



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & KANTAL, J.J.A)

CIVIL APPLICATION NO. 354 OF 2018

BETWEEN

SUREKHA HASMUKHLAL V IRCHAND SHAH.....1STAPPLLICANT

MUYURI SUNIL SHAH.....2NDAPPLLICANT

JASODABEN CHANDULAL SHAH.....3RDAPPLLICANT

AND

INVESTMENT & MORTGAGES BANK LIMITEDRESPONDENT

(Being an application seeking leave to appeal to the Supreme Court of Kenya against the decision of the Court of Appeal (Waki, Nambuye & Kiage, J.J.A) dated 23rd November, 2018

in

Civil Appeal No. 243 of 2015)

RULING OF THE COURT

The applicants filed a Notice of Motion dated 29th November, 2018 under **Article 163 (4) (b)** of the **Constitution** seeking certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No.243 of 2015 (Waki, Nambuye & Kiage, J.J.A) delivered on 23rd November, 2018.

Briefly, the background of the case revolves around a parcel of land known as **Mombasa Block XXVI/380- Kizingo** (the suit property) which was charged to **Investment & Mortgages Bank Limited**, the respondent herein. Upon default, the respondent sought to exercise its statutory power of sale by way of public auction in settlement of the outstanding sum of KShs.76,051,895.47. This resulted in the applicants instituting a suit in the High Court seeking a permanent injunction to restrain the respondent from disposing the suit property by public auction or otherwise interfering with its ownership and a declaration that the amount recoverable and for which the property stood as security was KShs.20,000,000.00 and an order that the property be redeemed according to the true account. The applicants concurrently filed an application seeking interim orders to restrain the respondents from disposing the land by public auction or otherwise interfering with its ownership pending the hearing and determination of the application and the suit.

In a ruling delivered on 24th April, 2014, the High Court (Havelock, J.) dismissed the application with costs to the respondent for reasons that: *“the applicants have failed to establish a prima facie as per the principles enunciated in Giella vs. Cassman Brown”*.

Aggrieved, the applicants lodged an appeal to this court which was dismissed for being unmeritorious. Applying the decision in **Nguruman Limited versus Jan Bonde Nielsen & 2 Others Civil Appeal No. 77 of 2012**, the Court rendered itself as follows:-

“Applying the above threshold to the rival submissions on this 1st pillar, and in the light of the holding in the Paul Odhiambo Edward Gondi versus National Bank of Kenya(supra), it is our finding that the appellants had satisfied the threshold on this pillar, reasons being that since the respondent does not dispute the existence of the limitation clause(s) in the contract, there was need for the Court to determine the merits of the applicability or otherwise of the said limitation clause(s) before the respondent could proceed with the process to realize the security to its finality.

As for the second pillar, we agree with the respondents' submissions that where a party has offered property as security which is capable of valuation and a market value attached to it, such a party cannot turn around and contend that the loss suffered by him if the property were to be sold would be irreparable. We are also not in doubt as regards the respondent's ability to compensate such value, should the suit property be realized as security. It would follow that the appellants have not met the second pillar and we have no basis therefore for granting the injunction sought. Being of that view, and in line with the Nguruman case, it becomes unnecessary to consider the balance of convenience."

It is this decision that precipitated the application for certification to the Supreme Court by the applicants under **Article 163 (4) (b)** of the **Constitution**, on the basis that the intended appeal involves a matter of general public importance. The pertinent question of general public importance to be determined by the Supreme Court has been stated as "whether the bank can sell the chargor's property before crystallization of the power of sale simply on the grounds that the bank is capable of paying any losses the chargor may otherwise suffer."

At the hearing of the application, learned counsel **Mr. Odera** represented the applicants and learned Counsel, **Miss. Diana Ogula** represented the respondent.

Mr. Odera submitted that the intended appeal was of great public importance related to the administration of justice and which transcended the dispute between the parties herein. Citing the case of **Bananahill Investment Ltd vs. Pan African Bank Ltd & 2 Others, Civil Appeal No. 68 of 1986**, counsel argued the question of whether the sale of a charged property in exercise of a statutory power of sale was an irreparable loss has been the subject of conflicting judicial determination raising uncertainty in the law. Also relying on the High Court case of **Kanorero River Farm Ltd and 3 others vs. National Bank of Kenya Ltd, Civil Suit No. 699 of 2001**, counsel submitted that no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.

Lastly, Counsel faulted this Court for basing its decision on the applicants' failure to show irreparable injury whereas its appeal was against the High Court's decision which was primarily determined on its failure to show a *prima facie* case. Counsel contended that a court sitting on appeal cannot deal with matters not before it and which have not been pleaded.

The Respondent's counsel opposed the application citing **Article 163** of the Constitution. Counsel submitted that the applicants had failed to demonstrate that the matter was of general public importance warranting attention by the Supreme Court. Counsel further contended that whether the power of sale had arisen was not a novel issue and that the law on injunctions was well settled. Counsel further submitted that even though the issue of irreparable loss was only pleaded in the Court of Appeal, the applicants had not demonstrated that they would suffer irreparable loss.

We have duly considered the application, the submissions by learned counsel, the authorities cited and the law. The purpose of certification under **Article 163 (4) (b)** of the Constitution is to ensure that only appeals which raise issues of general public importance have access to the Supreme Court. What constitutes a matter of general public importance was determined by the Supreme Court in **Malcolm Bell vs. Daniel Toroitich Arap Moi & Another [2013] eKLR** 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 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 [at earlier levels of the] 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 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 final appeal in the Supreme Court.”

The application before us raises various issues which in our view, challenge the validity of the Court of Appeal’s decision in declining to grant injunction orders. The question whether this Court determined, matters that were not placed before it and whether or not this Court rightly found that the applicants had not demonstrated irreparable loss goes to the correctness of the decision delivered by this Court on 23rd November, 2018.

The question whether a decision is correct or erroneous on matters of fact or law has no bearing on the certification of a matter to the Supreme Court. A party cannot use the provisions of **Article 163 (4) (b)** of the Constitution as a back channel appeal. As this Court stated in **Hermunus Philipus Styne vs. Giovanni Gneccchi-Ruscione, CA No. Sup. 4 of 2012:-**

“The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate court-for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.”

Applying the principles enumerated in the **Malcolm Bell** case above, we are of the view that the applicants have not satisfied this Court that the issue to be canvassed before the Supreme Court is one which transcends the circumstances of this particular case and has a significant bearing on public interest and is, therefore, a matter of general public importance. In our view, the matters in dispute concern clauses in the security documents signed by the parties and which specifically involves the parties. The question of whether the bank can sell the chargor’s property before crystallization of the power of sale is a question that requires evidence and that is yet to be canvassed before the High Court.

Also, the parameter on what amounts to irreparable injury is well established. Irreparable injury is one which cannot be adequately remedied by damages in the absence of an injunction. The applicant must therefore provide real tangible evidence that the loss cannot be quantified in monetary terms. If the value of the loss can be quantified and the respondent is in a financial position to pay them then an injunction should generally not be granted (See **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR** and **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA 86**)

Having reached the finding that there is no matter of general public importance or uncertainty in a point of law, we find that the application does not meet the threshold to merit certification to appeal to the Supreme Court. Consequently, it is devoid of merit and is hereby dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 20th day of December, 2019.

M. WARSAME

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JUDGE OF APPEAL

D.K MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR