



**National Bank of Kenya Limited (As the successor in business of Kenya National Corporation Limited) & another v Criticos (Application 14 (E023) of 2022) [2023] KESC 60 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 60 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION 14 (E023) OF 2022  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ  
JUNE 16, 2023**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED (AS THE SUCCESSOR IN BUSINESS OF KENYA NATIONAL CORPORATION LIMITED) ..... 1<sup>ST</sup> APPLICANT  
KENYA NATIONAL CAPITAL CORPORATION LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BASIL CRITICOS ..... RESPONDENT**

*(Being an application for review of the decision of the Court of Appeal (Okwengu, Ali-Aroni & Mativo, JJ.A.) dated 16th December 2022, arising from Nairobi Civil Application No. E158 of 2022)*

**Supreme Court does not have jurisdiction to hear and determine and appeal in which no substantial questions of law had been raised.**

*In an application contesting the decision of the Court of Appeal not to certify a matter as one of general public importance, the Supreme Court held that appellants had to raise substantial question of law, the determination of which, would have a significant bearing on the public interest to warrant an appeal to the Supreme Court on grounds of general public importance.*

Reported by John Ribia

***Jurisdiction*** – jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals that raised matters of general public importance – where the alleged matter of general public importance had not been pleaded - whether the Supreme Court had jurisdiction to hear and determine and appeal in which no substantial questions of law had been raised – , articles 159 and 163 (5).

**Brief facts**

The appellant had sought for its appeal to be certified as one that raised issues of general public importance that warranted an appeal to the Supreme Court. Aggrieved the appellant filed an application at the Supreme



Court to set aside the decision of the Court of Appeal. The matter of general importance that the appellant sought to be determined was whether a guarantor was discharged upon payment of the principal amount and was therefore not liable for interest, costs and other charges.

The respondent opposed the application on grounds that no matters of general public importance affecting the banking industry had been raised.

### **Issues**

Whether the Supreme Court had jurisdiction to hear and determine an appeal in which no substantial questions of law had been raised.

### **Held**

1. The Court of Appeal found that the certification application could not be sustained. The court based its decision on unconscionable contract as opposed to interpretation of the guarantee document; and that the issue of continuing guarantee clauses was neither pleaded nor determined.
2. The notice of motion lacked merit as the applicants had not highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling. The applicants had not raised any substantial question of law, the determination of which, would have a significant bearing on the public interest.

*Application dismissed with costs.*

### **Citations**

#### **Cases**

1. Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited “Kenyac”) & another (Appeal 80 of 2017; [2022] KECA 870 (KLR)) — Explained
2. Malcolm Bell, v Daniel Toroitich Arap Moi & another (Application 1 of 2013; [2013] eKLR) — Explained
3. Steyn, Hermanus Phillipus v Giovanni Gnechchi-Ruscione (Application 4 of 2012; [2013] KESC 11 (KLR)) — Explained

#### **Statutes**

1. Auctioneers Act, 1996 (Act No 5 of 1996) — In general — Cited
2. Banking Act (cap 488) — Section 44 — Interpreted
3. Constitution of Kenya, 2010 — Article 159, 163 (5) — Interpreted
4. Land Act, 2012 (Act No 6 of 2012) — In general — Cited
5. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 15, 15B — Interpreted
6. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 33 — Interpreted

#### **Advocates**

*Mr. Evans Moronge* for 1st and 2nd applicants

*Mr. Allen Waiyaki Gichuhi SC* for respondent

## **RULING**

### **Representation:**

Mr. Evans Moronge..... for the 1st and 2nd applicants

*(Moronge & Co. Advocates)*

Mr. Allen Waiyaki Gichuhi SC..... for the respondent

*(Wamae & Allen Advocates)*



1. Upon reading the notice of motion by the applicants dated December 22, 2022 and lodged on December 28, 2022 pursuant to articles 159 and 163(5) of the Constitution, sections 15 and 15B of the Supreme Court Act and rule 33 of the Supreme Court Rules, seeking: an order reviewing and setting aside the ruling of the Court of Appeal (Okwengu, Ali-Aroni & Mativo, JJA) dated December 16, 2022 denying certification, and in its place to issue an order allowing the applicants' notice of motion dated May 13, 2022 in Nairobi Civil Application No E158 of 2022; or in the alternative, to issue a certificate under article 163(4)(b) of the Constitution on the basis that the intended appeal against the Judgment of the Court of Appeal (Nambuye, Karanja & Kiage, JJA) dated April 28, 2022 arising from Civil Appeal No 80 of 2017, Basil Criticos v National Bank of Kenya Limited & another, involves matters of general public importance;
2. Upon perusing the grounds on the face of the application, the applicants' supporting affidavit sworn by the 1<sup>st</sup> applicant's Director of Legal Services and Company Secretary, Samuel Mundia on December 22, 2022 and the applicants' written submissions dated and filed on January 3, 2023, wherein they contend that their intended appeal raises the following matters of general public importance: conflicting case law from the Court of Appeal as to whether a guarantor is discharged upon payment of the principal amount and is therefore not liable for interest, costs and other charges; the applicability of continuing guarantee clauses in Kenya extending obligations of a guarantor so long as the principal borrower has any obligation to the creditor under the charge; the valuation date of a charged property for purposes of exercising the statutory power of sale as to whether a chargee is bound by a valuation procured before exercising the right of sale or well after the fact in assessment of damages; and the Court of Appeal's residual jurisdiction to stay execution of its own orders;
3. Further, noting the applicants' submissions, wherein they argue that the Court of Appeal based its ruling on the issue of unconscionable bargain, which issue was neither pleaded nor framed by the court for determination; and that contrary to the appellate court's holding, the date of valuation prior to the exercise of the statutory power of sale, is a matter of law provided for under the Land Act No 6 of 2012 and the Auctioneers Act cap 256 of the Laws of Kenya, and not an evidentiary matter specific to the parties involved. Furthermore, that the issues in the certification application directly and substantially affect all players in the financial sector hence the Court of Appeal's decision potentially exposes every financial institution to the risk of their facilities being unsecured or under secured;
4. Upon considering the respondent's replying affidavit, submissions and list of authorities all dated January 17, 2023 whereby he opposes the applicants' application for certification under article 163(4) (b), on inter alia that no matters of general public importance affecting the banking industry have been raised; the issue of continuing security is a new argument that was neither contested, pleaded nor determined by the Court of Appeal; the applicants have not shown that there are inconsistencies in the appellate court's jurisprudence relating to applicability of continuing guarantee clauses; and lastly, that the evidentiary issues raised concerning the Court of Appeal's reliance on the respondent's valuation report, are specific to the parties and cannot be the basis for invoking the jurisdiction of this Court as a matter of general public importance;
5. Further, noting the respondent's submission, wherein he urges that the Court of Appeal, being a court of equity and bound by the national values embodied in article 10 of the Constitution, was justified in declaring the interest visited upon the respondent by the applicant as unconscionable and usurious; and that the doctrine of in duplum applies by virtue of section 44 of the Banking Act prohibiting banks from recovering interest in excess of the principal amount; further, that the applicants were in contempt of court by selling the charged property in disregard of two injunctive orders, thus are undeserving of the certification orders sought; and finally, that the applicants' allegation that



enforcement of the damages granted by the Court of Appeal will paralyze the 1<sup>st</sup> applicant's operations by eroding its core capital, is not a matter of general public importance and is unsubstantiated;

6. Noting that the Court of Appeal found that the certification application could not be sustained on the basis of the principles settled in *Malcolm Bell v Hon. Daniel Toroitich arap Moi and another*, SC Application No 1 of 2013 [2013] eKLR; that the court based its decision on unconscionable contract as opposed to interpretation of the guarantee document; and that the issue of continuing guarantee clauses was neither pleaded nor determined;

7. Cognisant of the fact that this court has already established the basis upon which an intended appeal may be certified as one involving a matter of general public importance in *Hermanus Phillipus Steyn v Giovanni Gncchi Ruscone*, SC Application No 4 of 2012 [2013] eKLR; to the effect that:

“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...”

8. We now opine as follows:

The notice of motion lacks merit as the applicants have not highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling. Neither have the applicants raised any substantial question of law, the determination of which, would have a significant bearing on the public interest.

9. Consequently, for the reasons aforesaid, we make the following orders:

- i. The notice of motion dated December 22, 2022 and filed on December 28, 2022, is hereby dismissed;
- ii. The costs of this application shall be borne by the applicants.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2023.**

.....  
**P. M. MWILU**

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

.....  
**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**



.....  
**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**

**SUPREME COURT OF KENYA**

