



**REPUBLIC OF KENYA**  
**COURT OF APPEAL AT NAIROBI**  
**CIVIL APPLICATION 4 OF 2012**

**HERMANUS PHILLIPUS STEYN..... APPLICANT**

**VERSUS**

**GIOVANNI GNECCHI-RUSCONE..... RESPONDENT**

*(An Application for leave to appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal (Bosire, Waki & Aganyanya, JJ.A) delivered on 22<sup>nd</sup> October, 2010*

*in*

*CA. NO. 171 OF 2009)*

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**RULING OF THE COURT**

[1]. This is an application partly under **Article 163(4) (b)** of the Constitution of Kenya for a certificate that a matter or matters of general public importance is or are involved in the intended appeal to the Supreme Court against the judgment and orders of this Court in Nairobi Civil Appeal No. 171 of 2009.

By Article 163(4) of the Constitution appeals lie from the Court of Appeal 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....”***

However, by Article 163(5), such a certification may be reviewed by the Supreme Court and either affirmed, varied or overturned.

[2]. Although a certificate can be sought either from the Supreme Court or from the Court of Appeal, the Supreme Court has held that it is a good practice to originate the application in the Court of Appeal. In ***Sum Model Industries Limited v. Industrial and Commercial Development Corporation – SC Civil Application No. 1 of 2011***, the Supreme Court said in part:

***“This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing***

*the facts and legal arguments placed and advanced before it by the parties.*

***Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decisions in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163(5) of the Constitution.”***

[3]. That notwithstanding, it is important to recognize that arising from Article 163(4) and 163(5) of the Constitution, and section 15 of the Supreme Court Act (which provides that appeals to the Supreme Court shall be heard only with the leave of the Court), the jurisdiction to entertain an appeal is ultimately for the Supreme Court which is the best judge of whether a particular case meets the test in Article 163(4) (a) and (b) of the Constitution. It is also the best judge of whether its limited judicial resources are properly deployed in hearing a particular appeal.

Indeed, the Supreme Court has already recognized this constitutional duty in ***Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Anor – SC Petition No. 3 of 2012 [2012 eKLR]*** where the Court stated in part at paragraph 28:

***“But the Court need not wait for a preliminary objection before applying the test of admissibility in Article 163(4) (a). It is the Court’s duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold.”***

[4]. The Supreme Court Rules, 2011 are silent on whether or not an application for certification should first be made in the Court of Appeal. However, the proposed Supreme Court Rules, doubtlessly pursuant to the ruling in ***Sum Model Industries Limited (Supra)***, provide that an application for certification shall first be made in the court of first instance. As the Supreme Court has clarified in ***Lawrence Nduttu & 6000 Others (supra)***, ‘leave of the court’ referred to in section 15(1) of the Supreme Court Act and ‘certification by the Court’ in Article 163(4) (b) of the Constitution bear the same legal meaning and that it is the certification by either Court which constitutes leave.

[5]. This is, to our knowledge, the first application to be prosecuted in this Court for certification. Currently, there are no rules of procedure regulating the manner in which an application for certification should be filed and handled, the reason being that until the creation of the Supreme Court by the Constitution of Kenya, 2010 this Court was hierarchically the highest judicial organ. However, the absence of rules does not affect the jurisdiction of the Court, which is conferred by Article 163(4) (b) of the Constitution. The Court can apply the existing procedure for making applications to Court or the procedure provided for making a similar application to the Supreme Court. By rule 42 and 43 of the Court of Appeal Rules, all formal applications to Court should be made by motion supported by one or more affidavits. Similarly, interlocutory applications in the Supreme Court are made by notice of motion supported by an affidavit. (Rule 21(1), The Supreme Court Rules, 2011).

[6]. Until rules are made to specifically prescribe a different procedure for making an application for certification to this Court, such an application should be made by a notice of motion supported by one or more affidavits in accordance with the practice of the Court. Thus, the present application which is made by notice of motion supported by an affidavit is properly before the Court.

[7]. Comprehensive guiding principles will undoubtedly evolve as this Court and the Supreme Court deal with a variety of applications for certification. Both Mr. Mohammed Nyaoga, learned counsel for the applicant and Mr. Wadabwa, learned counsel for the respondent respectively, have suggested the applicable principles. They have also referred to case law to guide the Court. From the consideration of the respective submissions and the material placed before the Court, we would at this early stage formulate a few general guiding principles as follows:

[7.1] The Constitutional test is that a matter of *general public importance* must be involved in the case. When considering this test, care should be taken to ensure that the Court does not apply any other test which is not expressly provided. The test to be applied is not universal. It may vary from jurisdiction

to jurisdiction. By way of an example, section 3(b) of the East African (Appeal to Privy Council) Order-in-Council, 1951 provided that leave to appeal to Privy Council could be granted, if in the opinion of the Court, the question involved in the appeal;

**“is one which by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for the decision.”**

(See *In the Matter of an Advocates and in the Matter of the Advocates Ordinance, 1949, [1955] 22 EACA 309.*)

Regarding criminal appeals from the English Court of Appeal to the House of Lords, section 33(2) of Criminal Appeal Act 1968 provided:

**“The appeal lies with the leave of the Court of Appeal or the House of Lords; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be), that the point is one which ought to be considered by that House”. (*R v Ashdown [1974] 1 All ER 800*)**

In Ireland, the relevant legislation providing for appeals from the High Court to the Supreme Court (section 194(2)) reads:-

**“The Court shall grant leave under subsection (1) only if that Court certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court” (*Dellway Investments Limited & Others v. National Asset Management Agency & Others [2010] 1 EHC 375.*)**

In Uganda, the relevant legislation allows the Court of Appeal to grant a certificate to appeal to the Supreme Court where it is satisfied:

**“(a) that the matter raises a question or questions of law of great public importance.**

**or**

**(b) that the matter raises a question or questions of law of general importance.” (*Namuddu v. Uganda [2004] 2 EA 207.*)**

The phraseology in Article 163(4) (b) does not refer to questions of law or questions of law of *great public importance* or to point of law of *exceptional public importance* or to a matter of *great general public importance*. It merely refers to a *matter*. The Article does not also distinguish between criminal and civil matters. Although the expression ‘*a matter of general public importance*’ used in the Article is *ex facie* susceptible of liberal interpretation as opposed to restrictive interpretation, the true meaning of the phrase will ultimately depend on the construction that the Supreme Court will give to the phraseology.

[7.2] The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for granting leave to appeal to an intermediate court – for example, from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course. (See *Machira t/a Machira & Company Advocates v. Mwangi & Anor [2002] 2 KLR 391*) and *The Iran Nabuvat [1990] 3 All ER 9*).

The applicant's counsel relies on a passage in *Iran Nabuvat case (supra)* at page 10 paragraph 7 thus:

**“The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to**

***be exercised by the court. The bias must always be towards allowing the full court to consider the complaints of a dissatisfied litigant.”***

That passage, with respect is not applicable as it relates to leave to appeal from the High Court to the Court of Appeal.

[7.3] In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of *general public importance* reach the Supreme Court. The role of a Supreme Court was succinctly stated by the House of Lords in ***R v. Secretary of State Exp. Eastaway (Lord Bingham) [2001] 1 All ER 27*** at p. 33 paragraph b, thus:

***“In its role as a Supreme Court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.”***

In ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 Others – Supreme Court Petition No. 2 of 2012–*** [2012] eKLR, the Supreme Court interpreted its appellate jurisdiction 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.”***

[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. As **Madan JA.** (as he then was) said in ***Murai v. Wainaina [1982] KLR 38 at page 49 para 1:***

***“A question of general public importance is a question which takes into account the well being of a society in just proportions.”***

[7.5] The matter sought to be certified must arise from determination of the Court of Appeal in the case and not out of the argument or discussions at the hearing. This is clear from the holding of the Supreme Court in ***Lawrence Nduttu & 6000 others (supra)*** where the Supreme Court said at paragraph 28 regarding appeals as of right under Article 163(4) (a):

***“The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under provisions of Article 163(4) (a).”***

The same principle, with respect, applies to appeals requiring certification under Article 163(4) (b).

[7.6] Further, and generally speaking, there should exist between the parties a matter in actual controversy for consideration of the Supreme Court as a living issue and not a hypothetical case. (***Sun Life Assurance Co. of Canada v. Jerris [1944] All 469.*** However, it was held by the House of Lords in ***R v. Secretary of State for the Home Department – ex parte Salem [1999] 1 All ER 42*** that the House of Lords has a discretion to hear an appeal in the case where there was an issue of public law involving a

public authority, even though by the time the appeal was due to be heard there was no longer a case to be decided directly affecting the rights and obligations of the parties as between themselves. The House of Lords, however, qualified that holding by saying at page 47 paragraph e:

***“The discretion to hear disputes, even in the area of public law, must however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) where a discrete point of statutory construction arises, which does not involve detailed consideration of facts and where a number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”***

Nonetheless, until the Supreme Court decides to follow the practice of the former House of Lords relating to hearing of academic appeals, the jurisdiction to certify such academic appeals should be exercised sparingly.

[7.7] Section 16(3) of the Supreme Court Act provides:

***“The Supreme Court shall not grant leave to appeal against an order made by the Court of Appeal or any other Court or Tribunal on an interlocutory application unless satisfied that it is necessary, in the interest of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded.”***

In *Lawrence Nduttu & 6000 others (supra)*, the respondent's counsel raised a preliminary objection to the appeal contending *inter alia*, that the appellate jurisdiction of the Supreme Court lies only from the determination of a substantive appeal and not from an interlocutory ruling of the Court of Appeal. However, the Supreme Court declined to determine that jurisdictional issue at that stage and determined the preliminary objection on other grounds. Nevertheless, section 16(3) lays down a principle of law, in essence, that the Supreme Court should not entertain interlocutory appeals which have no final effect on the substantive dispute between the parties except in exceptional cases. That principle also binds this Court when considering applications for certification. Thus, until such time that the Supreme Court determines that it has no jurisdiction to entertain interlocutory appeals, if at all, this Court should grant a certificate to appeal to the Supreme Court from interlocutory rulings of the Court of Appeal, only in exceptional cases.

[7.8] The applicant should first identify and formulate the matter of general public importance involved in the decision so that the Court considering the application for certification can consider whether or not it is indeed a matter of *general public importance*. (*R v. Ashdown [1974] 1 All ER 800*). The formulation should be contained in the body of the application or in the supporting affidavit. As an illustration, *In the Matter of an Advocate (supra)*, three legal points were formulated in the supporting affidavit and the first one was formulated thus:

***“(a) On the question of degree of proof required to sustain a finding of professional misconduct against an advocate, and particularly whether proof which falls short of proof beyond reasonable doubt can suffice;”***

Equally, if the application for certification is allowed, the formulated certificate is granted. Again, by way of illustration, the certificate granted in *R v. Ashdown* (*supra*) was also as follows:

***“Certificate under section 1(2) of the Administration of Justice Act, 1960, that a point of law of general public importance was involved in the question “whether there is any limitation in law to the power of the court to sentence a fine with a term of imprisonment in default (consecutive to a term of imprisonment inflicted in respect of the same offence)”***

[8]. We now turn to consider whether or not a matter or matters of *general public importance* are involved in the intended appeal. Although the pleadings filed by the respective parties in the High Court have not been incorporated in the record of this application, the nature of the dispute between the parties

can be gathered from both the judgment of the High Court dated 7<sup>th</sup> September, 2007 and judgment of this Court dated 22<sup>nd</sup> October, 2010.

[9]. By a plaint dated 17<sup>th</sup> December 1993, Giovanni Gnecchi–Ruscione, the respondent herein claimed from Hermanus Phillipus Steyn, the applicant:

(a) a sum of US. Dollars 1,206,015/52 or its equivalent in Kenya shillings at the rate of exchange prevailing at the date of payment being 10% of the monetary compensation due to the defendant from the Government of the United Republic of Tanzania.

(b) a sum of US. Dollars 2,484,081/70 or its equivalent in Kenya shillings at the rate of exchange prevailing at the date of payment being 10% of the value of the property to be restored to the defendant by the government of Tanzania.

The background to the claim was briefly as follows:

[10]. Prior to 1982 the applicant was running various businesses and several companies in the United Republic of Tanzania. The companies owned various expansive tracts of land on which various commercial agricultural activities were carried out. In 1982, the assets of the applicants and his companies which included personal effects, motor vehicles, aircraft, houses and companies were seized by the government and subsequently nationalised. The government subsequently enacted the companies (**Acquisition and Management Act No. 20 of 1983**) to legalise the nationalization. The applicant was arrested, held in jail for economic sabotage for close to one year and subsequently declared a prohibited immigrant and deported. He relocated to neighboring Kenya. Thereafter, for close to ten years, the applicant unsuccessfully tried to get a fair and just compensation for his properties from the Tanzania Government. The respondent was introduced to him by a mutual friend as a person who, by virtue of his experience in Tanzania and influence among government officials, could help him.

[11]. After negotiations the applicant by a letter dated 26<sup>th</sup> July 1991 wrote to the respondent as follows:

***“Dear Giovanni,***

***I refer to our discussions regarding our claims against the government of Tanzania for our nationalized properties.***

***I confirm that we have agreed that you will act on our behalf, i.e. really on my behalf as the sole claimant, to procure a settlement with Tanzania Government. I confirm that we agreed that you will receive ten percent ... of any sums of money that might be paid to me in result of such agreement. Our understanding is that an agreement for settlement with Tanzania Government must be signed before the end of September 1991. It is also understood that the terms of the agreement must be discussed with me and that before it goes into print my acquiescence was met.***

***Best of luck.”***

The date by which settlement should have been reached was subsequently extended to the end of January 1992 and later, indefinitely until the matter had been satisfactorily concluded.

[12]. The negotiations yielded fruits. A memorandum of understanding was signed between the applicant and the government and subsequently a final agreement dated 8<sup>th</sup> November, 1993 was executed. By the final agreement, the Tanzania Government agreed to pay a total monetary compensation of US Dollars 12,060,155.23 and, in addition, to restore substantial assets to the applicant.

The applicant ultimately refused to pay the respondent the agreed commission claiming that the respondent was not entitled to *success fee* as the applicant took over the negotiations leading to settlement.

[13]. The respondent gave evidence at the trial and called two witnesses, namely **Paul Miliango Rupia** (PW2) who was Chief Secretary in the Office of the President (Tanzania) and **Gabinus Edgar Maganga** (PW3) - who was then the Assistant Commissioner of Public Investments (Tanzania). On his part the applicant gave evidence and called one witness **Eric Sikufua Ng'maryo** (DW1), an advocate. At the trial two bundles of documents, one from the applicant and the other from the respondent, were produced by consent. In addition, the applicant produced six other documents as exhibits.

[14]. Three broad issues emerged from the oral evidence, documentary evidence, and oral submissions which the trial judge framed thus:

1. What were the terms of the agreement between the parties dated 26<sup>th</sup> July, 1991? What were the rights and obligations of the parties under the agreement?
2. Was the settlement agreement between the defendant and the government of Tanzania as a result of the effort of the plaintiff? Was that agreement procured by the plaintiff's effort and influence?
3. Has the defendant been paid by the Government of Tanzania under the settlement agreement and if so to what extent?

Regarding the first issue, the learned judge set out the terms of the agreement. The terms of the agreement were not seriously in dispute. In addition, the court rejected the second claim for US Dollars 2,484,081/70, the 10% value of property restored to the applicant on the ground that it was not covered by the terms of the agreement which agreement provided that the 10% *success fees* would be based upon monetary compensation only.

The trial judge next considered the second issue which he regarded to be the main issue. After a commendable exhaustive evaluation of the entire evidence, the trial judge made a definitive finding that the settlement agreement between the applicant and the government of Tanzania was, on balance of probabilities, as a result of the effort of the respondent and that it was procured by the respondent's effort and influence.

On the third issue, the trial judge appreciated that the applicant had denied that the claim had been paid. He also appreciated that there was no documentary proof of payment. The trial judge however considered the evidence of Maganga that the applicant had received part payment by the time he left the office, the terms of the settlement agreement relating to the mode of payment and the fact that the applicant subsequently made a new claim to the government for loss of profits on the farm and loss of income from a house and came to the conclusion that; on the balance of probabilities the applicant had been fully or substantially paid.

[15]. On the basis of those findings, judgment was entered against the applicant for USD 1,206,015/52 with interest and costs being 10% of the monetary compensation of USD 12,060,155.23.

[16]. The applicant being aggrieved by the judgment appealed to this Court in **Civil Appeal No. 171 of 2009**. The judgment of this Court indicates that two broad issues arose in the appeal. The Court said:

***“There are two broad issues in this appeal, both of them based on findings of fact. Firstly, the appellant complains that the trial judge erred in finding that it was through the respondent's effort that an agreement as to payment was reached between the government of Tanzania and the appellant. Secondly, that the learned judge erred in fact in holding that the appellant had been paid by the government of Tanzania pursuant to the said agreement”***

This Court reevaluated the evidence relating to the two issues and ultimately reached the same findings as the High Court.

The Court also considered the submissions of the counsel for the appellant (applicant) that the claim was for damages of special nature (special damages) which had to be strictly proved. The Court

after hearing arguments made a finding that the claim was neither for special damages nor liquidated damages but a claim based on contract and for a contractual sum. The Court proceeded to dismiss the appeal in its entirety, hence the present application, in essence for leave to appeal to the Supreme Court.

**[17].** The applicant formulated the matters of general public importance involved in the intended appeal in paragraph 20 of the supporting affidavit as follows:

- (a) Is there a new head of damages which is neither general nor specific in respect of a breach of a commission contract for brokerage on a stated price?
- (b) Does a court have jurisdiction to order an award of liquidated damages in the absence of a liquidated damage clause in a contract between the parties?
- (c) Is a stated commission in a commission note for brokerage on that price a liquidated or special damages?
- (d) What is the principle pursuant to which damages should, if at all, be awarded, as the Court of Appeal did not enunciate any principles thereof?
- (e) To what extent is the ratio in *Hassan v. Hunt* [1964] E.A. 201, a decision of the East African Court of Appeal at Dar-es-Salaam (Sir Ronald Sinclair, P., Sir Trevor Gould, V-P., and Crawshaw, J.A.), November 11, 1963 and February 8, 1964, good law in Kenya following the enactment of the Law of Contract Ordinance, 1960 on 25th November 1960 and its commencement on 1st January, 1961?
- (f) Is the application by the said Courts of the ratio in *Hassan v. Hunt* [1964] E.A. 201 in violation of the express provisions of section 2(1), Law of Contract Act Cap. 23 Laws of Kenya, and of section 3(1), Judicature Act Cap. 8 Laws of Kenya, valid as a precedent of general public importance and application?
- (g) Therefore to what extent is the rule expressed in section 74(1) of the Tanganyika Law of Contract Act, Cap. 433 Laws of Tanganyika good law in Kenya, namely that:

“When a contract has been broken, if a sum is named in the contract, as the amount to be paid, in the case of such breach, or if the contract contains any other stipulation by way of a penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for?”

**[18].** We have already demonstrated the nature of the claim tried by the High Court, the issues which arose at the trial, the nature of the evidence and the findings of the High Court. We have also referred to the matters raised by the applicant in the appeal and the findings of this Court.

It is clear that the matters which arose for determination both in the High Court and in this Court were substantially matters of fact. Both the High Court and this Court made concurrent findings of facts on the evidentiary matters in controversy. In our view, there is no element of *general public importance* involved in the contract or arising from the relationship of the parties.

This was a case where the appellant engaged the respondent as his agent to seek and negotiate compensation for the applicant’s nationalized properties at an agreed commission. The main issue at the trial and in the appeal was whether or not the agent had earned his commission. The two courts made a finding that respondent had indeed earned his commission.

**[19].** The only issue of law which arose is whether or not damages claimed being special damages had been strictly proved. It seems that at the trial the respective counsel, considered the claim as a claim for special damages. The High Court made a finding that the respondent was seeking what is due to him under a written agreement. This Court held that the claim was neither for special nor for liquidated damages but a claim based on a contract and for a contractual sum. Apparently, there was an express

contract for remuneration, and the computation was based on an expressly provided formula. In our respectful view, the issues of law formulated as constituting matters of general public importance do not generally arise from the determination of the appeal by this Court. They are extraneous to the determination of the Court. The case of **Hassan v. Hunt** (supra) is irrelevant to the present case. It relates to a claim of special damages. For the foregoing reasons no matter or matters of general public importance is involved in the formulated matters.

[20]. Accordingly, guided by the principles we have set out above, we decline to grant a certificate and dismiss the application with costs to the respondent.

***DATED and delivered at Nairobi this 6<sup>th</sup> day of November, 2012.***

***E. M. GITHINJI***

.....  
***JUDGE OF APPEAL***

***J. W. ONYANGO OTIENO***

.....  
***JUDGE OF APPEAL***

***M. K. KOOME***

.....  
***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***