



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, VISRAM & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. SUP 10 OF 2015

BETWEEN

GOVERNORS BALLOON SAFARIS LIMITED APPLICANT

AND

SKYSHIP COMPANY LIMITED 1ST RESPONDENT

COUNTY COUNCIL OF TRANSMARA 2ND RESPONDENT

(Being an application for leave to appeal to the Supreme Court from the Ruling of the Court of Appeal (Warsame, Sichale & Otieno Odek, JJ.A.) dated 12th June, 2015

in

CIVIL APPLICATION NO. NAI 32 OF 2015)

RULING OF THE COURT

Background

1. On 12th June, 2015, this Court (*Warsame, Sichale & Otieno Odek, JJ.A.*), dismissed an application for stay of execution by the applicant herein, **GOVERNORS BALLOON SAFARIS LIMITED**. In the said application, the applicant had sought a stay of execution of the certificate of taxation or the decree on costs pending the hearing and determination of an intended appeal against the ruling.

2. Aggrieved by that ruling, the applicant has now moved to this court under **Article 163 (4) of the Constitution and Rule 24 (1) of the Supreme Court Rules, 2014** for certification that their intended appeal to the Supreme Court involves a matter of general public importance; for leave to lodge an appeal to the Supreme Court against the impugned ruling of this Court dated 12th June, 2015 and that the order of 12th June, 2015 be stayed pending the hearing and determination of the intended appeal in the Supreme Court. The respondents do not agree and contend that the intended appeal has neither ramification nor consequence to any other party save the parties to the dispute and does not, therefore, meet the required threshold as a matter of general public importance; that the application is fatally defective for the applicant’s failure to file a notice of appeal to the Supreme Court under **Rule 31 (2) of the Supreme Court Rules**; that there is no positive order to be stayed and the execution sought to be stayed has been

fully effected and has therefore been overtaken by events and that the Supreme Court has expressed some doubt whether or not it has jurisdiction to entertain an appeal against an interlocutory decision by the Court of Appeal.

3. The genesis of the application is that the applicant sued the respondent in High Court Civil Case No. 461 of 2008. The applicant contended that the respondents had defrauded it as a result of which it had suffered loss of KShs.1.5 billion. The suit was dormant from the year 2009 until 16th April, 2010 when the 1st respondent moved to have the same dismissed for want of prosecution. The suit was dismissed on 22nd November, 2013 with costs. Dissatisfied with the said decision, the applicant applied to this court for stay of proceedings pending the hearing and determination of an intended appeal. The said application for stay was dismissed on 13th June 2014.

4. Following the dismissal of the applicant's application for stay, the respondent filed their bill of costs which was taxed at KShs.23,010,674 in respect of the 1st respondent and KShs.23,056,164 in respect of the 2nd respondent. The 2nd respondent then moved to execute the costs taxed, prompting the applicant to apply to set aside the execution for costs. The applicant also filed a preliminary objection on the ground that the 2nd respondent, having ceased to exist after the enactment of the County Government Act, was therefore improperly before the court. The applications were heard by Gikonyo, J, who ordered the replacement of the 2nd respondent with the County Government of Narok. The learned Judge did not interfere with the decision of the taxing master dated 4th February, 2015 as he found that there was no error of principle.

5. Aggrieved with the whole decision of the taxing master, the applicant filed the application that provoked the instant application. The applicant sought for stay of execution of the certificate of taxation, it faulted the learned Judge for failing to find that the 2nd respondent had ceased to exist as a party to the suit and as a result, its advocates on record had no standing to appear on its behalf. It also faulted the learned Judge for assigning the County Government of Narok the costs that had been unlawfully awarded; the intended appeal will be rendered nugatory as it would suffer irreparable loss if it was to pay the decretal sum.

6. The application was strongly opposed by the respondents. The 1st respondent argued that this Court had no jurisdiction under **Rule 5(2)(b)** to grant an order of stay since there was no positive order granted by the High Court capable of being stayed and that there was no indication that the learned Judge had improperly exercised his discretion and, lastly, that the applicant had not indicated how the intended appeal would be rendered nugatory. The 2nd respondent on the other hand, argued that the applicant had not raised any arguable issues; the County Government of Narok was properly joined to the proceedings and therefore did not need to seek leave to be enjoined as a party to the suit.

7. This court in its ruling dated 12th June, 2015 dismissed the applicant's said application. The Court found that there was no arguable appeal; that **Section 33 of the Sixth Schedule** to the Constitution provided for transition to the new offices created therein; that the Local Authorities Act, which had created the County Council of Transmara had been repealed, effectively doing away with the Local Authorities; that the learned Judge did not improperly exercise his discretion in disallowing the reference and finding that the Deputy Registrar was correct in finding that the subject matter of the suit was KShs.1.5 billion. Regarding whether the appeal would be rendered nugatory, the Court found that the applicant had not described the hardship or loss that would be suffered if it were forced to settle the costs before the intended appeal is heard and determined. Consequently, the Court found the applicant's application devoid of merit and dismissed it resulting in the current application.

8. The issues of general public importance on the basis of which certification is sought are, *inter alia*:

- i. *The parameters and threshold that should govern the Court of Appeal in the application or enforcement of the express and unambiguous provisions of the law to undisputed facts.*

- ii. *The separation of judicial and legislative powers or functions in the administration of justice.*
- iii. *The applicability of the transitional provisions in the 2010 Constitution in relation to legal rights devolved to county governments pursuant to the repeal of the Local Government Act, and in particular, the enforcement of the said rights in judicial proceedings.*
- iv. *Enforcement of the individual's right to access justice and a fair hearing in the Court of Appeal and the exercise of judicial authority by the Court of Appeal in the administration of justice under the Constitution of Kenya.*

Submissions by counsel

9. Those are the issues which Mr Muite, senior counsel for the applicant agitated at the hearing of the application before us. He submitted that the applicant is raising fundamental issues of general public importance including the parameters and threshold that should govern this Court in the application or enforcement of the express and unambiguous provisions of the law to undisputed facts and the applicability of the transitional provisions in the 2010 Constitution in relation to legal rights devolved to County Governments pursuant to the repeal of the Local Government Act, and in particular, the enforcement of the said rights in judicial proceedings. Counsel urged us to allow the application.

10. The respondents opposed the application. Mr Kemboy, learned counsel for the 2nd respondent held brief for Mr Amoko, learned counsel for the 1st respondent. Mr Kemboy raised a preliminary issue that the applicant's application is fatally defective for failure to file a notice of appeal in the Supreme Court within fourteen days from the date of the impugned ruling in accordance with **rule 31 (2) of the Supreme Court Rules**.

11. Counsel submitted that the applicant having failed to take such an essential step within the stipulated time, there is no competent application upon which this Court can exercise its discretion and grant the relief sought. Counsel further submitted that the impugned ruling was in respect of an interlocutory issue of stay; that the learned judge directed that the 2nd respondent be referred to in all the pleadings as the County Government of Narok; that the applicant has failed to meet the jurisdictional threshold for certification as a matter raising issues of general public importance or leave to apply to the Supreme Court. Regarding the request for stay of the impugned ruling, counsel submitted that no jurisdiction has been invoked for the grant of such relief; that the impugned ruling was in the negative and the execution sought to be stayed has been fully effected and the application has, therefore, been overtaken by events. Counsel urged us to dismiss the application with costs.

Determination

12. We have duly considered the application, the submissions by learned counsel, the authorities cited and the law. It is trite law that in an appeal to the Supreme Court, the critical consideration is not whether the decision of this Court is perceived by any of the parties to be right or wrong, but rather whether the intended appeal raises a matter of general public importance. As this Court stated

in ***HERMUNUS PHILIPUS STYNE V GIOVANNI GNECCHI-RUSCONE, CA No. Sup. 4 of 2012***, which was subsequently upheld by the Supreme Court:

“The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate court-for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course... In contrast, 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.”

13. For the purposes of this application, it is important to consider what constitutes a matter of general public importance deserving of certification to the Supreme Court. In the case of ***Hermanus Steyn case [supra]*** this court had the opportunity to pronounce itself on the test applicable in determining whether a matter is of general public importance. The court outlined the governing principles as follows:

- 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 [other] 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 themselves, a basis for granting certification for an appeal before the Supreme Court.***

14. The applicant’s main grounds of contention are matters touching on the national values and principles of governance as enshrined in the Constitution, the administration of justice particularly by this Court and in particular under the Constitution of Kenya.

15. From the laid down principles, the applicant has not satisfied this Court that the issue to be canvassed on appeal at the Supreme Court is one the determination of which transcends the circumstances of this particular case and has a significant bearing on public interest and is, therefore, a matter of general public importance. As stated in the ***Hermanus Styne case [supra]***:

“Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

16. Accordingly, and after careful consideration of the applicants’ motion dated 23rd June, 2015, we find that there is no matter of general public importance involved in the applicant’s intended appeal to the Supreme Court.

17. Having reached that finding that there is no matter of general public importance, we do not find it necessary to deal with the validity of the notice of appeal or the application for stay of execution. We think that these are matters within the jurisdiction of the Supreme Court.

18. Accordingly, this application lacks merit and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of May, 2016.

E. M. GITHINJI

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR