



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, & Lenaola SCJJ)

APPLICATION NO. E015 OF 2023

-BETWEEN-

OTIENO, RAGOT & COMPANY ADVOCATES APPLICANT

-AND-

KENYA AIRPORTS AUTHORITY RESPONDENT

Being an application for review of the ruling of the Court of Appeal (P.O. Kiage, K. M'Inoti & Mumbi Ngugi JJA) dated 17th March 2023 in Civil Application Sup. No. E001 of 2012 (Kisumu)

Representation:

Mr. Otieno for the Applicant
(Owiti, Otieno Ragot & Company Advocates)

Mr. Munyu for the Respondent
(Iseme, Kamau & Maema Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the applicant dated 31st March, 2023 and filed on even date pursuant to Article 163 (5) of the Constitution, rule 33 (2) of the Supreme Court Rules, 2020 and all other enabling provisions of the law, seeking orders THAT:

1. *This Court be pleased to review the ruling of the Court of Appeal in CIVIL APPLICATION SUP. NO. E001 OF 2012 (KISUMU) dated the 17th March 2023 by which the said Court allowed the respondent's application dated 2nd June 2021 seeking certification that an intended appeal to the Supreme Court of Kenya against a decision of the said Court delivered on 19th May 2021 in Civil Appeal No. 39 of 2017 raised questions of general public importance and granted leave to appeal.*
2. *Upon the grant of the order for review, this Honourable Court be pleased to find that the intended appeal does not satisfy the criteria for the grant of an order for certification and leave under the Constitution and the law and that therefore the Court of Appeal should have refused the respondent's application dated 2nd June 2021 seeking certification and leave to appeal to this Honourable Court.*
3. *The costs of the proceedings be borne by the respondent.*

[2] UPON perusing the grounds on the face of the application; the supporting affidavit and further affidavit sworn on 31st March, 2023 and 26th April, 2023 respectively by David Otieno; and written submissions dated 31st March, 2023 and filed on 4th April, 2023 wherein the applicant argues that the intended appeal to this Court does not raise questions of general public importance since it does not meet the criteria set out in law and the principles that have been developed by this Court in the ***Hermanus Phillipus Steyn v. Giovanni Gnechi -Ruscione***, SC Application No. 4 of 2012; [2013] eKLR; that the dispute between the parties has always been about payment of professional fees for services rendered by the applicant as an advocate to the respondent who had been sued for Kshs.13,932,000,000/-; that since the parties differed on fees, the applicant filed advocate and client bill of costs and was awarded Kshs.8,759,022.74 including disbursements by the taxing officer; that the taxing officer arrived at the said sum by increasing the instruction fees

by one half as provided for under Schedule Part A and B of the Advocates Remuneration Order, 2014; and

[3] UPON considering the applicant's further argument that there is no ambiguity for the law is clear and decisions of superior courts have remained constant; that notwithstanding the clarity on the law, the applicant castigates the appellate court for relying on minority decisions of the superior court as constituting differences in opinions at the superior court; that the invitation of determining what "*subject value*" means is frivolous since the courts are clear about what the subject is in each case; that the respondent cannot propose this Court to litigate on matters that were never raised, addressed and determined before the superior courts, as reiterated by this Court in ***Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others***, SC Application No. 2 of 2015; [2015] eKLR. The applicant affirms that the only reason the respondent wants to prefer an appeal to this Court is because the sum increased to Kshs. 196,044,750.50/-; and

[4] UPON perusing the respondent's replying affidavit sworn on 17th April, 2023 by Margaret Munene and written submissions dated 26th April, 2023 and filed on 27th April, 2023 in which the respondent, in opposing the application, contends that the applicant raises no new issue warranting review because they reiterate the objections raised before the Court of Appeal; that the appellate judges correctly found that the intended appeal meets the criteria set out in the ***Hermanus Phillipus Steyn case*** given that the issues impact the public interest and therefore transcend the private interests of the parties to this dispute; that there are divergent opinions of majority and minority of the superior court regarding the interpretation and application of the provisions of Schedule VI Part A and B of the Advocates Remuneration Order, 2014 and the question of the exercise of the taxing officer's judicial discretion leaving the law unsettled on this subject; that to the extent it remains unsettled, the right to access to justice as enshrined under Article 48 of the Constitution may be impeded by claims of unreasonable fees; and

[5] COGNISANT that the questions of law as certified by the Court of Appeal for appeal to this Court are:

- a) *The proper interpretation of the provisions of Schedule VI Part A and B of the Advocates Remuneration Order, 2012 and in particular whether the phrase ‘fees prescribed in A above increased by one – half effectively takes away the taxing master’s judicial discretion in the taxation of an Advocate-Client bill of costs;*
- b) *The proper judicial interpretation of the term ‘subject value’ in instances where the subject matter of a dispute although pleaded is fictitious and unsubstantiated and hence unascertainable from the pleadings without valuation*
- c) *Whether a certificate of taxation of party and party costs is binding per se on the taxing master in the taxation of the Advocate – Client bill of costs and whether such certificate completely fetters discretion and appreciation of actual work done in assessing Advocate-Client instruction fees.*
- d) *Whether the costs awarded to an Advocate should be allowed to be so punitive (in this case being an increment of instruction fees by the majority of Court of Appeal from Kshs. 5,000, 000/- to Kshs. 196, 044, 750.50/-) with the effect of impeding access to justice as guaranteed under Article 48 of the Constitution; and*

[6] BEARING IN MIND the provisions governing this Court’s jurisdiction under Article 163 (4) (b) of the Constitution to hear appeals from the Court of Appeal on matters of general public importance, as well as section 15B of the Supreme Court Act and rule 33 (2) of the Supreme Court Rules, 2020 on the right to review the Court of Appeal’s decision on certification of a matter as one of general public importance; and

[7] TAKING INTO ACCOUNT the parameters of what amounts to a matter of general public importance as set out by this Court in *Hermanus*

Phillipus Steyn Case, as appreciated by the parties and the Court of Appeal; and the additional guidelines in ***Malcom Bell v. Daniel Toroitich Arap Moi & Another***, SC Application No. 1 of 2013; [2013] eKLR;

[8] WE HAVE CONSIDERED the application, responses thereto and submissions put forth by the parties and **NOW OPINE** as follows:

- (i) The main legal issue identified for certification is the interpretation of the provisions of Schedule VI, Part A and B of the Advocates Remuneration Order 2014 to the extent to which such interpretation limits the exercise of the taxing officer's judicial discretion in taxation of advocate-client bill of costs especially where the value of the subject matter of a dispute, although pleaded, is not substantiated.
- (ii) At the heart of the dispute between the parties is the manner in which the Advocates fees were taxed using either of the parameters set out in the Advocates Remuneration Order, whose outcome portends a massive difference in the entitlement of advocates fees as awarded by the courts. We also note that the Court of Appeal, though differently constituted, has pointed out the prevailing controversy. In ***Kinyua Muyaa & Co. Advocates v Kenya Ports Authority Pension Scheme & 8 others*** (Civil Appeal (Application) 69 of 2020) [2022] KECA 1119 (21 October 2022) (Ruling), the Court of Appeal stated as follows:

“19. Lastly, there is the contention that “there is uncertainty in the previous holdings by the Court of Appeal with some justices of appeal holding that a certificate of costs in a party & party bill is binding in an advocate/client bill of costs and that the taxing master need only increase that certificate with 50%”. There is merit in this contention. ...”

- (iii) We are satisfied that this case affords a sufficient opportunity for the need to decisively address the issue and that this issue

transcends the circumstances of this particular case and has a significant bearing on the public interest considering the existence of divergent positions as appreciated by the Court of Appeal.

- (iv) We see no difficulty in appreciating that the Court of Appeal correctly interrogated the proposed questions under the threshold set out in *Hermanus Phillipus Steyn Case* in arriving at its decision. We therefore, decline to vacate its finding.
- (v) As for costs, it is only prudent that we defer costs to follow the ultimate outcome of the appeal.

[7] CONSEQUENTLY, we make the following orders:

- a) *The Notice of Motion dated 31st March, 2023 and filed on even date by the applicant be and is hereby dismissed.*
- b) *The costs of this application to abide the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of June, 2023.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT OF KENYA

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

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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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

**I certify that this is a
a true copy of the original**

**REGISTRAR
SUPREME COURT OF KENYA**

