



**Sum Model Industries Ltd v Industrial & Commercial Development Corporation  
(Civil Application 1 of 2011) [2011] KESC 5 (KLR) (Civ) (2 December 2011) (Ruling)**

*Sum Model Industries Ltd v Industrial & Commercial Development Corporation [2011] eKLR*

Neutral citation: [2011] KESC 5 (KLR)

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

**CIVIL**

**CIVIL APPLICATION 1 OF 2011**

**PK TUNOI & SC WANJALA, SCJJ**

**DECEMBER 2, 2011**

**BETWEEN**

**SUM MODEL INDUSTRIES LTD ..... APPLICANT**

**AND**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT  
CORPORATION ..... RESPONDENT**

*(An application for leave to appeal against the judgment and decree of  
the Court of Appeal given at Nairobi (Omolo, Bosire & Githinji, JJA)  
dated 8th June, //2007// in NAIROBI CIVIL APPEAL NO. 229 OF 2001))*

**Necessity of obtaining certification from the Court of Appeal before approaching the Supreme Court  
on matters of general public importance**

*The Court emphasized the necessity of obtaining certification from the Court of Appeal before approaching the Supreme Court on matters of general public importance. It dismissed the application, stating that the applicant had failed to comply with procedural prerequisites and declined to invoke its special jurisdiction under section 14 of the Supreme Court Act.*

Reported by John Ribia

***Jurisdiction*** - jurisdiction of the Supreme Court - Supreme Court's Appellate Jurisdiction - appeal as of right - certification process - certification by the Court of Appeal - application for review of Court of Appeal judgment - circumstances when the Supreme Court can invoke its special jurisdiction and call for a review of the Court of Appeal's judgment where one sought to bypass certification by the Court of Appeal and sought certification at the Supreme Courts - whether bypassing the Court of Appeal and approaching the Supreme Court to certify a matter as one of public importance warranting determination by the Supreme Court was an abuse of the process of court - Constitution of Kenya 2010, article 163(4)(b); Supreme Court Act section 14; Supreme Court Rules, rule (30)(2).



## **Brief facts**

Sum Model Industries Ltd filed an application seeking leave to appeal against a judgment of the Court of Appeal. The applicant argued that the matter involved issues of general public importance and sought direct access to the Supreme Court. The application cited rules 30(2) and 42(1) of the Supreme Court Rules and various constitutional provisions.

The respondent, Industrial and Commercial Development Corporation, opposed the application, contending that the Supreme Court lacked jurisdiction in the absence of certification by the Court of Appeal.

## **Issues**

- i. Whether bypassing the Court of Appeal and approaching the Supreme Court to certify a matter as one of public importance warranting determination by the Supreme Court was an abuse of the process of court.
- ii. Under what circumstances should the Supreme Court invoke its special jurisdiction under Section 14 of the Supreme Court Act to review decisions of the Court of Appeal?

## **Held**

1. The appellate jurisdiction of the Supreme Court was set out under article 163(4) of the Constitution as read together with rule (30) (2) of the Supreme Court Rules. Before an appeal under the provisions could be entertained; either the Supreme Court or the Court of Appeal had to be satisfied that it involved a matter of general public importance. Upon being so satisfied, the Court could then issue a certificate for leave to appeal. The applicant had not cited article 163(4)(b) of the Constitution as the basis for the application before the court.
2. The application being for leave to appeal against a decision of the Court of Appeal, it would have been good practice to originate the application in the Court of Appeal which would have been better placed to certify whether a matter of general public importance was involved. It was the Court of Appeal which had all along been seized of the matter on appeal before it. That court had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. The Court of Appeal should have ideally been afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not.
3. If dissatisfied with the Court of Appeal's decision in that regard, the applicant would then be at liberty to seek a review of that decision by the Supreme Court as provided for by article 163(5) of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intended to appeal and go directly to the Supreme Court in search of a certificate for leave, would lead to abuse of the process of court.
4. The Court could not invoke the special jurisdiction and call for a review of the Court of Appeal's judgment under section 14 of the Supreme Court Act as prayed by the applicant as a perusal of the documents in support of the application had not disclosed any facts that would bring the application within the ambit of section 14 of the Supreme Court Act.

*Application dismissed.*

## **Orders**

- i. *Civil Application Number 1/2011 was to be filed before the Court of Appeal pursuant to article 163(4) of the Constitution for determination by the said Court.*
- ii. *Same Order was to be applied to Civil Application Numbers 2 of 2011 and 3 of 2011*

## **Citations**

None Mentioned

## **Statutes**

### ***East Africa***

1. Constitution of Kenya, 2010 articles 10;159;163(4)(b)(5) - (Interpreted)



2. Supreme Court Act, 2011(Act No 7 of 2010) sections 3, 14 - (Interpreted)
3. Supreme Court Rules, 2012(Act No 7 of 2010 Sub Leg) rules 30 (2); 42 (1) - (Interpreted)

## RULING

### **Ruling Of The Court**

1. This is an application for leave to appeal against a decision of the Court of Appeal. The application is made under rules 30 (2) and 42 (1) of the Supreme Court Rules and sections 3 of the Supreme Court Act and Chapter 4 of the Constitution and Articles 10 and 159 of the Constitution.
2. The Appellate Jurisdiction of the Supreme Court is clearly set out in Article 163 (4) of the Constitution. The Article provides that appeals shall lie from the Court of Appeal to the Supreme Court:-
  - (a) As of right in any case involving the interpretation or application of this Constitution; and
  - (b) 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).

Clause 5 provides that a certification by the Court of Appeal under clause 4 (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.
3. Rule 30 (2) of the Supreme Court Rules provides that where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal.
4. In our view, the relevant provisions pursuant to which this application must be initiated are Article 163 (4) (b) of the Constitution as read together with rule (30) (2) of the Supreme Court Rules. It is clear to us that before an appeal under these provisions can be entertained; either the Supreme Court or the Court of Appeal must be satisfied that it involves a matter of general public importance. Upon being so satisfied, the Court may then issue a certificate for leave to appeal. We are surprised to note that Counsel for the applicant has not cited Article 163 (4) (b) of the Constitution as the basis for the application before us. Instead, the application has been brought (with the exception of rule 30 of the Supreme Court Rules), under either general provisions of the Constitution, or provisions that bear no relevance to the application.
5. This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court.
6. With regard to the question as to whether this Court should invoke its special jurisdiction and call for a review of the Court of Appeal's judgment under section 14 of the Supreme Court Act as prayed by the applicant, we decline to invoke the special jurisdiction as our perusal of the documents in support



of the application has not disclosed any facts that would bring the application within the ambit of section 14 of the Act.

Accordingly, and in view of the foregoing reasons, we make the following Orders:-

“order

1. That Civil Application Number 1/2011 be filed before the Court of Appeal pursuant to Article 163(4) of the Constitution for determination by the said Court.

2. That the foregoing Order be applied to Civil Application Numbers 2 of 2011 and 3 of 2011 on the basis of the reasons advanced in this application.”

**DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2011.**

**HON. JUSTICE P.K. TUNOI HON. JUSTICE (DR) S.C. WANJALA**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**

