Keller Customs Kenya Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal (Application) E001 of 2025) [2026] KECA 237 (KLR) (13 February 2026) (Ruling)

Neutral citation: [2026] KECA 237 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E001 OF 2025

SG KAIRU, AK MURGOR & P NYAMWEYA, JJA

FEBRUARY 13, 2026

BETWEEN

KELLER CUSTOMS KENYA LIMITED ..... APPELLANT

AND

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

KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

SAINAJ HOLDING LIMITED ..... 3RD RESPONDENT

HYPER ATLANTIC TRANSPORTER LIMITED ..... 4TH RESPONDENT

(An application for injunction pending appeal and for certification that a matter of general public importance is involved for purposes of an appeal to the Supreme Court from the Judgment of this Court (Murgor, Laibuta & Ngenye, JJ.A) delivered on 17th February 2025 In Civil Appeal No. E001 of 2025)

RULING

1. This ruling is on an application dated 28th February 2025 lodged by the Applicant herein, Keller's Kustoms Kenya Limited, and arises from the judgment delivered by this Court (Murgor, Laibuta & Ngenye JJ.A) on 17th February 2025 in Civil Appeal E001 of 2025 . The Applicant, who was the appellant in the said appeal, is seeking two orders in its application. The first is an order of injunction restraining the implementation of the decision by Kenya Ports Authority, the 2nd Respondent herein, to award Tender no. KPA/284/2023-24/LP- Provision of Boat and Minibus (25 seater) Transport Service for Port of Lamu to award the tender to the five (5) successful bidders who included the 3rd respondent herein, Sainaj Holding Limited, and also seeking to restrain the 2nd Respondent herein, its officers, employees and agents from signing any contracts emanating from the award of the subject

tender or where the contracts have been signed, from executing or performing such contracts pending the hearing and determination of its appeal.

2. The second order sought by the applicant is for leave to pursue an appeal to the Supreme Court of Kenya against the judgment delivered by this Court on 17th February 2025 in Civil Appeal E001 of 2025 and that the costs of the application be in the intended appeal to the Supreme Court.

3. The applicant relied on the grounds in its application, supporting affidavit sworn on 28th February 2025 by its director, Jane Mombi Abeid, and written submissions dated 7th July 2025 filed by its advocates on record. The 1st Respondent's advocates on record filed submissions dated 12th June 2025 in opposition to the application, while the 2nd Respondent opposed the application by way of a replying affidavit sworn on 24th June 2025 by Daniel Amuyunzu, its Principal Supply Officer (Tenders), and submissions dated 7th July 2025 filed by its advocates on record. The 2nd Respondent did not file any response to the application. We heard the application on 8th July 2025 on this Court's virtual platform, and learned counsel Mr. Willis Oluga, was present representing the Applicant and 4th Respondent, while learned counsel Mr. Kelvin Kiprono, holding brief for learned counsel Ms. Wambui, was present appearing for the 1st respondent. The two counsel relied on and highlighted their respective submissions. There was no representation for the 2nd and 3rd Respondents despite service of the hearing notice on their advocates on record, and we relied on the pleadings on record filed by the 2nd respondent's advocates as set out hereinabove.

4. On the prayer for an injunction, counsel for the applicant submitted that the intended appeal would be rendered nugatory if the order of injunction is not granted, since the 2nd and 3rd Respondents will continue with the signing, execution and enforcement of the contract which is the subject of the procurement proceedings, and should the Supreme Court find that the 1st Respondent was wrong to have dismissed the Applicant's request for review. Therefore, that the order of injunction pending the appeal is intended to preserve the subject matter so that the intended appeal is not rendered nugatory and a mere academic exercise.

5. The 1st respondent's counsel on the other hand cited the decisions in Giella vs Cassman Brown (1973) 1 EA 358, Mrao Ltd vs First American Bank Ltd & 2 others [2003] eKLR and Nguruman Limited vs Jan Bonde Nielsen & 2 others [2013] eKLR to submit that the applicant did not meet the threshold for a prima facie case, neither had they demonstrated any reason or ground to substantiate the possibility of an irreparable harm, nor damages that they would suffer, or an injury or damage that could not be addressed by an award of damages. On the other hand, that the 1st and 2nd Respondents were being held hostage to the applicant's pursuit of their private interest to the detriment of the public entitled to its services, and the balance of probabilities thus tilted in favour of not granting an injunction against the 2nd Respondent.

6. The 2nd Respondent, while citing the same decisions, submitted that the applicant has failed to demonstrate what irreparable harm they will suffer if the injunctions sought are not granted and the balance of convenience tilts in favor of the respondents, since the injunctions would be prejudicial to the members of the public who rely on the boat and bus services provided by the 2nd respondent herein. Further,

   that this Court is functus officio, as it has performed all its duties in this particular case, and delivered its final decision on 17th February 2025 solving the matter with finality, and reliance was placed on the decision by the Supreme Court in Odinga vs Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR).

7. We sought clarification from Mr. Oluga on the provisions of the law he had relied on for the prayer for an injunction pending the applicant's intended appeal to the Supreme Court, and he informed us that this Court has inherent jurisdiction to grant the order. We however disagree for two reasons. The first is that the inherent jurisdiction granted to this Court under sections 3A and 3B of the *Appellate Jurisdiction Act* cannot be used to extend the court's jurisdiction beyond its constitutional or statutory mandate.

8. The second reason, which flows from the first, is that the extent of the jurisdiction of this Court under Rule 5(2) (b) of the Court of Appeal Rules to grant stay of execution or injunctions pending appeal was explained by this Court in Mukesh Kumar Kantilal Patel vs Charles Langat [2021] eKLR as follows:

> " It is trite that an application for stay by dint of Rule 5(2)(b) of the Court of Appeal Rules gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order to ensure its just and effective determination.

This relief was strictly to apply to matters that are yet to be heard and determined with finality by this Court. It was not envisioned to apply once this Court has issued its final orders. Hence this Court has no jurisdiction to issue orders staying its final decision delivered on 3rd October 2019. This position was well articulated by the Court in Jennifer Koinante Kitarpei v Alice Wahito Ndegwa & Another [2014] eKLR;"An application under Rule 5(2)(b) presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under Rule 75 and is pending in this Court. The application under Rule 5(2)(b) contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes functus officio."

9. While emphasising that Rule 5(2)(b) confers power to this Court to hear interlocutory applications pending the hearing and determination of the main appeal and does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment, this Court also further explained in Dickson Muricho Muriuki vs Timothy Kagondu Muruiki & 6 others [2013] KECA 543 (KLR) as follows:

> " 20. On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is functus officio and must down its tools. In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made. We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not

been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts."

10. We are in agreement with the above holdings, and find that we are functus officio in so far as any further proceedings in this appeal are concerned, and bearing in mind that the jurisdiction of this Court to entertain any application after its final judgment as granted by the Article 163(4)(b) of *the Constitution* is restricted to certification of matters that ought to proceed on appeal to the Supreme Court. Consequently, we have no jurisdiction to grant any injunction pending the applicant's intended appeal to the Supreme Court.

11. On the second prayer for certification and leave to appeal to the Supreme Court, the applicant averred that it lodged Request for Review No.102 of 2024 dated 11th October 2024 with the Public Procurement Administrative Review Board, the 1st respondent herein, seeking review of the decision by the 2nd respondent to award the subject tender, which Request for Review was struck out in a decision delivered by the 1st Respondent on 4th November 2024. Thereafter, the applicant sought a judicial review of that decision in the High Court at Mombasa in Judicial Review Application No. E037 of 2024 which was dismissed on 30th December 2024. Upon appealing to this Court in Civil Appeal No.E001 of 2025, its appeal was similarly dismissed.

12. According to the Applicant, two issues permeated the proceedings before the 1st Respondent, the High Court and the Court of Appeal. The first was whether there is a requirement in the law that the accounting officer of a procuring entity must be listed as a respondent to the request for review and not the procuring entity itself. The Applicant's counsel urged that the only requirement under section 170(b) of the *Public Procurement and Asset Disposal Act* is that the accounting officer of the procuring entity is to be a party to a Request for Review, the accounting officer is not made a party by being named and/or listed in the heading of the Request for Review but through notice issued by the 1st Respondent pursuant to Regulation 205(1) of the Public Procurement and Asset Disposal Regulations, and the heading and structure of the Request for Review is prescribed in the statutory form set out in the Fourteenth Schedule to the Regulations which names the respondent as the procuring entity itself and not the accounting officer. However, that the 1st Respondent, the High Court and the Court of Appeal all decided that the failure to list and name the accounting officer of a procuring entity as a respondent in the heading of the Request for Review is fatal.

13. The second issue was whether the 1st Respondent lacked jurisdiction to hear and determine the 3rd Respondent's preliminary objection to the Request for Review, that led to its striking out. The Applicant's position was that the preliminary objection was filed out of time contrary to regulation 209(3), which required a notice of preliminary objection to be filed within three days of notification of the hearing, therefore, the Board lacked jurisdictions to hear and determine the objection. However, the High Court dismissed its position on the ground that the issue of the 1st Respondent's jurisdiction to hear and determine the preliminary objection had not been pleaded in the judicial review application but was raised in submissions, notwithstanding that a question on jurisdiction may be raised at any time. Further, that while the Court of Appeal agreed that jurisdiction can be raised at any stage and faulted the High Court on that point, it nonetheless justified the 1st Respondent's decision to entertain a preliminary objection filed out of time on the basis that it raised a jurisdictional issue, yet the objection did not question the 1st Respondent's jurisdiction. Counsel for the Applicant maintains that no party pleaded or raised a challenge to the 1st Respondent's jurisdiction at any stage of the proceedings, and that the issue was introduced in the appellate judgment without affording the

Applicant an opportunity to be heard. The Applicant noted that in the Preliminary Objection by the 3rd Respondent, the word 'jurisdiction' did not appear.

14. The Applicant's counsel avers that arising from the determinations on the two central issues, the following questions sought to be argued in the intended appeal to the Supreme Court are of general public importance:

    i. Whether a Request for Review filed before the Public Procurement Administrative Review Board in conformity with the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations by naming the procuring entity rather than the accounting officer of a procuring entity is fatally defective.

    ii. Whether the Public Procurement Administrative Review Board has jurisdiction to declare the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations to be at variance with section 170 of the *Public Procurement and Asset Disposal Act*.

    iii. If the Public Procurement Administrative Review Board has jurisdiction to declare the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations to be at variance with section 170 of the *Public Procurement and Asset Disposal Act*; whether such declaration can be made where the issue has not been pleaded by any party and without hearing from the Minister and Parliament who enacted the Regulations.

    iv. Whether the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations is at variance with section 170 of the *Public Procurement and Asset Disposal Act*.

    v. Whether the Public Procurement Administrative Review Board has jurisdiction to hear and determine a notice of preliminary objection which has been filed outside the timeframe set out in Regulation 209(1) of the Public Procurement and Asset Disposal Regulations.

15. The Applicant's counsel urged that the above issues transcend the interest of the parties because there are many parties who have filed their requests for review before the 1st Respondent by listing the procurement entity as the respondent instead of the accounting officer, and have suffered the fate of having their requests for review dismissed or struck out by the 1st Respondent. As a result, many litigants have suffered and continue to suffer a fatal blow just for presenting their requests for review in the manner provided for in the law. It is therefore important that the Supreme Court of Kenya, the highest court in the land, makes a definitive pronouncement on the form that a Request for Review should take since the courts below have held that the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Rules cannot be followed.

16. The 1st Respondent's counsel was of a different view. While making reference to the threshold as set out in the case of Hermanus Philipus Steyn vs Giovanni Gnecchi –Ruscoe [2013] eKLR, counsel submitted that the application had not met the threshold for reasons that at the heart of the dispute was nothing that transcended the issue availed by the parties for determination; there was no uncertainty in law or any aspect of law; there was not a single inconsistency in this area of the law and there was uniformity and settled consensus by various courts on the correct position as was evidenced in the decision by the Court of Appeal in James Oyondi t/a Betoyo Contractors & anor vs El Roba Enterprises Limited & 8 others [2019] eKLR .

17. The 2nd Respondent's counsel, similarly, and while citing the judicial authorities relied upon by the 1st Respondent, submitted that there is no inconsistency in the law that requires the accounting

officer of the procuring entity to be the party to review proceedings, and submitted that the grounds on the 1st Respondent's jurisdiction to declare the form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations to be at variance with section 170 of the *Public Procurement and Asset Disposal Act* were not raised and determined by the High Court, neither were they raised in the memorandum of appeal dated 2nd January 2025 filed before this Court, and was not subjected to determination by this Court. Further, that the Applicant was thus at liberty to move the High Court for interpretation of section 170 of the *Public Procurement and Asset Disposal Act* and the resultant regulations. Lastly, that the issue raised whether the 1st Respondent has the jurisdiction to hear and determine a preliminary objection out of time was determined by this Court in its decision, and reliance was based on Peter Oduor Ngoge vs Hon. Francis Ole Kaparo & 5 others [2012] eKLR where this Court cautioned that personal grievance or mere dissatisfied with the outcome of litigation cannot be clothed in the language of public interest.

18. These arguments form the context of our analysis of the question as to whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave to appeal pursuant to Article 163(4) of the Constitution. The criteria for certification of a matter as one of general importance was laid down by the Supreme Court in Hermanus Phillipus Steyn vs. Giovanni Gnecchi Ruscone, (supra) as follows:

> "...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 close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

19. The Supreme Court further enunciated the principles for determining whether a matter of general public importance thus:

    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. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

20. It is notable in this respect that this Court framed the issues before it in the impugned judgment as follows:

> " 19. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we form the view that five (5) issues commend themselves for our determination, namely:
>
> (i) whether the 1st respondent had jurisdiction to hear and determine the 3rd respondent's preliminary objection;
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> (ii) whether the 1st respondent's decision was in accordance with the law;
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> (iii) whether, in reaching its decision, the 1st respondent acted fairly and reasonably;
>
> (iv) whether the 1st respondent acted in breach of the appellant's legitimate expectation; and
>
> (v) whether the 1st respondent acted in breach of the appellant's constitutional rights to fair hearing and fair administrative action."

21. The issues being raised in this application by the Applicant as regards the jurisdiction of the 1st Respondent to declare the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations to be at variance with section 170 of the *Public Procurement and Asset Disposal Act* and whether the said form is at variance with section 170 are therefore new issues which cannot be raised for the first time in the Supreme Court.

22. In addition, we have reproduced the applicant's grievance with the decisions made by the 1st Respondent, the High Court and this Court earlier on in this ruling, which illustrate that the Applicant is basically aggrieved that it's arguments were not upheld, and is seeking for an opportunity to relitigate its position. The Applicant did not set out any uncertainty caused by the law or previous decisions of this Court or the Supreme Court on the issues it raised, nor point out any substantial and novel points of law arising from the findings made by this Court in the impugned judgment. As indicated before, the Supreme Court's guidance is that matters of general public importance are those that inter alia, raise a substantial point of law, or occasion a state of uncertainty in the law or arise from contradictory precedents, or will affect a considerable number of persons in general, or as litigants. It is also notable that the applicant did not bring to our attention any similar cases where litigants have been adversely affected as claimed.

23. The applicant therefore appears to be dissatisfied with the conclusions reached by this Court, and challenges the factual and legal basis of the said conclusions. 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 a purely private claim relating to the decision on procurement of a tender and the procedures employed by the Applicant to review the said procurement, in which the public as a whole has no stake. In addition, 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. To this extent the intended appeal does not transcend the circumstances of that particular case.

24. Arising from the above stated reasons, the issues raised by the Applicant in our view do not qualify as substantial questions of law or matters of general public importance, nor are they capable of transcending the dispute between the parties in this particular case.

    The Applicant's Notice of Motion application of dated 28th February 2025 is accordingly found not to have merit, and is dismissed with costs to the 1st and 2nd Respondents.

25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF FEBRUARY, 2026.

S. GATEMBU KAIRU, FCIArb.C.Arb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR