



**Kenya Civil Aviation Authority v African Commuter Services Ltd & another
(Civil Application 7 of 2015) [2018] KESC 78 (KLR) (7 December 2018) (Ruling)**

Kenya Civil Aviation Authority v African Commuter Services Ltd & another [2018] eKLR

Neutral citation: [2018] KESC 78 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 7 OF 2015**

DK MARAGA, CJ, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

DECEMBER 7, 2018

BETWEEN

THE KENYA CIVIL AVIATION AUTHORITY APPLICANT

AND

AFRICAN COMMUTER SERVICES LTD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Application for Review of the ruling of the Court of Appeal at Nairobi
(G.B.M.Kariuki, Azangalala & Mohammed JJA) dated 29th May 2015)*

RULING

A. The Application

1. The Originating Motion before the Court is dated 12th June 2015 and contests the decision of the Court of Appeal where it declined to grant a Certificate to appeal to us as contemplated under Article 163(4) (b) of the [Constitution](#).
2. The Applicant seeks certification as a matter of general public importance in respect of the anticipated appeal arising from the judgment of the Court of Appeal (Karanja, Musinga and M’Inoti, JJA) delivered on 7th February, 2014.

B. Background.

i. High Court

3. The Plaintiff (1st Respondent herein) had been issued by the Directorate of Civil Aviation, the predecessor of the Applicant herein, with an Air Operator’s license (the License) to operate several



aircrafts under its command and ownership. The License was issued to the 1st Respondent upon compliance with the requisite Aviation Laws and Regulations pertaining to registration, airworthiness, maintenance as well as insurance.

4. On 24th January, 2003, an accident involving one of the 1st Respondent's aircrafts occurred at the Busia Airstrip, resulting in the demise of three passengers and injuries to several others. Following this incident, the Minister for Transport and Communication (the Minister) cancelled the License. The 1st Respondent's plea for reinstatement of the License and a request for a non-objection letter to enable its pilots to continue engaging in their professional work was declined. Further, the Minister set up an official inquiry into the plane crash. Despite its interest in the matter and participation in the inquiry, the 1st Respondent was never furnished with a report on the findings of the said inquiry.
5. Consequently, the 1st Respondent herein moved the High Court via a Complaint dated 12th November, 2003 and filed on 21st November, 2003 (HCC No 1208 of 2003) seeking the reliefs summarized hereunder: -
 - a) A mandatory injunction compelling the Attorney General, the 1st defendant (2nd Respondent herein) and the Minister to release to the 1st Respondent the report of the Commission of Inquiry into the Busia Plane crash;
 - b) A mandatory injunction compelling the Applicant to issue or reinstate the License;
 - c) Special damages of Kshs 1, 34, 616, 019. 65;
 - d) General damages for unlawful suspension of the License;
 - e) Aggravated, exemplary and punitive damages;
 - f) Costs of the Suit; and
 - g) Interest on (c), (d), (e) and (f).
6. Subsequently, the suit proceeded to full hearing and on 18th December 2008, Lady Justice Nambuye, as she then was, decided in favor of the 1st Respondent. The High Court granted a mandatory injunction against the first defendant to officially communicate the report of inquiry to the Plaintiff within 30 days from the date of the reading of the judgment and in default, the Plaintiff to take appropriate action to remedy the situation as it deemed fit. However, the Learned Judge declined to grant prayer (b) of the Complaint for the reason that it could only be issued where there was proof of ownership of the aircraft and after undergoing the necessary statutory routine audits and inspection. Further, the Judge awarded special damages, including the claim for consequential loss, but dismissed the one on general damages for unlawful suspension of the license although the claim for general damages for unlawful suspension of the license was disallowed.

The Learned Judge also awarded aggravated, exemplary and punitive damages as well as the costs of the suit.

Court of Appeal

a. The appeal

7. Aggrieved by the High Court's determination, the Applicant and the Attorney General appealed to the Court of Appeal by filing Civil Appeal No 311 of 2009 listing 56 grounds of appeal all aimed at setting aside the judgment of Nambuye, J. dated 18th December 2008 with the consequent effect that the Plaintiff's suit before the High Court be dismissed with costs.



8. The Court of Appeal (Karanja, Musinga and M’Inoti, JJA) in its judgment dated 7th February 2014 allowed the appeal by the 1st Appellant in part. The same was allowed with costs in the Court of Appeal and the High Court were also granted to it. The Appeal by the 2nd Appellant also partially succeeded, whereby the award on Revenue Loss as awarded by the High Court was undisturbed, to the extent that the Court of Appeal adjusted the consequential loss award by the trial court to a total of Kshs 362, 615, 656.00. The Respondent was awarded the costs both at the High Court and the Court of Appeal with interest.

b. Application for certification

9. Further aggrieved, the Applicant filed Civil Application No 5 of 2014 at the Court of Appeal, seeking two reliefs that is, a certificate under Article 163(4)(b) of the Constitution and stay of execution of the judgment of the Court of Appeal issued on 7th February 2014.
10. On 29th May 2015 the Court of Appeal (Kariuki, Azangalala and Mohammed JJA) declined to grant the Applicant leave to appeal to the Supreme Court for the reason that the Applicant did not demonstrate that there was an issue of general public importance in the intended appeal.
11. Consequently, the Applicant’s application was dismissed with costs to the Respondent.

ii. At the Supreme Court

12. Further aggrieved by the Court of Appeal’s ruling, the Appellant filed Civil Application No 7 of 2015 to this Court seeking the determination of the following questions namely; -
 1. Whether this Honorable Court should grant stay of execution of the Judgment of the Court of Appeal delivered on the 7th of February 2015 in (Nairobi Civil Appeal No 311 of 2009 The Hon. Attorney General & Kenya Civil Aviation Authority v African Commuter Services Limited, pending hearing and determination of the Applicant’s Petition to this Honorable Court.
 2. Whether this Honorable Court should review the decision of the Court of Appeal made on the 29th of May 2015 in (Nairobi) Civil Application No Sup 5 of 2014, Kenya Civil Aviation Authority v African Commuter Services Limited declining to grant a certification to Applicant, Kenya Civil Aviation Authority to appeal to this Honorable Court.
 3. Whether a Certificate should issue that the matters raised by the Applicant are of general public interest and importance as required by Article 163(4) of the Constitution.
 4. Whether the proposed appeal raises questions of great public interest and importance which will impact the development of jurisprudence on one of the most fundamental aspects of the mandate of the Kenya Civil Aviation Authority in the regulation and control of civil aviation in Kenya, which is very crucial in ensuring public safety in the aviation industry.
 5. Whether Section 5 B of the Civil Aviation Act prohibits the proper officer from communicating his decisions through a junior officer.
 6. Whether the requirement for the written delegation of power as contemplated by Section 5B of the Civil Aviation Act is a merely procedural issue and does it or does it not validate the delegation.



7. Whether the uncertainty on the form of delegation as contemplated by Section 5B of the [Civil Aviation Act](#) would not arise again and again in government procedures and governance of state corporations unless the same is authoritatively settled by the Supreme Court.
8. Whether the communication of the decision of the proper officer by his junior would affect the decision of such proper officer contrary to a later decision of the Court of Appeal in Dr. Wilfrida Itolondo and 4 others v The President and 7 others (Civil Appeal No 120 of 2014) which acknowledges that this is how government operations are run.
9. Whether it is in the public interest for such a colossal amount of tax payers money in the sum of Kshs 1,421,671,718.00 to be lost for the lack of written delegation where the statute appears to have merely been prescribing the mode of delegation.
10. Whether it was in the public interest for the Applicant to cancel the 1st Respondent's Air Operators Certificate (AOC) taking into account the overriding safety of the users of the aviation services and the general public likely to be affected by non-compliance of the Air Navigation Regulations.
11. Whether the holding by the Court of Appeal that the Respondent's AOC could be frozen once it was suspended amounts to an amendment of the law or regulations noting that such a holding fails to acknowledge that such an AOC is by operation of law only valid for a certain period of time and such period can only be extended by an application made to the regulator in accordance with the law.
12. Whether the proposed appeal raises a substantial point of law which will have a significant bearing on the public interest when determined and therefore warrant the grant of certification to appeal to the Supreme Court.
13. Whether the proposed appeal involves questions of general public importance which raise cardinal issues of law that deserve the further input of the Supreme Court.
14. Whether the costs of this Motion should be borne by the 1st and 2nd Respondents.
15. The Motion is supported by an Affidavit of Judith Ng'ethe deposed on the same date as the Motion.
16. There is no response to the Motion although the 2nd Respondent filed written submission in respect to the Applications dated 12th June 2015 and 19th June 2015. The submissions are dated 29th September, 2015 and filed on 30th September, 2015.

(a) Court Directions

17. As soon as the application dated 12th June, 2015 was lodged, the same was presented before a single Judge (Ojwang SCJ) of this court who on the 15th of June 2015 issued an order granting stay of execution pending hearing and determination of the matter.

(b) Notice of Motion Application dated 19th June 2015

18. In response to the Order of 15 June, 2015, the 1st Respondent filed a Notice of Motion under Certificate of Urgency on the 19th of June 2015. The application is anchored on Article 163 (5) of the [Constitution](#) of Kenya, Section 24 of the [Supreme Court Act](#) CAP 9A, Rule 21, 22 & 24 of the [Supreme Court Rules 2011](#).
19. The application seeks the following orders



1. That the Honorable Court do discharge its order of 15th June 2015 where it granted the Applicant herein, Kenya Civil Aviation Authority a stay of execution.
 2. That this Honorable Court do strike out the Originating Summons dated 12th June 2015 for want jurisdiction.
20. The application is based on the following grounds:
1. Kenya Civil Aviation Authority did not file any application seeking any prayers to stay the execution of the judgment / decree of the Court of Appeal delivered on 7th February 2014 by the Hon. Karanja, Musinga and M’Inoti JJA.
 2. The Applicant had only sought review of a denied certification under Article 163(5) of the Constitution by the Court of Appeal and thus this Honorable Court did not have jurisdictional competence to issue an interim relief, before leave is granted by the court.
 3. The said order fails to specify the order/decree, Ruling or Judgment it stayed.
 4. The 1st Respondent herein is gravely prejudiced by the order of this Honorable Court and this it is only fair and in the interest of justice that the said order be set aside.
 5. Article 163(5) does not bestow upon the Supreme Court of Kenya jurisdictional power to review a denied certification by the Court of Appeal under Article 163(4)(b)
 6. The Supreme Court of Kenya cannot through “interpretation of the Constitution” extend its jurisdiction or usurp jurisdiction.
 7. The Supreme Court of Kenya has a duty to act within the law.
 8. Hermanus Phillip Steyn v Giocanni Gnechi Ruscone Supreme Court Application No 4 of 2012(the Hermanus Case) is bad law insofar as it held that this court has power to review a denied certification by Court of Appeal.

The application is supported by the affidavit of Esmael Jibril deposed on the 19th of June 2015.

21. On 22nd June, 2015, this application was mentioned before a single Judge (Rawal DCJ, as she then was) who certified the application urgent and directed that the same be placed before the Deputy Registrar for a mention to take an urgent date for inter parties hearing.
22. These two applications have never been consolidated and this bench was constituted to determine the Motion dated 12th June, 2015 only. We shall thus limit ourselves to the said Motion.

C. Issues for determination

23. The following issues fall for determination in the Motion aforesaid:
 - i. Whether this Court has jurisdiction to hear this matter?
 - ii. Whether the matters raised by the applicant are of general public interest and importance as required by Article 163(4)(b) of the Constitution?



D. Analysis

Whether this Court has jurisdiction to hear this matter?

24. The Applicant herein contends that this is a matter of general public importance and that this Court has jurisdiction to entertain the same under Article 163(4)(b) of the Constitution. The said Article provides that:
- Appeals shall lie from the Court of Appeal to the Supreme Court, in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)".
25. In the written submissions, the Applicant submits that the Constitution has conferred jurisdiction upon this Court to review a decision of the Court of Appeal to deny certification. In support of this argument, the Applicant cites Article 163(4) (b) and 163(5) of the Constitution. It also cites Section 15(1) and 16(1) of the Supreme Court Act in support of the foregoing submission as well as the Hermanus Case.
26. However, the Respondent in their written submissions, submit that this Court lacks jurisdiction under Article 163(5) to review a decision of the Court of Appeal denying certification. The Respondent contends that this Court's jurisdiction is only limited to a situation where certification has been granted and not otherwise.
27. Further, the 1st Respondent contends that the Court's decision in the Hermanus Case was bad law and that the Court should depart from it as the Court did not analyze and interpret Article 163(5) of the Constitution properly. Additionally, the 1st Respondent submits that Article 163(5) is in clear and simple English requiring its application to a certain set of facts. The Respondent thus maintains that access to the Supreme Court is limited to certain cases determined in their circumstances and that the decision in the Hermanus Case was not intended for future reference in other matters.
28. In response to the 1st Respondent's submission on whether this court should depart from the Hermanus Case, the Applicant urges that the said case is good law and there is no need to depart from it. The Applicant further submits that the Supreme Court can only depart from its decision if the decision meets the principles set out in Jasbir Singh Rai & 3 others v Tracriochan Singh Rai Estate & 4 others [2013] eKLR namely; Where there are conflicting past decisions of the court, it may opt to sustain and to apply one of them;
- i. The court may disregard a previous decision if it is shown that such a decision was given per incuriam;
 - ii. A previous decision will not be disregarded merely because some, or all of the members of the bench that decided it might now arrive at a different conclusion;
 - iii. The court will not depart from its earlier decision on grounds of mere doubts as to its correctness.
29. On our part, having considered the oral submissions and as to whether this Court has jurisdiction to review a decision of the Court of Appeal denying certification, the Court has previously pronounced itself in the Hermanus Case as follows:
- (31) ...Consequently, it is our opinion that where one applies to the Court of Appeal for leave to appeal to the Supreme Court, and the Party is not satisfied



by the decision of the Court of Appeal, “no appeal” lies. The only course is for the party to apply for review of the matter to the Supreme Court...”

30. This Court observed further thus; -

(33) ..A party may come for review of the decision granting leave or denying leave. Hence, we hold that certification under article 163(5) should be broadly read as alluding to certification by the court that a matter of public importance is involved, or is not involved...”

31. None of the principles for such departure has been properly invoked and we maintain that it is still good law. In our recent decision in the case of *Republic v Ahmad Abolfathi Mohamed & another* Criminal Application No 2 of 2018, we reaffirmed our decision in the *Hermanus* case when we stated that in “interpreting the review jurisdiction in Article 163(5), regard should be had to the dictum of harmonization under Article 259(1) of the *Constitution* and giving the term “certifies” or “certification” in Article 163(4)(b)... and the principles of non-discrimination under Article 27 and fair hearing under Article 50 should never be lost sight of. We therefore find that deny a party aggrieved by a refusal to grant certification that a matter is one of general public importance i.e. discriminatory and contrary to Article 27 and a denial of the right to a fair hearing under Article 50(1) of the *Constitution*” In the circumstances, we find that the *Hermanus* case is still good law and the respondent has not demonstrated why this courts should depart from it.

32. Consequently, we hold that this court has jurisdiction contrary to the 1st Respondents assertion. We now proceed to consider the substantive Application dated 12th June 2015 on its merit.

Does the Intended Appeal Raise Matters of General Public Importance?

33. Having established that this Court has jurisdiction, and that the matter is rightly before us, we now consider the question whether the case before us raises issues of general public importance.

34. At paragraph 9 of its supporting affidavit, the Applicant has listed the following as matters of general public importance; -

- i. The issue of delegation contemplated by section 5B of the *Civil Aviation Act* Cap 394 of the Laws of Kenya;
- ii. The effect of non-compliance with the form of communication of the delegation of powers as recommended by legislation, on the substance of the decision so communicated;
- iii. Whether or not the decision to suspend the Respondent’s Air Operator’s Certificate under Regulation 57(1) of the Air Navigation Regulations was in the public interest;
- iv. Whether or not the Respondent’s Air Operators Certificate expired in the pendency of its suspension;
- v. Whether or not the Respondent, having failed to mitigate its damage by applying an efficacious remedy of Certiorari can be permitted to use the same evidence that could have supported the Judicial Review application, to support a claim for damages which ensued from that failure to mitigate.

35. In addressing the issue, we note, first, that this court made itself clear on instances in which it can exercise its powers to review a decision of the Court of Appeal in the following cases *Hermanus* Case, *Malcom Bell v Hon. Daniel Toroitich arap Moi & another*, Sup.Ct Application No 1 of 2013 and *Town*



36. Second, in the *Town Council of Awendo Case* we gave specific guiding principles as follows: -

21

- i. for an intended appeal to be certified as one involving a “matter of general public importance,” the intending appellant is to 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 is to 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 is/are to 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 and of themselves, a basis for granting certification for an appeal before the Supreme Court;
- viii. issues of law of repeated occurrence in the general course of litigation may, in proper context, become ‘matters of general public importance’, so as to be a basis of certification for appeal to the Supreme Court;
- ix. questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become ‘matters of general



public importance’, justifying certification for final appeal in the Supreme Court;

- x. questions of law that are destined to continually engage the workings of the judicial organs, may become ‘matters of general public importance’, justifying certification for final appeal in the Supreme Court;
- xi. Questions with a bearing on the proper conduct of the administration of justice, may become ‘matters of general public importance,’ justifying certification for final appeal in the Supreme Court.”

- 37. Having read section 5B of the *Civil Aviation Act* and Regulation 57(1) of the Air Navigation regulations, we agree with the Court of Appeal’s observation that the intended appeal does not raise an issue where the law requires clarification. The Applicant has indeed not demonstrated the uncertainty that this court will need to clear and clarify.
- 38. We also agree with the Court of Appeal that the extent of the effect of non-compliance with the form of communication of the delegation of powers prescribed by legislation does not need any clarification by this Court as the effect of such non-compliance will vary depending on the facts of each case and the legislation not being complied with.
- 39. In addition, the Applicant has not demonstrated how a determination on when the 1st Respondent’s license expired is of importance to the general public.
- 40. Finally, the Applicant has also not demonstrated how failure to mitigate damages by the 1st Respondent comprises a matter of general public importance.
- 42. Accordingly, the Application fails to comply with the principles enunciated by this Court in the *Hermanus* Case and is one for dismissal.

Order

- 43. Consequently, we make the following specific Orders:
 - 1. The Application is hereby disallowed.
 - 2. The orders of a single Judge (Ojwang², SCJ) issued on 15th June, 2015 staying execution are hereby vacated.
 - 3. Order 2 above automatically spends the 1st Respondent’s Application dated 19th June, 2015.
 - 4. The Applicant shall bear the costs of the 1st Respondent in relation to the two applications dated 12th June, 2015 and 19th June, 2015.

DATED AND DELIVERED AT NAIROBI THIS 7TH OF DECEMBER, 2018.

.....

DAVID K. MARAGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

J. B. OJWANG



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

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

