



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ &VP, Ibrahim, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. 11 (E020) OF 2022

-BETWEEN-

1. F. KINYUA KAMUNDI

2. D.T. MUYAA Practising as

KINYUA MUYAA & CO. ADVOCATESAPPLICANTS

VERSUS

KENYA PORTS AUTHORITY PENSION SCHEME

ALBERT CHAUREMBO MUMBA

ABDALLA H. MWARUWA

M.K. MURE

MARY WAIRIMU NG'ANG'A

ALEX OLE-TEIPAN

MARY OTIENDE

MARGARET NYAGA

**MAJENGO KATANA (sued on their own behalf and
on behalf of their predecessors and/or successors in**

title in their capacity as the Registered Trustees of

the Kenya Ports Authority Pension Scheme RESPONDENTS

(Being an application for review of the Ruling and orders of the Court of Appeal in Civil Application No. 69 of 2020 given at Mombasa (Gatembu, Nyamweya & Lesiit JJ.A) dated 21st October, 2022 dismissing the Applicant's Application for Grant of Certification)

Representation:

F.K. Kamundi & D.T. Muyaa practising as Kinyua Muyaa & Co. Advocates
(Acting in person)

Mr. Oyoo
(Kaplan & Stratton Advocates for the respondents)

RULING OF THE COURT

[1] UPON perusing the Originating Motion application dated 3rd November, 2022 and filed on 8th November, 2022 pursuant to Article 163(4)(b) of the Constitution, Section 15 and 16 of the Supreme Court Act and Rule 33(2) of the Supreme Court Rules, 2020 seeking, *inter alia*: the review and setting aside of the ruling of the Court of Appeal delivered on 21st October, 2022 declining to certify the questions raised by the applicant as being matters of general public importance; and refusal of grant of leave to appeal to the Supreme Court on the thirteen (13) issues identified and proposed as involving matters of general public importance;

[2] UPON perusing the grounds on the face of the application; the supporting affidavit sworn on 3rd November, 2022 and the supplementary affidavit sworn on 9th November, 2022 both by D.T. Muyaa, Advocate; and the submissions dated 4th November, 2022 in which the applicants contend that: the appeal raises substantial matters of general public importance that transcend the parties; the Judges of Appeal delivered contradicting judgments whose drafts were amended before they were re-circulated; and that the complaint concerned the wider question of administration of justice in the Court of Appeal;

[3] UPON considering the applicants' further grounds that the mode of assessment of advocates fees after certification of costs in a Party & Party Bill of Costs did not arise directly in the appeal as it was not one of the grounds of appeal; that by requiring the Taxing Master to use Kshs.201,981,424.00 as the value of the subject matter without any appeal the Court of Appeal reduced the fees by more than 90% thereby interfering with property rights already accrued

and without applying the doctrine of *res judicata*; and that the general public and specifically the legal profession will benefit from determination of these issues;

[4] UPON perusing the respondents' replying affidavit sworn on 30th November 2022 by Vincent Oweya, the respondents' Legal Officer; and their submissions dated 14th December, 2022, which oppose the application on the grounds that the application does not raise any matter of general public importance to warrant the review and certification being sought; that the sole question is on the subject value principle of taxation of the Bill of Costs; that there is no contradiction in the judgment of the Court of Appeal; that the issues raised have no bearing on the public interest transcending the parties. The respondents rely on this Court's decision in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013]eKLR and *Christopher Onyango & 23 others v Heritage Insurance Company Limited* [2021] eKLR to buttress their arguments;

[5] BEARING IN MIND the provisions on this Court's jurisdiction under Article 163(4)(b) of the Constitution, which grant this Court jurisdiction to hear appeals from the Court of Appeal on matters of general public importance, and Section 15B of the Supreme Court Act and rule 33 (1) and (2) of the Supreme Court Rules, 2020 which provide for the right to review the Court of Appeal's decision on certification of a matter as one of general public importance;

[6] TAKING INTO ACCOUNT this Court's guiding principles on certification of a matter as one involving general public importance arising from the decision in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone (supra)*; and

[7] NOTING that the genesis and the main contention by the applicants in the initial suit is the taxation of their advocate-client bill of costs and specifically, the value of the subject matter, the Court of Appeal in its judgment having set aside the ruling of the Employment and Labour Relations Court for failure by the taxing officer to compute the instruction and getting up fee, respectively, as provided in the Advocates Remuneration Order resulting in an excessive award of Kshs. 87,139,560.45, almost half the decretal sum of Kshs.201,981,424.50;

[8] WE HAVE CONSIDERED the application, affidavits, submissions filed and the issues proposed to be certified as involving great public importance and **NOW OPINE** as follows:

- (i) On whether the Court of Appeal may deliver a judgment without reading the record of appeal and whether judges did not read each other's draft judgments, we find this to be a matter of apprehension and/or speculation, and not a matter of general public importance;
- (ii) On the Court of Appeal's delivery of three separate contradicting judgments, we have perused the appellate court's judgment and the resulting orders and fail to see any contradiction as argued by the applicant, and none was pointed to us;
- (iii) On the questions whether the Court of Appeal can hear an appeal in the absence of a Notice of Appeal; whether parties have a right to equal protection, enjoyment and benefit of the law; and the doctrine of *res judicata*, this Court, just like superior courts below it has addressed and indeed settled those issues;
- (iv) As for the manner in which advocates' fees are to be determined after a Certificate of Costs is given in a Party & Party Bill of Costs, there is apparent discordance between increasing the certified party and party costs by one half or filing and taxing an Advocate-Client Bill of Costs. The Court of Appeal appreciated this dilemma and proposed, rightly so, that the appellate court should, through an expanded bench, have the first opportunity to resolve the issue, before escalating to this Court. We agree with the Court of Appeal that this was not a matter that directly arose out of the appeal.
- (v) The applicants' taxation of their advocate-client bill of costs and specifically, the value of the subject matter, was a contest between the parties and cannot be a matter of general public importance that would transcend the parties; A mere apprehension of a miscarriage of justice, is a matter most apt for resolution in the lower superior courts, and is not a proper basis for granting certification for an appeal to the Supreme Court.

(vi) We are satisfied that the Court of Appeal correctly interrogated the applicants' proposed issues under the threshold set by this Court in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone*** (supra) in arriving at its decision.

[9] CONSEQUENTLY, for reasons aforesaid, we make the following orders:

- (i) *The Originating Motion dated 3rd November, 2022 be and is hereby dismissed; and*
- (ii) *We order each party to bear its own costs.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 21st day of April 2023.

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

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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

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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA