IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & G.B.M. KARIUKI JJ.A.)

CIVIL APPLICATION SUP NO.13 OF 2014 (UR 9/2014)

BETWEEN

EQUIP AGENCIES LIMITED..... APPLICANT

AND

AKBER ABDULLAHI KASSAM ESMAIL.....1ST RESPONDENT

PHOENIX PROPERTIES LIMITED.....2ND RESPONDENT

KAMALJEET SINGH MATHARU .....3RD RESPONDENT

STEPHEN KIMANI KARUU .....4TH RESPONDENT

DIVYESH INDUBHAI PATEL .....5TH RESPONDENT

(An Application for leave to appeal against part of the judgment and/or decree of the Court of Appeal at Nairobi (Nambuye, Musinga & M'Inoti, JJA) dated and delivered on the 4th day of April 2014

Civil Appeal NO.267 of 2004

RULING OF THE COURT

1. The applicant, Equip Agencies Limited, has applied to this court for "leave to appeal to the Supreme Court against part of the judgment and/or decree of this court (by Nambuye, Musinga and M'Inoti JJA) delivered on the 4th of April 2014 in Civil Appeal No.267 of 2004.

2. Under Article 163(4)(b) of the Constitution of Kenya 2010, appeals "shall lie from the Court of Appeal to the Supreme Court (a) as of right in any caseinvolving the interpretation or application of the 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 of Article 163 which provides that a certification by the Court of Appeal may be reviewed by the Supreme Court and either affirmed, varied or overturned.

In effect, the applicant is seeking in its application dated 26th June 2014, a certification that a matter of general public importance is involved in its intended appeal to the Supreme Court against the said judgment. That judgment arose from a ruling and order of the High Court (Ojwang, Ag. J, as he then was) dated 22nd September 2004 in which the learned judge found the appellants as contemnors to be in contempt of an ex-parte injunction order of the High Court (by Nyamu J, as he then was) which restrained

its servants and/or auctioneers by temporary injunction from attaching, further advertising for sale and or selling by public auction... "the goods and/or items attached by the 2nd respondent, Phoenix Properties Limited, ... until the 27th August 2004 at 2.30 p.m." That order is what triggered the appeal to this court, which after re-evaluating and analyzing all the facts, procedure and law applicable set aside the decision of the trial judge and consequently upset the contempt indictment against the respondents.

3. In the judgment sought to be appealed to the Supreme Court, this Court (Nambuye, Musinga & M'Inoti, JJA) stated –

> ***"we are not satisfied that the proper procedure was followed in respect of the appellants before they were found to be in contempt of court. The breaches for which the appellants were being cited required to be defined precisely, and they had to be proved to a standard consistent with the gravity of the alleged contempt, which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. The validity of the order of 13th August 2004 has been severely impeached. The irregularities relating to personal service of that order and endorsement thereon of a penal notice are glaring. By denying the alleged contemnors an opportunity to be heard in the circumstances of this appeal, they were denied a fair hearing before condemnation. It was in a context like the above that Sir John Donaldson, MR stated that where the liberty of the subject is involved, the courts have asserted that procedural rules applicable must be strictly complied with. See Chiltern District Council Vs Keana, (supra).***
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> ***"We have come to the conclusion that this appeal must be allowed. We accordingly allow the appeal, set aside the orders dated 22nd September, 2004, 30th September, 2004 and 8th October, 2004 and substitute therefor an order dismissing the 1st and 2nd respondents' Chamber Summons dated 7th September, 2004. We would have awarded the appellants the cost of this appeal, but we take a very deem view of Mr. Karanja's letter of 30th August, 2004 which precipitated the litigation that has culminated in this appeal and which letter, as a responsible officer of the courts of this country, he ought not to have written. Each party shall therefore bear its own costs. The orders herein to operate in Civil Appeal Nos.268 and 269 of 2004.***
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> ***Those are our orders."***

4. When the said notice of motion came up for hearing before us, Mr. Kingara, learned counsel for the applicant, **Equip Agencies Limited**, urged usto grant the certification and pointed out that there are two glaring issues in the judgment of this Court sought to be appealed from which, in his view, are of general public importance. First, that this court's judgment found the order by Nyamu J, as he then was, null and void as the learned judge did not assign reasons for it. The firm of Ismael & Ismael decided that the order was null and void and proceeded with the sale. Mr. Kingara posed the question- *"can an advocate be the one to decide on behalf of his client or advise his client that an order of the court is null and void."* In his view, *"it would be inviting anarchy if advocates are the ones to decide whether court orders are null and void and should not be obeyed."* It was Mr. Kingara's submission that the judge was persuaded that the order he gave was merited and therefore *"a litigant cannot decide what order to obey and what order not to obey."* Mr. Kingara contended that this is a matter that needs to be placed before the Supreme Court for the law to be streamlined and defined appropriately.

5. On his part, Mr. James Ochieng Oduol, learned counsel for the respondents opposed the application and submitted that it is misconceived. He contended that the supporting affidavit to the application contains false averments. He drew the attention of the court to page 185 lines 16 to 21 of this Court's judgment which states –

> ***"it is readily apparent that the 1st respondent's application for contempt was against the 3rd respondent, its agents and the 5th respondent. The agents of the 3rd respondent in respect of whom the application was made were not disclosed or named. The application was never amended to seek the committal of Kamaljeet Singh Matharu and Akhbaal Ismail. Most striking, however, is the fact that as at the date of hearing of the application, the order upon which the contempt application was based had not been served personally upon the said Kamaljeet Singh***

Matharu, Akhbaal Ismail and even upon the 5th respondent. Indeed, from the process server's own affidavit, that order had never been served upon any director of the 3rd respondent."

6. Mr. Ochieng also referred to the following portion of the judgment -

"Equally without merit is the appellant's complaint that the learned judge heard the substantive contempt of court application on 30th September, 2004 while the same was listed for mention, rather than for hearing. We would readily agree with Mr Odera that the order issued on 22nd September, 2004, whatever the objections that the alleged contemnors raise against it, was clear enough that they were to appear before a judge in Chambers for the purpose of showing that they had purged their contempt or alternatively to show cause why they should not be committed for contempt. They had notice of the purpose of the court attendance on 30th September and were not misled by the fact that the matter was listed before the learned judge as a mention. Clearly their situation is easily distinguishable from the case of Wanjiku vs Esso Kenya Ltd, (supra)"

"As of 22nd September, 2004, the learned judge had found the alleged contemnors in contempt though they had not been joined in the proceedings and had not been heard. Of greater concern to us is that as of that date, the indisputable and uncontroverted evidence placed before the court by the 1st and 2nd respondents was that the order of 13th August, 2004 had not been served personally on any of the alleged contemnors. The affidavit of service by the process server indicated that the order had been served on the clerk of the appellant and that of the 5th respondent. There was no pretence that it had been served upon the 4th respondent."

7. It was Mr. Ochieng Oduol's submission that the applicant had distorted the facts in the application and that for this reason, the applicant ought not to be granted the certification. Moreover, said Mr. Ochieng Oduol, only a portion of the judgment is sought to be appealed against in the Supreme Court while the substantive orders remain in place, and therefore the *ratio decidendi* is not challenged.

8. In Mr. Ochieng Oduol's view, the applicant is perhaps seeking advisory opinion from the Supreme Court under Article 163 (6). It was his submission that *"one cannot go to the Supreme Court on the ground that one is unhappy with an aspect of a judgment as opposed to the entire decision of the court."*

9. We have considered the submissions of both counsel for the parties with a view to answer the pertinent questions raised before us. This is not a complicated application. The law governing certification by this court under Article 163(4)(b) is clear. The issue for our determination in this application is whether the applicant (on whom the onus rests) has shown that the threshold set by the law has been attained. In other words, has the applicant shown that the matter sought to be taken to the Supreme Court on appeal is of general public importance? What is that matter? That is the crux of the matter. The matter intended to be taken on appeal to the Supreme Court springs from the ex parte order by Nyamu J, as he then was, which granted interim injunction orders as aforesaid. Notwithstanding this injunction order, Phoenix Properties Ltd through its servant and particularly the 1st respondent, authorized sale of the applicant's goods. Consequently, the applicant sought orders for the respondents nos 1 to 4 to be committed to prison for contempt of court. The 1st, 3rd and 4th respondents were subsequently found guilty of contempt (by Ojwang J, as he was then) and upon their committal, the 1st respondent filed an application in this court for stay of proceedings which was allowed pending appeal which was determined on 4th April 2014 in the judgment (by Nambuye, Musinga & M'Inoti JJA) part of which is sought to be appealed to the Supreme Court. Of course, we agree that the person who deters to agree the matter before the Supreme is the defacto/primary beneficiary of the same is determined in his favour.

10. A matter of general public importance under Article 163 (4) (b) in an intended appeal to the Supreme Court is a matter that transcends the interest of the parties to the litigation and impacts on society and/or has consequences that bear on public interest. For a matter to be of general public importance, it must affect the rights of a large number of people and not merely the parties to the intended appeal. We of course agree that the person who intends to argue the matter before the Supreme Court is the defacto beneficiary if the same is determined in his favour.

11. In the *locus classicus* decision in **Hermanus Phillipus Steyn v. Giovan Gnecchi Ruscone** [Civil Application No Sup 4 of 2012 (UR 3/2012)] the Supreme Court succinctly stated that (1) at law, there is no exhaustive definition of what amounts to "a matter of general public importance"; (2) that in Kenya, the Court of Appeal has dealt with what amounts to "a matter of general public importance" on at least three occasions" and (3) that as early as 8th March 1979, the Court of Appeal (Madan, Wambuzi JJA & Miller Ag. JA) stated, as per Madan JA, in **Murai v. Wainaina** (No.4) [1982] KLR pg 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.***
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> ***...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.***
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> ***... indeed it is of general public importance that the exact status of Ahoi be resolved by the Court."***

12. In **Belinda Murai v. Amos Wainaina** [1982] KLR 38, Madan JA, as he then was, stated in relation to a "muhoi" under Kikuyu customary law land holding –

> ***"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..."***
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> ***"...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..."***

13. These principles are clear. Does what the applicant seeks to pursue on appeal to the Supreme Court attain the threshold set by the law? As correctly stated by Mr. Ochieng Oduol, an applicant under Article 163(4)(b) who merely shows that he/she is aggrieved by a decision without more fails to attain the legal threshold. The applicant shows that he is aggrieved by the decision of this court but does not go further to demonstrate how the rights of other members of the society or a section thereof will be affected by what has aggrieved him unless the law is properly settled. The issue the applicant raises in this application in respect of which certification is sought is not a novelty or a matter of general public importance. The applicant postulates that *"part of the judgment of the Court of Appeal declaring that the ex parte order of injunction granted in excess of 14 days is a nullity would be in the greater public interest to hear and determine the same"* on appeal. This is what this court stated in the judgment sought to be appealed.

> ***"the last challenge directed at the order of 13th August, 2004 was tht it was issued in violation of the provisions of the former Order 39 rule 3(2) of the Civil Procedure Rules. That provision read as follows;***
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> ***"No injunction may be granted ex-parte for longer than is shown to be necessary and in no case shall it be for more than 14 days."***
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> ***The record shows that the ex parte injunction was issued not for the maximum 14 days, but for a whole 45 days. We do not see any justification in law for such an ex parte injunction in view of the mandatory provisions of Order 39 Rule 3 (2). Again, in Omega Enterprises (Kenya) ltd Vs Kenya Tourist Development Corporation & Others, (supra) this Court held that an ex parte injunction issued contrary to Order 39 rule 3(2) for more than 14 days was invalid, null and void. It is instructive to note that the order in question in that appeal had been issued for 16 days. See also Wanjiku Vs Esso Kenya Ltd, (supra).***

Having found that the ex parte injunction issued without recording of reasons and for more than 14 days was null and void, we do not have to pronounce ourselves further on the amended order, which was equally invalid, null and void."

14. The issue of the ex parte injunction order being declared null and void by this court was not a matter of general public importance. It was a matter between the parties to the litigation. It did not affect the public or other people. There was nothing novel in the decision. Courts of law frequently make decisions on validity of ex parte injunction orders. The law on the subject is common place. As to whether advocates are entitled to engage in advising their clients what court order to obey or not to obey was not a matter for determination by the court. It did not arise. It is axiomatic that court orders once served must be obeyed. It is not for parties or their advocates to determine their validity. Only a court of law can do so. It is clear to us that there was nothing in the judgment of this court which is sought to be appealed from that can be said to amount to a declaration that affects other persons not privy to the litigation or a section of the members of the public. The argument advanced by the applicant in its quest to obtain certification under Article 163(4)(b) of the Constitution is misplaced.

15. Dissatisfaction with a decision of this court per se does not constitute a legitimate basis for seeking certification under Article 163(4)(b) of the Constitution. Nor can an applicant legitimately seek to be entitled to appeal to the Supreme Court against a matter that was not the subject of determination or was not canvassed in this court. All in all we are not persuaded by the applicant that a case has been made out for certification under Article 163(4)(b) of the Constitution.

16. It is our finding that the application does not evince any merit. We have no alternative but to dismiss it with costs to the respondents which we hereby do. It is so ordered.

Dated and delivered at Nairobi this *17th day of February, 2017*.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR