



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. SUP. 14 OF 2018

BETWEEN

EASTLANDS THEATRES LIMITED.....1ST APPLICANT

JAMES SAMUEL KINYAJUI.....2ND APPLICANT

ANNE NJERU KINYAJUI.....3RD APPLICANT

AND

KENYA NATIONAL CAPITAL

CORPORATION LIMITED.....RESPONDENT

(Being an Application for leave to appeal to the Supreme Court from the Judgment and Orders of the Court of Appeal (Waki, Nambuye & Musinga, JJ.A) dated and delivered on 20th April 2018)

in

Nairobi Civil Appeal No. 248 of 2018)

RULING OF THE COURT

1. The Notice of Motion dated 18th May, 2018 is pronounced to be brought under **Articles 25, 27, 40, 47, 50, 159 and 163(4)(b)** of the Constitution, **section 3A and 3B** of the Appellate Jurisdiction Act and any other enabling provisions of the law. The applicants seek in the main, certification that their matter is of general public importance and qualifies to be escalated to the Supreme Court for determination.
2. It is premised on grounds, *inter alia*, that: this Court misinterpreted and misapplied the provisions of **section 4(1)** of the Limitation of Actions Act which provides that an action founded on contract cannot be brought after 6 years from the date when the cause of action accrued; the decision violated the applicant’s rights to equal protection and benefit of the law, fair administrative action and fair hearing as respectively enshrined under **Articles 25, 27, 40, 47 and 50** of the Constitution by failing to determine certain issues which it found to have either been pleaded and/or counterclaimed.
3. According to the applicant, the issues raised in the application transcend the interests of the parties herein as the Supreme Court is being asked to determine with certainty when time starts to run on a guarantee, whether the banks should debit borrowers accounts with charges which have not been formally demanded or accepted as due by the borrowers; the use of standard forms which give the banks an upper hand and stronger bargaining power in all commercial transactions and other important banking practices. The applicants contend that since a substantial section of the commercial community is affected by the said banking practices the matter meets the required threshold and the application should therefore be allowed.
4. The application is supported by the 2nd Applicant’s affidavit sworn on 18th May, 2018 reiterating the above grounds. In brief, it was deposed that: the intended appeal to the Supreme Court raise issues/matters transcending the decisions of the High Court and this Court; that the intended appeal addresses the infringement of rights enshrined under the Constitution; that the application for certification has been occasioned by a state of uncertainty in law arising from erroneous findings and misinterpretation and/or misapplication of the law by both the High Court and this Court and; the intended appeal goes beyond a miscarriage of justice in the circumstances of this particular case but raises matters of general public importance.

5. The application is opposed through a replying affidavit sworn by Samuel Mundia, an employee of the respondent. He deposes, *inter alia*, that: the applicant's application does not meet the threshold for the granting of leave to appeal to the Supreme Court as provided under **Article 163(4)** of the Constitution and **Section 16(2)** of the Supreme Court Act and the Supreme Court Rules; that the determination of fact in contest between the parties are not by themselves a basis of granting certification for an appeal to the Supreme Court and; the mere apprehension of miscarriage of justice is not a proper basis for granting certification for an appeal to the Supreme Court and that for a matter to be certified it must meet the Constitutional threshold, which the instant application does not.

6. At the hearing of the application, learned Counsel Mr. Kelvin Mogeni and Mr. Lawson Ondieki appeared for the applicants and the respondent respectively.

7. Mr. Mogeni submitted on four areas; on the issue of the interpretation of section **4(1)** of the Limitation of Actions Act, he submitted that both the High Court and this Court cast doubt in the interpretation of the aforementioned provision specifically in reference as to when time starts to run on a guarantee. He maintained that this was a matter of public interest as this would question the practice of the entire banking sector in debiting borrowers' accounts with charges which have not formally been demanded or accepted as due by the borrower.

8. On the issue of the right to be heard and/or fair hearing under **Article 159(2)** of the Constitution, he submitted that this Court erred in dismissing all other grounds of appeal save for the issue of the principal sum owed based on the findings that the other issues raised by the applicants were not counterclaimed and were made based on unpleaded facts and on no evidence.

9. On the issue of the right to property under **Article 40**, Mr. Mogeni argued that the suit property was undervalued. He maintained that this issue was not addressed by the High Court and this Court hence that this is an appropriate issue to be heard by the Supreme Court. He placed reliance on **Narok County Government v. Livingstone Kunini Ntutu & 2 Others, Sup. Petition No. 3 of 2015.**

10. Citing **Geoffrey M. Asanyo & 3 Others V. The Attorney General, Sup. Petition No. 21 of 2015** Counsel submitted on the issue of interest rates by the bank arguing that the High Court and this Court did not properly address the issue and that it was pertinent for the Supreme Court to settle the law on the applicable laws on how banks ought to charge and calculate interests. He urged the Court to allow the application.

11. Opposing the application, Mr. Ondieki submitted that the test for certification to the Supreme Court was settle in **Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscone Civil Application No. 4 of 2012.** He maintained that the instant application fails to meet the threshold for the reasons that the primary matter is based on a contract between the parties and raised no points of general public importance and does not transcend the interests of the parties.

12. Mr. Ondieki contended that the interpretation of **Section 4(1)** of the Limitation of Actions Act was now settled law and there was no uncertainty of the interpretation of the said provision warranting the intervention of the Supreme Court. He maintained that this Court considered the appeal in its entirety and the totality of the applicants' allegations and averments. Further, that the said provisions of law had been properly interrogated by both the High Court and the Court of Appeal and decisions were reached.

13. Counsel submitted that there were no issues of violation of rights under the Constitution arising in the primary matter as this was a matter involving a contract between parties. He argued that the allegations of a breach of the Constitution had not been particularized and the same were simply raised as an afterthought. He urged the Court to dismiss the application.

14. We have considered the application, the grounds in support thereof, the rival affidavits, submissions by counsel and the law. The only issue for our determination is whether this application passes the threshold required, for certification to proceed to the Supreme Court.

15. It is trite law that in an appeal to the Supreme Court, the paramount consideration is not whether the decision of this Court is deemed to be right or wrong by any of the parties, but rather whether the intended appeal raises a matter of general public importance. The law in this area is now well settled and the Supreme Court has set the parameters this Court has to consider when determining whether a matters deserves to be escalated to the Supreme Court for determination. These parameters were succinctly set out in **Hermanus Phillipus Steyn v. Giovanni Gnechi-Ruscone Supreme Court application No.4 of 2012,** where the Supreme Court rendered itself 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. *determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”*

16. On the definition of “general public importance” the Court further expressed itself as follows:-

“...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”

17. In **Glencore Energy (UK) Ltd v. Kenya Pipeline Company Ltd [2018] eKLR**, the Supreme Court stated:-

“If the applicant’s appeal is based on a point of law, he “must demonstrate that such point is a substantial one, the determination of which will have a significant bearing on the public interest.”

18. In the instant case, it would be critical to analyze the grounds raised by the applicant *vis-a-vis* the established principles in order to be satisfied that the same indeed meets the required threshold for certification. It will also be imperative to further evaluate the specific elements of general public importance as urged by the applicants which they desire to be addressed by the Supreme Court to determine whether the requisite threshold has been met.

19. The first question that the applicant sought to be addressed by the Court relates to the interpretation of limitation based on the provisions of **section 4(1)** of the Limitations of Actions Act. In this regard the applicant faults the findings of this Court on grounds that the statute of limitation against the respondent started to run from the earliest time the amount remained unpaid and not from the time a demand was made. In our view, there is nothing novel about section 4(1) of the limitations of Actions Act, or the interpretation ascribed to it by the High Court and this Court.

20. Save for blanket submission on the provision of **Section 4(1)** of the Limitation of Actions Act, there has been no demonstration that the said question transcends the interest of the parties before the Court. Further, there has been no demonstration by the applicants that there have been conflicting decisions on the matter which the Supreme Court should be called upon to resolve. The issue of standard forms used in contracts and the inequality of parties to a contract are not novel issues. We also appreciate that the terms of a contract bind the parties to it and the terms of the contract are peculiar to the specific contract. A generalized purported unconscionableness of a contract cannot be the subject of reference to the Supreme Court.

21. The applicants also submitted on the issue of interest rates charged by banks which they contend was raised in the two courts below, but which they seek to canvass before the Supreme Court if the leave sought is granted. We hold the view that the issue of interest rates is a purely contractual one arising out of the commercial transaction as executed between the parties and interest rates are not standard but vary within the banking sector. It cannot therefore be said that the same is an issue that transcends the interest of the parties to the suit.

22. This Court has had occasion to address the issue of commercial transactions in the case of **Southern Shield Holding Limited & 2 Others -vs- Delphis Bank Limited & another (2019) eKLR**, where it stated as follows:-

“In the instant case, we are not satisfied that the applicant has met the obligation to identify and concisely set out the specific elements of general public importance. All the applicant has done is to enumerate issues without concise demonstration on how the issues are matters of general public importance. The dispute between the parties was a commercial loan between lender, borrower and guarantor. The applicant has not shown how a private commercial agreement between the parties and failure to repay a loan is a matter of general public importance.”

This case falls on all fours with the above case.

23. The affidavit sworn by the second applicant in support of the application is replete with deponents that challenge the correctness and/or fairness of the decision of this Court which the appellants seek to challenge before the Supreme Court. As clearly stated in the **Hermanus Phillipus** case (supra) “*mere apprehension of miscarriage of justice*” is not a proper basis for granting certification to the Supreme Court. It would seem to us that the applicants are unhappy with the decision of this court and would like to have another bite at the cherry on appeal. This would explain why the applicants are all over and do not seem sure whether to invoke Article 163(4)a or (b) of the Constitution.

24. We say so because the applicants have also submitted on alleged violation of their right to be heard/fair trial under **Article 159(2)** of the Constitution, violation of its right to property under **Article 40** of the Constitution; right to fair administrative action and fair hearing as enshrined under **Article 47** and **50** of the Constitution saying that the parties were condemned unheard. In respect of rights to property under **Article 40** of the Constitution, the applicants faulted the findings of the Court that the property was not sold at an undervalued price. He further contended that in so holding the Court failed to appreciate that the said finding was in violation of the applicants right to property as enshrined under **Article 40** of the constitution.

25. In the case of **Njenga Livingstone -vs- Joyce Wanjiku & 2 Others (2015) eKLR**, this Court extensively deliberated on application of constitutional questions as regards an application for certification where it held as follows:-

“Regarding the alleged violation of Article 22 (1) of the Constitution and breach of fundamental rights and freedoms, we have perused the judgment of this Court dated 25th November, 2014. Nowhere in the judgment does it show that constitutional issues were canvassed and considered before this Court and in the two courts below. In the case of Lawrence Nduutu & 6000 Others v. Kenya Breweries Limited & Another, Sup. Ct. Petition No. 3 of 2012, the Supreme Court stated:

“... The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. An applicant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)”.

We are alive to the decision of the Supreme Court in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Application No. 5 of 2014 [Munya 1], where a two- Judge Bench of the Supreme Court held:-

“That where no constitutional provisions relied upon are readily identifiable from the body of the Judgment of the Appellate Court, a party only needs to show that the reasoning and the conclusions of the Court took a constitutional trajectory. The import is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

26. These constitutional issues were not raised as such in the two courts. They have just been donned with constitutional regalia in this application for purposes of bringing the matter within the ambit of **Article 163(4) (a)** of the Constitution. In any event, if indeed the matter raises issues of constitutional interpretation and application, the applicants’ recourse lies directly with the Supreme Court and not with this Court.

27. Whichever way we look at this matter, it is evident that our unavoidable conclusion is that it falls short of the threshold required for certification of matters from this Court. Accordingly, we dismiss the Notice of Motion with costs to the respondent.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR