



**Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation
(Application E022 of 2023) [2023] KESC 88 (KLR) (Civ) (6 October 2023) (Ruling)**

Neutral citation: [2023] KESC 88 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

APPLICATION E022 OF 2023

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

OCTOBER 6, 2023

BETWEEN

MWAMBEJA RANCHING COMPANY LIMITED 1ST APPLICANT

PROJECT ADVISORY SERVICES LIMITED 2ND APPLICANT

AND

KENYA NATIONAL CAPITAL CORPORATION RESPONDENT

(Being an application for review of the decision of the Court of Appeal (Omondi, Laibuta, Mumbi Ngugi, Mativo & Odunga, JJA) delivered on June 9, 2023, denying certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution)

Requirements for a matter to be certified as being of general public importance

The application sought the review of the ruling of the Court of Appeal denying certification of the intended appeal. The court reiterated that 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 was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest. The court further found that the applicant opted for review of the Court of Appeal's judgment, in effect forfeiting his right of appeal at that instance.

Reported by Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals in matters certified as being of general public importance - what were the requirements for a matter to be certified as being of general public importance – of Kenya, 2010, article 163(4)(b).

Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms - right to appeal - whether opting for the review of a Court of Appeal decision amounted to forfeiting the right of appeal over the decision.



Brief facts

The application sought the review of the ruling of the Court of Appeal denying certification of the intended appeal as one involving matters of general public importance and leave to amend the notice of appeal. The applicants urged that the intended appeal raised the following questions of general public importance; conflicting case law from the Court of Appeal as to whether the *in duplum* principle applied retrospectively; applicability of section 4(4) and 19 of the prescribing a 6-year limitation period on interest on a guaranteed debt or a consent amounting to a preliminary decree; whether a guarantor assumed primary liability for the entire debt contrary to the fixed sum expressed in the contract; whether it was a clog and fetter on the equity of redemption for a chargee to charge unconscionable interest; whether a chargee was a constructive trustee of surplus monies following sale of charged property; what interest, between court rates, the bank's fixed deposit rates or commercial rates should be applied to surplus monies held in trust by a chargor who refused to account for and refund the excess.

Issues

- i. What were the requirements for a matter to be certified as being of general public importance?
- ii. Whether opting for the review of a Court of Appeal decision amounted to forfeiting the right of appeal over the decision.

Held

1. 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 was one the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest.
2. The motion lacked merit as the applicant had not satisfactorily highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling denying certification. Neither had the applicant raised any substantial question of law, the determination of which, would have a significant bearing on the public interest. In any event, the applicant opted for review of the Court of Appeal's judgment, in effect forfeiting his right of appeal at that instance.
3. The court had no jurisdiction to review certification of an intended appeal, where no right of appeal lay in the first instance. The applicants' prayer to amend the notice of appeal dated August 8, 2019 was moot.

Application dismissed;

Orders

Costs of the application to be borne by the applicants.

Citations

Cases

1. Bell, Malcolm v. Hon. Daniel Toroitich arap Moi and Another, (SC Application No. 1 of 2013; [2013] eKLR) — Mentioned
2. National Bank of Kenya Limited (As the successor in business of Kenya National Corporation Limited) & another v Criticos (Application 14 (E023) of 2022; [2023] KESC 60 (KLR)) — Mentioned
3. Steyn, Hermanus Phillipus v Giovanni Gnechi-Ruscone (Application 4 of 2012; [2013] KESC 11 (KLR)) — Mentioned

Statutes

1. Banking Act (CAP. 488) — section 44A — Interpreted
2. Constitution of Kenya, 2010 — article 163(4)(b) (5) — Interpreted
3. Limitation of Actions Act (CAP. 22) — section 4(4), 19 — Interpreted
4. Supreme Court Act (Act No 7 of 2011) — section 3A, 21, 15, 15B — Interpreted



5. Supreme Court Rules, 2020 (Act No 7 of 2011) — rule 33(2) (3) — Interpreted

Advocates

Mr. Allen Gichuhi SC for 1st and 2nd Applicants

Mr. George Mutua for Respondent

RULING

Representation:

Mr. Allen Gichuhi SC..... for the 1st and 2nd applicants

(Wamae & Allen Advocates)

Mr. George Mutua..... for the respondent

(Mutua-Waweru & Company Advocates)

1. Upon perusing the applicants’ motion dated June 20, 2023 and filed on June 23, 2023, pursuant to article 163(4)(b) and (5) of the Constitution, sections 3A, 21, 15 and 15B of the Supreme Court Act, 2011 and rule 33(2) and (3) of the Supreme Court Rules, 2020 seeking: review of the ruling of the Court of Appeal (Omondi, Laibuta, Mumbi Ngugi, Mativo & Odunga, JJA) dated June 9, 2023 denying certification of the intended appeal as one involving matters of general public importance; certification of the intended appeal (against the judgment of the Court of Appeal (Koome (as she then was), Warsame & Kiage, JJA) delivered on August 6, 2019 in Civil Appeal No 30 of 2018, *Mwambeja Ranching Company Limited v Kenya National Capital Corporation*; and leave to amend the notice of appeal dated August 8, 2019, to replace Kenya National Capital Corporation with Project Advisory Services; and
2. Upon considering the applicants’ grounds on the face of the application and affidavits in support both sworn by Harry Horn (Junior) and Allen Waiyaki Gichuhi, SC on June 20, 2023, wherein it is urged that the intended appeal raises the following questions of general public importance, reproduced thus: conflicting case law from the Court of Appeal as to whether the in duplum principle applies retrospectively; applicability of section 4(4) and 19 of the Limitation of Actions Act prescribing a 6-year limitation period on interest on a guaranteed debt or a consent amounting to a preliminary decree; whether a guarantor assumes primary liability for the entire debt contrary to the fixed sum expressed in the contract; whether it is a clog and fetter on the equity of redemption for a chargee to charge unconscionable interest; whether a chargee is a constructive trustee of surplus monies following sale of charged property; what interest, between court rates, the bank’s fixed deposit rates or commercial rates should be applied to surplus monies held in trust by a chargor who refuses to account for and refund the excess?; and
3. Further considering the applicants’ submissions dated July 10, 2023 and filed on July 17, 2023, restating the grounds set out above and in addition, urging that the appellate court in its judgment dated August 6, 2019 misapplied the law, in holding that the cause of action relating to continuing securities never lapses. Moreover, that the court created confusion by finding that a guarantor’s liability is limited to a fixed sum, but refused to apply the aspect of time barred interest or the in duplum rule to ascertain the lawful debt due; Furthermore, that the case raises matters of general public importance requiring certainty of law. In support, the applicants cite the case of Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone SC Application No 4 of 2012; [2013] eKLR, to urge that the questions raised permeate the banking industry, affect a considerable number of persons, continually engage the workings of judicial organs and have a significant bearing on public interest. As pertains the



prayer for leave to amend the notice of appeal, it is urged that this court has inherent jurisdiction to allow amendment of the notice of appeal dated August 8, 2019, as it shall not cause prejudice to the respondent; and

4. Upon noting the respondent's grounds of opposition, submissions and list of authorities, all dated July 27, 2023 and filed on even date wherein it is urged that the applicant have not established any basis for review under article 163(5) of the *Constitution*; that they are agitating narrow private interests relating to their adjudged contractual liability to the respondent, hence conclusions drawn by the superior courts below on matters of fact and interpretation of contractual documents, do not have any bearing on the public interest. To this end, the respondent cites this court's ruling in *National Bank of Kenya Limited v Basil Criticos* SC Application No 14 (E023) of 2022; [2023] eKLR. Additionally, it is urged that the in duplum principle under section 44A of the *Banking Act* has clear provisions as to its application, raising no novelty requiring this Court's determination; and that the applicants have not anchored the prayer on amendment of the notice of appeal on any enabling provisions of law; and
5. Noting that before the Court of Appeal, the applicants filed a composite application seeking leave to amend the notice of appeal; review of the Judgment of the Court of Appeal (Koome, Warsame & Kiage, JJA), delivered on August 6, 2019; and certification of its intended appeal in the alternative, in effect pursuing the appellate court's jurisdiction of appeal and review simultaneously. Further noting that the Court of Appeal declined the prayer for review as grievances raised by the applicant were principally grounds of appeal, the consideration of which would amount to sitting on appeal over its own decision. Similarly, the Court of Appeal found that the certification application failed to meet the principles settled in *Malcolm Bell v Hon Daniel Toroitich arap Moi & another* SC Application No 1 of 2013; [2013] eKLR. Furthermore, the appellate court stated that it was functus officio as jurisdiction to grant leave to amend a notice of appeal regularly filed against the decision of the court lay with the Supreme Court;
6. Cognisant of the fact that this court has already established the basis upon which an intended appeal may be certified as one involving a matter of general public importance in *Hermanus Phillipus Steyn v Giovanni Gnechi Ruscone (supra)*; to the effect that;

'...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...'

7. We now opine as follows: -
 - i. The motion lacks merit as the applicant has not satisfactorily highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling denying certification. Neither has the applicant raised any substantial question of law, the determination of which, would have a significant bearing on the public interest;
 - ii. In any event, the applicant opted for review of the Court of Appeal's judgment, in effect forfeiting his right of appeal at that instance;
 - iii. Flowing from the above, this court therefore, has no jurisdiction to review certification of an intended appeal, where no right of appeal lies in the first instance;
 - iv. Having found as above, the applicants' prayer to amend the notice of appeal dated August 8, 2019 is moot.



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

- i. The motion dated June 20, 2023 and filed on June 23, 2023, is hereby dismissed;
- ii. The costs of this application shall be borne by the applicants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

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

