REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal DCJ, Tunoi, Ibrahim, Wanjala & Njoki, SCJJ)

CIVIL APPLICATION NO. 39 OF 2014

BETWEEN

DHANJAL INVESTMENTS LIMITED …….. APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED ……..…… RESPONDENT

(Being an application for certification and grant of leave for the applicant to lodge an appeal from the decision of the Court of Appeal sitting at Malindi (Githinji, Makhandia & Ouko, JJA), delivered on 6th December, 2013, leave having been refused by the Court of Appeal (Okwengu, Makhandia & Sichale, JJA) in a Ruling delivered on 22nd May, 2014 in Civil Application No. 36 of 2014)

RULING

A. INTRODUCTION

[1] Coming up before us is an Originating Motion dated 8th October, 2014 and filed on 10th October, 2014, seeking certification of the intended appeal, pursuant to Article 163(4)(b) of the Constitution. The applicant is seeking a review of the Court of Appeal Ruling *(Okwengu, Makhandia & Sichale, JJA)* dated 22nd May, 2014, which declined to certify the intended appeal as one that involves matters of general public importance.

B. BACKGROUND

[2] The applicant had taken out an insurance policy issued by the respondent, whereby the respondent was bound to indemnify the applicant in respect of certain risks. The policy provided that in case of a dispute as to the liability of the respondent, or the amount of its liability, such dispute would be resolved by means of arbitration. Referral to arbitration was to be done within twelve months of the date of the dispute arising. However, the policy did not specify the procedure to be followed by the applicant, in the event the applicant wished to refer a dispute to arbitration.

[3] On the night of 3rd to 4th May, 2000, one of the applicant's camps fell victim to a robbery invasion, with tourists who were guests at the camp being attacked, assaulted, and deprived of their property and money. When the applicant notified the respondent of the incident, the respondent made a disclaimer; and this led to a dispute.

[4] The respondent, however, declined to initiate the arbitration process, by appointing an arbitrator as required by the insurance policy. This prompted the applicant to appoint an arbitrator. Despite the respondent being notified of the appointment of the arbitrator, it declined to participate in the subsequent arbitration proceedings. The arbitration proceedings commenced and an award was made, being published on 8thDecember, 2008, whereunder the arbitrator found the respondent liable. This award aggrieved the respondent, who resorted to litigation.

a. *High Court Proceedings*

[5] The respondent filed a Chamber Summons application dated 4th March, 2009 seeking *inter alia*, that the arbitral award dated 8th December, 2008 be set aside, and the accompanying proceedings declared null and void.

[6] The High Court *(Ojwang, J* as he then was) heard the application and, in a Ruling delivered on 16th October, 2009, dismissed it, holding that the respondent (applicant herein) was entitled to appoint an arbitrator just like the applicant (respondent herein), in the event of refusal or procrastination by the applicant. The learned Judge relied on what he perceived as a residual opening for such action by the respondent herein: a clause II of the Insurance Policy. This Ruling aggrieved the respondent further.

b. *Court of Appeal Proceedings*

[7] The respondent appealed to the Court of Appeal. The Court of Appeal (*Githinji, Makhandia & Ouko, JJA*), in a Judgement dated 6th December, 2013, overruled the High Court, holding that there was no basis for the applicant to appoint an arbitrator unilaterally, as the insurance policy reserved that role to the respondent, and that the learned Judge of the High Court erred in giving a residual opening for the applicant to appoint an arbitrator, contrary to established practice that Courts ought not rewrite the terms of a contract for the contracting parties.

c. *Certification Application before the Court of Appeal*

[8] The Court of Appeal Judgement reversing the High Court decision aggrieved the applicant herein. In an application dated 18th December, 2013, the applicant moved the Court of Appeal, seeking leave to appeal against that decision, to the Supreme Court; the applicant contended that its intended appeal involved matters of general public importance.

[9] In a Ruling dated 22nd May, 2014 the Court of Appeal (*Okwengu, Makhandia & Sichale, JJA*) dismissed the application, thus denying certification. The Court of Appeal held that there was nothing special that the appeal would lay before the Supreme Court, of such weight as to require its further input, and the determination of which would have a significant bearing on the interest of the public.

[10] It is this Ruling by the Court of Appeal, denying certification, that the applicant brings before this Court for review.

d. *Is there a Question of General Public Importance"*

[11] In its application, the applicant sets out the claims it intends to canvass in this Court, in the intended appeal, if leave is granted:

a. Is it open to an insurer, such as the respondent, who in its Public Liability Insurance Policy, sets out a 12-month bar to the making of a reference of all disputes arising out of the contract to Arbitration, to "ignore" arbitral proceedings that are initiated by its insured, and in the process treat all correspondence to it from the arbitrator as of no consequence"

b. The learned Judge in the High Court, (Ojwang, J as he then was*) held in the Ruling delivered on 16th October, 2009, that the conduct of the respondent-insurer undermines and /or erodes the purposes for which Arbitrations are held, as alternative modes of dispute resolution, and hence, the Policy behind the law on Arbitrations cannot condone such conduct: Do the aforesaid conclusions embody a correct juridical statement of the law, in relation to the attitude and conduct of parties to arbitrations generally"*

c. Should an insured, faced with a clause in an Insurance Policy such as that which the applicant had to deal with, i.e. Clause 11 (requiring an insured to make a reference to Arbitration without providing for the procedure to be followed), be left without a legal remedy, for no fault at all on its part, other than the reason that the insurer has ignored all arbitral proceedings initiated by the insured"

d. The applicant filed in the Court of Appeal the grounds for affirming the decision of the High Court. These grounds were never considered or dismissed. They are still live. What is the impact of this state of affairs on the proper administration of justice"

e. The Court of Appeal, in its determination of the appeal then before it, was persuaded by the provisions of Section 12 of the Arbitration Act, as amended in 2010, by Act. No. 11 of 2009 published in L.N. number 48 of 8th April, 2010, and not the initial Section 12, as originally enacted in the 1995 Act. In the proper administration of justice, was it open to the Court to be persuaded by arguments based on an enactment that was not in force at the time when the cause of action arose"

f. Is this a proper case for this Court to invoke its powers conferred by Section 27 of the Supreme Court Act, 2011, and direct the High Court to proceed to enforce the applicant's award filed (in the High Court) on the 13th January, 2009"

g. Finally, should certification and leave to appeal to the Supreme Court be granted to the applicant"

C. PARTIES' SUBMISSIONS

a. *Applicant*

[12] The application was heard before this Court on 9th December, 2015. The applicant was represented by learned counsel Mr. Buti, who relied on the applicant's written submissions and authorities filed on 16th February, 2015. The applicant also filed a supplementary list of authorities on 30th November, 2015.

[13] It was submitted that the application meets the principles of certification set out by this Court in ***Hermanus Phillipus Steyn v. Giovanni G. Ruscone***, Supreme Court application No. 4 of 2012, [2013] eKLR. On the question whether the issue in this case transcends the circumstances of this case, it was submitted that it does. It was submitted that the Insurance Policy in issue describes itself as "*A public Liability Insurance Policy*", as opposed to a "*Private or personal Insurance Cover*". The Policy, it was submitted, is issued in a '*standard form';* hence it is issued to whoever takes out a Public Liability

Insurance Cover from the respondent.

[14] The applicant urged that the contract does not determine rights as between insurer and insured only. It is a policy that directly affects the rights of the public who may be involved in the situations covered by the policy. To buttress the argument on the public dimension of the insurance relationship, the applicant cited part of the Court of Appeal Judgement:

"In the meantime, nine of the affected tourists brought proceedings for the recovery of damages against the respondent in the U.K. being claim No. 6L590055, in the High Court of Justice, Queens Bench Division, in Leeds. When it became apparent to the respondent that the appellant would not initiate the process of appointing an arbitrator as required by the policy, they proceeded to appoint Mulwa Nduya as the arbitrator and notified the appellant accordingly. The Appellant still did not respond."

[15] The above statement by the Appellate Court, in the applicant's submission, underlined the public nature and interest attendant upon this litigation. The subject of the suit revolved around the subject of Public Liability Insurance Policy, which extends even beyond Kenya's borders, involving foreign and local tourists. The policy is for the protection of members of the public, as much as for the protection of the insured; it is significant in this respect that members of the public are neither party to the contract of insurance, nor are they informed of the contents thereof.

[16] The applicant perceived a clear element of public interest in the section of the policy document entitled: *"Public Liability Clauses Attaching to and Forming Part of the Policy…."* It was submitted that this public aspect of the policy has a wide coverage of common situations: *fire and explosion; loading and unloading; pedal cycle clause ¾* and that these cover the applicant and any other person in the service of the applicant, who may be injured, or die, while in the service of the applicant as the insured; *car-park extension work; social and sports activities; employees personal effects; guests and visitors* (which clause would cover accidental direct damage to property of the insured's guests); *railway sidings; machinery/plant appertaining to the business; and temporary visits overseas*.

[17] It was submitted that the applications and effects of this Public Liability Insurance Policy are not limited to events occurring in Kenya, or to persons resident in Kenya, as its operation expressly includes events undertaken, and risks occurring anywhere in the world, so long as they are in connection with the business of the applicant.

[18] The applicant urged that the Court of Appeal erred in not applying its mind to decide the essence of something 'public'; for the policy describes itself as *a public policy*, and a meaning should have been attached to that expression.

[19] It was the applicant's case that the matter for determination was a substantial one, a determination of which would have a significant bearing on the public interest; and that such questions had arisen in the course of litigation and were in every respect proper for a final determination before the Supreme Court.

[20] Learned counsel for the applicant urged that the relevant questions had already come up before the Superior Courts: the appointment of the arbitrator had been followed by correspondence between the parties; the High Court found that the respondent had ignored the correspondence. The words of the learned Judge in the High Court may be cited here:

"All that will be required is for the appointment of the Arbitrator to be notified to the insurer and

the insurer given an opportunity to express agreement or disagreement, and in this case the insurer chose to remain mute. Since the arbitration clauses are designed to serve an important dispute settlement purpose, the insurer's silence on the question will only lead to a vacuum in the dispute settlement process, an end which the policy behind the law cannot be taken to allow, and consequently, I hold that the decision taken by the claimant-respondent to appoint an arbitrator was perfectly within the law. It follows that when the respondent/applicant chose to ignore communications from the arbitrator as the arbitrator conducted his task, the law was not on the insurer's side."

[21] The applicant urged that such a finding by the High Court was the same as that reached by the Court of Appeal in its Judgment, thus:

"When it became apparent to the respondent that the appellant would not initiate the process of appointing an arbitrator as required by the policy, they proceeded to appoint Mulwa Nduya Advocates as the arbitrator and notified the appellant accordingly. The appellant still did not respond."

[22] The applicant submitted that this common finding by the two superior Courts is the juridical basis upon which the whole litigation stands or falls, as it raises the following question for determination: *is it in order for the insurer to ignore arbitral proceedings initiated in accordance with the provisions of its own Standard Form Policy issued to the insuring public"*

[23] Learned counsel reiterated the terms of the High Court Judgement: s*ince arbitration clauses are designed to serve an important dispute-settlement purpose, the insurer's silence on the question will only lead to a vacuum in the dispute settlement process; an end which the Policy behind the law cannot be taken to allow*.

[24] Counsel submitted that matters in this case, after being fully canvassed in the High Court, featured yet again in the Court of Appeal, which made a reversal; hence the need to canvass the same juridical issues, in so far as they relate to arbitrations generally, in the intended petition of appeal before this Court.

[25] The applicant also argued its case on the basis of the ***Hermanus*** principles, from this Court: *issues of law of repeated occurrence in the general course of litigation; 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; and questions bearing on the proper conduct of the administration of justice¾as issues of general public importance.* It was submitted that the issues in this matter, based on the juridical standing of arbitrations, are in their very nature, not confined to the present applicant, or to the specific terms of the appeal; rather, the issues affect arbitrators, as well as those directly engaged in the subjects of such arbitrations¾as claimants or respondents.

[26] As regards the principle of proper conduct of the administration of justice, counsel urged that, before the Court of Appeal, *Kenindia Assurance Company Limited* (the respondent) had specified that Section 12 of the Arbitration Act, 1995 should be applied, in setting aside the award as pronounced by the arbitrator. However, the applicant submitted that at the time the proceedings commenced in July 2008, Section 12 of that Act, as amended, was not in existence. The Court of Appeal, thus, relied on a law that was not in existence; the amendment was introduced through *Act No. 11 of 2010,* published in *Legal Notice No. 48* of *8th April, 2010,* with a commencement date of *15th April, 2010*. Such an application of the law, counsel submitted, amounts to improper administration of justice.

[27] Finally it was submitted that while, in the Court of Appeal, the applicant did file a "Notice of Grounds for Affirming the Decision of the High Court", pursuant to Rule 94(1) of the Court of Appeal Rules, and indeed made submissions thereupon, the Appellate Court did not consider any of the matters raised; did not make any determination on any of the grounds; and did not give any reason for its course of action, or inaction. It was urged, in the circumstances, that the Appellate Court did not afford the applicant a fair hearing¾contrary to the tenets of natural justice, and contrary to the terms of Articles 25(c), 50, 259 and Chapters 4 and 10 of the Constitution. Such a situation, it was submitted, raises questions bearing on the proper conduct of the administration of justice.

[28] On the foregoing grounds, it was the applicant's submission that the intended appeal before this Court has a bearing on matters of general public importance, and leave should be granted for it to file the intended appeal.

(b) Respondent

[29] The respondent filed written submissions and a list of authorities on 4th March, 2015, and a supplementary list of authorities on 18th April, 2015. It contested the application as having been brought pursuant to Rule 24(4) of the Supreme Court Rules; that Rule is only procedural. It was urged that the application ought to have come under Rule 24(2).

[30] Secondly, it was submitted that the application is being brought as an appeal, whereas the decision of the Court of Appeal was delivered on 22nd May, 2014: the effect being that this matter, having been filed on 10th October, 2014, was out of time, and the applicant had not sought and obtained leave to bring a belated application. The respondent, relying upon ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*** [2014] eKLR**,** urged that an application such as this should be filed within 14 days of the Appellate Court decision.

[31] The respondent submitted that the Court of Appeal had considered all the decisions of the Supreme Court on the principles of certification, namely, ***Hermanus*** and ***Malcolm Bell v. Daniel Torotich Arap Moi & Another*** [2013] eKLR in relation to the principles of certification, and reached a proper finding that this matter did not meet the threshold. It was urged that this was not a fit case for certification, as only cardinal issues of law should come up to the Supreme Court, as had been held in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR.

[32] On the basis of the principle in the ***Malcolm Bell*** case, that the relevant questions must have arisen in the Court or Courts below and must have been the subject of judicial determination, for them to be regarded as *"matter of general public importance meriting the Supreme Court's appellate jurisdiction",* it was submitted that the legal issues considered and determined by the High Court and the Court of Appeal were the interpretation of conditions 10 and 11 of the Insurance Policy, and the application of Section 12 of the Arbitration Act, 1995 (repealed) to the facts. It was submitted that certification should not be granted, as the applicant had founded its case upon a tangential question¾the description of the document as a public liability policy.

[33] The respondent's position was that certification entails a sorting process, and that mere inclusion of the term 'public' does not qualify a matter as one of "general public importance". It was urged that the insurance policy had remained in all respect, a private contract for indemnity.

[34] It was now stated that the respondent did not participate in the arbitration proceedings because in its opinion, the process was void, and its participation could have amounted to validating the process. It was urged that the issue had been decided on the basis of the Arbitration Act, which was later repealed,

and so has no significance for future cases.

[35] Learned counsel urged that the Appellate Court had no basis for considering the grounds formulated by the applicant herein, as that Court had already affirmed the invalidity of the arbitration proceedings and the appointment of an arbitrator.

(c) Applicant in Reply

[36] The applicant submitted that Rule 24(4) has no application to its case, as the Court of Appeal did not certify its matter as involving matters of general public importance. It was further urged that Rule 24(4) imposes no time-limit; and so it was of no moment that the Appellate Court's Order was granted on 1st October, 2014 and the instant application was filed on 10th October, 2014¾and there was no breach of the time-limit prescribed in Rule 24(2).

D. **ANALYSIS AND DETERMINATION**

[37] From the foregoing account of pleadings and submissions, two issues emerge for determination, namely:

a. *whether this application is fatally defective for being filed out of time;* and
b. *whether the Court of Appeal erred in declining to certify this matter as one of general public importance.*

a. *Filing Time*

[38] It is the respondent's submission that this application is defective, as it was filed pursuant to Rule 24(4) of the Supreme Court Rules ¾ a procedural rule and not a substantive rule. So, it is urged, the application does not invoke this Court's review jurisdiction. It is urged further that, by citing Section 15 of the Supreme Court Act, which provides that appeals to the Supreme Court shall be by leave of the Court, the applicant has erred, as it has brought its application in the format of a main appeal, yet it has not been granted leave to make such an appeal. It was also urged that Rule 24(2) provides that an application for review should be filed within 14 days of the decision of the Court of Appeal granting certification. The applicant submitted that in its case, Rule 24(2) does not apply, since the Court of Appeal *did not certify* its matter.

[39] The contest to the applicant citing procedural laws, instead of substantive provisions that invoke a Court's jurisdiction, is not coming up for the first time. In the Court of Appeal, during the application for certification, a similar question came up, and that Court, *suo motu,* thus remarked:

"Before we go further, we note that the jurisdiction of the Supreme Court in respect of the Appeals emanating from this Court is anchored on Article 163(4) of the Constitution which provides *inter alia …*

"It is however instructive to note that the applicant has not cited the said provision in its Notice of Motion but instead pegged it on Rules 42 and 43 of the Court of Appeal Rules which are merely procedural rules regarding forms of applications to this Court and supporting documents which *per se****…therefore do not confer jurisdiction [upon] to this Court to entertain the application. In the days gone by when this Court was deemed to sacrifice substantive justice at the altar of technicality, such obvious omission would have attracted the wrath of the Court with the consequence that the application would have been deemed fatally defective or incompetent,***

[and] liable to be struck out. Thank heavens that we are no longer steeped in that era. We therefore deem that indeed the application is pegged on Article 163(4)(b) of the Constitution."

[40] Hence, the applicant's motion before the Court of Appeal was saved, and heard on its substance. It appears that the applicant has made the same mistake before this Court, by citing Rule 24(4) of the Supreme Court Rules. The respondent, on that account, urges that the application be dismissed.

[41] Rule 24(4) provides:

"An application under this rule shall be by originating motion in Form K set out in the First Schedule."

Clearly, this is a procedural rule, prescribing the form in which an application for grant of certification under Rule 24 should be packaged. It does not invoke the jurisdiction of this Court.

[42] In a similar case, ***Hermanus,*** in which the applicant had not cited the relevant provision of the law, this Court had thus observed (at paras. 23 and 24):

"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:*

'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.*

"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)."*

[43] Hence in the ***Hermanus*** Case, the failure by the applicant to cite Article 163(5) was cured by a pragmatic and conjunctive reading of Article 163(4)(b), so as to invoke Article 163(5) which grants the review jurisdiction.

[44] Consequently, we are in agreement with the respondent that Rule 24(4) is procedural, and does not confer any jurisdiction upon this Court. But as we have noted, it is significant that the applicant's motion is brought "*pursuant to Rule 24(4) of the Supreme Court Rules, 2012, Section 15 of the Supreme Court Act, 2011 and Article 163(4)(b) of the Constitution of Kenya, 2010*". Thus, even though the applicant was unable to invoke the Court's jurisdiction by citing Rule 24(4), it certainly did so when it cited Section 15 of the Act, and Article 163(4)(b) of the Constitution. Just as in ***Hermanus,*** we will pragmatically interpret Article 163(4)(b), so as to invoke Article 163(5).

[45] We are not in agreement with the respondent, that by citing Section 15 of the Act, the applicant had intended an appeal from the Appellate Court decision denying certification, instead of seeking a review. Section 15(1) provides:

"Appeals to the Supreme Court shall be heard only with the leave of the Court."

[46] The said Section [15(1)] should be read as amplifying the terms of Article 163(4)(b) of the Constitution as regards certification: an intended appeal is to be one involving "matters of general public importance." It is precisely such a certification, that amounts to a grant of leave to appeal to the Supreme Court. The Court has clarified that where such leave is denied in the Appellate Court, a review can be done at the Supreme Court.

[47] The respondent raises yet another pertinent issue. It submits that pursuant to Rule 24(2), an application for review should be filed within *14 days* of the Court of Appeal decision. The said Rule thus provides:

"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 within fourteen days."

[48] Is it the case that this Rule does not apply to the applicant, since the Court of Appeal did not "certify" its case" We have already held that, in the spirit of due access to justice for all, in the terms of the Constitution, the "review" contemplated in Article 163(5) of the Constitution, in cases of certification, applies equally to cases where leave has been granted, or denied by the Court of Appeal. In ***Hermanus***, we thus held (paras. 32 and 33):

"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

a. *promotes its purposes, values and principles;*
b. *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
c. *permits the development of the law; and*
d. *contributes to good governance'*

"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"* [emphasis supplied].

[49] The Ruling of the Court of Appeal was delivered on 22nd May, 2014. The Order therein was extracted on 1st October, 2014. This application was filed on 10th October, 2014. The relevant question is: was it filed out of time"

[50] We note that the ***Hassan Nyanje*** *Case*, upon which the respondent relied, is in departure from the instant one, as this is the first time we are asked to consider the applicability of Rule 24(2). In ***Hassan Nyanje***, this Court was faced with a question *whether it could entertain an application for certification, even as a similar one was pending before the Court of Appeal;* the question was not the applicability, or the interpretation of Rule 24(2). In citing Rule 24 in that decision, the Court was essentially concerned with sub-Rule 24(1), and not sub-Rule 24(2) ¾ the real issue being the proper forum for a first filing of an application seeking certification. Thus, the following passage in that decision is relevant (para. 22):

> *"Further Rule 24 of the Supreme Court Rules, 2012 provides:*
>
> *(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*** *within fourteen days"* [emphasis supplied].

[51] We note that in the ***Hassan Nyanje*** case, the Court had not considered the implication of the fourteen-day period, provided for in Rule 24(2). Is the fourteen-day rule mandatory"

[52] The Supreme Court Rules are made pursuant to Article 163(8) of the Constitution, and Section 31 of the Supreme Court Act. The 2012 version of the Supreme Court Rules have recently been amended *(The Supreme Court (Amendment) Rules, 2016)*; but, Rule 24(2) retains its earlier content.

[53] While Rule 53 empowers this Court to extend time limited by these Rules, this is a power exercised judiciously, and on a case-by-case basis. A party has to make a proper case for any extension to be granted. Hence the need for an application for extension of time; and this may have led to the respondent's argument that the applicant had not obtained leave to file its application out of time.

[54] The application of judicial discretion to waive certain required forms in the conduct of proceedings, was a question before this Court in ***Telcom Kenya Limited v. John Ochanda and 996 Others*** [2015] eKLR, and the Court thus remarked (paras. 18 and 19):

> ***"In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such 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….***
>
> ***"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…."***

[55] Consequently, while this Court would not underemphasize the importance of adherence to its Rules, we are of the opinion that this is a clear case where the substantive justice of the case requires a relative lightening-up of the prescription that the application for review should be filed within fourteen

days.

b. *Matter of General Public-Importance: Did the Court of Appeal Err"*

[56] The principles to guide the certification of a matter as one "of general public importance" are now clearly laid out in the ***Hermanus*** and ***Malcolm Bell*** cases. More recently, this Court has added a further limb to these principles, in ***Town Council of Awendo v. Nelson Oduor Onyango & 13 Others,*** Misc. Application no. 49 of 2014, [2015] eKLR, in the following terms (para. 35):

"From the content of paragraphs 32 and 34, it emerges that while this Court did, in the ***Hermanus Phillipus Steyn*** and ***Malcolm Bell*** *cases, set out an elaborate set of criteria for ascertaining 'matters of general public importance' for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated.* ***Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of 'matters of general public importance'."***

[57] The applicant's submission is that its application has met such a certification threshold. The respondent, by contrast, argues that the Court of Appeal did not err, and had indeed considered the laid-down principles, and found that this case fell short of the set requirements. The applicant submitted that the Insurance Policy is contained in a *Standard Form Contract,* that is issued to all individuals seeking insurance; and hence the issue is not peculiar to this particular case. This argument touches on the question whether the current incident points to just one person, or may recur later. The respondent, by contrast, submits that the mere description of the policy document as one of "Public Liability" does not make it "public".

[58] The Court of Appeal in denying certification, thus remarked:

"Finally, the applicant in both its written and oral submissions seems to suggest that the mere description of the policy as a public liability policy automatically warrants certification because it affects members of the public. But as correctly pointed out by the respondent, by the applicant's logic all claims for personal injuries arising out of accident involving public service vehicles would automatically be certified for Supreme Court's attention, as would all matters involving public utilities, roads, schools, institutions, parks, procurement, public servants, companies etc.¾ as invariably all these examples affect thousands of people. To uphold the applicant's position would invariably make nonsense of the need for certification in the first place, bogging down the Supreme Court to trifling matters and undermining its constitutional role and mandate".

[59] Our position, as stated earlier, is that an application for certification should always be decided on a case-to-case basis, as guided by its peculiar facts. The common denominator is only the principles for certification, to which the peculiar facts of each case are subjected. The overall effect of the Appellate Court's position, it appears, is that all those accidents involving the named entities and persons, could not possibly be certified for appeal before the Supreme Court. We are guided on this question, however, by an operational yardstick: the point of law or fact that is being presented to the Court for consideration, and its special exigencies. A private contract between parties may bring to the fore a point of law that, upon its evaluation, may be found to entail such jurisprudential perspectives as will apply to other cases¾thus making it a matter of general public importance.

[60] In this Court's perception, while the Insurance Policy described as a Public Liability Policy was

taken out by the individual applicant, this is not a one-off scenario, limited to the parties to this case. Apart from the design of standard form contracts through which insuring agencies attract commercial transactions, it properly falls to this Court to deliberate upon and to clarify the legal dimensions of arbitration, as a recourse in insurance business.

[61] This Court should pronounce itself on 'public liability' as a concept of the insurance business, even when only private individuals are involved. This is a question that can only be properly answered upon hearing the substantive appeal, and upon an evaluation of the policy documents ¾a venture that cannot be conclusively undertaken in an application seeking certification, like this one.

[62] This Court is also faced with the question: what is the remedy for breach of a contract anchored on a Standard Form procedure, that provides for an arbitration process in case of a dispute, but does not set out the steps for the process" We would observe that arbitration as a mechanism of dispute resolution, is in line with the Constitution, 2010 which provides for Alternative Dispute Resolution, in Article 159(2)(c), thus:

"Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted …"

In the promotion of alternative dispute resolution, such as by arbitration, this Court will be called to shed light on the remedy, in cases where such a process is lodged in the contract, but no procedure is conclusively laid out, and no remedy for breach is apparent.

[63] Lastly, there is an issue raised as regards the retrospective application of Section 12 of the Arbitration Act, 1995. The applicant framed this as a matter of general public importance bearing on administration of justice: the fact that in setting aside the High Court decision, the Court of Appeal relied on a provision of the law that was not yet in force at the time the cause of action arose. Retrospective application of a law is a valid issue calling for judicial determination, especially in the context of the promulgation of Kenya's Constitution of 2010, followed by the enactment or repeal of a plurality of statutes. Hence, such a question calls for a proper hearing and determination by the Supreme Court.

[64] We are cognisant of the fact that under Section 3 of the Supreme Court Act, this Court is called upon to develop a rich indigenous jurisprudence. To discharge this obligation, we should, in our perception, take on ultimate appellate hearings based on such vital issues as we have identified hereinabove.

E. **ORDERS**

[65] From the pleadings and submissions before this Court, it is clear to us that the intended appeal raises matters of general public importance. On that basis we will make Orders as follows:

a. ***The Court of Appeal decision of 22nd May, 2014 is set aside.***
b. ***The applicant's Originating Motion dated 8th October, 2014 is allowed.***
c. ***The applicant is hereby granted leave to file its appeal before this Court, in accordance with the Rules of the Supreme Court.***
d. **The costs of the application in the appeal.**

DATED and **DELIVERED** at **NAIROBI** this **10th Day** of **May, 2016.**

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K.H. RAWAL

DEPUTY CHIEF JUSTICE &

VICE-PRESIDENT

OF THE SUPREME COURT

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P. K. TUNOI

JUSTICE OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA