



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, G.B.M. KARIUKI & MWILU, J.J.A.**

**CIVIL APPLICATION NO. SUP 13 OF 2013 (UR 6/2013)**

**BETWEEN**

**EDWARD KINGS ONYANCHA MAINA.....APPLICANT**

**AND**

**TURKANA DRILLING CONSORTIUM (K) LTD.....1<sup>ST</sup> RESPONDENT**

**LUNDIN KENYA BV.....2<sup>ND</sup> RESPONDENT**

**AFRICA OIL CORPORATION.....3<sup>RD</sup> RESPONDENT**

**REPUBLIC OF KENYA.....4<sup>TH</sup> RESPONDENT**

**PS MINISTRY OF ENERGY KENYA.....5<sup>TH</sup>  
RESPONDENT**

*(An application for leave of Court of Appeal to Supreme Court from the ruling of the Court of Appeal (Nambuye, Warsame & Ole Kantai J.J.A) sitting at Nairobi on 8<sup>th</sup> March, 2013*

*in*

***CIVIL APPEAL (APPLICATION) NO. 64 OF 2011)***

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**RULING OF THE COURT**

The Constitution of Kenya 2010 which was promulgated on 27<sup>th</sup> August 2010 materially changed the structure of the Judiciary as it hitherto existed. It among other things created the **Supreme Court** under **Article 163(1)**. It defined the jurisdiction of the Supreme Court at **Article 163(3)** in the following terms:

**“(3) The Supreme Court shall have:-**

**(a) exclusive original jurisdiction to hear and determine disputes relating to election to the office of President arising under Article 140;**

*and*

*(b) subject to clause (4) and (5) appellate jurisdiction to hear and determine appeals from;*

*(i) the Court of Appeal; and*

*(ii) any other court or tribunal as prescribed by national legislation.”*

Of relevance to this ruling is clause (4) which articulates which appeals will lie to the Supreme Court from this Court. These are:

*4(a) “as of right 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).”*

The application which is the subject of this ruling is before us pursuant to the above article. This is so even though the applicant has not cited the provision of the Constitution as a basis of his application. He cites **Rule 21** of the **Supreme Court Rules** and **Section 15** of the **Supreme Court Act**. These other provisions are provided for in subsidiary legislation and they draw their validity from **Article 163(4)** of the **Constitution**.

Our task in this matter is not to delve into the merits or otherwise of the impugned ruling. Our jurisdiction is limited to establishing whether the matter before us falls within the threshold set out by **Article 163(4)(b)** of the **Constitution of Kenya 2010**.

We specifically say so because although, in his argument during the hearing, the applicant claimed that his constitutional rights were violated by the court, if that was his stand then he does not need to seek the leave of this Court pursuant to **Article 163 4(a)** of the **Constitution of Kenya 2010**. It is evident therefore that his application is predicated on **Article 163 4(b)** of the **Constitution**.

Does this matter qualify for certification? Although this is still a nascent area in our jurisprudence, the law on this matter is now well settled by the several applications which have been settled both here and before the Supreme Court. An applicant moving this Court under Article 163(4) (b) needs to satisfy the court that his matter raises issues of General Public Importance.

What then amounts to a matter of General Public Importance? The Supreme Court of Kenya in Sup. Application No. 4 of 2012 **Hermanus Phillippus Steyn vs Giovanni Gnechi – Ruscone** recently succinctly pronounced itself on this issue in the following terms:-

*“The Constitution under Article 163 (4)(b) contemplated that 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 were substantial, broad based and transcending the litigation interests of the parties and bearing upon the public interest...”*

If we apply this finding of the Supreme Court to the application before us, it becomes evident that the matters raised do not in any way amount to matters of general public interest.

The applicant’s application arises from the ruling of this Court that struck out his notice of appeal and the record of appeal. The same were struck out on account of non-compliance with the Court of Appeal Rules and more particularly **Rule 82** which the Court rightly found is couched in mandatory terms and no

explanation was proffered by the applicant for non-compliance. The other reason given by the court for striking out of the appeal was the applicant's lack of locus *standi* in that he could not sue on behalf of the company on whose behalf he was suing without its authority.

These in our view are mundane issues that have been long settled in our laws. As rightly submitted by Ms. Macharia, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents the issues raised do not show any jurisprudential moment to warrant certification to go to the Supreme Court.

We agree with Ms. Macharia and Mr. Omondi, learned counsel for 7<sup>th</sup> respondent that there is nothing novel about striking out a notice of appeal. Indeed the applicant ought to have come back to this Court and sought leave to file his intended appeal out of time.

As pronounced by the Supreme Court in the Hermanus Steynus case (supra), ***“mere apprehension of miscarriage of justice in 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 issues raised by the applicant do not transcend beyond his personal interests. They have in our view nothing to do with general public importance. They are issues that have arisen before in this Court and the High Court and have been settled there, and the law does not allow them to creep to the Supreme Court under the disguise of matters of “General public interest”. There is a reason why the Constitution itself gave this Court jurisdiction to act as a sieve for matters intended to proceed to the Supreme Court. One of the reasons is to stem abuse of process by ensuring that matters that can be handled by the other superior courts competently are handled there.

The Constitution did not intend that the Supreme Court becomes just one more tier in the judicial hierarchy for perpetuation of litigation. It was created for the specific mandate espoused in the Constitution.

We need not say more. This application fails to meet the threshold set out in the constitution and in the Supreme Court Act. It does not qualify for certification to the Supreme Court. In the circumstances, the same is hereby dismissed with costs to the respondents.

This application is similar to Sup No. 14 of 2013. Both arise from the same Ruling of the Court of Appeal; the issues raised are the same; the parties are the same and the submissions were the same, we order that this ruling applies *mutatis mutandis* to Sup. No. 14 of 2013.

***Dated and delivered at Eldoret this 11<sup>th</sup> day of April, 2014.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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