IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 31 OF 2015

BETWEEN

KENFREIGHT (E.A) LIMITED……...…….…….APPLICANT

AND

BENSON K. NGUTI…….....……RESPONDENT

(Being an appeal from the Judgment of the Industrial Court of Kenya at Mombasa (Makau, J.) dated 13th June, 2014

in

I.C.C No. 146 of 2013)

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RULING OF THE COURT

On the 11th day of March, 2016, this Court rendered its judgment in an appeal between the applicant and the respondent and dismissed the applicant's appeal. That appeal had been precipitated by the judgment of the Employment and Labour Relations Court ("**ELRC")** sitting in Mombasa delivered on 13th June, 2014.

The case before that court was that the respondent had been in the employment of the applicant in a career spanning over fourteen years which was however terminated by a letter dated 26th November, 2010 by the applicant. The respondent had by then risen to the position of the applicant's General Manager. Vide that letter, the respondent was informed that his services had been terminated with effect from 1st December, 2010 and that he would be paid his terminal dues.

The respondent however, instituted the suit against the applicant claiming that the termination of his employment was illegal, wrongful, unfair and discriminatory and sought damages therefor. The respondent's claim was denied by the applicant. After a full hearing, the Judge found in favour of the respondent and held that the applicant did not prove any justifiable cause for terminating the respondent's services and declared the respondent's termination unfair and unlawful. He was accordingly awarded damages.

Aggrieved by that decision, the applicant lodged an appeal before this Court and as already stated, this

Court upheld the ELRC's decision and dismissed the appeal. That dismissal would have put this matter to rest but it appears that the applicant still remains aggrieved and undeterred. So on 30th March 2016, a Notice of Appeal was filed to signal its intention to appeal the decision of this Court to the highest court in the land under the hierarchy of our court system, the Supreme Court.

Subsequently, a motion on notice dated 14th April 2016 was filed. It was expressed to be brought pursuant to **Articles 163 (3) (b)** and **(4) (b)** of the Constitution of Kenya, **Sections 15** and **16** of the Supreme Court Act, **Rules 24 (1)** and **31 (2)** of the Supreme Court Rules and **Sections 3A** and **3B** of the Appellate Jurisdiction Act. The application sought principally two orders; first this Court's leave to allow the applicant to appeal from its judgment to the Supreme Court, and second, a stay of execution of the decree.

In the applicant's affidavit, sworn by one **Bernard O. Ogajas** in support of the application, it is deponed that this Court's decision on the appeal between the applicant and the respondent involved the interpretation and application of the provisions of the Employment Act 2007, regarding the termination of employment based on the contractual notice period and what damages would be payable in case of such termination. Further, that there were now two conflicting decisions of this Court on the issue, that is, the decision that is the subject of this application and **Civil Appeal No. 199 of 2013 CMC Aviation-vs-Captain Mohamed Noor** "**the CMC**" case. To the applicant these decisions create a state of uncertainty and that it was in the public interest and for the common good that the law is clarified such that courts can administer the law not only for purposes of the instant case but also in future cases. The applicant deposed that:-

> **"The matter was of general public importance and goes well beyond the facts of this case…. beyond the parties of this case and touches upon the manner in which all employer/employee relationships shall be governed in so far as the question of the applicability of the contractual notice period is concerned in instances of termination of employment thereunder**."

According to the applicant, it was held in the appeal that was before us that the respondent's termination was unfair despite the fact that the applicant had complied with the provisions of **Section 35** of the Employment Act by paying the respondent one month's salary in lieu of notice and thereafter proceeded to interpret the applicability of the statutory provisions of the Employment Act to situations where the court was of the view that termination had been unfair. This Court then held that the law demanded that in case of unfair termination as was the case in the appeal, the respondent was entitled to 12 months' pay based on the provisions of **Sections 43, 45** and **49** of the Employment Act, 2007.

However, according to the applicant, this Court had taken a different and divergent view in the CMC case in that it held that even where the termination was found to be unfair, an award of one month's salary, in lieu of notice would be the only payment having regard to the notice period provided in the contract of employment. Given the divergent positions, the applicant was of the view that it was imperative that the conflicting positions be resolved by the Supreme Court for the benefit of the public at large and particularly, so that employers and employees would be able to tell with some degree of certainty the likely consequences of their actions and for the sake of uniformity of the law in the future.

The application was opposed by the respondent through his replying affidavit sworn on 30th May 2016. The respondent deponed that the application did not meet the constitutional threshold to warrant this Court's leave to appeal to the Supreme Court. That there was no element of general public importance involved that transcended the interest of the parties to the litigation as would impact on society. Further, that the application raised no important or cardinal issues or questions of law of jurisprudential moment that deserved further input of the Supreme Court. The respondent denied that there was any uncertainty of the applicable law as the law was well settled by statute. The respondent opined that the intended appeal purportedly sought to clarify errors of law or fact which fell outside the Supreme Court's mandate. He further deponed that the Court of Appeal had the competence and proper safety designs to resolve all matters turning on technical complexity of the law. Finally, the respondent stated that the CMC case was determined on its own peculiar circumstances. On the whole however, what was in question according to counsel, was when an appellate court can interfere with the exercise of discretion of the trial court. That

is an issue which was settled long ago.

During the hearing of the application **Mr. Khagram**, learned counsel for the applicant, submitted that the matter affected the entire labour movement and the uncertainty needed to be clarified. **Mr. Mogaka**, learned counsel for the respondent on the other hand, reiterated the contents of the respondent's replying affidavit. He denied that there was conflicting decisions of the court, and that in any event the statutory law had clarified the applicable position. Further, that according to **Section 49** of the Employment Act, reliefs were discretionary and that the facts of each case were distinguishable and were duly considered by the Court. According to counsel, the Court considered the different circumstances of each case in reaching the decisions. He submitted that in the CMC case, there was no claim for unfair termination and the court had given the reasons for the award.

It is evident that the applicant wishes to exercise the right of appeal provided for in **Article 164 (4)** of the Constitution. Under that Article, appeals from this Court to the Supreme Court lie as of right where they involve interpretation or application of the Constitution. However, all other appeals must meet the stricture set thereunder; that this Court or the Supreme Court's certification must first be obtained before the Supreme Court hears them. The only stricture or requirement is that the intended appeal must raise a matter of general public importance which this Court or the Supreme Court must certify.

It has been held that though a litigant may, when seeking leave to appeal to the Supreme Court, make the application directly to the Supreme Court, it is good practice that the application be made first in the Court of Appeal which has been seized of the matter and has had the advantage of assessing the facts and the legal arguments. (See **Sum Model Industries Ltd v Industrial and Commercial Development Corporation, SC Civil Application No. 1 of 2011**). Therefore, in the exercise of this mandate, the Court of Appeal has grappled with the question of what is a matter of general public importance and pronounced itself many a time. In fact, just recently this Court in **Civil Application No. 16 of 2016 Mtana Lewa v Kahindi Ngala Mwagadi (2016) eKLR,** rendered itself as below:-

> **"What goes in defining or determining what constitutes** *"matters of general public importance"* **(was identified in their essence) by the Supreme Court in the case of Hermanus Phillipus Styen case** *(supra).* **These, for convenience, may be set out as follows:-**
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> > "(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;
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> > **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 granting certification **for an appeal before the Supreme Court**." (Our emphasis).

More recently, the same court added a further limb to the above principles in the case of Town Council of Awendo v Nelson Oduor Onyango & 13 others [2015] eKLR, in the following terms:-

"…From the content of paragraphs 32 and 34, it emerges that while this Court did, in the Hermanus Phillipus Steyn and Malcolm Bell cases, set out an elaborate set of criteria for ascertaining "matters of general public importance" for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, which impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of "matters of general public importance…."

Therefore the sole consideration or question before this Court is whether the intended appeal raises a matter of general public importance. A reading of the grounds set out in the body of the application shows that the application is predicated on the grounds that:-

"(a) The Applicant is aggrieved by the decision and Judgment of this Honourable Court made and delivered on 11th March 2016 and has lodged a Notice of Appeal to the Supreme Court to Appeal against the whole of the said decision;

(b) The aforesaid decision is in conflict with and at cross-purposes with another decision of the Court of Appeal delivered in April 2015 in (CMC AVIATION-V-MOHAMMED NOOR (NRB CIVIL APPEAL NO. 199 OF 2013) on the question of interpretation and effect of the Provisions of Employment Act 2007 on termination effected pursuant to contractual notice periods;

(c) It is in the general public interest as well as to avoid a substantial miscarriage of justice for this apparent conflict in the decisions and interpretation of the relevant provisions of the Employment Act, 2007 to be resolved so as to enable courts to administer the law appropriately not in the instant case but in the future too."

It is clear from the applicant's case that its main bone of contention is that in the CMC case, the Court held that the respondent was only entitled to one month and not to twelve (12) months' gross pay as compensation for wrongful dismissal. However, in the instant appeal, this bench upheld the decision of the ELRC that the respondent was entitled to the 12 months' pay based on the provisions of **Sections 43, 45** and **49** of the Employment Act. In both instances, there was a contract of employment that stipulated that the contracts were terminable by one month's notice or one month's salary in lieu of notice. A reading of the judgment in the CMC case shows how the court arrived at the decision. The Court delivered itself thus;

"**We now turn to the award of US$ 108,000 being twelve months gross salary as compensation for unlawful loss of employment……We have already set out the remedies for wrongful dismissal and unfair termination as stipulated under** *section 49* **of the Act. The trial court did not state why it opted to give the remedy provided under** *section 49 (1) (c)* **that is, twelve months gross salary, and not the other remedies under** *section 49 (1) (a)* **or** *(b).* **The court should have been guided by the provisions of** *section 49 (4)* **but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did.……The respondent was serving a two year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of** *sections 41* **and** *45* **of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory**

procedure the dismissal was found to be unfair, which we agree. Taking all into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal" [Emphasis added]

From the above extract it's discernable that the court upheld the decision of the trial court on the premise that it had not exercised his discretion judiciously. The principles upon which an appellate court can interfere with the discretion of the trial are well known and settled. See **Mbogo & Another v Shah [1968] EA 93 at page 95.**

The Court in CMC case could only interfere with the exercise of the lower court's discretion where there was proof that the lower court was clearly wrong because of misdirection or for failing to take into account matters that should have been taken into account or for taking into account matters that should not have been taken into account. [See also **Matiba v Moi & 2 Others, [2008] 1 KLR 670**]. As is also discernable from the judgment, the decision to award the respondent one month's salary in lieu of notice was reached after consideration of all the peculiar circumstances of the case. Not two cases are alike and eventually each must be decided or must turn on its own set of circumstances and facts.

Turning to the present case, this Court also considered the circumstances upon which the respondent's services were terminated by the applicant as follows:-

"….**It is apparent from the e-mail directing the respondent not to report to work and surrender company assets that the respondent's employment was terminated before the termination letter was issued.**

Having rendered service to the appellant for over 14 years and considering his rank, we think he was unnecessarily subjected to an unfair and shabby treatment. No one even the respondent himself could be able to tell at the end of the day the reason for his termination".

It was conceded that the complainant was replaced by a Belgian national (like the Group Managing Director) immediately after termination of his employment, confirming that the respondent's position that he was treated in a discriminatory manner."

Further facts show that the respondent had received an email from the Group Managing Director on a Saturday, while taking his wife to undergo surgery, a fact which the manager was aware, demanding him to surrender the company's official car and mobile phone. When he went to the offices in compliance, he was mistreated by the security guards which this Court held was abhorrent. This Court therefore came to the same conclusion as the learned trial Judge that indeed the termination of the respondent's contract of service was, in the circumstances, unfair, the payment of the one's month salary in lieu of notice notwithstanding. The award of 12 months gross salary as per **Section 49 (c)** as opposed to either **Section 49 (a)** or **(b)** of the Act by the trial Judge was upheld since it was awarded in the exercise of the trial Judge's discretion which this Court agreed was exercised judiciously. The trial Judge had considered the respondent's rank and the difficulty he was likely to face before he could be employed as well as the applicant's conduct. That was the basis upon which the court upheld the trial court's exercise of discretion. As correctly observed by Mr. Mogaka, the issue in dispute is catered for under the Employment Act and the relief thereunder is discretionary.

It is apparent from the above discourse that any intended appeal to the Supreme Court would therefore entail the Supreme Court deciding upon a question(s) of law which is or are well settled and which does or do not warrant any further input by the said court, that is, exercise of discretion.

In our view, there are no conflicting decisions of this Court that warrant the Supreme Court's intervention. The application must therefore fail and is dismissed. We make no orders as to costs.

Dated and delivered at Malindi this 1st day of July, 2016.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR