Dhanjal Investments Limited v Cosmos Holidays PLC (Application 12 of 2020) [2021] KESC 53 (KLR) (24 March 2021) (Ruling)

Dhanjal Investments Limited v Cosmos Holidays PLC [2021] eKLR

Neutral citation: [2021] KESC 53 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 12 OF 2020

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

MARCH 24, 2021

BETWEEN

DHANJAL INVESTMENTS LIMITED ..... APPLICANT

AND

COSMOS HOLIDAYS PLC ..... RESPONDENT

(Being an application for review of the decision of the Court of Appeal (Karanja, Warsame & Murgor JJA) given at Nairobi on 22nd May 2020, dismissing the Applicants' request for certification)

Circumstances under which an intended appeal would be certified as one that involved matters of general public importance.

For an intended appeal before the Supreme Court to qualify as a matter of general public importance, it had to be one, the determination of which transcended the circumstances of the particular case and had a significant bearing on the public interest.

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the Supreme Court - appellate jurisdiction - matters of general public importance – claim relating to recognition and enforcement of a foreign judgment in which nine tourists were awarded damages for injuries suffered in a robbery while being accommodated at a Kenyan hotel - circumstances under which the Supreme Court would certify an intended appeal as one that raised matters of general public importance.*

Brief facts

The applicant was a hotelier who operated the Travellers Beach Hotel and the Mwalunganje Elephant Camp in Kwale County. The applicant entered into a contract with the respondent, a tour operator based in the United Kingdom to supply package holiday tourists to be accomodated at the applicant's hotels. On the night between May 3 and May 4 2000, nine tourists at Mwaluganje Elephant Camp Kwale County were attacked by a group of robbers and injured. They filed a suit at the United Kingdom to recover damages for the injuries

they suffered. The tourists were awarded damages in suit No 6LS90055 in the Queen's Bench Division of the High Court in England dated 10 August 2009. The judgment was registered in Kenya on March 16, 2012.

The applicant filed HCCC No 112 of 2012 (OS) at the High Court whilst stating that the foreign court lacked jurisdiction over the claim as it was a personal injuries claim arising in Kenya. The application was dismissed by the High Court which found that sections 3(3)(b) and 4(1)(i) of the Foreign Judgments Reciprocal Enforcement Act were inapplicable to the matter and that the foreign court had jurisdiction to handle the matter. The High Court also made the finding that the applicant had submitted to that court's jurisdiction by appearing in the proceedings. On appeal by the applicant, the Court of Appeal dismissed the appeal and upheld the High Court's decision.

The applicant then filed a notice of motion at the Court of Appeal seeking leave to lodge an appeal at the Supreme Court. According to the applicant, the intended appeal raised issues of general public importance as well as issues of law, specifically on enforcement of the provisions of the Foreign Judgments (Reciprocal) Enforcement Act. The Court of Appeal declined to grant certification and stated that the intended appeal did not raise a substantial point of law or matter of general public interest to be determined at the Supreme Court. The applicant then filed a review application at the Supreme Court seeking a review of the Court of Appeal's decision declining to grant certification that the intended appeal involved matters of general public importance.

Issues

When would the Supreme Court certify an intended appeal as one that involved matters of general public importance?

Held

1. For an intended appeal to qualify as a matter of general public importance, it had to be one, the determination of which transcended the circumstances of the particular case and had a significant bearing on the public interest.
2. As was correctly noted by the High Court and the Court of Appeal, the decision of the foreign court did not include the payment of money relating to exemplary, punitive or multiple damages. It therefore did not invoke the application of section 3(3)(b) of the Foreign Judgments Reciprocal Enforcement Act. Section 4(1)(i) of the Act was also inapplicable. Further, section 10(2)(c) and 10(4) of the Foreign Judgments Reciprocal Enforcement Act clearly gave the foreign court jurisdiction over matters arising out of the contract between the parties including indemnity as provided for in the contract.
3. The circumstances surrounding the claim of indemnity or damages under the contract with respect to the respondent's liability for the injuries suffered by the nine tourists, were evidentiary matters that were specific to the parties involved and they were not grounds for the grant of certification.
4. The applicant willingly participated in the foreign court proceedings where they litigated the matter until the appellate stage. In doing so they exhaustively addressed the initial claim. The opportunity to invoke the Supreme Court's jurisdiction on grounds that a matter was of public importance, was not an opportunity to continue litigation or obtain an extra tier of appeal from the Court of Appeal.

Orders

1. *The application dated June 3, 2020 was dismissed.*
2. *The applicant was to bear the costs of the application.*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. The Applicant seeks review of the decision by the Court of Appeal dated 22nd May 2020, which declined to grant certification that its intended appeal involves matters of general public importance.

2. At the heart of the matter is the interpretation of Sections 3 (3) (b); 4 (1) (a), (b), (c), (i) and (g), of the Foreign Judgments (Reciprocal Enforcement) Act. In brief, the background of this matter is an incident that occurred between the 3rd and 4th of May 2000. The Applicant, a Hotelier, operating the Travellers Beach Hotel, and Mwaluganje Elephant Camp in Kwale County, entered into a contract with the Respondent, a tour operator, based in the United Kingdom to supply to them with "Package holiday tourists" to be accommodated at their Hotels. Unfortunately, on the night between the 3rd and 4th of May 2000, 9 tourists who were at Mwaluganje Elephant Camp Kwale County were attacked by a group of robbers causing them to be injured. Consequently, they filed suit in the United Kingdom, for recovery of damages for injuries that they had sustained, during that attack.

3. The decision in that suit that is No. 6LS90055 in the Queen's Bench Division of the High Court in England dated 10 August 2009 was registered here in Kenya on the 16th March 2012.

4. Upon notification of the registered judgement, the Applicant filed at the High Court, HCCC No 112 of 2012 (OS). In a decision rendered on the 20th of June 2013, Justice Havelock (as he then was) dismissed the application finding that: both Section 3 (3) (b) and Section 4 (1)(i) of the Foreign Judgments Reciprocal Enforcement Act Cap 43 were inapplicable to the matter; that the English Court did have jurisdiction to decide the matter before it; and that the Applicant /Judgement Debtor being the defendant in the English Court submitted to the jurisdiction of the court by voluntarily appearing in the proceedings.

5. Aggrieved, the Applicant filed Civil Appeal No. 317 of 2013, at the Court of Appeal which upon hearing the parties and giving judgement and final orders upheld the decision of the High Court. Specifically, the Appellate court stated that

> " the Kenyan court will not re-examine the merits of the foreign Judgment, which is enforced on the basis that the Judgment debtor has a legal obligation as a matter of common law, recognized by the High Court, to satisfy the money decree of the foreign Judgment."

6. On applicability of the impugned Sections, they agreed with the reasoning of the High Court finding that there was no reason to differ from the appreciation of the documents made available to the trial court or the assessment and conclusions reached thereon. They noted that the foundation of the foreign Judgment was a contract made between the appellant and the respondent and that it was the interpretation of that contract that engaged the English courts, at both the trial and the appeal stages. Additionally, it was their finding that the full Judgments of those courts were part of the record of appeal, and they were able to verify that it was the construction of the indemnity clause in the contract that engaged the English courts, even before the quantum of the loss claimed by Cosmos was assessed.

7. They also rejected the Applicant's contention that under Sections 4 (1) (i) and (g) of the Act, the claim was based on personal injuries and that in that light, there was no jurisdiction on the part of the English courts to deal with it as the cause of action arose in Kenya.

8. Further Aggrieved, the Applicant filed a Noticed of Motion Application dated 23rd May 2018, at the Appellate Court seeking certification and leave to appeal to the Supreme Court against the Court of Appeal's decision on the premise that the intended appeal raises issues of general public importance

as well as issues of law, more specifically on enforcement of the provisions of the Foreign Judgments (reciprocal) Enforcement Act Cap 43.

9. The appellate Court declined to grant certification finding that it did not warrant a substantial point of law to be determined by the Supreme Court that would be relevant to the general public interest as it did not result in any uncertainty, neither was it contradictory. The learned Judges were of the opinion that all the questions were exhaustively addressed in the United Kingdom as the Applicant had sought appeal of the original decision before it came before the High Court in Kenya. The appellate Judges were also of the opinion that the application before it was but an attempt by the Applicant to have a fifth bite at the cherry, and that the law in Kenya properly recognizes and provides for instances where enforcement of Judgments passed in countries outside Kenya and which accord reciprocal treatment to Judgments passed in Kenya are allowed.

10. The Court of Appeal therefore found that all the issues raised by the Applicant were properly and correctly addressed by that Court adding that there was no question of law to be determined or uncertainty to be clarified by the Supreme Court that was of great public interest. It is that determination that prompted the application before us.

11. In the present motion, the Applicant proposes the following as questions of law and general public importance worth of consideration by the Supreme Court namely:

    i. Novel and extremely important matters of law, regarding interpretation, and application of the law relating to Enforcement of Foreign Judgments in Kenya, as provided in the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya.

    ii. The proper interpretation and correct application of the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Law of Kenya, in relation to Judgments obtained in Courts outside Kenya.

12. In its submissions dated 3rd June 2020 and filed on the 3th of June 2020, the Applicant urges that the world as a global village, makes it inevitable that the issues involving registration of foreign Judgments multiply and continue and it would therefore be imperative for the Court to make its conclusive pronouncement on the interpretation and application of the relevant provisions of the Fore The Foreign Judgments (Reciprocal Enforcement) Act.

13. The application is opposed by the respondent who has filed a Replying Affidavit sworn by Lawson Ondieki on 15th June 2020, filed on the 16th of June 2020 as well written submissions also dated on the 15th of June 2020 and filed on 16th of June 2020.

14. It is the Respondent's submission that this case fails to satisfy the conditions set by this Court in Hermanus Phillipus Steyn v. Giovanni Gnechhi – Ruscone, Supreme Court application No. 4 of 2012; [2013] eKLR (Hermanus Case) as one of general public importance. They urge that the applicant has failed to identify any points of general public importance; that none of the matters raised transcend the circumstance of this case; and that this is just but a further attempt to re-argue matters which have already been determined by the High Court and the Court of Appeal as well as the English High Court and Court of Appeal.

15. It is their contention that the Applicant submitted to the jurisdiction of the English Courts by executing the contract containing the exclusive jurisdiction provision and by fully participating and defending proceedings in England. In that regard, they submit that the claim was for indemnity and/or damages pursuant to a contract, and that the respondent was aware of its obligations in England. It is also contended that the tourists were not parties to the proceedings which gave rise to the Registered

English Judgement which they emphasize is not for exemplary, punitive or multiple damages contrary to Section 3(3)(b) of the Foreign Judgement (Reciprocal) Enforcement Act.

16. As properly cited by both parties, the criteria for certification has long been settled in many decisions of this Court which set principles governing what constitutes matters of 'general public importance.' In the Hermanus Case, Malcom Bell v. Hon. Daniel Toroitich arap Moi & another, Sup. Ct Application No. 1 of 2013 and Town Council of Awendo v Nelson Oduor Onyango & 13 others, Misc. Application No. 49 of 2014; [2015] eKLR it was our determination that for an intended appeal to qualify as a matter of general public importance, it must be one, the determination of which transcends the circumstances of the particular case and has a significant bearing on the public interest. It is therefore our mandate at this point to determine whether the Applicant's case meets the criteria set by this Court in the above-mentioned cases.

17. Having considered the application before us, on perusal of record, it is revealed, as correctly noted by both the High Court and the Court of Appeal, that the decision of the English Superior Court did not include the payment of monies by way of exemplary, punitive or multiple damages. Accordingly, that finding excludes the application of Section 3 (3) (b) of the Foreign Judgments Reciprocal Enforcement Act Cap 43. Further, that Section 4 (1) (i) of the Act does not apply as the suit whose Judgement has been registered here, had nothing to do with personal injuries or damages in relation to the said tourists. Additionally, that Section 10 (2) (c) and (4) of the Act clearly gives the English Courts jurisdiction over matters arising out of the contract between parties including the indemnity contained therein.

18. We also take note of the finding that the circumstances surrounding the claim of indemnity and or damages pursuant to the contract in respect of the respondent's liability to a group of 9 tourists who suffered injuries, whilst staying at a tented camp operated by the Applicant were evidentiary matters which were specific to the parties hereto and are therefore not grounds to grant certification.

19. We therefore agree with the determination of the appellate court that the matter before us does not warrant a substantial point of law to be determined by this Court that would be relevant to general public interest as it does not result in any uncertainty, neither is it contradictory.

20. Additionally, we note that the Applicant willingly participated in the proceeding in the English Superior Courts, where they litigated the matter until the appellate stage and in doing so, the Applicant exhaustively addressed the initial claim. We must emphasize that the opportunity to invoke the jurisdiction of this Court that a matter involves issues of public importance is not an opportunity for parties to continue litigation nor does it present an extra tier of appeal from the Court of Appeal.

21. Accordingly, we find that the present Application does not comply with the principles articulated by this Court in the Hermanus Case and is one for dismissal.

22. Consequently, we make the following orders;

    i. The Application dated 3rd June 2020 is hereby dismissed.

    ii. The Applicant shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021

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P. M. MWILU

Ag. CHIEF JUSTICE & Ag.

PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA