

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Rawal DCJ and V-P; Tunoi, Ojwang, Wanjala and Njoki, SCJJ)
CIVIL APPLICATION NO. 48 OF 2014

–BETWEEN–

P.M WAMAE & CO. ADVOCATES.....APPLICANT

–AND–

HON. NTOITHA M’MITHIARURESPONDENT

(Being an application for review of denial of leave to appeal to the Supreme Court, from the Judgment and decision of the Court of Appeal at Nyeri (Visram, Koome & Odek JJA) dated 25th November 2014, in Civil Appeal No. Sup. 4 of 2014)

RULING

A. INTRODUCTION AND BACKGROUND

[1] The instant application seeks review of a decision of the Court of Appeal, which declined to certify the intended appeal as one raising matters of general public importance. It is by way of an originating motion dated 9th December, 2014 supported by an affidavit sworn by Paul Matheri Wamae, on even date. It is anchored on Articles 159(2) (a) and (d), 165 (5) and 259(1) of the Constitution, Section 15(1) of the Supreme Court Act; Rule 24 of the Supreme Court Rules and

the principles set out in ***Hermanus Phillipus Steyn v. Giovanni Gneccchi Ruscone, sup.ct.*** Application 2 of 2012.(***Hermanus***)

[2] Learned counsel for the applicant, Mr. Gichuhi, urges that the following will be the issues for determination by this Court in the intended appeal, should leave be granted:

- (i) *Whether under Section 45(1)(b) of the Advocates Act and Advocates' fee on the Advocate-Client basis can be charged on un-executed fee agreement;*
- (ii) *Whether the common law doctrine of estoppel can be applied retrospectively;*
- (iii) *The circumstances in which common law principles may take precedence over written law; and*
- (iv) *Whether the Court of Appeal is a court of record, in light of the provisions of Articles 162(1) and 163(7) of the Constitution.*

[3] The origin of this matter can be traced to ***Ntoitha M'mithiaru v. Maoka Maore & 2 others***, Election Petition No. 1 of 2003, High Court at Meru. On 28th January, 2003, the respondent retained the applicant to represent him in the petition. After the conclusion of the case, the applicant presented a fee note for taxation to the Deputy Registrar, as the Taxing Master. The Bill was taxed at Ksh. 3, 236,343.68.

[4] This taxation aggrieved the respondent and a Reference: **Misc. Civil Application No. 62 of 2009** was filed at the High Court challenging it. The Reference sought only two Orders: (a) *that the decision of the Taxing Master the Honourable Mr. D. W. Mburu made on 24th August, 2012 on the Advocate/Client Bill of Costs dated 7th September, 2009, be set aside;* (b) *that the costs of the application be provided for.*

[5] The taxation was challenged, among other grounds, that the Taxing Master did not consider a letter dated 20th March, 2003. In the letter, the applicant had represented himself as a volunteer for NARC Party, and had agreed to take a concessionary fee of Ksh. 400,000, for conducting the hearing on condition that if the petition was successful, the applicant would be entitled to recover the balance of their fees from the costs to be recovered. The respondent argued that the applicant was estopped from filing an Advocates/Client Bill of costs against him.

[6] *Lesiit, J* in a Ruling delivered on 17th January, 2013 dismissed the Reference. She held that the said letter did not meet the provisions of Section 45 (1)(b) of the Advocates Act and affirmed the findings of the Taxing Master. Aggrieved by that decision, the respondent appealed to the Court of Appeal which allowed the appeal and set aside the decision of the High Court. The Appellate Court held that the applicant was bound by the representations he made in the letter dated 20th March, 2003.

[7] Dissatisfied by that decision the applicant sought certification, by the Court of Appeal, that the matter was of general public importance. The Court of Appeal, in a Ruling dated 25th November, 2014 declined to grant leave to appeal holding that the dispute between the parties was a private one. It is that Ruling, that the applicant implores us to review, and certify the intended appeal as one containing issues of general public importance.

B. PARTIES' SUBMISSIONS

(i) The Applicant

[8] Mr. Gichuhi for the applicant urges that the application meets the ***Hermanus*** principles and that the issues transcend the circumstances of this particular case. He also relies on the Indian Supreme Court decision in ***Dattaraj Nathuji Thaware v. State of Maharashtra, Indian & Others [2004] INSC 755 S.C 755 of 2004*** which adopted the meaning of public interest in *Stroud's Judicial Dictionary*.

[9] He contends that the applicant having acted for the respondent was entitled to charge for the services rendered and that the letter dated 20th March, 2003 was merely an offer and could not limit the costs charged to the applicant since it was invalid and contrary to Section 46(c) of the Advocates Act.

[10] Mr. Gichuhi further submits that the Court of Appeal erred in finding that the doctrine of estoppel was applicable in this case. He urges that estoppel only

applies to the future. Counsel contends that the precedent set by the Court of Appeal is tantamount to re-writing the principles of common law with regard to estoppel. He contends that there can be no estoppel against statute: Common Law doctrines have to be in line with written law. He submits that for that reason, the Appellate Court's decision, if not challenged, will affect the Advocates on how to deal with clients when charging fees and will encroach on Advocates' fundamental right to property as enshrined in Article 40 of the Constitution in that Advocates may be asked to charge fees below the Remuneration Order.

(ii) The Respondent

[11] Mr. Kairaria, learned counsel, for the respondent opposes the application and relies on the respondent's replying affidavit sworn on 13th January, 2015 and written submissions of 11th June, 2015. He contests this Court's jurisdiction to hear this application on the basis that this Court can only review a matter that is certified by the Court of Appeal to be one of general public importance; that this Court cannot review where certification has been denied.

[12] He submits that the dispute between the parties revolved around taxation of a Bill of Costs and the fees payable to the applicant for services rendered to the respondent. He urged that the matter was decided on the basis of its peculiar facts and can by no means descend into the arena of general public importance.

[13] He further contends that the question whether the common law doctrine of estoppel can apply retrospectively, was not an issue for determination before the

Court of Appeal, neither was the question whether the Court of Appeal is a Court of record.

C. ISSUES FOR DETERMINATION

[14] In our view two issues emerge for determination:

- (i) Whether this Court has jurisdiction.*
- (ii) Whether a matter of general public importance is involved in the intended appeal.*

D. ANALYSIS

(i) On jurisdiction

[15] Mr. Kairaria contested this Court's jurisdiction to review, set aside or discharge an order of refusal by the Court of Appeal to certify that a matter of general public importance lies under Article 163 (4) (b) and (5) of the Constitution and Rule 24 (2) of the Supreme Court Rules. He urged that an application for review by this Court can only be where certification has been *granted* by the Court of Appeal and not where it has been rejected. This view, he urges, is erroneous and contrary to the emerging jurisprudence from this Court. In *Hermanus*, this Court delivered itself thus:

[33] Hence, in interpreting the review competence of the Supreme Court, the mandate must be harmonised with the Constitution. One of the fundamental rights under the Constitution is access to justice for all, and non-

discrimination. Consequently, all litigants are to be accorded equal right of access to the Court. Either party can approach the Supreme Court for review under Article 163(5). A party may come for review of the decision granting leave or denying leave. Hence, we hold that certification under Article 163(5) should be broadly read as alluding to certification by the Court that a matter of public importance is involved, or is not involved. Hence, the applicant is rightly before the Court, despite seeking a review where there was no leave granted by the Court of Appeal.

We adopt this position and find that we have jurisdiction to hear this application.

(ii) On whether a Matter of General Public Importance lies in the intended appeal.

[16] Having affirmed that we have jurisdiction, the germane question now is: does this application satisfy the constitutional basis for the appellate jurisdiction of this Court in the terms of Article 163 (4) (b) of the Constitution; is *there a matter of general public importance involved?*

[17] Whether or not, a matter is one of general public importance is an issue to be determined by this Court on a case-by-case basis. However in determining such suitability, we set out guiding principles. This is the decisions in ***Hermanus*** which has been cited with approval by this Court in ***Malcom Bell***

v. Daniel Toroitich Arap Moi & Another [2013] eKLR, and ***S.A.J v. A.O G & 2 Others***, *Sup. Ct Petition No.1 of 2013 (a case involving a minor)*.

[18] Key among those principles is, that the issue to be canvassed on appeal is transcends the circumstances of the particular case and has a significant bearing on the public interest. Learned counsel for the applicant, Mr. Gichuhi, is of the view that this is one such case. He contends that if the Ruling of the Court of Appeal is allowed to stand, it will affect Advocates in that clients may interpret that fees payable to advocates for services rendered, may be based on agreements that were not signed by the clients or their lawfully appointed agent, contrary to Section 45 (1) (b) of the Advocates Act.

[19] Mr. Kairaria, on the other hand asks for sustenance of the Ruling of the Court of Appeal, should stand as the appeal was decided on its own peculiar facts and as such, this matter does not transcend the circumstances of this particular case. He is emphatic that these facts are unlikely to be replicated in any other case.

[20] We are unconvinced that this is a matter that transcends the circumstances of this particular case. Simply put, the record reveals a dispute between an Advocate and his client over fees owed to the advocate: the advocate makes a representation to his client then seeks to go back on the representation with the aid of legal provisions. We do not view it as a general question of whether advocates fees can be based on an unexecuted agreement. We are convinced by

the respondent that this was indeed a case determined on its own peculiar facts. To our minds therefore, this is not an issue that transcends the circumstances of this case with a significant bearing on the public interest.

[21] This Court stated in *Hermanus* case that, for an appeal to lie to the Supreme Court, under the rubric of “matter of general public importance”, there will be a question of law that has arisen, and will have been determined in the Courts below [paragraph 60]:

“In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions.”

[22] Counsel for the applicant contends that the issues that the intended appeal raises are substantial and that they arose in the superior Courts below the Supreme Court thereby qualifying for determination by this Court. These issues are: whether the common law doctrine of estoppel can be applied retrospectively; the circumstances in which common law principles may take precedence over written law; and whether the Court of Appeal is a Court of record, in light of the provisions of Articles 162(1) and 163(7) of the Constitution.

[23] However, after zealously perusing the record ,we find that the question as to whether the common law doctrine of estoppel can be applied retrospectively was not determined by the Court of Appeal. The Court of Appeal only noted that the law on the applicability of estoppel is settled and clear. The Court of Appeal did not make a finding whether it is a Court of record as the same was not raised before it – it could not consider the same as a ground for seeking leave. Consequently, as an appellate Court exercising appellate jurisdiction, we dare not exercise jurisdiction on these issues.

[24] We cite with approval the holding of a Bench of this Court (*Tunoi and Ibrahim SCJJ*) in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Anor***, Civil Application No. 3 of 2014:

“[T]his Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution.”

[25] Before our final orders, we would like to place it on record that after the close of the hearing of this application, counsel for the applicant wrote to the

Registrar of the Court on 22nd July, 2015 forwarding a Supplementary List of Authorities which he observed was important and extremely crucial in assisting the Court reach a just decision. The letter was duly copied to the respondent. Upon receipt of the letter, the Court directed the Registrar who on 13th August, 2015 wrote to the respondent requesting him to comment on the Supplementary List of Authorities. The respondent duly made his observations in a letter to the Court dated 18th August, 2015.

[26] The Court acknowledges counsel's gesture of industry and research and his execution of his duty as an officer of the Court in bringing to the attention of the Court a decision he deemed fit to aid the Court in reaching a just decision. The Court has read the said authority: ***Shell (U) Limited & others vs Muwema, Mugera Advocates & Solicitors & Another (2014) 3 E.A. 346***, together with the observations of the respondent. Upon evaluation, however, the authority fails to persuade this Court to the contrary in reaching its conclusion.

E. ORDERS

[27] It is plain to us that the applicant's case is for dismissal, as the circumstances of this case cannot be elevated to the plane of general public importance. We therefore set out the following orders:

- (a) *The Ruling of the Appellate Court delivered on 25th November, 2014 is hereby affirmed.*

(b) *The application dated 29th December, 2014 fails and is hereby dismissed.*

(c) *The parties shall bear their own respective costs.*

DATED and DELIVERED at NAIROBI this 19th Day of October 2015.

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K.H. RAWAL

**DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME
COURT**

.....

P. K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

S.N. NDUNGU

JUSTICE OF THE SUPREME COURT

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

REGISTRAR, SUPREME COURT