



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, G.B.M. KARIUKI & F. SICHALE, JJA)

SUP. 1 OF 2015 (UR 89/17)

IN THE MATTER OF: AN APPLICATION FOR CERTIFICATION THAT A MATTER OF GENERAL PUBLIC IMPORTANCE AS CONTEMPLATED UNDER ARTICLE 163(4) (b) OF THE CONSTITUTION EXISTS

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT AGAINST THE WHOLE JUDGMENT OF WAKI, KIAGE & MURGOR, JJ.A DELIVERED ON 31ST JULY 2014 IN CIVIL APPEAL NO. 236 OF 2012 (NAIROBI)

BETWEEN

KENYA PORTS AUTHORITY (APPELLANT) &

INDUSTRIAL COURT OF KENYA (1ST RESPONDENT)

KENYA DOCKWORKERS UNION (2ND RESPONDENT)

KENYA DOCKWORKERS RETIREES ASSOCIATION (3RD RESPONDENT)

BETWEEN

KENYA DOCK WORKERS RETIREES ASSOCIATION.....APPLICANT

AND

KENYA PORTS AUTHORITY.....1ST RESPONDENT

INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

KENYA DOCKWORKERS UNION.....3RD RESPONDENT

in

CIVIL APPEAL NO. 236 OF 2012

RULING OF THE COURT

1. **Kenya Dockworkers Retirees Association** made an application to this Court on 22nd January 2015 by way of Notice of Motion dated 20th January, 2015 seeking under **Article 163(4)(b)** of **The Constitution of Kenya 2010** certification of their intended appeal to the Supreme Court of Kenya from the judgment of this Court (**Waki, Kiage & Murgor, JJ.A**) delivered on 31st July, 2014 in **Civil Appeal No. 236 of 2012** involving **Kenya Ports Authority**, the 1st respondent herein, **the Industrial Court** (now Employment and Labour Relations Court), the 2nd respondent herein, and **Kenya Dockworkers Union**, the 3rd respondent herein.

2. **Appeal No. 236 of 2012** arose from the decision of the High Court (**Korir, J.**) contained in a Ruling delivered on 21st February, 2012 dismissing an application by **Kenya Ports Authority** seeking, *inter alia*, an order of certiorari removing to the High Court for quashing that part of the Industrial Court award dated 5th April, 2007 delivered in Industrial Cause No. 52 of 2007 and that part of the Industrial Court's award relating to the withdrawal of a contributory pension scheme introduced in 1999, and a demand by **Kenya Dockworkers Union (KDW Union)** and **Kenya Dockworkers Retirees Association (KDWR Association)** for the scheme to revert to the non-contributory scheme.

3. This Court (Waki, Kiage & Murgor JJ.A) made a finding in Appeal No. 236 of 2012 that the High Court reached the wrong conclusion on the scope of the Industrial Court's jurisdiction in respect of the pension dispute and held that the High Court should have issued an order of certiorari to quash the decision, for reasons that the Industrial Court acted in excess of its jurisdiction in determining the KPA Pension Scheme dispute, a jurisdiction that was reserved for KBA.

4. In its conclusion, the Court held that the orders by the Industrial Court were illegal. It stated in the judgment in this regard:-

“it is clear to us that the Industrial Court orders in respect of the pension contributions were illegal, irrational and unreasonable, and incapable of implementation, and we find in these circumstances that the High Court misdirected itself in failing to issue an order for certiorari as sought by the appellant (KPA).”

5. On the final issue in appeal No. 236 of 2012 whether the inordinate delay in delivery of the judgment was prejudicial to the appellant (KPA), and whether it rendered the award unconstitutional, the Court found that the delay of four years without explanation was inordinate. The Court did not go further than this in addressing the issue.

6. The applicant, KDWR Association, seeks to appeal against the decision to the Supreme Court if granted certification under Article 163 (4) (b) of the Constitution on the ground that the intended appeal raises **a matter of general public importance** which should be investigated and determined with finality by the Supreme Court.

7. The Notice of Motion by KDWR Association is supported by the affidavit sworn on 20th January, 2015 by **Pius Omondi Owuor**, the Chair of KDW Union, and the authorities cited in the List of Authorities filed in Court on 25th January, 2017.

8. The application is opposed by KPA but is otherwise supported by the KDW Union.

9. When it came up for hearing on 6th February, 2017, learned counsel **Mr. R. M. Tindika** appeared for the applicant (KDWR Association), and learned counsel **Mr. Geoffrey Imende** appeared for the 1st respondent (KPA), and learned counsel **Dr. Khaminwa** appeared for the 3rd respondent (KDW Union). The second respondent (Industrial Court of Kenya) did not participate and was perhaps needlessly joined in these proceedings.

10. **Mr. Tindika** relied on the applicant's written submissions filed in Court on 27th January, 2016 and on the applicant's List of Authorities filed on 25th January, 2016. In his oral submissions, Mr. Tindika urged that there are four issues of general public importance in this Court's judgment in CA 236 of 2012, namely whether delay of 4 years in delivery by the Industrial Court of judgment was inordinate and whether such delay should lead to an order of setting aside of a judgment and whether the party in whose favour the judgment was delivered after an inordinate delay is not prejudiced by the setting aside of such decision; in addition, that the jurisdiction of the Industrial Court (now Employment and Labour Relations Court) remains unresolved and hence is uncertain.

11. Mr. Tindika referred us to the Supreme Court decisions in **Hermanus Philipus Steyn vs. Giovanni Checch – Ruscone [2013] eKLR;**

Wilfrida Itolondo & 4 others vs. President & 7 others [2015] eKLR and Mwangi Stephen Muriithi vs. Daniel Toroitich Arap Moi & Another [2014] eKLR to buttress his submissions that the application has merit in that there are issues of general public importance involved in the intended appeal to the Supreme Court.

12. Learned counsel **Mr. Geoffrey Imende** for KPA (the 1st respondent) opposed the application and contended that the intended appeal does not raise any matters of general public importance. He pointed out that the applicant, KDWR Association, has failed to identify and concisely set out the specific elements of “general public importance” which the applicant attributes to the matter for which certification is sought. Mr. Imende referred to the **Hermanus Philipus** case (supra) and contended that the three issues raised in the Notice of Motion by the applicant never arose in the High Court or in the judgment of this Court and cannot be the subject of certification. He contended that there is no matter of general public importance in the issue as to what a litigant can do when a court delays delivery of judgment inordinately nor in whether such inordinate delay should lead to setting aside of such judgment or award because this is not a matter that was canvassed in the Industrial Court or in this Court. Mr. Imende dismissed as misplaced Mr. Tindika's argument that there is a matter of general public importance in the issue relating to judgment of this Court which (allegedly) relies on technicalities to (allegedly) defeat the constitutional rights of older members of the society (KDWR Association) and whether such judgment raises a constitutional issue as this being an affront to Article 57 of the Constitution. It was Mr. Imende's contention that the fact that the Industrial Court had no jurisdiction meant that that was the end of the litigation before it on the matter although this Court went further to examine other issues and to review decisions which are not said to be conflicting. Counsel found no merit in the applicant's discussion on the Kenya Constitution 2010 because the Industrial Court discussed the repealed Constitution.

13. On his part, **Dr. Khaminwa** appearing for KDW Union supported the application by KDWR Association. He relied on the authorities cited by the applicant, KDWR Association. He pointed out that a Judicial Officer does not have to give reasons for delay in delivery of a decision as to do so encroaches on the independence of the Judge's professional work. He urged that the application be allowed so that the Supreme Court may look into time-lines on delivery of judgments.

14. We have perused the Notice of Motion and have duly considered the submissions of the parties and the authorities.

15. The background leading to the Notice of Motion application before us shows that with effect from 1st January, 1999, The Kenya Ports Authority (Pensions) Regulations 1983 ceased to apply by dint of Kenya Gazette Supplement No. 35 of 11th June, 1999 issued by the Minister for Transport and Communications and in place thereof was introduced Kenya Ports Authority Pensions Scheme registered under the provisions of the Retirement Benefits Act (RBA) and the Income Tax Act applicable to employees of the KPA effective 1st January, 1999 from which date KPA commenced deducting pension contributions from its employees. KPA Pension Scheme was registered under the RBA in June, 2001. KDW Union and KDWR Association contended that the deductions prior to registration of the KPA Pension Scheme were unauthorized, and consequently KDW Union and KDWR Association demanded that all sums irregularly deducted between 1st January, 1999 and June 2001 be refunded to them.

16. This Court in its judgment in Appeal No. 236 of 2012 held that “the High Court reached a wrong conclusion on the scope of the Industrial Court's jurisdiction in respect of the pension scheme and should have issued an order of certiorari to quash the decision for reasons that the Industrial Court acted in excess of its jurisdiction in determining the KPA Pension Scheme dispute, a jurisdiction that was reserved for the RBA”.

17. For us to grant the application (seeking certification under Article 163(4)(b) so as to enable the applicant to appeal to the Supreme Court, we have to be satisfied that the application does show that there is in the intended appeal **a matter of general public importance** as mandated by **Article 163(4)(b) of The Constitution of Kenya 2010**.

18. The jurisdiction of this Court under Article 163(4)(b) of the Constitution is to determine whether, in an application seeking certification to appeal to the Supreme Court, a matter of general public importance is involved. The jurisprudence that has emerged in relation to the threshold on what constitutes “a matter of general public importance or interest” under Article 163(4)(b) in an intended appeal to the Supreme Court shows that such matter must transcend the interest of the parties in the litigation. It must impact on society and/or have consequences that bear on public interest.

19. In the case of **Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscione (Civil Application No. Sup 4 of 2012 (UR 3/2012)** the Supreme Court succinctly stated:

“1. At law, there is no exhaustive definition of what amounts to “a matter of general public importance.

2. In Kenya, the Court of Appeal has dealt with what amounts to “a matter of general public importance” on at least three occasions.

3. As early as 8th March 1979, the Court of Appeal (Madan, Wambuzi J.J.A & Miller Ag J.A, stated per Madan J.A, in Murai v. Wainaina (No. 4) (1982) KLR at page 48-49 that:

.....A question of general public importance is a question which takes into account the well-being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of continuity of life in human society.

....the question is obviously made one of general public importance for the subject affects the land rights of a large number of people not merely the parties to the appeal.

...Indeed it is of general public importance that the exact status of Ahoi be resolved by the court.”

20. In **Esso Standard v Income Tax [1971] EA 127** Duffus, P. said at page 141 as follows:

“The appeal having been set down for hearing we had the advantage of full consideration of the proceedings and in our view the points for decision in this case were on a matter of public importance; the point involved the circumstances in which foreign investors have to pay income tax on loans made abroad for the purposes of development in East Africa. This is undoubtedly a question which should be clearly defined from the point of view of foreign investors and it is also a matter of great importance to the three States of the Community that there should be no doubt about the position in future. We therefore, in all the circumstances of this case, granted the extension and reserved our decision on the costs until we heard the substantive appeal.”

21. In **George Chege Kamau vs. Esther Wanjira Kamau [Civil Application No. Sup 16 of 2013]**, this Court referred to the remarks of Madan JA in **Belinda Murai V. Amos Wainaina [1982] KLR 38** on whether the issue of a “Muhoi” in Kikuyu Customary Law with regard to land was of general public importance. Madan J.A stated:

“this appeal is of public importance as it touches on the subject of land rights, and will not only affect the parties to the appeal but will also affect a large number of original land owners, by dethroning them, causing economic and social upheaval...”

“...a question of general public importance is a question which takes into account the well-being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society?”

“...if the position of a Muhoi which I have earlier set out has been correctly expounded, which has yet to be decided, the question is obviously made one of general public importance for the subject affects the land rights of a large number of people and not merely the parties to the appeal...”

22. Matters that the applicant has crystallized in its application as being of general public importance relate to the issue of delay in the delivery of judgment by the court. For a matter to qualify for consideration as to whether it is a matter of general public importance, it (such matter) must have been canvassed and resulted in a decision in the trial court or in the court whose decision is sought to be impugned in the Supreme Court on appeal. The issue relating to delay which the applicant seeks to take up on appeal is in relation to the effect the setting aside of delayed judgment (that is in favour of “older members of the society”) has on the latter. No canvassing took place in that regard, nor did the court make any decision therefor. For this reason, we are unable to find any merit in the contention that the application evinces issues of general public importance fit to be canvassed on appeal in the Supreme Court.

23. Learned counsel for the applicant contended that the issue of jurisdiction of the Industrial Court is unresolved. This argument was contrived and farfetched. At no time did such discussion ensue, much less was a decision made in that regard. We find no merit in that contention which, in our view, cannot be a matter for appeal. This Court made a decision in the context of the pleadings that the Industrial Court had no jurisdiction to usurp the powers of the **Minister and that its decision was nullity. That decision cannot be said to evince an issue of general public importance.**

24. We find no merit in the application which we hereby dismiss with costs to the respondents.

25. This Ruling is not signed by Justice G.B.M Kariuki, JA because he stepped down from this Court before its delivery today.

Dated and delivered at Nairobi this 23rd day of February, 2018.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR