



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. E023 OF 2023

— BETWEEN —

JOHN KUNGU KIARIE.....APPLICANT

-AND-

DYER & BLAIR INVESTMENT BANK LIMITED.....1ST RESPONDENT

CFC STANBIC BANK LIMITED..... 2ND RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal at Nairobi (Musinga (P), Omondi & Laibuta, JJ.A) dated 9th June 2023 in Civil Application No. Sup. 7 of 2017 denying certification to appeal to the Supreme Court against the Court of Appeal Judgment (Visram, Karanja & Koome (as she then was) JJ.A) in Civil Appeal No. 78 of 2016 consolidated with Civil Appeal No. 62 of 2016 delivered on 28th July 2017)

Representation:

K'Bahati & Company Advocates for the Applicant

Oraro & Company Advocates for the 1st Respondent

RULING OF THE COURT

[1] UPON reading the Originating Motion application by the applicant dated 21st June, 2023 and filed on 26th June, 2023 pursuant to Article 163(4)(b) of the

Constitution, Section 16 of the Supreme Court Act 2011 and Rule 33(3) of the Supreme Court Rules 2020 for orders that:

- i) *The decision of the Court of Appeal dated 9th June in Civil Application No. Sup. 7 of 2017 be reviewed.*
- ii) *The decision of the Court of Appeal dated 9th June in Civil Application No. Sup. 7 of 2017 be set aside and substituted with an order allowing the Applicant's Notice of Motion dated 7th September 2017 filed at the Court of Appeal.*
- iii) *An order do issue certifying the Applicant's intended appeal of the decision of the Court of Appeal dated 28th July 2017 in Civil Appeal No. 78 of 2016 consolidated with Civil Appeal No. 62 of 2016 as a matter of general public importance.*
- iv) *Leave to appeal the decision of the Court of Appeal dated 28th July 2017 in Civil Appeal No. 78 of 2016 consolidated with Civil Appeal No. 62 of 2016 be granted.*
- v) *Costs of the application be provided for; and*

[2] UPON perusing the grounds on the face of the application, the supporting affidavit of John Kungu Kiarie, the applicant, and the submissions filed on his behalf on 26th June, 2023, wherein he raises the following seven issues that he considers to involve matters of general public importance:

- a) *Whether interest on treasury bonds in the year 2003 was 10% and whether this issue was pleaded, or evidence led to prove it. If not, whether this was a travesty of justice by the Court of Appeal.*
- b) *Whether the Court of Appeal has the power to introduce its own evidence in a case or use evidence neither pleaded, adduced or determined by the High Court thereby considering extraneous matters.*

- c) *Whether the applicant was entitled to only one year interest of 10% of the investment of Kshs. 91,500,000/-.*
- d) *Whether there was privity of contract between the applicant and the 2nd respondent.*
- e) *Whether the interests on the awarded damages ought to attract interest from the date of the High Court judgment.*
- f) *Whether a successful party should be denied costs without justification and whether this goes against well-established principles.*
- g) *Whether the Court of Appeal decision violated the applicant's rights under Articles 50(1), 48, 25 and 10 of the Constitution; and*

[3] BEARING in mind the facts giving rise to the dispute between the parties and noting that the 1st respondent and the applicant had a long-standing relationship. The former was the latter's investment adviser and stockbroker from time to time. Of significance to this application was a transaction in 2003 wherein the applicant availed to the 1st respondent Kshs. 100 million to invest on the applicant's behalf. The funds became the subject of investigations by the Central Bank's Anti-Banking Fraud Unit. The investigations culminated in the applicant being charged with several counts of obtaining money by false pretence; and

[4] CONSIDERING that in response to these events, the applicant's accounts with the 2nd respondent were frozen, which gave further rise to this dispute, because after these issues were resolved and the applicant acquitted, it turned out that the freezing was unwarranted. The question before the two courts below turned on what reliefs the applicant was entitled to from the 1st respondent. Later, the 1st respondent released to the applicant the principal amount of Kshs. 67,500,000 and interest of Kshs. 2,296,559.75. The applicant was shocked and wondered how such a colossal amount (the principal sum) which had been held by the 1st respondent for a period of over 4 years could earn such low interest, bearing

in mind that during the pendency of the criminal trial, the applicant successfully applied for the release of Kshs. 24,000,000; and

[5] ACKNOWLEDGING that the applicant, for his part, demanded Kshs. 465,500,000 as loss of income and interest of 16% per annum to be calculated on a daily basis until payment in full; and

[6] NOTING that the Court of Appeal agreed with the High Court that the 1st respondent failed to invest the funds in question in treasury bonds as agreed between the parties. The Court of Appeal, however disagreed with the High Court and set aside the award of damages and the interest applied thereon by the High Court which had implied that the contract to invest funds had been renewed for the duration of four years. According to the Court of Appeal, there was no basis for the four-year period. Instead, it held the view that an award of damages equivalent to the returns the respondent would have earned from the investment in treasury bonds for a period of one year “within the terms of the investment contract” would suffice; that the applicant was therefore only entitled to damages for one year and an interest rate of 10% on the principal amount. The appellate court also found that there was no privity of contract between the 2nd respondent and the applicant and proceeded to set aside the liability entered by the High Court against the 2nd respondent; and

[7] TAKING into account the applicant’s submissions challenging those conclusions, particularly the part of the judgment awarding interest of 10% based on the treasury bonds rates for the year 2003 when there was no evidence from either party of this fact; that in so holding the appellate court ignored the fact that the amount for investment was a whopping Kshs. 91.5 million held by the 1st respondent for a whole four-year period; and that the determination by the appellate court amounted to a travesty of justice; and

[8] FURTHER, considering the argument that by condemning the applicant to bear his own costs both in the High Court and Court of Appeal without giving a reason for overburdening him with costs, the appellate court violated the

applicant's constitutional right under Articles 50(1), 48, 10 and 25; and that all the aforementioned questions meet the test of general public importance as set out in ***Hermanus Phillipus Steyn v. Giovanni Gneccchi-Rusccone***, SC Application No. 4 of 2012; [2013] eKLR as being questions bearing on the proper conduct of the administration of justice; and

[9] UPON considering the 1st respondent's replying affidavit sworn on 7th July 2023 by Jimnah Mbaru, the Director of the 1st respondent and its submissions dated 10th July 2023 wherein the 1st respondent opposes the application for reasons that: the application does not raise any points of law that have a bearing on general public interest that deserve consideration by the Supreme Court; that the issues to be canvassed in the intended appeal are private, contractual and only affect the rights of parties to this particular dispute; that on the face of the application, the first ground concerns the percentage of interest which the applicant contends the Court of Appeal got wrong, and for which the proper course would be to go back to that court with application for review; that the issue of the duration of the contract, whether one year or four years is one of fact and concerns interpretation of a written contract between the parties which, in terms of this Court's declaration in ***Hermanus*** (supra) cannot be a basis for granting certification; that similarly the question of award of costs and interest does not warrant certification as the legal principles on award of interests and costs are well settled; and finally, that based on the foregoing, the application cannot be said to raise novel constitutional issues regarding violation of Articles 50(1), 48, 10 and 25 when such issues were not pleaded, canvassed or determined in both superior courts below and therefore cannot be made a ground for argument before this Court; and

[10] NOTING that the Court of Appeal in the first instance dismissed the application for certification for the reasons that the issues raised by the applicant do not transcend the applicant's personal interests; and that they are by their very nature, ordinary issues that do not rise beyond the business relationship between the applicant and 1st respondent. Moreover, no novel issues of law or uncertainty

in the law exists to warrant the Supreme Court pronouncement. In totality, the court held that there would be no jurisprudential value in the Supreme Court engaging in the determination of issues raised in this application outside its jurisdiction; and

HAVING considered the application, affidavits, and rival arguments by both parties, **WE NOW OPINE** as follows:

[11] **BEARING** in mind the well-settled principles for the grant of certification enunciated in a long line of our decisions, starting with the now famous case of *Hermanus* (supra), cited by both sides and the Court of Appeal in its ruling giving rise to the present application; that an intending appellant must demonstrate the following to warrant certification: that the issue to be canvassed transcends the circumstances of the particular case and has a significant bearing on public interest; that the appeal raises a substantial point of law the determination of which will have a significant bearing on public interest; that the question for determination has risen through the judicial hierarchy and has been the subject of judicial determination; and that there has been uncertainty in the law which requires resolution. Moreover, it was underscored in *Hermanus* (supra) that the mere apprehension of a miscarriage of justice and determinations of fact in contests between parties are not, by themselves, a basis for granting certification to appeal to the Supreme Court.

[12] **HAVING** examined the judgments of both the High Court and the Court of Appeal, we note that the applicant's grievance flows from a business relationship with the 1st respondent, signified by a written agreement. Specifically, the applicant wishes to challenge the quantum of damages assessed and the 10% interest applied thereon by the Court of Appeal on the basis of one year instead of four years. The applicant is also dissatisfied with the exoneration by the Court of Appeal of the 2nd respondent from liability on account of lack of privity of contract; and finally, that in error the Court of Appeal condemned the applicant to bear his own costs both in the High Court and Court of Appeal without giving reasons.

[13] UPON our own independent assessment of these grounds, we find that they all relate to private matters based purely and dependent solely on the construction of the terms of a written contract between the applicant and 1st respondent. None of the matters sought to be raised in the intended appeal transcends the interests of the parties herein. The determination of any or all of these issues will not affect any other group of persons or the public in general. In addition, these grounds entail determinations of facts by construing the terms and conditions of a contract between the applicant and the 1st respondent.

[14] IN VIEW of the many decisions of this Court on the proper invocation of its jurisdiction in terms of Article 163(4)(b) of the Constitution, we reiterate and remind parties and counsel that before taking out an originating motion for certification or review, the foregoing principles must be satisfied in terms of this Court's pronouncement in the following decisions; **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd and Another**, SC Petition No. 3 of 2012; [2012] eKLR, **Hermanus (supra)**, **Malcolm Bell v. Daniel Toroitich Arap Moi & another**, SC Application No. 1 of 2013; [2013] eKLR and **Town Council of Awendo v. Nelson Oduor Onyango & 13 others**, SC Misc. Application No. 49 of 2014; [2015] eKLR, among many others.

[15] CONSEQUENTLY, and for the reasons given, we find no merit in the motion and see no justification in disagreeing with the conclusion reached by the Court of Appeal, that the application has not passed the threshold for the grant of leave to appeal to this Court pursuant to Article 163(4)(b) of the Constitution.

[16] ACCORDINGLY, we make the following orders:

- i) The originating motion dated 21st June 2023 and filed on 26th June 2023 is hereby dismissed.***
- ii) The decision of the Court of Appeal delivered on 9th June 2023 denying leave to appeal to this Court is hereby affirmed.***

iii) The costs of this application shall be borne by the applicant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 6th Day of October, 2023.

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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

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

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

REGISTRAR
SUPREME COURT OF KENYA

