



IN THE COURT OF APPEAL

AT KISUMU

CORAM: KIAGE, SICHALE & J.MOHAMMED, J.J.A

CIVIL APPLICATION NO 150 OF 2019

BETWEEN

**CENTRE FOR PEACE AND DEMOCRACY....APPLICANT**

**AND**

**NGO CO-ORDINATION BOARD.....RESPONDENT**

**(Being an application for certification and leave to appeal to the Supreme Court against the judgment of this Court at Kisumu (Asike-Makhandia, Kiage & Otieno Odek, J.J.A) dated 21st May, 2019 in Civil Appeal No. 34 of 2017**

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RULING OF THE COURT

Background

1. By way of Notice of Motion dated 27th November, 2019, the applicant has moved this Court for certification and leave to appeal to the Supreme Court against the judgment of this Court delivered on 21st May, 2019.
2. A brief background will place the instant application in context. The applicant moved the High Court for an order of mandamus to compel the respondent to register a list of its officials elected at a special general meeting held on 29th October, 2010. **Nambuye, J.** (as she then was) struck out the application with costs on 28th September, 2011. Aggrieved by that decision, the applicant filed an appeal to this Court, **Civil Appeal No. 261 of 2011** which was dismissed. The respondent sought to recover its costs in the High Court whereby its bill of costs was taxed and costs certified by the Deputy Registrar on 18th June, 2012. Subsequently, the respondent filed a notice to show cause before the High Court to attach one-third of the judgment debtor's salary. The order attaching the applicant's salary precipitated an application for review by the applicant who sought to review, vary or set aside the Deputy Registrar's order made on 22nd November, 2016 authorizing the attachment of one-third of the judgment debtor's salary to settle the Kshs. 209,527/= being costs ordered against the applicant. The applicant's bone of contention was that the procurement of the firm of **Otieno, Yogo and Ojuro Advocates** (the Firm) by the respondent was improper and illegal. The learned Judge (**Majanja, J.**) found the application for review incompetent and dismissed it on the ground that the order sought to be reviewed was the one attaching one-third of the Judgment debtor's salary and not the order imposing costs on the applicant.
3. Aggrieved by that decision as well, the applicant filed an appeal to this Court (**Civil Appeal No. 34 of 2017**) which is the subject of the instant application on the following grounds:
  - a. Failing to outline and elucidate on the issues for determination from the pleadings of the parties contrary to the **Civil Procedure Rules Order 21**;
  - b. Failing to make a determination on the legality of representation of the respondent by the firm of Otieno, Yogo, Ojuro and Company Advocates in **Miscellaneous Civil Application No. 7 of 2011** and the consequence thereof;
  - c. Failing to make a finding on the consequences of the execution of illegal/unlawful costs in relation to the provisions of **Articles 10, 20, 21,22,23, 40 and 227** of the Constitution.
4. At the hearing of the appeal, the main issues for determination were whether the Firm should have represented the applicant in the main suit filed on 21st January, 2011 and in the subsequent application dated 24th November, 2014 without proper instructions and whether the respondent being a public/state body is liable to receive compensation from the applicant as costs for services rendered by the law Firm. It

was counsel's contention that the Firm was pre-qualified on 17th October, 2012 yet it was on record for the respondent before that date and the Firm therefore lacked the legal basis to make any claims against the applicant for services that had been rendered to it illegally.

5. Counsel for the respondent opposed the appeal and contended that the applicant had failed to show that instructions were not given to the Firm in the face of the affidavit deposition by the respondent's legal officer that verbal instructions were issued to the Firm by the respondent to act on its behalf. Counsel argued that in view of the fact that the two were in a contractual relationship the respondent is entitled to the awarded costs.

6. In the impugned judgment, this Court dismissed the appeal and stated as follows:

**"...the matter herein concerns party and party costs, therefore it does not matter how the other the law firm came on record for the respondent, which is not complaining. The costs were awarded to the respondent and therefore the same cannot be denied to them because of an irregularity, if any in the appointment of counsel. In any case, the issue of instructions, it was established that indeed there was a relationship between the respondent and the Firm which was clarified by the respondent's legal officer who deposed an affidavit affirming that indeed instructions were issued. This was uncontroverted."**

7. Aggrieved by the judgment of this Court, the applicant filed the instant application which is supported by the affidavit of **Michael Juma Otieno** deposed on 26th November, 2019. The grounds in support *inter alia* are that this Court did not assess procurement documents that were before it which show that the Firm was not properly on record since they came on record for the respondent over a year before the conclusion of the tendering process which placed them on the respondent's panel of lawyers; that this Court failed to determine the consequence of the verbal instructions in procurement of services from a private company by a Government entity without following procurement laws; that the impugned judgment sought to pronounce that an illegality in procurement can be questioned only by a contracting entity, in this case the respondent, regardless of how the respondent procured the services of the Firm; that if the impugned judgment which the appellant termed as "regressive" is sustained, it will make procurement laws in Kenya redundant with the consequence that it will promote proliferation of anarchy and corruption in procurement of services and goods by public/government entities which will not be questioned by the oversight and investigative bodies, and citizens; that this Court relied on a non-existent affidavit purported to have been sworn by the respondent's Legal Officer which became the basis upon which it made a determination that there was a legal relationship between the respondent and the Firm yet the only affidavit in defence of the respondent is that of **Geoffrey Otieno Yogo (Yogo)** dated 18th January, 2017; that **Yogo** was not the respondent's Legal Officer but a senior partner in the Firm whose services and legal appearance on behalf of the respondent was the subject of the appeal; and that in the impugned judgment, the Court failed to properly scrutinize the documents before it and if unchallenged will occasion serious miscarriage of justice and will set a bad precedent that will bind the lower courts and will erode public confidence in the administration of justice.

8. The respondent opposed the instant application and filed a replying affidavit sworn by **Eric O. Ojuro (Eric)** on 9th June, 2020. The respondent also filed written submissions of the same date. In the replying affidavit, **Eric** stated that the instant application lacks merit as the impugned judgment is sound; that there is no matter of public importance raised in the application that warrants certification by this Court; and that the dispute between the parties was contractual in nature and does not qualify for leave to appeal to the Supreme Court. In its written submissions, the respondent submitted that the dispute that arose in the High Court required the respondent to furnish evidence of how it had secured the services of its external lawyers and is not a dispute that raises issues of public importance to warrant this Court to issue leave to appeal to the Supreme Court.

Counsel urged us to dismiss the application with costs.

### **Determination**

9. We have considered the notice of motion, the affidavits, the rival submissions, the authorities cited and the law. The motion before us seeks leave and certification to appeal to the Supreme Court.

10. **Article 163(4) of the Constitution** stipulates that appeals lie from this Court 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."**

11. It is trite law as stated in **Hermanus Phillipus Steyn Vs Giovanni Gneccchi-Ruscone, Supreme Court application No.4 of 2012 (Hermanus Phillipus Steyn Case)** that to succeed in an application for certification under **Article 163(4)(b) of the Constitution**, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance:

**"the determination of which transcends the circumstances of the particular case, and has a 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 supplied].

12. The Supreme Court in the **Hermanus Phillipus Steyn** case (supra) pronounced itself on the meaning of 'matter of general public importance' thus;..."

**“...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.”**

13. This Court in Kenya Plantation And Agricultural Workers' Union vs. Kenya Export Floriculture, Horticulture And Allied Workers' Union (Kefhau); Represented by Its Promoters; David Benedict Omulama & 9 others [2018] eKLR stated as follows:

**“The principles set out in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione*, (supra) to determine whether a matter is of general public importance included:**

- 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.”**

14. In the instant application, it is our duty to consider and appraise if the foregoing principles enunciated for certification have been satisfied. The question that we must determine is whether the applicant has set out specific elements of general public importance which it attributes to the questions to be urged before the Supreme Court in the intended appeal?

15. The applicant identified the issues for determination in its intended appeal as follows:

- i. Whether the learned Judges erred in law in interpreting the laws regulating procurement of goods and services by public bodies as set out at Article 227 of the Constitution and Sections 134 and 135 of the Public Procurement and Disposals Act;**
- ii. whether the learned Judges erred in law in finding and holding that there was no illegality committed in an advocate appearing for a public body without legal instructions;**
- iii. whether the learned Judges erred in law in finding and holding that costs for legal representation and services should be paid whether their services were legally procured as ordered by the Court of Appeal and High Court;**
- iv. whether the learned Judges erred in law in finding and holding that only a public institution that fails to abide by the constitutional and legal provisions on procurement can question or challenge such illegalities and that such matters cannot be challenged by Kenyan citizens or other interested parties;**
- v. whether the findings and judgment will have effect on the constitutional and legal provisions on procurement of goods and services by public bodies;**
- vi. whether the findings and judgment will affect the fight against corruption in procurement of goods and services by public bodies by enforcement bodies and Kenyan citizens;**
- vii. whether the learned Judges erred in law and in fact in infringing on the appellant's rights under Article 50 of the Constitution;**
- viii. whether the learned Judges erred in law and in referring to a non-existent affidavit as the basis for determination of**

existence of contract; and

ix. whether the learned Judges erred in law by avoiding to determine issues presented before them for determination by creating their own issues.

16. None of these matters can be said to pass the test of a matter of general public importance as laid down in the *Hermanus Phillipus Steyn* case (supra) nor do they transcend the interest of the parties in the dispute that was before this Court. The dispute between the parties was a commercial matter. The applicant has not demonstrated how a private commercial matter between the parties is a matter of general public importance that transcends the interests of the parties herein. The applicant has therefore failed to satisfy this Court that his intended appeal falls within **Article 163(4)(b) of the Constitution** to warrant certification by this Court to grant leave to appeal to the Supreme Court.

17. The upshot is that the notice of motion dated 27th November, 2019 is bereft of merit and is hereby dismissed with costs to the respondent.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of November, 2020**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**