

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. E001 OF 2024

-BETWEEN-

FUAD MAHMOUD MOHAMED APPLICANT

-AND-

DIAMOND TRUST BANK KENYA LTD 1ST RESPONDENT

DIAMOND TRUST INSURANCE AGENCY LTD 2ND RESPONDENT

Being application for review of the Ruling of the Court of Appeal at Mombasa (Nyamweya, Lesiit, & Odunga JJ. A) delivered on 8th December 2023 in Civil Application Sup. No. E001 of 2023), and an application to amend the said application

Representation:

Mr. Kongere Billy for the Applicant
(Muriu Mungai & Company Advocates)

Mr. Jackson Kisinga for the 1st Respondent
(Madhani Advocates LLP)

No appearance for the 2nd Respondent

RULING OF THE COURT

[1] Before this Court are two applications filed by the Applicant. The first one is by way of an Originating Motion dated 11th January 2024 and filed on 25th July 2024. It seeks to review the decision of the Court of Appeal declining to certify the applicant's intended appeal to this Court against the judgment delivered on the 14th April 2023 in Civil Appeal No. E074 of 2021 *Diamond Trust Bank Limited vs. Fuad Mahmoud Mohamed & Diamond Trust Insurance Agency Ltd*, as one raising matters of general public importance. The second application is a Notice of Motion dated 17th July 2024 and filed on 25th July 2024 seeking

leave to amend the Originating Motion. This Ruling will dispose both applications, which in our view are correlated, in order to save on precious judicial time.

[2] UPON PERUSING the Originating Motion filed pursuant to Article 163 (4) (b) and (5) of the Constitution, and Sections 15 (1) & 16 (2) of the Supreme Court Act 2011, the applicant seeks a determination of the following questions from this Court:

- 1.) *Whether the applicant is entitled to leave to appeal to the Supreme Court following the dismissal of its appeal from the decision of the Court of Appeal at Mombasa dated 14th April 2023 on account of the intended appeal being one which raises a matter of general public importance.*
- 2.) *Whether on the facts and circumstances set out in the application and supporting material, a substantial miscarriage of justice would occur if the applicant were forever locked out of the appellate process and the question posed by the intended appeal left unaddressed.*
- 3.) *Whether the decision of the Court of Appeal dated 8th December, 2023 refusing certification of the matter before it as one of general public importance should be reviewed.*
- 4.) *Costs; and*

[3] UPON CONSIDERING the averments in the supporting affidavit of Fuad Mahmoud Mohamed sworn on 11th January 2024 in support of the application wherein he contends that, according to the Lending Terms and Conditions, the applicant and the 1st respondent were considered as insured parties jointly, making the 2nd respondent's role regarding the insurance of the security for the lender and borrower as purely advisory. To that end, the question of the duties and obligations of parties in a contract of insurance within a bancassurance arrangement, in itself, is an issue of general public importance; and despite the finding by the appellate court that bancassurance had not been specifically pleaded and could not be invoked, the concept of bancassurance arrangement

does not need to be pleaded by name, as long as it has been sufficiently disclosed by the facts. Further, whereas the Court of Appeal partially dismissed the certification application for being filed out of time, the applicant beseeches this Court to exceptionally exercise its discretion and consider the application for review to avoid locking him out from the seat of justice due to a technicality; and

[4] TAKING INTO ACCOUNT the 1st respondent's replying affidavit sworn on 30th April 2024 by Faith Ndonga, its Debt Recovery Officer, and the written submissions dated 29th May 2024 opposing the application on grounds that; the application for certification before the Court of Appeal was incompetent for being filed two months out of time, without leave, depriving this Court of the jurisdiction to review such a decision as was held in ***Joseph Sombo & 4 others vs. Nyari Investment (1998) Limited & 5 others***; SC Application No. EO48 of 2023; and

[5] FURTHER TAKING INTO ACCOUNT the 1st respondent's argument that the learned Judges of Appeal did not err in finding that the applicant had not raised sufficient grounds for certification, since the issue of bancassurance was never raised before either of the superior courts; that the Insurance (Bancassurance) Regulations 2020 cannot apply retrospectively to this case which arose in 2010; and that as a matter of course, the appellate Judges were correct in determining that the suit before the superior courts below related to the interpretation of the provisions of the Lending Contract between the parties; this issue does not transcend the contract, has no bearing on the general public nor has it been demonstrated that there are any conflicting court decisions related to this matter; and inevitably, the applicant having failed to identify issues of general public importance, the application should be dismissed with costs; and

[6] NOTING the applicant's Notice of Motion filed pursuant to Article 163 (4) (b) and (5) of the Constitution, and Sections 15 (1) & 16 (2) Supreme Court Act, 2011 seeking to amend his Originating Motion to plead with better specificity

the points of general public importance that he proposes to pursue upon certification. And noting further that, in the annexed draft Amended Originating Motion, the applicant seeks to amend the first question to now read:

- i. *Whether the applicant should be granted leave to appeal against the judgment of the Court of Appeal in Civil Appeal No. E074 of 2021 dated 14th April 2023 on account of the intended appeal being one which raises the following matters of general public importance;*
 - a. *What is the legal status or validity of a judgment which proceeds on the basis that an admittedly critical document was not before the court when, in fact, that document was before the court?*
 - b. *Does a bank offering bancassurance services owe a duty of care to its customers to advise and ensure that the insurance cover taken over charged property is appropriate and adequately covers the associated risks? and;*

[7] BEARING IN MIND the grounds on the face of the application and the averments contained in the applicant's supporting affidavit deponed on 17th July 2024 and written submissions dated 17th July 2024 and filed on 25th July 2024 wherein he argues that; appreciating that a party is bound by its pleadings, and his pleading was not concise as elucidated in ***Steyn v Ruscone*** (Application 4 of 2021) [2013] KESC 11 (KLR); the proposed amendment as sought by the applicant's new counsel, is not to introduce a new case or materially alter the original cause, but to specify and narrow down the points of general public importance as set out in ***Kampala International University v Housing Finance Company Limited*** (Petition (Application) 34 (E035) of 2021) [2023] KESC 67 (KLR); and in the alternative, no prejudice will be occasioned to the respondents which may not be adequately redressed by appropriate orders including costs; and

[8] IN VIEW OF the 1st respondent's grounds of opposition dated 14th August 2024 and written submissions dated and filed on 15th August 2024 wherein the 1st respondent urges that; the application, which lacks a statutory basis,

encapsulates the intended amendments sparked by their submissions, has been brought after an inordinate delay, as the Origination Motion was filed seven (7) months ago; that the 1st respondent will be highly prejudiced given that responses have been filed and the amendments are aimed at ameliorating any weaknesses disclosed; and

[9] HAVING considered the totality of the applications, responses and opposing arguments **WE NOW OPINE** as follows:

(i) There being two applications, we shall first address ourselves to the propriety of the substantive application for review of certification. If at all we find that the application is properly before us, we shall then consider the application for amendment.

(ii) Rule 33 (2) of the Supreme Court Rules provides that:

“Where the Court of Appeal has certified or has declined to certify a matter as one of general public importance, an aggrieved party may apply to the Court for review, within fourteen days.” (Emphasis ours)

(iii) At the onset, we need to satisfy ourselves that the application for review of certification is properly on record. We note that the impugned Ruling delivered by the Court of Appeal declining to certify the intended appeal as one raising matters of general public importance was delivered on 8th December 2023. Cognizant that an application for review should be made within fourteen (14) days, the last day for an aggrieved party to file such an application was 22nd December 2023. The Originating Motion in issue is dated 11th January 2024 and was submitted on this Court’s e-filing platform on 17th January 2024. The applicant then proceeded to present the physical copy on 25th July 2024, about six months after filing the electronic copy.

(iv) Rule 12 of the Supreme Court Rules, 2020 states that:

- (1) Pleadings and any other document filed in the court shall be in both printed and electronic form.**
- (2) A party filing any document shall ensure consistency in the printed and the electronic forms.**
- (3) In case of any inconsistency between the hard copy and soft copy, the hard copy shall prevail.**
- (4) Where a document is lodged in a sub-registry, the deputy registrar receiving the same shall transmit it to the Registry.**

- (v) This Court discussed the import of Rule 12 in ***Sonko v Clerk, County Assembly of Nairobi City & 11 others*** (Petition (Application) 11 (E008) of 2022 [2022] KESC 28 (KLR) where we held as follows:

“A plain reading of the rule would lead to the simple conclusion, as properly expressed by the Registrar in her letter of May 18, 2022 that the printed copy of any pleading, while matching the electronic copy, shall be filed simultaneously with the latter. This must remain the operative rule in this court.” [Emphasis added]

The above finding followed our decision in ***Kenya Hotel Properties Limited v Attorney General & 5 Others*** (Application 2 (E004) of 2021) [2021] KESC 49 (KLR) where we emphasised that filing of any pleading is considered complete under Rule 12(1) of the Supreme Court Rules when a party submits pleadings and documents in both printed and electronic form, failing of which the pleadings will not be considered as properly filed.

- (vi) Taking the above into account, it is evident that the Originating Motion is not properly before us. What is more, the applicant has not sought leave to extend time or file the same out of time, the filing having been completed seven months from the last day of filing

permitted under the Court's Rules. Peculiarly, the applicant has not provided an explanation for the inordinate delay in filing his Motion. Instead, he proceeded to file another application seeking leave to amend its application for review, without seeking the attendant leave for extension of time for filing the Originating Motion.

- (vii) Where the law provides for a timeframe within which something ought to be filed, and that time lapses, a party needs to first to apply for extension of that time under Rule 4 of this Court's Rules before proceeding. See: ***Salat v Independent Electoral and Boundaries Commission & 7 others*** (Application 16 of 2014) [2014] KESC 12 and ***County Executive of Kisumu v County Government of Kisumu & 8 others*** (Civil Application 3 of 2016) [2017] KESC 16 (KLR).
- (viii) Accordingly, and on our own motion, we find that the Originating Motion dated 11th January 2024 is not properly on record and ought to be struck out. With this finding, it is unnecessary to delve into the merits of the Court of Appeal decision sought to be reviewed including addressing ourselves to the intended leave to certify the matter as one involving a question of great public importance. Concomitantly, the applicant's Notice of Motion dated 17th July 2024 collapses in the absence of the substantive application for review of certification.
- (ix) On costs, award of the same is discretionary and follows the principle set out by this Court in ***Rai & 3 other v Rai, Estate of & 4 others*** (Petition 4 of 2012) [2014] KESC 31 (KLR) that costs follow the event. However, in order not to protract the dispute further on the limited question of costs before this Court, each party should bear its own costs.

[10] CONSEQUENTLY, and for the reasons aforesaid, we make the following Orders:

- (i) The Originating Motion dated 11th January 2024 and filed on 25th July 2024 be and is hereby struck out.***
- (ii) The Notice of Motion dated 17th July 2024 and filed 25th July 2024 be and is hereby dismissed.***
- (iii) No order as to costs.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of November, 2024.

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

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

.....
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