



REPUBLIC OF KENYA



KENYA LAW
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**Sundowner Lodge Limited v Kenya Tourist Development Corporation
(Application E039 of 2023) [2023] KESC 100 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KESC 100 (KLR)

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

APPLICATION E039 OF 2023

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

DECEMBER 8, 2023

BETWEEN

SUNDOWNER LODGE LIMITED APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION RESPONDENT

(Being an application for review of the decision of the Court of Appeal at Nairobi (Okwengu, Mativo & Ngenye JJ.A) dated 22nd September, 2023 in Nairobi Civil Application No. Sup. 19 of 2018)

Availability of general damages as a remedy for breach of contract does not warrant certification as involving matters of general public importance

The application sought review of the Court of Appeal decision declining to certify the intended appeal as being one involving matters of general public importance. The issues proposed to be certified revolved primarily around the availability of general damages as a remedy for breach of contract and the extent of such remedy, if at all. The Supreme Court found that in differing with the basis upon which the High Court had awarded general damages, the Court of Appeal did not negate but rather affirmed the general rule. Further, the Court of Appeal affirmed that there was no ambiguity in the legal practice since the appellate court did not misinterpret its previous decisions that general damages were not awardable for breach of contract except in exceptional circumstances.

Reported by Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals in matters certified as of general public importance - whether the issue of availability of general damages as a remedy for breach of contract and the extent of such remedy warranted certification as involving general public importance – Constitution of Kenya, 2010, article 163(4)(b).

Brief facts

The applicant filed the instant application seeking review of the Court of Appeal decision declining to certify the intended appeal as being one involving matters of general public importance. The applicant's claim at the trial court was premised on breach of the lending contract to which the applicant filed a suit and sought



general and special damages, interests and costs. The trial court awarded the applicant Kshs 153,000 as special damages and Kshs 30,000,000 as general damages. On appeal, the Court of Appeal set aside the award of Kshs 30,000,000 as general damages.

The applicant contended that a review of the Court of Appeal's decision was merited as the intended appeal to the Supreme Court raised questions of general public importance that transcended beyond the parties; as a result of the Court of Appeal's misinterpretation of its prior decisions, its decision in the matter had a likelihood of causing confusion in the legal practice and among the lower courts regarding the recoverability of general damages for breach of contract.

Issues

Whether the issue of availability of general damages as a remedy for breach of contract and the extent of such remedy warranted certification as involving general public importance.

Held

1. The Court of Appeal, in differing with the basis upon which the High Court had awarded general damages did not negate but rather affirmed the general rule. Further, *vide* the ruling dated September 22, 2023 in Civil Application No Sup 19 of 2018, the Court of Appeal, affirmed that there was no ambiguity in the legal practice since the appellate court did not misinterpret its previous decisions that general damages were not awardable for breach of contract except in exceptional circumstances, which had to be justified. Therefore, that issue was well settled and the issue of contradictory previous decisions did not arise.
2. The applicant sought another opportunity to have a third bite at the cherry by seeking to revisit factual findings and conclusions already resolved by the superior courts below. Determinations of fact in contests between parties were not, by themselves, a basis for granting certification for an appeal to the Supreme Court. The Court of Appeal correctly interrogated the proposed issues as against the threshold set out in the *Hermanus Phillipus Steyn* case in arriving at its decision that they did not warrant a certification as involving general public importance.

Application dismissed.

Orders

Costs to be borne by the applicant.

Citations

Cases

1. Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (Civil Appeal 189 of 2014; [2016] KECA 56 (KLR)) — Explained
2. Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)) — Explained
3. Malcolm Bell v Moi & another (Application No 1 of 2013; [2013] eKLR) — Explained
4. Otiso, Delilah Kerubo v Ramesh Chander Ndingra (Civil Appeal 154 of 2009; [2018] KECA 376 (KLR)) — Explained
5. Securicor Courier (K) Ltd v Onyango & another (Civil Appeal 323 of 2002; [2008] eKLR; [2008] KLR 252) — Explained
6. Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited (Civil Appeal 178 of 2005; [2015] KECA 822 (KLR)) — Explained
7. Town Council of Awendo v Onyango & 13 others (Misc Application 49 of 2014; [2015] eKLR) — Explained
8. Dharamshi v Karsan ([1974] EA 41) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 163(5) — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 15B(1)(b) — Interpreted



3. Supreme Court Rules, 2020 — rule 33(1)(2) — Interpreted

Advocates

None mentioned

RULING

Representation:

Mr Manyara for the applicant (Oyugi & Company Advocates)

Mr Opolo h/b for Mr Musyoka for the respondent (Muriu, Mungai & Company Advocates)

1. Upon reading the originating motion by the applicant dated and filed on October 4, 2023 pursuant to article 163(5) of the Constitution of Kenya, section 15B(1)(b) of the Supreme Court Act No 7 of 2011 and rule 33 of the Supreme Court Rules, 2020, seeking review of the Court of Appeal decision delivered on September 22, 2023 in Nairobi Civil Application Sup No 19 of 2018 declining to certify the intended appeal as being one involving matters of general public importance; and
2. Upon perusing the grounds on the face of the application, and the supporting affidavit of Samuel Warugu Kimotho, a Director of the applicant, sworn on October 4, 2023 wherein the applicant contends that; a review of the Court of Appeal’s decision is merited as the intended appeal to this court raises questions of general public importance that transcend beyond the parties; as a result of the Court of Appeal’s misinterpretation of its prior decisions, its decision in this matter has a likelihood of causing confusion in the legal practice and among the lower courts regarding the recoverability of general damages for breach of contract; this being an issue of repeated occurrence, there is need for the Supreme Court to pronounce itself on the same to provide guidance and settle the law by determining inter alia:
 - (1) Whether general damages are among the remedies available to parties for breach of contracts in Kenya;
 - (2) Whether general damages are recoverable for breach of contracts in Kenya in view of the impugned decision herein;
 - (3) Whether general damages are recoverable where quantifiable and/or special damages are not recoverable in view of the decision in Dharamshi v Karsan [1974] EA 41;
 - (4) Whether general damages are recoverable with quantifiable damages where one has proved the exceptions as alluded to in Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] eKLR;
 - (5) Whether general damages are only recoverable upon proof of the exceptions;
 - (6) Whether the Court of Appeal decisions on the issue are conflicting and are occasioning confusion to lower courts on interpretation of the question on whether general damages are recoverable for breach of contract? and
3. Upon considering the applicant’s written submissions dated and filed on October 5, 2023 wherein the applicant submits that it has met the threshold enunciated by this court in the case of Town Council of Awendo v Nelson Oduor Onyango & 13 others [2015] eKLR; and that the lack of certainty arising from the Court of Appeal’s misinterpretation of its decisions has raised several divergent schools of thought; whereas, all adhere to the general rule that damages are not recoverable in cases of alleged breach of contract, one school of thought applies this rule absolutely, while others apply it with exceptions and



others refer to the principle of *restitutio intergram* (sic); these schools of thought emerge from decisions including *Dharamshi* case, *Securicor Courier (K) Ltd vs Benson David Onyango & another* [2008] eKLR, *Capital Fish Kenya Limited Case*, and *Total (Kenya) Limited Formerly Caltex Oil (Kenya) v Janevams Limited* [2015] eKLR; hence, it would be in the interest of justice to certify the intended appeal as one raising issues of general public importance and requiring this court's intervention; and

4. Upon considering the replying affidavit of Daniel Musyoka, Advocate for the respondent, sworn on October 6, 2023 in opposition to the application and written submissions dated October 12, 2023 and filed on October 16, 2023 on grounds that; the applicant has not justified the need for certification of the intended appeal as involving a matter of general public importance; the decision of the Court of Appeal merely affirmed the trite, well-established and settled principle of law that general damages cannot be awarded for breach of contract; besides, the matters for determination that arose at the superior courts below were substantially matters of fact; alternatively, the issue of whether general damages for breach of contract, where quantifiable, are not allowed since the same would amount to duplication, was never urged in the superior court; consequently, this court cannot exercise jurisdiction as an appellate court; and
5. Further considering the respondent's argument that there being no element of general public importance or confusion arising from Court of Appeal's jurisprudence, it is clear that the appellate court in its decision merely restated the general rule as established in its previous decisions such as the *Dharamshi* case ; however, the court acknowledged known exceptions to this rule, as delineated in the *Capital Fish Kenya Limited* case, and reaffirmed by its subsequent decisions including *Delilah Kerubo Otiso v Ramesh Chander Ndingira* [2018] eKLR; since, the applicant has failed to plead and establish that the respondent's conduct fell within the exception for determination by the superior courts, this court cannot exercise jurisdiction over the same. Accordingly, the respondent states that the intended appeal would, at best, be an academic exercise to deal with hypothetical issues which would have no bearing on the dispute between the parties as the applicant under the disguise of the intended appeal involving matters of general public importance, intends to bring up entirely new matters before this Court; and
6. Acknowledging this court's jurisdiction under article 163(4)(b) of the *Constitution* 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* on the right to review the Court of Appeal's decision on certification of a matter as one of general public importance; and
7. Noting that the applicant's claim at the trial court was premised on breach of the lending contract to which the applicant filed Civil Case No 481 of 2003 and sought general and special damages, interests and costs. The trial court awarded the applicant Kshs 153,000/- as special damages and Kshs 30,000,000/- as general damages. On appeal, the Court of Appeal set aside the award of Kshs 30,000,000/- as general damages; and
8. Taking into account the guiding principles for certifying a matter as one involving general public importance and as set out by this court in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione* [2013] eKLR and *Malcolm Bell v Daniel Toroitich Arap Moi & another*, Supreme Court Appl No 1 of 2013 [2013] eKLR; and
9. Having therefore considered the application, response, submissions and issues proposed to be certified as involving general public importance, we now opine as follows:
 - (i) The issues proposed to be certified as involving general public importance revolve primarily around the availability of general damages as a remedy for breach of contract in Kenya and the



extent of such remedy, if at all. Specifically, the applicant seeks a final pronouncement from this court on this issue on account of conflicting decisions by the Court of Appeal on that subject.

- (ii) Examining the judgments of the superior courts submitted by the applicant, it is manifest that the High Court appreciated the general rule that general damages are not normally awarded in breach of contract cases save for exceptional circumstances upon which it proceeded to award general damages to the respondent. Likewise, on appeal, the Court of Appeal acknowledged the general rule and was not persuaded that the authorities cited by the trial court supported the proposition that in cases of breach of contract there exists a large and wide – open discretion to a court to award any amount of damages, in addition to the quantified damages. In the premise, the Court of Appeal, in differing with the basis upon which the High Court had awarded general damages did not negate but rather affirmed the general rule.
 - (iii) Further, *vide* the ruling dated September 22, 2023 in Civil Application No Sup 19 of 2018, the Court of Appeal, affirmed that there is no ambiguity in the legal practice since the appellate court did not misinterpret its previous decisions that general damages are not awardable for breach of contract except in exceptional circumstances, which have to be justified. It therefore follows that this issue is well settled and the issue of contradictory previous decisions does not arise.
 - (iv) To our minds the applicant seeks another opportunity to have a third bite at the cherry by seeking to revisit factual findings and conclusions already resolved by the superior courts below. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal to the Supreme Court.
 - (v) In the end, we have no difficulty in recognising that the Court of Appeal correctly interrogated the proposed issues as against the threshold set out in *Hermanus Phillipus Steyn* case in arriving at its decision that they did not warrant a certification as involving general public importance. We therefore, decline to vacate its finding.
 - (vi) As for costs, it is only prudent that costs follow the event.
10. Consequently, for the reasons aforesaid, we make the following orders:
- (i) The originating motion dated and filed on October 4, 2023 be and is hereby dismissed; and
 - (ii) The costs of this application be borne by the applicant.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 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
.....

S. C. WANJALA



JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

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I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

