Athi River Steel Plant Limited v Rao & 4 others (Application E003 of 2023) [2025] KESC 23 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KESC 23 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION E003 OF 2023

MK KOOME, CJ & P, PM MWILU, DCJ & VP, SC WANJALA, I LENAOLA & W OUKO, SCJJ

MAY 16, 2025

BETWEEN

ATHI RIVER STEEL PLANT LIMITED ..... APPLICANT

AND

PONANGIPALLI VENKATA RAMANA RAO ..... 1ST RESPONDENT

COMMERCIAL BANK OF AFRICA LIMITED ..... 2ND RESPONDENT

KCB BANK KENYA LTD ..... 3RD RESPONDENT

BANK OF AFRICA LIMITED ..... 4TH RESPONDENT

I & M BANK LIMITED ..... 5TH RESPONDENT

(Being an application for review of the Court of Appeal's decision on the applicant's application for leave to appeal to the Supreme Court in respect of the judgment of the Court of Appeal at Nairobi (Warsame, Ole Kantai & Gachoka JJ. A) dated 24th May, 2024)

RULING

Representation:

Mr. Koech for the applicant

(Harit Sheth Advocates)

Mr. Paul Kamara for the respondents

(Oraro & Company Advocates)

1. Upon Reading the Notice of Motion dated 26th February, 2025 and filed on 27th February, 2025 pursuant to Article 163(4)(b) of *the Constitution*, Section 15B of the *Supreme Court Act*, and Rule 33 of the Supreme Court Rules seeking inter alia: a review of the Court of Appeal's decision dismissing

the applicant's prayer for extension of time to file an application for certification; for this Court to certify its intended appeal as one raising matters of general public importance; and for grant of leave to appeal to this Court;

2. Upon Perusing the grounds on the face of the application and the supporting affidavit of Harit Sheth, the Advocate on record for the appellant, sworn on 25th February, 2025 in which it is averred that: the Court of Appeal delivered its judgment on the applicant's appeal on 24th May, 2024; aggrieved by the decision, the applicant filed an application on 27th November, 2024 for extension of time and for certification before the Court of Appeal and vide a Ruling dated 7th February, 2025 the Court of Appeal (Achode, JA) declined to extend time for the applicant to file its application for certification. It is further averred that on 12th February, 2025, the applicant appeared before the Court of Appeal (Gatembu, Ochieng & Muchelule JJ.A) who observed that in the absence of extension of time, the rest of the prayers relating to certification were marked as withdrawn; and that the application herein is for review of the said decision of the Court of Appeal; and

3. Upon Considering the applicant's averments that: it is currently under receivership of the 1st respondent who was appointed by the 2nd – 5th respondents on 24th May, 2018; it has consistently contested the receivership for violating the mandatory provisions of the *Insolvency Act* 2015; that the *Companies Act* Cap 486 which governed such appointments prior to the *Insolvency Act* was repealed while the *Companies Act* 2015 and the *Insolvency Act* 2015 do not provide a statutory framework for the appointment of Receivers under floating charges. Therefore, that the 2nd – 5th respondents lacked the statutory power to appoint a Receiver since the prevailing law at the time of the 1st respondent's appointment in 2018, was the *Insolvency Act* 2015; and the transitional provisions of the repealed *Companies Act* do not apply; and

4. Upon Perusing the proposed issues framed by the applicant, that its intended appeal raises substantial points of law involving the interpretation of Sections 690(4) and 734 of the *Insolvency Act* presenting the following legal questions:

    a. What is the purpose of the *Insolvency Act* in relation to Receiverships? Whether the intent, letter or spirit of the *Insolvency Act* 2015 was to allow Receivers and Managers of pre-*Insolvency Act* debentures to operate without any statutory regulation of their actions and conduct.

    b. Whether the *Insolvency Act* was drafted for the purpose of strategically and progressively phasing away Receiverships owing to their undisputed destructive nature, as clearly elaborated by the applicant's current condition under Receivership.

    c. Whether the holder of a debenture with a floating charge created by a company before the commencement of the *Insolvency Act* 2015 can validly appoint a Receiver of the whole of the assets of that company under the repealed *Companies Act* (Cap 486) after the commencement of the *Insolvency Act*.

    d. Whether a receiver appointed after the commencement of the *Insolvency Act* 2015 is governed by the provisions of the repealed *Companies Act* or by the *Insolvency Act* 2015 or whether such a Receiver is governed or regulated at all by any statutory provisions.

    e. Whether Section 690(4) of the *Insolvency Act* 2015 confers a power upon a debenture holder holding a debenture executed prior to the coming into effect of the *Insolvency Act* 2015 to appoint a Receiver of the whole of the assets of the issuer of that debenture after the coming into effect of the *Insolvency Act* on 16th June, 2016.

f. Whether the mere failure by a company to pay an amount demanded by a debenture holder after the commencement of the *Insolvency Act* 2015 without more amounts to an inability of that company to pay its debts constituting a "past event" as defined under Section 734(1)(g) of the *Insolvency Act* 2015.

g. Whether the issuer of a debenture is entitled to challenge the validity of the appointment of a Receiver of its assets by the holder of the debentures if it is indebted to the debenture holder.

5. Further Reading the applicant's contention that: its appeal meets the requirements for certification; it is an opportunity for the Court to address itself on the future of insolvency law which is split between prioritising the continuity and strategic revival of companies experiencing financial difficulties and unleashing havoc of reckless receiverships on companies such as the applicant; the interpretation of section 690(4) and 734 of the *Insolvency Act* will have far-reaching consequences for various stakeholders, including creditors, shareholders, directors, employees of companies subject to pre-existing floating charges,financial institutions that rely on such charges to recover debts, other business associates and the public at large; and that it will provide clarity on whether lenders may continue appointing receivers to liquidate companies under pre-existing debentures or whether such companies should be placed under administration, promoting their continuation as going concern; and

6. Considering the applicant's averments that there are a number of inconsistent judicial findings regarding the applicability of Sections 690(4) and 734 of the *Insolvency Act* 2015 resulting in legal uncertainty; that in Insolvency Cause No. E017 of 2020, the court upheld the appointment of a Receiver under Section 690(4) of the *Insolvency Act*, while in Insolvency Notice No. E013 of 2018 and Insolvency Petition No. E004 of 2021 the court restricted the right to appoint a receiver to the provisions of Section 734; that in view of the weighty matters in the intended appeal, this Court should excuse the delay in filing the application for certification in the Court of Appeal, review the Ruling of 7th February, 2025 by Hon. Lady Justice Achode JA; allow the extension of time, and subsequently deal with the substantive issue of certification and leave to appeal to the Supreme Court;

7. Upon Reading the applicant's submissions dated 26th February, 2025 and filed on 27th February, 2025 where it restates the arguments for certification, and in addition, urges that: the Court of Appeal improperly exercised its discretion by misapplying the principles governing the extension of time; it placed undue emphasis on procedural timelines at the expense of substantive justice effectively denying the applicant access to justice; it erred in finding that misapprehension of procedural rules was not a sufficient cause; and thus denied the applicant the opportunity to seek certification on matters of general public importance by compelling the applicant to withdraw its application; and that it failed to appreciate that the delay of six months and three days in filing its application for certification was occasioned by the complexity and conflict in procedural rules between the Court of Appeal and the Supreme Court creating genuine procedural confusion and uncertainty on the appropriate timelines for filing; and

8. Considering the applicant's further submissions that: it acted in good faith and was diligent in seeking clarity and compliance with the correct procedure; the delay was neither excessive nor unreasonable considering the conflicting timelines and the procedural ambiguity involved; the refusal to extend time resulted in a denial of justice as it compelled the applicant to withdraw the substantive application without a hearing on its merits; and this was in violation of the applicant's right to fair hearing under Article 50 and 159 of *the Constitution*. To buttress its averments, the applicant cites the decisions of D.T. Dobie & Company (Kenya) Vs Muchina [1982] KLR 1 to urge that procedural technicalities should not override the need to determine cases on their merits, Githu Muigai & Another Vs NSSF & Another [2020] eKLR and this Court's decision in Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7

Others [2014] eKLR to urge that procedural complexity and conflicting rules can constitute sufficient cause for delay; and

9. Taking into account the applicant's averments that: this Court has jurisdiction under Article 163(4) of *the Constitution* and Section 15(2) of the *Supreme Court Act* to review decisions of the Court of Appeal on matters of general public importance and where there is a misapplication of the principles guiding the exercise of judicial discretion; its application is in compliance with the criteria set out in Hermanus Phillipus Steyn Vs Giovanni Gnecchi-Ruscone [2013] eKLR; these are that; there exist substantial points of law; there is legal uncertainty arising from conflicting judicial decisions requiring clarification; that the matter transcends the interests of the parties involved; that it is foreseeable that other companies will contest the validity of receivership appointments and prefer administration; and that this court's determination will ensure that the *Insolvency Act* fulfills its objective of prioritizing corporate rescue over liquidation; and

10. Taking into account the opposition to the application by way of a replying affidavit sworn on 13th March 2025 and filed on 14th March, 2025 by Ponangipalli Venkata Ramana Rao, the 1st respondent, on his own behalf and on behalf of the 2nd – 5th respondents where it is averred that: none of the provisions relied upon by the applicant grants this court jurisdiction to review the decision of the Court of Appeal declining to extend time to file an application for certification; the application is fatally defective for reason that where a party is aggrieved by the decision of a single judge, review ought to be by a reference to the full bench of the Court of Appeal; further, no decision has been made by the Court of Appeal to justify the jurisdiction of this Court as the applicant withdrew the certification application with no orders as to costs; and

11. considering the respondents' contention that the decision of 7th February, 2025 was made in the exercise of judicial discretion to grant or decline extension of time; the applicant has not demonstrated the manner in which the Court of Appeal erred in the exercise of its discretionary power; the court's record shows that on 12th February, 2025, the applicant applied to have its application for certification withdrawn with no orders as to costs; the application was dispensed with without the Court of Appeal having an opportunity to consider it on merits; the applicant has now filed the instant application with the intention to circumvent the jurisdiction of the Court of Appeal; the prayer for certification is an abuse of the Court process; the jurisdiction of this Court has not yet arisen; and that the intended appeal does not raise any matters of general public importance to warrant this Court's intervention; and

12. Considering the respondents' further submissions that: the applicant filed an application dated 27th November, 2024 after a delay of six months seeking inter alia an extension of time to file an application for certification that the matter raises issues of general public importance; the reason set out for the delay was that the applicant's Counsel on record misunderstood the procedural requirements and the alleged complexity of the legal issues which required extensive research and consultation; the Court of Appeal in the Ruling dated 7th February 2025, made by a single judge, dismissed the request for extension of time; that thereafter, the applicant voluntarily applied for the withdrawal of the application with no orders as to costs; and that the applicant has filed the instant application with an intention to circumvent the jurisdiction of the Court of Appeal; and

13. Further considering the respondents' submissions that: this Court does not have jurisdiction to consider the application; that pursuant to Rule 57(1)(b) of the Court of Appeal Rules, *Legal Notice No. 40 of 2022*, a party dissatisfied with the decision of a single judge, shall apply informally before the single judge at the time of the decision or write to the Registrar within seven days thereafter for reference of the matter to a full bench; and the applicant has not explained why it has bypassed Rule 57(1) of the

Court of Appeal Rules. The respondents rely on the Court of Appeal decisions in Registrar of Trade Unions & Another Vs National Union of Domestic Workers (Civil Application 87 of 2020)[2022] KECA 511 (KLR) and Mbugua & 85 others Vs Ministry of Lands & 59 others (Civil Application E096 of 2023) [2024] KECA 1698 (KLR), as well as this Court's decisions in Ngoge Vs Kaparo & 5 others (Petition 2 of 2012)[2021] KESC 7 (KLR) and Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (Application 2 of 2011) [2012] KESC 8 (KLR); and

14. Noting the respondents' submissions that: even if this court has jurisdiction, which is denied, the decision to extend time to appeal is discretionary; this court's jurisdiction has been prematurely invoked, denying the Court of Appeal the opportunity to consider the application for certification; and the applicant has not requested to review, vary, overturn the Court of Appeal decision on certification as there is no decision from the Court of Appeal to justify applicability of Article 163(4)(b) as read with 164(5) of *the Constitution*; and

15. Further noting the respondents' submission that: even if this court arrogates itself jurisdiction, which is opposed, there is no legal ambiguity on the interpretation of Section 690(4) of the *Insolvency Act*; there are no conflicting decisions from the Court of Appeal to warrant a final determination by the Supreme Court; the High Court decisions relied on by the applicant regarding application of Section 690(4) of the *Insolvency Act* are not contradictory; further, Insolvency Cause No. E013 of 2018, Allied E.A Limited Vs I & M Bank Limited does not refer to or seek to interpret Section 690(4) of the *Insolvency Act*; and further that nothing turns on the application which is a smokescreen, and it does not address the indebtedness of the applicant to the respondents; and

16. Bearing in mind the provisions of Article 163(4)(b) and (5) of *the Constitution*, Section 15B of the *Supreme Court Act* and Rule 33(1) of the Supreme Court Rules, 2020, we have considered the application, the affidavit in support, the responses and submissions filed, and NOW OPINE as follows:

    i. This court has in several of its decisions pronounced itself on the exercise of its appellate jurisdiction under Article 163(4)(b) of *the Constitution* as well as its jurisdictional limits. In Sum Model Industries Ltd Vs Industrial & Commercial Development Corporation, Application No. 1 of 2011 [2011] KESC 5 (KLR) we stated that the Court of Appeal should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not under that provision. If the applicant should be dissatisfied with the Court of Appeal's decision 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*. This Court also held that circumventing this procedure would amount to abuse of the process of Court.

    ii. The above position was reiterated in Macharia & another Vs Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) where we stated as follows:

        > " 14. Article 163(4)(b) of *the Constitution* of Kenya, 2010 clearly intended to give the Court of Appeal the first option to consider an application for certification. It also intended to give the would-be respondent the earliest opportunity to challenge an intended appeal to the Supreme Court. Such a party would be expected to argue that the case did not qualify to be accelerated to the Supreme Court, because it was "not one involving a matter of general public importance". Another feature of article 163(5) was that it afforded the "intending appellant" a second chance to seek certification to appeal to the Supreme Court."

iii. Applying the above finding to the instant case, we note that six (6) months after the delivery of the judgment of the Court of Appeal dated 24th May, 2024, the applicant filed a Notice of Motion dated 27th November, 2024. In the said application, the applicant sought extension of time to file an application for certification. In the same application, it also sought for certification that the matters involved in the intended appeal are of general public importance, and for leave to appeal to the Supreme Court against the judgment of the Court of Appeal. The Court of Appeal (Achode, JA) determined the first part of the application falling within the jurisdiction of a single judge. In dismissing the application for extension of time, the court held that misapprehension of the law and complexity of legal issues are not sufficient reasons to excuse the inordinate delay.

iv. From the foregoing, the Court of Appeal did not consider the applicant's application to certify the appeal as one involving a matter of general public importance under Article 163(4)(b). It emerges that the remainder of the application relating to the prayers for certification was withdrawn leaving no application for certification to be determined by the Court of Appeal. Therefore, there is no decision of the Court of Appeal on the prayer for certification, which this Court can review. We are in the circumstances not minded to delve into the merits of the matters of general public importance as proposed by the applicant.

v. The applicant seeks to invite this court to review the decision of a single judge, a jurisdiction we cannot exercise in the manner sought. Further, the decision on extension of time is by nature in exercise of discretion by the Court of Appeal which we are not persuaded to interfere with.

vi. On the issue of costs, we have determined in several of our decisions that costs follow the event. It is not to punish the losing party but to compensate the successful party for the trouble taken in defending or prosecuting the suit. We find that it is a proper case to award costs.

17. Consequently, for reasons aforesaid, we make the following orders:

i. The Notice of Motion dated 26th February, 2025 and filed on 27th February, 2025 be and is hereby dismissed; and

ii. The costs thereof shall be borne by the applicant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2025.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA