IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, OUKO & KIAGE, JJ.A)

CIVIL APPLICATION SUP. NO. 21 OF 2013

BETWEEN

KENYA BANKERS ASSOCIATION.....APPLICANT

AND

ROSE FLORENCE WANJIRU….....1 RESPONDENT

STANDARD CHARTERED BANK

KENYA LIMITED.....2nd RESPONDENT

CENTRAL BANK OF KENYA..... 3rd RESPONDENT

(Being an application for a certification that a matter of general public importance is involved in the intended appeal to the Supreme Court (Maraga, G.B.M. Kariuki & J. Mohammed, JJ.A) delivered on 8th October, 2013

in

CIVIL APPEAL NO. 214 OF 2014)

RULING OF THE COURT

The single question raised in this application is, whether the decision of this Court (Maraga, G.B.M. Kariuki & J. Mohammed, JJ.A) in Civil Appeal No. 216 of 2004 delivered on 8th October 2013, overturning the holding by Mwera, J. (as he then was) that prior to filing a suit on behalf of an unidentifiable group of people, one is required to obtain leave of the court under Order 1 Rule 8 of the Civil Procedure Rules, qualifies for certification to the Supreme Court as a matter of general public importance under Article 163 (4) (b) of the Constitution.

Before Mwera, J. in the High Court, was a plaint brought by Rose Florence Wanjiru (the 1st respondent) on her own behalf and on behalf of all the present and past customers of the 2nd respondent and customers of all other banks under the umbrella of Kenya Bankers Association, against her bank,

Standard Chartered Bank (Kenya) Limited (the 2nd respondent), the Kenya Bankers Association (the applicant) and the Central Bank of Kenya, (the 3rd respondent), claiming that her bank and these other banks had illegally charged ledger fees of Kshs. 100 per month and fees for ATM withdrawals against the customers' accounts without authority of the Finance Minister.

The applicant and the 3rd respondent objected to the suit by filing applications to have the suit struck out on the grounds that it was incompetent as the 1st respondent did not obtain leave of the Court as required by Order 1 Rule 8 aforesaid to bring a suit in a representative capacity and secondly that the 1 st respondent ought to have sued the applicant instead of its Executive Director or representative. It is the striking out of the suit by Mwera J. on the ground that the 1st respondent failed to obtain leave before bringing a representative suit and that the applicant could be sued through its Chairman, Vice Chairman or Executive Director, that gave rise to the appeal and cross-appeal to this Court. Maraga, J.A in the leading judgment of the court allowed the appeal holding that:

"The respondents' contention therefore that one requires leave of court under this provision prior to instituting a representative suit, has, in my view, no legal basis."

The applicant has been aggrieved by this finding and intends to challenge it in the Supreme Court maintaining that the following grounds constitute matters of general public importance;

"a) Whether Kenya Bankers Association, a Trade Union, can be sued in a representative suit on behalf of all of its members, in this case all the 43 commercial banks licensed to operate in Kenya.

b. That the Judgment of the Court of Appeal does not determine ground 1 (c) in the 2nd respondent/applicant's Notice of Cross-Appeal that the judge in the High Court has erred in failing to strike out the plaint as against the 2nd respondent/applicant on the grounds that the 2nd respondent/applicant was being sued as representative of 43 commercial banks without complying with Order 1 Rule 8 of the Civil Procedure Rules which specifically required authority from the court for a person to defend proceedings in a representative capacity.
c. Whether in a representative suit brought under Order 1 Rule 8 of Civil Procedure Rules or proceeding under Order 1 Rule 8 of the Civil Procedure Rules, 2010, the court should grant authority to defend or permit to continue a suit in which one plaintiff is seeking remedies on behalf of all the past and present account holders with 43 different commercial banks for the period from 1st November, 1989.
d. The principles which should guide the High Court in determining whether to permit a representative suit to continue under Order 1 rule 8 of the Civil Procedure Rules, 2010.

e) The principles which should guide the Court of Appeal in determining whether to refer a representative suit back to the High Court to consider whether to permit such a suit to continue under Order 1 Rule 8 of the Civil Procedure Rules, 2010."

In arguing the application, Mr. Frazer, S.C., for the applicant submitted that the matter of procedure of bringing representative suits is a complex one, considering that when the matter was decided in the High Court the 2010 Civil Procedure Rules had not been made. Order 1 Rule 8 (1) of the 2010 Rules has introduced a new dimension which the court ought to have considered; that the court failed to make a determination on the cross-appeal, whether the High Court erred in failing to strike out the suit against the applicant. Learned senior counsel concluded that in view of the provisions of Article 22 (2) of the Constitution - Enforcement of Bill of Rights through class action - and section 4 of the Consumer Protection Act, also dealing with class action, there is need for the Supreme Court to clarify the procedure for instituting and prosecuting representative suits.

These submissions received support from Mr. Okoth representing Standard Chartered Bank (K) Ltd and the Central Bank of Kenya. However, Mr. Waigwa for the 1st respondent in opposing the application argued that it does not meet the threshold laid down in the Constitution, Civil Procedure Rules and case law.

The law regarding the jurisdiction of this Court under Article 163 (4) (b) aforesaid is now firmly settled by a long line of decisions emanating from the Supreme Court and from this Court. That jurisdiction does not include a consideration whether the Court was in error in making the decision sought to be challenged on appeal to the Supreme Court. The application for certification is not and cannot constitute an appeal to the Court from its own decision. All we are required to consider, within the parameters demarcated by the Supreme Court in Hermanus Phillipus Steyn V. Giovanni Guecchi - Ruscone, S.C. Application No. 4 of 2012 is as follows:-

> "i) For a case to be certified as one involving 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." (Emphasis ours)

All the decisions on this subject emphasize, inter alia, the fact that the superior courts below the Supreme Court have the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law; and that only cardinal issues of law or issues of jurisprudential moment will deserve the further input of the Supreme Court. See Peter Oduor Ngoge V. Francis Ole Kaparo & 5 others, S.C. Petition No. 2 of 2012; that as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked except 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, see Malcom Bell V. Daniel Toroitich Arap Moi & others S.C. Application No. 1 of 2013; and further that it would be a perversion of the law were certification to become fare for ordinary cases no matter how complex that for ages been concluded with finality in this Court. See Koinange Investments & Development Ltd Vs. Robert Nelson Ngethe C.A. No. 15 of 2012.

We are minded to state that before we exercise our jurisdiction as sought in the instant application, we must pay obedience to the above strictures. Applying the aforementioned guidelines to the grounds to be raised in the intended appeal we are not persuaded that the issue of whether or not a party bringing a representative suit ought to seek and obtain permission of the court to do so is a matter of general public interest.

We do not think, respectfully, that there is or has been doubt either under Order I Rule 8 (1) of the repealed Civil Procedure Rules or the present Order 1 Rule 8 (1) on the procedure for instituting a representative action. It has not been argued that there is uncertainty in the law in this area and no contradictory precedents have been shown to us.

The question sought to be raised in the Supreme Court does not go beyond the facts and circumstances of the individual case before the High Court. The question whether or not the 1st respondent was required to

obtain leave to bring a representative suit, is in our view, not a substantial one and has no significant bearing on the general public. The present Order 1 Rule 8 (1) was not before the two courts and no determination could be expected. The apprehension of the applicant that so much time and money will be expended in proceeding with the suit as brought is not a consideration in an application for certification to the Supreme Court.

In any case, no suit can be defeated merely by reason of the misjoinder of parties. The question involved in the intended appeal cannot, for the reasons given above, constitute cardinal issues of law to require further determination by the apex court.

We think no purpose will be served by granting the applicant a certificate to the Supreme Court in view of the clear position enunciated by that court and this Court in such matters. The application fails and is accordingly dismissed with costs.

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

P. M. MWILU

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR