

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(CORAM: TUNOI & WANJALA, SCJJ)

SUPREME COURT CIVIL APPLICATION NO. 1 OF 2011

BETWEEN

SUM MODEL INDUSTRIES LTDAPPLICANT

AND

INDUSTRIAL AND COMMERCIAL
DEVELOPMENT CORPORATIONRESPONDENT

*(An application for leave to appeal against the judgment and decree
of the Court of Appeal given at Nairobi (Omolo, Bosire & Githinji,
JJA) dated 8th June, 2007*

in

NAIROBI CIVIL APPEAL NO. 229 OF 2001)

RULING OF THE COURT

This is an application for leave to appeal against a decision of the Court of Appeal. The application is made under *rules 30 (2)* and *42 (1)* of the Supreme Court Rules and *sections 3* of the Supreme Court Act and Chapter 4 of the Constitution and *Articles 10* and *159* of the Constitution.

The Appellate Jurisdiction of the Supreme Court is clearly set out in *Article 163 (4)* of the Constitution. The Article provides that appeals shall lie from the Court of Appeal to the Supreme Court:-

(a) As of right in any case involving the interpretation or application of this Constitution; and

(b) In any other case in which the Supreme Court, or the Court of Appeal certifies that a matter of general public importance is involved, subject to clause (5).

Clause 5 provides that a certification by the Court of Appeal under *clause 4 (b)* may be reviewed by the Supreme Court, and either affirmed, varied or overturned.

Rule 30 (2) of the Supreme Court Rules provides that where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal.

In our view, the relevant provisions pursuant to which this application must be initiated are *Article 163 (4) (b)* of the Constitution as read together with *rule (30) (2)* of the Supreme Court Rules. It is clear to us that before an appeal under these provisions can be entertained; either

the Supreme Court or the Court of Appeal must be satisfied that it involves a matter of general public importance. Upon being so satisfied, the Court may then issue a certificate for leave to appeal. We are surprised to note that Counsel for the applicant has not cited *Article 163 (4) (b)* of the Constitution as the basis for the application before us. Instead, the application has been brought (with the exception of *rule 30* of the Supreme Court Rules), under either general provisions of the Constitution, or provisions that bear no relevance to the application.

This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not.

If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by *Article 163 (5)* of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court.

With regard to the question as to whether this Court should invoke its special jurisdiction and call for a review of the Court of Appeal's judgment under *section 14* of the Supreme Court Act as prayed by the applicant, we decline to invoke the special jurisdiction as our perusal of the documents in support of the application has not disclosed any facts that would bring the application within the ambit of *section 14* of the Act.

Accordingly, and in view of the foregoing reasons, we make the following Orders:-

"ORDER

- 1. THAT Civil Application Number 1/2011 be filed before the Court of Appeal pursuant to Article 163***

(4) of the Constitution for determination by the said Court.

2. THAT the foregoing Order be applied to Civil Application Numbers 2 of 2011 and 3 of 2011 on the basis of the reasons advanced in this application."

DATED and delivered at NAIROBI this 2nd day of December, 2011.

HON. JUSTICE P. K. TUNOI
SUPREME COURT JUDGE

HON. JUSTICE (DR) S.C. WANJALA
SUPREME COURT JUDGE