



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWERA & KIAGE J.J.A)**

**CIVIL APPLICATION NO. NAI 139 OF 2012**

**OMEGA CHEMICAL INDUSTRIES LTD.....APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

***(An application for leave to appeal in the Supreme Court of Kenya, the Judgment of the Appeal Court of Kenya delivered on 14<sup>th</sup> December 2007***

***in***

***CIVIL APPEAL NO. 276 OF 2002)***

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**RULING OF THE COURT**

This is an application under **Article 163(3)(i)** and **(4)(b)** of the **Constitution of Kenya 2010**, through which the applicant, **Omega Chemical Industries Ltd**, seeks a certification that its intended appeal raises a matter of general public importance to enable it file an appeal in the Supreme Court of Kenya .It also prays that costs of and incidental to this application do abide in the said appeal. The applicant charges that the matter under application is of great public interest in that this Court, as a court of last resort declined a review of a glaring mistake on account that it does not possess jurisdiction to sit on appeal on its own judgments.

The genesis of this charge is the Judgment in **Civil Appeal No 276 of 2002** which was delivered on 14<sup>th</sup> December 2007. The applicant, the appellant in that appeal, was awarded the sum of Kshs 509,692.60 with interest at court rates from the date of filing suit until payment in full. The applicant was also awarded half the costs of the appeal as well as half of the costs in the High Court. Following this, the applicant filed an application under Rule 35 of the Court of Appeal rules seeking an order that the arithmetical mistake in the judgment delivered on 14<sup>th</sup> December 2007 be corrected, and the correction thereof be incorporated in the judgment to give effect to the intention of the Court when judgment was given. The applicant's argument was that the Court must have intended to award the sum of Kshs 1,585,394.00 or to award the sum of Kshs 509,692.60 and 27% interest until payment in full.

The Court after considering the judgment was satisfied that the Court which heard the matter had found that the claimed amount of Kshs 1,815,787.15 was not proved and that the rate of interest at Kshs 27% per annum was not proved either. The Court found that the judgment of the court was clear and the

intention was to award the sum of Kshs 509,692.60, a sum which was not disputed, as well as interest at court rates and disallow any claim above that sum, either based on interest or penalties. As a result, the Court held that the slip rule was not applicable in this case as the applicant was in effect asking the Court to sit on appeal on its own judgment, a jurisdiction that it does not possess except in limited circumstances. The application was dismissed with costs to the respondent on 25<sup>th</sup> April 2008. The applicant now wishes to prefer an appeal to the Supreme against the original judgment of this Court.

*Mr. Alex Thangei* learned counsel for the respondent, **Barclays Bank of Kenya Limited**, challenges the application on the grounds that it does not meet the threshold set out in the Constitution, in that it does not raise an issue of great public importance, neither does it involve a point of law of exceptional public importance. To his mind, this application is a non-starter and has no legal basis at all, as the genesis of the suit is a commercial dispute which falls under private law.

The judgment that the applicant wishes to appeal against was delivered on **14<sup>th</sup> December 2007**. This was three years before the promulgation of the Constitution that established the Supreme Court of Kenya. The appellate jurisdiction of the Supreme Court was dealt with in **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application 2 of 2011** where that court considered whether it had jurisdiction to entertain appeals from cases that had been heard and determined by the Court of Appeal before it (the Supreme Court) had come into existence. The court stated that:

***The sole issue to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of the Constitution of 2010. Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.***

The court therefore categorically stated that:

***We hold that Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.*** (emphasis ours)

In the premises, the Supreme Court of Kenya does not have jurisdiction to hear an appeal on a matter determined by this Court before the promulgation of the Constitution. We believe that this is the correct position, and one that we are bound by the principle of *stare decisis* to follow, as we have done in other cases. See for example the ruling of this Court in **Greenfield Investments Limited V Baber Alibhai Mawji [2013] eKLR** where certification was declined in the following terms:

***“We accordingly cannot grant the said certificate for to do so would be tantamount to attempting to grant the Supreme Court a jurisdiction it does not possess and that would be an act of signal judicial futility.”***

We think we have said enough to show that the application before us is for dismissal. Even if we had not found that to be so, we would still decline to grant certification on the basis that the intended appeal does not raise a matter of general public importance as contemplated by **Article 164 (3)(b)**.

What comprises ‘a matter of general public importance’ was outlined by the Supreme Court in **Hermanus Phillipus Steyn V Giovanni Gneccchi-Ruscione [2013] eKLR (Supreme Court of Kenya Application 4 of 2012)** where it was stated at paragraph 60 that:

***In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts***

**below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions.** (emphasis supplied).

The Supreme Court then summarised the governing principles that would be considered in determining if a matter is of general public importance as follows:

- a. *The issue to be determined must transcend the circumstances of each particular case, and must have a significant bearing on the public interest;*
- b. *Where a point of law is to be raised, its determination must impact significantly on the public interest; moreover, this point of law must have arisen during determination in the courts below;*
- c. *Where there is uncertainty of law through contradictory precedents, then the Supreme Court may either resolve the uncertainty, or refer the matter to the Court of Appeal for its determination;*
- d. *The elements of general public importance must be specified;*
- e. *An apprehension of miscarriage of justice is not, by itself, a proper basis for granting certification for an appeal to the Supreme Court. Neither is a determination of facts in contest between parties.* (emphasis supplied)

We have had occasion to consider the judgment of this Court, alongside the grounds adduced in the motion, and the supporting affidavit. Our determination is that the issues raised by the applicant do not raise any point of law at all. The applicant's grounds are mainly on the merits of the judgement of this Court, and do not transcend the circumstances beyond the present case.

In a nutshell, the applicant has not raised any issue that would form a matter of general public importance as contemplated by Article 163 (4) (b) of the constitution of Kenya (2010). For these reasons, we decline certification. This application stands dismissed with costs to the respondent.

***Dated and delivered at Nairobi this 26<sup>th</sup> day of July, 2013.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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