IN THE HIGH COURT OF APPEAL

AT NAIROBI

(CORAM:AZANGALALA, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPLICATION NO. SUP. NO. 9 OF 2014

JAN BONDE NIELSEN…….....……..
……..APPLICANT

VERSUS

NGURUMAN LIMITED …….....…….……..……1ST RESPONDENT

HERMAN PHILLIPUS STEYN ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN**…..2ND RESPONDENT**

HEDDA STEYN…….....….....….3RD RESPONDENT

(An application for a certificate that a matter of general public importance is involved pursuant to Article 163 (4) (b) of the Constitution of Kenya with respect to the proposed appeal against the judgment of this Honourable Court(Ouko, Kiage & M'Inoti, JJ.A.) dated 4th April, 2014 in Civil Appeal No. 77 of 2012)

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RULING OF THE COURT

0. By his application dated 2nd May, 2014, **Jan Bonde Nielsen**, *(hereinafter "the applicant")*, prays that a certificate be issued by this Court under **Article 163 (4) (b)** of the **Constitution** that matters of general public importance are involved in his proposed appeal to the Supreme Court against the judgment of this Court **(Ouko, Kiage and M'Inoti, JJ.A.)**, in **Civil Appeal No. 77 of 2012** dated 4th April, 2014. The applicant has also invoked the following provisions of the Law: ***Section 15*** of the ***Supreme Court Act, 2011 and rule 24 (1)*** of the ***Rules*** made thereunder, ***Sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act*** and all the enabling provisions of the Law.
0. The matters claimed to be of general public importance are:

a. ***Whether the said judgment breached the applicant's rights under Article 50 of the Constitution.***

b. ***Whether the jurisdiction to grant temporary orders of injunction is limited to Order 40 of the Civil Procedure Rules or whether such orders may be made under the inherent jurisdiction of the Court.***

c. ***Whether the corporate veil of a corporate entity can only be pierced following a full trial or may***

be addressed at the hearing of an interlocutory application for purposes of establishing whether an interim order of injunction should be granted against such a corporate entity.

(d) Whether the said judgment set out and applied an impossible standard to meet in demonstrating the first limb (prima facie case) set out in Giella –v- Cassman Brown, [1973], EA 358.

e. ***What is the appropriate test and/or standard to be applied by an appellate Court in reviewing discretionary decisions of the Court below***.

[3] The applicant contends, in the grounds in support of his application, that the above matters relate to the administration of justice and transcend the dispute between the parties herein; that they are substantial, determination of which will have a significant bearing on the public interest and that it is just and equitable to grant the certificate sought. The applicant has supported his application by his affidavit sworn on 2nd May, 2014 which affidavit reiterates the said grounds. Annexed to the affidavit are two exhibits namely, a copy of the said judgment and copies of a Notice of Appeal and a letter bespeaking copies of proceedings.

[4] The application was opposed on the basis of a replying affidavit sworn by **Mr. Moses Loontasati Ololowuaya**, sworn on 21st April, 2015, for and on behalf of the 1st respondent. In addition to their affidavits, parties with the leave of the Court, filed through their advocates written submissions upon which they wholly relied when the application came up for hearing on 16th November, 2015.

[5] **M/s Oraro and Company Advocates** for the applicant invoked the decision of the Supreme Court in ***Hermanus Philipus Steyn –v- Giovanni Gnecchi Ruscone, [Civil Application No. 4 of 2012] (UR)*** on the principles which govern the granting of certification. On alleged breach of the applicant's rights under ***Article 50*** of the ***Constitution***, it was argued by the advocates that this Court in the impugned judgment made final determinations on matters in issue at an interlocutory stage namely; whether the applicant had a claim as against the 1st respondent; whether the applicant had a claim on the suit property; whether the applicant had a claim on the basis of constructive trust; and whether the applicant's remedies were restricted to a refund. To buttress this proposition, the applicant invoked the case of ***Agip (K) Ltd. -v- Vora [2000] 2 EA 285.***

[6] On the High Court's jurisdiction to grant interim orders of injunction, the advocates for the applicant submitted that the approach taken by this Court in the impugned judgment is a narrow one as, in their view, orders of temporary injunction beyond the confines of ***Order 40*** of the ***Civil Procedure Rules***. In learned counsel's view, a determination in this regard will have a significant bearing on the public interest.

[7] On the issue of piercing the corporate veil, the Advocates submitted that it was a matter of law whether the same can only be available at a full trial or may also be addressed at the interlocutory stage when determining whether to grant an interim order of injunction against such a corporate entity. The advocates for the applicant contended that the issue would "*continually engage the workings of judicial organs and transcends the circumstances of the present case*".

[8] On the first test of demonstrating a *prima facie* case set out in ***Giella –v-Cassman Brown & Co. Ltd.,*** (supra), the advocates submitted that the impugned judgment departed from the standard set out in the said precedent setting case and set out and applied an impossible standard. It was counsel's view that the said judgment was not only a bad precedent but would affect a considerable number of persons in general and litigants in particular. This event, according to learned counsel, will have a significant bearing on the public interest.

[9] On the review of discretionary decisions of lower courts, by higher courts, counsel for the applicant submitted that an appropriate test should be established which issue is concerned with a matter of general policy in the administration of justice and in the discharge of Court of Appeal and Supreme Court functions. The issue, according to counsel for the applicant, transcends this case. In those premises, the

applicant's advocates urged us to grant it certification to proceed to the Supreme Court against the said judgment.

[10] In response, **M/s Ahmednasir, Abdikadir & Company Advocates**, for the 1st respondent, relied upon the replying affidavit sworn on 21st April, 2015 by the Chairman of the 1st respondent, **Moses Loontasati Ololowuaya**. In the affidavit it was deponed, among other things, that the issues raised in the application had become moot and that the criteria for referring an appeal to the Supreme Court had not been satisfied.

[11] It was further argued for the 1st respondent that having stated in other proceedings that he had never had any legal or beneficial interest in any asset in Kenya, the applicant lacked the right to seek the relief of injunction before the High Court and cannot, therefore, seek certification to go to the Supreme Court.

Related to the above argument, it was also submitted, for the 1st respondent, that the foundation of the relief of orders of injunction rests in the probability of irreparable injury being suffered by the applicant and as the applicant herein has left the suit property, no live controversy exists between the parties and the matter is, therefore, moot. The cases of ***Independent Electoral Commission –v-Langeberg Municipality [2001] (3) SA 925 (CC)*** and ***Stephen Mongua Mnagiru & Another –v- Tatu City Limited & Another, [2012] eKLR***, were invoked to buttress the above submissions.

[12] On the merits or demerits of the application, the advocates for the 1st respondent submitted that no cardinal issue of law or of jurisprudential moment arises from the impugned judgment as the principles applicable for the grant of interim injunction have long been settled and the proposed appeal raises no issue which transcends the facts of the case herein as decreed in ***Hermanus Philipus Steyn –v- Giovanni Guecchi – Ruscone*** (supra).

[13] It was further argued for the 1st respondent that there was no error of law committed by this Court in the impugned judgment as the court properly applied the principles in ***Giella –v- Cassman Brown & Co. Ltd***., (supra) and ***Mrao Ltd. –v- First American Bank of Kenya Ltd. & 2 Others, [2003] KLR 125***.

In those premises, it was urged, on behalf of the 1st respondent, that we dismiss the applicant's Originating Notice Motion with costs.

[14] Having considered the Originating Notice of Motion, the affidavits filed both in support and in opposition thereto, the written submissions of learned counsel, the authorities cited and the law, we take the following view of the matter. Our jurisdiction to consider the applicant's Originating Notice of Motion is derived from ***Article 163 (4) (b)*** of the ***Constitution*** which is in the following terms:

> ***"163 ……..***
>
> ***(4) Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> a. **……..**
>
> b. ***in any 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)".***
>
> *And Clause 5 reads:*
>
> ***"(5) A certification by the Court of Appeal under Clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned".***

It is plain from a reading of the above provisions that certification to proceed to the Supreme Court is not

a mere formality nor is certification granted as a matter of course. Certification can only be granted where a matter or matters of general public importance is/are involved. The onus to demonstrate that such matter or matters of general public importance, indeed, exist obviously rests on the shoulders of the party seeking certification and the burden is on a balance of probabilities.

[15] Both learned counsel acknowledged that what amounts to an issue of general public importance is not definable and for a guide, both counsel invoked the Supreme Court decision in ***Hermanus Philipus Steyne –v- Giovanni Guecchi – Ruscone*** (supra). In that case, the Supreme Court gave the following as some of the governing principles:-

> ***"(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 appeal in the Supreme Court, must 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 facts in contests between parties are not by themselves a basis for granting certification for an appeal before the Supreme Court".***

[16] In the matter before us the applicant has identified the matters listed in paragraph 2 above, which he contends raise issues of general public importance and were the subject of determination in the impugned judgment.

[17] To put this Originating Notice of Motion in proper perspective, we think we should relate how the dispute landed before the Court of Appeal. The applicant instituted ***Nairobi, H.C. Milimani Commercial Suit No. 332 of 2010,*** against the 1st respondent and two others claiming, among other reliefs, a declaration that there was a partnership between him and the 2nd respondent on a 50:50 basis; that the veil of the 1st respondent be pierced; that upon piercing the veil, it be declared that the shares held by the 2nd and 3rd respondents are held on a constructive trust as to the said 50% for the applicant and as to the remainder for the 2nd and 3rd respondents; that accounts of the partnership be taken and sums found due to be paid into the partnership or in the alternative, be paid to the applicant; that the 2nd and 3rd respondents be restrained from using the corporate veil to interfere with the applicant in his participation in the management or operation of any of the partnership assets including the 1st respondent; that the 2nd respondent be restrained from interfering with the applicant in common management of partnership assets, and that US $ 1,917,333 be paid to the applicant being money had and received by the 2nd and 3rd respondents to the use of the applicant.

[18] Appurtenant to the plaint, the applicant lodged a Notice of Motion claiming, among other things, a temporary injunction restraining the 2nd respondent and others from interfering with the applicant's homestead; a mandatory injunction compelling the 2nd respondent and others to restore all water supply to his homestead; a mandatory injunction compelling the 2nd respondent and others to remove forthwith all camps established on 26th August, 2010, around his homestead; a mandatory injunction compelling the 2nd respondent and others to allow the applicant to participate in the management of or operation of any of the partnership assets; a temporary injunction restraining the 2nd respondent and others from interfering with the applicant's homestead.

Those orders were sought pending the hearing of both the application and the suit.

[19] **Odunga, J**., heard the application and determined that the applicant had demonstrated a *prima facie* case with a probability a success at the trial and that an award of damages would not be sufficient compensation to the applicant and further that balance of convenience was in favour of granting the interim injunction restraining the respondents and others from interfering with the applicant's homestead commonly known as **Ol Donyo Laro** pending the hearing of the suit.

[20] Clearly, therefore, the principles in ***Giella –v- Cassman Brown and Co. Ltd***. (supra) were in focus in the applicant's application before the High Court. The application of those principles was also the subject of the appeal the 1st respondent lodged before this court and which appeal was allowed in the impugned judgment.

[21] The 1st respondent's appeal was as already observed, heard by **Ouko, Kiage and M'Inoti, JJ.A**. The learned Judges considered all the principles for the grant of temporary injunctions as set out in ***Giella –v- Cassman Brown & Co. Ltd***. (supra) and the standard of proof applicable in demonstrating those principles and having done so, came to the conclusion, on the material which was availed to the learned Judge of the High Court, that the applicant had failed to establish a *prima facie* case with a probability of success at the trial. On irreparable injury, the learned Judges found, again on the material which was before the High Court, that the applicant had not demonstrated that unless the injunction was granted, he would suffer such injury. They in fact found that the High Court had expressly found that the applicant's claim was capable of being quantified and hence damages would be sufficient compensation.

[22] Having found that the applicant had not demonstrated a *prima facie* case with probability of success at the trial and further having found that he would not otherwise suffer irreparable injury unless an injunction was granted, the learned Judges concluded that the learned Judge of the High Court had not properly exercised his discretion in granting an interim injunction to the applicant and consequently, allowed the 1st respondent's appeal.

[23]Having anxiously considered the impugned judgment, we think what may have peeved the applicant were general statements made by the learned Judges of this Court in the said judgment with regard to whether the applicant had demonstrated a *prima facie* case and what would appear to be a conclusive statement that an interim injunction can never issue unless irreparable injury is demonstrated. In our view, however, those general statements did not purport to lay down criteria which is different from the principles set out in ***Giella –v- Cassman Brown & Co. Ltd***. (supra). Those statements, in our view, have been taken out of context.

[24] Starting with what amounts to a *prima facie* case, the learned Judges expressly accepted the definition given in ***Mrao Ltd. –v- First American Bank of Kenya Ltd. & 2 Others,*** (supra). In that case, a *prima facie* case was defined as follows:

> ***"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's***

case upon trial. That is clearly a standard, which is higher than an arguable case".

On this definition, the learned Judges expressly stated: -

"We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities".

The learned Judges adopted the definition of *prima facie* case given in ***Mrao Ltd. –v- First American Bank of Kenya Ltd. & 2 Others,*** (supra) and attempted to explain the same. The learned Judges did not pretend to lay down a new test or standard for a *prima facie* case in civil cases. With all due respect to counsel for the applicant, no new test or standard let alone an impossible one for a *prima facie* case was set or applied by the learned Judges of this Court.

[25] On the test applicable for higher courts to review discretionary decisions of lower courts, it was submitted on behalf of the applicant that the impugned judgment somewhat brought the test in doubt. Having perused the judgment, we find no basis for such doubt. The learned Judges of this Court were alive to the test applicable. In their own words: -

"……it is appropriate to reiterate that before this Court can interfere with the exercise of a discretion of a Judge, it must be shown that the Judge has either erred in principle in his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong, or that the decision was so aberrant that no reasonable Judge, aware of his duty to act judicially could have reached it. These are the words of Sir, Charles Newbold, P. expressed in this often-cited –Mbogo & Another –v- Shah, [1968] EA 98 decision……".

The learned Judges then quoted the very words of Sir Charles Newbold as reported in the case itself. They added:

"This dictum underlines what is well settled in our laws that as an appellate court, this court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below……It must defer to the exercise of discretion by the Judge in the court below and must not interfere with it merely upon the ground that the members of this Court would have exercised the discretion differently. See Export Processing Zones Authority –v- Kapa Oil Limited & 6 Others, Civil Appeal No. 190 of 2011".

[26] With those principles in mind, the learned Judges, after considering what was available before the High Court, came to the conclusion that the learned Judge of the High Court had improperly exercised his discretion in granting to the applicant a temporary injunction and allowed the appeal against him. There is no doubt as to the test applicable to review discretionary decisions of lower courts by higher courts. The learned Judges were alive to the well settled law particularly while dealing with appeals from interlocutory orders, that merely because some other view is possible, the appeal court should not interfere with a discretionary order where the discretion is validly and judicially exercised.

[27] As to whether the jurisdiction to grant an injunction is only available under ***Order 40*** of the ***Civil***

Procedure Rules, counsel for the applicant submitted that case law emanating from the High Court showed that orders of injunction may be given under the inherent jurisdiction of the court which approach is now restricted by the impugned judgment. Again, with respect to learned counsel for the applicant, the learned Judges of this Court in their Judgment considered an appeal from an interlocutory decision made under the then ***Order XXXIX rules 2 and 3*** now ***Order 40 rules 2 and 3*** of the ***Civil Procedure Rules***. The decision of the learned Judges flowed from the material availed before the High Court and submissions made before the learned Judges. The issue of granting an interim injunction outside ***Order XXXIX or Order 40*** of the ***Civil Procedure Rules*** does not appear to have been argued before the learned Judges. No new principle of law on injunctions was laid down by the learned Judges to warrant certification to the Supreme Court. It is elementary that the general inherent jurisdiction of the High Court was not in contention. There was also no argument that orders of injunction can be granted under

Article 23(3) (b) of the ***Constitution***.

[28] With regard to whether piercing of the veil of incorporation can only be addressed following or during a full trial, the three learned Judges of this Court stated:

> ***"What the learned Judge did was to prematurely pierce the corporate veil at an interlocutory stage without prima facie evidence".***
>
> (Underlining ours).

The learned Judges then continued:

> ***"The 2nd respondent and the appellant company, having intimated that as far as they were concerned, the respondent was only managing the camp, it was for the latter to rebut that by presenting the prima facie evidence that we have alluded to earlier".***
>
> (Underlining ours).

[29] These excerpts clearly show that the learned Judges of this Court did not lay down a rule or principle that the piercing of the corporate veil of a corporate entity can only be addressed following or during a full trial. The learned Judges were, in our view, prepared to hold that the corporate veil can be pierced if there is *"prima facie evidence"* to do so even at interlocutory stage.

[30] We have deliberately left the complaint regarding breach of the applicant's rights under ***Article 50*** of the ***Constitution*** until now because what we have discussed above somewhat answers that complaint. ***Sub-Article (1)*** of the said ***Article*** is in the following terms:

> ***"50 (1) Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body".***

The applicant made that complaint because, in his view, the learned Judges of this Court, in the impugned judgment, made final determinations on matters in issue between the applicant and the 1st respondent at interlocutory stage.

[31] With respect to learned counsel for the applicant, we find no basis for that contention. We can do no better than quote the learned Judges themselves:

> ***"While we have abstained from expressing any firm views on the prima facie evidence presented in the High Court, we are of the view that the evidence did not discharge the burden. There is every possibility only a possibility that the 1st respondent may, indeed, have cogent evidence beyond the letters. He may, indeed, have the relevant documents to prove at the trial on a higher scale of balance of probabilities that, indeed, the 2nd and 3rd respondents received funds from***

him which are traceable to the appellant company. He may have evidence that unequivocally defines his relationship with the other respondents; that he paid contractors who built the camp and those who graded the road; he may in fact have documents relating to the purchase of the Cessna plane. The burden cast on the respondent at this stage was, in our view, simple, dischargeable by merely, producing copies of these documents and did not entail calling witnesses. That is how we think the standard of prima facie is proved. It is a standard as was explained in the Mrao case (supra), higher than an arguable case".

This excerpt shows beyond peradventure that the learned Judges could not make definitive findings on the applicant's case. Those findings are to be made at the trial. We find it necessary to state that whatever language that may have been used by both the High Court and the learned Judges of this Court, the fact remained that the applicant's claim would ultimately be determined at the trial. Findings at the interlocutory stage would not, with all due respect to learned counsel, bind the trial Judge. The learned Judges were fully alive to their role and right from the outset stated:

"Once more, we remind ourselves that in considering this appeal, it would be both premature and prejudicial to rights of the parties to make any conclusive pronouncements on the matters either of fact or law, while the suit where such merits will be decided is still pending".

The question of breach of ***Article 50*** of the ***Constitution*** does not, therefore arise.

[32] In view of our above analysis, we have come to the conclusion that the applicant has not demonstrated any of the principles set out in ***Hermanus Philipus Steyn –v- Giovanni Guecchi – Ruscone*** (supra). We are alive to the fact that those principles are not exhaustive. That notwithstanding, the applicant has not demonstrated any other circumstance or principle which would impel us to grant the certification as set out in ***Article 163 (4) (b)*** of the ***Constitution.***

The issues the learned Judges of this Court discussed relate to a mundane issue of temporary injunction and the principles crystallized in ***Giella –v- Cassman Brown & Co. Ltd.*** (supra). The learned Judges considered an appeal from an interlocutory order of the High Court in which appeal no conclusive

pronouncements on matters either of fact or of law could be made. As the suit itself is yet to be determined, the question of the matter raising cardinal issues of law or of jurisprudential moment does not arise. (See ***Ngoge –v- Kaparo & 5 Others, [Supreme Court Petition No. 2 of 2012] (UR)***.

[33] The upshot of our above consideration is that we find no merit in this Originating Notice of Motion. We decline to certify that the applicant's intended appeal raises any matter that is of general public importance under ***Article 163 (4) (b)*** of the ***Constitution***.

We dismiss the application with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY, 2016.

F. AZANGALALA

……..……..….

JUDGE OF APPEAL

J. MOHAMMED

…….……

JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR