IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & OUKO, JJ.A)

CIVIL APPLICATION NO. 45 OF 2013

BETWEEN

KIRAN CHANDUBHAI PATEL …….. APPLICANT

AND

TRANSWORLD SAFARIS LIMITED ……...……. RESPONDENT

(An application for leave to appeal from the judgment at Nairobi (Visram, Nambuye & Maraga, JJ.A) dated 8th February 2013

in

MISC. CIVIL APPL. NO. 238 OF 2003)

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RULING OF THE COURT

It is now firmly established by the judicial authorities of this Court and those of the Supreme Court that for this Court to grant a certificate to a party to challenge its decision to the Supreme Court under **Article 163 (4) (b)** of the Constitution, the applicant must demonstrate that the intended appeal involves a matter of general public importance.

The threshold of "*general public importance*" has been defined variously to embody the following principles:

i. a clear formulated definition of what in the intended appeal amounts to a matter of general public importance. See **Steyn V. Gnecchi – Ruscone** [2013] 2 EA 348 and **Koinange Investments & Development Ltd V. Robert Nelson Ngethe** SC Appl. No. 4 of 2013;

ii. the matter must be one the determination of which transcends the circumstances of the particular

case with significant bearing on the public interest;

iii. where the matter involves a point of law, the point must be substantial, so that its determination will have a significant bearing on the public interest;

iv. such question(s) of law must have arisen in this Court and must have been the subject of judicial determination.

v. issues of law of repeated occurrence in the general course of litigation may amount to matters of general public importance;

vi. questions of law that are, as a matter of fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general or of litigants may constitute matters of general public importance;

vii. questions bearing on the proper conduct of the administration of justice may equally amount to matters of general public importance. See **Koinange Investment & Development Ltd** (supra) and **Mwangi Stephen Muriithi V. Daniel Toroitich Arap Moi & Another** Civil Application No. Sup. 10 of 2014 (UR 7/2014).

viii. the determination of fact in contest between parties are not by and of themselves a basis for granting certification for an appeal to the Supreme Court;

ix. certification of a matter as one raising matters of general public importance is justified only in exceptional cases that raise cardinal issues of law or of jurisprudential moment, respecting and upholding the jurisdictional set up of courts running up to the Court of Appeal with professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law. See **Peter Oduor Ngoge V. Francis ole Kaparo & 5 others** SC Petition No. 2 of 2012;

x. the jurisdiction under **Article 163 (4) (b)** is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law.

Having set out the limits of jurisdiction of this Court in terms of **Article 163 (4) (b)** of the Constitution we turn to consider their application to this motion. Needless to state, the application seeks that this:

"……..Honourable Court be pleased to grant the applicant leave to appeal the judgment of the honourable court delivered herein on 8th February 2013", though not stated, to the Supreme Court. The heading of the application does not cite **Article 163 (4) (b)** aforesaid, which is the foundation of any application for leave (or certificate) to challenge the decision of this Court to the Supreme Court.

The dispute is traceable to a plaint filed in Nbi HCCC No. 2786 of 1998 by the respondent, Transworld Safaris Limited, against the applicant, Kiran Chandubhai Patel & Others for the recovery of rental arrears in the sum of US $ 88,176 in respect of L.R No. 209/8385 LANGATA HOUSE which had been leased to the applicant and guaranteed by those others.

Before filing a defence, the applicant brought an application for stay of proceedings pending the determination of the dispute under **section 6 (1)** of the Arbitration Act. The proceedings were accordingly stayed. Pursuant to this, the respondent appointed Mr. Justice (retired) Torgbor and asked the applicant to likewise appoint, within 7 days, an arbitrator to represent his interest in the arbitration. After the applicant failed to respond to that invitation the sole arbitrator set the dispute down for directions. Even on this occasion the applicant did not avail himself with the result that directions on the manner of hearing of the arbitration were issued in his absence.

Further directions were issued on 15th December 1999 (requiring each party to make part payment of Kshs.50,000 towards arbitration costs) and on 11th January 2000 (directing the 3rd and 4th defendants in

the suit to file their defences by 21st January 2000).

After an objection to the jurisdiction of the arbitrator was dismissed by the arbitrator and a judicial review application to the High Court similarly dismissed by Rawal, J (as she then was) the applicant amended his defence and filed written submissions. The arbitrator thereafter made an award and asked the parties to collect it upon payment of his fees.

After the applicant failed to pay, the respondent did so and collected the award and demanded the payment of the award from the applicant. There was once again no response prompting the respondent to seek enforcement of the award in the High Court. The applicant responded to this by filing an application to strike out both the award and the application for enforcement. Nyamu, J. (as he then was) dismissed the application provoking Civil Appeal No. 216 of 2003 to this Court. Visram, Nambuye & Maraga, JJ.A found in favour of the respondent and held that;

i. the agreement between the disputants had an arbitral clause requiring any dispute between them regarding the lease to be referred to arbitration.

ii. the applicant was duly notified of both the appointment of the arbitrator and the availability of the award for collection.

iii. the arbitrator had jurisdiction to entertain the dispute.

iv. although the issue of forfeiture was exempted from arbitration proceedings, the applicant by his conduct had waived the exemption and given the arbitrator an open invitation to interrogate and determine the issue by placing it in his defence and submissions.

v. the award was deemed to have been delivered to the applicant when he was informed that it was ready for collection upon payment of the fees.

vi. having failed to raise the question of arbitrator's fees before the arbitrator or at any other stage in writing, the applicant took a risk to be confronted by unilateral fees and in any case this is not one of the prerequisites for setting aside an arbitral award as it does not amount to having pecuniary interest in the subject matter.

vii. there was an error on the part of the learned Judge in relying on foreign authorities since his construction and interpretation of the law was improper.

It is this determination that the applicant now wishes to challenge, with leave of this court, to the Supreme Court, and to ask, among other questions,

i. whether the presumption by the Court that the award was read in the manner alleged did deny the applicant his fundamental right to access to justice and to a fair determination of his appeal.

ii. whether the Court did not erroneously legitimize an arbitrary waiver of due process and the applicant's fundamental rights to protection of the law thereby violated.

iii. whether the Court did not erroneously legitimize the arbitrary levy of onerous and unreasonable costs without due process thereby denying the applicant the rights guaranteed by **Article 22** of the Constitution.

iv. Whether the court did not erroneously legitimatize the appointment of the arbitrator contrary to the terms of arbitration agreement as read together with the Arbitration Act, 1995.

Mr. Wamalwa, for the applicant, urged us to find that these grounds and those contained in the draft memorandum of appeal raise matters of general public importance and to grant the applicant leave to move to the Supreme Court.

Mr. Mayende for the respondent was of the contrary view. He submitted that the application does not meet the threshold to warrant the certificate it seeks; that the matter arises from a determination of a private contract dispute.

We have looked keenly at the grounds proffered both in this application and in the draft memorandum of appeal and it is clear to us that the intended challenge is based on the alleged errors committed by this Court in its interpretation of the Arbitration Act, the application of evidence and violation of the applicant's fundamental rights. Regarding the latter complaint, in terms of **Article 163 (4) (a)** appeals to the Supreme Court from the decision of this Court lie as of right.

The other grounds turn squarely on the interpretation and application of the Arbitration Act in so far as the terms of the lease agreement between the parties was concerned. In particular, the question before the two courts was whether the applicant had placed before Nyamu, J. a basis for striking out the arbitrator's award and the respondent's application for the enforcement of the award. It was the applicant's case that the arbitrator had not been validly appointed; that the arbitrator had no jurisdiction to entertain the dispute; that the arbitrator violated the rules of natural justice by giving the award without hearing the applicant; and that he unilaterally awarded himself fees. In view of the decision reached on each of these grounds by this Court, we do not see how those questions transcend the circumstances of the dispute between the parties herein or the significant public bearing in them. The applicant does not claim that there is uncertainty in the law regarding the grounds upon which arbitral awards may be set aside.

This was a determination of fact in a contest between the parties which does not meet the threshold of "*a matter of general public importance*".

We find no merit in this application. It is dismissed with costs to the respondent in the motion dated 21st February, 2013.

Dated and delivered at Nairobi this 29th day of May 2015.

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mgkm