

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaol, SCJJ)

MOTION NO.25 OF 2020

—BETWEEN—

WILLIAM OLOTCH.....APPLICANT

—AND—

PAN AFRICAN INSURANCE COMPANY LIMITED.....RESPONDENT

*(Being an application for review of the Ruling of the Court of Appeal at Nairobi
(Ouko (P), Koome and Murgor, JJA) dated 22nd May, 2020)*

RULING OF THE COURT

A. THE APPLICATION

[1] By an originating Motion dated 16th September 2020 and premised on Section 16(1) and (2) of the Supreme Court Act, 2011 as well as Rule 33(2) and (3) of the Supreme Court Rules, 2020, the Applicant, William Olotch, has applied for a review of the decision of the Court of Appeal delivered on 22nd May 2020. In its Ruling, the appellate Court had declined to certify the dispute between the parties as one requiring further input by this Court, as a matter of general public importance, under Article 163(4) (b) of the Constitution.

B. BACKGROUND

[2] Before the High Court, in **HCCC No.509 of 2002**, the Applicant had prayed for a declaration that his summary dismissal as the Managing Director of the Respondent, Pan Africa Insurance company Ltd was unlawful and that he was entitled to certain sums of money being salary in *lieu* of notice, accrued leave, salary arrears, club membership, severance pay, dues for 8 years of service and translocation expenses. The Respondent, on its part, counterclaimed for delivery of M/V Reg. No. KAM 509M or payment of Kshs.3,575,000.00 in *lieu* thereof as well as damages for loss of use of the said motor vehicle.

[3] In a Judgment delivered on 9th March 2017, *Sergon J* dismissed the Applicant's claim with costs and ordered him to pay Kshs.4,737,187.60 plus costs to the Respondent. The Applicant was dissatisfied and on appeal, the Court of Appeal, in a Judgment delivered on 10th May 2019 (*Warsame, Musinga and Kiage JJA*) dismissed his appeal with no order as to costs.

[4] By a Notice of Motion dated 17th July 2019, the Applicant prayed for certification of his intended appeal to this Court as one involving a matter of general importance. The appellate Court, in a Ruling delivered on 22nd May 2020 (*Ouko, Koome and Murgor JJA*) declined the plea of certification thus triggering the present Motion.

C. CASE FOR THE APPLICANT

[5] According to the Applicant, the following questions, arising from proceedings in the Courts below, require this Court's answers as a matter of general public importance:

- i) Whether the principle of Natural Justice applies to all contracts.

ii) Where an employer summarily dismisses an employee on grounds of gross misconduct (under the repealed Employment Act, Cap. 226) and an employee disagrees, does the employee have a right to be heard and the employer an obligation to disclose details of the grounds of gross misconduct?

iii) Where a company has disciplinary regulations, are they deemed to be part of the contract?

iv) Whether, upon a summary dismissal, an employee automatically forfeits all his benefits including those that he is legally entitled to and had accrued prior to the dismissal, in other words what is the place of those benefits not contingent on the Ruling of the case in question?

v) Can a Chairman of Board of Directors unilaterally terminate a contract of a Board employee without a Board Resolution, where the letter of appointment clearly states that the Chairman was acting on behalf of the Board following a Board Resolution?

vi) Whether a decision made, which on the face of it is without any *iota* of evidence in support, is not in itself tantamount to a miscarriage of justice.

vii) Whether refusal to give a relief in the presence of overwhelming evidence is itself a miscarriage of justice.

viii) Can a termination of an employee's contract of employment be retroactive?

[6] It is the Applicant's submission that, all the above questions transcend the contractual circumstances of the parties before us and ought to be addressed

within the principles enunciated by this Court in ***Hermanus Phillipus Steyn v. Giovanni Gnechi Ruscone***, Sup Ct. Appl. No.4 of 2012.

D. CASE FOR THE RESPONDENT

[7] The Respondent, in answer to the Applicant's plea, has stated that the Motion before us is bad in law and lacks merit because it has failed to disclose any substantial grounds for this Court to exercise discretion in his favour. In any event, that, all the factual issues arising between the parties were properly determined by the Courts below and no specific issue arises for determination as a matter of general public importance or which would otherwise attract the public interest.

[8] In therefore seeking dismissal of the Motion with costs, the Respondent relies on our decisions in ***Hermanus Phillipus Steyn*** (supra), ***Malcom Bell v. D. T. Arap Moi & Anor***, Sup. Ct. Application No.1 of 2013 and ***Town Council of Awendo v. Nelson Oduor Onyango & 13 Others*** [2015] eKLR. Reliance has also been placed on ***Peter Odiwuor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR on the specific question of matters warranting our attention on account of public interest.

E. ANALYSIS AND DETERMINATION

[9] Article 163(4) (b) of the Constitution provides as follows:

“Appeals shall lie from the Court of Appeal to the Supreme Court in any case in which the Supreme Court or the Court of Appeal, certifies that a matter of Public Importance is involved subject to Clause 5”

[10] In applying the above provision, this Court in ***Hermanus Phillipus Steyn*** and ***Town Council of Awendo*** among other decisions on the subject,

laid down a number of principles that a party seeking review of non–certification by the Court of Appeal must properly invoke for this Court to grant such review. Of relevance to the present Motion are the following:

- i)** The issue canvassed must transcend the specific circumstances of a particular case and have a significant bearing on the public interest.
- ii)** Where the issue is one of law, its determination must have a significant bearing on the public interest.
- iii)** Mere apprehension of injustice by the Courts below cannot be a proper basis for certification.
- iv)** The specific elements of “*general public importance*” must be clearly and concisely identifiable.
- v)** Determination of facts in contest between the parties cannot be a basis for certification.

[11] In the above context, we have set out above the eight questions that the Applicant considers to be so significant as to attract the application of the above principles in his favour. We have weighed all of them against the expectation of the law and with respect, they all fall far below the above threshold. We say so because whereas general questions of law such as applicability of natural justice to all contracts and retroactivity of contracts of employment may have been thrown in to spice the Motion, the questions relate wholly to the specific circumstances between the parties hereto. A contract between an employee and an employer is ordinarily looked at, within its four corners, should a dispute arise and applicable law is then invoked to determine the dispute which in the end should not transcend the special and private relationship between parties to it so as to attract the general public importance qualification or the public interest necessity.

[12] The Judgments of the Courts below were in that context also detailed on the real dispute between the parties: was the Applicant lawfully dismissed from his employment and if so, was he entitled to his monetary claims? And was the Respondent's counterclaim regarding M/V Reg.No. KAM 509M a lawful one or not? Both Courts reached near similar conclusions on the twin questions and there was nothing in the dispute nor in the Judgments to warrant the attention of the general public.

[13] We must reiterate that mere dissatisfaction with the manner in which Courts below determined disputed facts is not by and of itself a good reason to raise a matter to the higher platform of "*general public importance*" neither does apprehension that miscarriage of justice may have been committed, do so. Article 163(4) (b) was never enacted to placate every litigant unhappy with the final decision of the appellate Court. This must be said of the present case.

[13] Without saying more, the Motion is one for dismissal. As for costs, we have no doubt that, in the present instance, they must follow the event and so the Respondent shall have costs thereof.

D. DISPOSITION

[14] For reasons above, the final orders to be made are that;

- a) *The Originating Motion dated 16th September 2020 is hereby dismissed.***
- b) *The Respondents shall have costs thereof.***

[15] It is so ordered.

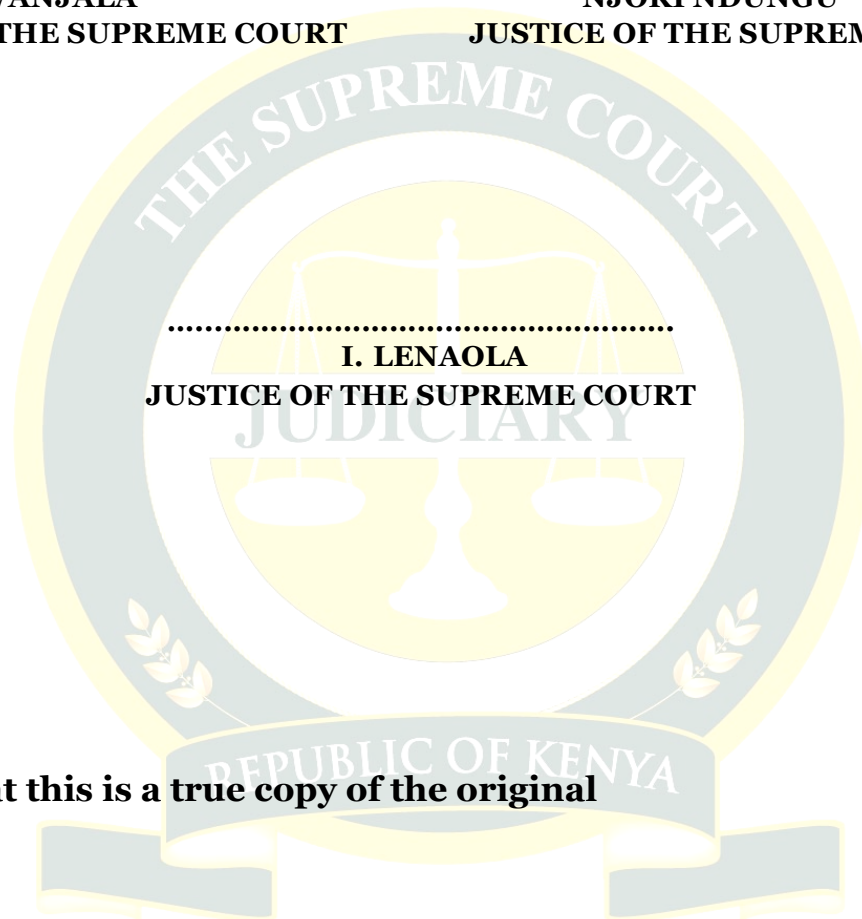
DATED and ISSUED AT NAIROBI this 5th day of March, 2021.

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P. M. MWILU
Ag. CHIEF JUSTICE &
Ag. PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT



.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA