IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION SUP NO. 11 OF 2017

BETWEEN

MASARI DISTRIBUTORS LIMITED.....APPLLICANT

AND

UAP PROVINCIAL INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an application seeking leave to appeal to the Supreme Court of Kenya against the judgment of the Court of Appeal (Kariuki, Sichale & Kantai, JJ.A) dated 24th November, 2017

in

Civil Appeal No. 312 of 2013)

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JUDGMENT OF THE COURT

By a Notice of Motion dated 8th December, 2017 the applicant seeks certification and leave to appeal to the Supreme Court against the decision of this Court in Civil Appeal No.312 of 2013. (Kariuki, Sichale & Kantai, JJ.A). The impugned decision dismissed the appeal against the judgment of the High Court (Havelock J.) which found brake failure to be a mechanical defect which was exempted by the insurance policy signed by the applicant and the respondent and which entitled the respondent to repudiate liability.

In upholding the High Court's finding the Court of Appeal reiterated that the policy of insurance was not vague as it clearly provided that it would not cover loss arising from wear and tear, mechanical or electronic breakdowns. The accident in question occurred from the applicant's motor vehicle suffering brake failure which was categorized as a mechanical failure.

Aggrieved by the judgment of this Court, the applicant wishes to proceed on appeal to the Supreme Court under **Article 163(4)(b)** of the Constitution.

Appeals from decisions of this Court to the Supreme Court are allowed if they meet the criteria prescribed under ***Article 163(4) of the Constitution*** which reads as follows:

> ***(4) Appeals shall lie from the Court of Appeal 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).***

The applicant's motion is premised on the assertion that its intended appeal raises issues of public importance with regard to the law. The pertinent questions of law for determination by the Supreme Court are stated as follows:

> *i) Considering the universal application by the insurance industry in Kenya, what is the legal interpretation to be given to the provisions of the standard motor insurance policies in Kenya which provide for cover for "**loss or damage to the motor vehicle and its accessories…by accidental collision or overturning**" but provides exceptions to cover for "**mechanical or electrical***

breakdowns, failures or breakages?"

ii) Whether policy exceptions for ***mechanical or electrical breakdowns, failures or breakages,"*** *as are applied to such insurance policies of motor insurance in Kenya preclude compensation to the insured in cases of "****damage arising out of accidental collision or overturning"*** *if the accidental collision or overturning is triggered by a mechanical defect or failure.*

iii) Therefore, in such motor insurance policies, is there a distinction to be made between mechanical or electrical breakdowns, failures or breakages taken alone, and instances of mechanical or electrical breakdowns, failures or breakages that give rise to an accidental collision or overturning.

iv) In the event of such mechanical or electrical breakdowns, failures or breakages that give rise to an accidental collision or overturning, is there a legal presumption in favor of the insured that prima facie provides cover unless rebutted by evidence (by the insurer) of lack of proper maintenance.

v) Whether a private insurance contract that is affected with a public interest, continues to be 'jurisprivati' only or it becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large

vi) Considering the purpose of insurance being to create a fund of assurance and credit, with the insurance companies being the depositories of the money paid by the insuring public, what is the public law effect of the restrictive interpretation of rendered by the court on the exclusion clause in issue bearing in mind its universal application by the insurance industry in Kenya?

At the hearing of the application, learned counsel **Mr. Wamai** represented the applicant, learned counsel **Miss Miringu** represented the respondent.

In support of the application for certification, Counsel for the applicant submitted that the matter was of great public interest as it involved the interpretation of a contract of insurance between the insurer and insured. He further submitted that the appeal had a high chance of success given that the claim fell outside the exceptions for mechanical or electrical breakdowns, failures or breakages and added that certification to the Supreme Court was necessary to avoid a grave miscarriage of justice.

Opposing the application, counsel for the respondent relied on the Replying Affidavit sworn on 1st March, 2019 by one **Joseph Mwai**. She submitted that the matter between the parties was purely contractual and did not transcend the circumstances of the case. Counsel also pointed out that the applicant had failed to demonstrate that the matter was of general public importance.

Lastly, learned counsel submitted that there was no point of law raised by the applicant that warranted intervention by the Supreme Court and that the question of whether the accident was caused by mechanical failure was a fact which had been determined by two courts. It was argued that determinations of fact in contest between parties are not a basis for granting certification for an appeal to the Supreme Court.

We have considered the application, the divergent positions taken by the parties, the law, the authorities cited and the determination by both Superior Courts. Our mandate is to determine whether the intended appeal raises issues of general public importance so as to justify certification by this Court.

In the *Locus classicus* case of ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi – Ruscone, Supreme Court 2013 eKLR***, the Supreme Court in determining whether or not a matter involves a question of general public importance on a point of law stated as follows:

> ***"It is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions.***

Applying the above criteria, we must determine whether applicant's intended appeal raise matters of law that are of general public importance. This Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [supra]*** in discussing matters of law that are of general public importance stated that:

> ***"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 that 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."***

It is evident from the applicant's application and the issues raised in the Memorandum of Appeal that its claim is anchored on its contestation over the finding that the accident was a result of brake failure which was deemed to be mechanical which resultantly fell under the exemption clauses in the insurance contract and which entitled the respondent to repudiate the contract.

The point of law raised by the applicant revolves around the legal interpretation of the provisions of the insurance policy which provides for "*loss or damage to the motor vehicle and its accessories…by accidental collision or overturning*" vis-à-vis the exception in the cover for "*mechanical an electrical breakdown, failures or breakages*." The public interest aspect of the application concerns the exemption clauses.

In a judgment dated 24th November, 2017, this court in agreeing with High Court found that the accident occurred because of brake failure

which according to the contract was exempted by the policy. It is obvious that the matters which arose for determination by both Superior Courts were substantially matters of fact, which were conclusively determined in light of the evidence on record. Consequently, the circumstances surrounding the occurrence of the accident and the cause of the accident were evidentiary matters which are specific to the parties hereto and do not go beyond the facts of this particular case so as to constitute a matter of general public importance

As stated by the Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** ***[supra]*** "*determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court*." Similarly, in this case, the applicant's opposition to the finding of fact by the High Court and the Court of Appeal cannot be a basis for certification.

The question which is fundamental for our determination is the place and consequences of exemption clauses in the contract of insurance signed by both sides. In our view, that does not warrant a substantial or important point of law to be determined by the Supreme Court that would be relevant to general public interest. In our view, such determination must involve a noble or novel question of great public importance or that the decision reviewed is contradictory to an earlier decision resulting in confusion and uncertainty in the administration of law. We think that the appellant cannot be allowed to go to the Supreme Court for that would defeat the sieving mechanism provided under **Article 163(4)(b)** of the **Constitution**.

The Applicant has therefore failed to demonstrate that its application involves a point of law or that there is uncertainty in the decision which requires clarification. The law in Kenya recognizes and provides for instances where an insurer can validly and legitimately void/repudiate an insurance policy on the ground that it was entitled to do so. However, the insurance has an obligation to prove that the exemptions relied on apply and this was achieved in this case.

In the end, we find that all the issues raised by the applicant were properly and correctly addressed by this court. There is no question of law to be determined or uncertainty to be clarified by the Supreme Court. Accordingly, we find that the application does not meet the threshold to merit certification to the Supreme Court. Consequently the application dated 8th December, 2017, is dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 6th day of December, 2019.

W. KARANJA

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JUDGE OF APPEAL

H.M OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a

*true copy of the original***.**

DEPUTY REGISTRAR