



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, OUKO & MURGOR, JJA)

CIVIL APPLICATION NO. SUP. 5 OF 2017

BETWEEN

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION.....APPLICANT

AND

THE KENYA EXPORT FLORICULTURE,

HORTICULTURE AND ALLIED WORKERS' UNION

(KEFHAU) REPRESENTED BY ITS PROMOTERS

DAVID BENEDICT OMULAMA.....1ST RESPONDENT

ANDREW MAKWAGA.....2ND RESPONDENT

BENARD AMUCHIZI MUKAISI .....3RD RESPONDENT

ADRIANO MUKALO .....4TH RESPONDENT

WYCLIFFE SORE.....5TH RESPONDENT

SEVERIO MASIKA.....6TH RESPONDENT

LILIAN INDUTIA.....7TH RESPONDENT

EFELI A. NANDI .....8TH RESPONDENT

JAMES AMATONYE .....9TH RESPONDENT

THE REGISTRAR OF TRADE UNIONS.....10TH RESPONDENT

*(Being an application for certification and leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (Waki, Githinji & Kiage JJA) dated 12th May, 2017*

in

Civil Appeal No.141 of 2014

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RULING OF THE COURT

By a Notice of Motion dated 11th July, 2017 the applicant seeks certification and leave to appeal to the Supreme Court against the decision of the Court of Appeal sitting at Nairobi in **Civil Appeal No.141 of 2014**. The application is brought under the provisions of **Article 163 (4)** of the Constitution, **Rule 24 and 26** of the Supreme Court Rules and **Rule 40** of the **Court of Appeal Rules**. In **Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another, Supreme Court Petition No.3 of 2012 [2012] eKLR**, The Supreme Court stated that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under Article 163(4) (b) of the Constitution, where it is certified that the appeal involves a matter of general public importance.

The applicant's grounds for certification are reproduced hereunder:

- a) The Court's findings and judgment were not supported by the law.***
- b) The Court's findings and judgment were not based on sound legal provisions as set out by Article 41 of the Constitution and section 14 of the Labour Relations Act.***
- c) The Court's findings and judgment are grounded on presumptions and individual opinion of the Judges and relates to a matter of public interest in so far as registration and administration of unions is concerned.***
- d) The Court's findings and judgment were unconstitutional and violation of the Applicant's rights.***

In support of the application for certification, we hereby reproduce verbatim issues that the applicant states are pertinent questions for determination by the Supreme Court;

- a) Whether the learned Appeal Judges erred in law in finding and holding that the Industrial Court was right in applying the provisions of the Kenyan Constitution 2010 to a case that came into being before its promulgation.***
- b) Whether the learned appeal Judges erred in law and in fact in infringing on the Appellants' rights under Article 41 of the Constitution in the same manner as those of the 1st Respondent.***
- c) Whether the learned Appeal Judges erred by misapprehending the order of registration of the respondent by the Judges as set out at Article 41 of the Constitution, Section 14(d) of the Labour Relations Act without power/mandate to do so.***
- d) Whether the learned Appeal Judges erred in fact and in law in taking into account an irrelevant factor to the effect that the registration of the union by the Registrar of Trade Unions cured the defect in the superior Judge's (Justice Monicah Mbaru) orders of 11th February, 2014, where the order was a very specific case that came into being before the promulgation of the Constitution of Kenya in August 2010.***
- e) Whether the learned Appeal Judges erred in law and fact by making the decision that is plainly wrong as they failed:-***
  - i) To appreciate that Floriculture and Horticulture are indeed part of the agricultural activities and were areas that attract great public interest.***
  - ii) Overrule the trial Judge's lack of mandate to register the new union which is the preserve of the Registrar of Trade Unions.***
  - iii) To observe the administrative role of the Registrar of Trade Unions in issuing certificates to unions that he has duly registered by virtue of his statutory duty and not otherwise.***

At the hearing of the application, learned counsel Judith Guserwa represented the applicant, learned counsel David Omulama represented the 1st to 9th Respondents and learned counsel Schola Mbilo represented the 10th Respondent. Counsel for the applicant elaborated on the grounds in support of the application for certification. She submitted that the matter was of great public interest and that it involves splinter Unions registration. She submitted that if the Court does not get the parameters right, it would affect labour movement, work force and the economy.

The other ground that the learned counsel for the applicant submitted was that Constitutional interpretation of Article 24 and 26 of the Bill of Rights have to be done within the law. She further stated that Section 14 of the Labour Relations Act addresses restriction on registration.

The Respondent's counsel opposed the application citing Article 163 of the Constitution. He submitted that the applicant had failed to demonstrate that the matter is one of general public importance. That registration does not affect the general public and that the issues now raised were not litigated in the High Court and Court of appeal. The learned counsel submitted that the issues raised were fresh and should not be allowed to be raised after the Court of appeal's judgment. He further stated that there are so many Trade Unions registered in Kenya and urged the Court to dismiss the application. He added that the Court cannot deregister a trade union which was in existence since 2012.

The 10th Respondent's counsel submitted that the application does not meet the threshold of referring the matter to the Supreme Court. He suggested that there should be a reference filed before the Court to correct the two conflicting decisions. The applicant's learned counsel, on this submission, countered by stating that the decision by the Supreme Court shall guide both the Court of appeal and the High Court.

We have considered the instant application, the grounds in support thereof, the affidavit sworn by the applicant, the able submissions of counsel and the law. Article 163 (4) (b) of the Constitution provides as follows,

**“(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**

**(a) ....**

**(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).” (Emphasis added)**

The applicant invokes this foregoing provision of the Constitution and seeks leave to appeal to the Supreme Court. This Court has been moved to determine whether the appeal to the Supreme Court raises issues of general public importance. The Supreme Court gave the test for granting certification and leave to appeal to the Supreme Court in **Hermanus Phillipus Steyn v Giovanni Gniecchi – Ruscone, Supreme Court application No.4 of 2012**. The Court held that the meaning of “matter of general public importance may vary depending on the context. The Supreme Court considered Article 163(4) (b) of the Constitution and 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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”**

The principles set out in **Hermanus Phillipus Steyn v Giovanni Gniecchi-Ruscone**, (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.”**

These are the principles that this Court shall seek to ensure have been met in considering the application before us. The first question we ask is whether the applicant has raised a point of law and demonstrated that such point of law is substantial and having a significant bearing on the public interest. We have perused the applicant's grounds in support of certification and the pertinent questions that he seeks the Supreme Court to determine. The main issue in the applicant's case is whether the learned Appeal Judges erred in law in finding and holding that the Industrial Court was right in applying the provisions of the **Kenyan Constitution 2010** to a case that was filed before its promulgation. Prima facie, this issue transcends the circumstances of the instant case and may have bearing on public interest.

The next issue for consideration is whether the applicant has been able to identify and concisely set out the specific elements of “*general public importance*” which he intends to rely on. The applicant has listed what he terms pertinent questions for consideration by the Supreme Court. We acknowledge that the Constitution of Kenya 2010 under Article 36(1) confers the right to freedom of association by every person as a fundamental human right. Also, Article 41 of the Constitution also provides that every worker has the right to form, join or participate in the activities and programmes of a trade union of their choice. Consequently, because this case may affect these fundamental freedoms, we are of the opinion that it is of general public importance. The case of **Peter Oduor Ngoge v Francis Ole Kaparo & 5 others, Supreme court Petition No. 2 of 2012 [2012] eKLR** requires the Supreme Court's examination must have undergone examination in all lower courts which we hereby confirm. Further, we note that the present application alleges that the instant application has been occasioned by a state of uncertainty in law arising from contradictory precedents.

We have analyzed the Notice of Motion and the affidavit in support of the application and hold that the intending appellant has met his obligation to identify and concisely set out the specific elements of "general public importance" which he attributes to the matter for which certification is sought. Counsel for the applicant outlined clearly that the decision shall affect the labour movement, the workforce and the economy if the parameters of registration of trade unions are not set right. In **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR at para 52**, it is stated that an appeal to the Supreme Court within the terms of Article 163 (4) should be founded on cogent issues of constitutional controversy. The applicant has demonstrated to our satisfaction that he intends to challenge the interpretation or application of any specific provision in the Constitution and has demonstrated how the issues that were before the High Court and the Court of Appeal became matters within the ambit of Article 163 (4) of the Constitution. The **Supreme Court in Peter Oduor Ngogo v Francis Ole Kaparo & 5 others** (supra) stated that a petitioner must rationalize the transmutation of the issue in contention from an ordinary subject of leave to appeal, to a meritorious theme involving the interpretation or application of the Constitution, such that it becomes a matter as of right falling within the appellate jurisdiction of the Supreme Court. In the instant case, the applicant has established that this Court's reasoning and conclusions in **Nairobi Civil Appeal No.141 of 2014** delivered by Hon. Justice Philip Waki, Onesmus Githinji and Patrick Kiage dated 12th May 2017 can properly be issues of constitutional interpretation or application, for which under Article 143(4) (a) of the Constitution no leave would be required. In totality, however, we are satisfied that the threshold in Article 143(4) (b) has been met.

For the foregoing reasons, it is our considered view that the present application has met the test established in the **Hermanus Steyn** case by reason that it has demonstrated to the Court's satisfaction the existence of specific elements of general public importance which are attributed to this matter, and we therefore certify the same.

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

**M.WARSAME**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**