



**IN THE COURT OF APPEAL**

**AT MALINDI**

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

**CIVIL APPLICATION NO. 21 OF 2015**

**BETWEEN**

**LAWI DUDA & 21 OTHERS.....APPLICANTS**

**AND**

**BAMBURI CEMENT COMPANY LTD.....RESPONDENT**

***Application for certificate to appeal to the Supreme Court of Kenya from the ruling of the Court of Appeal at Malindi, (Okwengu, Makhandia & Sichale, J.J.A) dated 19<sup>th</sup> March 2015***

***in***

***CA No. 6 of 2013)***

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**RULING OF THE COURT**

By the motion on notice dated 30<sup>th</sup> April 2015, the 22 applicants seek a certificate from this Court that their intended appeal to the Supreme Court of Kenya raises matters of general public importance deserving the attention of that Court. It is trite that such a certificate is a prerequisite under **Article 163 (4) (b)** of the **Constitution** before the applicants can agitate their intended appeal in the final Court. The intended appeal is against the judgment of this Court (**Okwengu, Makhandia and Sichale, JJA**) dated 19<sup>th</sup> March 2015. By that judgment, the Court dismissed with costs the applicants' appeal and upheld a decision of the High Court, which found that the termination of their employment by the respondent was not unlawful.

The main matter of general public importance that the applicants claim to be involved in their intended appeal does not arise from any of the issue canvassed and determined by this Court in the appeal. Rather, what the applicants seek the Supreme Court to address is whether an order of this Court directing them to file written submissions and setting time limit for their counsel's oral address, is a violation of the right to fair trial under Article 50 (1) of the Constitution. The applicants believe that it is, and further that the issue is not only of concern to them, but also to many other litigants who have and are likely to have appeals in this Court. There are other secondary matters that the applicants contend to be of general public importance, which we shall advert to in due course.

The respondent, **Bamburi Cement Company Ltd**, on the other hand contends that the intended appeal

does not raise any issue of general public importance beyond the personal interests of the applicants; that the main issue that the Supreme Court is being asked to determine was never raised and determined by this Court; and that as regards the other issues that the applicants seek the Supreme Court to address, they are no more than a poorly disguised attempt to re-litigate the merits of their case before three courts.

Before we consider the merits of the application, it is apposite to briefly outline the background to the application, which stems from a claim for wrongful termination of employment lodged by the applicants against the respondent in the High Court at Mombasa. In their suit the applicants pleaded that the respondent had employed them on permanent and pensionable terms; that their employment could not be terminated before attainment of the retirement age of 55 years; that similarly they could not be subjected to early retirement; that in breach of their contracts of employment and the law the respondent had subjected them to early retirement; that the respondent had shortchanged them by capping their benefits at one month's pay for every year worked up to a maximum of 18 years of service or a maximum of Kshs 2.5 million; and that the capping of their benefits constituted discrimination because the benefits of employees of the respondent who had retired earlier than the applicants were not similarly capped. Accordingly, they sought a declaration that the termination of their employment was unlawful, and payment of dues under early retirement or redundancy and loss of future earnings.

In response, the respondent contended that it had lawfully retrenched the applicants; that on account of the retrenchment they had been paid enhanced and more generous terminal benefits than they were otherwise entitled to; and that they had executed discharge vouchers absolving the respondent from further claims or liability. On 6<sup>th</sup> November 2008, *Mwera, J.* (as he then was), found no merit in the suit and dismissed the same. The appellants' appeal to this court suffered the same fate by the judgment that they wish to challenge in the Supreme Court.

Arguing the applicant's case, (ironically and without objection, through written submissions and limited oral address) their learned counsel, *Mr. Joseph Gathuku* submitted that the intended appeal raises matters of general public importance, which deserve to be addressed by the Supreme Court. To begin with, counsel submitted, when the parties appeared before this Court to argue their appeal, he requested to be granted "**not less than four hours**" to argue the appeal because it raised complex issues of employment law and discrimination, with the record of appeal running into four volumes. Instead of acceding to his wish, the Court asked him to argue the appeal in 30 minutes or alternatively to prepare written submissions which he could highlight orally later. To make matters worse, he submitted, he was denied a free hand with his written submissions because he was restricted to 15 pages, double-spaced, font-12.

In counsel's view, the above directions by the Court were a violation of the applicants' right to a fair trial under Article 50 (1) of the Constitution. He submitted that determination of an appeal through written submissions does not constitute a "hearing" which is conducted in "public" as required by Article 50(1). Counsel rather boldly asserted that both the Supreme Court and the High Court can give directions that cases before them be determined through written submissions because the rules of those courts expressly provide so.

As regards the Supreme Court, it was submitted that **rule 16 (3)** of the *Supreme Court Rules* expressly recognises the right of a party to file written submissions in addition to or in lieu of oral submissions, while **rule 17(3)** empowers the Court to prescribe the time for making oral presentations and address by the parties or their advocates. For the High Court, it was submitted that **Order 51 Rule 16** of the *Civil Procedure Rules* empowers the court, in its discretion to limit the time for oral submissions by parties or their advocates and to allow written submissions. As far as this Court is concerned, it was submitted that there was no equivalent provision and to that extent the Court lacks the power either to limit the period of address by litigants or their advocates or to direct that appeals be determined by written submissions.

Moving to other matters of general public importance raised in the intended appeal, learned counsel submitted that these included whether the capping of the applicants' benefits by the respondent was lawful; whether such capping of benefits constituted discrimination; whether there was duress in execution of discharge vouchers; whether this Court can refuse to address an issue merely because it was not pleaded and whether this Court had ignored evidence and failed to follow precedent. For good

measure and to emphasize the general public importance angle to the intended appeal, we were invited to find that it affected 22 people together with their immediate and extended families.

Opposing the application, **Mr. T. M Njeru**, learned counsel for the respondent relied exclusively on the respondent's written submissions dated 25<sup>th</sup> August 2015 and submitted that the constitutionality of the order of this Court that the applicants' appeal be heard through written submissions and the setting of time within which counsel would highlight the submissions orally was never raised or decided by this Court. Accordingly, it was argued that the matter could not be the subject of an appeal to the Supreme Court.

As regards the other matters that the appellants intended to raise in the Supreme Court, we were invited to find that they did not constitute matters of general public importance; were matters of interest only to the 22 applicants; did not raise any novel or difficult point of law implicating the interest of the general public and that the intended appeal was otherwise an attempt to re-agitate before the Supreme Court mundane issues of fact and law that had been settled by the High Court and this Court, but whose decisions the applicants did not agree with.

We have duly considered the application and the submissions of learned counsel. Certification that an intended appeal deserves to be considered by the Supreme Court is not a matter of course. Nor is such an appeal intended merely to correct what a party perceives to be errors of law committed by this Court. To be entitled to a certificate, the applicant must demonstrate that the intended appeal involves a matter of general public interest. What such a matter entails is now well settled. Indeed, in **PETER ODUOR NGOGE v. HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012**, the Supreme Court stated that under our present constitutional arrangement, appeals to that Court are exceptions rather than the rule, in the following terms:

***“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety design, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”***

The Court subsequently and more comprehensively explained in **STYNE V. GNECCHI-RUSCONE SC App. NO. 4 OF 2012** that a matter of general public importance is one, the determination of which transcends the circumstances of the particular case with **significant bearing** on the public interest and that where the matter involves a point of law, the point must be **substantial** so that its determination will have significant bearing of the public interest. In **BELL V. ARAP MOI & ANOTHER SC App No. 1 of 2013**, the Court further emphasized that mere apprehension of miscarriage of justice, is not a proper basis for certification unless the matter is within the terms of Article 163 (4)(b) of the Constitution and further that only exceptional cases that raise cardinal issues of law or of jurisprudential moment deserve certification.

Having carefully considered the application, we are not satisfied that the applicants have placed before us any issues that transcend the circumstances of their particular case or that have a significant bearing on the public interest. Nor have we discerned any issue of great jurisprudential moment in the intended appeal. With respect, what the applicants have placed before this Court is no more than a catalogue of what they perceive to be errors in the judgment of this Court on every day issues such as the effect of execution of a discharge voucher, reliance by parties on unpleaded issues; interpretation of contracts of employment, evaluation of evidence and reliance on precedent. The applicants, plainly and simply, are seeking to agitate the merits of their case before the Supreme Court, having failed before the High Court and this Court. We are afraid that under the terms of Article 163(4)(b), that is not the purpose or intendment of certification.

We agree with the respondent that the primary issue that the applicants seek to be determined by the Supreme Court regarding the alleged violation of their constitutional right to a fair hearing was never raised, let alone determined by this Court. In **THE KENYA SECTION OF INTERNATIONAL COMMISSION OF JURISTS V ATTORNEY GENERAL & 2 OTHERS, CRIM. APP. NO. 1 OF 2012**,

the Supreme Court held that for purposes of its jurisdiction, an issue involving the interpretation or application of the Constitution must not be a collateral question, only minimally related to the substantive issues determined by this Court. If it is, then the leave of this Court is still required.

But even if we were to be charitable to applicants, we do not see how an order that an appeal be heard through written submissions or the setting of time for oral address by counsel, can possibly constitute a violation of the right to fair hearing. This is because **Article 159 (2) (c)** of the Constitution expressly recognises the principle that ***justice shall not be delayed*** as one of the cardinal principles of judicial authority in Kenya. The order on written submissions and the setting of time for address by counsel are in our view legitimate devices for actualization of that important constitutional principle.

Apart from the constitutional underpinning, the **Appellate Jurisdiction Act** and the Rules made thereunder vest in this Court sufficient power and authority to direct that appeals be heard by written submissions and to set the time for oral address by parties and their counsel. First **section 3 (2)** of the Act confers upon this Court, when hearing an appeal, in addition to any power, authority and jurisdiction, conferred by the Act such power, authority and jurisdiction enjoyed by the High Court. That would include the powers granted by **Order 50 rule 16** regarding written submissions and setting of time. Secondly, the overriding objective in **Section 3A** and **3B** of the Act emphasizes **efficient** use of available judicial resources, including time, and **timely** disposal of proceedings before the Court. An order that an appeal be determined by written submissions or one setting time for oral address cannot possibly be inconsistent with the above overriding objective. Thirdly, **rule 100** of the Rules of this Court as well as the **Court of Appeal Practice Directions, 2015**, make provision for hearing of appeals through written submissions. In particular, the case management provisions of the Practice Directions make detailed and extensive provisions on written submissions, including the power of the Court to direct that appeals be heard by written submissions and the power to limit or otherwise determine the length of any oral or written submissions. Lastly **rule 1(2)** of the Rules of this Court reserve for the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Without such power, the Court would be at the mercy of parties, who for whatever reason, feel that their interests are best served by a full blown filibuster, despite the clear values spelt out in **Article 159 (2)** of the Constitution and in the overriding objective. Clearly, learned counsel for the applicants has not considered those pertinent constitutional and statutory provisions.

Ultimately, we are satisfied that the applicants' intended appeal is wholly undeserving of certification, and accordingly dismiss the application with costs to the respondent. It is so ordered.

**Dated and delivered at Malindi this 30<sup>th</sup> day of October, 2015**

**ASIKE MAKHANDIA**

**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**