IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OKWENGU, MURGOR & KANTAI, JJ.A.)

CIVIL APPLICATION SUP. 4 OF 2017

BETWEEN

EBBY ONDIEKI .... APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED...............RESPONDENT

(Being an application for leave of the Court of Appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal (Waki, Nambuye & Kiage, JJ.A.) delivered on 18th October, 2017

in

Civil Appeal No. 107 of 2012)

****

RULING OF THE COURT

On 30th July, 1999 **Hebby (or Ebby) Ondieki ("the applicant")** entered the Nakuru branch of National Bank of Kenya and withdrew a sum of Kshs.800,000 in cash. She walked to Barclays Bank of Kenya Limited, Nakuru branch **("the bank"**) where she intended to deposit the money. Finding a queue of customers, and believing that she was entitled to priority service as a **"premier customer"**, she walked to the front of the queue and informed a bank teller that she had a large amount of money to deposit. The bank teller was serving another customer and he rudely told her in a loud voice that although she had a large sum of money to deposit she should queue like all other customers. The applicant complied and stood in line to be served. When it was her turn to be served – lo and behold – she had no money at all as it had all been stolen as she stood in the queue.

Those facts were established through evidence before the trial Judge (Maraga, J. – as he then was) who found that the applicant had withdrawn money (a withdrawal form was produced in evidence); the bank witness admitted in evidence that he had ordered the applicant to queue like all other customers. Finding that the applicant should have used safer means to transfer money instead of carrying large amounts of cash, but further finding that the bank was negligent in the way it had handled the applicant, the trial Judge apportioned liability equally between the parties meaning that the applicant was entitled to half of the stolen money, to be paid to her by the bank.

Meanwhile, the thieves who had stolen the money had been arrested. They were tried in Nakuru Criminal Case No. 1367 of 1999 and probably convicted. A sum of Kshs.325,000 was recovered from the thieves and the applicant admitted before the trial Judge that she had recovered this sum after the criminal trial had been concluded.

The bank appealed the finding by the High Court on apportionment of liability. The applicant cross-appealed claiming that she was entitled to much more money – including a sum of Kshs.155,992,000 for "loss of user" of the stolen money. The appeal was partially allowed (Waki, Nambuye, Kiage, JJ.A.) in a judgment delivered on 18th October, 2017. This Court held that the bank was fully to blame for the loss of the stolen money but factoring the recovered sum of Kshs.325,000 the applicant was awarded the balance of Kshs.475,000 to carry interest at court rates from the date of filing suit till payment in full. The cross-appeal partially succeeded to the extent that the order apportioning liability at 50:50 was set aside, it being found that the bank was 100% to blame for the theft that took place in its premises. The claim for loss of user of the stolen money was

dismissed.

The applicant is relentless in her pursuit of what she considers her rights against the bank.

In the Motion said to be brought under various provisions of the Supreme Court Act, the Supreme Court Rules and various articles of the Constitution of Kenya, 2010 it is prayed in the main:

> ***"2.0 The trial court do grant leave to the applicant for lodging appeal from the judgment delivered at Nyeri on 18.10.2017 and its order in appeal to the Supreme Court."***

We understand it to be an application for leave to appeal to the Supreme Court against the Judgment delivered by this Court in Nyeri on 18th October, 2017. It is stated in grounds in support of the Motion and in Supporting Affidavit sworn by the applicant at Nakuru on 1st November, 2017 that this Court declined to grant damages for loss of user of Kshs.800,000 stolen from the applicant at the bank; that:

> ***"The intended appeal to the Supreme Court has very great prospects of success and is neither bad in law nor frivolous nor scandalous nor vexatious at all ..."***

So the only point to be taken on the intended appeal to the apex Court in the land is failure by this Court to award damages for loss of user of the stolen money.

This Court considered that issue in the judgment intended to be appealed and found that the applicant had not pleaded that issue at all in the plaint she had filed at the High Court of Kenya at Nakuru. Finding that the applicant was bound by her pleading and after analyzing various case law on that issue the court found that it had no jurisdiction, on appeal, to consider an issue that had not been before the High Court. It held:

> ***"...it is our finding that since the claim for loss of user was not one of the issues raised before the High Court; the proceedings before the High Court were regular and not illegal, and that the High Court was properly seized of the matter and therefore issues of want of jurisdiction did not arise, we cannot intervene on behalf of Hebby on the issue of loss of use of the money she lost in 1999 on account of want of jurisdiction to do so on appeal..."***

When the Motion came up for hearing before us on 18th February, 2020 the applicant appeared in person while learned counsel **Mr. Steve Opar** appeared for the bank. The applicant had filed written submissions with authorities attached and had also highlighted those submissions in a document filed on 10th February, 2020. The bank had filed "Grounds of Opposition" through the law firm of Walker Kontos Advocates and we observe here that there is no provision in the rules of this Court for filing "grounds of opposition." This, however, is not of any moment today.

The written submissions by the applicant and the accompanying highlight are difficult to follow. The narrative taken is an attack on documents filed by the bank; whether the lawyers on record for the bank are properly on record; whether documents are properly drawn or filed; whether the lawyer signing documents for the law firm of Walker Kontos Advocates, has authority to sign.

The applicant fully relied on her submissions at the plenary hearing.

Counsel for the bank in opposing the motion submitted that it did not meet the threshold for certifying matters for an appeal to the Supreme Court. Counsel submitted that the applicant had not shown that the intended appeal raised any issue of public interest; had not raised a point of law the determination of which would have a significant bearing to public interest. According to counsel the applicant was pursuing an issue on award of damages which issue was personal and did not affect the public interest in any way at all.

In sum, the issue that was before the High Court was whether the bank was liable for the money stolen at the banking hall from the applicant. The High Court found both parties to blame and apportioned liability equally between the parties, but this finding was reversed on appeal, this Court finding the bank fully to blame for negligence in not ensuring that there was sufficient security at the bank to prevent thieves from stealing from customers (like the applicant) from the banking hall or otherwise in the bank's premises. This Court declined the applicant's prayer for loss of user of the money, finding that the applicant had not made that prayer before the trial court.

The applicant prays that we certify that there is a point in her case calling for determination by the Supreme Court.

Article 163(4) of the **Constitution of Kenya, 2010** on appeals from this Court to the Supreme Court, provides:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court:***
>
> ***(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)."***

This Court and the Supreme Court have had occasion to consider the phrase **“matter of general public importance”** in various cases. In the case of **Greenfield Investments Limited v Baber Alibhai Manji, Civil Application No. Sup 5 of 2012** it was 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.”***

In the case of **Hermanus Philipus Steyn v Giovanni Gnecchi –Ruscone Civil Application No. Sup 4 of 2012** on the question of certification for an appeal to the Supreme Court this Court stated:

> ***“The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. 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 the 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.”***

The Supreme Court of Kenya in the case of **Hermanus Phillipus Steyn v Giovanni Gnecchi – Ruscone [2013] eKLR** while considering whether a matter merited certification as one of general public importance summarized the applicable principles 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;***
>
> ***(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) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”***

We have spoken to the point that the applicant thinks warrants the intervention of the Supreme Court - that this Court was wrong not to award her damages for loss of use of stolen money. Firstly, as was found by this Court in the Judgment delivered on 18th October, 2017, the applicant had not taken that point in the pleadings before the trial court. That issue was not available on appeal as the Court of Appeal had no jurisdiction to entertain an issue that had not been pleaded at the High Court. Secondly, the issue of award of damages is not a point of law the determination of which would have a significant bearing on the public interest within the meaning of the holding in ***Hermanus Philipus Steyn*** (supra). The applicant’s money was stolen; this Court found the bank fully liable and the applicant was awarded that sum with interest, a sum she had recovered from the thieves being factored in the award made.

There is no matter of public interest or importance at all raised and the applicant is not entitled to an order that there is a matter of public interest which the Supreme Court should consider. There is no such matter at all. The motion has no merit; it fails and we dismiss it with costs to the bank.

Dated and delivered at Nairobi this 5th day of June, 2020.

HANNAH OKWENGU

…….…………………….

JUDGE OF APPEAL

A.K. MURGOR

……………………………

JUDGE OF APPEAL

S. ole KANTAI

…………………………..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR