



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, ODEK & KANTAL, J.J.A)

CIVIL APPLICATION No. SUP. 10 f 2018 (UR 720/18)

BETWEEN

SOUTHERN SHIELD HOLDINGS LIMITED..... 1<sup>ST</sup> APPLICANT

AKBERALI KARIM KURJI.....2<sup>ND</sup> APPLICANT

SADRUDIN KARIM KURJI..... 3<sup>RD</sup> APPLICANT

AND

DELPHIS BANK LIMITED.....1<sup>ST</sup> RESPONDENT

SHIELD HIRE PURCHASE LIMITED.....2<sup>ND</sup> RESPONDENT

*(Being an application for certification and leave to appeal to the Supreme Court; and also being an application for stay of the judgment of this Court in Civil Appeal No. 102 of 2010 delivered at Nairobi (Karanja, Okwengu & J. Mohammed, J.J.A) on 2nd February 2010) in H.C.C.C. No. 672 of 2013)*

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RULING OF THE COURT

1. By way of Notice of Motion dated 26<sup>th</sup> March 2018, the applicants have moved this Court for certification and leave to appeal to the Supreme Court against the judgment of this Court delivered on 2<sup>nd</sup> February 2010. The applicants also seek an order for stay of execution of the judgment and decree of this Court pending the hearing and determination of the instant application.

2. The application is supported by the affidavit of **Mr. Akberali Karim Kurji** deposed on 26<sup>th</sup> March 2018. The grounds in support are that the intended appeal to the Supreme Court involves a matter of general public importance that transcends the interest of the parties; that the intended appeal raise points of law that rise above the decisions of the High Court and this Court; that the application for certification has been occasioned by a state of uncertainty in law arising from contradictory judgments of this Court; that the intended appeal is not based on mere apprehension of miscarriage of justice but contains pre-requisites of a case involving a matter of general public importance.

3. Several grounds have been urged in support of the application for stay of execution of the judgment and decree of this Court; the applicant is apprehensive that the respondents may proceed and execute the judgment while the application for leave and certification to the Supreme Court is pending; that the applicants are aggrieved by the judgment of this Court; that this Court erred in entering judgment against the applicant in the sum of Ksh. 21,863,070.56 plus interest thereon at court rates from the date of filing suit; that in order for ends of justice to be met, it is fair that there be stay of the judgment and decree of this Court pending hearing and determination of the intended appeal to the Supreme Court; that as a matter of law and fact, this Court is the only Court from which the applicants can seek a stay order at the first instance; that the criteria for certification and leave to appeal to the Supreme Court as enunciated in the case of **Hermanus Phillipus Stevn - v- Giovanni Gnechi- Ruscone [2031]** eKLR have been fulfilled.

4. At the hearing of the application, learned counsel **Mr. Makhanu** of Makhanu & Odhiambo Advocates appeared for the applicants while learned counsel **Miss Doreen Areri** instructed by the firm of Waweru Gatonye & Co. Advocates appeared for the 1<sup>st</sup> respondent.

**APPLICANT'S SUBMISSION**

5. Counsel for the applicants recapped the grounds in support of the application stressing that there are two conflicting decisions of this Court

that justify leave and certification to the Supreme Court. Due to the conflicting decisions, a matter of general public importance has arisen pursuant to **Article 163 (4) (b)** of the Constitution; the two conflicting decisions of this Court are **Kenya Commercial Finance Company Limited -v- Kipngeno arap Ngeny & another [2002] eKLR** and the decision in this matter against which leave to appeal to the Supreme Court is sought. Whereas in **Kipngeno Case** (supra), this Court held that failure to serve a guarantor personally with a demand letter leads to no liability on their part on account of a borrower's default in paying the facility; in the intended appeal this Court conflictingly expressed and held that when a guarantor who doubles up as a director of a company has been served with a demand letter, the service is proper and it does not matter in what capacity he was served; and that service of a demand letter in the capacity of director is proper service and the director/guarantor cannot escape liability.

6. Owing to the alleged conflicting decisions of this Court, the applicants emphasized that there is legal uncertainty on how to effect proper service on a guarantor who doubles up as a director of a company; such uncertainty has transmuted itself and has now become a matter of general public importance to be resolved by the Supreme Court in the intended appeal.

7. Underscoring its submission, the applicants urged that the contradictory decisions on personal service upon a guarantor doubling up as a director of a borrowing company has the potential of creating ambiguity and uncertainty in jurisprudence. In summation, the applicant submitted that the issues of general public importance to be determined by the Supreme Court is the conflicting jurisprudence of this Court on how to effect proper service upon a guarantor to a loan who is also a director of the borrowing company.

## RESPONDENT'S SUBMISSION

8. The 1<sup>st</sup> respondent, **Delphis Bank Limited**, in a replying affidavit dated 22<sup>nd</sup> June 2018 deposed by **Mr. Wilfred K. Machini** opposes this application. It is averred that the application does not disclose any matter of general public importance; that the criteria for certifying a matter as one of general public importance has not been met; that the applicant has not demonstrated the point of law to be urged at the Supreme Court; that the legal issue regarding service is not a substantial point of law to warrant certification to the Supreme Court; that there is no uncertainty in law on the issue of service; that the allegation that there are conflicting decisions of this Court is incorrect; that the facts and *ratio decidendi* in **Kip'ngeno Case** (supra) is distinguishable from the facts of the decision of this Court in the intended appeal; that in the **Kip'ngeno case** (supra), no notice was issued to the guarantors while in the present case notice was issued and served. On these distinct facts, it was submitted that there is no uncertainty in law on how to effect proper service on a guarantor who doubles as a director of the borrowing company.

9. Submitting on the prayer for stay of execution of the judgment and decree of this Court, the respondent cited the case of **Dickson Muriuki -v- Timothy Kagonda [2013] eKLR** and submitted that this Court becomes *functus officio* once it has delivered judgment and the Court has no jurisdiction to stay its judgment.

10. Replying to the submission on *functus officio*, the applicants articulated that this being an application for leave and certification to appeal to the Supreme Court, it is this Court that can, in the first instance, consider an application for stay; that the applicant cannot move the Supreme Court to apply for stay of execution without certification from this Court. For this reason, counsel submitted that this Court has jurisdiction to stay its own judgment pending leave and certification to the Supreme Court.

## ANALYSIS and DETERMINATION

11. We have considered the Notice of Motion, the grounds in support thereof as stated on its face and in the supporting affidavit; we have also considered the replying affidavit and the authorities cited by the parties. The Motion before us has two prayers: the first for leave and certification to appeal to the Supreme Court and the second is a prayer for stay of execution of the judgment and decree of this Court.

12. On leave and certification, it is now trite law as stated in **Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione**, paragraph 60, 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 significant 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.”**

13. The Supreme Court has given the test for granting certification and leave to appeal to the Court in **Hermanus Phillipus Steyn Case** (supra). It was held that the meaning of “matter of general public importance” may vary depending on the context. It is stated at paragraph 58 that:

**“...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.”**

14. 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 Gneccchi-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.”**

15. In the instant application, it is our duty to consider and appraise if the foregoing principles enunciated for certification and leave to appeal have been fulfilled. We shall also consider the applicant’s submission that there are conflicting decisions of this Court that raise a substantial point of law the determination of which will have a significant bearing on the public interest. We shall finally consider and determine if 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.

16. The core submission in this matter is that there are two conflicting decisions of this Court as to what constitutes proper personal service upon a guarantor who doubles-up as a director of the borrowing company.

17. In our considered view, the law on service of court processes and contractual or commercial documents is well settled. The applicant contends that as a result of the decision of this Court, conflicting jurisprudence and uncertainty in law has arisen regarding proper personal service on a guarantor who is also a director of the borrowing company. In civil litigation, the mode and manner of service of court documents and pleadings is well settled. In commercial and contractual documents, in the first instance, parties make provision as to how documents ought to be served on the other party.

18. We are convinced that the law on personal service is well settled. The applicant has failed to demonstrate to our satisfaction that there is uncertainty in the law of service of process that has now transmuted into a matter of general public importance that requires determination by the Supreme Court. On identification of specific elements of general public importance, we state that mere enumeration of issues as matters of general public importance does not suffice; there must be cogent demonstration that the issues identified come within the ambit and definition of matters of general public importance.

19. 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.

20. The applicant further urged that there is a point of law to be urged before the Supreme Court in the intended appeal. 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.”**

21. In this matter the applicant has not demonstrated any point of law that has a significant bearing on public interest. We decline to grant leave and certification to appeal to the Supreme Court.

22. Regarding the prayer for stay of execution of the judgment and decree of this Court, in **Dickson Muricho Muriuki -v-Timothy Kagundu Muriuki & 6 others [2013] eKLR**, this Court expressed itself as follows:

**“20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence**

of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding.

**21. If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.”**

23. Persuaded by the sound reasoning in *Dickson Muricho Muriuki Case* (supra), the applicant has not given us good reasons to depart from it. Accordingly, we decline to grant stay orders as we re-affirm that this Court becomes *functus officio* after pronouncement and delivery of its judgment. 24. In totality, the upshot of our consideration of the Notice of Motion dated 26<sup>th</sup> March, 2018 is that the Motion has no merit and is hereby dismissed. The applicant is to bear the 1<sup>st</sup> respondents costs in this application.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of April, 2019**

**F. SICHALE**

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**JUDGE OF APPEAL**

Certify that this is a true copy of the original.

**DEPUTY REGISTRAR**