



IN THE COURT OF APPEAL

AT MALINDI

CORAM: (MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL (APPLICATION) NO. SUP. 43 OF 2018

BETWEEN

ACCREDO AG.....1ST APPLICANT

SALAMA BEACH HOTEL LIMITED.....2ND APPLICANT

HANS JUEGEN LANGER.....3RD APPLICANT

ZAHRA LANGER.....4TH APPLICANT

AND

STEFFANO UCCELLI.....1ST RESPONDENT

ISAAC RODROT.....2ND RESPONDENT

(Being an application to seek leave to the Supreme Court against the judgment

and orders of the Court of Appeal, Nairobi (Visram, Koome, Murgor, J.J.A.)

delivered on 21st August 2019) in Civil Appeal No. 43 of 2018)

RULING OF THE COURT

This Notice of Motion dated 24th July 2018 is made under **Article 163(4)** (b) of **the Constitution** following a decision of this Court (Visram, Koome and Murgor, J.J.A.), delivered on 21st August 2019. In the application, the applicants seek for certification to appeal against the decision of this Court to

the Supreme Court.

The motion was filed on the grounds that this Court upheld the judgment and orders of the High Court (W. Korir, J.) of which were neither sought by the appellants, nor were they matters that were before the court for consideration; that the effect of the orders was to strike out the suit in *HCCC No 118 of 2009*, and had given rise to a grave injustice.

Further, that the intended appeal raises constitutional issues, which should be argued and adjudicated by the Supreme Court, in particular, whether final orders can be made in an interlocutory application, instead of a full trial; that the High Court and this Court proceeded on the premises that the High Court decree obtained was based on a non-existent Milan judgment, where the applicants were adjudged to have been fraudulent, and were matters that were neither pleaded nor proved.

It was contended that the reasoning adopted by this Court sets a precedent that is highly prejudicial and unconstitutional, and raised matters with a significant bearing on public interest and on the administration of justice, which as a consequence, will cause widespread uncertainty and transcend the law and facts of the case. The motion was supported by the sworn affidavit of **Hans Juergen Langer, the 3rd applicant**, of 7th October 2019.

So as to ascertain whether a matter of public importance has arisen from the judgment of this Court, a brief background of the dispute is

essential. The dispute can be traced back to rent arrears dispute in respect of premises that were alleged to have been owed to Adinos AG (*Adinos*), a Swiss company by *Viaggi Del Ventaglio (Ventaglio)*, an Italian company which the Swiss company had leased to the Italian company. Adinos had instituted proceedings in a court in Milan, Italy. In the course of the proceedings, by a cessation agreement Adinos assigned its rights under the lease to **Accredo AG, the 1st applicant**, which obtained judgment in the Milan court in favour of Adinos on 14th December 2001 for the sum of 825,000 Euros. But owing to the insolvency of Ventaglio, the 1st applicant was unable to execute the judgment in Milan and sought instead to execute the judgment against Ventaglio's subsidiary, **Salama Beach Hotel Limited, the 2nd applicant**, a company incorporated in Kenya, which was the registered proprietor of a property known as Plot No. 9890 Watamu, Grant No. 11576 and the owner of Salama Beach hotel (*Salama Beach*) erected thereon.

To achieve this, the 1st applicant instituted proceedings in *HCCC No. 118 of 2009* to obtain a judgment that would enable it enforce the Milan judgment in Kenya. Simultaneously with the suit, it sought injunction orders to restrain **the 1st respondent, Stefano Uccelli**, and **the 2nd respondent, Isaac Rodrot**, both directors of the 2nd applicant from disposing of the Salama Beach, and for a further order to allow the 3rd and 4th applicant, **Zahra Langer** to take over its management.

The 1st respondent swore an affidavit admitting the applicants' claim, following which a consent order dated 21st December 2009 was entered between the parties which in effect, allowed the 3rd and 4th applicants to take over and assume directorship and control of Salama Beach.

The 1st respondent later reneged on his admission, and in so doing, filed an application dated 20th November 2014 seeking to set aside the consent judgment, for reasons that he had since discovered that the Milan judgment that underpinned the decree in Kenya did not exist, and that since he was not a shareholder of Salama Beach, he lacked the authority to enter into the consent arrangement with the applicants; that furthermore, the 2nd respondent who was the majority shareholder of Salama Beach, had not been afforded an opportunity to be heard. He finally averred that since the 3rd and 4th applicants had coerced him into signing the consent, it had been procured unlawfully through fraud, misrepresentation and coercion.

The application fell for determination before Chitembwe, J., who found that the decree had been procured through fraud, misrepresentation and coercion, and in so finding, reversed the consent orders, and instead ordered, *inter alia*, that the Registrar of Companies remove the names of the 3rd and 4th applicants from the register of shareholders and hand over Salama Beach and its bank accounts to the respondents. The applicants' subsequent appeal to this Court upheld the decision and orders of Chitembwe, J.

Undeterred, the applicants filed another application in the High Court seeking an interim injunction against Chitembwe, J's orders. The respondents responded with a preliminary objection dated 9th January 2018 wherein they contended that the application was *res judicata*, and that the court lacked jurisdiction to determine it. In a ruling delivered on 20th March 2018, the learned judge, (W. Korir, J.) concluded that the application was *res judicata* and he lacked jurisdiction to hear and determine it, as it would be tantamount to reviewing or sitting on appeal over Chitembwe, J's decision. The judge further ordered compliance with Chitembwe, J's orders. The applicants were displeased with that decision, and once again appealed to this Court, which upheld W. Korir, J's decision. This Court concluded that the application was indeed *res judicata*, and that the High Court had no jurisdiction to determine it. It is this decision that has given rise to this application for certification before us.

In the submissions, learned counsel for the applicants, **Mr. Ndegwa**, submitted that the applicants' rights to fair hearing under **Article 25 (c)** of the **Constitution** had been offended, because the decision of this Court which upheld the ruling of the trial court had made final orders in a matter that had yet to be heard on its merits. It was further submitted that this Court erred in upholding the finding of the trial court which had concluded, in the absence of any pleadings, or a hearing where the allegations should have been tested by cross examination, that the applicants were guilty of fraud; that furthermore no defence was filed in the lower court, and that these were matters that transcended the facts of the case.

Mr. Kibunja, learned counsel for the respondents, submitted that on the basis of the Chitembwe, J's ruling and this Court's judgment of 15th December 2018, the learned judge was right to have dismissed the applicants' injunction application for reasons that it was *res judicata*.

It was further submitted that the grounds of appeal set out did not meet the threshold requirements for certification; that the parties were heard, and sufficient material on the Milan judgment had been placed before the court; that the two courts were satisfied that the acquisition of Salama Beach was based on a fraudulent document. Counsel concluded that the issues in controversy were not matters that transcended the facts of this case, and as such, there was no issue of general public importance for the Supreme Court to consider.

Mr. Mkomba, learned counsel for the 2nd respondent also opposed the motion.

We have considered the application, the replying affidavits and the parties' submissions, and in our view at the core of the application is the issue whether the intended appeal to the Supreme Court is a matter of general public importance, and therefore eligible for certification as such. This application is brought under **Article 163 (4) of the Constitution** and **sections 15 and 16 of the Supreme Court Act. Article 163(4)** of the Constitution provides the criterion for grant of leave to appeal to the Supreme Court. It states that:

“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....” (Emphasis ours)

Whether or not a matter is considered to be of general public importance was set out in the guidelines enumerated by the Supreme Court in the case of *In the Matter of Hermanus Phillipus Steyn vs Giovanni Gneccchi-Rusccone*, Civil Application No. Supreme Court 4 of 2012 (UR 3/2012) which are that;

- i. for a case to be certified as one involving a matter of general public importance, the intended appellant must satisfy the Court that the issue to be canvassed 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 significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the court or courts below, and must 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. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

In their application for certification, the applicants' claim is that *Article 25 (c)* of the *Constitution* on the right to a fair trial had been offended because W. Korir, J's ruling, which this Court upheld, had made final orders in a matter that had not been heard on its merits; that Chitembwe, J's ruling had set aside a consent without the parties having been heard, or the allegations of fraud tested in cross examination, all of which were matters that transcended the facts of the case.

If we understand the applicants' correctly, their grievances are twofold, firstly, that the orders issued by W. Korir, J and upheld by this Court were

final orders not prayed for, and secondly, that the final orders made in Chitembwe, J's ruling were at the interlocutory stage instead of after a full trial; that by this Court upholding W, Korir, J's decision, uncertainty had been created regarding the question of whether the consent order ought to have been set aside, particularly as the suit was yet to be heard and determined.

For a matter of general public importance to be found to have arisen, an applicant is required to demonstrate, *inter alia*, that a matter of law which transcends the facts of the case and has created uncertainty in the law has arisen. In the Supreme Court in the case of *Hermanus Phillipus Steyn vs Giovanni Gneccchi-Rusccone (supra)*, it was stated that;

"the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; ...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....; 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." (emphasis ours)

And citing the English case of *Glancare Teorada vs A.N. Board Pleanala [2006] FEHC 250*, in the case of *Hermanus Phillipus Steyn vs Giovanni Gneccchi-Rusccone (supra)* the court further held that a matter of general public importance should be one of *exceptional public significance*, in that;

- i. the matter goes substantially beyond the facts of the case, and the appropriate test is not whether there is a point of law, but whether the point of law transcends the facts of the individual case;
- ii. the law in question should stand in a state of uncertainty-so that it is for the common good that such law be clarified, so as to enable the Courts to administer the law, not only in the instant case, but also in future cases;
- iv. the point of law must have arisen out of a decision of the Court, and not from a discussion of a point in the course of the hearing.

Firstly, as to whether this Court has created uncertainty in the law by upholding W. Korir, J's ruling dismissing the applicant's application for reasons that it was *res judicata* and that he lacked jurisdiction to hear and determine it, and further requiring compliance with the orders of Chitembwe, J, we therefore find nothing novelle or exceptional in this Court's decision that has given rise to uncertainty in the law. We also find nothing in the decision that transcends the facts of the case.

On the second issue pertaining to the setting aside of the consent and the alleged final orders made by Chitembwe, J, it is not lost on us that, the applicants seek to impugn the ruling of Chitembwe, J. In these premises, an application for certification ought properly to have been made following this Court's judgment of 15th December 2017 which arose from that ruling, rather than from, this Court's impugned judgment of 21st August 2019 that arose from the ruling of W. Korir, J. In effect, as certification to the Supreme Court has not been sought in respect of this Court's decision of 15th December 2017, we consider it inopportune to address matters raised in respect of that decision.

In sum, the Notice of Motion dated 7th October 2019 is unmerited and is dismissed with costs to the respondents.

It is so ordered

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR