REPUBLIC OF KENYA

IN THECOURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 15 OF 2012

KOINANGE INVESTMENT & DEVELOPMENT LTD..... APPLICANT

VERSUS

ROBERT NELSON NGETHE..... RESPONDENT

(Being an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya from the

Judgment of the Court of Appeal at Nairobi (Bosire, Karanja & Okwengu, JJ.A) delivered on 23rd March, 2012

in

Civil Appeal No. 108 of 2012)

RULING OF THE COURT

The applicant moves the Court under **Article 163(4) (b)** of the Constitution, **sections 3A** and **3B** of the Appellate Jurisdiction Act and **Rule 30** of the Supreme Court Rules for a certificate that a matter of general public importance is involved in the intended appeal to the Supreme Court. The dispute relates to a parcel of land known as L.R 209/9099 in the city of Nairobi. The background information leading to the present application may be briefly stated as follows.

On 23rd March, 2012, this Court delivered a judgment in which the applicant's appeal, being Civil Appeal No. 108 of 2003 was dismissed with costs. In that appeal the applicants had challenged the exercise of judicial discretion by the High Court (**Osiemo, J.**) in an application brought under **Order 9B Rule 8** of the Civil Procedure Rules, in which that court declined to set aside a judgment entered in default of the defendant's/applicant's attendance.

The dispute between the parties relates to a parcel of land known as L.R. 209/9099, in the city of Nairobi. This Court found that the High Court properly exercised its judicial discretion by rejecting the applicant's application to set aside a judgment entered after the applicant and its counsel had severally failed to attend court when the suit was set down for hearing. In dismissing the appeal the court observed that:

"The case was adjourned severally due to non-attendance of the appellant and its counsel. The appellant's counsel had himself to withdraw from the case because the appellant was not co-operating

with them. Even when they were served with his application to the postal address which it admits is the correct one they did not respond. The company's behaviour as also that of its advocate at the material time makes us believe that the appellant has not been particularly candid in this matter."

Aggrieved by this judgment the applicant moved to the Supreme Court by a motion dated 16th April, 2012. On 11th October, 2012 the Acting Registrar of the Supreme Court directed the applicant to seek "leave" before this Court.

By Article 163(4) aforesaid, appeals lie from the Court of Appeal to the Supreme Court -

"(a) as a 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." *(Emphasis supplied)*

Although the word used in this Article is "**certified**", the applicant seeks "**leave**" to lodge an appeal against the judgment of this Court to the Supreme Court. We suspect that the use of the word "leave" in the application must have been influenced by both section 15 of the Supreme Court Act and the heading of Rule 22 of the Supreme Court Rules 2011, now revoked, which read;

"22. Application for review of grant of leave by the Court of Appeal."

As we have observed, these rules have since been revoked by Legal Notice No. 123 of 2012,which came into effect on 1st February, 2013. The heading of Rule 24 of the new rules now reads:

"24. Application for grant of certification."

The Supreme Court in **Lawrence Nduttu & 6000 others v Kenya Breweries Limited & Anor – SC Petition No. 3 of 2012** and this Court's recent decision in **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone,** Civil Application No. Sup 4 of 2012 (UR 3/2012) have both held that the words "**leave of the court**" and "**certification by the court**" bear the same legal meaning and that it is the certification by the court which constitutes leave. We have taken the trouble to explain this apparent distinction because learned counsel for the respondent took issue with the use of the word "**leave**" in the application arguing that Article 163(4) (b) of the Constitution does not use the word "leave" but "**certifies**".

Having disposed of that point we turn to consider the sole question before us, namely; whether the intended appeal raises a matter of general public importance. The phraseology "**a matter of general public importance**" has received interpretation in the case of **Hermanus Phillipus Steyn** (supra) where the court considered similar provisions in various jurisdictions, for instance the Order-In-Council, 1951 providing for appeals to the Privy Council. **In the matter of an Advocate and in the Matter of the Advocates Ordinance, 1949** [1955] 22 EACA 309, English case of **R v Ashdown** [1947] 1 All ER 800, the Irish case of **Dellway Investments Ltd & Others v National Asset Management Agency & Others** [2010] 1 EHC 375 and closer home, **Namuddu v Uganda** [2004] 2 EA 207. After reviewing these decisions the court in **Hermanus Phillipus Steyn** held that there is a distinction between leave to appeal to this Court from the High Court and from this Court to the Supreme Court; that 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 Exp. Eastway** [2001] 1 All ER 27 at page 33 paragraph b (per Lord Birgham), cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist. This point was expounded by the Supreme Court itself in **Peter Oduor Ngoge v Hon. Francis Ole Kaparo & 5 Others** Supreme Court Petition No. 2 of 2012, where the learned judges explained the jurisdiction of the Court thus:

"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." (Emphasis supplied)

In so far as Article 163(4) of the Constitution is concerned, it is now settled that the party alleging that the appeal raises a matter of general public importance must demonstrate the existence of that importance by identifying and formulating in the application the matter of public importance relied upon. (**R v Ashdown** [1974] 1 All ER 800).

The applicant has not framed what they consider to be of general public importance but it is averred in the grounds on the face of the application and in the supporting affidavit sworn by Eddah Wanjiru Mbiyu:

i) that the *ex parte* judgment was obtained in violation of an order directing that the application be served personally;

ii) that as a result, the applicant was not heard contrary to rules of natural justice;

iii) that consequently the applicant stands to lose a prime property valued at Kshs. 1 billion.

Both Osiemo, J. and this Court made a concurrent finding that there was sufficient evidence of service upon the applicant with the hearing notice. Secondly, the dispute between the applicant and the respondent relates to an agreement between the parties entered into on 5th December, 1988 in which the applicant granted to the respondent an option to purchase the suit property at Kshs. 50M upon fulfiling certain specified conditions.

In **Shabbir Ali Jusab v Anaar Osman Gaturi & The AG,** Civil Application No. Sup 1 of 2012 (UR 1/2012), this Court referred to numerous foreign authorities and **Hermanus Phillipus Steyn** (supra) in which attempts have been made to define what constitutes a matter of general public importance. For instance in **Hermanus Phillipus Steyn** this Court has held that:

"(7.4) The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law; not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law."

Similar position was articulated in the two authorities cited by counsel for the applicant, the Jamaican case of **Paget DeFreitas & Others v Enoch Karl Blythe**, Supreme Court Civil Appeal No. 43 of 2008 and the Indian case of **Dattaraj Nathnji Thaware v State of Maharashtra & Others** [2004] INSC 755.

As the law in this area develops, both this Court and the Supreme Court will be laying down and expanding the broad guidelines as to what constitutes a matter of public importance. For our part, and as the law stands, we think that, by the very nature of the applicant's claim (a sale contract), and in view of the manner in which the *ex parte* judgment was obtained, the intended appeal to the Supreme Court does not raise a matter of public importance.

Finally, we observe that the jurisdiction of the Supreme Court being the apex court, a court of last resort, must not be invoked in a routine fashion. It was never intended to be a regular court of appeal against all and sundry orders passed by this Court.

In the result, we decline to grant a certificate and dismiss the application with costs to the respondent.

DATED and DELIVERED at Nairobi this 8th day of March, 2013.

R. N. NAMBUYE

.....
JUDGE OF APPEAL

W. OUKO
.....
JUDGE OF APPEAL

J. MOHAMMED
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR