Case Number:	Motion 44 of 2014
Date Delivered:	29 Oct 2015
Case Class:	Civil
Court:	Supreme Court of Kenya
Case Action:	Ruling
Judge:	Philip Kiptoo Tunoi, Kalpana Hasmukhrai Rawal, Mohammed Khadhar Ibrahim, Smokin C Wanjala, Susanna Njoki Ndungu
Citation:	Kenya Bankers Association v Rose Florence Wanjiru & 2 others [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application disallowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Rawal DCJ and V-P, Tunoi, Ibrahim, Wanjala & Njoki Ndungu SCJJ)

MOTION NO. 44 OF 2014

-BETWEEN-

KENYA BANKERS ASSOCIATION……..……..……APPLICANT

-AND-

ROSE FLORENCE WANJIRU……..1ST RESPONDENT

STANDARD CHARTERED BANK KENYA LIMITED……..2ND RESPONDENT

CENTRAL BANK OF KENYA……..3RD RESPONDENT

(Application for certification of matters of general public importance)

RULING

A. **INTRODUCTION**

[1] The applicant comes before this Court by way of Originating Motion dated 21st November, 2014 seeking certification, as a "matter of general public importance" in respect of an intended appeal arising from the Judgment of the Court of Appeal delivered on 8th October, 2013 in Civil Appeal 216 of 2004.

[2] A similar application had been disallowed by the Court of Appeal *(P. M. [Mwilu, W. Ouko and P. O. Kiage JJA,]* in its Ruling dated 14th November, 2014. It is that denial of certification that led to the current application.

[3] The applicant states that if leave to appeal is granted, the Court will be called upon to determine the following issues:

i. whether the applicant, a trade union can be sued in a representative suit on behalf of all of its members;

ii. that the Judgment of the Court of Appeal did not determine ground 1(c) of the applicant's Notice of Cross-Appeal; that ground stated that the High Court Judge had erred in failing to strike out the plaint as against the applicant, on the basis that the applicant was being sued as a representative of 43 commercial banks without complying with Order 1 Rule 8 of the Civil Procedure Rules, 2010;

iii. whether in a representative suit, or proceedings under Order 1 Rule 8 of the Civil Procedure Rules, the Court should grant authority to defend, or permit a suit to continue in which one plaintiff is seeking

remedies on behalf of all past and present account holders;

iv. the principles which should guide the High Court in determining whether to permit a representative suit to continue under Order 1 Rule 8;

v. The principles which should guide the Court of Appeal in determining whether to refer a representative suit back to the High Court, to consider the propriety of allowing the suit to continue under Order 1 Rule 8.

B. **BACKGROUND**

[4] This matter was commenced by plaint, as HCCC 433 of 2008: the 1st respondent, suing on her own behalf and on behalf of others, at the High Court on 22nd July, 2003. In that suit, the central issue was the increase of the banking rates and other charges, to the detriment of the 1st respondent without the approval of the Finance Minister. The defendants in the plaint were:

i. Standard Chartered Bank (1st defendant);

ii. J.K. Wanyela, the Executive Director of the Kenya Bankers Association sued on behalf of Kenya Bankers Association (2nd defendant); and,

iii. Central Bank of Kenya (3rd defendant).

[5] The 1st respondent stated that she was suing on her *"own behalf and on behalf of, and representing, and for the benefit of all persons interested in, and being past and present account holders"* in the 1st defendant's bank and in all member banks in Kenya, of the applicant.

[6] Before the determination of the matter the applicant filed an application by way of chamber summons dated 20th August 2003, seeking the striking out of the suit, or the striking out of Kenya Bankers Association as a party to the suit, on the ground that the 1st respondent had no leave or authority to bring a representative suit, and that Kenya Bankers Association as a registered trade union, should sue or be sued in its own name, pursuant to Section 27 of the Trade Unions Act; and that the 1st respondent had no authority to sue J. K. Wanyela as a representative of the Kenya Bankers Association.

[7] The 1st respondent subsequently filed grounds of opposition, stating that the plaint was in order, was within the provisions of Order 1 Rule 8 of the Civil Procedure Rules and that no leave of the Court was required before instituting a representative suit, or suing J. K. Wanyela as the Executive Director of the applicant.

[8] The application dated 20th August, 2003 and the grounds of opposition were heard together by the

High Court *(Mwera J* as he then was*)*. The Ruling of the Court delivered on 6th November, 2003 was that the suit was bad as against the 1st 2nd and 3rd defendants, as it was not brought in accordance with Order 1 Rule 8 of the Civil Procedure Rules. It held that *"the plaintiff had an amorphous, uncertain and weird group of fellow depositors past, present or in the future."*

[9] The 1st respondent appealed against the Ruling of the High Court, and the applicant filed a Notice of Cross-Appeal in the same matter on 22nd January, 2012. Upon hearing all parties, the Court of Appeal *(Maraga, Kariuki and Mohammed JJA,)* delivered its Judgment on 8th October, 2013 dismissing the appeal. However, the Court held that the High Court Judge had erred by dismissing the entire suit.

[10] The applicant sought for certification by the Court of Appeal, for an intended appeal to this Court, as "a matter of general public importance". The Court of Appeal in its Ruling delivered on 14th November, 2014 denied certification, stating that: there is no doubt in the Civil Procedure Rules on the procedure for instituting a representative action; the question sought to be raised at the Supreme Court does not transcend the facts and circumstances of the case; and no suit can be defeated merely by reason of misjoinder of parties.

C. **THE APPLICANT'S SUBMISSIONS**

[11] Learned Senior Counsel, Kenneth Fraser for the applicant submits that the intended appeal raises issues of general public importance. He urges that in the matter at the High Court, there were three notable situations:

i. the plaintiff suing as representative of all account holders of the 2nd respondent as well as account holders in all member-banks of the applicant;

ii. Mr. Wanyela being sued as a representative of the applicant; and

iii. Mr. Wanyela being sued as a representative of all 43 commercial banks in Kenya, as members of the applicant.

[12] Counsel urges that they are at the moment, only concerned with the third element – Mr. Wanyela being sued as representing all 43 commercial banks in Kenya, as members of the applicant without complying with Order 1 Rule 8 of the Civil Procedure Rules, or Order 1 Rule 8 of the Civil Procedure Rules, 2010. Further, he submits that this issue of representation had been raised in their cross-appeal at the Court of Appeal, but it was not considered in the final decision. Counsel urges that this third aspect of representation was the basis of the application before the Court of Appeal and remains the sole basis for the current application.

[13] He submits that, by the depositions of the 1st respondent, almost 20 million customers of the applicant's member-banks are affected by this matter, and that this shows the gravity of the question before this Court.

[14] Counsel relies on the principles set out by this Court in ***Hermanus Phillipus Steyn v. Giovanni***

Gnecchi-Ruscone, S.C. Application No. 4 of 2012 and in ***Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another,*** S.C. Application No. 1 of 2013***.*** Over and above the five issues cited in the originating motion, as the issues of general public importance, counsel urges that the intended appeal has three aspects which qualify as matters of general public importance. These are:

i. a determination of whether the issue, proceedings against a trade union (such as Kenya Bankers Association), resulting in declarations and monetary judgments, against each and every member of that trade union, is one of "general public importance", on the ground that it applies to all trade unions in Kenya and their members.

ii. that "general public importance" arises from the fact that the intended appeal affects all the 43 commercial banks licensed to carry on business in Kenya, and all customers of those banks since 1994 - hence affecting the pecuniary interests, and legal rights and liabilities of a large proportion of the population in Kenya, as well as the entire banking industry. (Counsel cites ***R v. The Inhabitants of Bedfordshire*** [1855] S. C. 3 C. L. R. 442; 6 Cox, C. C. 565; 24 L. J. Q. B. 81; 1 Jur. N. S. 208; 3 W. R. 205, in which the Court held that "general public interest" means "that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected)."

iii. that a substantive ground of appeal was not addressed by the Court of Appeal, namely, that Mr. Wanyela was sued as representing all 43 members of the applicant without authority under Order 1 Rule 8 of the Civil Procedure Rules; Counsel urges that it was a matter of general public importance that justice should always be done, and should be seen to be done.

[15] Counsel further urges that the intended appeal falls within the parameters already set by this Court in ***Phillipus Steyn*** and ***Malcolm Bell*** in the following respects:

i. the issue in this matter transcends the circumstances of this particular case, and has a significant bearing on the public – it concerns the powers of the Court to allow and control representative actions;

ii. the point of law is a substantial one, the determination of which will have a significant bearing on the public interest. The interpretation of the old Order 1 Rule 8 of the Civil Procedure Rules on the authority to institute representative suits, will affect the pecuniary interests, and the rights and obligations of all customers of banks in Kenya since 1994, as well as of the banks;

iii. the questions for determination arose, both at the High Court and the Court of Appeal;

iv. the Court of Appeal did not resolve all matters turning on the technical complexity of the law hence there is a matter of general public importance;

v. the notice of motion has concisely set out the elements of general public importance as required;

vi. the intended appeal is solely based on points of law and not on disputed facts;

vii. the determination of issues in this case will have repeated occurrence in many cases to be filed in the future;

viii. the 1st respondent having indicated that she was suing on behalf of every person or customer who

has a bank account in Kenya puts the number of represented persons at approximately 20 million; and so the matter falls within the ninth principle set out in ***Malcolm Bell.***

ix. the questions of law are such as will continually engage the workings of the judicial organs, and have a bearing on the proper conduct of the administration of justice, hence making the intended appeal a matter of general public importance.

D. SUBMISSIONS OF THE 1ST RESPONDENT

[16] Mr. Waigwa, learned counsel for the 1st respondent relies on the replying affidavit of Rose Florence Wanjiru sworn on 10th march, 2015. He urges that the intended appeal raises no issues of general public importance, agreeing with the reasoning of the Court of Appeal in denying leave to appeal. He urges that this Court should decline to grant leave to appeal since no issues of general public importance are raised by the intended appeal. He submits that the issues do not transcend the facts of this particular case, have no bearing on the public interest; and are not cardinal issues of law or of jurisprudential moment deserving the further input of this Court. Counsel urges that the applicant's reason for the intended appeal is mere apprehension of miscarriage of justice, which is not a proper basis for granting certification.

[17] Counsel urges that the issue of *"authority to defend or permit to continue a suit,"* did not arise in the High Court or in the Court of Appeal and, as such was not subject to judicial determination in those Courts. Further, he urges, there is no uncertainty in the law (Order 1 Rule 8(1) of the old or new Civil Procedure Rules) which has arisen from contradictory precedents, that necessitates the intervention of the Supreme Court.

[18] Counsel further submits that the High Court and the Court of Appeal have the professional competence, and the proper safety designs to resolve all matters turning on the technical complexity of the law. He contends that the applicant has not demonstrated to this Court that the intended appeal falls within the ***Hermanus*** principles.

[19] Learned Counsel submits that "as a matter of principle and judicial policy, the appellate jurisdiction of the Supreme Court must not be invoked merely for the purposes of rectifying errors with regard to matters of settled law".

[20] Counsel further makes recourse to the rules of equity urging that "no one is entitled to the aid of a court of equity when that aid has become necessary through his or her own fault." He invokes the breach of s. 44 of the Banking Act, as the "fault" on the part of the Banks. He submits further that "equity does not relieve a person of the consequences of his/her own carelessness;", "a court of equity will not assist a person in extricating himself/herself from the circumstances that he or she has created;" and "equity will not grant relief from a self-created hardship".

[21] Counsel cites the following maxims of equity in support of his submissions:

a. he who seeks equity must do equity;

b. he who comes to equity must come with clean hands;

c. equity delights to do justice and not by halves;

d. equity will not suffer a wrong to be without a remedy;

e. Equity regards substance rather than form.

E. **ISSUES AND ANALYSIS**

[22] There is only one issue for determination in the application before us – *whether the intended appeal raises issues of general public importance.*

[23] Mr. Fraser urges that there are five issues of general public importance in the intended appeal which we have already set out in this Ruling. They all revolve around the institution of representative suits under Order 1 Rule 8 of the Civil Procedure Rules, 2010.

[24] In his submissions, counsel alludes to three other aspects of the concept of general public importance raised by the intended appeal – as set out in paragraph 14 above.

[25] Counsel for the 1st Respondent, on the other hand urges that the intended appeal does not meet the criterion set in ***Hermanus*** and in ***Malcolm Bell*** and hence certification should be denied. He urges further that the application is based on mere apprehension of miscarriage of justice, which is not a ground for consideration when granting certification.

[26] The Constitution entitles a party to lodge an appeal from the Court of Appeal to the Supreme Court, but upon certification by the Supreme Court, or the Court of Appeal, that a matter of general public importance is raised. Article 163 (4) provides that:

"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)."

[27] The guiding principles for determining whether a matter raises issues of general public importance, have been set out in the decisions of this Court in ***Hermanus*** and in ***Malcolm Bell.*** In ***Hermanus,*** this Court stated, (at paragraph 58), that:

"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".

[28] The applicant sought certification from the Court of Appeal, but this was denied in the Ruling delivered on 14th November, 2014. In that Ruling, the Appellate Court held that the issue of whether or not a party bringing a representative suit ought to seek and obtain the permission of the Court to do so is not a matter of general public importance.

[29] The Appellate Court observed that no submission had been made, attributing uncertainty to the state of the law, as regards the instituting of representative suits. Further, the Appellate Court held that the question as to whether the 1st respondent was required to obtain leave in order to bring a representative suit, is not a substantial one, and has no significant bearing on the general public.

[30] In ***Malcolm Bell*** , this Court held, (at paragraph 46,) that:

"It is now sufficiently clear that, as a matter of principle and of judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked save in accordance with the terms of the Constitution and the law, and ***not merely for the purpose of rectifying errors with regard to matters of settled law."***

[31] We agree with the Appellate Court that the issue whether or not a party instituting a representative suit had obtained the permission of the Court to do so, is not a matter of general public importance. Indeed, no doubts exist, and neither is there any uncertainty in relation to Order 1 Rule 8 of the repealed or current Civil Procedure Rules, as regards instituting a representative action.

[32] As this Court held in ***Malcolm Bell,*** its jurisdiction is not to be invoked merely for the purpose of rectifying errors with regard to matters of settled law. In that regard, though counsel for the applicant urges that the Appellate Court failed to take into consideration a ground raised in his client's cross-appeal, we are of the opinion that that issue by itself, is not a sufficient basis for invoking the jurisdiction of this Court, under Article 163(4)(b) of the Constitution.

[33] This Court's decision in ***Koinange Investments & Development Ltd. v. Robert Nelson Ngethe,*** Application No. 4 of 2013 [2014] eKLR, is also relevant in that respect. In that case, this Court was called upon to certify that a matter involved issues of general public importance on the ground that the issue in contestation related to the service of process on corporations. In denying certification, this Court held, (at paragraph 60), as follows:

"…Though service is an inescapable procedural aspect of every Court-oriented action, this matter is regulated by law. As submitted by counsel for the Applicant, service is an issue of law that affects a broad spectrum of individuals in commercial and domestic relations. As the law on service of process on corporations stands now, we see no *lacunae* ***calling for clarification, for the good of the public at large."***

[34] Similarly, in the matter currently before us, the applicant urges that the intended appeal is a matter of general public importance, since it relates to the issue of representation of the 43 commercial banks (members of Kenya Bankers Association) by the Executive Director of Kenya Bankers Association. We are convinced that the law on representative suits is well settled and there are no uncertainties in it, that demand clarification by this Court. We are persuaded that the Court of Appeal, acting within its

jurisdictional remit sufficiently pronounced itself on this issue.

[35] We are further guided by the decision of this Court in ***Peter Ngoge v. Honourable Francis Ole Kaparo and 5 Others,*** Petition No. 2 of 2012, in which the Court held thus (paragraphs 29-30):

"The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.

"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."

[36] We are in agreement with the Court of Appeal's finding, that the law on representative suits is explicit enough and there is no uncertainty and we therefore find no issue deserving the further input of this Court in that matter.

[37] We would add that the claim, by the applicant, that Mr. Wanyela was being sued as a representative of 43 commercial banks without complying with Order 1, Rule 8 of the Civil Procedure Rules, had not been raised in the High Court. It was raised for the first time in the cross-appeal of the applicant, in the Appellate Court. Learned Counsel, Mr. Fraser urges that the application before us is based on that very issue of representation of the 43 commercial banks by Mr. Wanyela.

[38] This Court has had the opportunity to pronounce itself on the issues that may be entertained on appeal before it, in exercise of its jurisdiction under Article 163(4)(b). In ***Hermanus,*** this Court signalled that for a matter to be certified as one of general public importance, the questions it raises *must have arisen in the Court or Courts below, and must have been the subject of judicial determination.*

[39] We find, therefore, that the issue the intended appeal will raise concerning Mr. Wanyela being sued as a representative of the 43 commercial banks which are member-banks of the Kenya Bankers Association, fails to meet the criteria set in ***Hermanus*** and ***Malcolm Bell.*** The issue had not been raised in the High Court and was therefore, not the subject of judicial determination at the High Court or the Court of Appeal. Its introduction at the Court of Appeal, through the cross-appeal, does not bring it within the compass of the ***Hermanus*** principles.

[40] On the grounds set out in detail in this Ruling, we find that the applicant has failed to demonstrate that the intended appeal entails "a matter of general public importance".

F. **ORDERS**

[41] Consequently we, make the following Orders:

1. ***The application by Originating Motion dated 21st November, 2014 for certification that the***

intended appeal involves matters of general public importance, is hereby disallowed.

2. ***The costs of this application are to be borne by the applicant.***

DATED and **DELIVERED** at **NAIROBI this 29th day of October , 2015.**

…… **……**

K.H. RAWAL **P.K. TUNOI**

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

VICE-PRESIDENT

OF THE SUPREME COURT

…… **……..……..**

M.K. IBRAHIM **S. C. WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true

copy of the original

REGISTRAR

SUPREME COURT OF KENYA