends that despite the Court acknowledging that the applicant was a victim of its advocate's blunders, the Court made no effort to consider if this constituted an excusable neglect. According to Counsel, a court should not penalise a party for its legal advisers' blunders. For this argument he cites the cases of B*Elinda Murai & Others -vs- Amoi Wainaina [1978] LLR 2782 (CALL)* and *Philip Chemowolo & Another -vs-augustine Kubede [1982-88] KAR 103* at 1040. In conclusionthe applicant urges this Court to allow the application.

13. Besides the replying affidavit, the respondent opposed the application through written submissions lodged by the law firm of Ogembo & Associates on 29th June, 2020. Notably, some of the responses in the submissions were also highlighted in the replying affidavit and so I will not rehash them. On the question of breach of the applicant's rights under Article 50 of the Constitution, counsel contends that the appellant seeks to persuade the Supreme Court to rectify an alleged error by this Court yet the Supreme Court is not established as another layer in the appellate structure. In support of this argument the respondent relies on the Supreme Court's decision in *Daniel Kimani Njihia -vs- Francis Mwangi Kimani & Another [2015] eKLR* that:

> " It is clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution".

14. On the issue of whether the respondent's claim in the High Court was liquidated and whether this Court's determination of the same conflicts with other decided cases, Counsel submits that there was no determination either in this Court or the High Court as to whether the claim was liquidated or

not, hence the alleged decision could not possibly conflict with other decided cases. Counsel further draws the Court's attention to the applicant's citation of the applicable legal standards for certification as enunciated in the classicist cases of *Hermanus Phillipus Steyn* (*supra*) and *Malcolm Bell* (*supra*). In particular, for a point sought to be raised as an important point of law of general public importance, "such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination". The respondent further places reliance on the case of *Daniel Kimani Njihia -vs- Francis Mwangi Kimani & Another* [2015] eKLR where the Supreme Court declined to certify a matter on a point not raised in the courts below.

15. With respect to the ground seeking the proper application of the principles upon which courts excuse lapses by parties, Counsel asserts that, the question as framed does not raise a substantial point of law of public importance to be decided at the Supreme Court. He refers to *Shabbir Ali Jusab -vs- Anaar Osman Gaturi & The Ag* Civil Application No. Sup I Of 2012 (UR 1/2012) ascited with approval in *Koinange Investment & Development Ltd -vs- Robert Nelson Ngethe* [2013] eKLR, where thatcourt, inter alia, held that; "[...] the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law; not only in the case at hand, but also in such cases in future".

16. Concerning the contention that the Court of Appeal reviewed the discretionary decision of the High Court without the record of proceedings, counsel for the respondent refutes that allegation as untrue arguing that, the decree of the court dated 25th July, 2014 was on record, Judgment having been entered by the Deputy Registrar on 30th June, 2014 upon a request dated 23rd June, 2014. Further, following reconstruction of the file by consent of the parties, the High Court acknowledged the existence of Judgment and the Decree in its ruling of 26th April, 2016 and the issue rested at that point. Counsel rebuts the applicant's submission that the court in *Kenya Commercial Bank Limited* (*supra*) made a decision tothe effect that any question of a missing court record would raise a substantive point of law with a public interest element. To the contrary, the respondent cites paragraph 104 of that decision where the Apex Court stated:

> "In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that question was first determined with finality on 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved".

17. The issue of the missing court file having been raised and settled by the High Court on 26th April 2016 after parties had reconstructed the court file and records by consent, counsel for the respondent urges this Court to adopt the above holding by the Apex Court. In the end the respondent implores us to dismiss the application.

18. I have considered the application, the grounds in support thereof, the submissions by counsel and the law as I have captured them herein. An appeal from this Court to the Supreme Court arises in only two instances as set out in Article 163(4) of the Constitution;

> " 163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-
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> 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. As was held by this Court in *Joseph Amisi -vs- The Independent Elections & Boundaries Commission & 2 Others [2014] eKLR* (Per Waki, M'inoti & Murgor JJA);

> " [...] the requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance engaged the Supreme Court, whose role may not be relegated to that of correcting errors in the application of settled law, even where they are shown to exist"

20. In this matter it is conceded that the Apex Court authoritatively set down the test for determining what entails a matter of general public importance in the classicus case of *Malcolm Bell* (*supra*) para. 54. I have already outlined that test herein.

21. The substantive issue that arises then is, does the application before us satisfy the test? I think not. I find that the applicant is seeking the Apex Court's intervention on matters that have long been settled and hinge on the exercise of the unfettered judicial discretion on a case by case basis. That is how I see the question of the standards applicable for appellate review, and the extent to which lapses by a party can be excused. The applicant further seeks to introduce at the Supreme Court matters that it did not raise at the two courts below in blatant disregard of the established test in *Malcolm Bell* (*supra*). Significantly, the issues raised by the applicant do not have a bearing on public interest to justify granting the certification sought. It ought to be borne in mind and bears repeating that the mere fact of dissatisfaction with this Court's decision is no basis for approaching the Supreme Court.

22. Having taken that view of the matter, I find that the application lacks merit and I would dismiss it with costs to the respondent.

23. As Murgor JA agrees, it is so ordered.

24. This Ruling is delivered pursuant to Rule 32(3), Koome JA having ceased being a judge of the Court upon assuming the Office of Chief Justice.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2021.

O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

CONCURRING RULING OF MURGOR, JA

I have had the advantage of reading in draft the ruling of KIAGE, JA. I am in full agreement with the reasoning and conclusions and, therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 26TH OF NOVEMBER, 2021.

A.K. MURGOR

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JUDGE OF APPEAL