JTG Enterprises Limited v China Gezhouba Group & another (Civil Application Sup E011 of 2025) [2025] KECA 2130 (KLR) (5 December 2025) (Ruling)

Neutral citation: [2025] KECA 2130 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION SUP E011 OF 2025

PO KIAGE, AO MUCHELULE & WK KORIR, JJA

DECEMBER 5, 2025

BETWEEN

JTG ENTERPRISES LIMITED .... APPLICANT

AND

CHINA GEZHOUBA GROUP .... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .... 2ND RESPONDENT

(An application for certification that matters of general public importance are involved with respect to the proposed appeal against the judgment and orders of the Court of Appeal (Musinga (P), J. Mohammed & Odunga, JJ.A.) dated 20th December, 2024 in Nairobi Civil Appeal No. E793 of 2023)

RULING

1. By a notice of motion dated 5th March 2025, the applicant seeks in the main orders that;

> " B. This Honourable court be pleased to certify under Article 163(4) of *the Constitution* of Kenya 2010, that the intended appeal raises matters of general public importance warranting grant of leave to appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal dated 20 December 2024, in Nairobi Civil Appeal No. E793 of 2023.
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> C. Upon certification in (B) above, the applicant be granted leave to appeal to the Supreme Court against the Judgment and Orders of the Court of Appeal dated December 20, 2024, in Nairobi Civil Appeal No. E793 of 2023."

2. The application is based on a prolix 18 grounds, most of which is unnecessary literature not useful for this kind of application. In summary it is averred that this Court erred in;

a. Holding that the Subcontractor should have consulted the Government before proceeding with the adjusted scope under the signed Supplementary Agreements, when the contractual reality is that the Subcontractor is barred from having direct engagement with the government.

b. Holding that by proceeding with the works without engaging the Government, the Subcontractor assumed the commercial risk for those works, a decision that places an unreasonable burden on the Subcontractor.

c. Imposing upon the Subcontractor the burden of proving that the Government has paid the Main Contractor, an impossible evidentiary burden given the contractual opacity limiting visibility into the financial arrangements between the Government and Main Contractor.

d. Invalidating the binding Supplementary Agreements signed by the parties to address unforeseen site conditions thereby placing an unfair commercial risk upon the Subcontractor.

3. The applicant avers that the intended appeal involves matters of general public importance since it raises the following questions;

i. What recourse is available to a subcontractor who has executed its obligations in good faith but is denied payment due to the opacity of government - main contractor financial arrangements?

ii. What happens when the government has paid the main contractor, but the latter diverts these funds, leaving subcontractors uncompensated?

iii. Should a subcontractor's entitlement to payment depend on a contractual relationship with the government, even when the work benefits a public project and is undisputedly performed to the required standards?

iv. How should courts balance the interests of subcontractors who lack direct contractual privity with the government but are indispensable to the execution of public projects?

v. Does it serve the public interest to allow public infrastructure projects to be delayed by disputes arising from unfair payment mechanisms, thereby jeopardizing national development?

vi. Should the courts, in the interest of equity and justice, interpret contractual arrangements in a manner that prevents the main contractor from using its position as an intermediary to unjustly enrich itself at the expense of subcontractors?

vii. Whose interests does it serve for the government or main contractor to withhold retention sums indefinitely, even after the subcontractors have properly completed their work?

viii. Should the government be permitted to invoke the doctrine of privity of contract to escape liability for non-payment to subcontractors, despite directly benefiting from their work?

ix. What safeguards should be put in place to prevent the exploitation of subcontractors, who often lack the bargaining power to challenge oppressive payment practices in large-scale public infrastructure projects?

x. Should courts recognize implied obligations of good faith and fair dealing to ensure that subcontractors are not arbitrarily denied payment for work duly executed?

xi. How can the legal framework be strengthened to guarantee that subcontractors receive timely and fair compensation, thereby preventing unnecessary litigation and financial ruin?

xii. What precedent should the Supreme Court establish to harmonize public procurement laws with equitable payment mechanisms in large-scale public infrastructure projects?

xiii. Should the burden of proving that the government has paid the main contractor rest on the subcontractor, given the lack of transparency in government - main contractor financial dealings?

xiv. What remedies should be available to subcontractors in cases where the government terminates a main contractor from a public project before the main contractor settles payments owed to the subcontractor for completed works?

xv. Should the public interest in efficient and cost-effective project completion override rigid contractual formalities that disadvantage subcontractors?

xvi. What mechanisms should be instituted to prevent the misuse of public funds by main contractors who withhold payments due to subcontractors, thereby delaying progress on national projects and causing cost overruns due to disputes?

xvii. Does the treatment of a contract as a lump-sum contract, despite it being a measurement contract with fixed rates,raise concerns about the proper classification and enforcement of specialised contracts in large-scale public infrastructure projects?

4. The application is supported by an affidavit sworn on 5th March 2025 by Joseph Gichuhi Thuo, the applicant's Director. In the long- winded 24-page affidavit, the applicant gives a background to the dispute and raises further grounds to the motion contending that this Court's decision undermines subcontractors' rights in public infrastructure projects, enabling main contractors to unjustly enrich themselves while subcontractors remain uncompensated. Further, the decision fosters uncertainty in public project contracts thereby discouraging subcontractor participation and jeopardizing national infrastructure development. The applicant, however, proceeds to argue the grounds in detail, as though re-litigating the appeal before us. This matter having already been determined by this Court on appeal, we resist the invitation to re-consider its merits.

5. In answer to the motion, the 1st respondent filed a replying affidavit sworn on 16th September 2025, by Deng Zhe, the Commercial Manager of the 1st respondent. It is averred that the only question before this Court ought to be whether the intended appeal raises a matter of general public importance pursuant to Article 163(4)(b) of *the Constitution*, and as clarified by the Apex Court in Hermanus Phillipus Steyn v. Giovanni Gnecchi-ruscone [2013] eKLR; Daniel Kimani Njihia V. Francis Mwangi Kimani & Another 2014] Eklr; And Teachers Service Commission v. Simon P. Kamau & 19 Others [2015] eKLR. It is urged that in those decisions the court was categorical that, certification is not automatic but is only grantable in exceptional cases where, the issues elicited were also raised and determined in the courts below. Moreover, the said issues must transcend the interests of the parties and bear significance for the public at large. While referring to the litigation history to the dispute herein, the 1st respondent contends that the dispute has at all material times been anchored in the interpretation and enforcement of the parties' contract, and not constitutional, statutory or public law questions of broad application.

6. It is contended that the applicant has introduced new issues which were neither pleaded nor determined by the trial court or this Court. Such issues include the invocation of the doctrines of contra proferentem, good faith and fair dealing; the question of unjust enrichment and systemic exploitation of subcontractors in public projects; invocation of the doctrine of substantial compliance in public infrastructure contracts; the proposal for the establishment of direct recovery rights for

subcontractors against the government; constitutional questions like the alleged violation of socio-economic rights under Articles 43 and 69; and, policy debates on issues like privity of contract and public finance management. Citing the principles governing certification of a matter as one of general public importance, as particularized in Hermanus Phillipus Steyn (supra), it is asserted that the instant application does not meet the threshold for certification. Answering the questions posed by applicant, the 1st respondent argues that none of them transcend the contractual bargain between the parties or raise any unsettled question of law of public significance, instead, they are either contractual, hypothetical or reform-oriented questions. It is urged that the application is unmerited and offends the constitutional limits of appellate jurisdiction, thus it ought to be dismissed with costs to the respondents.

7. During the hearing, learned counsel Mr. Sarara appeared for the applicant while Mr. Wandati appeared for the 1st respondent. There was no appearance for the 2nd respondent and neither had they filed written submissions. Counsel present highlighted their respective filed submissions.

8. As a way of introduction, Mr. Sarara submitted that the dispute herein concerns payment for excavation works under a Subcontract between the applicant and the 1st respondent for the Thwake Multipurpose Dam Project, a national flagship project. He contended that while the applicant and the 1st respondent executed three fully performed Supplementary Agreements after encountering unforeseen geological conditions at the site, this Court refused to enforce them, thus undermining contractual certainty and overlooking the inevitability and necessity of variations in large scale public works. Counsel argued that the Supreme Court must clarify whether courts can disregard expressly anticipated and contractually integrated supplementary agreements. He proceeded to state that this Court's judgment placed the burden of proving the Government's payment to the Main Contractor on the applicant, a fact solely within the respondents' knowledge and control. To counsel, that evidentiary standard is impractical and oppressive, and the Supreme Court must determine whether it should shift to the party with the information.

8. Alternatively, the Court should develop legal mechanisms to compel disclosure for justice and public accountability under Article 201.

9. It was submitted that while privity is a settled common law doctrine, its unqualified application in public infrastructure projects risks undermining constitutional values of equity, fairness and accountability. Counsel thus urged that the Supreme Court should reconcile these competing imperatives by determining whether the Government can invoke privity to escape liability when funds are not remitted down the chain. Further, that this Court's decision implicitly condones the Main contractor enjoying the fruits of work but refusing to pay the Subcontractor, in effect promoting unjust enrichment. Mr. Sarara contended that the Supreme Court should render itself on the measures that should be put in place in public project contracts to prevent such abuse. He added that without judicial guidance, subcontractors nationwide face catastrophic losses when main contractors' financial positions collapse and, therefore, the Apex Court should determine whether fiduciary or trust-like obligations should be imposed on main contractors to safeguard public funds for subcontractor payments, as well as clarify payment risk allocation in government-funded projects.

10. Mr. Sarara submitted that the Supreme Court should prescribe mechanisms for preventing misuse of public funds by main contractors, ensuring prompt payment of subcontractors, and harmonising public procurement laws with equitable payment practices. Moreover, the Court should align traditional contract doctrines with *the Constitution*'s transformative aspirations. In the end, we were urged to grant the orders sought in the motion. We inquired from Mr. Sarara whether the questions he was raising were matters of law or they were actually policy issues in the industry. In reply, he asserted that they were both legal and policy questions.

11. In opposition to the application Mr. Wandati substantially revisited the averments made by the 1st respondent in its replying affidavit. He insisted that the application falls short of the constitutional threshold for certification, being that the record demonstrates that the dispute herein as considered by the trial court and this Court on appeal, was at all times confined to a private commercial claim centered on the interpretation and enforcement of a Subcontract and Supplementary Agreements. Counsel asserted that at no point did the dispute transcend into a constitutional, statutory, or public interest matter. He emphasized that the applicant had introduced entirely new matters that were never pleaded, argued nor determined by the trial court and this Court.

12. Mr. Wandati contended that the 17 questions that have been posed by the applicant for consideration by the Apex Court do not meet the prescribed criteria for certification, as they are rooted in private contractual rights and payment procedures; they disclose no unsettled or conflicting legal principle; and, they are better suited to be handled by parliament, not judicial determination. It was submitted that interpretation of contractual terms is a well-settled matter in law that does not in itself constitute a substantial legal issue warranting the attention of the Apex Court. Moreover, the law governing subcontractor recovery rights, risk-sharing and unjust enrichment is already settled and the applicant has not demonstrated that this Court's decision created legal uncertainty, conflicting jurisprudence or far-reaching implications. The Supreme Court decision in Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others [2012] eKLR, was cited for the proposition that parties are barred from escalating ordinary legal disputes under the guise of constitutional importance. Mr. Wandati contended that the applicant's arguments concerned areas of reform in the law or in industry practice and standards, but not for consideration by the Supreme Court. He opined that if a subcontractor wanted visibility in the relationship between the employer and the main contractor when it comes to payment, then one way of solving that issue could be through the making of tripartite agreements between the employer, the main contractor and the subcontractor. In conclusion counsel urged us to dismiss the application with costs.

13. We have considered the application, the grounds in support thereof, the submissions by parties, and the law. The applicant seeks certification to appeal to the Supreme Court pursuant to Article 163(4)(b) of *the Constitution* which states;

> " 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)."

An intending appellant is obliged to demonstrate that the matter in question carries specific elements of real public interest concern. The Supreme Court authoritatively set down the governing principles in the determination of what entails a matter of general public importance in Hermanus Phillipus Steyn (supra) as follows;

> "[60] ...
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> i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. 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;

iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. 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*;

vi. 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;

vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court. (See also Malcolm Bell v Daniel Toroitich Arap Moi & Another[2013] eKLR)

14. The applicant drew up a huge list of 17 questions, some of them repetitive, urging that those questions are matters of general importance that the Supreme Court ought to determine in the intended appeal. The 1st respondent disagrees that the said questions meet the criteria for certification. It is urged that the applicant's case concerns a private commercial claim centered on the interpretation and enforcement of a subcontract and supplementary agreements. The 1st respondent contends that interpretation of contractual terms is a well-settled matter in law that does not amount to a substantial matter of law warranting the attention of the Apex Court. We agree with the 1st respondent that the determination of the dispute herein revolves around the construction of the Main Contract, the Subcontract and the Supplementary Agreements. Indeed, this Court observed as much at paragraph 37 of its judgment and proceeded to outline the law guiding the construction of contracts.

15. At paragraph 38, the Court noted that the principles guiding construction of contracts are now settled and went on to delineate them as supported by case law. We think the learned Judges judiciously applied their mind to the issue at the heart of the dispute between the parties herein. We are not persuaded that the questions that have been proposed to be canvassed on appeal transcend the circumstances of this particular case with the effect that they have a bearing on public interest.

16. It was also asserted, without controvert, that the questions raised by the applicant were never pleaded nor considered during trial or before this Court. Upon applying the test in Hermanus Phillipus Steyn (supra) that, 'such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination,' we find that those questions are not matters of general public importance. We further agree with the submission that the concerns raised by the applicant are policy issues, not legal matters qualifying certification for appeal before the Apex Court. Ultimately, the instant application falls short of the test established by the Supreme Court.

17. The upshot is that we find that the application is unmerited and we disallow it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR