IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, WARSAME & MURGOR, JJ.A)

SUP CIVIL APPLICATION NO. 15 OF 2018

BETWEEN

DHANJAL INVESTMENT LIMITED..APPLICANT

AND

COSMOS HOLIDAY PLC.....RESPONDENT

(An application for grant of certification and leave to appeal to the Supreme Court on grounds of general Public importance and points of law under Article 163 (4) (b) of the Constitution in respect of a judgment of the Court of Appeal of Kenya at Nairobi (Waki, Makhandia & Gatembu, JJ.A) dated 27th *April, 2018* **in Civil Appeal No. 317 of 2013**

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RULING OF THE COURT

1. By way of a Notice of Motion dated 23rd May, 2018, the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No. 317 of 2013. The impugned decision dismissed the applicant's appeal against the ruling of the High Court (**Njagi, J.).**

2. In upholding the High Court's finding the Court of Appeal observed that there was no finality in the decision made on the petition with respect to the issue of registration of the foreign judgment and could not in the circumstances therefore make the finding that the decision was *res judicata*. According to this Court, the foreign judgment remained alive despite the decision of the High Court in the petition.

3. Aggrieved by the judgment of this Court, the applicant wishes to proceed on appeal to the Supreme Court under **Article 163 (4) (b)** of the Constitution which reads;

> **"(4) 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)".**

4. The applicant's motion is premised on the assertion that its intended appeal raises issues of general public importance in addition to raising issues of law, more specifically on enforcement of the provisions of the **Foreign Judgments (reciprocal) Enforcement Act Cap 43**.

5. The pertinent questions of law and the public interest aspect raised by the applicant for determination by the Supreme Court are stated as follows:

> i. Whether the superior courts below correctly **interpreted Sections (3) (3) (b)** and **4 (1) (i)** of Cap 43 in respect to the registration of foreign judgments arising from physical injuries sustained in Kenya in which a recovery suit thereof is commenced in foreign courts outside Kenya.
>
> ii. Whether the issues to be raised in the intended appeal affect not only Kenyan public, hotel and tour operators but also traverse across its boundaries to include the tourists visiting Kenya who are a common scene in Kenya and the tourism industry in general.

6. At the hearing of the application, learned counsel **Mr. Buti** represented the applicant, while the learned counsel **Mr. Ondieki** represented the respondent.

7. In support of the application for certification, counsel for the applicant submitted that this matter was of general public importance as it involved the registration of a foreign judgment concerning an indemnity contract performed in Kenya. According to him, the judgment was not registrable in Kenya as there was no contract performed partly or wholly in the United Kingdom.

8. He further submitted that the injuries suffered by nine tourists occurred in Kenya and hence the cause of action arose in Kenya, therefore the two provisions, **Sections 3 (3) (b)** and **4 (I) (i)** could not apply in the circumstances.

9. Opposing the application, counsel for the respondent relied on the Replying Affidavit sworn on 26th October, 2018 by one **Rubin James Adams**. He submitted that the point of law raised by the applicant only affects the parties herein and did not transcend the circumstances of the case. Counsel also pointed out that the apprehension of miscarriage of justice is not a ground for certification.

10. It was also contended that the Court of Appeal erred in the interpretation of **Section 4 (I) (g).** Counsel argued that the applicant's intention was to re-appeal the case before Supreme Court and urged this Court to bring the matter to an end.

11. We have considered the application, the rival positions taken by the parties, the law, the authorities cited and the determination by both Superior Courts. Our mandate is to determine whether the intended appeal raises issues of general public importance on a substantial point of law so as to justify certification by this Court.4

12. In the oft-cited case of ***Hermanus Phillipus Steyn vs. Giovanni Gnocchi-Ruscone, Supreme Court 2013 eKLR*** the Supreme Court, in determining whether or not a matter involves a question of general public importance on appoint of law, stated as follows:

> **"It is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions."**

13. In the circumstance of this matter and going by the above criteria, we must determine whether applicant's intended appeal raises a point of law that is of general public importance. This Court in **Hermanus Pillipus Steyn vs. Giovanni Gnecchi-Ruscone** ***[supra]*** in establishing matters of law that are of general public importance stated that:

> **"Where the matter involves a point of law, 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. It is not enough to show that a difficult question of law arose. It must be an important question of law."**

14. It is evident from the applicant's application that its claim in the intended appeal is anchored on the hospitality and tourism industry which issues affect not only the Kenyan public, hotel and tour operators but also affect those visiting Kenya such as tourists. According to the applicant, this is the crux of the public interest aspect of the application.

15. The point of law raised by the applicant revolves around the legal interpretation of the provisions of **Section 3 (3) (b)** and **Section 4 (1) (i)** of the **Foreign Judgments Reciprocal Enforcement Act Cap 43.** The former provides as follows:

> **"(3) This Act does not apply to a judgment or order-…;**
>
> **b. To the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages."** [Emphasis added].

Section 4 (1) (i) of the Act provides:

> **"4 (1) In proceedings in which it is necessary for the purposes of this Act to determine whether a Court of another country has jurisdiction to adjudicate upon a cause of action, that Court shall, subject to subsection (2), be treated as having had jurisdiction where;**
>
> **i. In the case of an action to recover damages for physical injury to the person or the death of a person, or for damages to tangible property, the circumstances giving rise to injury, death of damage substantially occurred in the country of the Original Court or the injury or damage was suffered in that country."**

16. It is the appellant's assertion that the said provisions prohibit the registration of any foreign judgment under that Act where the same relates to damages for personal injuries/physical injuries to the person which did not occur in the country of the original court.

17. In a judgment dated 27th April 2018, this court in agreeing with High Court found that **Section 1** of the **Foreign Judgment Reciprocal Enforcement Act** gives the judgment creditor six years within which to register such a judgment and that the creditor (respondent) still had

sufficient time to apply for registration. Indeed, following that ruling, the respondent proceeded to register the judgment on 16th March, 2012.

18. It is obvious that the matters which arose for determination by both Superior Courts were substantially matters of fact based on a contract between the two parties, which were conclusively determined in light of the evidence on record. Consequently, the circumstances surrounding the claim of indemnity and or damages pursuant to a contract in respect of the respondent's liability to a group of 9 tourists who suffered injuries, loss and damage during an attack by 10-12 armed men whilst staying at a tented camp operated by the applicant were evidentiary matters which were specific to the parties hereto and are therefore not grounds to grant certification.

1`9. As stated by the Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** *[supra]:*

> **"Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."**

20. Another question which we deem is fundamental for our determination is the consequence of the indemnity clause in the contract signed by both sides on 29th October, 1999 which was the crux of the matter *ab initio* vis-à-vis the impugned provisions of law already cited. It reads:

> **"Throughout the period of contract the Hotelier warrants and guarantees as follows;**
>
> > **a. the Hotelier shall indemnify and keep indemnified Cosmos against all losses, liabilities, claims of expenses for or in respect of injury (including death), loss or damage to persons or property which may arise from any cause whatsoever out of or in connection with the supply of services to Cosmos…".**

21. In our view, this does not warrant a substantial point of law to be determined by the Supreme Court that would be relevant to general public interest as it does not result in any uncertainty, neither is it contradictory. We think that all these questions were exhaustively addressed from the initial claim in the United Kingdom in regard to which the applicant herein appealed. The matter subsequently came before the High Court in Kenya and was thoroughly adjudicated up until the current stage. We respectfully agree with respondent that this application represents an attempt by the applicant to have a 5th bite at the cherry.

22. Moreover, the law in Kenya recognizes and provides for instances where enforcement of judgments passed in countries outside Kenya which accord reciprocal treatment to judgments passed in Kenya are allowed. Under the Cap 43, a judgment creditor in whose favour a foreign judgment from a ***"designated country"*** has been made may apply and register the foreign judgment at the High Court of Kenya and such foreign judgment shall, for purposes of execution, be of the same force and effect as a judgment of the High Court of Kenya entered at the **date of registration**. (Emphasis).

23. The Court in ***Jayesh Hasmukh Shah vs. Navin Haria & Another [2016] eKLR*** acknowledged the learned Justice Eldad Mwangusya of Uganda High Court while endorsing and adopting the dicta in ***Hilton vs. Guyot, 159 US 113 (1895)*** when he directed enforcement of the USA judgment in Uganda and expressed as follows:

> **"The judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in the absence of a reciprocal arrangement. This court grants him the prayer that the judgment is enforceable in Uganda…".**

24. In light of the above we are of the view the matter before the court in the United Kingdom was duly tried and adjudicated and our Kenyan laws and justice system recognize the enforcement of such judgment albeit after registration. It is also our considered view that litigation must come to an end and the judgment creditor be allowed to enjoy the fruits of its judgment.

25. We think that the applicant has failed to demonstrate that its application involves a point of law or that there is uncertainty in the decision which requires clarification by the Supreme Court.

26. In conclusion, we find that all the issues raised by the applicant were properly and correctly addressed by this Court and there is no question of law to be determined or uncertainty to be clarified by the Supreme Court that is of great public interest. Accordingly, we find that the application does not meet the threshold to merit certification to the Supreme Court. Consequently, the application dated 23rd May, 2018 is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 22*nd day of May, 2020.*

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR