Omega Chemical Industries Limited v Barclays Bank of Kenya Limited (Civil Application 6 of 2013) [2014] KESC 16 (KLR) (29 April 2014) (Ruling)

Omega Chemical Industries Ltd v Barclays Bank of Kenya Ltd [2014] eKLR

Neutral citation: [2014] KESC 16 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 6 OF 2013

WM MUTUNGA, CJ & P, KH RAWAL, DCJ & VP, PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

APRIL 29, 2014

BETWEEN

OMEGA CHEMICAL INDUSTRIES LIMITED ..... APPLICANT

AND

BARCLAYS BANK OF KENYA LIMITED ..... RESPONDENT

(An application to review the decision of the Court of Appeal (Karanja, Mwera and, Kiage JJA), dated 26th July 2013, in Nairobi Civil App. 139 of 2012)

Supreme Court declines to entertain a matter that was concluded before the promulgation of the Constitution

Reported by Emma Kinya & Opiyo Lorraine

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to review a decision of the Court of Appeal with respect to certification of a matter for appeal to the Supreme Court – where the Court of Appeal had dismissed an application for leave to file an appeal to the Supreme Court – constitutional provision for review by the Supreme Court in respect of matters of general public importance in an intended appeal – whether the application had merit – Constitution of Kenya, 2010 article 163(4)(b),(5);Supreme Court Act section 19(b)*

Jurisdiction *– appellate jurisdiction of the Supreme Court – certification to appeal to the Supreme Court on the basis that the matter was of general public importance–retrospectivity of the law - where the issue arose before the promulgation of the Constitution and therefore before the Supreme Court was established – where the Court of Appeal had concluded the matter before the establishment of the Supreme Court – whether the Supreme Court had jurisdiction grant certification for an appeal in the circumstances – Constitution, 2010, article 163(4)(b)*

Brief facts

The Applicant Company herein brought an Application by Notice of Motion for the review of a decision of the Court of Appeal declining their request for leave to appeal to the Supreme Court. They had entered into

a contractual agreement with Barclays Bank, the Respondent herein from whom they had secured a Charge on parcel of land, registered in the name of one of the Directors of the Applicant Company. As a result of the delay in debiting the Applicant Company's account, the exchange rates rose from Kshs 35.14 per SFR to Kshs 53.337, thereby causing the bank to incur a foreign exchange loss of Kshs 509,692.60. The account also attracted interest, penalty and charges over a period of 51 months. The bank demanded payment consequently.

The High Court dismissed the Applicant Company's claim for award of damages in the sum of Kshs 1,815,787.15 at court rates. Aggrieved by the decision, they appealed to the Court of Appeal which set aside the High Court decision but only entered judgment in favour of the Applicant Company in the sum of Kshs 509,692.60 with interest at court rates and not the accrued commercial rates as claimed in the appeal. Aggrieved again by this decision, the Applicant Company under rule 35 of the Court of Appeal Rules applied for a correction of the decision. However, the Court upheld its previous decision to calculate the interest using the court rates and not commercial rates.

Consequently, the Applicant Company applied for leave by the Court of Appeal to appeal to the Supreme Court on the ground that the issue at hand was a matter of general public importance and thus occasioning the appeal of the matter to the Supreme Court. However, the Court of Appeal declined to grant leave and hence the instant application to the Supreme Court for review of the Court of appeal's decision.

It is noteworthy that the instant matter was concluded by the Court of Appeal three years ahead of the promulgation of the Constitution of Kenya, 2010 and that at the time the Court of Appeal was the final court.

Issues

i. Whether the Supreme Court had the jurisdiction to entertain a matter that the Court of Appeal had already determined before the promulgation of the Constitution of Kenya, 2010.

ii. Whether the issues that were raised in the Application qualified the threshold criteria of matters of general public importance.

Relevant provisions of the Law

The Constitution of Kenya, 2010

Article 163

"(*4) Appeals shall lie from the Court of Appeal to the Supreme Court-*

1. *as of right in any case involving the interpretation or application of this Constitution; and*
2. *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)"*

"(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."

Court of Appeal Rules, 2010

35. **Correction of errors**

"(1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the

Court was when judgment was given."

"(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected."

Held

1. Whether or not a Court had jurisdiction was not a mere procedural technicality since without jurisdiction, a Court had no basis in law for entertaining a case. It was the fountain from which the flow of the judicial process sprung.

2. Article 163 (5) of the Constitution gave the Applicant company *locus standi b*efore the Supreme Court. However, the instant matter was concluded three years before the promulgation of the Constitution of Kenya, 2010 when the Court of Appeal was the final Court. The Supreme Court could therefore not entertain cases that were heard and determined before the Court came into existence.
3. Article 163 (4) (b) of the Constitution was forward-looking, and did not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution of Kenya, 2010.
4. A "filter principle" had emerged, in the Supreme Court's mode of admitting cases to appeal. The Supreme Court, as the ultimate judicial agency, ought to exercise its powers strictly within the jurisdictional limits prescribed. It ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. It would be perverse for the Supreme Court to assume a jurisdiction which, by law, was reposed in the Court of Appeal, and which that Court had duly exercised and exhausted.
5. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle was to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, had the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law and only cardinal issues of law or of jurisprudential moment, would deserve the further input of the Supreme Court.
6. The applicant had raised several issues which potentially could become matters of general public importance, such as:

(i) Lending contracts, rates, due dates of instalments, exchange rates applicable;

(ii) Whether a delay by a bank in debiting the account of its customer, occasioning loss due to inflationary trends, must be borne by customers; and

(iii) Impacts of declining currency values on international banking transactions.

However, these issues would possibly become relevant only after a consideration of the merits of the proposed appeal itself and therefore are premature issue at this moment.

1. The instant case fell far short of the Supreme Court's established criteria for assuming appellate jurisdiction by virtue of Article 163(4) of the Constitution. Where, as in the instant case, the Court of Appeal had considered an application for leave to appeal further and declined to grant the requisite certification, an aggrieved party seeking a review of such a decision had to come in good faith, and with cogent argument founded on the terms of the Constitution either:

(i) that issues of interpretation or application had arisen (giving automatic rights of appeal); or

(ii) that the proposed appellate cause carried issues of general public importance.

1. The conditions for seeking a review of the decision of the Court of Appeal declining to grant leave to file further were not fulfilled by the applicant who was set against the well-settled decisions of the Court, that cases appealed to finality in the apex Court, prior to the promulgation of the Constitution of Kenya, 2010 were not for re-opening before this Supreme Court.

Application dismissed.

Orders

i. *Application dismissed.*
ii. *Each party to bear its own costs.*

Citations

East Africa

1. *Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited and 2 Others* Application No 2 of 2012 –(Applied)

2.*Nduttu, Lawrence & 6000 Others v Kenya Breweries Ltd & another* Petition No 3 of 2012 –(Explained)

3.*Ngoge, Peter Oduor v Francis Ole Kaparo and 5 others* Petition No 2 of 2012 –(Mentioned)

4.*Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 –(Followed)

5.*Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* Application No 4 of 2012 –(Applied)

United Kingdom

1.*R v Secretary of State for Trade and Industry, ex parte Eastaway* [2001] 1 All ER 27 –(Considered)

Statutes

East Africa

1.Constitution of Kenya, 2010 articles 27(1); 28; 50; 159(2)(a)(d)(e); 163(3)(b)(4)(b)(5) –(Interpreted)

2.Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 10, 30(1) –(Interpreted)

RULING

1. Introduction

1. This is an application by Notice of Motion dated 12th August, 2013 for the review of a decision of the Court of Appeal declining the applicant company's request for leave to appeal to the Supreme Court.

2. The application is anchored upon Articles 159 (2)(d) and (e); 163 (3)(b)(1); and 163 (4)(b) and (5) of *the Constitution* of Kenya, and Rules 10 and 30 (1) of the Supreme Court Rules. The applicant company seeks the setting aside of the Ruling of the Court of Appeal, and grant of leave for a hearing of the substantive appeal before the Supreme Court. The company prays that all costs awarded to the respondent be quashed.

3. The application was premised on grounds set out in the Notice of Motion, and the supporting affidavit of Chrispus Mukiria Muriuki, one of the directors of the applicant company.

4. The respondent filed a replying affidavit through its learned advocate, Mr. Alex Ngatia Thangei, contesting the application as misconceived, and wanting as to legal basis. The respondent contended that the application does not meet the threshold set out in Article 164 (4) of *the Constitution*, which requires that an issue raised must be of great, general, or public importance, or a point of law of exceptional public importance. The deponent contended that the genesis of the primary suit was contractual, and that the facts of such a private, commercial dispute do not fall within the jurisdiction of this Court.

II. HISTORICAL BACKGROUND

5. The cause of action arose from an import-financing transaction between the applicant company (1st plaintiff in the High Court) and the respondent bank (defendant in the High Court). The applicant company had been a customer of the respondent bank since 1983. The respondent bank granted overdraft facilities to the applicant company which were secured by a charge on a parcel of land known as L. R. No. 12596/5 Nairobi, registered in the name of Crispus M. Muriuki (2nd plaintiff in the High Court), as well as personal guarantees of three directors. In 1992, the applicant company through the said Mr. Crispus Muriuki, negotiated a Letter of Credit (L.C.) for Swiss Francs (SFR) 27,959, to finance the importation of chemicals from Ciba-Geigy Limited, based at Basle, Switzerland.

6. On or about 21st July, 1992 the respondent bank opened an irrevocable L.C. No.9218/286 for SFR.27,959 in favour of Ciba-Geigy Ltd., payable within 120 days following the date of shipment, with a maturity date of 25th January, 1993. The import/export transaction between the applicant company and Ciba Geigy Ltd. was duly successfully completed.

7. The respondent bank instructed its correspondent bank, Barclays Bank of Switzerland, to pay Ciba Geigy Ltd. on the due date and reimburse itself by debiting the respondent bank's Swiss account. Ciba Geigy Ltd. was paid by Barclays Bank Switzerland on the maturity date, 25th January, 1993. However, the respondent bank did not debit the applicant company's account until 31st May, 1993, by which date the Kenya shilling had substantially depreciated against the SFR.

8. The applicant company asserted that as at 25th January, 1993 (the maturity date of the L.C.) the exchange rate was Kshs.35.14 per SFR and this rate, by 31st May, 1993 had risen to Kshs.53.337 per SFR. As a result of the delayed debiting of the applicant company's account, it incurred a foreign-exchange loss of Kshs.509,692/60, which had the effect of reflecting a negative balance in the applicant company's account. This overdraft on the account of the applicant company attracted interest, penalty, and charges over a period of 51 months, as from 31st May, 1993 to 30th September, 1997.

9. The respondent bank demanded payment of interest and penalties at commercial rates, accrued on the account since 31st May, 1993. The bank, indeed, threatened to realize this amount through sale of the applicant's security, L.R. No. 12596/52; and the applicant company responded by paying Kshs.1,815,787/15 on 6th October, 1997.

10. But the company then moved the High Court, alleging that the respondent bank had acted fraudulently and/or negligently, in the transaction occasioning the foreign-exchange loss of Kshs.509,692/60 which was reflected in the overdraft facility provided by the bank. The applicant further alleged that it had been forced to pay the interest and penalties at commercial rates, even though the loss had been occasioned by the respondent's deliberate or erroneous act, or omission, and that on this account, the amount demanded was not duly payable. The respondent bank denied these allegations, averring that there had been a shortage of foreign exchange in the country; and that the Central Bank of Kenya, the regulatory agency, availed the money to it only on the 31st May, 1993, and so it bore no responsibility for the loss in question.

11. The High Court dismissed the entire claim by the applicant company for an award of damages in the sum of Kshs.1,815,787/15 – on the ground that it had not been proven how the loss of Kshs.509,692/60 had accelerated to Kshs.1,815,787/15. An order for costs was made against the applicant company and Mr. Crispus Muriuki, the two having been the plaintiffs.

12. The applicant company and Mr. Crispus Muriuki, aggrieved by the High Court decision, appealed to the Court of Appeal on various grounds, the main one being that the High Court Judge erred in law and fact by failing to award the applicant company (1st appellant at the Court of Appeal) Kshs.509,692 or any sum at all, despite clear evidence that the respondent had not promptly debited the company's account as soon as the payment to Ciba-Geigy Ltd was made on 25th January, 1993 and had instead waited until 31st May 1993.

13. The Court of Appeal, on 14th December, 2007 set aside the High Court judgment, dismissing the applicant's claim for Ksh. 1,815,787/15, though entering judgment for the applicant for Kshs.509,692/60 with interest at Court (not commercial) rates.

14. Aggrieved by the Court of Appeal's judgment, the applicant company applied to the same Court under Rule 35 of that Court's Rules, for "correction of the decision". The applicant company claimed that the circumstances before the Court merited an award of Kshs.1,585,394.80, with interest at commercial rates. The Court thus moved, however determined that the intention of the trial Court had been clear enough; and that judgment for the applicant was for Kshs.509,692.60, with interest at Court rates.

15. The company, by application dated 24th May, 2012 then applied for leave to appeal to the Supreme Court. The essence of the application was that the case raised "matters of public interest". But the Court of Appeal, in its ruling dated 26th July, 2013 declined to certify the matter as one of general public importance: hence occasioning the current application before the Supreme Court.

16. The respondent bank, through its counsel, strenuously opposed this application. It filed a preliminary objection and grounds of opposition. The preliminary objection was to the effect that this Court has no jurisdiction to entertain the matter.

III. Merits of the Cases: Submissions

(a) The Applicant

17. Learned counsel, Mr. Muriuki for the applicant company, stated that he was seeking a review of the Court of Appeal ruling which declined certification for a final appeal, and urged this Court to certify this matter as one of general public importance – and thus qualifying for hearing before the Supreme Court.

18. Counsel recognized that the principles governing the qualification of a matter as one of general public importance, are already set out in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone (Supreme Court Application No. 4 of 2012). He submitted that the principles set out in Hermanus Steyn are duly satisfied by the current application. He urged that the issues for determination in the intended appeal are the same issues that were the subject of determination both at the High Court and at the Court of Appeal. He contended that the respondent bank had denied him an opportunity to scrutinize the authorities which the respondent had intended to rely on, at the first appellate stage; and that, consequently, he was disadvantaged in convincing the Court of Appeal that the issues arising in the case transcended the circumstances and interests of the parties alone.

19. The Court of Appeal's decision on the merits had been delivered on 14th December, 2007; and counsel for the respondent's position was that a decision of that Court concluded before the creation of the Supreme Court, cannot be reopened. The applicant disagreed, relying on the dissenting opinion of Ibrahim, SCJ in Jasbir Singh Rai v. Tarlochan Singh Rai, Supreme Court Petition No. 4 of 2012. By that opinion, the petitioners would have been allowed to proceed with their case to the Supreme Court, even though this matter had been concluded prior to the creation of the Supreme Court. And so, counsel urged, this matter should be certified as one "of general public importance", and should be entertained by the Supreme Court.

20. Mr. Muriuki argued that, pursuant to the provisions of *the Constitution*, this Court had the jurisdiction to take up any dispute "as of right in any case involving the application of *the Constitution*." He stated that he was seeking to protect his family's hard-earned monies from a bank fraud. He contended that the Court of Appeal had implicitly acknowledged error in the judgment of the High Court, by partially restoring to the applicants certain sums of money. He submitted that the "right to seek full restoration" was in keeping with his rights as provided for under Article 27 (1) and 28 of *the Constitution*. He submitted that Article 50 of *the Constitution* resolved the question of lack of jurisdiction, as it declared that every person had the right to have any justiciable dispute decided in a fair hearing, before a Court of law.

21. The applicant company urged that when a Court of last resort declares itself impotent, even though there be evidence of wrong, that is in itself a "matter of public interest"; and such a declaration would be unconstitutional, and against the spirit of Article 159 (a) and (d) of *the Constitution*.

22. Mr. Muriuki submitted that this case should be allowed to proceed to full hearing, as the applicant company "did not get sufficient time to canvass its case before the Court of Appeal". He urged that should this Court grant the necessary certification, "the full details of the case will be argued, and the evidence examined".

(b) The Respondent Bank

23 The respondent bank through learned counsel, Mr. Alex Thangei perceived two issues as fundamental in this application. Firstly, counsel submitted that this Court lacks jurisdiction to entertain and determine this matter. He urged that the judgment sought to be appealed against had been heard and determined on 14th December, 2007 before the creation of the Supreme Court; and that Article 163(4) of *the Constitution* does not confer appellate jurisdiction on the Supreme Court to hear and determine matters heard and determined before its creation. He cited the Supreme Court's decision in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited and 2 Others, Supreme Court Application No. 2 of 2012 to support this point. On this ground alone, learned counsel submitted that this motion was for dismissal.

24. Secondly Mr. Thangei submitted that this matter does not meet the threshold set out in Article 163 (4) of *the Constitution*, as it neither raises an issue of great, general or public importance, nor does it raise a point of law of exceptional public importance. He submitted that the primary claim by the applicant company in the High Court had been founded on contractual arrangements between it and the respondent bank; and that, in this respect, the genesis of this claim was purely contractual, between a bank and a borrower. Such a claim, counsel urged, lay within the ambit of private law, and involved only the parties. Nothing in this context, it was urged, fell under the category of public interest. Counsel submitted that there are no points of law in this matter arising in the past or present, to warrant this Court's intervention.

IV. Analysis

(i) Issues before the Court

25. It emerges from the application, the affidavits filed in support, the written and oral submissions, as well as the authorities cited, that the main issues for determination are as follows:

    i. Whether this Court has jurisdiction to hear this matter?

    ii. Whether this matter is one of general public importance?

    iii. Whether any constitutional rights of the applicant company have been violated?

    iv. Whether any party is entitled to costs?

(ii) The Question of Jurisdiction

26. Whether or not a Court has jurisdiction is not a mere procedural technicality; for without jurisdiction, a Court has no basis in law for entertaining a case. It is the fountain from which springs the flow of the judicial process. We recognise that "where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing" (Words and Phrases Legally Defined, Vol. 3: 1-N, page 113).

27. Article 163 (5) of *the Constitution* gives the company locus standi before this Court. It provides thus:

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

28. The applicant company in its submissions asserted that it wanted to 'appeal' against the Court of Appeal ruling which had denied certification for an appeal in this matter. Thus, what precisely the applicant company is seeking, is a review of the decision of the Court of Appeal to decline to certify this matter as one of general public importance. As this Court decided in Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. and J. Harrison Kinyanjui & Co. Advocates, SC Petition No. 3 of 2012, at para 20-21, only two categories of appeal lie to the Supreme Court:

> " At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is a case involving the interpretation or application of *the Constitution*. In such a case, no prior leave is required from this Court or Court of Appeal.
>
> > "The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court.....then such intending appellant must convince the Court that the case is one involving a matter of general public importance."

29. Consequently, by challenging the Court of Appeal Ruling dated 26th July 2013, the applicant company is an 'intending appellant' which is being accorded a second chance to seek certification to appeal to the Supreme Court.

30. We have noted that this matter was concluded by the Court of Appeal on 25th April, 2008, several years ahead of the promulgation of *the Constitution* of Kenya, 2010; and at that time the Court of Appeal was then the final Court.

31. The appellate jurisdiction of this Court is clearly outlined in the Macharia case. In summary, this Court will not entertain cases that were already heard and determined before it came into existence. The appellate jurisdiction of this Court, in its essential character, does not look back in time to early years predating *the Constitution*. It is clear from the Macharia case (para. 63):

> " ...The sole issue is to consider whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of *the Constitution* of 2010. Decisions by the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court was to allow appeals from cases that had already been finalized by the Court of Appeal before the commencement of *the Constitution* of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of citizens."

The Court, in the same case, further reaffirmed (para.65):

> " Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of *the Constitution*."

32. A "filter principle" has thus emerged, in this Court's mode of admitting cases to appeal. In Peter Oduor Ngoge v. Francis Ole Kaparo and 5 Others, SC Petition No. 2 of 2012, the Court considered the decision of the English House of Lords in R. v. Secretary of State for Trade and Industry, ex parte Eastaway [2001] 1 All ER 27, and came to a position thus elaborated:

> " 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. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

33. In the instant matter, by the Court of Appeal's final determination, the applicant became entitled to a decree for Ksh.509, 692/60 with interest at Court rates, as from the date of filing suit until payment was made in full. The respondent bank was obliged to pay this amount, which it did, to the tune of Ksh.1,218,165/30, – acknowledged in the Court of Appeal judgment dated 25th April, 2008. It is a cardinal principle of law that litigation must come to an end.

(iii) Matter of General Public Importance

34. We note that at the Court of Appeal, two main issues were canvassed: (i) the sum awarded as interest; and (ii) the rate of interest. For this Court to form any impression as to the adequacy of the damages, it would have to look into the substance of the appeal – which would be premature at this preliminary stage. Has a question thus prematurely raised, the essentials for crystallizing "matters of general public importance", and thus capable of qualifying as a subject of appeal before the Supreme Court?

35. The framework for qualifying a disputed question as one of "general public importance" was set up in the Hermanus Phillipus Steyn Case, as follows:

> " (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 a 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 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 themselves, a basis for granting certification for an appeal before the Supreme Court."

36. The applicant has raised several issues which, in potential, could become matters of general public importance, such as: (i) lending contracts, rates, due dates of instalments, exchange rates applicable; (ii) whether a delay by a bank in debiting the account of its customer, occasioning loss due to inflationary trends, must be born by customers; and (iii) impacts of declining currency values on international banking transactions. But these issues would possibly become relevant only after a consideration of the merits of the proposed appeal itself – a premature issue at this moment.

37. This case falls far short of the Supreme Court's established criteria for assuming appellate jurisdiction, by virtue of Article 163(4) of *the Constitution*. Where, as in this instance, the Court of Appeal has considered an application for leave to appeal further, and declined to grant the requisite certification, an aggrieved party seeking a review of such a decision, must come in good faith, and with cogent argument founded on the terms of *the Constitution*: either, that issues of interpretation or application had arisen (giving automatic rights of appeal), or that the proposed appellate cause carries issues of general public importance.

38. Such conditions were not fulfilled by the applicant herein who, besides, is set against the well-settled decisions of this Court, that cases appealed to finality in the apex Court, prior to the promulgation of *the Constitution* of Kenya, 2010 are not for re-opening before this Supreme Court.

39. With all due respect, we find the instant application to be not well-founded in law, and accordingly, dismiss it.

Orders

40. Each party shall bear its own costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2014.

.....

W.M. MUTUNGA,

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

K.H. RAWAL,

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

P.K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court of Kenya