

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: W. KARANJA, TUIYOTT & NYAMWEYA, JJ.A.)

CIVIL APPLICATION NO. NAI E123 OF 2023

BETWEEN

KABUITO CONTRACTORS LIMITED.....APPLICANT

AND

ATTORNEY GENERAL.....RESPONDENT

*(Being an application for Certification and leave to appeal to the
Supreme Court of Kenya from the Judgment of the Court of Appeal at
Nairobi (Okwengu, Warsame & Mativo, JJ. A.) dated 3rd March
2023*

in

***Civil Appeal No. 638 of 2019
HCCC NO. 284 of 2008)***

RULING OF THE COURT

1. The brief background of this application is that, Kabuito Contractors Limited (the applicant), sued the Attorney General, (the respondent), in **Nairobi HCCC No. 284 of 2008**. In its amended plaint dated 23rd March 2019 the applicant claimed from

the respondent Kshs.1,122,668,596.76, interest thereon from the

date of filing suit, costs of the suit and interest. Its dealings with the respondent stemmed from a contract dated 14th March 1997 between the applicant and with the respondent

through the Ministry of Local Government, and extensions thereof, pursuant to which the applicant was to undertake periodic maintenance of roads within the Nairobi Central Business District (CBD).

2. In its judgment delivered on 25th May 2018 (**Sergon, J.**) was satisfied that the applicant had proved its claim against the respondent on a balance of probabilities and entered judgment in its favour for Kshs.3,170,908,263/25 as at June 30, 2017 plus interests at court rates from the date of judgment together with costs.
3. The judgment and decree of the High Court dated 25th May 2018 prompted the filing in this Court of **Civil Appeal No. 638 of 2019**. The appeal was heard and the Court in its judgment dated 3rd March 2023, made the following observations:

“i. It’s not clear why the applicant did not avail the entire contract to the trial court. Also, it is not clear how the trial Judge conclusively determined the validity of the oral extension of the written contract without the benefit of the entire written contract particularly to satisfy himself that the written contract did not have an express non- variation clause or whether it provided for extensions whether written or oral. The applicant only relied on selected pages of the contract which are of no help as far as the questions raised above are concerned and;

ii. On the issue whether the applicant proved its claim to the required standard on a balance of probabilities, this Court held that there was no evidence before the trial Judge to support the finding that the ingredients of a valid oral contract had been proved.”

Ultimately, the respondent's appeal was allowed and the Court set aside the judgment of the High Court and substituted it with an order dismissing the applicant's suit with no orders as to costs.

4. Aggrieved by that decision, the applicant filed a Notice of Motion dated 31st March 2023 pursuant to **Article 163(4)(b)** of the **Constitution, Section 3, 3A** and **3B** of the **Appellate Jurisdiction Act** and **rules 41(2)** of the **Court of Appeal Rules, 2022** seeking certification that the intended appeal involves matters of general public importance, hence this application for leave to appeal to the Supreme Court for determination of the issues which the applicant has framed as follows:
- a) Whether the Government of Kenya bears any liability for contracts entered expressly or impliedly.
 - b) Whether the Government of Kenya bears any liability for contracts performed with its acquiescence.
 - c) Whether the Government of Kenya can benefit from the performance of contracts for which the provider has not been compensated.
 - d) Whether the principle of *quantum meruit* applies to the

Government of Kenya.

- e) Whether all contracts entered into or performed at the behest of the Government of Kenya must be in writing and

whether there is any implied or express exception to such requirement and the implication of this on the constitutional right of a party dealing in good faith with the Government of Kenya.

5. The applicant contends that the issues set out above are substantial and weighty and determination of the same will have tremendous impact and bearing on the general public interest, particularly in the litigation of whether the Government of Kenya can benefit from the performance of contracts for which the provider has not been compensated.
6. The applicant maintains that the foregoing matters transcend the litigation interest of the parties herein which only the Supreme Court can conclusively and finally settle to give guidance to both this Honourable Court and the Superior Courts dealing with similar claims regarding nuances of the performance of contracts with the Government, and the ramifications of the same upon contractors especially those acting in good faith on instructions issued

expressly or impliedly in the performance of the subject contracts.

7. The application is supported by an affidavit sworn on 3rd March 2023 by Amip Patel, the Managing Director of the applicant, which has several annexures.

8. The application is opposed by the respondent through a Notice of Preliminary Objection dated 20th November 2024 raising the grounds that: The application for leave to appeal to the Supreme Court has been filed out of time and that the intended appeal does not involve matters of general public importance.
9. Both parties also filed submissions and case digests amplifying their rival positions.
10. When the matter came up for hearing before us on 3rd March, 2025, learned counsel **Mr. Kithinji Marete** appeared for the applicant, while learned State counsel, **Mr. Kiarie**, appeared for the respondent. They both highlighted, albeit briefly, their submissions which are quite detailed and which in our view cover every aspect of the application before us. We have read and noted the contents of the said submissions.
- 11.** According to counsel for the applicant, the application was filed within the stipulated time on 3rd April 2023 in compliance with **Rule 41(2)** of the **Court of Appeal Rules**.
12. The applicant submitted that the questions for determination by the Supreme Court affect many contractors working for the government agencies who may find themselves in situations where

they are not paid for work done, and the other questions can only

conclusively be answered by the Supreme Court, and that can only be done if this application is allowed.

- 13.** Learned counsel for the applicant maintains that the issues raised are substantial and weighty and determination of the same transcend the personal interests of the applicant and affect the particular class of citizens or citizen contractors engaged in services with the government of Kenya. He says that the application meets the criteria set by the Supreme Court in **Hermanus Phillipus Steyn Stein -vs- Giovanni Gnecchi - Ruscone [2013] eKLR.**
14. The application is strongly opposed by the respondent through the Preliminary Objection dated 20th November 2024, and the submissions and case digest dated 25th November 2024. According to the respondent, the application is factually and legally defective and bad in law. It is said to be an abuse of the court process in that it was filed outside the 30 days prescribed under **rule 41(1)(a)(ii)** of the **Court of Appeal Rules** and as such the same was filed out of time.
15. The respondent submitted that the nature and genesis of this dispute is contractual in nature and the issues raised do not in

any way have a significant bearing in public interest, and

concludes by saying that the application lacks merit and the same should be dismissed.

16. On the issue as to whether or not the application was filed out of time without leave of the court, our view of the matter is that the application was filed within time. We say so because **rule 41(2)** of the **Court of Appeal Rules** states as follows:

“An application seeking certification that a matter of general public importance is involved shall be made within 30 days after delivery of the decision.”

17. Learned Counsel for the applicant maintained that the application was filed within time as although it was filed on the 31st day, the last day of filing fell on a Sunday which moved the deadline to the following day. After computing the said dates, we are satisfied that the application was filed within the prescribed time and so nothing much turns on that point. Accordingly, we find no merit in that objection and dismiss it accordingly.

- 18.** On the substantive application, the law is now settled as to the threshold an application has to meet in order for an appeal to be escalated to the Supreme Court for determination. As expressed by the Supreme Court in **Ngao -vs- Kitheka** **(Petition E006 of**

2024) [2025] KESC 1 (KLR), Article 163(4)(b) of the
Constitution is not a thoroughfare for all intended appeals
from

the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution or those that can be said to involve matters of general public importance will be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes the Supreme Court with jurisdiction. See also: **Lawrence**

Nduttu & 6000 Others -vs- Kenya Breweries Ltd & Another,

SC Petition No. 3 of 2012; [2012] eKLR, Samuel Kamau

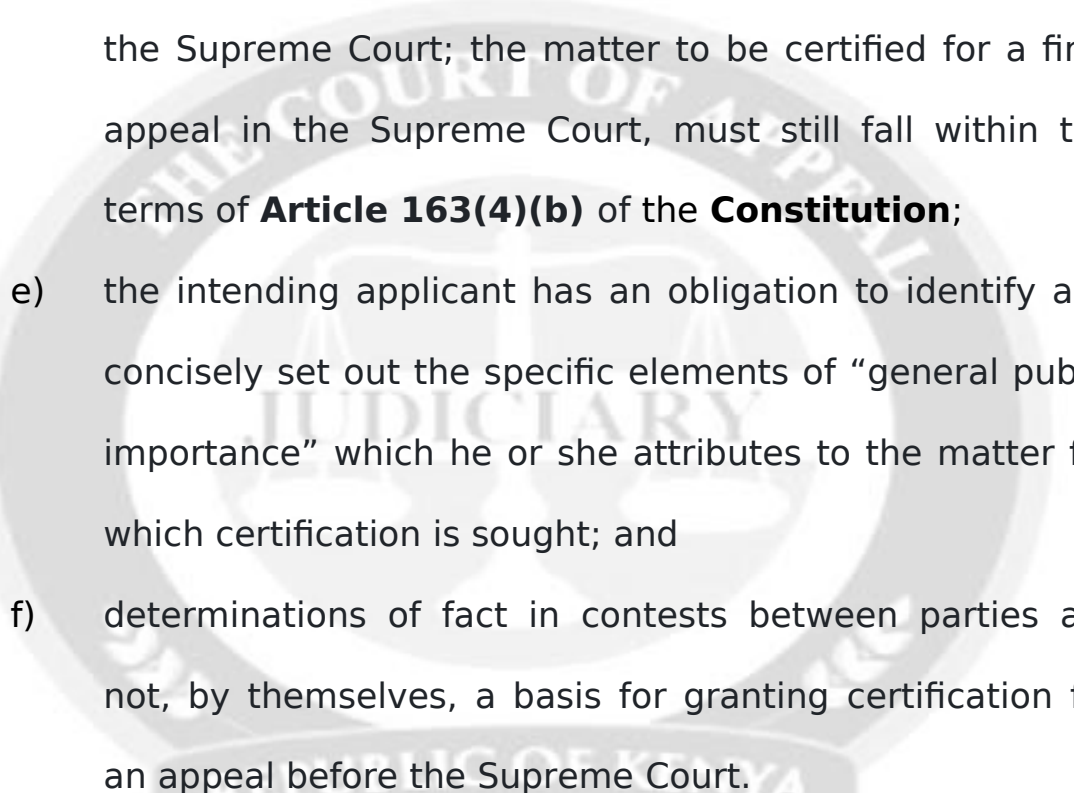
Macharia and Another -vs- Kenya Commercial Bank and 2

Others, SC Application No. 2 of 2011; [2012] eKLR,
among

many other decisions.

19. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court:
 - a) 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;
 - b) where the matter in respect of which certification is

sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

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- The watermark is a circular seal of the Supreme Court of Kenya. It features a central shield with a scale of justice, a book, and a sword. The text 'THE COURT OF APPEALS' is written in a circle around the top, 'JUDICIARY' is written across the middle, and 'REPUBLIC OF KENYA' is written at the bottom.
- c) such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;
 - d) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of **Article 163(4)(b)** of the **Constitution**;
 - e) the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought; and
 - f) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

20. It is against the above guidelines that we will consider the application before us. We have considered the 5 issues counsel for the applicant has concisely identified as the ones that qualify to be determined by the Supreme Court. Do these issues transcend the interests of the parties herein or are they issues that were peculiar to the specific matter before the Court? We

shall analyse them and

determine if they pass the test set out in the **Hermanus Phillipus**

case (supra).

21. What constitutes a point or points of law of general public importance was clearly enunciated in the **Hermanus Phillipus**

case (supra) where the Supreme Court explained that:

“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.”

22. The description above cannot be said to be the case in the applicant’s intended appeal. While the intended appeal may be said to raise points of law, those points are, in our considered view, of no general public importance. They relate to purely private claims under the terms of a contract entered into by the two parties herein, in which the public as a whole has no stake. Neither do the findings of this Court on the failure by the applicant to attach the entire contract between it and the respondent to justify compensation for works done; the

doctrine of *quantum meruit*; or the applicant's claim for
payment after performance of
contracts for which the provider has not been compensated,
raise

substantial and novel points of law of general public importance. Those, in our view, are issues that were peculiar to the specific case before the Court.

23. The decision of this Court on the issues raised by the applicant was based on the specific circumstances of the case and the evidence presented before the Court. We cannot say that similar issues have arisen before the courts and the courts have rendered different opinions on the same, to require clarification by the Supreme Court. To our mind, the issues intended to be escalated to the Supreme Court have no bearing on general public welfare that calls for protection beyond the scope of the law of contract.
24. The applicant seems to question why the learned Judges arrived at particular conclusions on the evidence presented before them, and not other conclusions. This in our view goes to the root of the reasoning and merit of the judgment, and given that the Supreme Court will not be hearing an appeal on the merit of the impugned decision, there is nothing identified to us, within the parameters listed above, to qualify for reference to the Supreme Court for interpretation.
25. Evidently, the applicant harbours serious apprehension that it

was not compensated by the respondent for works carried out.

It has

raised some germane questions, but as long as the issues in question relate to the specific peculiar circumstances of this case and challenge the merits of the decision, we cannot elevate them to a pedestal of general public importance as underlined earlier in this ruling, and we must eschew making any comments on the same.

26. We think we have said enough to demonstrate that we are not persuaded that this application meets the threshold set out in the **Hermanus Philipus** case (supra). In the circumstances we find the application without merit and dismiss it with no orders to costs.

Dated and delivered at Nairobi this 21st day of November 2025.

W. KARANJA

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.