



**ADK Technologies Ltd in Consortium With Transnational Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Application E078 of 2022) [2023] KECA 1182 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1182 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E078 OF 2022  
DK MUSINGA, F SICHALE & HA OMONDI, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**ADK TECHNOLOGIES LTD IN CONSORTIUM WITH TRANSNATIONAL  
COMPUTER TECHNOLOGIES LTD ..... APPLICANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1<sup>ST</sup>  
RESPONDENT**

**PRINCIPAL SECRETARY, NATIONAL TREASURY & PLANNING .... 2<sup>ND</sup>  
RESPONDENT**

**NATIONAL TREASURY & PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**KINGSWAY BUSINESS SYSTEMS LTD IN CONSORTIUM WITH KOBBY  
TECHNOLOGIES LTD & INPLENION EAST AFRICA LTD . 4<sup>TH</sup> RESPONDENT**

**ADK TECHNOLOGIES LIMITED ..... 5<sup>TH</sup> RESPONDENT**

*(An Application for certification that matters of general public importance are involved pursuant to Article 163 (4) (b) of the Constitution of Kenya, 2010 with respect to the intended appeal against the Judgment and Orders of the Court of Appeal at Nairobi (M’Inoti, Kantai & Laibuta, JJ.A) on 4th March 2022 in Civil Appeal No. E598 of 2021)*

**RULING**

1. The applicant’s Notice of Motion dated March 7, 2022 substantially seeks certification that the following matters, emanating from this Court’s judgement of March 4, 2022, are of general public importance and therefore leave be granted to appeal the said judgment to the Supreme Court:



- i. Whether the computation of 45 days provided under section 175 (4) of the *Public Procurement and Asset Disposal Act*, 2015 starts from the date of filing the appeal or from the date of hearing of the appeal or any other time.
  - ii. Whether one party to a consortium agreement may lodge a request for review, file a Judicial Review and prefer an appeal if the other party is unwilling to do so.
2. The applicant further seeks, pending determination of the application, an order to suspend or stay the enforcement of the judgment of this Court that struck out the appeal with costs to the respondent.
  3. The central issue that fell for determination by this Court in its impugned decision was whether the Court has jurisdiction to hear an appeal arising from the *Public Procurement and Asset Disposal Act* (the PPAD Act) after expiry of 45 days from the date of the decision appealed from.
  4. A brief background to the judgment is necessary to provide the right perspective of the impugned judgment. The applicant in consortium with Computer Technologies Ltd was an unsuccessful bidder for a tender for the provision of outside support for IFMIS e-procurement system that had been floated by the National Treasury and Planning, the 3<sup>rd</sup> respondent.
  5. The applicant applied to the Public Procurement Administrative Review Board, (1<sup>st</sup> respondent), to review the 3<sup>rd</sup> respondent's decision. The 1<sup>st</sup> respondent struck out the applicant's request for review after the same was disowned by the 5<sup>th</sup> respondent, in whose name it had been made. The applicant unsuccessfully moved the High Court to quash the decision of the 1<sup>st</sup> respondent vide a judicial review application.
  6. After a lapse of 191 days from the date of the High Court decision dismissing the applicant's judicial review application, the applicant lodged its notice of appeal to this Court.
  7. In its impugned judgment of March 4, 2022, this Court cited the provisions of section 175 (1) of the *Public Procurement and Asset Disposal Act*, which provides, inter alia:
    - “(4) 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.”
  8. The Court held that the appeal, having been filed outside the mandatory statutory time frame of seven days, it had no jurisdiction to hear and determine the appeal. The Court cited its earlier decision in *The Consortium of TSK Electronica Y Electricidad S A & Ansaldoenergia v PPARB & 3 Others*, Civil Appeal No E012 of 2022, where it held that: “These timelines are cast in stone and cannot be varied. The strict time frames under this section underscore the intention of Parliament to ensure disputes relating to Public Procurement and Asset disposal are disposed of expeditiously.”
  9. Being dissatisfied with the Court's decision, the applicant filed a notice of appeal dated March 7, 2022, signifying intent to appeal to the Supreme court against the said decision.
  10. In this application, the applicant's counsel submitted that the two issues raised in paragraph 1 of this ruling are of general public importance; that this Court erred in its computation of time under section 175 (4) of the *Public Procurement and Asset Disposal Act*, thus denying them access to justice; and that the decision sanitized illegal procurement processes contrary to constitutional values and principles relating to public procurement of goods and services.
  11. The respondents opposed the application. Their respective arguments may be summarized as follows:



- i. The application does not raise any issues or rights involving the interpretation or application of the Constitution and/or of general public importance.
  - ii. The application has not met the threshold of matters of general public importance as was stipulated by the Supreme Court in Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2012] eKLR and Malcolm Bell v Hon Daniel Toroitich arap Moi & Another [2013] eKLR.
  - iii. There is no demonstration that the two issues raised transcend the interest of the parties or that there is any uncertainty brought about by conflicting decisions in interpretation of section 175 (4) of the Public Procurement and Asset Disposal Act.
  - iv. This Court did not make any determination on the second issue as raised by the applicant as it held that it lacked jurisdiction to hear and determine the appeal.
  - v. The Court has no jurisdiction to stay its own orders, such an application can only be entertained by the Supreme Court.
12. We have considered the application, the affidavits and submissions by all the parties. Article 163 (4) (b) of the Constitution states as follows:

"Appeals shall lie from the Court of Appeal to the Supreme Court –

- (a) .....
- (b) In any other cases in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

13. In Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone (*supra*), the Supreme Court set out the governing principles for determining what amounts to a matter of general public importance. They are as follows:

- “(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;

- ii. 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;
- iii. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

- 14. In our view, this application does not meet the threshold established by the Supreme Court in Phillipus case (*supra*). Firstly, the applicant was pursuing a private commercial deal that did not go its way. It is not the kind of matter that can attract public interest.
- 15. Secondly, the first issue involves a mundane point of law that has been a subject of determination in a plethora of this Court’s decisions, among them being Aprim Consultants v Parliamentary Service Commission & Another, Civil Appeal No E039 of 2021.
- 16. Thirdly, we were not told of any conflicting decisions of this Court on the issue that may require the Supreme Court’s intervention.
- 17. Fourthly, as regards the second issue, this Court did not pronounce itself on the same, having simply downed its tools for want of jurisdiction.
- 18. All in all, we find this application unmeritorious. Consequently, we hereby dismiss it with costs to the respondents.
- 19. Lastly, the delay in delivery of this ruling is regretted. It was occasioned by inadvertent failure to diarize it.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

