Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & another v Standard Chartered Financial Services Limited & another (Application E011 of 2024) [2024] KESC 49 (KLR) (Civ) (30 August 2024) (Ruling)

Neutral citation: [2024] KESC 49 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

APPLICATION E011 OF 2024

MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

AUGUST 30, 2024

BETWEEN

MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED NOW CALLED KING WOOLEN MILLS LIMITED ..... 1ST APPLICANT

GALOT INDUSTRIES LIMITED ..... 2ND APPLICANT

AND

STANDARD CHARTERED FINANCIAL SERVICES LIMITED .... 1ST RESPONDENT

A.D. GREGORY & C.D. CAHILL ..... 2ND RESPONDENT

(Being an application for review of the decision of the Court of Appeal(Warsame, M'inoti & Mativo, JJ. A) delivered on 23rd February, 2024 in Nairobi Civil Application No. Sup. E001 of 2023, granting leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b)_____ of the__ Constitution)__)

RULING

Representation

Ms. Brenda Onchagwa h/b for Mr. Philip Nyachoti for the Applicants (Nyachoti & Co. Advocates)

Ms. Ann Kadima h/b SC George Oraro for the 1st Respondent (Oraro & Co. Advocates)

Ms. Namwoli Aisha h/b for Mr. Paul Chege for the 2nd Respondent

(Amolo & Gacoka Advocates)

Ruling of The Court

1. Noting the facts pertaining this matter as established by the superior courts below; that the Standard Chartered Merchant Bank Limited of London (SCMB) advanced 1,300,000 Deutschemarks and 1,050,000 Swiss Francs to the 1st applicant vide a Euro-currency loan dated 22nd March 1982; that the 1st applicant executed a debenture dated 5th April 1982 in favour of the 1st respondent who was its guarantor for the said loan; that on 7th October 1986, the 1st applicant and 1st respondent 'localized' the Euro-currency loan to Kshs.9,000,000/= through a facility letter; that the 1st respondent advanced the localized loan to the 1st applicant who in turn offset its dues to SCMB; that the 1st applicant defaulted in repaying this loan and the 1st respondent sought to recover Kshs.19,024,522.05/= from the 1st applicant by appointing the 2nd respondent as receiver and manager over the 1st applicant's assets; and

2. Further Notingthat at the hearings before the superior courts below, the parties made conflicting arguments as relates whether the localized agreement was secured on the existing security or the parties had to execute new securities; that the applicants urged that the localized agreement was unsecured and the respondents urged that the localized agreement was secured based on the existing security under the Euro-currency loan; and

3. Taking Into Accountthe High Court's decision (Githinji, J.) in Nairobi HCCC No. 5002 of 1990 Manchester Outfitters (Suiting Division) Ltd. & Another v Standard Chartered Financial Services Ltd & Others that the debenture dated 22nd March 1982 was valid and so was the appointment of the 2nd respondent as receiver and manager for recovery of the amounts owing under the localized agreement; and noting the Court of Appeal's decision delivered on 16th December 2022 in Nairobi Civil Appeal No. 88 of 2000 Manchester Outfitters (Suiting Division) Limited & Another v Standard Chartered Financial Services Limited & Another (Asike Makhandia, Kantai and Nyamweya, JJ.A) that overturned the High Court's decision and where the appellate court held that; a) the old debenture was invalid for failure to register and execute a new security as per the facility letter and the correspondence exchanged between the parties could not create one, b) the 2nd respondent's appointment was invalid, c) the parties intended to have new securities for the localized loan of Kshs.9,000,000/= d) and awarded the 1st Applicant Kshs.251,000,000/= plus interest; and

4. Cognisantof the Court of Appeal's decision in Standard Chartered Financial Services Limited v Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & 2 Others, Civil Application No. Sup. E001 of 2023 (Warsame, M'Inoti and Mativo, JJ. A) that certified the following issues as matters of general public importance:

    a. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged;

    b. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, as submitted by the applicant, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan; and

    c. Whether this Court (Court of Appeal) can proceed to enter judgment on its own discernment and interpretation of a Record of Appeal which is inconsistent, illegible, incomplete and/or portions of the same are missing. Under this ground, the applicant argues that the Supreme

Court will be called upon to determine whether an incomplete record of appeal which obscures evidence denies a party a right to fair hearing (as protected by Article 25 of *the Constitution*) and access to justice (as protected by Article 48) of *the Constitution*);

and

5. Upon perusing the Originating Motion dated 5th March 2024, brought under Article 163(5) of *the Constitution* of Kenya, Sections 15 & 16 of the *Supreme Court Act*, Cap 9B of the Laws of Kenya and Rule 33(2) of the Supreme Court Rules, 2020, wherein the applicants seek the following orders:

   a. The Supreme Court does review and set aside the ruling of the Court of Appeal delivered on 24th February 2024 in Nairobi Court of Appeal Civil Application No. Sup. E001 of 2023 certifying that the matters raised in the 1st respondent's application dated 20th January 2023 were matters of general public importance.

   b. The Supreme Court does review the said ruling and declare that the Court of Appeal erred in law in certifying that the matters raised in the 1st respondent's application dated 20th January 2023 raised questions of general public importance requiring the input of the Supreme Court.

   c. Costs of the application be provided for.

6. Uponperusing the grounds on the face of the application and the affidavit in support sworn on 5th March 2024 and further affidavit sworn on 28th March 2024 by Mohan Galot, who describes himself as the principal shareholder, governing director and chairman of the 1st and 2nd applicants' Board of Directors, and the applicants' submissions dated 5th March 2024 and supplementary submissions dated 28th March 2024 to the effect that the localized agreement superseded any previous agreements with regard to the facility offered; that as per the terms of the 'localized loan', the 1st respondent advanced Kshs.9,000,000/= to the 1st applicant to enable it repay its loan to SCMB, but the discharge to the initial debenture was not registered and neither was a new debenture registered; that the matters certified as issues of general public importance did not meet the parameters set out in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, SC Appl. No. 4 of 2012; [2013] KESC 11 (KLR); that the matters in question revolve purely around facts and the parties' contractual engagements and thus do not affect the public and cited the case of Southern Shied Holdings Limited & 2 Others v Delphis Bank Limited & Another, Civil Appeal (Application) No. 4 of 2019; [2024] KECA 242 (KLR) in support thereof; that the questions raised in the suit are issues which the courts ordinarily handle in their day-to-day operations; that, citing the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another, SC Motion No. 42 of 2014*; [2016] eKLR, the issue of the illegible Volume 5 of the Record of Appeal which was, by consent of the parties, not considered by the Court of Appeal when writing its judgment, was raised belatedly and was not a question that was placed before the Court of Appeal for determination and was therefore, erroneously indicated to be a basis for granting certification as a matter of general public importance; that the Court of Appeal erred in certifying that the circumstances of the case raised matters of general public importance while the same was purely an appeal; and

7. Uponconsidering the 1st respondent's replying affidavit sworn on 21st March 2024 by Dr. Davidson Mwaisaka, the Head of Legal (Kenya & East Africa) of Standard Chartered Bank Kenya Limited, and noting that Standard Financial Services Limited forms part of the larger Standard Chartered Group; that the 1st respondent acknowledged the existence of the Euro-currency loan and localization agreement and the suit's progression at the superior courts below as espoused by the applicants; that the applicants' application is incurably defective for raising new matters that were not the subject of the appeal; that the certification by the Court of Appeal in Standard Chartered Financial Services Limited v

Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & 2 Others met the parameters laid down in the Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, SC Appl. No. 4 of 2012 [2013] KESC 11 (KLR); and

8. Bearing in mind the 1st respondent's submissions dated 21st March 2024 wherein it urged that the Court of Appeal's finding delivered on 16th December 2022 contradicted its previous precedents on the principle of a continuing security as espoused in the cases of *Habib Bank AG Zurich v Rajnikant Khetshi Shah, Civil Appeal No. 233 of 2016*; [2018] eKLR, *Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another, Civil Appeal No. 18 of 2014*; [2017] eKLR and *Mwambeja Ranching Company Limited & Another v Kenya National Capital Corporation, Civil Appeal No. 30 of 2018*; [2019] eKLR; that further, the finding that the 1st respondent could not exercise any power over the applicants since its counter-claim was dismissed thereby declaring the debt irrecoverable is contrary to the principle of unjust enrichment and the Court of Appeal's decisions in *Chase International Investment Limited v Laxman Keshra & 3 Others, Civil Appeal No. 8 of 1978*; [1978] eKLR and *National Bank of Kenya Limited v Anaj Warehousing Limited, SC Petition No. 36 of 2014*; [2015 eKLR; that the Court of Appeal has given conflicting decisions on the effect of an incomplete record of appeal- see *Paul Murunga T/A Splinter Tours & Travel v J.N. Wafubwa T/A Red Impex General Services, Civil Appeal No. 170 of 2000*; [2001] eKLR, Jackson Mutharia Mwaura & Another v the Republic, Criminal Appeal No. 58 of 1989 [unreported] and *Intercounters Importers and Exporters v Teleposta Pension Scheme Registered Trustees & Others, Civil Appeal (Application) No. 293 of 2016*; [2021] KECA 44 (KLR); that the Court of Appeal erred in proceeding to render itself on an appeal based on an incomplete record of appeal and cited the case of *Bwana Mohamed Bwana v Silvano Buko Bonya & 2 Others; SC Petition No, 15 of 2014*; [2015] eKLR in support of the said submission; and

9. Consideringthat the 2nd respondent did not file any response or submissions in opposition or in support of the application; and

10. Taking into Account this Court's jurisdiction under Article 163(4)(b) of *the Constitution*, Sections 15 and 15B of the *Supreme Court Act*, Cap 9B of the Laws of Kenya and Rule 33 of the Supreme Court Rules, 2020; and the guiding principles set out in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone, SC Application No. 4 of 2012; [2013] KESC 11 (KLR) and *Malcolm Bell v Daniel Toroitich Arap Moi & Another, SC Application No. 1 of 2013*; [2013] eKLR on certification of matters that involve general public importance which guiding principles are as follows:-

i. for a case to be certified as one involving a 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 the lower 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.

and

11. Having Consideredthe totality of the application, the responses and submissions put forth, We Now Opineas follows:

a. On the first question, to wit Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged, we find that indeed there have been conflicting decisions from the Court of Appeal on whether a lender must register fresh securities whenever a subsequent advance is made. We have thus considered the Court of Appeal's decisions in, Habib Bank AG Zurich, Robert Njoka Muthara, Mwambeja Ranching Company Limited and the decision the subject of this appeal, which confirm the existence of a state of uncertainty in the law which this Court has a duty to resolve.

b. We are in agreement with the Court of Appeal that this is a substantial issue that affects the entire financial, banking and commercial sector, therefore transcending the parties' circumstances. .

c. The second question is Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, as submitted by the applicant, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan. As held by the Court of Appeal, this is directly related to the first question. Once the question of the necessity, or lack thereof, of registering new security for future advances between the same parties is resolved, it follows that the lender's place in an unsecured loan will be addressed as well.

d. The third question is whether a court of record can, in the face of an incomplete record of appeal which allegedly obscures evidence and denies a party the right to a fair hearing and access to justice, render a valid judgment. In this respect, we have considered the record and make our findings below.

e. The applicants urged that none of the parties raised any objection or demonstrated any prejudice they would suffer with regard to the missing volume 5 of the record of appeal at the hearing of the appeal. The same was also not raised as a question for determination before the two superior courts below and was therefore not a matter of general public importance. Further, in view of the age of the matter, the issue of illegible and faded documents was peculiar to the instant matter and could not reasonably fall under the parameters warranting certification as a matter of general public importance.

f. The respondents, on their part, urged that the question of faded or illegible documents goes to the Court of Appeal's jurisdiction since it is a court of record and can only carry out its appellate jurisdiction by reassessing the evidence adduced and render its judgment based on a complete and legible record of appeal. In that connection, the respondents alleged that the Court of Appeal has rendered contradicting judgments on this question and there was need for this Court to settle the matter.

g. The judgment of the Court of Appeal reads in part as follows:

'... In the course of time documents have been lost or misplaced, others have faded and become illegible, dates are lost; the 7 volumes of Record of Appeal are difficult to follow...

... At the conclusion of hearing the appeal, we reserved Judgment to be delivered on 22nd October, 2021. It was then discovered that of the 7 of the volumes of the record of appeal Volume 5 of that record was missing. The Court Registry could not trace its copy; counsel for the parties did not have it and this led to delay in preparing this Judgment where the matter had to be mentioned several times to ascertain whether that volume had been traced. An online version of the record was provided by the High Court Registry but this was not of much help. This Judgment has been prepared as agreed by the parties in the absence of the said Volume 5 of the record of appeal which it is agreed cannot be found or traced. We finally deferred Judgment to be delivered on 9th December, 2022.' [Emphasis ours]

It is manifestly obvious that indeed, the issue of the illegible record of appeal only manifested after the hearing. It follows therefore, that by any stretch of imagination, this is not an issue that could have arisen prior to the hearing before the Court of Appeal.

h. In addition to the above, it is crystal clear from the Court of Appeal's judgment, which has not been denied by either party, that the parties consented to the preparation of the judgment by the Court of Appeal without volume 5 of the record of appeal. Would that question then, fall within the parameters of the principles set out in the Hermanus and Malcolm Bell cases? We think not. Having consented to the preparation of the judgment in the absence of one volume of the record of appeal, which record was missing on account of no party's mistake, the respondents could not later claim that the same infringed upon their right to a fair trial. We say this in full recognition of the fact that the parties were all represented by counsel. To our minds, this is a situation that is peculiar to the respondents' case and therefore, does not meet the parameters set out in the Hermanus Case.

i. We are alive to the fact that the right to a fair trial under Article 50 of *the Constitution* is non-derogable as provided under Article 25 (c) of *the Constitution*. We are also agreeable that in

normal circumstances, an incomplete record may infringe and violate one's right to a fair trial and access to justice. However, the circumstances in this case are unique as espoused above that the 1st respondent consented to the preparation of the judgment nonetheless.

j. The Paul Murunga Case is distinguishable in that the Court of Appeal, while striking out the appeal, left it open for the appellants to take the necessary corrective steps. In the Intercounters Case, the Court of Appeal held that it would be unjust to strike out an appeal on account of an incomplete record of appeal which was occasioned by the unavailability of records. The Court of Appeal proceeded to give the appellants time to file a supplementary record of appeal. Notably, none of the said decisions speaks to a situation that is conflicting that would require this Court's intervention.

k. The 1st respondent's claim that the Court of Appeal lacked jurisdiction is belated in the circumstances. The importance of the record of appeal is also well-settled from this Court's jurisprudence, like in the Bwana Mohamed Case cited by the 1st respondent.

12. In the end, the application is partly successful to the extent that the question of whether a court of record can proceed to write a judgment in the face of an incomplete record of appeal, as per the facts of this case, is unique to the parties herein and is therefore not a matter of general public importance.

13. In line with our decision in Jasbir Singh *Rai & 3 Others v Tarlochan Singh Rai & 4 Others, SC Petition Application No. 4 of 2012*; [2014] eKLR, we order that the costs shall abide the outcome of the appeal.

Orders

14. Consequently, and for the reasons aforesaid, we make the following Orders:

a. The Originating Motion dated 5th March 2024 is partly successful to the extent that the third question certified by the Court of Appeal as a matter of general public importance, to wit, Whether this Court can proceed to enter judgment on its own discernment and interpretation of a Record of Appeal which is inconsistent, illegible, incomplete and/or portions of the same are missing and whether an incomplete record of appeal which obscures evidence denies a party a right to fair hearing (as protected by Article 25 of *the Constitution*) and access to justice (as protected by Article 48) of *the Constitution*) is not a matter of general public importance. In the result this question is stuck off the record of issues to be determined by this Court.

b. For the avoidance of doubt, we uphold the certification of and determination of the following two issues as matters of general public importance:

i. Whether a financier holding securities in a charge or debenture is required to register fresh securities whenever a subsequent advance is made, even if the securities for the previous advances have not been discharged;

ii. Whether there is a correlation between a security instrument drawn in favour of a lending institution, and the right of recovery under a facility advanced by the same lending institution. In particular, as submitted by the applicant, the Supreme Court will be called upon to determine whether a borrowing which has not been secured (whether as contemplated by the parties or otherwise) discharges a borrower from its obligation to repay a loan;

c. The costs shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2024.

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT