IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 72 OF 2018

BETWEEN

AFRICA MERCHANT ASSURANCE COMPANY..................................APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED.....................RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya against the Judgment of the Court of Appeal at Malindi (Visram, Karanja & Koome, JJ.A) dated 26th April, 2018

in

Civil Appeal No. 59 of 2017.)

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RULING OF THE COURT

1. Up until the promulgation of the ***Constitution*** and the establishment of the Supreme Court, this was the Court of last resort and to some extent it still retains that title for some matters. Appeals from decisions of this Court to the Supreme Court are circumscribed in the manner prescribed under ***Article 163(4)*** :

> ***"(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)."***

2. Of relevance to the matter before us is ***Article 163(4) (b)*** where certification by this Court or the Supreme Court is required before an appeal can be lodged to the Supreme Court. It is evident from the terminology thereunder that not all decisions of this Court can be subjected to an appeal in the Supreme Court. This much was succinctly put by this Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** **[2012] eKLR** as follows:

> ***"…, 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."***

3. It is on that basis that the applicant vide an application lodged on 20th June, 2018 seeks certification that its intended appeal to the Supreme Court against this Court's judgment dated 26th April, 2018 in Civil Appeal No. 59 of 2017 involves matter(s) of general public importance; and for leave to appeal to the Supreme Court.

4. The facts informing the application were that following a fire outbreak on 21st June, 2009 within Kibokoni area in Malindi, several properties which had been insured by the applicant were razed to the ground. As a result, the applicant settled most of the indemnification claims from its insured and thereafter, went after the respondent who it believed was responsible for the fire on account of its negligence. The applicant filed suit under the doctrine of subrogation seeking reimbursement of a total amount of Kshs.82,253,214 from the respondent. As

would be expected, the respondent strenuously defended the suit denying any liability on its part.

5. In a judgment dated 16th March, 2016, the High Court (**Chitembwe, J**.) found in favour of the applicant and awarded it a sum of Kshs.71,527,412 as the amount incurred due to the inferno. Aggrieved with that decision, the respondent lodged the appeal in this Court premised on a number of grounds principal amongst them, that the applicant lacked the capacity to institute the suit. Upon considering the arguments put forth by the parties and the law, this Court in the impugned judgment agreed with the respondent to the extent that the applicant lacked the requisite standing to institute the suit in its own name under the doctrine of subrogation. Consequently, the decision and award issued by the High Court were set aside.

6. It is that decision that the applicant desires to challenge in the Supreme Court. In its view, the intended appeal raises issues of law that are of general pubic importance *to wit*,

> a) Whether the applicant or any insurance company for that matter, has capacity to institute a suit in its own name under the doctrine of subrogation where an insured by contract or assignment relinquishes his/her right to seek legal recourse to the insurer.
>
> b) Whether such capacity can arise from the following standard insurance clause which was incorporated in the insurance contract between the applicant and the insured:
>
> ***"Every right of the insured accrued or to accrue will by way of subrogation pass to and absolutely vest in the insurer to the extent that loss or damage incurred by this policy may be made good or diminished thereby."***
>
> c) Whether ***Article 159*** of the ***Constitution*** could remedy the lack of capacity by an insurance company to institute a suit in its name under the doctrine of subrogation.

7. As per the applicant, the aforementioned issues transcend the dispute between the parties and extend to an identifiable class of litigants, that is, insurance companies, brokers, commission agents and insured. So far, this was the only case in the country that had brought the said issues, which have significant bearing on the public interest, to the fore. In addition, the doctrine of subrogation is vital in all if not most of insurance claims hence the determination by the Supreme Court of whether an insurance company can institute a suit in its own name under the doctrine of subrogation is integral in clarifying that particular point of law. The applicant was also apprehensive that unless the leave or certification sought is granted a miscarriage of justice will result against it.

8. In opposing the application, the respondent filed a preliminary objection and grounds of opposition. In a nutshell, its objection was centred on firstly, that the issues intended to be raised by the applicant in the appeal to the Supreme Court touch on the interpretation and/or application of the ***Constitution*** thus no certification and/or leave to appeal is required. Secondly, the application was filed out of the prescribed 14 days period from the delivery of the impugned judgment as delineated under ***Rule 39(a) & (b)*** of the ***Court of Appeal Rules***. Thirdly, that despite the notice of appeal against the impugned judgment being filed on time no appeal had been lodged as required under ***Rule 33(1)*** of the ***Supreme Court Rules***. Fourthly, that the intended appeal did not disclose any matter of general public importance. All in All, the application was defective, bad in law and otherwise an abuse of the court process.

9. At the hearing Mr. Muga, learned counsel for the applicant and Mr. Ajigo, learned counsel for the respondent, relied entirely on the written submissions on record and opted not to make any oral highlights.

10. Emphasising on the need for the Supreme Court to consider the question of *locus standi* of an insurer to sue in its own name under the doctrine of subrogation, the applicant argued that the same has been a contentious subject not just in this country but worldwide. As such, the applicant believes that the Supreme Court should conclusively determine the issue like the South African Supreme Court of Appeal did in the case of **Rand Mutual Assurance Company Ltd. vs. Road Accident Fund (484/07) [2008] ZASCA 114; 2008 (6) SA 511 (SCA) ; [2009] 1 All SA 265**. The said Court expressed itself as herein under:

> ***"[23] This court is duty-bound to consider whether the procedural requirement is consonant with our constitutional values and our law of procedure. I believe that it is not. To require a party to litigate in the name of another appears to me to fly in the face of the requirement of transparency that underlies all litigation. The rule serves no public interest in modern times, as appears from the position in the USA. It is formalistic and creates anomalies. It enables the insurer to litigate in the name of the insured without taking any risks as far as litigation costs are concerned. The supposed advantage, namely that the insurance company may be able to retain its anonymity, is clearly not to the advantage of the wrongdoer and also probably not to that of the insured.***
>
> ***[24] It is safe to assume if regard is had to the prevailing practice that insurance companies have been acting on the basis that they have to litigate in the name of the insured. Although, this is in my view a less than desirable practice it would be wrong to abolish it by judicial fiat. This court is reluctant to interfere with settled legal principles, even when they have their origin in an incorrect interpretation of the law because members of the public may have arranged their affairs on the assumption that they were settled. Communis error facit ius. Consequently, this judgment does not hold that the insurer must litigate in its own name and may not litigate in the name of the insured. What it does hold is that the English rule in its stark form cannot be justified and that, unless the wrongdoer will be prejudiced in a procedural sense, courts may permit the insurer to proceed in its own name. It might be necessary to adapt other procedural rules in such an event as requiring, by analogy with Uniform rule 35(5)(b), discovery by the insured.***
>
> ***[25] I therefore hold that the plaintiff was not non-suited by litigating in its own name, particularly where there is no discernible prejudice to the respondent."***

It is therefore, important for the Supreme Court to settle the question with finality so as to ensure certainty and predictability of precedent on

the issue in this country.

11. It was added that this Court's interpretation of the standard insurance clause which is set out herein above also necessitates the Supreme Court's input. This is because, as far as the applicant is concerned, subrogation in the literal sense is the substitution of one person for another; in that, the doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the insured has against third parties in regard to loss to the extent indemnified by the insurer. In other words, the insurer is entitled to exercise whatever rights the insured possesses to recover compensation of loss from a third party. Consequently, in the applicant's opinion, to confer the foregoing right without the right to pursue the same serves no purpose.

12. Making reference to this Court's decision in ***Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau) represented by Its Promoters David Benedict Omulama & 9 others*** [**2018] eKLR**, the applicant concluded that the intended appeal meets the requisite threshold of being certified as raising a matter of general pubic importance and warranting consideration by the Supreme Court.

13. Reiterating that the intended appeal revolves around the interpretation and/or application of the ***Constitution***, the respondent intimated that the applicant was challenging the construction applied by this Court to ***Article 159(2)(d)***. More importantly, the applicant was seeking the Supreme Court's opinion on whether the provision in question could clothe an insurer with capacity to institute a suit in its own name under the doctrine of subrogation. In the respondent's opinion, the applicant should have filed the intended appeal to the Supreme Court as of right as contemplated under ***Article 163(4)(a)*** of the ***Constitution*** as opposed to seeking certification from this Court. Conversely, the applicant disputed that line of argument and maintained that it was properly before us.

14. The competency of the application was also attacked on the ground that the impugned judgment was delivered on 26th April, 2018 while the application herein was lodged on 20th June, 2018, outside the stipulated 14 days period under ***Rule 39*** of this Court's Rules. Besides, no reasonable explanation was given for the delay and/or leave sought to file the application out of time.

15. While acceding that the current application was filed out of time the applicant urged that the anomaly was curable under ***Rule 4*** of this Court's Rules which grants us the power to extend such time. Towards that end, this Court's decision in ***Paul Wanjohi Mathenge vs. Duncan Gichane Mathenge*** **[2013] eKLR** was cited. The applicant went on to attribute the delay to the fact that it was forced to change counsel following the lack of interest on the part of its previous counsel to continue with the matter. Even so, the delay was not inordinate and did not prejudice the respondent in any way.

16. The respondent asserts that the intended appeal does not raise any matter of general public importance; the issue of whether an insurance company can sue in its own name under the doctrine of subrogation is well settled. The issue(s) in contention was contractual and does not transcend the circumstances of this case.

17. We have considered the application, the divergent positons taken by the parties as well as the law. To begin with the determination of the competency of the application would be ideal because in the event we find that it is not suited the same will be disposed in its entirety.

18. Contrary to the parties' belief ***Rule 39*** of this Court's Rules is not applicable in this case. This is because it relates to an application seeking leave to lodge an appeal to this Court from a decision of a superior court which is defined under ***Rule 2*** to mean a court of unlimited jurisdiction from which an appeal lies to this Court. The provision in question reads:

> ***"39. Application for leave to appeal in civil matters***
>
> ***In civil matters-***
>
> ***(a) where an appeal lies on certification by the superior court that the case is fit for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;***
>
> ***(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal."***

19. In point of fact, there is no provision limiting the time frame within which an application for certification, such as in this case, should be filed. The Supreme Court had the opportunity to address its mind on that issue in **Teachers Service Commission vs. Simon P. Kamau & 19 others [2015] eKLR** as follows:

> ***"The Court of Appeal in its Ruling, correctly noted that there is no time- limit within which to apply for the certification of a matter as one "of general public importance."***

20. Be that as it may, such an application should be filed within reasonable time in line with ***Article 259(8)*** of the ***Constitution*** which stipulates:

> ***"If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises."***

As to what amounts to unreasonable delay is to be determined with regard to the peculiar circumstances of each case.

21. In our view, taking into account that the application herein was filed on 20th June, 2018, almost two months after the delivery of the impugned judgment, coupled with the fact that the applicant had to instruct another counsel to take over the matter, we find that the delay was not inordinate.

22. On whether the intended appeal is premised on interpretation and/or application of the ***Constitution***, we are cognizant of the Supreme Court's observation in **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 others [2015] eKLR** that the avenue chosen by a party to lodge an appeal to that Court rests on the character of the issues involved in the subject matter. In as much as the applicant wants to challenge our application of ***Article 159*** of the ***Constitution*** in the matter herein, we cannot help but note that the applicant has also raised other issues which it claims to be of general pubic importance. For that reason, we find that the applicant is rightly before us. Our position is fortified by the following sentiments of the Supreme Court in the aforementioned case:

> ***"And where it is perceived that an appeal raises both categories of issues, the course of merit is to comply with the requirements of both: file an appeal "as of right" on the constitutional issues; and seek leave as regards "matters of general public importance."***

23. What is more, the allegation that the applicant had failed to file the appeal in the Supreme Court within the set time line under ***Rule 33(1)*** of the ***Supreme Court Rules*** is a non-starter. We say so because the aforementioned provision speaks for itself:

> ***"33***
>
> ***(1) <u>An appeal to the Court shall be instituted by lodging in the registry </u>within thirty days of the date of filling of the notice of appeal where the appeal is as of right, or <u>within thirty days after the grant of certification where such certification is required</u>…"***

In this case, the applicant is seeking certification that the intended appeal raises a matter of general public importance. It is only after such certification that the abovementioned time begins to run.

24. Moving on to the merits of the application, it is trite that there can be no hard and fast definition of what a matter of general public importance entails. Nevertheless, a broad criteria of determining what constitutes a matter of general importance has since been established as set out by the Supreme Court in **Malcolm Bell vs. Daniel Toroitich Arap Moi & Another [2013] eKLR:**

"

> ***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."

25. Applying the foregoing, does the intended appeal in issue involve matters of general importance? We do not think so. Firstly, we are in agreement with the applicant that the issue of whether an insurance company can sue in its own name under the doctrine of subrogation transcends the dispute between the parties and extends to the insurance sector and the key players therein hence it is an issue of public interest. Equally, the issue is a substantial point of law as it touches on the standing of a litigant to institute a suit. Nonetheless, the onus was on the applicant to establish the existence of uncertainty or lacunae, if any, as concerns that point of law which, in our view, it failed to do. See the Supreme Court's decision in **Koinange Investments & Development Ltd vs. Robert Nelson Ngethe [2014] eKLR.**

26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. As per the applicant, the manner in which such rights and remedies may be enforced by an insurer is what requires the Supreme Court's clarification. In an effort to illustrate the perceived uncertainty on that point of law, the applicant's argument centred on how different jurisdictions had tackled the issue differently.

27. With tremendous respect, we doubt whether the Supreme Court in formulating the criterion of uncertainty of law occasioned by conflicting decisions as a basis of determining whether a matter is of general public importance, had in mind decisions rendered in other jurisdictions. More so, taking into account that different legal systems and laws apply in different jurisdictions. Furthermore, such decisions are not binding on the courts of this country rather they are persuasive. The focus of the criterion in question, in our view, is uncertainty created by conflicting decisions of courts of this country. In that regard, we cannot help but note that the applicant did not give any instance of such conflicting decisions. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in ***Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co*. [1994] eKLR** and ***Michael Hubert Kloss & another vs. David Seroney & 5 others*** **[2009] eKLR**.

28. Secondly, our interpretation of what the applicant deems as the standard insurance clause set out herein above, cannot by itself constitute a matter of general public importance since in our view, it does not go beyond the circumstances of this case. In interpreting the said clause, the Court was intent on determining whether the same assigned the insured's right of action to the applicant as had been alluded. Towards that end, this Court in its own words held:

> ***"We understand the above clause to be simply setting out the rights of the respondent under the doctrine of subrogation. It did not in any way assign the right of action to the respondent as alluded to."***

29. Last but not least, on the application of ***Article 159(2)(d)*** of the ***Constitution*** to the matter at hand, we find that the same is not an issue that falls for our consideration by virtue of our limited jurisdiction as enshrined under ***Article 163(4).***

30. In the end, we find that the applicant has not made out a case to warrant the certification that the intended appeal to the Supreme Court involves matter(s) of general public importance or the leave to appeal to the Supreme Court. Consequently, the application is devoid of merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 6th day of December, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR