



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & AZANGALALA, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 36 OF 2013

BETWEEN

**TIMMAMY ABDALLA.....APPLICANT/1ST
RESPONDENT**

AND

**SWALEH SALIM SWALEH IMU.....1ST
RESPONDENT**

**FAHIM YASIN TWAHA.....2ND
RESPONDENT**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION(I.E.B.C.).....3RD
RESPONDENT**

**SILVANO BUKO BONAYA.....4TH
RESPONDENT**

(An appeal from the Judgment, Decree and Order of the High Court of Kenya at Malindi (Muchemi, J.) dated 25th September, 2013

in

H.C. Elec. Petition No. 4 of 2013 Consolidated with

H.C. Election Petition No. 5 of 2013)

RULING OF THE COURT

[1] This is an application by *Fahim Yasim Twaha*, (hereinafter "the applicant"), for the principal relief that he be granted leave to appeal to the Supreme Court and that we issue a certificate that his intended appeal from the decision and orders of this Court, (*Okwengu, Makhandia & Sichale, J.J.A.*), dated 13th January, 2014, *Civil Appeal No. 36 of 2012*, involves matters of general public importance.

[2] The application is by notice of motion which motion invoked **Article 163 (4)** of the **Constitution, Sections 15 and 16** of the **Supreme Court Act, Rules 24 (1) and 31**

(2) of the **Supreme Court Rules, Sections 3A and 3B** of the **Appellate Jurisdiction Act** and **Rules 1, 42, 43 and 47** of the **Court of Appeal Rules, 2010**. In support of the motion on notice, the applicant filed an affidavit which he swore on 19th February, 2014.

[3] In our view, the grounds on the face of the notice of motion and the supporting affidavit show that the following issues are raised as matters of general public importance:

1). The dispute was an election dispute which, ipso facto, is a matter of general public importance.

2). The scope of Articles 38, 81, 83 and 86 of the Constitution.

3). Security of counter foils of used ballot papers.

4). Whether leave is a prerequisite before exercising the right of appeal from a decision of the Court of Appeal in an election dispute.

[4] The notice of motion and the applicant's said affidavit, so far as relevant, indicate the following as the basis signifying the reasons for importance:

- i. That the above issues transcend the circumstances of the dispute between the parties herein;**
- ii. that the intended appeal raises substantial questions of law with a significant bearing on the public interest;**
- iii. that the issues of law were canvassed before the High Court and this Court and**
- iv. that there is controversy as to when election outcome is deemed declared.**

0. The notice of motion was opposed and a replying affidavit sworn on 28th February, 2014, by **Timamy Issa Abdalla**, (hereinafter "the 1st respondent"), was filed. The 1st respondent also swore a supplementary affidavit on 12th September, 2014. The opposition is multipronged but the main areas of objection are: that the application is incompetent having been lodged by counsel not properly on record; that the application has been lodged too late in the day; that no issue is raised which transcends the facts of this case; that the application and the supporting affidavit do not disclose any cardinal issue of law of jurisprudential moment nor do they disclose any issue which has a significant bearing on the public interest; that the issues do not disclose any inconsistency or contradiction in the law nor did they arise in the appeal before this Court; that the intended appeal challenges contested facts; that the applicant is abusing the process of the court as he has lodged another application before the Supreme Court seeking the same relief.

[6] Learned counsel for the applicant, **Mr. Kibe Mungai**, in support of the notice of motion, adopted and expounded upon the stand-point taken by the applicant in his supporting affidavit and the written submission, his firm had previously filed on behalf of the applicant. Learned counsel took us through the genesis of the dispute between the parties, the petition before the High Court and the appeal before this Court. **Mr. Kibe Mungai** reiterated what, in his view, were issues of general public importance in the applicant's intended appeal and even mooted that even what constitutes a matter of general public importance is itself an issue which the Supreme Court should settle.

0. On the challenge to the competence of the application, **Mr. Kibe Mungai** submitted that his firm was properly on record as these proceedings are new and he need not have filed a Notice of Change of Advocates or sought leave to act. On the application for leave in the Supreme Court,

learned counsel contended that the issue had been resolved by the Supreme Court which had declined to consider the application before it during the currency of this application.

0. **Mr. Okoth**, learned counsel for the respondents, in opposing the notice of motion, reiterated the written submissions which had previously been filed on behalf of the respondents. It was learned counsel's contention that the applicant had not satisfied the principles in **Hermanus Phillipus Steyn -v- Giovanni Gneechi - Ruscone, [Supreme Court Application No. 4 of 2012] (UR)**, and further that what he seeks is a challenge to the exercise of discretion by the High court and this Court. It was also learned counsel's submission that this application is incompetent for the reason that another application for the same relief had been made before the Supreme Court and that the application had been lodged late in the day by counsel who is not on record. Additionally, learned counsel submitted that the application should not have been filed within the appeal before this Court but in separate proceedings.
0. We have considered the application, the affidavits filed, the submissions of learned counsel, the authorities cited and the law. The jurisdiction to grant the certificate sought is donated by **Article 163 (4), (b)** of the **Constitution** which reads:

"163.....

(4) Appeals shall lie from the Court of Appeal to the Supreme Court -

- a.
- 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;...**

(Emphasis ours)

And **Rule 31 (2)** of the **Supreme Court Rules** provides:

"Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal".

0. As may be observed, **Article 163 (4), (b)** requires us to determine whether the intended appeal to the Supreme Court raises any matter or matters of general public importance and if we so determine, issue the requisite certificate. The onus to satisfy us that such matter or matters of general public importance indeed exist, rests on the applicant.
0. A matter of general public importance is not defined in the **Constitution** and the **Supreme Court Act**. The applicant has indeed argued, before us, that the need for a definition is one of the issues of general public importance to be settled by the Supreme Court in his intended appeal. We may dispose of this argument in a summary manner. In our view, a definition of the phrase "*a matter of general public importance*" is likely to be restrictive as such matters are infinitely variable and will necessarily depend on particular circumstances which circumstances will vary from time to time and which cannot be fully anticipated. We think an attempt at a definition will be counter-productive and may, in fact, impede development of jurisprudence in this area. We, therefore, decline to certify the need to define the phrase "*a matter of general public importance*" as such matter.
0. In any event, failure to define the phrase has not occasioned any failure of justice and the applicant did not demonstrate that any prejudice had been visited upon him. Indeed, no prejudice could have been suffered as the Supreme Court has set out principles which the court will consider in determining whether a matter is one of general public importance. Those principles were considered in **Hermanus Phillipus Steyn -v- Giovanni Gneechi - Ruscone (supra)**, **Malcom Bell**

-v- Hon. Daniel Toroitich Arap Moi & Another, [SC Application No. 1 of 2015] (UR) and Telkom Kenya Limited -v- John Ochanda, [Motion No. 17 of 2014] (UR).

0. The principles are:

- "(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 questions of law must have arisen in the Court or Court's 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 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 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 to 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".*
0. We also add that only one question of general public importance need be demonstrated for certification to be granted. (See Muiri Coffee Estate -v- Kenya Commercial Bank Ltd., & Another, [2014] eKLR).

0. Before we consider whether the applicant has demonstrated a matter or matters of general public importance, we think it appropriate to dispose of three points of objection which in reality challenge the competence of this application. The first objection is procedurally grounded. It is contended that this application should not have been filed within the appeal as the appeal has already been determined. The objection, in our view, has basis as the practice is to lodge such an application separately. However, nothing should turn on this procedural objection as the respondents have not demonstrated that they have suffered any prejudice by reason of the defect in procedure. The respondents fully responded to the application by affidavit, written submissions and oral submissions. In the event, we shall overlook the procedural defect to which our registry may very well have contributed.

[16] The second objection taken by the respondents is that the application was filed by advocates who were not properly on record. The basis of the objection was that the said advocates did not represent the applicant at the canvassing of the appeal and should therefore have, before acting, filed a Notice of Change of Advocates under **Rule 23 (1)** of this **Court's Rules**. Again, nothing turns on the failure to file a Notice of Change of Advocates. In our view, such failure is not fatal and to sustain the objection would offend the overriding objective of the **Appellate Jurisdiction Act** provided in **Section 3A** and **3B** and **Article 159 (2) (d)** of the **Constitution 2010**. We can also say without finally determining the issue that these proceedings are independent and we entertain doubt whether a Notice of Change of Advocates would be necessary. See also **Ministry for Internal Security & Provincial Administration -v- Centre for Rights Education & Awareness (CREAW) & Others, 2013**, [Civil Appeal No. 218 of 2012] eKLR.

[17] Thirdly, the respondents challenged the application on the ground that it was an abuse of the process of the Court as the applicant had simultaneously lodged another application before the Supreme Court seeking the same relief. The applicant freely acknowledged filing the application before the Supreme Court but submitted that the Supreme Court had declined to grant him leave while this application was pending before this Court. We would have had no hesitation in dismissing or striking out this application if the application before the Supreme Court was alive. The legitimacy of this application was indeed acknowledged by the Supreme Court.

[18] The respondents have also contended that this application has been lodged too late and its Notice of Appeal which should be the foundation of the application was also filed late. The judgment intended to be challenged is dated 13th January, 2014. It had been preceded by the order of 21st November, 2013, which contained the orders of the Court in outline form. The judgment of 13th January, 2014 contained the full reasons for the orders made on 21st November, 2013. Given the orders of 21st November, 2013, and the time the Notice of Appeal was filed on 2nd December, 2013, our conclusion is that the applicant is not guilty of any delay in lodging its Notice of Appeal. (See the then **Rule 30 (3)** of the **Supreme Court Rules 2012**).

[19] With regard to the notice of motion, we observe that it was lodged on 21st February, 2014. That was a period of about three months from the time the orders of 21st November, 2013 were made and a period of 1 month and 8 days from the date the judgment of 13th January, 2014, was delivered. The Supreme Court Rules do not give a time limitation for lodging an application for certification. We would, in the premises, not hazard a guess as to when the delay may be deemed inordinate. That is a subject for another day. For now, however, we are content to state that there is nothing which would prevent us from considering the applicant's notice of motion. We proceed to consider the same on its merits.

0. On the argument that election matters are *ipso facto* matters of general public importance and we should certify that the intended appeal, as it is on an election matter, raises matters of general public importance, our view is that the contention offends the principles set on in **Hermanus Phillipus Steyn -v- Giovanni Gnechi - Ruscone**, case (supra). The character or type of case is not a relevant factor. The applicant still has the obligation to identify and concisely set out the specific elements of general public importance which he attributes to the matter for which certification is sought. The fact that the dispute is an election dispute, *per se*, is not sufficient for certification.

0. The applicant will further, in the intended appeal ask the Supreme Court to delineate the limits of **Articles 81, 83 and 86** of the **Constitution**. Our perusal of the judgments of the High Court and this Court does not show that the two courts were called upon to interpret those provisions of the Constitution. True, those provisions were necessarily considered so far as relevant to their decisions but there was no issue framed requiring the interpretation or application of those provisions and full arguments were not made on their interpretation or application. Indeed, if the applicant was of the view that the said provisions of the Constitution or any other provisions of the Constitution were wrongly interpreted or applied, he would not have sought certification to go to the Supreme Court, as under **Article 163 (4), (a)** of the **Constitution**, the applicant had direct right of appeal to the Supreme Court in any case involving the interpretation or application of the Constitution. We adopt what the Supreme Court stated in **Hermanus Phillipus Steyn**, (supra) that:

"(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 final appeal to the Supreme Court must still fall within the terms of Article 163 (4), (b) of the Constitution".

[22] The third issue identified by the applicant as being of general public importance is the security of counter-foils of used ballot papers. The manner in which the question has been framed, in our view, demonstrates, beyond peradventure, that the issue does not raise a matter of general public importance. The applicant seeks the Supreme Court:

"(d) To determine the proper and/or lawful mode of delivering tamper proof sealed envelopes containing the counter-foils of the used ballot papers in view of the practice by presiding officers to seal them in the ballot boxes vis-a-vis the decision of the Court of Appeal in the instant case that the counter-foils are not required to be sealed in the ballot box although Regulation 86 does not explicitly state so".

[23] There is no allegation that this Court misapprehended the relevant law or regulation or that its decision is in conflict with other decisions on the same issue. There is also no demonstration that the practice alleged is notorious as no other case was cited where the practice was said to be proper and should be adopted. In any event how can the issue as framed be described as a matter of general public importance? Just because this Court stated what the correct position in law is as opposed to a practice which election officers applied in the subject election, in our view, cannot satisfy the principles outlined in **Hermanus Phillipus Steyn**, case (supra). The issue neither transcends the circumstances of the dispute between the parties herein nor is it a substantial one determination of which has significant bearing on the public interest. [24] The last issue identified by the applicant is that the Supreme Court should determine whether leave is required to appeal to the Supreme Court from the Court of Appeal in election disputes. The short answer is that leave will be required if the application is made under **Article 163 (4) (b)** of the **Constitution**. It is only where the case involves the interpretation or application of the Constitution that an appeal lies as of right to the Supreme Court under **Article 163 (4), (a)** of the same **Constitution**. The provisions of **Article 163 (4)** are plain and the applicant has not demonstrated a case for certification for further input of the Supreme Court on the issue regarding the requirement of leave to appeal from this Court in election disputes.

The upshot of our above consideration is that we find no merit in the applicant's notice of motion dated 19th February, 2014. We dismiss it with costs.

Dated and delivered at Nairobi this 17th day of June., 2016.

G. B. M. KARIUKI, SC,

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JUDGE OF APPEAL

P. M.MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR