IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, PCA, GATEMBU & M'INOTI, JJ.A.

CIVIL APPEAL (APPLICATION) NO.188 OF 2012 (R 1/2016)

BETWEEN

NIELS BRUEL.....APPLICANT

AND

MOSES WACHIRA.....1ST RESPONDENT

HELMUTH RAME.....2ND RESPONDENT

AIRTRAFFIC LIMITED.....3RD RESPONDENT

(Application for review of the judgment of the Court of Appeal dated 5th February 2016 (Kariuki, Sichale & Kantai, JJA) and/or for certificate to appeal to the Supreme Court of Kenya against the said judgment

in

Civil Appeal No. 188 of 2012)

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RULING OF THE COURT

By his motion on notice dated 7th March 2016, ***the applicant, Niels Bruel***, craves two alternative orders, namely review of the judgment of this Court dated 5th February 2016, or a certificate that a matter of general public interest is involved in his intended appeal, so as to gain a foothold to the Supreme Court on appeal. The prayer for review is based, on the main, on the claim that the Court failed to evaluate evidence as it was duty bound to do, while that for certification is grounded on the assertion, among others, that failure of justice erodes public confidence in the administration of justice and is therefore a matter of general public importance within the meaning of Article 163(4) (b) of the Constitution. The ***1st respondent, Moses Wachira***, does not think that there is any merit in either of the prayers, contending that there is neither basis for review of the judgment, nor any issue of general public importance implicated in the judgment to trigger the jurisdiction of the Supreme Court.

The background to the application before us are two agreements entered into between the applicant and the 1st respondent by which the former agreed to sell and the latter to purchase two aircrafts. The first agreement was for the sale of a ***twin-engine King Air C90, LJ-528, registration No. 5Y-NBB*** for

US$ 110,000, while the second was for a ***twin-engine King Air 200, BB1-211, registration No. 5Y-BMC*** for ***US$ 175,000***.

In a suit, which he subsequently filed in the High Court for misrepresentation, fraud and breach of contract against the appellant and the 2nd and 3rd respondents, the 1st respondent prayed for a raft of reliefs, among them refund of US$ 249,932.39 (Kshs 18,744,929.25) being the purchase price, spare and repair costs, damages for loss of user of the first aircraft at the rate of US$ 42,000 per month from March 2005, special damages of US$ 1,129,500, damages for breach of contract, interest and costs. In their defences the applicant, the 2nd and 3rd respondents denied liability and the latter filed a counterclaim against the 1st respondent for parking fees, US$ 17,806.64, interest and costs.

After hearing the suit, ***Okwengu, J.*** (as she then was) found that the applicant had made false representations to the 1st respondent intended to mislead and that the 1st respondent had repudiated the contract after breach by the applicant. She accordingly entered judgment in favour of the 1st respondent against the applicant for US$110,000 and for Kshs 129,500.00 against the 3rd respondent with interest from the date of filling suit and costs.

The learned judge also dismissed the counterclaim with costs.

The applicant was aggrieved and filed in this Court ***Civil Appeal No. 188 of 2012*** challenging the findings of the learned judge as regards breach of the contract by the applicant and the 1st respondent's right to rescind the same. On his part the 1st respondent cross-appealed, challenging the findings of the learned judge on the spare parts and repair costs, damages for loss of user of the first aircraft, and special damages. By a judgment dated 5th February 2016, this Court dismissed both the appeal and cross-appeal, but made no orders on costs. It is that judgment that aggrieved the applicant, leading to the present application.

Prosecuting the application, ***Mr. Gichuhi***, learned counsel for the applicant, submitted that this Court should review its judgment because it failed to consider the evidence in its entirety and to re-evaluate the evidence as it was duty bound to do and thus occasioned a miscarriage of justice. He relied on the decisions in ***Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123***, ***Aroni Sure & 9 Others v. Gesare Nyanaiko [1988] eKLR*** and ***Ngugi Holdings Ltd v. Joseph Kamau Mwangi [2009] eKLR*** to underscore the duty of the Court to re-evaluate the entire evidence in a first appeal. Counsel contended that the heart of the appeal was the distinction between rescission and repudiation of a contract, but the Court determined the appeal on the basis of fraud, without evaluating the entire evidence and the law. He urged that the trial court had expressly found that the 1st respondent had forfeited his right to rescind the contract but erred by finding that he had repudiated the contract, evidence which contradiction was not considered by this Court. It was further submitted that fraud was not specifically pleaded and proved and that the Court failed to consider the applicant's submissions.

Relying on ***Articles 20(3), 25(C), 50, 159, 163*** and ***259*** of the Constitution, the applicant submitted that fair hearing is a constitutional imperative, which was violated in this appeal, therefore implicating the jurisdiction of this Court to review the judgment. He added that the Court has inherent jurisdiction to ensure that justice is done. The decisions of this Court in ***Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd [2014] eKLR*** and ***Standard Chartered Financial Services Ltd & 2 Others v. Manchester Outfitters Ltd [2016] eKLR*** were cited to support the view that this Court has residual jurisdiction to review its own decisions to correct errors of law that have occasioned real injustice or miscarriage of justice.

Turning to the alternative prayer for certification of the appeal as one raising a matter of general public importance within the meaning of ***Article 163(4) (b)*** of the Constitution, the appellant submitted that his intended appeal raises matters of general public importance, namely, whether failure to evaluate evidence amounts to judicial bias and a contravention of the right to fair hearing under ***Article 50*** of the Constitution; whether an erroneous decision is a violation of the right to property; and whether repudiation and rescission of contracts are substantive matters or technicalities. He also invoked ***section 16(2)*** of the ***Supreme Court Act***, which he claimed allows the Supreme Court to entertain an appeal in the interest of justice if a substantial miscarriage of justice may have occurred. We should however point out that to the best of our understanding, section 16(2) was declared unconstitutional by the High Court in ***Commission on Administrative Justice v. Attorney General, HC Pet. No. 242 Of 2012***, after it found the provision to be *ultra vires* the Constitution of Kenya, 2010 to the extent that it purported to extend the jurisdiction of the Supreme Court to determination of appeals if a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

The applicant relied on the decision of the Supreme Court in ***Herman Phillipus Steyn v. Giovanni Gnecci-Ruscone [2013] eKLR*** on the considerations that guide the Court in determining whether to certify a matter to the Supreme Court and submitted that his intended appeal satisfies all the considerations. He accordingly urged us to allow the application.

The 1st respondent, represented by ***Mr. Kanjama***, learned counsel, opposed the application. As regards the prayer for review, counsel submitted, on the authority of ***Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd***(supra), and ***Ladd v. Marshall [1954] 3 ALL ER 745*** that the review jurisdiction in a concluded appeal is exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law, which was not the case in this appeal. In the 1st respondent's view, it was readily apparent from the judgment that this Court appreciated all the facts and considered all the circumstances of the appeal and properly upheld the conclusion by the trial court that the applicant had deliberately made misrepresentations to the 1st respondent. He further contended that there was no substance in the applicant's claim that fraud was neither pleaded nor proved and therefore this was not an appropriate case for the exercise of the Court's jurisdiction to reopen and review a concluded appeal.

Turning to the prayer on certification, the 1st respondent submitted that it was an abuse of the process of the court because instead of using the prescribed procedure for the proper purpose, the applicant was merely seeking an opportunity to re-argue his appeal. He added that the dispute in the appeal was between two private parties and did not involve any matter of general public importance and neither did it involve interpretation and application of the Constitution.

The 1st respondent relied on the decisions of the Supreme Court in ***Herman Phillipus Steyn v. Giovanni Gnecci-Ruscone*** (supra) on the considerations which guide the Court in an application for certification and ***Malcome Bell v. Daniel Toroitich arap Moi & Others [2013] eKLR*** for the proposition that to justify certification on the basis that the intended appeal raises a point of law, it must be demonstrated to be a substantial one, the determination of which would have a significant bearing on the public interest. He accordingly urged us to dismiss the application with costs.

The applicant and the 1st respondent informed us that the other respondents did not take any part in the appeal. They were also not represented at the hearing of this application.

Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment. In ***Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd*** (supra), this Court expressed itself as follows regarding that jurisdiction:

> ***"The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in***

doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”

The applicant invites this Court to exercise its residual and exceptional jurisdiction on the ground that the Court failed to evaluate the evidence as it was duty bound to do in the first appeal and failed to address the grounds of appeal that he preferred. It is trite that on a first appeal, this Court proceeds by way of retrial. Sir ***Clement De Lestang V-P,*** of the predecessor of this Court, famously stated the proposition half a century ago in ***Selle & Another v. Associated Motor Boat Co. Ltd & Others*** (supra)as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

There is no set formula or strict methodology on the manner in which the Court, in a first appeal, is to reconsider and re-evaluate the evidence. Ultimately, what is important is to ensure that the Court has carefully considered the evidence that was adduced by each party and properly weighed it to determine whether or not it supports the conclusion of the trial court, subject to the caution sounded above. What a retrial entailed was explained as follows in ***Coghlan v. Cumberland [1898]1 CH 704:***

“...the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the material before the Judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that the judgment is wrong.”

With respect, we are not persuaded that the Court failed to evaluate the evidence as the applicant claims. In paragraphs 2 to 11 of the judgment, the Court carefully considered the case put forth by each party and the evidence that was adduced to support the respective positions. In paragraphs 12 to 14, the Court considered the findings of the learned judge against the evidence that was adduced, before setting out the grievances in the appeal and the cross-appeal. Thereafter the Court considered the merits of the appeal and the cross-appeal in turns, before concluding that neither had any merit. The applicant’s novel complaint is that the judgment of this Court is far much shorter than that of the trial court. In our view nothing turns on the length of the respective judgments, the critical question is whether the first appellate Court re-evaluated the evidence as it was supposed to do. We do not think it is the duty of the first appellate court to merely regurgitate the evidence so as to make a long judgment. Looking at the judgment as a whole, we do not agree with the applicant that the Court failed in its duty so as to justify a re-opening and review of its judgment.

On the applicant’s complaint as regards fraud and misrepresentation, the same are clearly pleaded and particularized in the amended plaint dated 2nd May 2007. There is also no merit in the assertion that the Court ignored the distinction between rescission and repudiation. The Court considered the grounds of appeal and was satisfied that the learned judge had properly appreciated the distinction that the applicant was handing his case on. In these circumstances and with respect, all the applicant is saying, essentially is that the judgment of this Court is wrong, which is not a legitimate ground for re-opening and reviewing the judgment. The first limb of the application has no merit and is hereby dismissed.

On certification, it is trite that a matter of general public importance is one whose determination will transcends the circumstances of the particular case with ***significant bearing*** on the public interest and where the alleged matter of general public importance involves a point of law, the point has to be ***substantial*** so that its determination will have significant bearing of the public interest. (See ***Herman Phillipus Steyn v. Giovanni Gnecci-Ruscone*** (supra)).

The Supreme Court has laid down other germane principles in determining whether a matter of general public importance is involved in an application for certification. These include that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law; that determinations of fact in contests between parties are not by and of themselves a proper basis for certification; that mere apprehension of miscarriage of justice is not a proper basis for certification; that only exceptional cases that raise cardinal issues of law or of jurisprudential moment deserve certification; and that the jurisdiction of the Supreme Court under ***Article 163(4) (b)*** is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law. (See ***Peter Odour Ngoge v. Hon Francis ole Kaparo &5 Others, Malcome Bell v. Daniel Toroitich arap Moi & Others*** (supra) and ***Koinange Investments & Development Ltd v. Robert Nelson Ngethe [2013] eKLR).***

Having carefully considered this application, we are not satisfied that it satisfies the above considerations to justify a certificate to the Supreme Court under Article 163(4) of the Constitution. Although the applicant claims that this Court shirked its responsibilities that is a mere disguise. The real complaint, which should be clear from what we have said earlier, is that the decision of the Court is wrong, which in itself is not a ground for issuing a certificate. In the event, the notice of motion fails and is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 12th day of October, 2018.

W. OUKO, PCA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR