



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; (DCJ & V-P), Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

APPLICATION NO. 14 (E023) OF 2022

–BETWEEN–

NATIONAL BANK OF KENYA LIMITED

(As the Successor in Business of

***Kenya National Corporation Limited*).....1ST APPLICANT**

KENYA NATIONAL CAPITAL

CORPORATION LIMITED.....2ND APPLICANT

–AND–

BASIL CRITICOS.....RESPONDENT

*(Being an application for review of the decision of the Court of Appeal
(Okwengu, Ali-Aroni & Mativo, J.J.A.) dated 16th December 2022, arising
from Nairobi Civil Application No. E158 of 2022)*

Representation:

Mr. Evans Moronge..... for the 1st and 2nd applicants
(Moronge & Co. Advocates)

Mr. Allen Waiyaki Gichuhi SC.....for the respondent
(Wamae & Allen Advocates)

RULING OF THE COURT

[1] UPON reading the Notice of Motion by the Applicants dated 22nd December 2022 and lodged on 28th December 2022 pursuant to Articles 159 and 163(5) of the Constitution, Sections 15 and 15B of the Supreme Court Act and Rule 33 of the Supreme Court Rules, seeking: *an order reviewing and setting aside the Ruling of the Court of Appeal (Okwengu, Ali-Aroni & Mativo, JJ.A) dated 16th December 2022 denying certification, and in its place to issue an order allowing the Applicants' Notice of Motion dated 13th May 2022 in Nairobi Civil Application No. E158 of 2022; or in the alternative, to issue a Certificate under Article 163(4)(b) of the Constitution on the basis that the intended appeal against the Judgment of the Court of Appeal (Nambuye, Karanja & Kiage, JJ.A) dated 28th April 2022 arising from Civil Appeal No. 80 of 2017, Basil Criticos v. National Bank of Kenya Limited & Another, involves matters of general public importance;*

[2] UPON perusing the grounds on the face of the application, the applicants' supporting affidavit sworn by the 1st applicant's Director of Legal Services and Company Secretary, **Samuel Mundia** on 22nd December 2022 and the applicants' written submissions dated and filed on 3rd January 2023, wherein they contend that their intended appeal raises the following matters of general public importance: *conflicting case law from the Court of Appeal as to whether a guarantor is discharged upon payment of the principal amount and is therefore not liable for interest, costs and other charges; the applicability of continuing guarantee clauses in Kenya extending obligations of a guarantor so long as the principal borrower has any obligation to the creditor under the charge; the valuation date of a charged property for purposes of exercising the statutory power of sale as to whether a chargee is bound by a valuation procured before exercising the right of sale or well after the fact in assessment of damages; and the Court of Appeal's residual jurisdiction to stay execution of its own orders;*

[3] FURTHER, noting the applicants' submissions, wherein they argue that the Court of Appeal based its ruling on the issue of unconscionable bargain, which issue was neither pleaded nor framed by the court for determination; and that contrary to the Appellate Court's holding, the date of valuation prior to the exercise of the statutory power of sale, is a matter of law provided for under the Land Act No. 6 of 2012 and the Auctioneers Act Cap 256 of the Laws of Kenya, and not an evidentiary matter specific to the parties involved. Furthermore, that the issues in the certification application directly and substantially affect all players in the financial sector hence the Court of Appeal's decision potentially exposes every financial institution to the risk of their facilities being unsecured or under secured;

[4] UPON considering the respondent's replying affidavit, submissions and list of authorities all dated 17th January 2023 whereby he opposes the applicants' application for certification under Article 163(4)(b), on *inter alia* that no matters of general public importance affecting the banking industry have been raised; the issue of continuing security is a new argument that was neither contested, pleaded nor determined by the Court of Appeal; the applicants have not shown that there are inconsistencies in the appellate court's jurisprudence relating to applicability of continuing guarantee clauses; and lastly, that the evidentiary issues raised concerning the Court of Appeal's reliance on the respondent's valuation report, are specific to the parties and cannot be the basis for invoking the jurisdiction of this Court as a matter of general public importance;

[5] FURTHER, noting the respondent's submission, wherein he urges that the Court of Appeal, being a court of equity and bound by the national values embodied in Article 10 of the Constitution, was justified in declaring the interest visited upon the respondent by the applicant as unconscionable and usurious; and that the doctrine of *in duplum* applies by virtue of Section 44 of the Banking Act prohibiting banks from recovering interest in excess of the principal amount; further, that the applicants were in contempt of court by selling the charged property in disregard of two injunctive orders, thus are undeserving of the certification orders sought;

and finally, that the applicants' allegation that enforcement of the damages granted by the Court of Appeal will paralyze the 1st applicant's operations by eroding its core capital, is not a matter of general public importance and is unsubstantiated;

[6] **NOTING** that the Court of Appeal found that the certification application could not be sustained on the basis of the principles settled in *Malcolm Bell v. Hon. Daniel Toroitich arap Moi and Another*, SC Application No. 1 of 2013 [2013] eKLR; that the court based its decision on unconscionable contract as opposed to interpretation of the guarantee document; and that the issue of continuing guarantee clauses was neither pleaded nor determined;

[7] **COGNISANT OF THE FACT** that this Court has already established the basis upon which an intended appeal may be certified as one involving a matter of general public importance in *Hermanus Phillipus Steyn v. Giovanni Gneccchi Ruscone*, SC Application No. 4 of 2012 [2013] eKLR; to the effect that:

“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...”

[8] **WE NOW OPINE** as follows:

The Notice of Motion lacks merit as the applicants have not highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling. Neither have the applicants raised any substantial question of law, the determination of which, would have a significant bearing on the public interest.

