



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: NAMBUYE, MARAGA & GATEMBU, JJA.)**  
**CIVIL APPLICATION NO. SUP. 4 OF 2013 (UR 1/13)**

**BETWEEN**

**MENGINYA SALIM MURGANI ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

*(Being an Application to seek leave to appeal to the Supreme Court of Kenya under Article 163 (4) (b) of the Constitution of Kenya 2010, against the judgment (orders) of the Court of Appeal (Omolo, Nyamu & Waki JJA.) in Civil Appeal No. 108 of 2009 delivered on 16<sup>th</sup> July, 2010)*

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**RULING OF THE COURT**

1. The applicant, Meginya Salim Murgani, seeks leave of this Court under Article 163(4)(b) of the Constitution of Kenya, 2010 to appeal to the Supreme Court against the judgment of this Court in Civil Appeal No. 108 of 2009 delivered on 16<sup>th</sup> July 2010. The applicant contends that the intended appeal involves a matter of general public and constitutional importance pertaining to employment rights of senior civil servants involved in fighting corruption and engaged in protecting public resources and affects the rights of a section of public officers employed by statutory bodies and there is need to settle the law regarding the binding rules of natural justice and that the decision of the Court of Appeal intended to be appealed to the Supreme Court is retrogressive.

**Background**

2. The background to the application before us is scanty as the pleadings before the High Court and the judgment of the High Court from which the applicant appealed to the Court of Appeal are not part of the record of the application. What emerges from the record of the application however is that the applicant was an employee of the respondent. He was employed by the respondent as a Senior Research Officer in 1996 and rose to become a Senior Assistant Commissioner. He was dismissed from employment on 9<sup>th</sup> March 2001. Aggrieved by the dismissal, he filed suit against the respondent, being Civil Suit Number 1139 of 2002, in the High Court for wrongful termination. He claimed general damages for wrongful termination, exemplary damages for

destruction of his career and injury to his dignity and special damages comprising of pension contributions, leave allowance, six months pay in lieu of notice, costs and interest.

3. The High Court, Ojwang J, (as he then was) in a judgment dated 22<sup>nd</sup> September 2008 held that the applicant's dismissal was unlawful and awarded him exemplary damages in the sum of Kshs. 1,000,000.00. The High Court judge also directed the Registrar of the High Court to calculate damages under other heads of damages that the Judge considered the applicant was entitled to claim. The Registrar assessed damages payable to the applicant under those other heads of damages in the total sum of Kshs. 28,883,712.00. From that judgment the respondent appealed to this Court in Civil Appeal Number 108 of 2009. The applicant cross appealed contending that the learned trial judge erred in awarding damages in the total sum of Kshs. 28,883,712.00 when the award should have been Kshs. 91,629,856.00.
4. The Court framed the issues for determination in Civil Appeal Number 108 of 2009 as follows: whether the contract of employment between the parties was determinable and if so whether it was determinable by giving reasonable notice; whether the contract of employment was properly terminated; whether the High Court was justified in awarding general damages in respect of a contract of employment instead of an award of salary for the period of notice; whether the High Court was justified in awarding exemplary damages; whether the High Court was correct in directing the Registrar to calculate damages.
5. When considering those issues and particularly the question whether the contract of employment was properly terminated, this Court took the view that the High Court wrongly imported the rules of natural justice and the provisions of section 77 of the then Constitution regarding a fair trial into the contract of employment, which the Court considered to be inapplicable to the organs of discipline or tribunal specifically provided for in a contract of service; that the introduction of a constitutional dimension concerning the right of hearing in a contractual setting was a misapprehension of the law; that the applicant's dismissal was done pursuant to a contractual provision; that if the reasons for the applicant's dismissal were wrongful, the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice; that the concept of destruction of the applicant's career and the application of the tort of misfeasance in public office by the trial judge had no basis; that the findings by the High Court that the applicant was entitled to salary for 7 years and 6 months from the date of his dismissal from employment on 9<sup>th</sup> March 2001 to the date of judgment was arbitrary and violated the principles on which damages for wrongful dismissal or termination of employment are awarded; that the award of exemplary damages was a serious error and had no basis in law; that the trial judge erred in converting a judicial function into a ministerial one by directing the Registrar of the High Court to calculate damages. The result was that in its judgment delivered on 16<sup>th</sup> July 2010 this Court allowed the appeal, set aside the judgment of the High Court and substituted that judgment with an award to the applicant of 6 months salary in lieu of notice in the sum of Kshs. 527,794.20 together with respondent's own contribution to the pension fund in the sum of Kshs. 1,387,658.80.
6. Dissatisfied with that judgment, the applicant intends to appeal to the Supreme Court and it is for that purpose that he has sought leave of this Court under Article 163(4)(b) of the Constitution of Kenya, 2010 in order to do so on the ground that the intended appeal raises a matter of public importance.

### **Applicable test**

7. Article 163(4)(b) of the Constitution of Kenya, 2010 provides:

“(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).”

8. In **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR** the Supreme Court pronounced the test applicable in determining whether a matter is of general public importance. The Court outlined the governing principles thus: “

**“(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;**

**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 [other] 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.”**

9. Recently in **The Court Of Appeal Civil Application Nos. 12 & 13 Of 2012 (Consolidated), the Malcolm Bell vs. Daniel Toroitich Arap Moi And Others Sup. Ct. Appl. No. 1 Of 2013 in The Matter Of Supreme Court** stated that:

***“It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law”.***

### **Submissions by counsel**

10. At hearing of the application, the parties were represented. Learned counsel. Mr. Henry Kurauka appeared for the applicant while Mr. Chacha Odera appeared for the respondent.

11. Mr. Kurauka referred us to grounds appearing on the face of the application and to the applicant’s affidavit in support and submitted that the applicant has made two unsuccessful attempts to have the judgment of this Court given on 16<sup>th</sup> July 2010 reviewed and the Court declined to do so on

- the basis that it had no jurisdiction to review its own judgment; that there are two reasons the applicant is seeking leave. First, that the matter is of great public importance in that the applicant having been an employee of the respondent and having been summarily dismissed on unlawful grounds, there is need for the Supreme Court to set the law straight on the question of whether disciplinary procedures in employment matters relating to public institutions are subject to the principles of natural justice; that the decision conflicts with previous decisions of the Court and rules of natural justice were not adhered to in the dismissal of the applicant; that the applicant based his claim on breach by the respondent of section 77 of the Constitution and he should therefore be allowed to go to the Supreme Court as a matter of right.
12. Secondly the applicant is likely to experience gross miscarriage of justice if leave is not granted considering that the respondent admitted liability and this Court substantially reduced the award made by the High Court; that the injustice perpetrated in this matter led to reference of the same to the Judges and Magistrate's Vetting Board with the result that two of the judges who presided over the same were removed from the judiciary; that under the Supreme Court Act, where miscarriage of justice is likely to be occasioned, there is right to seek redress in the Supreme Court; that the circumstances in this case are distinguishable from those in **Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and another Supreme Court application 2 of 2011** in which sections 14 and 15 of Supreme Court Act were declared unconstitutional; that the case of **Malcolm Bell vs. Daniel Toroitich Arap Moi And Others Sup. Ct. Appl. No. 1 Of 2013 in The Matter Of The Court Of Appeal Civil Application Nos. 12 & 13 Of 2012 (Consolidated)** where Section 16 was also declared unconstitutional is also distinguishable as it related to private property while the applicant's case relates to infringement of constitutional rights which is a matter of high public importance and that in the interest of justice the matter should be heard by the Supreme Court.
  13. Opposing the application, Mr. Chacha Odera referred us to the replying affidavit of David Ontweka and submitted that if the matter is one that involves the interpretation or application of the Constitution as urged by counsel for the applicant, then an appeal lies to the Supreme Court as of right and the present application is unnecessary; and that the matter commenced in the High Court by way of plaint and it cannot now be considered a constitutional matter.
  14. On the question of whether a matter of general public importance is involved, counsel submitted that the judgment was delivered on 16<sup>th</sup> July 2010 prior to the promulgation of the Constitution and that on the authority of the decision of this Court in **Greenfield Investments Limited vs. Baber Alibhai Mawji Civil Application No. 5 of 2012** the jurisdiction of the Supreme Court cannot stretch back to the time prior to the promulgation of the Constitution and that for the jurisdiction of the Supreme Court to be invoked the issues must have arisen after the promulgation of the Constitution.
  15. Counsel went on to say that the issue of assessment of damages that was before the Court of Appeal does not constitute a matter of public importance; that the contention that the decision of the Court led to the removal of judges by the Judges and Magistrates Vetting Board is not correct as only two of the three judges who sat on the appeal were removed and their removal could not therefore have been based on this decision and that the third judge, Justice Waki would never have survived. With that Mr. Odera urged us to dismiss this application.
  16. In his brief reply Mr. Kurauka submitted that the Constitution was promulgated during the pendency of applicant's application for review and that the circumstances in this case are distinguishable from those in **Greenfield Investments Limited vs. Baber Alibhai Mawji** and the jurisdiction in this case stems from the date when the Court of Appeal declined to review its decision; that the issue involved in this matter is not simply a question of damages; and that a party is entitled to raise constitutional issues in the plaint.

### **Analysis and Determination**

17. We have considered the application, the submissions and the authorities cited. The first question we have to determine is whether the applicant's intended appeal raises a matter of general public importance in accordance with the test set out in **Hermanus Phillipus Steyn v Giovanni Gnecci-Ruscione, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR.** The second question is whether the decision of this Court intended to be appealed against, can be appealed to the Supreme Court, having been made before the promulgation of the Constitution of Kenya, 2010.

18. Regarding the first question, the applicant says that the issue he intends to canvass on appeal to the Supreme Court is whether the principles of natural justice enshrined in the Constitution are applicable to disciplinary proceedings in employment relations. In that regard counsel argued that there are conflicting decisions on this question and that the opportunity is now for the Supreme Court to put the matter right. Conflicting decisions of the Court on a particular issue, does not by itself render such an issue to be one of public importance for purposes of Article 163(4) of the Constitution. The Supreme Court expressed itself on that question in **Malcolm Bell vs. Daniel Toroitich Arap Moi And Others** as follows:

*“In the instant matter, the Court of Appeal alluded to the existence of conflicting decisions on the question: when does time begin running, in regard to the emergence of rights of adverse possession? That is a straightforward issue, which lends itself to resolution on the basis of a review of factual scenarios, and a review of the decisions of the superior Courts rendered over the years; and on that basis the Court of Appeal has it in its power to canvass the legal principles and to settle the technicality of the law, for the time being. Such a scenario falls outside the profile of “matter of general public importance.”*

19. Although the real grievance by the applicant with the decision of the Court of Appeal seems to be that the award of damages for wrongful termination by the High Court in his favour in the amount of approximately Kshs. 30,000,000.00 was substantially reduced by the Court of Appeal, we are prepared to give the applicant the benefit of doubt and accept that an issue of principle is involved. The Supreme Court stated in **Malcolm Bell vs. Daniel Toroitich Arap Moi And Others Sup. Ct. Appl. No. 1 Of 2013** that:

*“It is a principle embedded in this Court's decision in the **Hermanus Steyn** case, that: “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.”*

20. Article 50 (1) of the Constitution provides that:

*“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

21. Under Article 10 of the Constitution, all persons are bound by the national values and principles when applying or interpreting the Constitution and any laws. The national values and principles include the rule of law.

22. In light of those constitutional provisions, we think that the question whether the principles of natural justice enshrined in the Constitution are applicable to disciplinary proceedings in employment relations is an arguable question and one that transcends the circumstances of this particular case and has a significant bearing on the public interest. If that were the only consideration for us in this application, we would have had no difficulty in certifying that the matter is of great public importance and in refusing leave to the applicant to appeal to the Supreme Court. There is however the second question to which we now turn.

23. The decision the appellant intends to appeal to the Supreme Court was made on 16<sup>th</sup> July 2010.

That was before the promulgation of the Constitution of Kenya 2010 under which the Supreme Court was created. In **Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and another** (supra) the Supreme Court held that Article 163(4) of the Constitution is forward looking and does not confer upon aggrieved parties a retrospective right of appeal. As emphasized in **Greenfield Investments Limited vs. Baber Alibhai Mawji** (supra) this Court is bound by that decision of the Supreme Court. We are not persuaded that the decision of this Court rejecting the applicant's application for review from the decision intended to be appealed has the effect of bringing the intended appeal within the scope of the jurisdiction of the Supreme Court. If there was a right of appeal from the decision of this Court given on 16<sup>th</sup> July 2010, that right accrued from the date of delivery of that judgment, and not from the date when revision of that judgment was rejected. The Supreme Court did not exist on 16<sup>th</sup> July 2010. When it was eventually created upon the promulgation of the Constitution, there was no provision conferring on it the power to entertain appeals from decisions made prior to its existence. In the circumstances, we therefore uphold the submission by the respondent that we have no jurisdiction to grant the relief the applicant seeks from this Court. It cannot succeed.

24. The result of the foregoing is that the application fails and is dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 14th day of March, 2014.***

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**REGISTRAR**