



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, MWILU & OTIENO-ODEK, JJA)**

**CIVIL APPLICATION NO. SUP. 7 OF 2015**

**Dr. WILFRIDA ITOLONDO.....1ST APPLICANT**

**Dr. MUMAH SOLOMON.....2ND APPLICANT**

**Dr. ELENA KORIRI.....3RD APPLICANT**

**MARTHA MIYANDAZI.....4TH APPLICANT**

**FRED OBARE.....5TH APPLICANT**

**AND**

**THE PRESIDENT.....1ST RESPONDENT**

**THE ATTORNEY GENERAL .....2ND RESPONDENT**

**THE COUNCIL, KENYATTA UNIVERSITY .....3RD RESPONDENT**

**THE CHANCELLOR, KENYATTA UNIVERSITY .....4TH RESPONDENT**

**THE MINISTER FOR HIGHER EDUCATION SCIENCE**

**AND TECHNOLOGY.....5TH RESPONDENT**

**PROF. OLIVE MWIHAKI MUGANDA .....6TH RESPONDENT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....7TH RESPONDENT**

**NATIONAL COHESION & INTEGRATION COMMISSION .....8TH RESPONDENT**

*(An application for leave to appeal to the Supreme Court of Kenya from the judgment of the Court of Appeal at Nairobi (W. Karanja, Mwera & Kiage, JJA) dated 11<sup>th</sup> May 2015*

**in**

**Civil Appeal No. 120 of 2014)**

## RULING OF THE COURT

1. The applicants, acting in person, moved this Court by Notice of Motion dated 25<sup>th</sup> May 2015, seeking certification and leave to appeal to the Supreme Court. The face of the application indicates that the same is grounded upon **Article 164(3) (4) (b)** of the 2010 Constitution. The order sought is for this Court do certify that a matter of great public importance is to be canvassed in the intended appeal.
2. The intended appeal to the Supreme Court is against the judgment of this Court dated 11<sup>th</sup> May 2015. The dispute between the parties relates to the re-appointment of the 6<sup>th</sup> respondent, **Prof. Olive Mwihaki Mugenda**, as Vice Chancellor of Kenyatta University by the 1<sup>st</sup> Respondent who is the sitting President of the Republic of Kenya. The applicants by way of judicial review sought orders of *mandamus* and prohibition to issue against the respondents to restrain the 6<sup>th</sup> respondent from acting as Vice Chancellor of the University and to compel the respondents to undertake the process to appoint or re-appoint the Vice Chancellor according to **Section 10** of the now repealed **Kenyatta University Act**. The learned judge of the High Court declined to grant the judicial review orders prompting the applicants to lodge an appeal to this Court; the appeal was dismissed by the judgment dated 11<sup>th</sup> May 2015 prompting the instant application for certification and leave to appeal to the Supreme Court.
3. The ground in support of the application is that a matter of general public importance is to be canvassed in the intended appeal; that the suit is of public interest because the High Court on 10<sup>th</sup> July 2012 certified the suit as being of public interest; that the High Court in a ruling delivered on 6<sup>th</sup> June 2013 in **JR No. 232 of 2012** acknowledged that the suit was of great public interest and or of substantial national importance and that Kenyatta University is a public institution of higher learning with nationwide enrolment of students and employing thousands of Kenyans.
4. The applicants at paragraph 3 of the Motion specify constitutional issues relevant to the intended appeal urging that in its judgment, this Court misdirected itself when it failed to uphold and defend the supremacy of the Constitution pursuant to **Articles 2** and **3** thereof; that this Court erred in holding that the 6<sup>th</sup> respondent was legally re-appointed as Vice Chancellor yet the re-appointment was contrary to **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution; that this Court misdirected itself by distorting the definition of the term re-appointment thereby leading to violation of the Constitution and miscarriage of justice; that this Court misdirected itself in finding that the applicants did not table a list of authorities and the Court erred in awarding costs to the respondents.
5. In opposing the application, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, **The Council of Kenyatta University** and **The Chancellor of Kenyatta University**, filed a joint affidavit deposed to by Prof. Paul K. Wainaina dated 30<sup>th</sup> June 2015. The core of the replying affidavit is that there is no issue of great public interest and the instant application does not meet the threshold set out in **Article 163 (3)** and **(4)** of the Constitution; that the applicants have failed to identify and concisely set out the specific elements of general public importance which they attribute to the matter; that the applicant has failed to demonstrate that germane issues of law that transcend the circumstances of this case have arisen; that the applicants seek to canvass grounds which were neither pleaded nor prayed for in their application before the High Court; and that no uncertain points of law that require clarification by the Supreme Court have been identified.
6. The 6<sup>th</sup> respondent filed her replying affidavit opposing the application urging that the same does not demonstrate that the issues transcend the circumstances of this case or that the matter has a bearing on public interest; that the question sought to be raised in the Supreme Court does not go beyond the facts and circumstances of this case; that at no point did the High Court determine this suit to be of public interest; that the question whether the 6<sup>th</sup> respondent was validly re-appointed as Vice Chancellor is not of public interest; that the issue of quashing her re-appointment as Vice Chancellor was not pleaded

before the High Court; that mere apprehension of miscarriage of justice is not a ground for leave and certification to the Supreme Court and that the applicants have not demonstrated with any level of precision the points of law they wish to raise before the Supreme Court.

7. At the hearing of this application, the applicants acted in person; learned counsel Ms Judy Shamalla for the 7<sup>th</sup> respondent and holding brief for learned counsel Ms Scola Mbilo for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> urged the case for all those respondents; learned counsel Mr. Emmanuel Wetangula appeared for the 3<sup>rd</sup> and 4<sup>th</sup> respondents while learned counsel Mr. Wilson Mwihuri appeared for the 6<sup>th</sup> respondent.

8. Dr. Itolondo submitted on behalf of the applicants and urged this Court to grant leave to appeal to the Supreme Court and certify that a matter of general public importance is to be canvassed in the intended appeal. The applicants reiterated the ground stated in the Notice of Motion and the replying affidavit in support thereof. It was submitted that the 1<sup>st</sup> respondent as the appointing authority did not follow the provisions of **Section 10** of the now repealed **Kenyatta University Act** as read with **Articles 134 (1), (2) (b)** of the Constitution; that **Article 135** of the Constitution requires any decision of the 1<sup>st</sup> respondent to be evidenced in writing and this Article was violated; that the members of the public were never informed by way of advertisement or otherwise that a vacancy had arisen for the position of Vice Chancellor of Kenyatta University to enable a competitive recruitment or reappointment process to be undertaken; that the right of public participation as stipulated in **Article 35 (1) (a), (3)** and **Article 232 (1) (g)** were violated; that the 1<sup>st</sup> respondent violated several Articles of the Constitution more specifically **Articles 10, 35, 73** and **232**; that **Article 73** is critical as it touches on integrity of statutory officers; that the Constitution requires transparency, inclusiveness and competitiveness in recruitment of statutory officers and these were not observed by the 1<sup>st</sup> respondent.

9. The applicants emphasized that there is public interest in this matter because Kenyatta University is a public institution with nationwide enrolment of students; that the High Court had identified the suit as one of public interest. The applicant's cited the following cases in support of their submissions: **Centre for Human Rights & Democracy -v- Moi Teaching and Referral Hospital, & 2 Others [2011] eKLR; Benson Riitho Mureithi -v- J. W. Wakhungu & 2 Others [2014] eKLR; Mumo Matemu -v- Trusted Society of Human Rights & Others, [2013] eKLR. The applicants submitted that all the foregoing illustrate that appointment to a statutory office is a matter of public interest.**

10. Counsel for the respondents in their respective submissions urged this Court to decline certification and turn down leave to appeal; the gravamen of the respondents submission was that the applicants had not demonstrated that the issues to be canvassed in the intended appeal transcend the interest of the parties in this case; that the threshold for invoking the Supreme Court's jurisdiction under **Article 163 (4) (b)** had not been met; that the applicants had not demonstrated how the intended appeal would impact the society; that the applicants are simply keen on challenging this Court's judgment; that no question of public interest is disclosed for determination by the Supreme Court; there is no cardinal issue of law that requires resolution by the Supreme Court and the criteria for determining whether a matter is of general public importance as set out by the Supreme Court in the case of **Hermanus Philipus Styen -vs- Giovanni Gnechi-Ruscione - Civil Application No. Nai. Sup.4 of 2012** had not been met.

11. We have considered the application, the grounds and affidavit in support and opposition thereof as well as the able submissions by the applicants and all learned counsel. An appeal from this Court to the Supreme Court arises in only two instances as set out in **Article 163(4)** of the Constitution. The said Article provides:-

**“163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**

**(a) As of right in any case involving the interpretation or application of this Constitution; and**

**(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, subject to clause (5).”**

12. The applicant premised its application on **Article 163 (4) (b)** of the Constitution submitting that a matter of general public importance is involved. It is for us to determine whether indeed a matter of general public importance is disclosed. This Court in **Hermanus Philipus Styen -vs- Giovanni Gneccchi-Ruscone - Civil Application No. Nai. Sup.4 of 2012** observed:-

**“...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. What constitutes a matter of general public importance? The Supreme Court of Kenya in ***Hermanus (supra)*** held: -

**“....a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad based, transcending the litigation-interests of the parties, and bearing upon the public interest.”**

The majority opinion in the aforementioned case set out the following as the governing principles in the determination of matter(s) of general public importance:-

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

(See also the Supreme Court’s decision in **Malcolm Bell -vs- Hon. Daniel Toroitich Arap Moi & another - Application No. 1 of 2013**).

14. At the heart of the dispute between the parties herein is the re-appointment of the 6<sup>th</sup> respondent as Vice Chancellor of Kenyatta University. Re-appointment to the position of Vice Chancellor was done pursuant to **Section 10** of the then **Kenyatta University Act** which was the enabling statutory instrument. The legal issue in our mind is whether any violation of statutory procedure or criteria for appointment or reappointment to a statutory office is a constitutional issue that can activate the appellate jurisdiction of the Supreme Court. We are of the view that if appointment to a statutory office is governed by an Act of

Parliament, contravention of the procedures stipulated in the Act does not necessarily activate and invoke the appellate jurisdiction of the Supreme Court; the rights of the parties and any remedy for violation must of necessity be sought in the legislative instrument governing the appointment or re-appointment. Not every violation of a statutory provision activates the appellate jurisdiction of the Supreme Court. The Supreme Court's appellate jurisdiction may only be activated if an issue of constitutional interpretation or application ensues from the judgment of this Court or a matter of general public importance is disclosed.

15. The applicants urge this Court to find that violation of the provisions of **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution in the process of re-appointment of the 6<sup>th</sup> respondent to the position of Vice Chancellor of Kenyatta University activate the appellate jurisdiction of the Supreme Court. Our reading of Article 163 (4) (a) of the Constitution shows that the appellate jurisdiction of the Supreme Court is invoked as of right if there is a question of interpretation or application of the Constitution (emphasis ours). The Supreme Court's appellate jurisdiction cannot be invoked on the basis that a constitutional provision has been violated; its jurisdiction may only be invoked if there is an issue of interpretation or application of the Constitution.

16. We have evaluated the grounds and affidavit in support of the present application and find that they do not reveal any issue or question of interpretation of the Constitution.

The applicants are not inviting the Supreme Court to interpret **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution. For this reason, we find that despite the applicants citing **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution, the requirement of **Article 163 (4) (a)** has not been established to activate the appellate jurisdiction of the Supreme Court as a matter involving interpretation of the Constitution.

17. The next issue for us to consider is whether the present application satisfies the threshold under **Article 163 (4) (a)** of the Constitution in relation to application of the Constitution. The applicants submitted that the point of law to be urged in the intended appeal is the application of **Section 10** of the now repealed **Kenyatta University Act** as read with **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution of the Constitution.

18. We note that the instant application does not cite **Article 163 (4) (a)** of the Constitution. It is not fatal to fail to cite a constitutional provision to invoke the Supreme Court's jurisdiction. In **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, the Supreme Court has held that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application. We are of the view that failure by the applicants to cite **Article 163 (4) (a)** as the basis of their application is not fatal. We are minded of the obligation reposed on courts under **Article 159 (2) (d)** of the Constitution to administer justice without undue regard to technicalities.

19. Appeals to the Supreme Court as of right under **Article 163 (4) (a)** require criterion that the case either involves interpretation or application of the Constitution. The criteria in **Article 163 (4) (a)** is disjunctive not conjunctive.

20. In the instant application, it is intended that the Supreme Court should consider and determine whether in re-appointing the 6<sup>th</sup> Respondent as Vice Chancellor, the 1<sup>st</sup> respondent was under a constitutional obligation to apply and conform to **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution. It is the applicants' contention that the issue of application of the foregoing Constitutional Articles was raised, canvassed and determined both at the High Court and before this Court and as such, the appellate jurisdiction of the Supreme Court has been activated to determine if this Court correctly applied the foregoing Constitutional Articles.

21. This Court in its judgment observed that the relevant constitutional Articles to the case were **Articles 134 (2) (b), 135 and 232 (1) (g)**; this Court then proceeded to make a determination on the application of

Articles 134 and 135 to the facts of this case; it was held that the 1<sup>st</sup> respondent in re-appointing the 6<sup>th</sup> respondent was exercising statutory and not constitutional powers. On the application of Article 232 (1) (g), this Court held that the Article was inapplicable to the facts of this case because the 6<sup>th</sup> respondent was not being recruited but re-appointed; that the competitive requirement under Article 232(1) (g) of the Constitution does not apply to re-appointment and the aspect of competitive recruitment does not arise in this case.

22. Having perused the judgment of this Court, we are satisfied that an issue of application of **Articles 134 (2) (b), 135 and 232 (1) (g)** of the Constitution was raised, canvassed and determined by this Court. This Court also made a determination that **Articles 10, 73, and Section 7** of the Sixth Schedule to Constitution were irrelevant to this case.

23. From the foregoing, we are satisfied that the instant application discloses an issue on application of the Constitution. The applicants have demonstrated that the appellate jurisdiction of the Supreme Court under **Article 163 (4) (a)** of the Constitution should be invoked to determine the applicability of the identified Articles of the Constitution.

24. On the question whether a matter of general public importance is disclosed in the intended appeal, we are guided by the criteria set by the Supreme Court in the case of **Hermanus Philipus Steyn -vs- Giovanni Gnechi-Ruscione - Application No. 4 of 2012.**

25. Have the applicants demonstrated that there is a substantial point of law the determination of which will have a significant bearing on the public interest? We answer this question in the affirmative. Whether **Articles 10 and 73 and Section 7 of the sixth Schedule** are relevant and must be complied with in any statutory appointment is a substantial point of law that requires consideration, clarification and determination by the Supreme Court. Whether this Court correctly applied the provisions of **Articles 134, 135 and 232** of the Constitution are issues involving application of the Constitution. We are satisfied that these are points of law that arose before the High Court and in this Court and were subject to judicial determination. We are also satisfied that there are no contested issues of fact in the intended appeal.

26. We agree with the respondents that fear of miscarriage of justice cannot activate the appellate jurisdiction of the Supreme Court.

27. On the issue whether the intended appeal transcends the interest of the parties to this case, we are of the view that the procedure for appointment or reappointment of an individual to a statutory office is a matter of general public importance. We hasten to add that it is not the appointment of a specific individual that is of public importance but adherence to relevant procedures and the criteria to be adhered to is what is of public importance. We are satisfied that the issue in the intended appeal is the question of application and adherence to the identified Constitutional Articles in the process of re-appointment of the 6<sup>th</sup> respondent as an office bearer in a public institution. In our view, an inquiry into the mandatory nature or otherwise of application of **Articles 10, 73, 134, 135, 232 and Section 7** of the Sixth Schedule to Constitution in the process of appointment or re-appointment of persons to a statutory office are matters that transcend the interest of the parties to this case.

28. On the respondents submission that the applicants had not identified and concisely set out the specific elements of ‘general public importance’ which they attribute to the matter sought for certification; we are of the view that the requirement to identify and concisely set out the matters does not connote that enumeration, listing or numbering of the issues or questions for consideration by the Supreme Court should be done. It is sufficient if the question or issue for consideration is or are discernible and identifiable from the grounds and affidavit in support of the application. We are satisfied that the grounds and affidavit in support of the application identify one issue and point of law of general public importance to be considered in the intended appeal; the issue and question is as follows:

*Whether any of Articles 10, 73, 134, 135, 232 and Section 7 of the Sixth Schedule to Constitution is relevant and applicable and must be complied with in appointment or re-appointment of an individual to a statutory office?*

29. The upshot of our analysis and consideration of the application and submissions made in this matter is that we find the Notice of Motion dated 25<sup>th</sup> May 2015 has merit. We hereby allow the Motion, grant leave and issue a Certificate to appeal to the Supreme Court. We hereby certify that the question for determination by the Supreme Court is the following: whether any of **Articles 10, 73, 134, 135, 232** and **Section 7** of the Sixth Schedule to Constitution is relevant and applicable and must be complied with in appointment or re-appointment of an individual to a statutory office.

30. We are cognisant that under **Article 163 (4) (a)**, appeals to the Supreme Court is as of right. Under this limb, the applicants did not require leave and certification from this Court. However, since leave has been applied for, the Certificate herein is issued under the provisions of **Article 163 (4) (a)** of the Constitution that a matter involving the application of the Constitution is in issue. Certificate and leave is also issued pursuant to **Article 163 (b)** that a matter of general public importance has been disclosed.

31. Each party shall bear his/her/its costs in this application.

***Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2015.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**P.M. MWILU**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**