



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KOOME & MURGOR, JJ.A)**

**CIVIL APPLICATION NO. SUP. 15 OF 2019**

**BETWEEN**

**WILLIAM OLOTCH.....APPLICANT**

**AND**

**PAN AFRICA INSURANCE COMPANY.....RESPONDENT**

*(Being an application for certification and leave to appeal to the Supreme Court of Kenya against the judgment*

*of the Court of Appeal at Nairobi (Warsame, Musinga & Kiage, JJ.A) dated 10<sup>th</sup> May, 2019 In Civ. App. No. 357 of 2017)*

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**RULING OF THE COURT**

[1] *William Olotch*, (the applicant) seeks leave and certification to appeal to the Supreme Court against the judgment of this Court delivered in Civil Appeal No. 357 of 2017 (**Warsame, Musinga & Kiage, JJ.A**) dated 10<sup>th</sup> May, 2019. On 17<sup>th</sup> July, 2001 the applicant was summarily dismissed from employment by *Pan Africa Insurance Company* (the respondent). Dissatisfied, and by way of an amended plaint filed before the High Court on 4<sup>th</sup> October, 2001 the applicant sued the respondent for a sum of Ksh. 23,270,789.00 being special damages with costs and a declaration that the summary dismissal was unlawful. Upon hearing the matter, the learned Judge (Sergon, J.) of the High Court rendered a judgement on 9<sup>th</sup> March, 2017 wherein he dismissed the applicant's case. In doing so, he held that the respondent was entitled to summarily dismiss the applicant for gross misconduct without notice or pay in lieu of notice which was in accordance with the statute prevailing then, and the contract of employment.

[3] Aggrieved by the said decision, the applicant appealed before this Court. As far as the applicant's case was concerned, this Court found that under the provisions of **Section 17 (c)** and **(g)** of the **Employment Act Cap 226** (repealed) and **Clause 10 (a) (i)** of the service contract, the respondent was entitled to terminate the employment of the applicant without notice or payment in lieu of notice on account of gross misconduct. This Court also agreed with the trial Judge that the evidence disclosed that there were acts of gross misconduct which involved the applicant and other directors in the purchase of plots belonging to the respondent for personal enrichment and in breach of fiduciary duties which were acts of abuse of office. That the applicant and some local directors while in a fiduciary position benefited from a purchase scheme which was not meant for them. The other directors once confronted with the evidence of the scam opted to retire but the applicant filed suit. After re-evaluating the evidence this Court was satisfied that the trial court did not err in finding that the applicant guilty of gross misconduct and that the summary dismissal in lieu of notice was lawful. The appeal was therefore dismissed.

[3] The applicant has filed the instant application principally under **Article 163(4)** of the Constitution, **Section 15 (1)** of the **Supreme Court Act**, and other enabling rules. The applicant seeks certification that the intended appeal involves a matter of general public importance to be determined by the Supreme Court. These were the specific questions that the applicant raised: -

*“i. Whether the principle of natural justice applies to all contract?*

*ii. Where an employer summarily dismisses an employee on grounds of gross misconduct (under the repealed Employment Act, Cap 226) and an employee disagrees, does the employee have a right to be heard and the employer an obligation to disclose details of the grounds of gross misconduct?*

*iii. Where a company has disciplinary regulations, are they deemed to be part of the contract?*

iv. *Whether upon a summary dismissal an employee automatically forfeits all his benefits including those that he is legally entitled to and had accrued prior to the dismissal, in other words what is the place of those benefits not contingent on the ruling of the case in question?*

v. *Can a chairman of a board of directors unilaterally terminate a contract of a board employee without a board resolution?*

vi. *Whether a decision made which on the face of it without any iota of evidence in support is not in itself tantamount to a miscarriage of justice?*

vii. *Whether refusal to give a relief in the presence of overwhelming evidence is itself a miscarriage of justice?*

viii. *Can a termination of an employee's contract of employment be retroactive?"*

[5] The application was supported by the applicant's affidavit in which he rehashed and elaborated on the above issues faulting the two courts below for finding that there was gross misconduct when he maintained that there was none. In the said affidavit the applicant also seems to have introduced new evidence which was not before the trial court as stated in some key paragraphs of the affidavit such as paragraphs 15,16, 18 and 19. In brief, the applicant explained that there was in place three different schemes for different cadres of employees and since he was an employee of the Board and not of shareholders he bought one plot only under the scheme. That the other plots were allowed by the respondent because they were less attractive to members of public and also that there was a misconception by the respondent who equated developers' prices with market prices.

[6] During the plenary hearing of this application **Mrs. Pamela Ochieng** learned counsel for the applicant submitted that the issue of an employee being subjected to a disciplinary procedure is a fundamental one that cuts across all contracts of employment under the **Employment Act, Cap 226** (repealed). That the resolution of the Board shows that the applicant was supposed to be taken through a disciplinary procedure and that he was entitled to his terminal benefits. Moreover, the question of whether a chairman of the Board can terminate an employee without a board resolution was not answered by the two courts.

[7] The application was opposed by **Mr. Fred Ojiambo SC** learned counsel for the respondent. He made reference to the Judgement of this Court that dissected the issues of whether the summary dismissal was justified and the reasons given. According to counsel, the judgment fully explained that once there was evidence of gross misconduct, both the Employment Act of 2007 and the contract of employment provided for summary dismissal. That there was no duty imposed on an employer to hear an employee before dismissal or need for them to assign any reasons for dismissal although the two courts found that the applicant was given reasons for termination. Moreover, the Court of Appeal stated that: -

**"The repealed Act embodied the exclusive power of the employer to dismiss or terminate employment at will which was founded on freedom of contract. Moreover, Kenya had not (and still has not) ratified the ILO Termination of Employment Convention, 1982 (No. 158) which the Employment Act (2007) was modeled from."**

Counsel therefore submitted that there are no issues of general public importance which cut across the general public as this was a contract between the two parties which has been determined by the two courts. Counsel urged us to dismiss the application with costs.

[8] The principles to bring to bear in determining whether there are matters of general public importance that requires a decision of the Court of Appeal to be reviewed by the Supreme Court were set out by the Supreme Court itself in the following cases **Hermanus Phillip Steyn vs. Giovanni Gnegchi Ruscone** Supreme Court Application No 4 of 2012, **Malcom Bell v. Hon. Daniel Toroitich arap Moi & another**, Sup. CT Application No. 1 of 2013 and **Town Council of Awendo v Nelson Oduor Onyango & 13 others** [2015] eKLR (*the Town Council of Awendo Case*).

We particularly wish to refer to what the Court stated in the ***Town Council of Awendo Case*** by reproducing the specific guiding principles set out therein as follows: -

**"Para 21**

**i. for an intended appeal to be certified as one involving a "matter of general public importance," the intending appellant is to 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 is to 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 is/are to 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. 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 of certification for appeal to the Supreme Court;*

*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;*

*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 certification for final appeal in the Supreme Court.”*

[9] We have considered this application within the above strictures in our bid to answer the question of whether the application raises issues of general public importance justifying a review of this Court’s judgment by the Supreme Court. The main issue was whether the applicant’s summary dismissal was unlawful and if that was the case whether he was entitled to the sum claimed. This was a contract between the applicant and the respondent. The said contract of employment was founded on the repealed law and those issues were thrashed by the two courts below to a pulp.

[10] Is there any question of law, or a substantial gap in the law that transcends the parties herein to be taken to the Supreme Court as far as the issue of the applicant’s termination of employment is concerned? Unfortunately, in our view the questions raised by the applicant do not behold the parties herein as they revolve around the interpretation of the contract of employment. We therefore find nothing in this matter that is private/public in nature that would satisfy the threshold set in the *Town Council of Awendo case*. We also bear in mind what was stated by this Court in *Greenfield Investments Limited vs. Baber Alibhai Manji*, Civil Application No. Sup 5 of 2012 where this Court observed: -

**“It would be a perversion of the law as ... unambiguously spelt out in the Constitution, were certifications to become fare for ordinary cases no matter how complex that have for ages been concluded with finality in this Court. This is part of the rationale for the requirement that certification be first sought in this Court.”**

[11] What is clear to us is that the applicant is aggrieved by the decision of this Court which is not a basis for granting certification. In an effort to perhaps justify the issues for determination, he attempted in a very unorthodox manner, to introduce new evidence that was not before the High Court. We therefore find no merit in this application which is hereby dismissed with costs to the respondent.

*Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020*

**W. OUKO. (P)**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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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**