REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu SCJJ)

MOTION NO. 17 OF 2014

–BETWEEN–

TELKOM KENYA LIMITED.....APPLICANT

–AND–

JOHN OCHANDA
(Suing on his own behalf and on behalf of
996 former employees of Telkom Kenya Ltd.).....RESPONDENTS

(Being an application to review the Ruling and Orders of Hon. Nambuye, Ouko and Musinga JJA. delivered on 9th April, 2014 dismissing an application for leave to appeal to the Supreme Court in Civil Application No.sup.24 of 2013)

RULING

A. INTRODUCTION

[1] This is an application dated 23rd April, 2014 seeking to review the Ruling of the Court of Appeal (*Nambuye, Ouko and Musinga, JJA.*), of 9th April, 2014 dismissing the applicant's application for leave to appeal to this Court.

B. SUBMISSIONS, AND ANALYSIS

[2] The applicant urges that the appeal raises pertinent issues of general public importance, admissible under to this Court's appellate jurisdiction, in accordance with Article 163(4)(b) of the Constitution.

[3] The respondent, however, has contested this Court's jurisdiction to hear this matter on the ground that: the Constitution only contemplates a review of "certification granted" by the Court of Appeal, and not "certification denied." The respondent also argues that the application offends Rule 31(1) & (2) of the Supreme Court Rules, 2012 which makes it mandatory to file a notice of appeal within 14 days from the date of the Judgement or Order appealed from. The parties, by consent, agreed to have these objections treated as a response to the application.

[4] Learned Senior Counsel, Mr.Oraro urged on behalf of the applicant that the principles settled in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone,*** S.C. Application No. 4 of 2012 were applicable in this case. At paragraph 33 of the ***Hermanus*** case, we held that any party may approach the Supreme Court for review under Article 165(5) of the Constitution, in the following terms:

> *".....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."*

[5] The respondent sought to have the application struck out on the ground that the applicant had not filed a notice of appeal within the time prescribed by Rule 31(1) and (2) of the Supreme Court Rules, 2012.

[6] In response, Mr. Oraro submits that in the current application, what is sought is the "review" of the Ruling of the Appellate Court dismissing the applicant's application for leave to appeal. He notes, however, that a notice of appeal is a requirement in instances where a Judgement in the main cause is sought. Counsel adds that the Court ought to exercise its jurisdiction to sustain matters before it, rather than strike them down, especially where the opposing party has suffered no prejudice. In aid of this submission he cites this Court's decision in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others,*** S.C. Application No. 2 of 2011; [2012] eKLR. Learned counsel urged that, not filing a notice of appeal does not circumscribe the Court's authority to review the decision of the Court of Appeal on an application to certify an appeal as involving "matters of general public importance." In his view, it was indeed proper to file the notice of appeal, but it remains at the discretion of the Court to allow an application for review, where a notice of appeal has not been filed.

[7] Mr. Oraro reinforces his argument by citing this Court's decision in ***Law Society of Kenya v Centre for Human Rights and Democracy & 12***

Others, Sup.Ct. Petition No. 14 of 2013, [2014] eKLR in which it was held that *"[t]he Notice [of Appeal] as its title indicates, is a signification of intent by the potential appellant, to challenge by way of appeal the decision of a lower Court."*

[8] Mr. Oluoch, learned counsel for the respondents, contests these submissions and asserts that the decision complained of by the applicant is the Judgement of the Court of Appeal, dated and delivered on 7th February, 2014. He urges that, in terms of Rule 31(1) of the Supreme Court Rules, 2012, the Notice of Appeal should have been filed within 14 days of the said Judgement.

[9] It is counsel's submission that the applicant did not file any notice in the appropriate registry (the Court of Appeal registry) until 12th March, 2014 ─ which was approximately 19 days out of the time provided for under Rule 31(1) of the Supreme Court Rules, 2012.

[10] Counsel argues that the Court lacks jurisdiction to entertain the application since there is no proper appeal before it, and the applicant has not made an application for extension of time to file the notice of appeal. Counsel cites the decisions of this Court in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others,*** S.C. Petition 18 & 20 of 2014; [2014] eKLR, and ***Mary Wambui Munene v. Peter Gichuki King'ara & 2Others,*** S.C. Petition No. 7 of 2014; [2014] eKLR, in which this Court affirmed the binding nature of timelines, as set by the Constitution.

[11] Counsel urges that although this Court has a discretion, under Rule 53 of the Supreme Court Rules, 2012 to extend the time limited under the Rules, the applicant neither invoked that Rule nor applied to have the notice of appeal filed at the High Court (instead of the Court of Appeal) on 12th February, 2014 deemed to have been properly filed. He called in aid this Court's holding in ***Raila Odinga v. Independent Electoral and Boundaries Commission & Others,*** S.C. Petition 5 of 2013; [2013] eKLR that the exercise of discretion is to be done sparingly, as the law and the Rules relating to the Constitution bear certain solemn demands.

[12] Rule 31(1) of the Supreme Court Rules, 2012 provides that:

> ***"A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in form B set out in the Fist Schedule, with the Registrar of the court or with the tribunal it is desired to appeal from."***

And Rule 53 provides as follows:

> ***"The Court may extend the time limited by these Rules, or by any decision of the Court."***

[13] Rule 31(1) is expressed in mandatory terms, and a person intending to appeal to this Court must file a notice of appeal within the stipulated time-frame. Rule 31(2) allows a party intending to appeal against a decision to file a notice of appeal even before certification has been obtained. This rule underlines the centrality of the notice of appeal in appellate proceedings before this Court. As the Court *(Wanjala, Njoki, SCJJ)* signalled in ***Law Society of Kenya v. Centre for Human Rights and Democracy & Others,*** S.C. Petition 14 of 2013 (at paragraph 36):

> ***"The use of the word 'shall' in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of Rule 33(1) leads to the conclusion that an appeal comprises the Petition of Appeal, the Record of Appeal, and the prescribed fee..."***

[14] The Rules of the Court embody certain procedural requirements attendant upon the notice of appeal. Rule 33 outlines the procedure of instituting appeals, with the petition and record of appeal being aspects of this process. The direction certifying that a matter is of "general public importance" is an integral part of the record of appeal, from a Court or tribunal exercising appellate jurisdiction. Even though there is a provision to file a supplementary record

of appeal with or without leave in certain instances, we should examine the practical aspects of these procedural requirements.

[15] Filing the petition and record of appeal is subject to certain fee prescriptions. The process of preparing the documents is also formal, and often time consuming. While the right of appeal from the High Court to the Court of Appeal is automatic, though regulated by the Appellate Jurisdiction Act, appeals to this Court are limited by the Constitution.

[16] A distinction is to be drawn between the two instances when a party may move this Court on appeal: as a matter of right in any case involving the interpretation or application of the Constitution; and in those cases in which this Court, or the Court of Appeal, certifies that a "matter of general public importance" is involved. While a party instituting an appeal as a matter of right *must* file a notice of appeal within 14 days of the date of Judgement by the Appellate Court, a party proceeding on appeal on the premise that "matters of general public importance" are involved, has the *option* to wait until the requirements of leave are met – an option signalled in Rule 31 (2).

[17] Section 15 of the Supreme Court Act provides that appeals, other than appeals in respect of matters relating to the interpretation or application of the Constitution, shall be heard only with the *leave of the Court.* The purpose served by the notice of appeal would not be lost by requiring a party to obtain leave,

pursuant to Article 163(4)(b) (5), to file an appeal. The notice of appeal in this instance ought to be filed either immediately after the Judgement being appealed from, or within 14 days of the Ruling of the Court of Appeal on the application for leave.

[18] In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such an appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to Court discretion curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place. In the case of ***SAJ v. AOG & 2 Others,*** S.C. Civil Appeal 1 of 2013; [2013] eKLR, this Court *(Wanjala, Njoki, SCJJ)* was asked to strike out the petition of appeal at the preliminary stage, on the ground that it had been filed out of time. The Court, upon evaluating the special circumstances to the case, disallowed the preliminary objection. Taking into account the provisions of Rules 53 and 55 of the Supreme Court Rules, 2012 the Court thus held (paragraph 18):

> *"In arriving at this decision, this Court is guided by rules and regulations, and urges all parties to follow the same since they*

guide the Court and the parties in obtaining justice. However, the Court is alive to the provisions of Article 159 (2) (d) of the Constitution which require the Court to administer justice without undue regard to procedural technicalities. Indeed, the Court in the case of Raila Odinga vs IEBC and 4 others Petition (No. 5 of 2013), pronounced itself on the matter thus:

> ***"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course"***

This is one of the cases where the Court disregards procedural technicalities in favor of substantive justice having regard to all relevant circumstances obtaining in this case"[emphasis supplied].

[19] It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case, and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant, but are the handmaiden of justice that facilitate the right of access to justice, in the terms of Article 48 of the Constitution, can only be fully realized within a disciplined programme of procedural rules.

[20]Does the intended appeal involve *matters of general public importance?*

[21] In ***Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another,*** S.C. Application No. 1 of 2013, the Court incorporated additional principles drawn from the dissenting opinion in the ***Hermanus*** case, making them part of the principles this Court will consider in determining whether a matter is one of general public importance. We thus held (at paragraph 53):

> ***"The categories of questions that merit the appellate jurisdiction of the Supreme Court, on the basis that they are "matters of general public importance", have already been identified in their essence, in*** *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, Sup***.** Ct. Appl. No. 4 of

2012. ***These categories are to be found in paragraph 60 of the main Ruling of the Court and in paragraph 17 of the dissenting opinion."***

[22] The principles applicable in determining whether a matter is of general public importance were thus stated in the ***Hermanus*** and ***Malcolm Bell*** cases :

(i) 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;

(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;

(vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

(viii) ***issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis for appeal to the Supreme Court;***

(ix) ***questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;***

(x) ***questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;***

(xi) ***questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance,' justifying final appeal in the Supreme Court.***

[23] As submitted by learned counsel for the applicant, though a subject of contests, this matter transcends the interests of the parties to the dispute. It bears direct impacts on the lives of many former public servants who were laid off or declared redundant during the public-enterprise privatization processes in the 1990's. Such initiative was inspired by the Government of Kenya's Public Enterprise Reforms Programme, contained in the 1992 Policy Paper on *Public Enterprises Reforms and Privatization*. As urged by Mr. Oraro, the process in this particular case is still ongoing, and certainly bears upon the public interest.

[24] We find that this case involves the interpretation of public policy, human rights, and employment laws. This is clear from the issues raised for determination: *whether discrimination is a legitimate ground, independent of Statute and contract, on which a Court can make an award to an employee in labour law*; *whether differentiation on the basis of age is permissible in labour Law*; *whether Civil Service directives are legally applicable to State-owned companies and parastatals, and whether their employees are entitled to the benefits available to employees of the Civil Service*; *whether trade union members, whose benefits and exit- packages have been negotiated on their*

behalf, are entitled to claim and be awarded benefits beyond those negotiated ; and *whether a trial Court can direct that a class action be prosecuted and defended as one that leads to a Judgement in rem, and then issue a Judgement in personam*.

[25] The issues arising transcend the circumstances of the parties to this suit, and have implications for other persons working in parastatals, who were dismissed on grounds of redundancy, in the course of processes of privatization and/or staff rationalization. Persons affected by these processes have a clear interest in knowing what their entitlements would be in such circumstances, bearing in mind the terms of employment; the existing collective - bargaining agreements; the provisions of the Employment Act; and the applicable government policies, and constitutional provisions.

[26] The principles in ***Hermanus*** require that an issue for determination be one that arose in the lower superior Courts, and was the subject of judicial determination in those Courts. Principally, the issue for determination at the High Court was whether there was discrimination in the payment of severance allowance, and in the dispensation of golden handshake between persons retrenched in the different phases. There were two issues for determination at the Court of Appeal: whether the differential payment of severance allowance to employees in phase 1 and phase 2 amounted to discrimination; and whether non-payment of the 'golden handshake' to the retrenchees in phase 1 constituted

discrimination. It is clear that whether differential treatment amounted to discrimination, was the central issue for determination both at the High Court and the Court of Appeal.

[27] In light of these additional questions, it is clear to us that the dominant issue in this matter relates to discrimination, which appears from the very nature of things, *set to affect considerable numbers of persons in general, or as litigants*. We find that the issue whether differential treatment amounted to discrimination in this matter, is a cardinal issue of law, and one of general public importance, requiring the further input and final resolution by this Court.

[28] A final issue was raised by counsel for the respondents: *should this Court's certification for leave be based on the condition that the applicant deposits Kshs.3.2 billion, or an equivalent guarantee from a bank?*

[29] Learned Counsel, Mr. Oluoch, was apprehensive that the applicant was on the verge of financial collapse, and had already signalled its intention to sell the company to third parties. It was urged, is that context, that the respondents stood to suffer irreparable loss. The applicant's rejoinder was that the respondents had failed to demonstrate how they had arrived at the figure of Kshs.3.2 billion, as a condition for the grant of leave. Counsel contested the suggestion that the applicant intended to defeat the respondents' claim,

portraying it as scandalous and vexatious. Counsel urged this Court to disregard the respondent's prayer.

[30] After the hearing, the High Court had issued the following Orders – which were upheld by the Court of Appeal:

> ***"In sum it is concluded that:***
>
> ***(a) the plaintiffs be paid severance pay based on 2½ months' salary for each year of completed service,***
>
> ***(b) the plaintiffs be paid a golden handshake on the same scale as what was paid to the retrenchees in phase 2,***
>
> ***(c) the plaintiffs get costs and interest."***

The respondents doubt the applicant's ability to comply with the Orders of the Court, in the event that the same are upheld, and the applicant is incorporated into a different company pending the outcome of the intended appeal.

[31] Learned counsel, Mr. Oluoch for the respondents, asks this Court to take judicial notice of the fact that the applicant is dependent on loans from subsidiaries of another company, France Telkom. However, such a fact is not within the public domain, and its accuracy can only be ascertained through regular judicial process. The respondents did not adduce any evidence in support

of the allegation that the applicant might be transferred to another company; and neither did they substantiate their claim that the applicant has been involved in financial impropriety with respect to its subsidiaries.

[32] Article 48 of the Constitution, on safeguards for access to justice, thus provides:

> ***"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."***

It is clear to us that this constitutional right is vital to fair play in the Court process; and any Order requiring monetary commitment by a party must not only be reasonable, but constitutionally justified.

[33] We agree, with respect, with learned Counsel Mr. Oraro, that the respondents have not demonstrated how they arrived at the sum of Ksh.3.2 billion to be deposited by the applicant as security, should leave be granted. To require the deposit of such a large amount of money by the applicant, without any legal justification, would impede the right of access to justice, in terms of Article 48 of the Constitution.

[34] We are not persuaded that the respondents will suffer irreparable loss if leave is granted, and the applicant is transferred to another company pending the outcome of the appeal. The laws that govern such transfers do take

into account any legal suits pending at the time of transfer, safeguarding the interests of the respondents in the event the appeal fails.

C.CONCLUSION

[35] Having considered the background to this case, in the context of the pleadings and the submissions of counsel, we are of the opinion that this Court has jurisdiction to hear the intended appeal, and that the issues arising involve "matters of general public importance".

D. ORDERS

[36] We are inclined to make the following Orders:

(a) The application dated 23rd April 2014 is hereby allowed.

(b) The Ruling and Orders of the Court of Appeal in Civil Application No. Sup. 24 of 2013, delivered on 9th April, 2014 are hereby set aside.

(c) This appeal is certified as involving matters of general public importance, and leave to appeal is hereby granted.

(d) The Notice of Appeal shall be filed and served within 14 days of the date hereof.

(e) Costs shall be in the appeal.

DATED and **DELIVERED** at **NAIROBI** this ....13th..... Day of ...May..... 2015**.**

..... **.....**
P.K. TUNOI, SCJ **M.K IBRAHIM, SCJ**

..... **.....**
J.B. OJWANG, SCJ **S. WANJALA, SCJ**

.....
N.S NDUNGU SCJ

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA