

**IN THE COURT OF APPEAL
AT NAIROBI**

**(CORAM: MUSINGA (P), LILAN, & OKELLO,
JJ.A.) CIVIL APPLICATION SUP. NO. E011 OF
2026 BETWEEN**

MULTICHOICE KENYA LIMITED.....APPLICANT

AND

**INSPECTOR GENERAL OF POLICE1ST
RESPONDENT DIRECTOR OF PUBLIC PROSECUTIONS
.....2ND RESPONDENT CEMENTERS LIMITED
.....3RD RESPONDENT
STANLEY KEBATHI4TH
RESPONDENT STANLEY KEBATHI T/A ARCHPLANS
.....5TH RESPONDENT
KARIUKI MUCHEMI6TH
RESPONDENT INTERCONSULT ENGINEERS LIMITED .
.....7TH RESPONDENT WILSON MUNYU KARABA
.....8TH RESPONDENT CONAPEX CONSULTING
ENGINEERS LTD9TH RESPONDENT**

(Being an application for certification that a matter of grave public importance is involved warranting the grant of leave to appeal to the Supreme Court against the Judgment of the Court of Appeal (Kiage, Ali-Aroni & Achode, JJ.A.) dated 24th January 2025

in

**Civil Appeal No. E604 of 2023
Consolidated with
Civil Appeal No. E676 of 2023)**

**** RULING OF THE
COURT**

1. Before this Court is a Notice of Motion dated 12th January

2026 brought under **Article 163(4)(b) of the Constitution, sections 15B(1)(a) of the Supreme Court Act, rule 33(1) of the Supreme Court Rules, 2020, and rules 12, 41(c) and 44 of the Rules of this Court.** The applicant principally seeks

certification that the intended appeal to the Supreme Court against the judgment of this Court (Kiage, Ali-Aroni & Achode JJ.A.) delivered on 24th January 2025 in Civil Appeal No. E604 of 2023 as consolidated with Civil Appeal No. E676 of 2023 raises matters of general public importance; leave to appeal to the Supreme Court against the said judgment and orders; orders staying the proceedings in Milimani Chief Magistrate's Criminal Case No. E007 of 2022 both pending the application and pending the intended appeal.

2. The dispute culminating in this application originates from Nairobi High Court Judicial Review Miscellaneous Application No. E033 of 2022. The *ex parte* applicants, namely **Stanley Kebathi, Stanley Kebathi t/a SK Archplans, Kariuki Muchemi, and Interconsult Engineers Limited (IEL)** applied to the High Court for orders of certiorari and prohibition in a bid to quash several decisions, namely: decision of the police to investigate them, the decision of the Director of Public Prosecutions to charge and prosecute them, and the decision of the trial court to admit an amended charge sheet. They also sought to quash the entire proceedings in Milimani Chief Magistrate's Court Criminal Case No. E007 of 2022, and to prohibit any further prosecution, harassment, or institution of charges arising from the same facts.
3. The application before the High Court arose from criminal

charges brought against them following a complaint by Cementers Limited. The complaint alleged that the applicants

had participated in the alteration or falsification of a Structural Integrity Report prepared in relation to a construction project, with a view to shifting blame for structural defects. Investigations followed resulting in criminal charges of conspiracy to defraud and making a false document. On their part, the *ex parte* applicants maintained that the report constituted a professional opinion rendered in the course of their duties and that the criminal proceedings were being used to advance a civil dispute.

4. The High Court (Ngaah, J.) declined to interfere with the decision of the Director of Public Prosecutions to charge the accused persons in Milimani Chief Magistrate's Criminal Case No. E007 of 2022. Aggrieved by that decision, the affected parties, including Multichoice Kenya Limited and the *ex parte* applicants, lodged appeals to this Court in Civil Appeal Nos. E604 and E676 of 2023 (consolidated).
5. In its judgment delivered on 24th January 2025, this Court (Kiage, Ali-Aroni & Achode, JJ.A.) upheld the decision of the High Court. The Court found that the Director of Public Prosecutions acted within his constitutional mandate in preferring charges and that the appellants had failed to demonstrate any improper motive, illegality, or abuse of process to warrant judicial review intervention. The Court further held that the existence of parallel civil and arbitral proceedings did not bar criminal prosecution in light of **section 193A of the Criminal Procedure Code**, and that no sufficient basis had been laid to prohibit the continuation

of the criminal trial.

6. The applicant is not relenting and now seeks to escalate the matter to the Supreme Court.
7. The grounds in support of the application as set out on the face thereof and in the affidavit in support sworn by **Ruth Omondi**, the applicant's Finance Manager, are that the intended appeal raises substantial questions of general public importance, concerning the scope and limits of prosecutorial powers under **Article 157(11) of the Constitution** and the proper interpretation and application of **section 193A of the Criminal Procedure Code** regarding concurrent civil and criminal proceedings. The applicant contends that the intended appeal is arguable and with high chances of success.
8. The applicant contends that there is a growing need for the Supreme Court to provide authoritative guidance on when criminal proceedings may be said to amount to an abuse of process, especially where they intersect with ongoing civil and arbitral disputes. The applicant invokes comparative jurisprudence and prior Supreme Court decisions, including **Jirongo v Soy Developers Ltd & 9 others [2021] KESC 32 (KLR)** for the proposition that the existing principles require clarification and possible development in light of evolving legal and commercial realities.
9. The applicant further asserts that the issues transcend the interests of the parties and have broader public significance regarding the independence and accountability of

prosecutorial decision-making.

10. It is contended that no prejudice will be occasioned to the respondents if the orders sought are granted and that the applicant has already demonstrated its intention to appeal by filing and serving a notice of appeal. Ultimately, the applicant maintains that it is in the interests of justice for this Court to certify the matter and grant leave to appeal to the Supreme Court together with interim orders staying the ongoing criminal proceedings.
11. The application is opposed by the 3rd respondent vide a replying affidavit sworn by **Ramesh Vishram**, its director. It is averred from the onset that the application is legally deficient, does not meet the threshold for grant of the reliefs sought, and ought to be dismissed with costs.
12. It is deponed that the subject of the intended appeal is the decision of this Court which affirmed that the Director of Public Prosecutions properly exercised his constitutional mandate in instituting criminal proceedings and that the present application merely seeks to re-litigate that issue. The 3rd respondent contends that questions concerning prosecutorial discretion under **Article 157 of the Constitution** and the principles governing the institution and continuation of criminal proceedings are well settled and do not raise any novel or unsettled issues warranting certification.
13. It is further averred that the application does not satisfy the threshold under **Article 163(4)(b) of the Constitution** as it does not raise any matter of general public importance.

It is

contended that the issues raised are confined to the specific facts of the case and do not transcend the parties or require further authoritative pronouncement in line with the principles set out in **Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR.**

14. Additionally, it is averred that this Court is *functus officio* in respect of the merits of the appeal and is only seized of limited jurisdiction in relation to certification. It is further contended that this Court lacks supervisory jurisdiction over subordinate courts which is constitutionally vested in the High Court under **Article 165(6)** and cannot, therefore, grant orders that would interfere with ongoing criminal proceedings.
15. The 3rd respondent also asserts that the prayer for stay of criminal proceedings improperly invites this Court to assume jurisdiction it does not possess, in circumstances where no decision of the trial court is under appeal. Further, it is contended that the applicant has not demonstrated that continuation of the criminal proceedings would render the intended appeal nugatory nor has any exceptional or irreparable prejudice been shown that cannot be addressed within the criminal trial process.
16. In conclusion, the 3rd respondent maintains that the application is misconceived, jurisdictionally barred, incompetent, and an abuse of the appellate process and urges this Court to dismiss it with costs.

17. When the application came up for hearing, learned counsel **Mr. Omondi** represented the applicant. The 3rd respondent was represented by learned counsel **Mr. Gitonga** while learned counsel **Mr. Njoroge** appeared for the 4th and 5th respondents. Learned counsel **Mr. Kirika** represented the 8th and 9th respondents. **Ms. Frida Mwanza** held brief for **Ms. Njoki Keng'aara** for the 2nd respondent. There was no appearance for the 1st respondent despite having been served with the hearing notice.
18. In his highlights of the applicant's written submissions, counsel argued that the intended appeal raises a matter of general public importance warranting certification to the Supreme Court. Drawing from **Hermanus Phillipus Steyn** (supra) and comparative guidance in **Pioneer Shipping Ltd & Others v BTP Tioxide Ltd [1981] 2 All ER 1030**, it was contended that recurrence of an issue and its impact on the administration of justice are relevant indicators. It was contended that the question of prosecutorial overreach and abuse of criminal process particularly in commercial disputes is a recurring issue affecting a wide class of litigants and therefore meets this threshold.
19. Counsel further submitted that although this Court dismissed the appeal solely on the basis that no evidence of ulterior motive had been furnished, in modern practice, abuse of prosecutorial power is often subtle and difficult to prove directly. It was contended that in the current legal and technological landscape, improper motives may be

concealed thereby

necessitating a re-examination and development of the legal test for establishing abuse of process. To support this argument, counsel placed reliance on **Cyrus Jirongo v Soy Developers Ltd & 9 Others [2021] KESC 32 (KLR)**, where the Supreme Court addressed the question of abuse of prosecutorial power and recognized that criminal proceedings may be impugned where they are used for collateral purposes. Counsel contended that the principles in that decision require further development to reflect contemporary realities and that without such evolution, proving ulterior motive will remain impracticable. Further reliance was placed on **Dande & 3 Others v Inspector General, National Police Service & 5 Others [2023] KESC 40 (KLR)**, which reaffirmed **Jirongo** (supra) and addressed the interplay between civil disputes and criminal proceedings, a context similar to the present case.

20. Counsel also invoked comparative jurisprudence from India to illustrate the development of principles governing abuse of criminal process. In **R.P. Kapur v State of Punjab AIR 1960 SC 866**, the Supreme Court of India laid down foundational categories under which criminal proceedings may be quashed including where the allegations do not disclose an offence or where proceedings are manifestly attended by *mala fides*. These principles were subsequently expanded in State of **Haryana & Others v Bhajan Lal & Others 1992 AIR 604**, which set out a broader quashing matrix of illustrative circumstances where courts may

intervene to prevent abuse of process.

21. Further reliance was placed on **B.N. John v State of Uttar Pradesh & Another (2025) INSC 4**, where the Supreme Court of India emphasized safeguards against abuse of police powers in relation to non-cognizable offences and underscored the need for judicial oversight before investigations are commenced. Similarly, in **Mahmood Ali v State of Uttar Pradesh (2023) 10 SCC 544**, the Court stressed that where *mala fides* are alleged, courts must go beyond the face of the complaint and examine surrounding circumstances to determine whether the criminal process is being misused.
22. In conclusion, it was submitted that the intended appeal raises important and recurring questions on the limits of prosecutorial discretion and the threshold for establishing abuse of criminal process in cases intertwined with civil disputes. Counsel reiterated that these issues transcend the parties and bear significantly on the administration of justice thereby warranting certification for appeal to the Supreme Court.
23. **Mr. Njoroge** for the 4th and 5th respondents and **Mr. Kirika** for the 8th and 9th respondents fully associated themselves with both the application and the submissions made by Mr. Omondi for the applicant.
24. On her part, counsel Ms. Mwanza highlighting the 2nd respondent's written submissions, contended that the applicant has failed to meet the threshold under **Article 163(4)(b) of the Constitution**. She submitted that

certification is only available where an intended appeal raises a matter of general public

importance and that this must be demonstrated at the outset. In this regard, reliance was placed on **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione** (supra) where the Supreme Court emphasized that certification is a filtering mechanism to ensure that only appeals raising genuine issues of public importance reach the Supreme Court.

25. Further reliance was placed on **Kimweli & 46 Others v National Social Security Fund Board of Trustees [2024] KECA 202 (KLR)**, where this Court drawing from Hermanus Phillipus (supra) clarified that a matter of general public importance must concern the public at large and not merely the interests of the parties before the Court. It was submitted that the present dispute is fact-specific and does not transcend the parties or implicate broader public interest considerations.
26. It was further contended that the applicant has failed to identify any specific question of law warranting the intervention of the Supreme Court, adding that the application merely challenges exercise of prosecutorial discretion of the Director of Public Prosecutions in the particular case which is a settled area of law and does not raise any novel or unsettled legal question.
27. In addition, counsel contended that the applicant has not preferred any evidence of the alleged prosecutorial impropriety, hence the claim remain bare assertions which cannot elevate the dispute into one of general public

importance.

28. For the 3rd respondent, it was submitted that the application for certification does not meet the threshold under Article 163(4)(b)

of the Constitution. Counsel contended that the sole issue for determination is whether the intended appeal raises a matter of general public importance and opined that it did not. Counsel emphasized that mere dissatisfaction with the outcome of litigation or an attempt to re-open factual findings does not satisfy that threshold set out in **Hermanus Phillipus Steyn** (supra).

29. According to counsel, the present application is anchored on allegations that the Director of Public Prosecutions acted improperly in instituting criminal proceedings yet the applicant itself concedes that there is no evidence of prosecutorial impropriety. It was contended that such an admission is fatal as allegations made in the abstract without evidentiary support cannot found a basis for certification nor make the dispute one of general public importance. Counsel further asserted that the propriety or otherwise of the criminal charges in question charges is entirely based on specific facts of the case and does not transcend the parties so as to warrant the intervention of the Supreme Court.
30. Counsel further challenged the applicant's reliance on comparative jurisprudence from India, contending that while foreign decisions may offer persuasive value, they must be applied cautiously and within the context of Kenya's constitutional and statutory framework. It was therefore argued that the applicant had failed to demonstrate the relevance or applicability to the present case and that reliance on such

jurisprudence had not aided in yielding any novel or unsettled issue within Kenyan law.

31. On the issue of jurisdiction, reliance was placed on **Dande & 3 others v Director of Public Prosecutions & 2 others** (supra) where the Supreme Court declined jurisdiction to stay criminal proceedings pending before a Magistrate's Court, holding that its appellate jurisdiction is limited to decisions emanating from the Court of Appeal and does not extend to supervisory control over subordinate courts. According to counsel, that reasoning applies with equal force to the present application as no decision of the trial court is before this Court and the criminal proceedings are properly continuing within the jurisdiction of the Magistrate's Court.
32. We have considered the application, the submissions by learned counsel, the authorities cited and the applicable law. **Article 163(4) of the Constitution** stipulates that appeals lie from this Court to the Supreme Court:

“(a) as of right in any case involving the interpretation or application of this Constitution; and

(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.”
33. It is trite law as stated in **Hermanus Phillipus Steyn** (supra) that to succeed in an application for certification

under **Article**

163(4)(b) of the Constitution, an applicant has to demonstrate that the issue to be raised in the intended appeal involves a matter of general public importance. A ‘matter of general public importance’ was defined in the said decision thus:

“...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.”

34. The gravamen of the applicant’s case is that the jurisprudence governing the establishment of ulterior motive and abuse of prosecutorial process requires re-examination in light of evolving legal and socio-political realities. It is contended that the current legal framework as reflected in decisions such as **Cyrus Jirongo v Soy Developers Ltd** (supra) is no longer adequate to deal with modern forms of alleged prosecutorial overreach, particularly where such conduct is subtle and difficult to prove through direct evidence. In other words, the appellant appears to be saying that the established threshold for intervention by courts contemplates only instances where abuse of prosecutorial

power for ulterior motive is obvious, blatant or overt. In
contradistinction, the appellant now posits

that where there is subtlety which is inherently difficult to detect, another threshold or “expanded quashing matrix” should be deployed. The applicant relies on comparative jurisprudence, especially from India, to support the view that the existing quashing matrix should be reviewed and expanded.

35. While that argument has some appeal in theory, the difficulty we face is that the issue, as framed, does not arise from the judgment sought to be appealed in a way that would justify certification. The decision of this Court in the consolidated appeals turned on a straightforward finding that no evidence of ulterior motive or abuse of process had been demonstrated. That finding was grounded on the facts placed before this Court, the application of well settled principles relating to the exercise of prosecutorial discretion under **Article 157 of the Constitution** and the permissibility of concurrent civil and criminal proceedings under **section 193A of the Criminal Procedure Code**. The applicant does not, in our view, point to any uncertainty, inconsistency, or lacuna in those principles as applied by this Court. Rather, what is sought is, in substance, a reconsideration of the evidentiary threshold for establishing abuse of process in the context of the particular facts of this case.
36. In our view, that is not a proper basis for certification. A matter does not attain the status of general public importance merely because it touches on constitutional

provisions or because it is framed in broad terms. It must be demonstrated that the issue transcends the interests of the parties and has a significant

bearing on the public at large. It must also be shown that the issue is not merely one of fact or of the application of settled law to particular circumstances. The question whether ulterior motive (subtle or otherwise) was established in the institution of the criminal proceedings in this case is, at its core, a factual inquiry. The applicant has not identified any specific, novel or unsettled question of law arising from that determination that would warrant the intervention of the Supreme Court.

37. The applicant has not demonstrated how the cited authorities from foreign jurisdiction disclose a gap or uncertainty in Kenyan law requiring clarification by the Supreme Court. On the contrary, the principles governing abuse of criminal process and the limits of prosecutorial discretion have been, in our view, authoritatively settled by the Supreme Court.
38. We have also considered the argument that the intended appeal seeks to develop the law in light of changing circumstances. That may be a valid concern in an appropriate case. However, certification cannot be granted on the basis of broad or general statements. The issue must arise clearly from the decision being appealed and must be stated with precision. In this case, despite the wide-ranging submissions, no clear and specific question of law has been identified that meets this threshold.
39. As regards the prayer for stay of the criminal proceedings, it is sufficient to note that this Court's jurisdiction in an

application of this nature is confined to the issue of certification. This Court is *functus officio* on the merits of the appeal and does not, in

any event, exercise supervisory jurisdiction over subordinate courts, that being the mandate of the High Court.

40. In the end, we are not satisfied that the intended appeal raises a matter of general public importance within the meaning of **Article 163(4)(b) of the Constitution**. Consequently, the Notice of Motion dated 12th January 2026 is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 30th day of April, 2026.

D. K. MUSINGA (PRESIDENT)

.....
**JUDGE OF
APPEAL PAUL
LILAN**

.....
**JUDGE OF APPEAL
DR. JOHNSON
OKELLO**

.....
JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.