

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: GATEMBU, MUCHELULE & J. NGUGI, JJ.A.)

**CIVIL APPEAL NO. E1012 OF
2025**

BETWEEN

ELC ELECTROCONSULT S.P.A.....APPELLANT

AND

**THE PUBLIC PROCUREMENT
ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT**

**SINTECNICA ENGINEERING S.R.L. IN
JOINT VENTURE WITH STEAM S.R.L.....2ND RESPONDENT**

**THE ACCOUNTING OFFICER,
KENYA ELECTRICITY
GENERATING
COMPANY PLC (KENGEN).....3RD
RESPONDENT**

**KENYA ELECTRICITY GENERATING
COMPANY PLC (KENGEN).....4TH
RESPONDENT**

*(Being an appeal from the Judgment of the High Court of
Kenya at Nairobi (H. Aburili, J.) dated 20th November 2025*

in

HCJR Case No. E323 of 2025)

JUDGMENT OF THE COURT

1. This appeal arises from a judgment delivered on 20th

November 2025 in which the High Court of Kenya at Nairobi
(**Aburili, J.**) dismissed the appellant's Judicial Review
Application dated 13th

October 2025 and upheld the decision of The Public Procurement Administrative Review Board, the 1st respondent, made on 26th September 2025. For consideration by the Court alongside the appeal is an application by Notice of Motion dated 4th December 2025 presented by the 2nd respondent, Sintecnica Engineering S. R. L. In Joint Venture with Steam S. R. L, seeking an order to strike out the appeal for being time barred by dint of Section 175(4) of the Public Procurement and Assets Disposal Act, 2015 (the Act).

2. The appeal and the said application came up for hearing before us on 15th December 2025. Learned counsel **Mr. Kirui** appeared for the appellant, **Ms. Wamuyu** appeared for the 1st respondent; and **Mr. Omiti** appeared with **Miss. Lagat** for the 2nd respondent, which is also the applicant in the application dated 4th December 2015. The advocates for the 3rd and 4th respondents did not appear despite having been served with notice of hearing. Upon consultation with counsel, it was agreed, and the Court directed, that the application dated 4th December 2025 be subsumed in the appeal.

3. As the application challenges the jurisdiction of the Court to hear and determine the appeal, we must first address it.
4. It is the 2nd respondent's case that in the appeal, the appellant is seeking to set aside the judgment of the High Court delivered on 20th November 2025; that the appellant's record of appeal is dated 26th November 2025 but was filed on 28th November 2025 outside the statutory seven (7) days provided under Section 175(4) of the Act; that the timelines set under that provision are "jurisdictional, peremptory and non-extendable and any action taken outside those timelines is a nullity *ab initio*"; that consequently, the present appeal is incompetent and fatally defective and should be struck out. In his affidavit supporting the application, Matteo Quaia, a Director and Chief Executive Officer of the 2nd respondent reiterated the grounds appearing on the face of the application maintaining that the appeal is incompetent.
5. In his written and oral submissions in support of the application, learned counsel Mr. Omiti relied on the decision of the Court in **Aprim Consultants vs. Parliamentary Service**

Commission & Another (Civil Appeal E039 of 2021)

[2021] KECA 1090 (KLR) in urging that an appeal to this Court

under Section 175 must be filed within 7 days, a timeline, he urged that is “cast in stone”.

6. In opposing the application, learned counsel for the appellant Mr. Kirui, in his own replying affidavit and in written and oral submissions urged that “the application is a non-starter and only deserving a dismissal *in limine*”; that while the decision of this Court in **Aprim Consultants vs. Parliamentary Service Commissions & Another** remains good law, “an appeal to this Court is lodged by way of a Notice of Appeal as per Rule 77 of the ... Court’s Rules”; that in compliance therewith, the appellant lodged the Notice of Appeal on 26th November 2025 and served it; that the Record of Appeal inclusive of the Memorandum of Appeal was lodged on 27th November 2025 which, despite his best efforts, was, however approved by the Deputy Registrar on 28th November 2025 and on the same date made payments for the same.
7. On the strength of the Supreme Court decision in **Nicholas**

Kiptoo Arap Korir Salat vs. Independent Electoral & Boundaries Commission (IEBC) & 7 Others [2014]

eKLR, as

well as the decision of this Court in **Multichoice (Kenya) Limited vs. Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR** Mr. Kirui submitted, that an appeal to this Court

is deemed to have been filed when under the Rules of the Court, the Notice of Appeal is given; that consequently, the notice of appeal in the present case having been given on 26th November 2025, the appeal was therefore filed within the 7 days prescribed under Section 175(4) of the Act.

8. We have given due consideration to the application and the rival arguments. The issue we need to determine is whether this appeal was filed within the seven (7) days prescribed under Section 175(4) of the Act. In that regard, the appellant contends that the notice of appeal was filed on 26th November 2025, which is clearly within the seven days, and the appeal is, therefore, competent, and the Court has jurisdiction to hear and determine it.
9. The 2nd respondent/applicant, on the other hand, contends that it matters not that the Notice of Appeal was filed on 26th November 2025 and that what matters is the date when the

memorandum and record of appeal was filed, which, it

maintains, was on 28th November 2025, when the same was paid for. The appellant counters by asserting that even if the date for filing the record of appeal is taken as the relevant date, then the appeal was filed on 27th November 2025 even though payment for the same was made on 28th November 2025 on account of factors beyond its control.

10. Section 175(4) of the Act provides that:

“A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.”

And so, the question, is an appeal, for purposes of that section signified by the filing of a notice of appeal or by the filing of the memorandum and record of appeal?

11. In ***Aprim Consultants vs. Parliamentary Service Commission & Another*** to which counsel on both sides referred, this Court expressed as follows:

“16. We think, with respect, that the provisions of section 175 are couched in terms that are plain and unambiguous, admitting to no interpretive wriggle room. The Section sets strict timelines for applicants, the High Court and this Court in a sequential manner;

1. **A person aggrieved must file seek (sic) judicial review of the Boards' decision within 14 days.**
 2. **The High Court must determine the judicial review application within 45 days.**
 3. **A person aggrieved by the decision of the High Court must appeal to the Court of Appeal within 7 days.**
 4. **The Court of Appeal must make a decision within 45 days.**
- 17. All of these timelines are patently tight. They also greatly constrict the usual timelines for the filing and determination of proceedings. For this Court, for instance, ordinary appeals are initiated by filing of a notice of appeal within 14 days of the decision appealed from. This is followed by a lodging of the record of appeal some 60 days thereafter. There is no set time within which an appeal is to be heard. It is the decision following hearing of the appeal that is required to be rendered within 90 days by dint of rule 32(1), but the Court may still deliver its judgment outside that period for reasons to be recorded.**

12. In effect, appeals to this Court under Section 175 are not ordinary appeals. They are *sui generis*; in a class of their own. If, as the appellant argues, an appellant is deemed to have filed the appeal (for purposes of Section 175) upon filing the notice of appeal, and if timelines in the Court of Appeal Rules were then to apply, it would mean either, that an appellant would have 60 days from the date of filing the notice of appeal to file the memorandum and record of appeal or

alternatively, the time for

filing the memorandum and record of appeal would be at large.

Such interpretation would, in our view, make nonsense of the statutory command that the Court of Appeal must make its decision within 45 days. It would be impossible to hear and determine the appeal within 45 days.

13. It bears repeating that procurement proceedings under the Act are *sui generis* and distinct from normal proceedings. To that extent, the decisions in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral & Boundaries Commission (IEBC) & 7 Others** and **Multichoice (Kenya) Limited vs. Wananchi Group (Kenya) Limited & 2 Others** on which Mr. Kirui relied do not assist in the present circumstances.

14. Underscoring the importance of the strict timelines in procurement matters under the Act, it was stated in **Al Ghurair Printing and Publishing LLC v Coalition For Reforms and Democracy & another; Public Procurement Administrative Review Board (Interested Party) (Civil Appeal 63 of 2017) [2017] KECA 565 (KLR)** that:

“Section 175 of the Act as a whole provides for

an elaborate time bound process for escalating the dispute from the Review Board (which must complete its review within 21 days after receiving

the request), to seeking judicial review to the High Court (which must be done within 14 days from the date of the decision of the Review Board); to the High Court (which has 45 days after such application to make its decision). A person aggrieved by the decision of High Court may appeal to the Court of Appeal within 7 days of the High Court decision. The Court of appeal shall make a decision within 45 days which decision shall be final.

The importance of the timelines is buttressed by Section 175(5), which provides that the decision of the Review Board shall be final and binding to all the parties should the High Court or the Court of Appeal fail to make a decision within the prescribed timelines.”

15. In procurement matters, the strict statutory timelines under Section 175 of the Act take precedence over those in the Court of Appeal Rules. For good measure Section 5 of the Act provides that where there is a conflict between the Act and any other written law, the Act prevails.
16. In our judgment, we pronounce that an appeal to this Court for purposes of Section 175(4) of the Act is filed when the memorandum and record of appeal is filed and that is when the 45 days within which the Court must make a decision begins to run. That said, we think that the Rules Committee should promulgate specific rules (akin to those relating to election petition appeals) to guide the practice and

procedure of the

Court in relation to appeals under Section 175(4) of the Act. To that end, the Registrar of the Court is hereby directed to transmit a copy of this judgment to the Chairman of the Rules Committee.

17. As regards the argument that the appeal was nonetheless filed on 27th November 2025, the memorandum and record of appeal having been uploaded on that date, it is not disputed that payment for the appeal was made on 28th November 2025. That then becomes the relevant date, because, as pronounced by the Court in **Tuv Austria Turk vs. Public Procurement Administrative Review Board & 3 Others, Civil Appeal**

E644 of 2025 *“the appeal could only be deemed as duly filed upon payment of the Court fees.”* Expounding, the Court in that case stated:

“The practice within our jurisdiction remains that a document is deemed as duly filed after a party has not only lodged it at the appropriate court registry but also paid the prescribed fees. This position was affirmed long ago by the predecessor of this Court in Motel Schweitzer vs. Thomas Edward Cummingham & Another [1955] 22 EACA 252, where it was held that an appeal is not instituted until the record of appeal is lodged and fees paid.”

18. Based on the foregoing, we uphold the contention by the 2nd respondent that this appeal was filed out of time and is, therefore, incompetent. Being of that view, we have no basis for considering the merits or otherwise of the appeal. Accordingly, the application dated 4th December 2025 succeeds and the appeal is hereby struck out with costs to the 2nd respondent.

19. Orders accordingly.

Dated and delivered at Nairobi this 19th day of December 2025.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

A.O. MUCHELULE

.....
JUDGE OF APPEAL

J. NGUGI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR