IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, ASIKE-MAKHANDIA & KANTAI, JJA)

CIVIL APPLICATION NO. SUP. 12 OF 2020

BETWEEN

VULCAN LAB EQUIPMENT LIMITED.....APPLICANT

AND

ETHICS AND ANTI CORRUPTION COMMISSION.....1ST RESPONDENT

SCHOOL EQUIPMENT PRODUCTION UNIT.....2ND RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court of Kenya against the Judgement and Orders of the Court of Appeal (Honourable Ouko, (P), Kiage and Murgor, JJ.A.) dated 19th June 2020)

in

Civil Appeal No. 197 of 2018 as consolidated with Civil Appeal No. 354 of 2018

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RULING OF THE COURT

1. By a Notice of Motion dated 3rd July, 2020 the applicant seeks certification and leave to appeal to the Supreme Court against the decision of the Court of Appeal sitting at Nairobi in **Civil Appeal No. 197 of 2018 as consolidated with Civil Appeal No. 354 of 2018.** The application is brought under the provisions of **Article 163 (4)** of the Constitution, **section 16** of the Supreme Court Act and **Rule 1(2), 42, 43** and **47** of the **Court of Appeal Rules**.

2. The facts in brief are that School Equipment Production Limited, the 2nd respondent approached Vulcan Lab Limited, the applicant, for the supply of science equipment and laboratory chemicals. On the day of the execution of the contract, the 2nd respondent issued a cheque worth Kshs. 75,086,880 to the applicant which prompted the Ethics and Anti-Corruption Commission to obtain orders that froze two bank accounts held by the applicant. When the matter fell before the High Court in ***Benson Anyona Ombaki & 5 others vs. Republic [2015] eKLR, Criminal Appeal Nos.185, 149, 150, 151, 154 & 155 of 2013*** the directors from the 2nd respondent were convicted and sentenced on the charge of **fraudulent payment from public revenue for goods not supplied** contrary to **Section 45(2) (a)(ii)** as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act**. The applicant was however acquitted of the charge of **fraudulent acquisition of public property** contrary to **Section 45(1) (a)** as read with **Section 48** of the **Anti-Corruption and Economic Crimes Act**.

3. The applicant proceeded to the High Court at Nairobi in ***Anti-Corruption and Economic Crimes Case No. 27 of 2016 formerly Civil Suit No. 110 Of 2010*** against the 1st and 2nd respondents for damages and breach of contract suffered as a result of the 2nd respondent's failure to receive the goods due and the 1st respondent's action of freezing the applicant's bank accounts. While guided by the principle in ***Royal British Bank vs-Turquand (1856) 6 E&B 327***, in what it referred to as the "Rule of Turquand" case, as applied in the case of ***China Wu Yi Co. Ltd. vs-Edermann Property Ltd. & 2 Others [2013] eKLR,*** and subject to the procurement laws flouted by the 2nd respondent the trial court found that the applicant was not a party to the conspiracy by the 2nd respondent's employees. Hence the applicant was entitled to recover the value of the goods to be supplied to the 2nd respondent. It is also entitled to damages for breach of contract.

4. The respondents were aggrieved by the said findings and lodged separate appeals which were consolidated into **Civil Appeal No. 197 of 2018** whose unfavorable outcome, on the basis that the supply contract between the applicant and the 2nd respondent was found unenforceable for failure of the 2nd respondent to adhere to statutory requirements in its tender process, now forms the substratum of the present application.

5. At the hearing of the application, learned counsel Mr. Mogere was present for the applicant while learned counsel Mrs. Okwara and Mr. Korongo were on record for the 1st and 2nd respondents respectively. Counsel for the applicant asserted that since the applicant was acquitted and absolved of any wrong doing, the entirety of the challenged judgment of this Court was wrongly based on the apprehension that the applicant was involved in corruption. Counsel for the applicant further submitted that the imputations of corruption cannot stand against the acquittal. It was further submitted that since the applicant was found innocent, it is entitled to the protection of the indoor management rule which are prima facie on the procurement laws and regulations.

6. The 1st respondent opposed the application and contended that the applicant failed to concisely state the specific points of law, matters of general public importance and further failed to expound on the extent the internal management rule applied in the circumstances. Hence the 1st respondent contended that the applicant failed to meet the requirements that warrant the certification for leave to the Supreme Court of Kenya. It was the 1st respondent's view that the application merely is an attempt to re-litigate the applicant's matter which was dealt with conclusively by this Court. In conclusion the 1st respondent prayed that litigation must come to an end. Mr. Kongoro for the 2nd respondent held the same views as regards the submissions of the 1st respondent and emphasized the fact that the grounds and submissions raised in the application fail to demonstrate matters of general public importance and urged the Court to dismiss the application.

7. We have considered the material placed before us in the instant application, the grounds in support thereof, both written and the able submissions of counsel and the law. The applicant invokes the jurisdiction of this Court under **Article 163 (4) (b)** of the Constitution of Kenya and prays that leave for certification do issue as matters of general public importance are involved in the intended appeal to the Supreme Court against the challenged judgment and orders of this Court. Article 163(4) (b) provides as follows,

> ***"(4) 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)."***

8. Our jurisdiction to entertain an application for certification for leave to appeal to the Supreme Court herein is admitted as we note that the Notice of Appeal was duly filed on 3rd July 2020. (See. **Langata Development Co. Limited vs. Mary Wanjiru Dames [2019] eKLR**).

9. It is also alive to us that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under **Article 163(4) (b)** of the Constitution, where it is certified that the appeal involves a matter/s of general public importance. (See. **Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another, Supreme Court Petition No.3 of 2012 [2012] eKLR).**

10. The Supreme Court in ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi – Ruscone, Supreme Court application No.4 of 2012*** held that the meaning of "matter of general public importance may vary depending on the context. The Supreme Court considered Article 163(4) (b) of the Constitution and stated at paragraph 58 that:

> ***"…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."***

11. It is apparent to us that *the determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the supreme court* poses a significant threat to the subject of the present application. The trial court in **Benson Anyona Ombaki & 5 others v Republic [2015] eKLR, CRIMINAL APPEAL NOS.185, 149, 150, 151, 154 & 155 OF 2013** (Kimaru, J) despite acquitting the applicant, could not in the circumstances of the case allow the applicant to benefit from the obvious illegal and criminal conduct of the directors of the 2nd respondent company. The trial court in **Vulcan Lab Equipment Limited v. School Equipment Production Unit & another [2017] eKLR, Anti-Corruption and Economic Crimes Case 27 of 2016,** (Ong'udi, J) further observed that despite the applicant not being a party to the conspiracy by the 2nd respondent, the trial court could not proceed to enforce the subject contract. When the matter fell before this Court for an appeal, it was held that the contract between the applicant and the 2nd respondent was vitiated by obvious fraud. Hence it is an irrefutable fact that the contract was unenforceable and illegal.

12. The Supreme Court *in* ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** ***[2013] eKLR*** **(supra)** noted that this Court in declining to certify the matter as warranting a further appeal to the Sureme Court, observed thus;

> ***"It is clear that the matters which arose for determination both in the High Court and in this Court were substantially matters of fact. Both the High Court and this Court made concurrent findings of facts on the evidentiary matters in controversy."***

13**.** In view of the above, the Supreme Court upheld the findings of this Court and found no element of general public importance involved in the contract which led to the conclusion and principle that *the determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the supreme court.*

14. We are satisfied that the matters raised by the applicant are not novel, they are not issues that transcend the dispute between the parties herein. We are also satisfied that the issues raised herein have no bearing upon public interest which was not resolved or was resolved wrongly by this Court to warrant the intervention of the Supreme Court to correct a matter of general public importance. It is therefore our

humble view that the applicant is undertaking an obvious attempt to re-litigate what was lost in the High Court and in this Court. That is not what the noble Constitutional provisions of **article 163 (4)** was intended to address or resolve. We decline the camouflaged attempt to have a third bite in the cherry. The application is therefore dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of April, 2021

M.WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DUPUTY REGISTRAR