IN THE COURT OF APPEAL
AT NAIROBI

CORAM: GITHINJI, ONYANGO OTIENO & KOOME, JJ.A.

CIVIL APPLICATION NO. SUP 1 OF 2012

BETWEEN

SHABBIR ALI JUSAB ..... APPLICANT

AND

ANAAR OSMAN GAMRAI
THE HON. ATTORNEY GENERAL ..... RESPONDENTS

(An application for leave to file a notice of appeal and an appeal to the Supreme Court from the judgment of the Court of Appeal at Nairobi (O'Kubasu, Aganyanya & Waki, JJ.A) dated 10th June, 2011

in

CA NO. 188 OF 2009)
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RULING OF THE COURT

1. ***SHABBIR ALI JUSAB*** [the applicant] intends to file an appeal before the Supreme Court against the judgment of this Court, that is, Civil Appeal No. 188 of 2009 *[O'Kubasu, Aganyanya & Waki, JJ.A]* delivered on 10th June, 2011. The applicant has brought the notice of motion under the provisions of ***Article 163 (4) (1) the Constitution*** which provides:

> *"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). …"

2. Although a certificate can be sought either in the Supreme Court or from the Court of Appeal, the Supreme Court has held that it is a good practice to originate the application in the Court of Appeal. In a recent decision by the Supreme Court, the case of; **SUM *MODEL INDUSTRIES LTD VS INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION*, *SC CIVIL APPLICATION NO. 1 OF 2011***, the Court observed inter alia that:

> *"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 general 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."*

3. The brief background of the matters that gave rise to this application arose from the judgment of this Court which determined an appeal from the judgment (ruling) and order of the High Court of Kenya at Nairobi *[Rawal, J as she then was]* delivered on 17th March, 2009. The learned Judge, made the following orders:

> *"1. The minor known as Z.A.J., [ZAINUL ABIDEEN JUSAB], be forthwith returned to the High Court of Justice, Family Division, England as a ward of the said Honourable Court.*
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> *2. Order number 1 above be effected not later than 3 days from today.*
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> *3. The child Z.A.J., [ZAINUL ABIDEEN JUSAB], be accompanied by the 1st respondent Anaar Osman Gamrai and the applicant shall bear the costs of travel.*

4. *The passport of the child Z.A.J., [ZAINUL ABIDEEN JUSAB], in the custody of this Court be released to a representative of the 2nd respondent, the Kenyan Attorney General, jointly with a representative of the British High Commission in Nairobi, Kenya.*

5. *An officer of Foreign or Home Office from the United Kingdom Home Office shall receive the child and the 1st respondent at the London Airport and produce them before the High Court of Justice, Family Division, England, within 24 hours of their arrival.*

6. *The applicant, Shabbir Ali Jusab, shall provide adequate family living for the 1st respondent and the child.*

7. *No order as to costs.*

8. *The Honourable Court of Justice, Family Division, to hear and determine with utmost urgency the issues of custody of the child.*

9. *The order for the return of the child to the High Court of Justice, Family Division, be complied with, within 72 hours of today."*

4. Being aggrieved by those orders, the 1st respondent appealed before this Court. After carefully analyzing the law and facts this Court quashed the orders by Rawal, J and ordered that the matter before the Children's Court should proceed for hearing. The effect of that judgment, is what we are now called upon to determine whether it raises a matter of general public importance to justify its certification for an appeal before the Supreme Court.

5. In the notice of motion, the applicant seeks a certificate that the intended appeal to the Supreme Court of Kenya involves and raises points of law of general public importance regarding international child abduction necessitating adjudication before the Supreme Court, directions be issued on

the lodging of the requisite notice of appeal pursuant to ***rule 30 (3) of the Supreme Court Rules***. In the supporting affidavit, the applicant states that there is need to interpret the judgment in order to resolve the six issues which are framed as matters of general public importance. We have reproduced those issues elsewhere in this ruling.

6. Mr Kinyanjui, learned counsel for the applicant, made very lengthy submissions and cited several authorities, international and regional instruments that touch on the rights of the child as well as decided cases from Canada, UK, Ireland and South Africa, among others. He submitted that the child, the subject of these proceedings is a UK citizen; the issue of his residence and the rights of the child to associate with the applicant is an outstanding issue that should be determined by the Supreme Court, and that although it may appear as if this is a matter between two parents with competing interests over a minor child, it has far reaching implications on the wider society regarding the fundamental rights of a child.

7. He also raised the issue regarding the effect of an order to return a minor to the jurisdiction of his or her habitual residence that is issued by a court of competent jurisdiction by a contracting state party to a non contracting state party under the Hague Convention on child abduction as a matter of general public importance. He submitted further that, notwithstanding Kenya is not a state party to the Hague Convention on Child Abduction there are cross cutting principles that are embodied in the Children's Act and also in the Convention

and the Charter on the Rights and Welfare of the Child; that the place of international child abduction, the time taken to resolve such matters and the place of international law such as the Hague Convention on child abduction, should be clarified by the Supreme Court by setting a precedent which can be followed in other cases; that although the Court of Appeal observed that the Hague Convention on child abduction was not applicable, the Court at the same time said that the principles of international laws on the rights of the child were generally applicable and that the Supreme Court should clarify those principles.

8. Regarding what constitutes a matter of general public importance, Mr Kinyanjui made reference to several authorities, among them a case by the High Court of Ireland; ***DELLWAY LTD & OTHERS VS NATIONAL ASSET MANAGEMENT AGENCY, IRELAND & THE ATTORNEY GENERAL, [2010] IEHC 375***. This case which was cited by counsel for the 3rd respondent endeavoured to set out the guidelines on how a court should certify a matter for appeal before the Supreme Court. Some of the guidelines were:

> *"1. …*
> *2. …*
> *3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.*
> *4. …*
> *5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing."*

9. In the same case, the learned Judges relied on the judgment in ***ARKLOW HOLIDAYS V AN BORD PLEAN'ALA [2007] 4 IR 112***, which suggests that a number of tests must be met before a case is certified. The matters required to be established were noted as being:

> *"(i) there must be uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example **LANCEFORT V AN BORD PLEANA'LA [1998] 2 1.R. 511**;*
>
> *(ii) the importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case; see **KENNY V AN BORD PLEANA'LA (NO 2) [2001] 1 I.R. 704**. It is the case that every point of law arising in every case is a point of law of importance; see **FALLON V AN BORD PLEANA'LA [1992] 2 I.R. 380**."*

10. Mr Kinyanjui went on to submit that another matter of public concern that needs to be resolved from the judgment of this Court is the acknowledgement that the matter involved the fundamental rights of the child and the jurisdiction is vested in the High Court; that nonetheless, the Court went on to quash the order of the High Court and referred the matter to the Children's Court; the fate of the pending petition by the applicant was not determined: thus, persons involved in cross border marriages and issues arising on child abduction; how the Kenyan Courts should deal with an order for the return of minors that are issued by a contracting state party and hence a cross section of people would also wish to know which court has jurisdiction.

11. Counsel went on to distinguish the case of ***PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 6 OTHERS, SC NO. 2 OF 2012***, from this

application by stating that the intended appeal was not frivolous nor was it repeating the jurisdictions of other courts and tribunals but raises a matter of *"jurisprudential moment"* meant to determine the appropriate forum for the interpretation and the applicable principles in international and regional instruments vis-a-vis the best interests of the child; which is consistent with the objects of the ***Supreme Court Act, 2011***.

12. Ms Jan Mohamed, learned counsel for the 1st respondent, opposed the application. She relied on the replying affidavit of Anaar Osman Gamrai sworn on 20th April, 2012. She submitted that the application did not meet the threshold for the issuance of the certificate pursuant to ***Article 163 (4) and Section 3*** and the ***Supreme Court Act*** respectively. She contended that it was intended that the Supreme Court should deal with only cardinal issues of law of jurisprudential moment and that all the matters of law were settled by the judgment. While elaborating on this point, she made reference to the case of ***PROSECUTOR V WILLIAM SAMOEI RUTO & ANOTHER, ICC 01/09-01/11***, where the ICC held that:

> *"A matter that is appealable must raise a substantial issue of legal construction that arises directly from the confirmation hearing. The chamber was not convinced that the application by Ruto raised substantial issues and was disallowed."*

13. Jan Mohamed submitted further that a matter of general public importance must be interpreted narrowly; that the petition that was filed in the High Court on 4th March, 2009, was before the new Constitution was passed;

that the Court was satisfied that the new Constitution was not applicable as well as the Supreme Court Act which had not been enacted; that the learned judge of the High Court appreciated that the **Foreign Judgment Enforcement Act** was not applicable in the matter, and, therefore, the decision to have the minor returned to the UK was without basis and that Kenya is not a signatory to the **Hague Convention on Child Abduction**. She also submitted that the issue of whether the child was abducted or he came to Kenya with the consent of his father was never resolved; that is why the matter was referred back to the Children's Court for determination; that the Children's Court is a proper forum within the hierarchy of the courts set up to determine the issues in dispute; that the issue of the nationality of the child was never an issue; that it was common ground throughout that the child is a British citizen; although the best interest of the child is always of paramount consideration, that can be determined by the Children's Court and it is not a matter of *"jurisprudential moment"*. Regarding the application of ***Section 22 of the Children's Act***, she contended that the Chief Justice has not made rules to operationalise it.

14. Mrs Wambugu learned counsel for the 3rd respondent, associated herself with the submissions by Jan Mohamed and added that although the interlocutory application and the orders thereto in the High Court were quashed, the proceedings before the Children's Court are still pending and the matters being agitated as being matters of *"general public interest"* can be adjudicated in that court. Further, she submitted that the applicant has not

demonstrated the public interest nature of the issues in line with the guidelines set out in the case of ***Dellway, [supra]***. Finally, she submitted that the orders that were quashed also dealt with the fundamental rights of the child and urged the Court to dismiss the application.

15. It is very clear from the preamble of this Court's judgment, that our brethren Judges who heard the matter appreciated that the appeal before them was a complex matter that involved fundamental issues of law on the rights and welfare of the child; the efficacy of the **Children's Act, 2001**, and the applicability of the international conventions, particularly the United Nations Convention on the Rights of Children, African Charter on the Rights and Welfare of the Child and the civil aspects of International Child Abduction more popularly known as the **Hague Convention of 1980**. In our view, they also thoroughly recapitulated the facts and therefore, it is not necessary for us to repeat them save for the brief facts that elicit controversy.

16. The applicant is a UK citizen while the 1st respondent is a Kenyan citizen. The two got married on 26th April, 2003, at a ceremony held at the Bilah Mosque in Nairobi. After marriage, they settled in the UK and on 5th May, 2005, they were blessed with a son **Zainul Abideen Jusab** [ZAJ]. On 30th November, 2007, the 1st respondent travelled to Kenya with the child. The circumstances surrounding the trip, whether it was with the consent of the applicant or the 1st respondent abducted the child have not been resolved either by the Children's Court, the High Court or even the Court of Appeal. The

applicant's effort to have the child returned to the UK and the 1st respondent's intention to have the child remain in Kenya under her custody, gave rise to several suits.

17. We recognize that the ***Children's Act, 2001***, is a very progressive piece of legislation. It embodies the fundamental principles of the rights of the child and even before the Constitution of Kenya, 2010, was promulgated which subsequently entrenched those rights under ***Article 53 (2)*** the best interests of the child were recognized and are always of paramount consideration even under ***Section 4 (3) of the Children's Act, 2001***, which makes it obligatory for:

> *"All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of a child as the first and paramount considerations to the extent that this is consistent with adopting a course of action calculated to-*
>
> *(a) safeguard and promote the rights and welfare of the child;*
>
> *(b) conserve and promote the welfare of the child;*
>
> *(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."*

18. Under the Children's Act, the government is also obligated to ensure the realization of the rights of the child as well as a child's survival. The Children's Act also embodies the principles of the Convention on the rights of the Child and the African Charter on the Rights and Welfare of the Child**.** ***Section 22 of***

the Children's Act gives jurisdiction to the High Court to enforce the fundamental rights of the child which rights are spelt out in ***Sections 4 to 19 of the Act***. The Act has generally spelt out what matters should be handled by the High Court and by the Children's Court.

19. It is discernable from the records of this matter that there were two suits before the Children's Court in Nairobi and Kiambu, a petition in the High Court and proceedings before an English Family Court in the UK and finally an appeal before the Court of Appeal. The applicant has tabulated the several cases that have touched on the issue of the minor at paragraph 41 of his supporting affidavit as follows:

> *"41. I have waited for a long time since the superior court made its decision on 17th March, 2009 directing the return of the child of the marriage back to England. The issue of the return of the child has had a convoluted history of litigation that I wish to bring an end once and for all [without prejudice] and the following cases revolve around the subject child:*
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> > *Nairobi Children's Case No. 439 of 2008, HC Misc Civil Application NO. 15 & 19 of 2009, CA NAI Nos. 19, 75, 329 & 170 of 2009, CA NAI 75 of 2009, Kibera CR Case Nos. 1789 & 1842 of 2009, HC CR REV No. 18 of 2009, HC Misc CR Application No. 221 of 2009 and UK High Court of Justice Family Division Case."*

20. At this stage, we cannot tell with certainty the position of some of the matters, but what is clear is that the issue surrounding the custody of the child; whether the child was abducted or came to Kenya with the consent of the applicant; the forum for adjudication whether it is the High Court as the

applicant contends; whether there are serious fundamental issues on the rights of the child to be determined such as the right to nationality and the right to associate with both parents; whether they should be determined in the High Court or can appropriately be determined by the Children's Court; what the Kenyan courts should do with orders of return of minor children from contracting parties; are in our view, matters of general public importance as they touch on a child involving parties of different nationalities.

21. In a recent case, this Court by the same bench in; ***HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, CIVIL APPLICATION NO. SUP 4 OF 2012***, after reviewing the various tests applied in various jurisdictions of the commonwealth including Uganda, formulated some guiding principles on the exercise of jurisdiction to certify an appeal before the Supreme Court as a matter of general public importance. We reproduce one of the principles formulated thus:

> *"The applicant should first identify and formulate the matter of general public importance involved in the decision so that the court considering the application for certification can consider whether or not it was a matter of general public importance.* ***R V ASHDOWN [1974] 1 ALL ER 800.*** *The formulation should be contained in the body of the application or in the supporting affidavit as an illustration. In the matter of an advocate (supra), three legal points were formulated in the supporting affidavit and the first one was formulated thus:*
>
> > *"(a) On the question of degree of proof required to sustain a finding of professional misconduct against an advocate, and particularly whether proof which falls short*

> *of proof beyond reasonable doubt can suffice;"*

Equally, if the application for certification is allowed, the court formulates a certificate to be granted. Again, by way of illustration the certificate granted in ***R V Ashdown (supra),*** *was also as follows:*

> *"Certificate under section 1 (2) of the Administration of Justice Act, 1960, that a point of law of general public importance was involved in the question "whether there is any limitation in law to the power of the court to sentence a fine with a term of imprisonment in default (consecutive to a term of imprisonment inflicted in respect of the same offence)."*

22. The applicant has formulated both in the certificate of urgency and in the affidavit to support the certificate of urgency the matters which he considers to be of *"monumental public interest"* arising from the judgment of this Court thus:

> *"(i) The arising deprivation of the child subject of these proceedings of his nationality (UK), which in itself is a constitutional right;*
>
> *(ii) The choice of forum between two competing for the adjudication of the custody issues in international child abduction (in this case Kenya and the United Kingdom);*
>
> *(iii) The time line for the determination of international child abduction cases as presented by this case;*
>
> *(iv) The procedure and manner of determining international abduction cases in Kenya such as this where Kenya is as yet NOT a signatory to the Convention on the Civil Aspects of International Child Abduction (Hague Convention), 1980;*
>
> *(v) The import and application of international instruments and of the African Charter on the Rights and Welfare of the Child and the United*

Nations Convention on the Rights of the Child in International Child Abduction cases such as this;

(vi) The rights of the "victim" parent of international child abduction in cases such as this."

23. It is apparent from the impugned decision of this Court that the Court considered the application of the Hague Convention, or the spirit and principles thereunder; the principles of international instruments and customary international law vis-à-vis the provisions of the Children Act, 2001 and concluded:

> *"It (Children Act) says nothing about the Hague Convention or the principles and it follows therefore that abduction cases if they arise in the country under Section 13 (1) of the Act shall be dealt with on first principles."*

The Court also dealt with the procedure for return of an abducted child; the application of paramouncy of the best interest of a child stipulated by ***Section 4 (3) of the Children's Act*** and the jurisdiction of the local courts.

24. It is apparent that the applicant treats this as clear case of international child abduction. The respondent denies that the child was abducted. This Court found that the fact of abduction had not yet been proved and conclusively determined. The issue is still pending in the Children's Court. However, the issue of the alleged abduction seems to have been superseded by the order of the Family Divisions of the High Court of Justice of England dated 15th January, 2009. By the order, the child the subject matter of the intended appeal was made a ward of the English court and the mother [1st respondent] was ordered to return the child to England.

It follows that there is a subsisting conflict between the jurisdiction of the English courts and the Kenya courts and other attendant problems including the applicable law; nationality of the child, the best interest of the child, the rights of the respective parents and their parental responsibilities. So as a consequence of the orders of the English court and the impugned decision of this Court viewed against the orders of Rawal, J that the child be returned to England the matters framed by the applicant necessarily arises. We have summarized the import of those matters in paragraph 20 above.

25. Guided by the principles in ***Hermanus Phillipus Steyn [supra]***, which we adopt in this application, we have come to the conclusion that a matter of general public importance is involved in each of the six issues framed by the applicant.

We appreciate that the issues are not formulated in a manner which makes it easy for the Supreme Court to deal with them but they are nevertheless comprehensible. If we were to recast them, there is the danger of being accused of changing the nature and tenor of the intended appeal. It is preferable that a certificate should be issued in respect of the six matters as formulated by the applicant.

In the result, we allow the application. We grant a certificate under ***Article 163 (4) (b) of the Constitution*** that a matter of general public importance is involved in each of the six issues framed by the applicant in *nos. [i] – [vi]* at paragraph 22 above.

This being a family matter, the costs of this application shall be costs in the appeal.

Dated and delivered at Nairobi this 9th day of November, 2012.

E. M. GITHINJI

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR