



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram; Mwilu; (DCJ & VP), Ibrahim, Wanjala, Lenaola & Ouko SCJJ)*

**APPLICATION NO. E022 OF 2023**

**–BETWEEN–**

**MWAMBEJA RANCHING COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**PROJECT ADVISORY SERVICES LIMITED.....2<sup>ND</sup> APPLICANT**

**–AND–**

**KENYA NATIONAL CAPITAL CORPORATION .....RESPONDENT**

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*(Being an application for review of the decision of the Court of Appeal (Omondi, Laibuta, Mumbi Ngugi, Mativo & Odunga, J.J.A) delivered on 9<sup>th</sup> June 2023, denying certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution)*

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**Representation:**

Mr. Allen Gichuhi SC ..... for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants  
*(Wamae & Allen Advocates)*

Mr. George Mutua ..... for the Respondent  
*(Mutua-Waweru & Company Advocates)*

## **RULING OF THE COURT**

[1] UPON perusing the applicants' Motion dated 20<sup>th</sup> June 2023 and filed on 23<sup>rd</sup> June 2023, pursuant to Article 163(4)(b) and (5) of the Constitution, Sections 3A, 21, 15 and 15B of the Supreme Court Act, 2011 and Rule 33(2) and (3) of the Supreme Court Rules, 2020 seeking: *review of the Ruling of the Court of Appeal (Omondi, Laibuta, Mumbi Ngugi, Mativo & Odunga, JJ.A) dated 9<sup>th</sup> June 2023 denying certification of the intended appeal as one involving matters of general public importance; certification of the intended appeal (against the judgment of the Court of Appeal (Koome (as she then was), Warsame & Kiage, JJ.A) delivered on 6<sup>th</sup> August 2019 in Civil Appeal No. 30 of 2018, **Mwambeja Ranching Company Limited v. Kenya National Capital Corporation**; and leave to amend the Notice of Appeal dated 8<sup>th</sup> August 2019, to replace Kenya National Capital Corporation with Project Advisory Services; and*

[2] UPON considering the applicants' grounds on the face of the application and affidavits in support both sworn by Harry Horn (Junior) and Allen Waiyaki Gichuhi, SC on 20<sup>th</sup> June 2023, wherein it is urged that the intended appeal raises the following questions of general public importance, reproduced thus: *conflicting case law from the Court of Appeal as to whether the in duplum principle applies retrospectively; applicability of Section 4(4) and 19 of the Limitation of Actions Act prescribing a 6-year limitation period on interest on a guaranteed debt or a consent amounting to a preliminary decree; whether a guarantor assumes primary liability for the entire debt contrary to the fixed sum expressed in the contract; whether it is a clog and fetter on the equity of redemption for a chargee to charge unconscionable interest; whether a chargee is a constructive trustee of surplus monies following sale of charged property; what interest, between court rates, the bank's fixed deposit rates or commercial rates should be applied to surplus monies held in trust by a chargor who refuses to account for and refund the excess?; and*

**[3] FURTHER** considering the applicants' submissions dated 10<sup>th</sup> July 2023 and filed on 17<sup>th</sup> July 2023, restating the grounds set out above and in addition, urging that the appellate court in its judgment dated 6<sup>th</sup> August 2019 misapplied the law, in holding that the cause of action relating to continuing securities never lapses. Moreover, that the court created confusion by finding that a guarantor's liability is limited to a fixed sum, but refused to apply the aspect of time barred interest or the *in duplum* rule to ascertain the lawful debt due; Furthermore, that the case raises matters of general public importance requiring certainty of law. In support, the applicants cite the case of ***Hermanus Phillipus Steyn v. Giovanni Gneccchi Ruscone***, SC Application No. 4 of 2012; [2013] eKLR, to urge that the questions raised permeate the banking industry, affect a considerable number of persons, continually engage the workings of judicial organs and have a significant bearing on public interest. As pertains the prayer for leave to amend the Notice of Appeal, it is urged that this Court has inherent jurisdiction to allow amendment of the Notice of Appeal dated 8<sup>th</sup> August 2019, as it shall not cause prejudice to the respondent; and

**[4] UPON** noting the respondent's grounds of opposition, submissions and list of authorities, all dated 27<sup>th</sup> July 2023 and filed on even date wherein it is urged that the applicant have not established any basis for review under Article 163 (5) of the Constitution; that they are agitating narrow private interests relating to their adjudged contractual liability to the respondent, hence conclusions drawn by the superior courts below on matters of fact and interpretation of contractual documents, do not have any bearing on the public interest. To this end, the respondent cites this Court's Ruling in ***National Bank of Kenya Limited v Basil Criticos*** SC Application No. 14 (E023) of 2022; [2023] eKLR. Additionally, it is urged that the *in duplum* Principle under Section 44A of the Banking Act has clear provisions as to its application, raising no novelty requiring this Court's determination; and that the applicants have not anchored the prayer on amendment of the Notice of Appeal on any enabling provisions of law; and

[5] **NOTING** that before the Court of Appeal, the applicants filed a composite application seeking leave to amend the Notice of Appeal; review of the Judgment of the Court of Appeal (*Koome, Warsame & Kiage, JJ.A*), delivered on 6<sup>th</sup> August 2019; and certification of its intended appeal in the alternative, in effect pursuing the appellate court’s jurisdiction of appeal and review simultaneously. Further noting that the Court of Appeal declined the prayer for review as grievances raised by the applicant were principally grounds of appeal, the consideration of which would amount to sitting on appeal over its own decision. Similarly, the Court of Appeal found that the certification application failed to meet the principles settled in *Malcolm Bell v. Hon. Daniel Toroitich arap Moi and Another*, SC Application No. 1 of 2013; [2013] eKLR. Furthermore, the appellate court stated that it was *functus officio* as jurisdiction to grant leave to amend a notice of appeal regularly filed against the decision of the court lay with the Supreme Court;

[6] **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* (*supra*); 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...”***

[7] **WE NOW OPINE** as follows: -

- (i) The Motion lacks merit as the applicant has not satisfactorily 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 denying certification. Neither has the

applicant raised any substantial question of law, the determination of which, would have a significant bearing on the public interest;

- (ii) In any event, the applicant opted for review of the Court of Appeal's judgment, in effect forfeiting his right of appeal at that instance;
- (iii) Flowing from the above, this Court therefore, has no jurisdiction to review certification of an intended appeal, where no right of appeal lies in the first instance;
- (iv) Having found as above, the applicants' prayer to amend the Notice of Appeal dated 8<sup>th</sup> August 2019 is moot.

**[8] CONSEQUENTLY**, for reasons aforesaid, we make the following Orders:

- (i) The Motion dated 20<sup>th</sup> June 2023 and filed on 23<sup>rd</sup> June 2023, is hereby dismissed;***
- (ii) The costs of this application shall be borne by the applicants.***

**It is so Ordered.**

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> Day of October, 2023.**

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

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

.....  
**S. C. WANJALA**  
**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**

