REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO 4 OF 2012

-BETWEEN-

HERMANUS PHILLIPUS STEYN.....APPLICANT

-AND-

GIOVANNI GNECCHI-RUSCONE.....RESPONDENT

(An Application for leave to appeal against the decision of the Court of Appeal given at Nairobi (Githinji, Onyango Otieno & Koome JJ.A) dated 6th December, 2012 in Nairobi Civil App.No. SUP 4 of 2012)

R U L I N G

I. HISTORICAL BACKGROUND TO THE APPLICATION

[1] This is an application by Notice of Motion, for review of the decision of the Court of Appeal dismissing the applicant's Notice of Motion dated 2nd April, 2012 by which he was seeking leave of that Court to appeal to the Supreme Court, in respect of matters of general public importance. The application is brought on the basis of Articles 159(2)(a);(d) & (e); 163(4)(b); and 259(1) of the

Constitution; section 15(1) and 16(1) of the Supreme Court Act No. 7 of 2011); Rule 21(1) of the Supreme Court Rules, 2011; ***the principle in Sum Model Industries Limited v. Industrial and Commercial Development Corporation,*** Nairobi Supreme Court Civil Application no.1 of 2011; and the inherent powers of the Court. The Applicant prays that this Court do set aside the Court of Appeal's Ruling, and issue an order allowing the Notice of Motion of 2nd April 2012.

[2] In the alternative, the applicant prays that a certificate under section 163(4) (b) of the Constitution does issue on the basis that a matter or matters of general public importance is/are involved in the intended appeal to the Supreme Court against the judgment and orders of the Court of Appeal of 22nd October, 2010 in Nairobi Civil Appeal No.171 of 2009.

[3] The application is premised on the grounds laid out in the Notice of Motion by Mr. Mohammed Nyaoga, learned counsel for the applicant. It is supported by an affidavit sworn by the applicant.

[4] The applicant and the respondent entered into a commission agreement dated 26th July, 1991 in which the applicant agreed to pay to the respondent, a commission of 10% of any sums of money that

might be paid to the applicant by the Government of the United Republic of Tanzania, in respect of the nationalization of the applicant's assets by that Government. Disputes and differences arose between the parties over and in relation to the said commission agreement, occasioning Court proceedings lodged by the respondent in the High Court for the recovery of the sum of **US $ 1,206,015.52,** with interest thereon from the date of filing suit until payment in full.

[5] The trial Court determined that the respondent was entitled to a commission **of US $ 1,206,015.52** under the contract between the two parties, and awarded the respondent damages in the said sum, with interest thereon at Court rates as prayed, having determined that the applicant was fully or substantially paid the sum of **US $ 12,060,155.53** by the Government of Tanzania.

[6] The applicant was aggrieved by the findings and decision of the trial Court, and appealed to the Court of Appeal on the grounds, *inter alia,* that the trial Judge erred in failing to appreciate that the respondent had failed to discharge his burden of pleading and strictly proving special damages which were due to him, and more particularly, that the respondent failed to prove that the applicant

had been fully paid the sum of **US $ 12,060,155.53** by the Government of the United Republic of Tanzania.

[7] On appeal, however, the Court of Appeal found in favour of the respondent, and agreed with the finding of the trial Court, dismissing the appeal. The applicant being aggrieved by the finding of the Court of appeal, applied to the same Court under article 163(4) (b) of the Constitution, for leave to appeal to the Supreme Court.

[8] Article 163(4) (b) of the Constitution provides thus:

> ***"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-***
>
> ***(a) ...***
>
> ***(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)."***

[9] It was the applicant's case that the case before the Court of Appeal raised matters of great public importance. However, the Court of Appeal disagreed with the applicant, and denied him leave. It was the Court of Appeal's decision that the issue before the Court did not raise any matter of great public importance.

[10] The applicant being aggrieved with the decision of the Court of Appeal denying him leave, has now approached this Court for a review of this decision, hence the instant application.

II. JURISDICTION OF THE COURT

[11] Article 163(4) (b) of the Constitution provides for jurisdiction; and Article 159 provides that judicial authority, on the whole, is derived from the people. The relevant part provides thus:

> ***"159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***
>
> ***(a) justice shall be done to all, irrespective of status;***
> ***(b) justice shall not be delayed***
> ***(c) …***
> ***(d) …***
> ***(e) the purpose and principles of the Constitution shall be protected and promoted."***

[12] Article 259 deals with the interpretation of the Constitution. The part cited by the applicant provides:

> *"**259(1) This Constitution shall be interpreted in a manner that-***
>
> *(a)* ***promotes its purposes, values and principles;***
> *(b)* ***advances the rule of law, and the hum an rights and fundamental freedoms in the Bill of Rights;***
> *(c)* ***permits the development of the law; and***
> *(d)* ***contributes to good governance."***

[13] It was the applicant's case, in both his written and oral submissions, that this Court has the jurisdiction to hear and determine this application. Counsel submitted that Article 163(3) (b) of the Constitution has given both the Court of Appeal and the Supreme Court concurrent jurisdiction in certifying matters as being of great public importance, so as to warrant an appeal to the Supreme Court. Learned counsel, Mr. Nyaoga further asserted that the Supreme Court has the jurisdiction to review a certification given by the Court of Appeal. Where the Court of Appeal refuses to issue a certification, it was counsel's submission, the Supreme Court should invoke its original jurisdiction to grant such leave, and certify the matter. Counsel relied on the definition in **Black's Law Dictionary,** of concurrent jurisdiction, thus:

> ***"Concurrent jurisdiction. (17c)1. Jurisdiction which might be exercised simultaneously by more than one court over the same***
>
> ***subject matter and within the same territory, a litigant having the right to choose the court in which to file the action."***

[14] In his written submissions, counsel urges that the Supreme Court is a creature of statute and as such, **"it cannot assume jurisdiction which has not been conferred upon it by statute"**. Counsel cited this Court's decision in ***Sum Model Industries***

limited v. Industrial and Commercial Development Corporation [Sum Model Case]. He also cited the case of ***Namuddu v. Uganda [(2004] 2 EA 207,*** in which the Court stated:

> ***"...for leave to be granted by the Supreme Court, this Court is not restricted to the decision of the Court of Appeal once that Court refuses to grant the requisite certificate. Whereas it can be said that the application to this Court is in the nature of an appeal because the application arises only after the Court of Appeal refuses to grant a certificate, when this Court considers the application to review, this Court is not necessarily confined only to the matters which were considered by the Court of Appeal before it declined to give the certificate."***

[15] The applicant submitted that having first gone to the Court of Appeal and having been denied leave, he is now rightfully before the Supreme Court.

[16] In reply, the respondent through learned counsel, Mr. Andrew Wandabwa, first urged the Court to consider the time within which the application was filed. It was his case that the applicant has come belatedly to Court, and this is calculated to deny the respondent justice at the stage of execution proceedings.

The decision occasioning grievance was delivered on 22nd October 2010, following the promulgation of the Constitution establishing the Supreme Court in August, 2010. The respondent submits that the Supreme Court Act came into force on 23rd June, 2011; and the applicant filed the application to the Court of Appeal on 4th April 2012, four months after the creation of the Supreme Court. The applicant sought leave to appeal to the Supreme Court in the Court of Appeal, in April 2011, four months after the Supreme Court's direction in ***Sum Model Industries Limited vs. Industrial and Commercial Development Corporation.*** Mr. Wandabwa invites the Court to exercises its discretion on the basis of principles laid out in Article 159(2) of the Constitution, particularly the one that justice should not be delayed.

[17] Further, with regard to jurisdiction, counsel concurs with the applicant that, indeed, under Article 163(4) of the Constitution the Court of Appeal and the Supreme Court have concurrent jurisdiction. However, it is counsel's submission that, guided by the **Sum Model Case,** the applicant having gone to the Court of Appeal, and having been denied leave, the Supreme Court lacks

jurisdiction to review that decision. Counsel submits that under Article 163(5), the Supreme Court has no power of review, where there has been no certification.

[18] Further, it was counsel's case that pursuant to section 19(b) of the Supreme Court Act, the Court should refuse to entertain a matter of appeal against a decision to refuse leave to appeal. Section 19(b) provides thus:

> ***"19.The Supreme Court shall hear and determine appeals from the Court of Appeal or any other court or tribunal against any decision made in proceedings, only to the extent that-***
>
> ***(a) a written law, other than this Act, provides for the bringing of an appeal to the Supreme Court against such decision, or***
>
> ***(b) the decision is not a refusal to grant leave to appeal to the Court of Appeal."***

On this premise, counsel argued that there was no jurisdiction, and that jurisdiction should not be implied. It was counsel's argument that allowing the application amounts to reviewing the Court of Appeal's decision that there was no matter of public importance, which is barred by section 19 of the Supreme Court Act. Counsel sought to distinguish the ***Namuddu v. Uganda case*** in regard to this issue. He argued that in ***Namuddu,*** the law allowed the

Supreme Court to sit on appeal on matters falling to the Court of Appeal, which is not the case in the present instance.

[19] In reply, Mr. Nyaoga reaffirmed that the Court has jurisdiction. He asserted that all parties have a right to approach the Court, under article 163 of the Constitution, whether leave has or has not been granted by the Court of Appeal; and that limiting room for review only where there is certification (leave for appeal having been granted) will amount to discrimination against parties, which is not allowed by the Constitution.

[20] In deciding whether the Court has jurisdiction, the following questions call for answers:

(i) What is the implication of article 163(4) (b) of the Constitution?

(ii) Is there concurrent jurisdiction?

(iii) How should litigants proceed under article 163(4) (b)?

(iv) What is the Court's interpretation of Article 163(5)? Is certification to be interpreted to mean a matter being certified as being "of public importance"; or a matter being certified as lacking public importance?

(v) What is the scope of review under Article 163(5)? Is it limited to where there is a certification that a matter of public importance has been raised?

[21] As to whether this Court has jurisdiction, the Court has previously pronounced itself, especially in the ***Sum Model Case,*** thus:

> ***"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 . . . . 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 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 be dissatisfied with the court of Appeal's decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution."*

[22] Suffice it to say that the applicant has met the threshold set by the Court in the above case. He first applied to the Court of Appeal, where leave was denied. Hence the next step was for him to move to the Supreme Court. However, the pertinent question to ask is: under which law does he move to this Court? It is worth noting that the

applicant has come to this Court under Articles 159(2)(a),(d) & (e); 163(4)(b); and 259(1) of the Constitution; Sections 15(1) and 16(1) of the Supreme Court Act; Rule 21(1) of the Supreme Court Rules, 2011; the principle in ***Sum Model Industries Limited v. Industrial and Commercial Development Corporation,*** Nairobi Supreme Court Civil Application No.1 of 2011 and the inherent powers of the Court.

[23] It is unfortunate that the applicant has not cited Article 163(5) of the Constitution, as a basis for the proceedings. This is the provision of the law that clearly gives the applicant ***locus standi*** before this Court, by referring to 'review'. It states thus:

> ***"163(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."***

The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the

Constitution. Consequently, the failure to cite article 163(5) will not be fatal to the applicant's cause.

[24] Further, it is worth noting that the applicant has moved the Court under article 163(4)(b). However, an objective reading of this provision shows that the same should be read conjunctively with Article 163(5). One reading Article 163(4)(b), therefore, should not stop there but go further and read article 163(5), noting the words in Article 163(4)(b); *"**.... subject to clause (5)**)."* It may thus be stated that by the very act of citing Article 163(4), the applicant still invoked the Court's jurisdiction under Article 163(5).

[25] The other issue raised was as to the concurrent jurisdiction of both the Court of Appeal and the Supreme Court, in granting leave to appeal to the Supreme Court. The respondent averred that once the concurrent original jurisdiction has been exercised under article 163(4) (b) by the Court of Appeal, it was no longer tenable for the Supreme Court to exercise the same jurisdiction. Adopting the definition in ***Black's Law Dictionary*** on *"concurrent jurisdiction":* ***"Concurrent jurisdiction. (17c)1. Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant***

having the right to choose the court in which to file the action," we would agree with counsel that, indeed, we have concurrent jurisdiction; and when one opts to exercise one's right under either of the entities with jurisdiction, one cannot again go before the other entity with the same subject matter. This is the reasoning behind the principle of r*es judicata* in civil matters, in choosing the Court (forum) in which to institute a matter. This is the reasoning held sacrosanct in criminal matters under the doctrine of *double jeopardy* (especially with reference to international crimes like genocide, piracy and war crimes where all nations have jurisdiction).

[26] The question then is whether, by coming to the Supreme Court, the applicant is invoking the original jurisdiction of the Court. The answer readily emerges from the **Sum model Case,** thus:

> "***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 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 be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution."

[27] Consequently, it is our decision that, by first proceeding to the Court of Appeal as in this case, and then to the Supreme Court, one does not invoke the original jurisdiction, so as to warrant a question of "*res judicata*". Hence, on this consideration, the applicant is properly before the Court.

[28] The last question is whether the review contemplated under Article 163(5) of the Constitution is limited to where leave was granted, and hence a certificate did issue, and not otherwise, since pursuant to Section 19(b) of the Supreme Court Act no appeal lies when it is a matter where leave to appeal to the supreme Court was **not** granted. This perception raises two questions: Can one appeal from a decision of the Court of Appeal **refusing to grant leave** to appeal to the Supreme Court? And how far does the review jurisdiction of the Supreme Court, in matters for grant of leave to appeal, extend?

[29] As to whether an appeal lies, we need to read the various provisions of the law conjunctively. The relevant provision of the Constitution is Article 163(5). It provides thus: "***A certification by the Court of Appeal under clause (4) (b)*** *may be reviewed* ***by the Supreme Court and either affirmed, varied or overturned".*** The constitution does not allude to "appealing" the decision but talks of "*review*". The respondent's counsel based his argument on section 19(b) of the Supreme Court Act, which thus provides:

> ***"19.The Supreme Court shall hear and determine appeals from the Court of Appeal or any other court or tribunal against any decision made in proceedings, only to the extent that--***
>
> ***(a) a written law, other that this Act, provides for the bringing of an Appeal to the Supreme Court against such decision, or***
>
> ***(b) the decision is not a refusal to grant leave to appeal to the Court of Appeal"***

[30] It is worth noting that section 19 of the Act is entitled: **Extent of the appellate jurisdiction of the Supreme Court**. Part Four of the Supreme Court Rules, 2012 deals with applications. Rule 24 deals with applications for grant of certification. It provides thus:

> ***"24(1) An*** *application for certification* ***shall first be made in the court or tribunal it is desired to appeal from.***

> ***(2) Where the Court of Appeal has*** *certified* ***a matter to be of general public importance, an aggrieved party may*** *apply to the Court for review* ***with fourteen days …..”***

A Proper reading of Section 19 (b) of the Supreme Court Act clearly shows that it has nothing to do with Article 163 (5) of the Constitution. It does not deal with refusal to certify a case as one involving a matter of general public importance. It actually deals with refusal to grant “leave to appeal to the Court of Appeal.” The implication here is that the envisaged refusal to grant leave must have emanated from a lower court (such as the High Court) or tribunal.

[31] From the above provisions, it can be deduced that both the Act and the Rules do not provide for *“appeals”* as regards a case where the Court of Appeal has pronounced itself on a matter of grant of leave to appeal to the Supreme Court. The legal framework provided for is that of *“review”.* Consequently, it is our opinion that where one applies to the Court of appeal for leave to appeal to the Supreme Court, and the party is not satisfied by the decision of the Court of Appeal, no *“appeal”* lies. The only course is for the party to apply for *“review”* of the matter in the Supreme Court. The appeals procedure provided for by the Act and under the Rules, is for matters where one has already been granted leave to appeal and one is now

approaching the Supreme Court in relation to the *"substantive matter"* of appeal, from the Court of Appeal. Hence, in the case before the Court, the applicant has rightly sought *"review"* and not *"appeal"*.

[32] The second question was in relation to the extent of this review jurisdiction, with the respondent averring that it only lies where a matter has been certified as *of general public importance*. In answering this question, the Court is alive to its mandate under Articles 159 and 259 of the Constitution, which provide:

> "***259(1) This Constitution shall be interpreted in a manner that-***
>
> *(e)* ***promotes its purposes, values and principles;***
>
> *(f)* ***advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> *(g)* ***permits the development of the law; and***
>
> *(h)* ***contributes to good governance.***

[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.

[34] The applicant urged that the Supreme Court is a creature of statute, and as such cannot exercise a jurisdiction that it has not been given. We would like to qualify this assertion. As much as we agree with counsel that jurisdiction has to be conferred before it is exercised, the Supreme Court is a creature of the Constitution which confers jurisdiction upon it. The statute, namely, the Supreme Court Act, only lays out the mechanism for the exercise of that jurisdiction.

III. MATTERS OF GENERAL PUBLIC IMPORTANCE

[35] Having established that the Court has jurisdiction, and that the matter is rightly before the Court, we now consider the question whether the case raises **issues of general public importance.**

[36] The applicant in his Notice of Motion avers that matters of general public importance are involved. He makes his application on various grounds, *inter alia*:

> ***"14. This case is of general importance to a class of litigants in Kenya comprising brokers and commission agents in so far as this is the only case so far in Kenya which involves the award of damages to a commission agent for an alleged breach of a commission note for brokerage on an actual price.***
>
> ***"15…***
>
> ***"16. Therefore this case involves matters of general public importance to all business people in Kenya including all agents and investors who should know what the criteria is for the determination of the quantum of an award of damages for the breach of a commission contract for brokerage on a stated price…"***

[37] The applicant has enumerated a range of matters which he urges to be of general public importance. It was the applicant's case that matters of general public are involved in this instance. His advocate submitted that the matter before the Court is not academic, but is an actual controversy. He cited case law in support of this argument, and argued that the appeal has a realistic prospect of success. He cites the English case, ***Smith v. Cosworth Casting Processes*** **Ltd [1997] 4 All ER 840,** in support of his argument that even in cases with no prospect of success, but which raise

points of general public importance, Courts will grant a certificate of appeal.

[38] On the other hand, the respondent urged that the matter herein was not of general public importance, but was one limited to the contracting parties. He avers that the application if granted, will lead to a protraction of the matter, further occasioning injustice to him.

[39] Not all matters in the Court of Appeal are appealable to the Supreme Court. There are only two instances in which one can appeal to the Supreme Court from the Court of Appeal, by Article 163 of the Constitution:

> "***163 (4) 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).***"

Consequently, this phrase is a vital one as *it is the fulcrum around which the Supreme Court's jurisdiction on appeal turns,* in matters *other than the interpretation or application of the Constitution.*

[40] It is the first occasion before this Court, this issue is coming up for determination. The Court is presented with an opportunity to pronounce itself on what amounts to *"a matter of general public importance."*

[41] The term *"general public importance"* has not been defined in the Constitution or the Supreme Court Act. **Black's Law Dictionary** links *"general importance"* to *"public interest".* It goes further to define public interest as:

> ***"...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation"***.

In litigating on matters of *"general public importance",* an understanding of what amounts to *'public'* or *'public interest'* is necessary. *"Public"* is thus defined*: concerning all members of the* ***community; relating to or concerning people as a whole;*** *or all* ***members of a community;*** *of the* ***state; relating to or involving government and governmental agencies; rather than private corporations or industry;*** *belonging to the community as a whole, and administered through its representatives in government, e.g. public land.*

[42] As de Smith, Woolf and Jowell have written in **Judicial Review of Administrative Action**:

> *"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they* ***intervene or participate in social or economic affairs in the public interest".***

[43] The pertinent concept, in most jurisdictions, is *"a point of law of general public importance"*; but hardly is a definition of that concept given. What is given is no more than some criterion on how to ascertain that a matter is of great public importance.

[44] In the United Kingdom, under **the Administration of Justice Act (1969),** one is allowed to appeal to the Supreme Court under section 12 (3) where a point of **general public importance** is involved; such a point either:

> *"(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or*
>
> *(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous*

proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings."

[45] Under the Indian Constitution, the appellate jurisdiction of the Supreme Court is invoked under Article 133 in the following circumstances:

> ***"(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under article 134A—***
>
> ***(a) that the case involves*** *a substantial question of law of general importance****; and***
>
> ***(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court".***

[46] The Court of Appeal has had occasion in two recent cases to consider the concept of *"matter of general public importance"* meriting certification for a final appeal to the Supreme Court: in ***Greenfield Investments Limited v. Baber Alibhai Mawji,*** **Civil Appl. No. Sup.5 of 2012 (UR4/2012),** and ***Koinange Investment & Development Ltd v. Robert Nelson Ngethe,*** **Civil Appl. No. Sup.15 of 2012 (UR9/2012).**

In the first of these cases the Court aptly stated:

"It would be a perversion of the law as …. unambiguously spelt out in the Constitution, were certifications to become fare for ordinary cases no matter how complex, that have for ages been concluded with finality in this Court. This is part of the rationale for the requirement that certification be first sought in this Court."

[47] And in ***Koinange Investment & Development Ltd. v. Robert Nelson Ngethe,*** the Court of Appeal, again, quite properly stated the governing principle in respect of appeals to the Supreme Court:

"……. there is a distinction between leave to appeal to this Court [i.e., the Court of Appeal] from the High Court and from this Court to the Supreme Court: …. the requirement for certification under Article 163(4)(b) is a genuine filtering process to ensure that only appeals with ***elements of general public importance*** *reach the Supreme Court, as the role of the Supreme Court, as was observed in* ***R. v. Secretary of State, ex parte Eastway*** *[2001]1 All E.R. 27 at p.33 [para.(b)* ***- per*** *Lord Bingham], cannot be relegated to deal with correction of errors in the application of settled law, even where such are shown to exist. This point was expounded by the Supreme Court itself in* ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo and Five others,*** *Sup. Ct. Petition No. 2 of 2012……"*

[48] On the question of matters of general public importance which would warrant certification for a final appeal in the Supreme Court, the Court of Appeal, in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone,*** **Civil Appl. No. Sup.4 of 2012 (UR3/2012)** had thus, quite properly, stated:

> ***"The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law".***

[49] The Court of Appeal ruled that the foregoing principles did not apply in another case, ***Koinange Investment & Development Ltd. v. Robert Nelson Ngethe,*** **Civil Appl. No. 15 of 2012 (UR 9/2012):** the reason being that the relevant claim was in *ordinary sale contract*, and the intention to appeal related to a quite *legitimate exercise of discretion by the trial Judge* in the High Court, to grant a default judgment. We find merit in the Court of Appeal's

grounds for refusal of certification in that case: the category of the question of law being quite ordinary; and the original judicial decision being challenged, being quite well-founded.

[50] It is clear to us that, the exact image of a *"matter of general public importance"* may vary in different situations – save that there will be broad guiding principles to ascertain the stature of a particular case. Besides, the comparative judicial experience shows that *criteria of varying shades* have been adopted in different jurisdictions. The general phraseology in the laws of most jurisdictions is, *"a point of law of general public importance";* but Kenya's Constitution, in Article 163(4)(b) refers to *"a matter of general public importance",* as a basis for invoking the Supreme Court's appellate jurisdiction. In our opinion, the Kenyan phraseology reposes in the Supreme Court, in principle, a *broader discretion* which, certainly, encapsulates also the *"point of law of general public importance".*

[51] One of the relevant decisions of the Court of Appeal in this matter, ***Murai v. Wainaina (No.4),*** **Civil Appl. No. NAI 9/1978,** was on grant of extension of time for filing an appeal, on the ground of a question being of public importance; and that Court thus ruled:

"The appeal is of public importance as it touches on the subject of land rights, and will not only affect the parties to the appeal, but will also affect a large number of original land-owners, by [depriving] them, causing economic and social upheaval....."

[52] In the English case, ***Public Interest Lawyers Ltd. v. Legal Service Commission [2010] EWHC 3259,*** where a number of solicitors' firms undertaking work of public character sought a protective-costs order, in proceedings which challenged a tendering exercise conducted by the respondent, the Judge found that although the claimant-firms ***had a private interest,*** that was not a major factor to be taken into account, in view of the ***strong public interest*** in ensuring that ***the public tendering process was carried out in accordance with the law.***

[53] In another English case, ***The Queen on the Application of Cromptom v. Wiltshire Primary Care Trust*** *(2008) ECWA* Civ. 749, Waller, L.J. set out to analyze the requirements for certifying a matter as being of general public importance; he laid out the following standards:

(i) that the matter involves the elucidation of public law by higher courts, in addition to the interests of the parties;

(ii) that the matter is of importance to a general class, such as the body of tax-payers;

(iii) that the matter touches on a department of State, or the State itself, in relation to policies that are of general application.

[54] In ***R (Crompton) v. Wiltshire Primary Care Trust*** *[2009] 1 All E.R. 978,* the Court stated the principles under which a protective-cost order may be issued: one of these being that the issues raised are of *general public importance;* and such issues do not have to be of importance to ***all*** citizens or the whole nation. In the words of Holman, J (p.983):

> ***"I am satisfied that the ultimate issue in this case, namely continuing closure or reopening of the*** *MTU,* ***is an important and not trivial one; and that is of importance to a sufficiently large section of the public….."***

The Court, in that case, stated that the mere fact that a case happens to contain some topic of general importance, upon which the public as a whole may gain from a ruling, does not make the case one of general public importance. Similarly, it does not necessarily follow that, simply because an issue is raised which is of general public importance, the public interest requires it to be resolved. The

Court then gave certain directions on how a Judge should evaluate the importance of the issues raised, and make judgment as to whether they are of general importance. First, there is *no absolute standard* by which to define what amounts to an issue of general public importance. Second, there are *degrees to which the requirement may be satisfied:* some issues may be of the first rank of general public importance. Third, making the judgment is an exercise in which two judges might legitimately reach a different view, without either being wrong.

[55] In South Africa, upon the promulgation of the Constitution in 1996, various Human Rights groups moved to Court, to compel the Government to operationalize the rights provided for. Though these cases had taken up a variety of *group-issues,* they were still of general public importance. Thus, in early July, 2002, AIDS treatment activists celebrated the decision of the South African Constitutional Court in ***Minister of Health and Others v. Treatment Action Campaign and Others,*** dealing with the Government's obligations regarding the right to health, which the Constitution protects. The Court ordered the Government to (i) make an approved drug for the prevention of mother-to-child transmission of HIV (PMTCT) available

in the public health sector, and (ii) set out a timetable for the roll-out of a national program for PMTCT.

[56] The relevance of questions of law in determining *"a matter of general public importance" was* considered in the English case, ***Pioneer Shipping Ltd and Others v. BTP Tioxide Ltd; The Nema*** *[1981]2 All E.R. 1030,* in which the issue was whether leave to appeal against an arbitral award should be granted. The Court in that case, in considering matters that would be of general public importance, especially in commercial transactions, drew a distinction between an exceptional clause and contract, on the other hand, and questions of law of general importance to a ***substantial section of the commercial community*** (such as may arise under standard-form contracts), on the other. The Court remarked that the interpretation in an exceptional contract *is unlikely to arise again* – and so there is no basis for grant of leave to appeal, even when a large sum of money is involved. Such is not the position, however, where a ***standard form*** is involved, in which case the question is *likely to come up again and again:* thus in such a case, the question may well be one of general public importance.

[57] That same judicial approach marks another English case, ***Glancare Teorada v. A. N. Board Pleanala*** *[2006]FEHC 250,*

which holds that a matter of general public importance should be one of *exceptional public significance,* in that:

> *(i) the matter goes substantially beyond the facts of the case, and the appropriate test is not whether there is a point of law, but whether the point of law* ***transcends the facts of the individual case;***
>
> *(ii) the law in question should stand in a* ***state of uncertainty****- so that it is* ***for the common good that such law be clarified****, so as to enable the Courts to administer the law, not only in the instant case, but also in future cases;*
>
> *(iv) the point of law must have arisen out of a decision of the Court, and not from a discussion of a point in the course of the hearing.*

[58] The foregoing comparative survey, in our opinion, sheds sufficient light on the position to be taken by this Court, as contemplated by the terms of Article 163 (4)(b) of the Constitution. Before this Court, *"a matter of general public importance"* warranting the exercise of the appellate jurisdiction would be a *matter of law or fact*, provided only that: *its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties,* and *bearing upon the public*

interest. As the categories constituting the public interest are not closed, *the burden falls on the intending appellant* to demonstrate that the matter in question carries specific elements of real public interest and concern.

[59] From the research material availed to this Court, it is clear that a matter of general public interest may take different forms: as instances, an environmental phenomenon involving the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of persons in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance, or the Court's scope for dispensing redress, or the mode of discharge of duty by public officers.

[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. In summary, we would state the governing principles as follows:

(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*.

IV. APPREHENSION OF A MISCARRIAGE OF JUSTICE

[61] Beyond the reliance on the provisions of law for a review of the Court of Appeal's certification, the applicant calls in aid the general principle of the rendering of justice, as contemplated in Article 159 (2) of the Constitution of Kenya, 2010: he avers that *"the intended appeal is necessary as a substantial miscarriage of justice might have occurred or may occur unless the said appeal is heard".*

[62] *"Miscarriage of justice"* is thus defined in ***Black's Law Dictionary,*** 8th ed (2004) (at p. 1019):

> ***"A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime…… also termed failure of justice."***

[63] From the example thus given, it is clear that *"miscarriage of justice"* is more consistent with failings in the judicial process of a rather glaring nature, and in threshold trial stages, than with the adjudication of complex questions of law at tertiary-level Courts. And in the instant case, as appears from the details set out in the Notice of Motion, from the sets of depositions, and from the submissions, we must consider the merits of the application entirely on the criterion of whether, as prescribed under Article 163(4)(b) of the Constitution, it raises *"a matter of general public importance"*.

V. APPLICATION OF PRINCIPLES: DOES THE MOTION RAISE "A MATTER OF GENERAL PUBLIC IMPORTANCE"?

[64] It is the applicant's case that the issue at hand relates to a ***class*** of litigants in Kenya, namely brokers and commission agents; and that it relates to

an award of damages which pays no regard to the compensation terms embodied in the *commission agreement.* The Court is called upon to consider

the question whether *brokers* and *commission agents,* constitute a category of

general importance, in processes of litigation.

[65] The applicant urges that a matter of general public importance arises: as the Court of Appeal erred in awarding a head of damages that does not qualify as special damages or general damages, a category of damages that is alien to the law.

[66] The applicant urges that the instant matter raises questions of general importance to businessmen and businesswomen, and, in particular, investors and commission agents; and so an error such as is being attributed to the Court of Appeal, that will stand in law as *precedent for lower Courts,* entails issues of general importance in the process of litigation.

[67] The respondent contests such an argument, adopting the very rationale the applicant had invoked: that, allowing the proposed appeal will undermine the filter process, open up floodgates into the Supreme Court and, thereby, occasion a miscarriage of justice.

[68] The respondent's position, it is clear to us, is not focused on the merits of the motion, but is more concerned with matters of general policy in administration of justice and in the discharge of the

Supreme Court's functions. Such an approach leaves the applicant's case unanswered – and we must consider that case on its merits.

[69] The application identifies the critical issues in paragraphs 14, 15, 16 and 17, as follows:

> ***"14. This case is one of general importance to a class of litigants in Kenya comprising brokers and commission agents insofar as [it] is the only case so far in Kenya which involves the award of damages to a commission agent for an alleged breach of a commission note for brokerage on an actual price.***
>
> ***"15. At common law the criteria for the award of damages to a broker is that the commission is only payable on money actually <u>obtained.</u> This principle has not hitherto ..... been dealt with by any Courts in Kenya.***
>
> ***"16. Therefore, this case involves matters of general public importance to all business people in Kenya, including all agents and investors who should know what criteria is for the determination of the quantum of an award of damages for breach of a commission contract for brokerage on a stated price.***
>
> ***"17. The intended appeal seeks the establishment of a precedent of general application with respect to the interpretation of the law on the award of damages where the actual damage or loss by the plaintiff, although specifically pleaded, is not strictly proven".***

[70] It is now time to apply the principles we have set out at paragraph 60 of this Ruling to the specific circumstances of this case. Before discharging this burden, it is worthwhile to note that the Court of Appeal declined to certify this case as one involving a matter of **general public importance**. In essence therefore, the Applicant is asking us to overturn the Appellate Court's decision. In declining to certify the matter as warranting a further appeal to this Court, the Court of Appeal stated as follows:

> ***"It is clear that the matters which arose for determination both in the High Court and in this Court were substantially matters of fact. Both the High Court and this Court made concurrent findings of facts on the evidentiary matters in controversy. In our view, there is no element of general public importance involved in the contract or arising from the relationship of the parties. This was a case where the appellant engaged the respondent as his agent to seek and negotiate compensation for the applicant's nationalized properties at an agreed commission. The main issue at the trial and in the appeal was whether or not the agent had earned his commission. The two courts made a finding that the respondent had indeed earned his commission".***

[71] Is this a matter where the issue to be determined can be said to transcend the circumstances of the case, and have a significant bearing on the public interest?

It is not in issue that the dispute whose final resolution the applicant seeks, arose out of a commission agreement between the two parties. The gist of this agreement was to the effect that the Applicant was to pay to the Respondent a commission of 10% of any sums of money that might be paid to the Applicant by the Government of the United Republic of Tanzania, in respect of the nationalization of the Applicant's assets by that Government. Like in most commission agreements, *the payment was premised upon the occurrence of an event.* The facts are set out in paragraphs 4, 5, 6 and 7 of this Ruling.

[72] It is also not in dispute that the Respondent filed suit against the Applicant claiming payment of **US $ 1,206,015.52** being 10% of the total sum of money "paid" to the Applicant as per the terms of the commission agreement. In deciding for the Respondent, both the High Court and Court of Appeal found as a fact that:

1. The Applicant was paid the sum of **US $ 12, 060, 155. 53** by the United Republic of Tanzania.
2. The Applicant was paid the aforesaid sum through the efforts of the Respondent as per the commission agreement.

[73] Indeed, an examination of the pleadings clearly indicates that the Applicant's main grievance that triggered the initial appeal to the Court of Appeal revolves around his contention that the trial court erred in finding that he was not only paid the aforesaid sum but that he was paid through the efforts of the Respondent as per the commission agreement.

[74] If this Court were to certify this case as warranting a further appeal, the main issue for determination in the substantive appeal would be whether the Applicant was paid the said sum of **US $ 12,060,155.53** through the efforts of the Respondent or not. We see no substantial question of law that would arise for determination on Appeal to this Court. No such question of law arose for determination either at the High Court or Court of Appeal. At stake in the main appeal therefore, would be findings of fact by the two lower superior courts. On the basis of what we have stated, *such a determination of fact in contests between parties cannot be in itself, a basis for granting certification for an appeal before the Supreme Court.*

[75] The pleadings at the High Court also disclose one irrefutable fact; i.e. **that the commission agreement was a private contract**

negotiated between two parties. The terms of the contract, including the percentage payable to the Respondent as commission, were determined by the parties. Counsel for the Applicant, Mr.Nyaoga contends that the case is one of general public importance to a class of litigants in Kenya comprising brokers and commission agents in so far as it is the only case so far in Kenya which involves the award of damages to a commission agent for an alleged breach of a commission note for brokerage on an actual price. Yet the fact remains, that the dispute between the parties, does not transcend the particular case into the public realm. It is difficult to see how the determination of the question of fact which we have isolated above would have *a significant bearing upon the public interest* in Kenya.

[76] In making the Applicant's case for certification, Mr. Nyaoga further argues that this case involves matters of general public importance to **all business people in Kenya, including all agents and investors who should know what criteria is for the determination of the quantum of an award of damages for breach of a commission contract for brokerage on a stated price.** It is our opinion however, with respect, that Counsel is treading a journey of legal innovation so as to clothe a private-

agency contract between two parties with ingredients of public interest. The nature of the commission agreement in the instant case and the dispute arising there-from cannot affect *all business people in Kenya including all agents and investors.* **The criteria for the determination of the quantum of damages for breach of a commission contract,** was never an issue for determination at the High Court or Court of Appeal.

VI. DETERMINATION

[77] As the Applicant has not demonstrated to the Court's satisfaction the existence of specific elements of *general public importance* which he attributes to this matter, we decline to certify the same for a further appeal to this Court. We consequently affirm the Court of Appeal's decision.

[78] In the result, by the majority decision, we dismiss the application with costs to the Respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this ……. day of …….. ……, 2013**.**

…… ……

P.K. TUNOI **S.C. WANJALA**

JUDGE OF THE SUPREME COURT **JUDGE OF THE SUPREME COURT**

……

N.S. NDUNGU

JUDGE OF THE SUPREME COURT

IBRAHIM and OJWANG, SCJJ (Dissenting)

[1] The Ruling rendered in the majority opinion carries the fundamental principles and detailed considerations which the Court, in unanimity, sets down as the guideline for the exercise of the Supreme Court's appellate jurisdiction. However, there is a difference as to how those principles should apply, on the unique

facts of the instant case. We have taken the liberty, in this context, to set out our contrasting opinion, as follows.

[2] It has become settled law since the Supreme Court was launched in 2011, that it is a special judicial forum for ultimate adjudication on issues of law and of the Constitution, its mandate being thus defined in the Supreme Court Act, 2011 (Act No.7 of 2011), Section 3:

> ***"(a) [to] assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***
>
> ***(b) [to] provide authoritative and impartial interpretation of the Constitution;***
>
> ***(c) [to] develop rich jurisprudence that respects Kenya's history and traditions and facilities its social, economic and political growth……."***

[3] The Supreme Court's jurisdiction includes entertaining appeals from the Court of Appeal; save that, to run as an efficient and special appellate Court, a filter process has been established, ensuring that only the most deserving appeals come up before this Court. Thus, Article 163 (4) and (5) stipulates 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).

"(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned".

[4] The general principle running through the foregoing provisions is the *"filter principle",* which this Court has explicated clearly enough, in ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo and Five Others,*** **Sup Ct. Pet. No. 2 of 2012,** in these terms:

"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court".

[5] In the instant matter, the Court of Appeal declined certification for an intended appeal, and the intending appellant, quite consistently with the terms of Article 163 (5) of the Constitution,

sought *review* of the Court of Appeal's decision, to allow him to be heard in this ultimate appellate Court.

[6] Before this Court, there is a single, critical issue: has the intending appellant lodged before the Court *"a matter of general public importance"?* We think he has, and consequently, that the Supreme Court should entertain his appeal. The relevant criteria for *"a matter of general public importance"* have been well set out in the main Ruling of the Court. The question is: does the intending appellant's case fall within those criteria? We believe so – for the following reasons.

[7] The Court has reached a consensus that the law in Kenya, as regards certification for ultimate appeal, on grounds of the fundamental nature of the issues, is as stated in the Constitution of Kenya, 2010, Article 163 (4) (b): namely, that the matter must be of *"general public importance".* And the Court is equally agreed that such a formulation is, in principle, broad enough to incorporate *"matters of **law** of general public importance",* as is the case in most other jurisdictions the experience of which came to our attention; and also to incorporate ***other*** matters of considerable public significance, in the context of this country.

[8] In the averments and submissions by which this Court has, on this occasion, been moved, the intending appellant's position is thus set out:

> *"14. This case is one of general importance to a class of litigants in Kenya comprising brokers and commission agents insofar as [it] is the only case so far in Kenya which involves the award of damages to a commission agent for an alleged breach of a commission note for brokerage on an actual price.*
>
> *"15. At common law the criteria for the award of damages to a broker is that the commission is only payable on money actually* ***obtained.*** *This principle has not hitherto …….. been dealt with by any Courts in Kenya.*
>
> *"16. Therefore, this case involves matters of general public importance to* ***all business people in Kenya,*** *including* ***all agents and investors*** *who should know what criteria [apply] for the determination of the quantum of an award of damages for breach of a commission contract for brokerage on a stated price.*
>
> *"17. The intended appeal seeks the establishment of a precedent of general application with respect to the interpretation of the law on the award of damages where the actual damage or loss by the plaintiff, though specifically pleaded, is not strictly proven".*

[9] We believe such pleaded grounds to be anchored on an attribution of *"general public importance":* and so we have exercised solicitude to perceive how such a rationalisation, by itself, stands, as well as the manner in which the respondent answers.

[10] The intending appellant, in illustration of the nature of the appeal, has raised certain *questions of law* in respect of which, we have no doubt, the guiding position should be settled, in aid of *the general process of litigation in Kenya.* A typical example is: When an agent claims *commission f*rom a principal, can such an agent be said to have earned the *right to the commission,* if he or she cannot establish that the event has happened which, alone, triggers the payment of such commission? Can the Court make an order for payment to an agent on the basis of *"services rendered"* – that is, by graduated, proportional assessment – where the contract is one for brokerage as a specified commission, especially where the relevant event cannot be shown to have happened?

[11] It is the applicant's case that the issue at hand relates to a *class of litigants* in Kenya, namely *brokers and commission agents;* and that it relates to an award of damages which paid no regard to the compensation terms embodied in the *commission agreement.* The Court is called upon to consider the question whether *brokers* and *commission agents* constitute a category of litigants of general importance.

[12] The applicant urges that, indeed, a matter of general public importance arises in this case, besides, because the Court of Appeal had erred in awarding a head of damages that, with the uncertainty in the law relating to brokers and commission agents, cannot be said to qualify as special damages or general damages. He urges that the Court of Appeal had, in effect, hinted at a category of damages not known to the law.

[13] The applicant urges that the instant matter raises questions of general importance to businessmen and businesswomen, and, in particular, investors and commission agents: and so, an error such as is being attributed to the Court of Appeal, one that will *stand in law as precedent for other Courts,* is to be perceived as entailing issues of general public importance in the processes of litigation.

[14] The respondent contests such an argument, relying on his Advocate's advice, that *"the issues intended to be canvassed are issues which have been established [at] common law centuries ago, [and which] require no re-inventions";* that *"the intended appeal to the Supreme Court are frivolous, devoid of any merit, or matter of general public importance"*; and that *"this is not a proper case for the exercise of the Court's jurisdiction".* The respondent further,

relying on a general argument, contends that, allowing the application will undermine the filter process, and open up floodgates into the Supreme Court, thereby occasioning a miscarriage of justice.

[15] It is clear to us that the respondent's position is not focused on the detailed elements of the motion, but is instead, more concerned with matters of general policy in administration of justice and in the discharge of the Supreme Court's functions. Such an approach sidesteps the burden of the applicant's case – which we must then consider on its merits.

[16] Although this is a dispute of immediate relevance only to the parties, the course of judicial resolution will establish *legal principles of general application in future cases.* This being a dispute regarding *commercial transactions,* a sector of the most active relationships in a growing economy such as that of Kenya – a fact of which we take judicial notice – it is reasonably to be expected that such legal principles as will emerge from the adjudication of the intended appeal, will, in time, have a *significant recurrence in the incidence of dispute settlement.* Not only will *considerable numbers of litigants be affected,* but the *proper conduct of administration of*

justice, and the *workings of the judicial organs*, too, will be touched by the *lines of principle which this Court has the occasion to lay out.*

[17] To the set of factors that constitute a matter in Court as one of *"general public importance",* therefore, we will add:

(i) issues of law of repeated occurrence in the general course of litigation;

(ii) 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 of litigants;

(iii) questions of law that are destined to continually engage the workings of the judicial organs;

(iv) questions bearing on the proper conduct of the administration of justice.

[18] It is clear to us that the question at the centre of the intended appeal is one that should be settled, as a matter of law, regarding categories of business persons – namely, brokers and commission agents – likely to grow in numbers, over time, and who ought, in principle, to be regarded as legitimate actors within the economy. This is a public outlook, that is focused on a matter of *public interest,* and involving the judicial process as an avenue of fulfilment of the Bill of Rights safeguard for *"social justice and the realisation*

of the potential of all human beings" [Constitution of Kenya, 2010, Article 19 (2)].

[19] The question being brought forward by the applicant, in our opinion, is certainly one of *general public importance,* both when perceived as a matter of law, and when viewed as a factual matter of individual initiatives in the fields of commerce and the economy.

[20] Consequently, we would have granted leave to the applicant to file the intended appeal in the Supreme Court.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of May **2013.**

.....	**.....**
M. K. IBRAHIM	**J. B. OJWANG**
JUDGE OF THE SUPREME COURT	**JUDGE OF THE SUPREME COURT**

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

REGISTRAR
SUPREME COURT OF KENYA