



REPUBLIC OF KENYA



KENYA LAW

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Kamundi & another (Practising as Kinyua Muyaa & Co Advocates) v Kenya Ports Authority Pension Scheme & 8 others (2nd - 9th Respondents - Sued on their own behalf and on behalf of their predecessors and/or successors in title in their capacity as the Registered Trustees of the Kenya Ports Authority Pension Scheme) (Application 11 (E020) of 2022) [2023] KESC 29 (KLR) (21 April 2023) (Ruling)

Neutral citation: [2023] KESC 29 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 11 (E020) OF 2022

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

APRIL 21, 2023

BETWEEN

F KINYUA KAMUNDI 1ST APPLICANT

DT MUYAA 2ND APPLICANT

PRACTISING AS KINYUA MUYAA & CO ADVOCATES

AND

KENYA PORTS AUTHORITY PENSION SCHEME 1ST RESPONDENT

ALBERT CHAUREMBO MUMBA 2ND RESPONDENT

ABDALLA H MWARUWA 3RD RESPONDENT

MK MURE 4TH RESPONDENT

MARY WAIRIMU NG'ANG'A 5TH RESPONDENT

ALEX OLE-TEIPAN 6TH RESPONDENT

MARY OTIENDE 7TH RESPONDENT

MARGARET NYAGA 8TH RESPONDENT

MAJENGO KATANA 9TH RESPONDENT

2ND - 9TH RESPONDENTS - SUED ON THEIR OWN BEHALF AND ON BEHALF OF THEIR PREDECESSORS AND/OR SUCCESSORS IN TITLE IN THEIR CAPACITY AS THE REGISTERED TRUSTEES OF THE KENYA PORTS AUTHORITY PENSION SCHEME



(Being an application for review of the Ruling and orders of the Court of Appeal in Civil Application No. 69 of 2020 given at Mombasa (Gatembu, Nyamweya & Lesiit JJ.A) dated 21st October, 2022 dismissing the Applicant's Application for Grant of Certification)

Taxation of advocate-client bill of costs is a contest between the parties and not a matter of general public importance that would transcend the parties

The application sought the review and setting aside of the ruling of the Court of Appeal declining to certify the questions raised by the applicant as matters of general public importance. The court held that whether the Court of Appeal delivered a judgment without reading the record of appeal and whether judges did not read each other's draft judgments was a matter of apprehension and/or speculation, and not a matter of general public importance. The court further found that from a perusal of the appellate court's judgment and the resulting orders, there was no contradiction. The court also held that the applicants' taxation of their advocate-client bill of costs and specifically, the value of the subject matter, was a contest between the parties and could not be a matter of general public importance that would transcend the parties.

Reported by Kakai Toili

Civil Practice and Procedure - appeals - appeals to the Supreme Court - appeals in cases certified as matters of general public importance - matters considered to be of general public importance - whether the allegation that the Court of Appeal delivered a judgment without reading the record of appeal and that the judges did not read each other's draft judgments were matters of general public importance appellable to the Supreme Court - whether taxation of advocate-client bill of costs was a matter of general public importance appellable to the Supreme Court - Constitution of Kenya, 2010, article 163(4)(b).

Brief facts

The application sought the review and setting aside of the ruling of the Court of Appeal declining to certify the questions raised by the applicant as matters of general public importance and refusal of grant of leave to appeal to the Supreme Court on issues identified and proposed as involving matters of general public importance. The applicants contended that the appeal raised substantial matters of general public importance that transcended the parties and that the judges of the Court of Appeal delivered contradicting judgments.

The applicants stated that the mode of assessment of advocates' fees after certification of costs in a party and party bill of costs did not arise directly in the appeal as it was not one of the grounds of appeal. Further, that by requiring the taxing master to use Kshs 201,981,424.00 as the value of the subject matter without any appeal the Court of Appeal reduced the fees by more than 90% thereby interfering with property rights already accrued and without applying the doctrine of *res judicata* and that the general public and specifically the legal profession would benefit from determination of those issues.

Issues

- i. Whether the allegation that the Court of Appeal delivered a judgment without reading the record of appeal and that the judges did not read each other's draft judgments were matters of general public importance appellable at the Supreme Court.
- ii. Whether taxation of advocate-client bill of costs was a matter of general public importance appellable at the Supreme Court.

Held

1. Article 163(4)(b) of the Constitution of Kenya, 2010 (Constitution) granted the court jurisdiction to hear appeals from the Court of Appeal on matters of general public importance. Section 15B of the Supreme Court Act and rule 33(1) and (2) of the Supreme Court Rules, 2020 provided for the right to review the Court of Appeal's decision on certification of a matter as one of general public importance.



2. Whether the Court of Appeal delivered a judgment without reading the record of appeal and whether judges did not read each other's draft judgments was a matter of apprehension and/or speculation, and not a matter of general public importance. From a perusal of the appellate court's judgment and the resulting orders, there was no contradiction.
3. The court, like superior courts below, had addressed and settled the issues as to; whether the Court of Appeal could hear an appeal in the absence of a notice of appeal; whether parties had a right to equal protection, enjoyment and benefit of the law; and the doctrine of *res judicata*.
4. As for the manner in which advocates' fees were to be determined after a certificate of costs was given in a party and party bill of costs, there was discordance between increasing the certified party and party costs by one half or filing and taxing an advocate-client bill of costs. The appellate court should, through an expanded bench, have the first opportunity to resolve the issue, before escalating to the instant court. That was not a matter that directly arose out of the appeal.
5. The applicants' taxation of their advocate-client bill of costs and specifically, the value of the subject matter, was a contest between the parties and could not be a matter of general public importance that would transcend the parties. A mere apprehension of a miscarriage of justice, was a matter most apt for resolution in the lower superior courts, and was not a proper basis for granting certification for an appeal to the Supreme Court.

Application dismissed.

Orders

Each party to bear its own costs.

Citations

Cases

1. Onyango, Christopher & 23 others v Heritage Insurance Company Limited (Civil Application 16 of 2020, [2021] eKLR) — Applied
2. Steyn, Hermanus Phillipus v Giovanni Gnechi-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)[2013]eKLR) — Applied

Statutes

1. Constitution of Kenya, 2010 — Article 163(4)(b) — Interpreted
2. Supreme Court Act (act no 7 of 2011) — Section 15B,16 — Interpreted
3. Supreme Court Rules, 2020 (act no 7 of 2011 sub leg) — Rule 33(1)(2) — Interpreted

Advocates

None mentioned

RULING

Representation:

FK Kamundi & DT Muyaa practising as Kinyua Muyaa & Co Advocates (Acting in person)

Mr Oyoo

(Kaplan & Stratton Advocates for the respondents)

1. Upon perusing the originating motion application dated November 3, 2022 and filed on November 8, 2022 pursuant to article 163(4)(b) of the Constitution, section 15 and 16 of the Supreme Court Act and rule 33(2) of the Supreme Court Rules, 2020 seeking, *inter alia*: the review and setting aside of the ruling of the Court of Appeal delivered on October 21, 2022 declining to certify the questions raised by the applicant as being matters of general public importance; and refusal of grant of leave to



- appeal to the Supreme Court on the thirteen (13) issues identified and proposed as involving matters of general public importance;
2. Upon perusing the grounds on the face of the application; the supporting affidavit sworn on November 3, 2022 and the supplementary affidavit sworn on November 9, 2022 both by DT Muyaa, Advocate; and the submissions dated November 4, 2022 in which the applicants contend that: the appeal raises substantial matters of general public importance that transcend the parties; the Judges of Appeal delivered contradicting judgments whose drafts were amended before they were re-circulated; and that the complaint concerned the wider question of administration of justice in the Court of Appeal;
 3. Upon considering the applicants' further grounds that the mode of assessment of advocates fees after certification of costs in a Party & Party Bill of Costs did not arise directly in the appeal as it was not one of the grounds of appeal; that by requiring the Taxing Master to use Kshs 201,981,424.00 as the value of the subject matter without any appeal the Court of Appeal reduced the fees by more than 90% thereby interfering with property rights already accrued and without applying the doctrine of res judicata; and that the general public and specifically the legal profession will benefit from determination of these issues;
 4. Upon perusing the respondents' replying affidavit sworn on November 30, 2022 by Vincent Oweya, the respondents' Legal Officer; and their submissions dated December 14, 2022, which oppose the application on the grounds that the application does not raise any matter of general public importance to warrant the review and certification being sought; that the sole question is on the subject value principle of taxation of the Bill of Costs; that there is no contradiction in the judgment of the Court of Appeal; that the issues raised have no bearing on the public interest transcending the parties. The respondents rely on this court's decision in [*Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone \[2013\]eKLR*](#) and [*Christopher Onyango & 23 others v Heritage Insurance Company Limited \[2021\]eKLR*](#) to buttress their arguments;
 5. Bearing in mind the provisions on this court's jurisdiction under article 163(4)(b) of the [*Constitution*](#), which grant this court jurisdiction to hear appeals from the Court of Appeal on matters of general public importance, and section 15B of the [*Supreme Court Act*](#) and rule 33(1) and (2) of the [*Supreme Court Rules, 2020*](#) which provide for the right to review the Court of Appeal's decision on certification of a matter as one of general public importance;
 6. Taking into account this court's guiding principles on certification of a matter as one involving general public importance arising from the decision in [*Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone \(supra\)*](#); and
 7. Noting that the genesis and the main contention by the applicants in the initial suit is the taxation of their advocate-client bill of costs and specifically, the value of the subject matter, the Court of Appeal in its judgment having set aside the ruling of the Employment and Labour Relations Court for failure by the taxing officer to compute the instruction and getting up fee, respectively, as provided in the Advocates Remuneration Order resulting in an excessive award of Kshs 87,139,560.45, almost half the decretal sum of Kshs 201,981,424.50;
 8. We have considered the application, affidavits, submissions filed and the issues proposed to be certified as involving great public importance and now opine as follows:
 - i. On whether the Court of Appeal may deliver a judgment without reading the record of appeal and whether judges did not read each other's draft judgments, we find this to be a matter of apprehension and/or speculation, and not a matter of general public importance;



- ii. On the Court of Appeal’s delivery of three separate contradicting judgments, we have perused the appellate court’s judgment and the resulting orders and fail to see any contradiction as argued by the applicant, and none was pointed to us;
- iii. On the questions whether the Court of Appeal can hear an appeal in the absence of a notice of appeal; whether parties have a right to equal protection, enjoyment and benefit of the law; and the doctrine of res judicata, this court, just like superior courts below it has addressed and indeed settled those issues;
- iv. As for the manner in which advocates’ fees are to be determined after a Certificate of Costs is given in a Party & Party Bill of Costs, there is apparent discordance between increasing the certified party and party costs by one half or filing and taxing an Advocate-Client Bill of Costs. The Court of Appeal appreciated this dilemma and proposed, rightly so, that the appellate court should, through an expanded bench, have the first opportunity to resolve the issue, before escalating to this court. We agree with the Court of Appeal that this was not a matter that directly arose out of the appeal.
- v. The applicants’ taxation of their advocate-client bill of costs and specifically, the value of the subject matter, was a contest between the parties and cannot be a matter of general public importance that would transcend the parties; A mere apprehension of a miscarriage of justice, is a matter most apt for resolution in the lower superior courts, and is not a proper basis for granting certification for an appeal to the Supreme Court.
- vi. We are satisfied that the Court of Appeal correctly interrogated the applicants’ proposed issues under the threshold set by this court in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (supra)* in arriving at its decision.

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

- i. The originating motion dated November 3, 2022 be and is hereby dismissed; and
- ii. We order each party to bear its own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU



JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

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

