REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & OUKO, JJ.A.)

CIVIL APPLICATION NO. SUP. 24 OF 2013

BETWEEN

TELKOM KENYA LIMITED …….. APPLICANT

VERSUS

JOHN O. OCHANDA (SUING ON HIS BEHALF AND

ON BEHALF OF 996 FORMER EMPLOYEES

OF TELKOM KENYA LTD) ……..…...…….... RESPONDENTS

(Being an application for leave to appeal to the Supreme Court from the Judgment and Orders (Hon. P. Kihara Kariuki, PCA, M'Inoti & J. Mohammed, JJ.A.) dated 25th October, 2013

in

Civil Appeal No. 207 of 2012)

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RULING OF THE COURT

1. This ruling is in respect of an application dated 12th November, 2013 where the applicant urges this Court to certify this matter as being of general public importance and grant leave to the applicant to appeal to the Supreme Court from the judgment of this Court delivered on 25th October, 2013. The application was brought under **Articles 159** and **163 (4) (b)** of the **Constitution** and **Sections 3A and 3B** of the **Appellate Jurisdiction Act.**

2. The facts giving rise to this application are that on 25th October, 2013 this Court dismissed the applicant's appeal that sought to challenge a judgment by the High Court where it was ordered that each of the respondents, as former employees of the applicant, be paid severance sum and a **"Golden**

handshake".

3. The subject of the appeal concerned the restructuring and staff rationalization of the applicant, which at the time was a State owned company, pending its privatization. The staff rationalization programme was to be effected in two phases; the first one included staff over 50 years of age and the second one included staff below 50 years of age. The appellant's Human Resources Policy Manual stated the voluntary and compulsory retirement age as 50 and 55 years respectively.

4. The appellant offered different packages for these two categories of workers. Under phase one, the package included three months' basic salary in lieu of notice, severance pay of one months' salary for every year remaining and transport allowance of Kshs.40,000/=. The package for phase two included two months' basic salary in lieu of notice, severance pay of 2½ months' basic salary for every year worked, golden handshake of Kshs.150,000/= and transport allowance of Kshs.40,000/=. The respondents were on phase one of the programme.

5. The respondents argued that the retrenchment process was discriminatory. They further argued that their terminal benefits were not meant to be less than what one could be entitled to in the event of normal termination of employment.

6. After a full hearing, the High Court held that the respondents be paid severance pay based on 2½ months' salary for each year of completed service as well as "golden handshake" on the same scale as was paid to retrenchees who were below the age of 50 years.

7. On appeal, this Court upheld the High Court judgment. It found that the use of different methods in calculating severance pay amounted to discrimination against the respondents. The applicant was dissatisfied with the judgment and intends to prefer a further appeal to the Supreme Court.

8. The applicant states that this matter merits certification as one of general public importance for the following reasons:

> ***"(i) The privatization process, similar to the one undertaken upon the Applicant, is currently ongoing and intended to be undertaken by the Government of Kenya through the Privatization Commission in respect of at least twenty-five other State owned companies and parastatals;***
>
> ***(ii) Therefore, it is in the public interest and beyond the circumstances of this particular case, that there be certainty on the legal principles to guide the process in relation to staff redundancy.***
>
> ***(iii) This matter will question the applicability of civil service directives to State owned companies and parastatals, specifically, whether employees of such State owned companies and parastatals are entitled as of right to the benefits that employees of the civil service are entitled to;***
>
> ***(iv) In view of the centrality of trade unions to ensure the timely negotiation of an unusually large number of their members' redundancy benefits with State corporations and parastatals in the privatization process, the nature of their authority to bind their members on the terms agreed upon, in the absence of a negation of that authority, will be questioned in this matter;***
>
> ***(v) This matter will also raise the question whether discrimination is a legitimate ground, independent of statute and contract, on which a court can make an award to an employee in labour law;***
>
> ***(vi) The matter will also raise the related question whether in labour law, discrimination is a legitimate ground for a court to make an award to an***

employee that exceeds contractual and statutory requirements;

(vii) In view of the high likelihood of class action employment suits arising from the privatization processes, this matter will question the scope of a trial court's powers in terms of their prosecution and defence and the nature of the remedies that it can grant in ensuring that justice is done to both parties."

9. **Mr. Oraro**, Senior Counsel, and **Mr. Nyaoga** appeared for the applicant. Mr. Oraro made submissions in support of the aforesaid grounds and stressed that the intended appeal raises issues of law that are of great public importance.

10. The respondents opposed the application and stated, *inter alia*, that:

- ***the Supreme Court lacks jurisdiction to entertain applications arising out of contracts of employment.***
- ***the application does not raise any matter of general public importance.***
- ***the application does not meet the threshold set out under Article 163 (3) and (4) of the Constitution.***

11. **Mr. Oluoch** for the respondents submitted that the application does not satisfy the requirements for grant of leave to appeal to the Supreme Court as set by this Court as well as the Supreme Court in several decisions including:

(i) IN THE MATTER OF HERMANUS PHILLIPUS STEYN V GIOVANNI GNOCCHI RUSCHONE, Supreme Court Application No. 4 of 2012,

(ii) IN THE MATTER OF LAWRENCE NDUTTU & 6000 OTHERS V KENYA BREWERIES LTD & ANOTHER, Supreme Court Petition No. 3 of 2012 and

(iii) IN THE MATTER OF MALCOLM BELL V HON. DANIEL TOROITICH ARAP MOI & ANOTHER, Supreme Court Application No. 1 of 2013.

12. **Article 163 (4)** of the **Constitution** stipulates that appeals lie from this Court 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 ….."

13. What is a matter of "general public importance"? This question was exhaustively answered in **HERMANUS PHILLIPUS** case (supra), where the Supreme Court stated the governing principles as follows:

"(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 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 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."

14. It is against the aforesaid principles that we considered this application. Although the applicant's counsel argued that the privatization process, similar to the one undertaken upon the applicant, is intended to be undertaken by the Government of Kenya in at least 25 other State owned companies and parastatals, that issue was neither raised before this Court when the appeal was argued nor was evidence to that effect availed to us.

15. In our view, the issues that were raised in the appeal before this Court were purely related to termination of contracts of employment and subsequent payment of terminal benefits. We are unable to decipher any legal issue of jurisprudential moment that requires further input of the Supreme Court. The application is based on anticipated disputes that may arise. That cannot be the basis for a certificate.

16. The fact that the respondents in this appeal are 997 and the amount that they are claiming from the applicant is in the region of **Kshs.3.1 Billion,** [which is a colossal sum of money], does not necessarily qualify the matter as one of great public importance.

17. Whereas it is the interest of justice to develop our jurisprudence in all areas of law, it would be a misconception to believe that only the Supreme Court can play that pivotal role and therefore the filter principle must be applied liberally to enable a considerable number of litigants to access the apex court.

18. The Supreme Court in **PETER ODUOR NGOGE v. HON. FRANCIS OLE KAPARO & FIVE OTHERS, Supreme Court Petition No. 2 of 2012** stated that:

"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 designs, 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."

19. In **KOINANGE INVESTMENT & DEVELOPMENT LTD vs ROBERT NELSON NGETHE, Civil Application No. Sup. 15 of 2012**, this Court re-stated the governing principle in respect of appeals to the Supreme Court in the following words:

> ***"……the requirement for certification under Article 163 (4)(b) is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court, as the role of the Supreme Court, as was observed in R. v. Secretary of State, ex parte Eastway [2001]1 All E.R. 27 at p.33 [para.(b) – per Lord Bingham], cannot be relegated to deal***
>
> ***with correction of errors in the application of settled law, even where such are shown to exist."***

20. We believe we have said enough to demonstrate that the application before us is for dismissal, which we hereby order. The applicant shall bear the costs of the application.

Dated and Delivered at Nairobi this 9th day of April, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

……..

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR