Koinange Investments & Development Ltd v Ngethe (Application 4 of 2013) [2014] KESC 19 (KLR) (13 March 2014) (Ruling)

Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR

Neutral citation: [2014] KESC 19 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 4 OF 2013

PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

MARCH 13, 2014

BETWEEN

KOINANGE INVESTMENTS & DEVELOPMENT LTD ..... APPLICANT

AND

ROBERT NELSON NGETHE ..... RESPONDENT

Service of court documents is not a "matter of general public importance" to be certified to go on appeal to the Supreme Court

Reported by Njeri Githang'a Kamau

Civil Practice and Procedure *– review – application for review of the decision of the Court of Appeal denying the applicant leave to appeal to the Supreme Court with respect to a matter of general public importance - what amounted to a matter of public importance – criteria to be considered – whether service of court documents was a "matter of general public importance" to be certified to go on appeal -whether there was any uncertainty in the law of service of process; or it was an issue of administration of justice bearing upon public interest - Constitution of Kenya, 2010, article 165(5); Supreme Court Act, section 15(1).*

Brief facts

The application before the court was for review of the Court of Appeal's ruling denying the applicant leave to appeal to the Supreme Court. The application was brought under article 165(5) of the Constitution and section 15 (1) of the Supreme Court Act. The Court of Appeal in a ruling dismissing the application for leave to appeal observed that the sale-contract nature of the applicant's claim as well as the procedural aspects that characterized the default judgment at the High Court were not matters that could be categorized as being of public importance.

Counsel for the applicant argued that service of court documents was a critical aspect of the litigation process, bearing significantly on all litigants in the country. It was submitted that it was a matter involving the proper conduct of administration of justice when a specific court order regarding personal service was overlooked by

the judges and deemed as postal service, in spite of absence of evidential proof of a search from the Companies Registry.

Issues

i. Whether service of court documents was a "matter of general public importance" to be certified to go on appeal.

ii. Whether there was any uncertainty in the law of service of process; or it was an issue of administration of justice bearing upon public interest.

iii. Whether the 'interest of justice' was a relevant factor in considering the peculiarities of the instant matter in relation to "general public importance"

Held

1. The jurisdiction of the court, especially on matters predicated on article 163(4) (b) of the Constitution, which relate to "a matter of general public importance", was well settled. Two factors must be borne in mind by an applicant who wished to move the court under article 163(4) (b) of the Constitution. One, to move the court under the provision, an applicant had to first seek leave at the Court of Appeal, consequent to which a party aggrieved by denial of permission or certification may exercise a right, under article 163(5), to seek a review, affirmation or overturning of the decision *(see Sum Model Industries Limited v Industrial and Commercial Development Corporation,* Sup. *Ct. Civ. Appl. No. 1 of 2011).*

2. The right to seek such a review is not a *carte blanche*: for a question or issue of law or fact, however framed, must be a substantial one, transcending the concerned parties, and satisfying or falling within the category of the *Hermanus Steyn* principles on matters of general public importance. The principles were defined by both the majority and minority opinions, and restated, in the case of *Malcom Bell v Daniel arap Moi & Another Sup. Ct. Application No. 1 of 2013.*

3. Service of court documents was an important component in the administration of justice, and was a common aspect of litigation that confronted courts of all cadres, in the normal business schedule. Service as a procedural function was regulated by law and other relevant instruments.

4. The onus of proving that a law bore uncertainty or *lacunae* impacting adversely on the public interest fell on the party who sought to convince the court that such was the case.

5. A matter of general public importance warranting the exercise of appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences were substantial, broad-based, transcending the litigation-interest of the parties, and bearing upon the public interest. As the categories constituting the public interest were not closed, the burden fell on the intending appellant to demonstrate that the matter in question carried specific elements of real public interest and concern.

6. Though service was an obvious procedural aspect of every court-oriented action, the matter was regulated by law. Service was an issue of law that affected a broad spectrum of individuals in commercial and domestic relations. As the law on service of process on corporations stood, there was no *lacuna* calling for clarification, for the good of the public at large.

7. It was not the object of the court to intervene in the jurisdictional domains of other judicial organs - a principle already stated in *Peter Ngoge v Ole Kaparo* Sup. Ct. Petition No. 2 of 2012 [2012] eKLR

8. The Supreme Court, as the ultimate judicial agency ought to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other courts and tribunals.

9. For a matter to be categorized as one of general public importance, its impact and consequences must raise substantial and broad-based questions of law or fact that affect the public interest. It is not sufficient to merely allege that a provision of a law that touched on the administration of justice, ought to be categorized as "a matter of general public importance". It must be a substantial question of law, if a party was to invoke the input of the Supreme Court.

10. The issue of service was a matter that courts could competently deal with as an ordinary component of administration of justice, as long as there was no uncertainty or ambiguity occasioned by some law, or incongruent court decisions. It was ordinarily, outside the fine line of "matter of general public importance", since "as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court was not to be invoked save in accordance with the terms of the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law. (*Malcom Bell v Moi*).

11. Courts were the wellsprings of justice, the bastion to which recourse in law was sought. Whenever a party sought to vindicate infringed rights at any tier of the courts, the duty to do justice was always the rule of thumb. It was also a cardinal principle that flowed from the Constitution, and which demanded that the ends of justice be met when any court of justice in the Republic of Kenya has been properly seized of a pertinent question. "Interest of justice" cannot therefore be an isolated criterion, on the basis of which the court may be urged to allow an appeal as a matter of general public importance.

12. The applicant had failed to demonstrate that the matter was of general public importance, in the terms of the *Hermanus Steyn* principles. The application failed to disclose any proper basis upon which an appeal may be preferred from the Court of Appeal to the Supreme Court under article 163(5) of the Constitution.

Application dismissed.

Orders

Application for review of the Court of Appeal's ruling dismissed.

Citations

Statutes

1. Civil Procedure Act
2. Companies Act
3. Constitution of Kenya, 2010
4. Supreme Court Act

Advocates

Mr. A. B Shah, learned Counsel
Mr. Murugara, learned Counsel

RULING

A. Background

1. The Applicant before us moves the Court by way of Originating Motion under Article 163(5) of *the Constitution* and Section 15(1) of the *Supreme Court Act*, 2011 for a review of the Court of Appeal's decision of 8th March, 2013 which denied the Applicant leave to appeal to the Supreme Court on the ground that the matters in issue in the intended appeal did not involve a matter of general public importance.

2. At the root of the issue in dispute is a botched 'agreement conferring option to purchase' over a Nairobi property said to be of substantial monetary value, known as L.R No. 209/9099(the suit property). The agreement is dated the 5th day of December, 1988 and was executed by the Applicant as the vendor and the Respondent as the purchaser. The dispute culminated in the institution of suit, being HCCC No. 3164 of 1995 seeking declaratory reliefs.

3. The case was on several occasions listed for hearing but for one reason or another the hearing did not materialize. On 13th February, 2002, the matter came up for hearing before Ringera, J as he then was. Since both the Applicant and its advocates failed to appear for the hearing on the appointed date, the

learned judge deferred the hearing to a later date, until after the Applicant had been 'personally served with the hearing notice'.

4. On 17th July, 2002 when it was again scheduled for hearing before Osiemo, J the Applicant and its advocates did not appear for the hearing. The judge noted that the Applicant had been duly served with the hearing notice and proceeded with the trial of the matter in default of the Applicant's attendance.

5. In consequence, the High Court (Osiemo, J) rendered a default judgment on 14th day of November, 2002 with orders for specific performance framed as follows:

   (a) A declaration that the deed of 5th December 1998 sic is valid

   (b) A declaration that the Plaintiff has validly exercised his right of purchase thereunder.

   (c) An order that the Defendant do within 30 days complete subdivision of the plot sold to the plaintiff and in default the plaintiff be at liberty to carry out the exercise of subdivision.

   An order that the Defendant do transfer the subdivision to the plaintiff and in default the Deputy Registrar may execute all necessary documents to necessitate sic the transfer."6 Immediately after the delivery of this judgment, the Applicant made an application under Order9B Rule 8 of the Civil Procedure Rules before the same judge, seeking to set aside the default judgment on grounds that the Applicant had not been properly served with a hearing notice as per the earlier order of Justice Ringera. Other premises of the setting aside the request were that the Applicant's defence and counterclaim raised triable issues of law and fact, and therefore in the interest of justice the judgment ought to have been set aside.

7. At all stages of the motions of trial, it was contended that the service on the Applicant was effected through its registered mail, Post Office Box Number 44286, and not through Post Office Box Number 78032, the official address of the Applicant, contrary to the law (the then Order 5 rule 2 of CivilProcedure Rules) on process of service. The judge declined to allow the application for setting aside of the ex parte judgment, on a factual finding that the postal address through which the Applicant was served was the 'Defendant's postal address in accordance with section 391 of the *Companies Act*'.

8. Aggrieved by this holding, the Applicant sought redress at the Court of Appeal. It challenged the judicial discretion exercised by the High Court on the issue of service. The Court was unwavering in its determination that the Respondent had no onus of proving its case during the hearing of the Applicant's application to set aside the ex parte judgment. It was the Applicant who was seeking the Court's assistance and as such, it was the duty of the Applicant to convince the Court that the Respondent sent the process to a wrong address. The Court took note of Order 5 rule 2 of theCivil Procedure Rules and was of the view that the mere fact that there was no attempt at service upon the directors or any principal officers did not make the service by registered post improper in light of the previous history of the matter.

9. With regard to the issue of personal service, the Court noted that the order made by Ringera J was to be considered in the context of the matter before him. The Court was persuaded that Ringera J meant that service henceforth would be on the Applicant personally as opposed to service on Counsel. Thus, the Court of Appeal in its judgment dated 23rd March 2012 was satisfied that Osiemo J in his order had acted within his judicial discretion. It dismissed the appeal with costs.

10. Undeterred, the Applicant brought its case to this Court by way of Notice of Motion dated 16th April, 2012. The application was anchored on Articles 50 (1), 163(3) (b) (i)of *the Constitution*, section 15, 16(2) (b) of the *Supreme Court Act* 2011, rule 30 of the Supreme Court Rules, 2011 and all enabling provisions of the law. It was based on the grounds that:

i. This Court has, in the interests of justice, powers to save a party from being subjected to miscarriage of justice which the Applicant has suffered in the hands of the two courts below;

"ii. Both courts below despite being aware of the order directing that the hearing notice be personally served on the Applicant (Appellant in the Court of Appeal), proceeded ex parté to consider the matters canvassed on an alleged service of hearing notice by post;

"iii. The Applicant has been condemned unheard in violation of its constitutional rights under Article 50 (1) and it stands to be unlawfully dispossessedof its prime property valued at over Kshs. 1 billion;

"iv. The Respondent, by virtue of the two judgments below, stands to acquire a parcel of land valued at over Kshs. 1 billion opposite the building housing this Honourable Court at no payment at all;

"v. Unless this Honourable Court hears the Applicant on its present prayers the Applicant will suffer the gravest miscarriage of justice, in that it will lose its prime land for no payment whatsoever, without being heard at all on merits and when *the Constitution* provides that no one shall be condemned unheard."

11. The application came up for mention before the Honourable Tunoi and Ibrahim (SCJJ) at the Supreme Court on 3rd July, 2012. The Judges gave directions to the parties to file and serve their respective written submissions and a hearing date be given by the Registrar on 17th July, 2012. The Respondent gave his undertaking not to execute against the Applicant. The Court, on its own motion, changed the mention date to 23rd July, 2012 then later a hearing date was set for 11th October 2012. On 11th October, 2012 the matter was listed for mention before the Acting Registrar. The Acting Registrar then issued an order to the Applicant to seek leave from the Court of Appeal before appealing to the Supreme Court. Consequently, the Applicant brought an application to set aside the decision of the Acting Registrar on the basis that she exceeded her powers and usurped the jurisdiction of the full Court and purported to give orders inconsistent with the directions given by the Court on 3rd July, 2012. Learned Counsel for the Applicant contended that whether the Applicant should seek leave from this Court or the Court of Appeal can only be decided upon by this Court and not by the Acting Registrar. The Court determined that the orders made on 3rd July 2012 were merely directory and could be enforced by the Acting Registrar and that she was not to be vilified or condemned for stating the correct position in law. This saw the application dismissed and the Applicant seeking certification from the Court of Appeal by way of Notice of Motion dated 26th October, 2012.

12. This application was yet again dismissed by the Court of Appeal in a ruling delivered on the 8th day of March, 2013 (Nambuye, Ouko and Mohammed, JJA). In dismissing the application, the learned judges unanimously observed that the sale-contract nature of the Applicant's claim as well as the procedural aspects that characterized the default judgment at the High Court were not matters that could be categorized as being of public importance. This is the gist of the cause of the instant application now before us.

13. The Applicant has grounded its motion before this Court and the Court of Appeal on the Affidavits of one Eddah Wanjiru Mbiyu, and a synopsis of the purport of all these applications and affidavits is that the Applicant had sought in vain to have its case certified as raising a question or matter of general public importance for which the Supreme Court should allow an appeal against the Court of Appeal's judgment of 23rd March, 2012 to be preferred. Such an application has been brought under Article 165(5) of *the Constitution* and Section 15 (1) of the Act, seeking a review of the Court of Appeal's ruling of 8th March, 2013 denying a certification to the Applicant. Article 165 (5) provides as follows:

(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

Section 15(1) of the *Supreme Court Act*, 2011 provides:

(1) Appeals to the Supreme Court shall be heard only with the leave of the Court."

14. In accordance with the above provisions of the law, the Applicant in its Originating Motion asked this Court:

1. Whether the ruling of the Court of Appeal dated 8th March, 2013 should be reviewed, set aside and discharged and that the Applicant be granted a Certification that the matter herein is of great public importance and that there has been a great miscarriage of justice and therefore deserving of an appeal to this Honourable Court of the decisions of the two courts below in HCCC No. 3164 of 1995 and C.A. No. 108 of 2003 dated 28th November, 2002 and 23rd day of March, 2012 respectively."

15. At paragraph 3 of the said Eddah Mbiyu's affidavit, she relies on an annexed Civil Application No. 1 of 2012, a Notice of Motion application, which then becomes an integral part of her Originating Motion application. That application, earlier filed in this Court but deferred to the Court of Appeal in compliance with the applicable procedural rules, was brought under Articles 50(1), 163(3)(b)(i) of *the Constitution*, Sections 15 and 16(2)(b) of the *Supreme Court Act*, 2011 and Rule 30 of the Supreme Court Rules(now repealed), and enabling provisions of the law.

16. It is meet and just in the circumstances, that we review the relevant provisions of the law on which the application is founded. Article 50(1) of *the Constitution* deals with a fair hearing, while Article 163(3) (b) (i) relates to the appellate jurisdiction of the Supreme Court in appeals arising from the Court of Appeal. Article 165, reproduced above, deals with Court of Appeal decisions on whether a matter of general public importance is involved. Section 15 (1) of theSupreme Court Act, 2011 requires that appeals be by way of leave, while section 16(2) (b) was a statutory criterion for leave to appeal where there has been a substantial miscarriage of justice.

17. At the hearing, Mr. A. B Shah, learned Counsel for the Applicant, reminded us that section 16(2) (b) had been struck out as unconstitutional by this Court in the case of Malcolm Bell v Hon. Daniel Toroitich arap Moi & Another Sup. Ct. Application No. 1 of 2013 (Malcolm Bell v Moi) in which the Court held that:

> Not only does the foregoing statutory provision appear to vest a diffuse kind of appellate competence in the Supreme Court, it runs out of fit with the mandatory appellate-jurisdiction clause in Article 163(4) (b) of *the Constitution*..."

18. For that reason, Mr. Shah declared his wish not to move the Court under that provision, since it was no longer available as a foundation for his case. He also stated that he would, instead of Section 15(1), be relying on section 16(1) of the *Supreme Court Act*, 2011 and Article 163(4) of *the Constitution*. He regretted the error on his pleadings, especially the Originating Motion, and urged the Court to treat the application as brought only under Article 163(4) of *the Constitution* and Section 16(1) of the Act.

19. That request was not objected to by the Respondent, and we find no reason to decline it; and in the interest of justice we do allow the same, since under the said provisions, this Court has been properly moved and has the competence and discretion to dispose of the matter at hand. We add, for purposes of clarity, that since this is a request for review of denial of certification, Article 163(5) is the jurisdictional pillar on which the instant application is to be considered.

B.submissions By The Parties

(i) Applicant's case

20. Mr. Shah, in his submissions made before us, lamented that the Court of Appeal in its ruling of 8th March, 2013, which declined certification, failed to consider the issue of 'miscarriage of justice', a term he abandoned, preferring in its place 'a failure of justice' / 'mis- justice'.

21. He averred that both the High Court (Osiemo, J) in hearing the application to set aside the default judgment, and the appellate Court upon appeal, misapprehended the earlier order of Ringera, J which required direct personal service on the Applicant of the hearing notice. He contended that it was apparent Osiemo, J did not in fact see the order of Ringera, J. For that reason, he submitted, the Applicant's fundamental right to a fair hearing under Article 50 (1) of *the Constitution* was eroded, having been condemned unheard, with resultant miscarriage of justice.

22. Learned Counsel then cited both majority and dissenting opinions on circumstances that constitute "a matter of general public importance" for the purpose of lodging an appeal before the Supreme Court, as set out in the case of Hermanus Philipus Steyn v Giovani Gnecchi Ruscone Sup. Ct. Civil Application No. 4 of 2012. He argued that, in essence, there was no conflict in the parameters set by both sets of opinions.

23. Counsel restated the central issue before the Court as, whether postalservice can be equated to direct service as had been ordered by Ringera J. He faulted the Court of Appeal for upholding the High Court's judgment that considered service of a hearing notice by registered post to be proper service, in accordance with the law.

24. To learned counsel, modalities of service are common problematic issues for courts, all through from the Magistrates Courts to Court of Appeal, and are by no means peripheral, in the course of litigation. In aid of this argument, counsel drew general principle from the following remarks of that sagacious judge, Madan, J in Murai v Wainana (1982) KLR 38:

> We do not want to have a wilted legal system in this country. We want to have a legal system for the common will. A question of general public importance is a question which takes into account the well-being of society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of human continuity."

25. Counsel also averred that the Court of Appeal did not address its mind to all the questions that he had canvassed in his written submissions. He noted that the Court of Appeal had, indeed, aptly remarked that: "As the area of law develops, both this Court and the Supreme Court will be laying down and expanding the broad guidelines on what constitutes a matter of public importance;" save, however, that the Court of Appeal had left out the word 'general'.

26. Counsel submitted that the major issue in this case was whether personal service amounted to postal service. He submitted that, by no means, had Ringera, J suggested postal service. Mr. Shah asserted that the fact that there was no attempted service on the directors orprincipal officers rendered service by registered post improper, in view of the history of the case. Counsel contested the conclusion made by the Court of Appeal that personal service could be effected by postal service. Counsel was adamant that personal service is not equivalent to postalservice. He recalled that until *Legal Notice No. 5 of 1996* service upon a corporation was in the first instance allowed by postal service. This rule was subsequently amended to overcome the tricks of litigants who abused the rules relating to postal service.

27. Counsel urged that the Court is not being invited to inquire into simple procedural issues, but to look into an issue of service, which forms a critical cog in the wheels of any given legal process. He relied on the case of Paget DeFreita & Others v. Enock Karl Blythe S.C (Jamaica) Motion No. 16/2009 to buttress his arguments that the issues need not necessarily be of law affecting the rights of a particular litigant but of effect and implication for others in commercial and domestic relations. In that authority the Jamaican Supreme Court had this to say on procedural aspects of a case:

> The Eastern Caribbean Court of Appeal allowed PEWC's appeal by holding that the court below did not have a discretion to dismiss the procedural challenge, but the Court of Appeal did not address the forum non conveniens issues. On 6 October, 2008, the Court of Appeal granted leave to appeal '... because it required the guidance of Her Majesty in Council on the procedural issues' (Para 24). According to Lord Collins, if the Court of Appeal was right this was a case '...where the law of procedure prevents the appellants from invoking a power which is designed to ensure that the litigation is centred in the court in which the case may be tried more suitably... for the ends of justice.'

28. Mr. Shah contended that an uncertainty in law has been occasioned by the Appellate Court's decision of construing personal service as postal service. The postal address number 44286, he averred, had not been shown to belong to Koinange Investment & Development Limited, the Applicant. In his opinion, the appellate court was, hence, wrong in law in shifting the burden of proving the true registered address from the process server to the Applicant.

29. In his written submissions Mr. Shah urged that the main issue, like in the Hermanus Steyn case, relates to uncertainty in the interpretation of the effect of a statutory provision, vis-a-vis a subsidiary rule or a specific order of Court. He urged the Court to unravel the uncertainty in the law of service of process on corporations, as a matter of common public good. He cited para. 58 of the Hermanus Steyn case, in which this Court had stated:

> The foregoing comparative survey, in our opinion, sheds sufficient light on the position to be taken by this Court, as contemplated by the terms of Article 163(4)(b) of *the Constitution*. Before this Court, "a matter of general public importance" warranting the exercise of appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad based, transcending the litigation interests of the parties, and bearing upon the public interest. As the categories constituting public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

30. Still in the written submissions, Counsel conceives of service of Court documents as a critical aspect of the litigation process, bearing significantly on all litigants in the country. It is, therefore, as counsel noted, a matter involving the proper conduct of administration of justice when a specific court order regarding personal service is overlooked by the judges and deemed as postal service, in spite of absence of evidential proof of a search from the Companies Registry.

31. On the issue of miscarriage of justice, learned counsel contended that the Hermanus Steyn decision had not ruled out miscarriage of justice as a criterion for appeal under article 163(4) (b) of *the Constitution*. However, he preferred to rely only on "matter of general public importance arising from the law", as regards modalities of service upon companies. He submitted that there are so many entities in this country carrying out business as companies, as opposed to partnerships, to which the Court process of service is important.

32. As to whether there is jurisdiction to entertain this Application, learned counsel invoked paragraph 2 of the dissenting opinion in the Hermanus Steyn case, where the mandate of the Supreme Court was restated:

It has become settled law since the Supreme Court was launched in 2011, that it is a special judicial forum for ultimate adjudication on issues of law and of *the Constitution*, its mandate being thus defined in the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*, Section 3:

'(a) to assert the supremacy of *the Constitution* and the sovereignty of the people of Kenya.

to provide authoritative and impartial interpretation of *the Constitution*;(c) to develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth....."

33. Mr. Shah, submitting that *the Constitution* should be interpreted in a manner that permits development of the law, relied on paragraph 88 of the concurring opinion of the Chief Justice in Jasbir Singh Rai and Others v Tarlochan Singh Rai and Others, Petition 4 of 2012. He urged the Court to consider this as an apt moment to give jurisprudential input and to propound the correct position in law, regarding service of important Court documents which affect the rights of parties.

34. Counsel also submitted that Article 163(4)of *the Constitution* coincides in terms with Section 16(1) of the *Supreme Court Act*, in that it donates to this Court the jurisdiction to do justice when the Court feels that injustice or 'mis-justice' has been done by the Court below. Counsel urged that Section 16(1) is of fundamental importance, and that the interest of justice must remain a key issue for the Court to consider, in any given situation.

35. With regard to this matter being one of general public importance, Counsel submitted that the issue of public interest in this case relates to the service of the hearing notice. Counsel asserted that the issue of service of important Court documents is one of repeated occurrence, affecting a considerable number of litigants all the time. Counsel fortified this with the Indian Supreme Court case of Dattraj Nathuji Thaware v State of Maharashta, Indian &Others2004 INSC 755 S.C 755 of 2004 which adopted the meaning of public interest as set out in Stroud's Judicial Dictionary' Vol. 4 (v Ed) as:

> A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

36. Counsel faulted the Court of Appeal for placing the onus on the Applicant to show its post office box number; yet it was obligatory on the process server to show that the box number used was in accordance with the companies registry record. Counsel submitted that the reversal of onus bears upon the proper conduct of administration of justice, an issue arising where a specific Court order (for personal service) is overlooked by the judges, and postal service is deemed proper despite there being no evidence of a search at the Companies Registry.

37. Counsel also submitted that this Court is not restricted by the decisions of the Court of Appeal. As such, it is entitled to look into the matter of patent miscarriage of justice, as happened in this case where the High Court condemned the applicant them unheard, and unserved. He contended that it is a matter of injustice when judges overlook a specific order of personal service and do not consider the effect.

38. As regards jurisdiction, Counsel submitted that Article 163 (4) of *the Constitution* as read with section 16 (1) of the *Supreme Court Act*, donates to this Court the jurisdiction to correct an injustice

propagated by Courts below it. Counsel argued that this Court cannot shut its eyes to principles relating to the interests of justice, as it ought to take into account the needs of society. He urged that Section 16(1) of the *Supreme Court Act* is still operational and obligates this Court to grant leave to appeal, if it is in the interests of justice; and the Supreme Court in this way, develops the law in accordance with Article 259 of *the Constitution*. Counsel submitted that this Court should not be bound by procedural technicalities, in view of Article 159 of *the Constitution*.

(ii) Respondent's Case

39. Mr. Murugara, learned Counsel for the Respondent, emphatically opposed this application, firstly: because the Applicant had not demonstrated that the Court of Appeal made an error in refusing to certify this matter as one of general public importance. Secondly, counsel contested the argument that this matter contains any elements of general public importance. Counsel urged the Court to probe the rationale and trajectory of the Applicant's cause at the High Court and the Court of Appeal, to ascertain whether there is an aspect of general public importance to merit proceedings before the Supreme Court. Mr Murugara contended that the only reason that the applicant is before the Court is that the suit property is valued at Ksh. 1 billion.

40. With regard to service, Counsel submitted that there are only two parties before the Court: a limited company, and an individual; and the decision herein would affect only the two. He contended that this decision does not relate to the general public.

41. Counsel submitted that the law on service, for human beings, companies, societies, partnerships and governments, is clear and settled. He urged that service upon corporations is dealt with in Section 391 of theCompany's Act. He submitted that the *Civil Procedure Act* has no provisions that relate to service, as service is a procedural requirement under the Rules. Thus, counsel urged, this Court is being called upon to consider matters of procedure. He submitted that this matter does not meet the threshold of "general public importance"; it only affects one individual, with no effects upon the general public.

42. Counsel contended that the corporations' register lists the names of directors, and the physical and postal addresses of the companies. He urged that service through any of these is "personal service". He justified this by urging that posting mail to a company, equates to personal service upon that company. Counsel submitted that personal service could mean serving the directors by post, or by visiting the registered company. He contended that postal service is not "substituted service" and is actually personal service to a corporation. Counsel also submits that service upon a company entails obtaining the registered address of the company, and effecting the service which can be equated to both personal and direct service.

43. Counsel submitted that the Applicant had moved this Court in a mere routine fashion, as the grievance does not go beyond this case to affect the general public. He submits that this Court had aptly summed up what constitutes matters of general public importance in the Hermanus Steyn decision. He submitted that Murai v Wainana (Supra), in which Madan, J gave an opinion, can be distinguished from the present matter, in that it pertained to a system of land- ownership that affected over one-third of the relevant community, while the matter now before the Court only affects the two parties.

44. Counsel submitted that the issue of service had been heard and finally determined by the High Court and Court of Appeal, and so the Applicant could no longer purvey a grievance of being condemned unheard; and that, from the records, such a question was amply deliberated upon and a verdict given, leaving the Supreme Court with no issue of general concern to the population or the Republic. For that

reason, Counsel submitted that this Court lacks jurisdiction to make a determination on the question, in aid of a single individual.

45. Learned Counsel contended that it would be improper to claim that the respondent acquired the land for free, as there was a contract between the parties with enforceable terms.

46. In response to the argument that this Court must in the interests of justice overturn the certification of the Court of Appeal, Counsel urged that the wheels of justice must turn both ways: he referred the Court to the record, and recounted the history of this matter. He submitted that the Applicant was given every opportunity to be heard, but was guilty of the non-appearances, and non-instructions to Counsel. He submitted that the issue is not that service was "never done" but rather "how the service was done". He urged that a party cannot properly claim to have been condemned unheard, where it is established that there was service.

47. Responding to the question whether the Applicant stands to be dispossessed of property as a result of the striking out of suits due to procedural defects, against the spirit of *the Constitution*, Counsel invoked the contract executed between the parties, which contract had supplied consideration and specified in clear terms the rights and obligations of theparties. He also submitted that the Court of Appeal had done an analysis of the case, and had observed that the Applicant's conduct had impeded the wheels of justice; and therefore, the applicant cannot complain at this juncture of any procedural technicality relating to service.

48. In response to the Respondent's submissions, Mr. Shah for the Applicant submitted that injustice was occasioned to them, as their defence and counterclaim was never heard by the Court of Appeal.

C. Issues For Determination

49. From the submissions of counsel, we consider the following issues as necessary for determination, in arriving at a proper finding:

    a . Does the application raise a "matter of general public importance" to be certified to go on appeal? Is there:uncertainty in the law of service of process; or

    b an issue of administration of justice bearing upon public interest?

    Is the 'interest of justice' a relevant factor in considering the peculiarities of the instant matter in relation to "general public importance"?

D. Analysis

50. This matter was filed at the Court of Appeal for certification that a matter of general public importance is involved, and that it merited an appeal to the Supreme Court. That Court dismissed the request and ruled that the claim as it stood, was a sale contract and the question of ex parte judgment did not raise a " matter of general public importance."

51. The Court of Appeal, in its initial judgment regarding the validity of the default judgment, evaluated all the provisions of the law on service (Order 5 rule 2 of the Civil Procedure rules), and the set of circumstances under which the default judgment was obtained at the High Court. It came to the conclusion that service on the Applicant with the hearing notice was proper in the circumstances, and was consonant with the law.

52. The jurisdiction of this Court, especially on matters predicated on Article 163(4) (b) of *the Constitution*, which relate to "a matter of general public importance", is now well settled. Two factors must be borne in mind by an Applicant who wishes to move this Court under Article 163(4) (b) of

the Constitution. One, to move this Court under this provision, an Applicant must first seek leave at the Court of Appeal, consequent to which a party aggrieved by denial of permission or certification may exercise a right, under article 163(5), to seek a review, affirmation or overturning of the decision (see Sum Model Industries Limited v Industrial and Commercial Development Corporation, Sup. Ct. Civ. Appl. No. 1 of 2011).

53. Second, the right to seek such a review is not a carte blanche: for a question or issue of law or fact, however framed, must be a substantial one, transcending the concerned parties, and satisfying or falling within the category of the Hermanus Steyn principles on matters of general public importance. These principles were defined by both the majority and minority opinions, and restated, most recently, in the case of Malcom Bell v Daniel arap Moi & Another Sup. Ct. Application No. 1 of 2013:

53"(i) 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;

(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;

(iii) such question or questions of law must 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 at earlier levels of the 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 s' 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; and

(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 for appeal to the Supreme Court;

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;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;questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance,' justifying final appeal in the Supreme Court.Counsel for the Applicant sought to convince this Court that the application raises some of these criteria.

(a) Whether there is uncertainty in the law of process service

54. Does the dispute as to service, in the terms of the Hermanus Steynprinciples, raise a substantial question of law whose impact goes beyond the contestants herein, and bearing upon the public interest?

55. The Applicant's counsel narrated at length the law of service of process on corporations, as well as the High Court's and the Court of Appeal's interpretive stand, and how it affected his client's rights over the land in dispute. The Applicant had faulted the appellate court for upholding the High Court's judgment that considered service of hearing notice by registered post to be lawful and proper service. The Respondent controverted that theory, and argued that the law on service upon a corporation is well settled.

56. As correctly pointed out by the Applicant, service of Court documents is an important component in the administration of justice, and is a common aspect of litigation that confronts courts of all cadres, in the normal business schedule. Service as a procedural function, is regulated by law and other relevant instruments.

57. This prompts us to ask: What law exists in Kenya governing service of process on corporations? Are there any grey areas which cloud such a law? At page 5 of the Court of Appeal's judgment, the learned judges set out the material particulars of the then Order 5 rule 2, which at the time governed service of process on corporations. They found, as we also find, that the rule has been retained in the current Civil Procedure Rules-as Order 5 rule 3. No alteration has been made. In its interpretation of that rule, the Court of Appeal adjudged that a pre-paid registered postage is the immediate option if direct service on the principal officers becomes impossible. Section 391 of the *Companies Act*, cited in the High Court judgment, appears in the following terms:

    (1) A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.

    "(2) A document may be served on the registrar by leaving it at, or sending it by registered post to, his office."

58. In our view, the onus of proving that a law bears uncertainty or lacunae impacting adversely on the public interest, falls on the party who seeks to convince the Court that such is the case. This is a principle laid down by this Court in the Hermanus Steyn case (paragraph 58), reproduced hereunder:

> Before this Court, a matter of general public importance warranting the exercise of appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interest of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

59. In the application before the High Court, Ringera, J. ordered personal service on the Applicant. The Court of Appeal was of the view that this meant service on the company and not its advocates. The appellate Court observed too, that given the peculiar antecedents of the case, postal service on the company's registered address was the most expedient, a finding that Mr. A. B Shah contested, arguing that the Court of Appeal fell into error, and created uncertainty in the law by construing personal service on acorporation to mean postal service.

60. Here we are concerned with rules of procedure as they relate to acorporation. Though service is an inescapable procedural aspect of every Court-oriented action, this matter is regulated by law. As submitted by counsel for the Applicant, service is an issue of law that affects a broad spectrum of individuals in commercial and domestic relations. As the law on service of process on corporations stands now, we see no lacunae calling for clarification, for the good of the public at large.

61. The Court of Appeal, acting within its jurisdictional remit, has pronounced itself on this subject. We find no reason to disturb the Court of Appeal's finding.

62. In any event, it is not the object of this Court to intervene in the jurisdictional domains of other judicial organs_ a principle already stated in Peter Ngoge v Ole Kaparo Sup. Ct. Petition No. 2 of 2012 2012 eKLR as follows:

> The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted."
>
> The same principle appears in the Malcom Bell case as follows:
>
> In principle, this Court believes, these Court of Appeal decisions should be aligned, to create consistency as to when time starts running, for purposes of adverse possessory rights. The Court of Appeal itself has the competence to deal with this question in its subsequent decisions. As stated in Peter Ngoge v Ole Kaparo, this Court ought to safeguard the respective jurisdictions of other courts in the hierarchy of Courts in Kenya, and should resist the temptation to encroach on their proper spheres of work."

Whether Service of process is a matter bearing upon the administration of justice

63. We now turn to the second element, on the basis of which the application is canvassed as a matter of general public importance. One of the criteria for certifying a matter to be of general public importance is that, the matter must raise a question with a bearing on the proper conduct of the administration of justice. Counsel relied on this category, and surmised that since the law of service of process is a typical litigation-question which bears significantly on litigants in the country, it becomes a concern touching on the general administration of justice. This is especially so, he urged, when a specific Court order regarding personal service is bypassed by judges and deemed to incorporate postal service, even without proof of search at the Companies Registry for particulars of address.

64 We have held in the Hermanus Steyn case that, for a matter to be categorized as one of general public importance, its impact and consequences must raise substantial and broad-based questions of law or fact that affect the public interest. It is not sufficient to merely allege that a provision of a law that touches on the administration of justice, ought to be categorized as "a matter of general public importance". It must be a substantial question of law, if a party is to invoke the input of the Supreme Court.

65 As we have stated above, the issue of service is a matter that our Courts can competently deal with as an ordinary component of administration of justice, as long as there is no uncertainty or ambiguity occasioned by some law, or incongruent Court decisions. It falls ordinarily, outside the fine line of "matter of general public importance", since "as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of

the Constitution and the law, and not merely for the purpose of rectifying errors with regard to matters of settled law" (Malcom Bell v Moi).

(c) Whether the 'interest of justice' is a relevant factor in considering a matter to be one of general public importance

66. This Court was urged to consider this application under Section 16(1) of the *Supreme Court Act*, 2011 which provides that:

> The Supreme Court shall not grant leave to appeal unless it is satisfied that it is in the interest of justice for the Court to hear and determine the proposed appeal."

67. Mr. Shah, while noting that Section 16(2) (b) of the *Supreme Court Act* had been struck out as unconstitutional, urged the Court to do justice under section 16(1) of the same Act which is operational. He argued that it would be in the interest of justice to allow the appeal to come up before the Supreme Court.

68. In the written submissions before the Court of Appeal, which Mr. Shah adopted as part of the record and brought to our attention, it is contended that the Court of Appeal's ruling of 8th March, 2013, refusing him certification, failed to consider the effect of a failure of justice perpetrated against his client by misapprehending the order of Ringera, J regarding personal service. Part of that record reads as follows (pp 76-77):

'(1) Ringera J (as he then was) made a specific order as follows:

(page 22 of the record)

In those circumstances, I think the just order to make is that the suit be taken out of today's list, fresh hearing dates to be taken and the Defendant the Applicant before this court be personally served with the hearing notice".

'(2) Whilst the Order of Ringera J was in force the Respondent took an ex-parte date and served the hearing notice(for the hearing of the suit) by registered post at P.O Box 44286 Nairobi....whereas the Post Office Box Number of the Applicant as shown in the agreement conferring Option to Purchase... is shown as 78032, Nairobi.

'(3) It was not shown by the Respondent's Advocates how they obtained Box No. 44286.

'(4) When the suit came up for hearing before Osiemo J on 17.02.2002.... there is sketchy reference to "Defendant (served)".

'(5) Obviously Osiemo J did not take into account the Order of Ringera J made on 13.02.2002.... At page 28 of the record the learned Judge simply said "The Defendant was served with the hearing notice but did not attend to defend the suit".

69. The contention is that the Applicant's constitutional right to a 'fair and public hearing' were abridged; and that this condemned the Applicant unheard, leading to a miscarriage of justice, which this Court ought to look into, and to settle the issue whether 'judgments based on total disobedience to a specific order of the Court are such as to create binding legal relations between parties'.

70. Counsel argued that Article 163(4) of *the Constitution* is synonymous with section 16(1) of the *Supreme Court Act*, which vests in this Court the "jurisdiction to do justice when the Court feels that injustice or 'misjustice' has been propagated by the Court below". He invoked the special significance

of Section 16(1) of the *Supreme Court Act*, which to his mind, is a key issue which ought to be taken into account by this Court, in any given situation.

71. We have clarified whether a statutory provision can add to the foundation upon which the jurisdiction of this Court may be invoked; in Malcolm Bell v Moi, this was the opinion of the Court (in relation to section 16(1) of the *Supreme Court Act*):

> 'Interests of justice' as a criterion of decision-making by the Supreme Court and other Courts, is already declared by *the Constitution* in the 'national values and principles of governance' Article 10. Such values include Article 10(2): the rule of law; human dignity; equity; social justice; equality; human rights; non-discrimination; and the protection of the marginalised. As the jurisdiction to render justice is, thus, clearly conferred by *the Constitution*, it is not to be attributed to the provision of s.16(1) of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*."

72. What we meant, in the earlier decision, is that Courts are the wellsprings of justice, the bastion to which recourse in law is sought. Whenever a party seeks to vindicate infringed rights at any tier of Courts in our country, the duty to do justice is always the rule of thumb. This is also a cardinal principle that flows from *the Constitution*, and which demands that the ends of justice be met when any Court of justice in the Republic of Kenya has been properly seized of a pertinent question. "Interest of justice" cannot therefore be an isolated criterion, on the basis of which this Court may be urged to allow an appeal as a matter of general public importance.

E. Conclusion

73. In our opinion, the Applicant has failed to demonstrate that this is a matter of general public importance, in the terms of the Hermanus Steyn principles. The Application failed to disclose any proper basis upon which an appeal may be preferred from the Court of Appeal to this Court under Article 163(5) of *the Constitution*.

74. Consequently the Application for review of the Court of Appeal's ruling dated 8th March, 2013 is dismissed, and leave to appeal, accordingly, refused.

75. The parties shall bear their own respective costs in respect of this application.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2014.

P.K. TUNOI, SCJ MOHAMMED IBRAHIM, SCJ

J.B. OJWANG, SCJ SMOKIN WANJALA, SCJ

NJOKI NDUNGU SCJ

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya