



IN THE COURT OF APPEAL AT NAIROBI

(CORAM: GITHINJI, SICHALE & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. SUP. 167 of 2018 (UR 136/2018)

BETWEEN

SGS KENYA LIMITED.....APPLICANT

AND

ENERGY REGULATORY COMMISSION.....1st RESPONDENT

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....2nd RESPONDENT

INTERTREK TESTING SERVICES

(EA) LIMITED3rd RESPONDENT

(Being an application for certification and leave to appeal to the Supreme Court; and also being an application for stay of the judgment of this Court (Nambuye ,Ouko & Kiage, JJA)dated 11th May, 2018

in

Civil Appeal No. 341 of 2017)

RULING OF THE COURT

1. Before us is a twin application for certification and leave to appeal to the Supreme Court and application for stay of the judgment of this Court delivered in Civil Appeal No. 341 of 2017.
2. By Tender No. ERC/PROC/4.3/16-17/119 dated 12th May 2017, the **Energy Regulatory Authority** invited bids for marking and monitoring petroleum products to detect and curb adulteration of motor fuel. On 30th June 2017, the **Evaluation Committee of the Regulatory Authority** recommended the Tender be awarded to the SGS (K) Limited, the applicant herein. However, the Committee in its recommendation made a General Observation that there is in existence a new technology that can detect jet fuel in motor fuel.
3. Acting on the General Observations of the Tender Committee, the tender process that awarded the bid to **SGS Limited** was terminated and re-started with requirement that the new technological changes be incorporated in the bid documents. The decision to terminate the tender was communicated to all bidders as well as **the Public Procurement Regulatory Authority**.
4. **SGS (K) Limited** being aggrieved by the decision to terminate the tender filed a Request for Review before the **Public Procurement Administration Review Board (Review Board)** seeking orders that the termination of the tender be declared null and void. Upon hearing the parties, the Review Board in its decision dated 1st August 2017 dismissed the request for review stating the 1st Respondent was at liberty to re-advertise the tender.
5. Further aggrieved, the **SGS (K) Limited** moved to the High Court in a judicial review application. The High Court granted the prayers sought and quashed the decision of the Review Board and ordered the **Energy Regulatory Authority** to proceed with Tender No. ERC/PROC/4.3/16-17/119 dated 12th May 2017.
6. Aggrieved, the **Energy Regulatory Authority**, the 1st respondent herein moved to this in Civil Appeal No. 341 of 2017. In a

judgment delivered on

11th May 2018, this Court allowed the appeal set aside in entirety the judgment of the High Court. It is against this judgment that the applicant seeks certification and leave to appeal to the Supreme Court. The applicant also seeks stay of judgment of this Court delivered on 11th May 2018.

7. By Notice of Motion dated 5th June 2018, the applicant seeks certification and leave based on the following grounds:

(i) *That the intended appeal raises matters of general public importance to wit:*

(a) *Whether Tribunals such as the Public Procurement Administrative Review Board are bound by their prior decisions according to the doctrine of precedent (stare decisis) and*

(b) *Whether the failure, without providing reasons, by quasi-judicial bodies such as the Public Procurement Administrative Review Board to abide by or distinguish their prior decisions is an irrational exercise of their mandate.*

8. In the Notice of Motion aforesaid, the applicant seeks two orders of stay namely:

“(a) *Pending the hearing and determination of the instant application, this Court do stay enforcement of the judgment of this Court dated 11th May 2018.*

(b) *Pending the hearing and determination of the instant application and the intended appeal thereafter, this Court to stay the re-advertisement and tender process by the 1st respondent, the Energy Regulatory Commissions or its staff or agents of Tender Number ERC/PROC/4/3/17-19/016 for Provision of Marking and Monitoring of Petroleum Products.”*

9. The 1st respondent in opposing the application filed a replying affidavit dated 7th September 2018 deposed by **Mr. Edward Mwirigi Kinyua**. A further affidavit dated 14th December 2018 deposed by **Mr. Ezra Kimutai Terer Milgo** was filed on 17th December 2018.

10. At the hearing of this application, Senior Counsel **Mr. Paul K. Muite** with learned counsel **Mr. D. K. Musyoka** appeared for the applicants. Learned counsel **Mr. Gershom Otachi** appeared for the 1st respondent while **Mr. Kepha Onyiso** appeared for the 2nd respondent. The 3rd respondent, despite service of the hearing notice on 6th December 2018 did not appear.

11. Senior Counsel **Mr. Muite** for the applicant urged us to grant certification and leave to appeal to the Supreme Court. It was urged the intended appeal raise novel matters of general public importance. Of significance, it is intended to postulate and urge before the Supreme Court whether Tribunals such as the Public Procurement Administrative Review Board are bound by the doctrine of precedent; that in the instant matter, the Procurement Review Board in arriving at its decision declining review of the impugned Tender did not follow its own previous decision made in **Avante International Technology Inc. vs. Independent Electoral and Boundaries Commission, PBAP Review No. 19 of 2017** (hereinafter the **Avante case**); that the Review Board not only failed to follow its previous decision, it failed to give any reason for overruling or distinguishing its own precedent; that failure by the Review Board to abide by its prior decisions or provide reasons for not doing so is an irrational exercise of its power and this is capable of causing extreme uncertainty in the administration of justice before the Review Board and similar quasi-judicial tribunals. Counsel submitted the issue in this matter transcends the interest of the applicant and affects the public at large and the administration of justice in general.

12. On leave to appeal, Senior Counsel urged this Court to bear in mind the provision of **Article 47** of the Constitution and its implementing statute the **Fair Administrative Actions Act**. It was submitted judicial review of administrative decisions is founded on **Article 47** of the Constitution; since review process has a constitutional underpinning, a party aggrieved by an administrative decision must be allowed to appeal as of right to the Supreme Court pursuant to **Article 163 (4) (a)** of the Constitution. It was submitted that a decision such as an Award under a Tender is an administrative decision subject to the provisions of the **Fair Administrative Actions Act**. This being the case, all administrative decisions and more particularly the decisions of the Public Procurement Administrative Review Board are subject to the national values of good governance, transparency and accountability enshrined in **Article 10 (2) (c)** of the Constitution.

13. On the twin stay applications before this Court, it was urged that granting stay in this matter is in the interest of the public as it will promote public good as the stay order will prevent adulterated and counterfeited motor fuel from reaching members of the public.

14. Learned Counsel **Mr. Otachi** in opposing the instant application urged that there is no matter of general public importance that is disclosed in the instant application; that the stay application is misplaced as the tender in dispute between the parties has been overtaken by events; that a new tender was advertised, floated and evaluated; the new tender is set to be executed on 1st January 2019.

15. In a replying affidavit deposed by **Mr. Kinyua**, the 1st respondent avers there has been setback of over one year in the tendering process; the tender process is now at an advanced stage nearing conclusion; the applicant has had a previous tender to supply the services required for over half the period required in the tender documents; that any further delay in the tendering process will create a vacuum in protecting consumer's interest and Kenyans will be exposed to adulterated fuel as there will be no provision for marking and monitoring of petroleum products; it was urged the issue of Public Procurement Administrative Review Board deciding cases with different facts cannot be basis of any constitutional interpretation by the Supreme Court; that minor inconsistency in the decisions of a Review Board is not a matter of general public importance; that the dispute in this case relate to special circumstances of the applicant and are not of general importance.

16. The respondent submitted that the Review Board did in fact affirm the principles in the **Avante case** and its decision is in rhyme and

consonance with the doctrine of precedent. It was urged the applicant's contestation is founded on an erroneous assertion that the Public Procurement Administrative Review Board departed from its earlier ruling in the *Avante case* where the Board found that termination of a tender on "substantial technological change" require evidence and a technical report by a technical committee or by persons who are technically competent to demonstrate that there has indeed been a technological change specifying the nature of the change. It was urged this Court in its judgment held that the Review Board did not act in ignorance or disregard of the *Avante case*.

17. In further opposition to the instant application, the respondent urged there was no issue of interpretation and application of *Article 47* of the Constitution before the Review Board, High Court or this Court; that in the instant application, the attempt to invoke the jurisdiction of the Supreme Court founded on *Article 47* of the Constitution and an alleged violation of the provisions of the *Fair Administrative Actions Act* is an introduction of extraneous issues that were never canvassed before the superior courts.

Counsel cited the decision in *Lawrence Nduttu & 6000 others vs. Kenya Breweries Limited & another SC Petition No. 3 of 2012* where it was remarked an appeal must originate from the Court of Appeal where issues of contestation revolved around the interpretation or application of the Constitution. It was urged that in the instant matter, there is no question of interpretation or application of the Constitution.

18. The respondent further relied on *Section 175 (4)* of the *Public Procurement and Disposal Act* which provides that the decision of the Court of Appeal is final. The Section provides:

"175 (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."

19. On the issue of stay orders, the respondent submitted that the applicant has not demonstrated that it stands to suffer irreparable injury if stay is not granted. On balance of probability, counsel submitted that subsequent to the judgment of this Court delivered on 11th May 2018, a fresh tender was advertised and the process is now at an advanced stage nearing conclusion; that the instant application for stay has been overtaken by events and the intended appeal to the Supreme Court will serve no purpose; that a grant of stay orders will create a vacuum in the immediate future and Kenyans will be exposed to adulterated fuel.

20. In concluding his submissions, the respondent submitted this Court has no jurisdiction to grant an order staying its judgment pending certification and leave to the Supreme Court. Counsel cited the decision of this Court in *Dickson Muricho Muriuki vs. Timothy Kagondu Muriuki & 6 others* [2013] eKLR where it was held:

"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....."

It is our considered view that subject to the Court of Appeal's jurisdiction to certify matters of appeal to the Supreme Court, the proper forum to seek and apply for stay of execution after judgment by the Court of Appeal is the Supreme Court."

21. We have considered the Notice of Motion, the grounds in support thereof as stated on its face and in the supporting affidavit. We have also considered the replying affidavit and the list of authorities filed by the parties.

22. We shall consider the instant application at two levels. First, the application for certification and leave to appeal; second, the twin applications for stay.

23. The principles applicable in an application for leave and certification to appeal to the Supreme Court is well settled and enunciated in numerous cases. The Supreme Court has given the test for granting certification and leave to appeal to the Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi – Ruscone, Supreme Court application No.4 of 2012*. The Court held that the meaning of "*matter of general public importance*" may vary depending on the context. The Court considered *Article 163(4) (b)* of the Constitution and stated at paragraph 58 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 closed the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

24. This Court in *Kenya Plantation and Agricultural Workers Union vs. Kenya Export Floriculture, Horticulture and allied Workers' Union (Kefhau) represented by Its Promoters David Benedict Omulama & 9 others* [2018] eKLR stated as follows:

"The principles set out in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone*, (supra) to determine whether a matter is of general public importance included:

a) 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;

b) 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;

c) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

d) 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;

e) 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;

f) 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;

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

25. In the instant application, it is our duty to consider and appraise if the principles enunciated for certification and leave to appeal have been fulfilled. At the risk of repetition, the applicant contends the intended appeal raises two matters of general public importance namely:

i. Whether Tribunals such as the Public Procurement Administrative Review Board are bound by their prior decisions according to the doctrine of precedent (stare decisis) and

ii. Whether the failure, without providing reasons, by quasi-judicial bodies such as the Public Procurement Administrative Review Board to abide by or distinguish their prior decisions is an irrational exercise of their mandate.

26. We have considered the two issues postulated to be of general public importance. In the first instance, the issues as identified are targeted at impugning the decision of the Public Procurement Administrative Review Board. There is no express identification of what error of law or miscarriage of justice was arrived at by this Court in its decision that is the subject of the intended appeal. We have analyzed the judgment of the High Court and this Court. The question whether the Public Procurement and Administrative Review Board is bound by the doctrine of precedent was not canvassed before the High Court or this Court. The Supreme Court in **Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 others, Supreme court Petition No. 2 of 2012 [2012] eKLR** expressed that for an issue to be canvassed before the Supreme Court, the issue must have undergone examination in all lower courts. In **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR at para 52**, it was stated that an appeal to the Supreme Court within the terms of **Article 163 (4)** should be founded on cogent issues of constitutional controversy.

27. Of significance is dicta by the Supreme Court in **Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR**, in which the Supreme Court reiterated that it does not have jurisdiction to entertain an appeal that does not raise a question of constitutional interpretation or application; the mere clothing of an appeal or intended appeal as a question of constitutional interpretation or application does not automatically grant jurisdiction to the Supreme Court.

28. In the instant matter, the applicant has invoked the provisions of **Article 47** of the Constitution and the **Fair Administrative Actions Act**. The Article and the Act were not subject matter of interpretation or litigation before the High Court or this Court. The Article and the Act not having been subject of litigation, canvassing and determination by the High Court and this Court leads us to conclude that the jurisdiction of the Supreme Court cannot *prima facie* be invoked under **Article 163 (4) (b)** of the Constitution. In this regard, we are persuaded by the dicta of the Supreme Court that it matters not how one clothes his application; the mere clothing of an appeal or intended appeal as a question of constitutional interpretation or application does not automatically grant jurisdiction to the Supreme Court.

29. The applicant in its submissions urged us to make a finding that any administrative decision invites the application of **Article 47** of the Constitution and the provisions of **Fair Administrative Actions Act** and consequently, a person aggrieved can appeal as of right to the Supreme Court pursuant to **Article 163 (4) (a)** of the Constitution. Once again, we note that this issue was neither litigated, canvassed nor considered by the High Court or this Court. This is an application for certification. In such an application, we have no original jurisdiction to hear and determine a substantive contestation on a point of law without the benefit of the High Court or this Court's reasoned decision on the matter. Accordingly, we decline to pronounce ourselves on the issue. We further find that an issue that was neither canvassed before the High Court or this Court cannot suddenly transmogrify to become a matter of general public importance that warrant invocation of Supreme Court's appellate jurisdiction under **Article 163 (4) (b)** of the Constitution.

30. Notwithstanding the foregoing, we note the persuasive decision of the High Court in **Republic vs. Kenyatta University Ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR** where it was expressed as follows:

“22. Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the Fair Administrative Action Act. Section 2 of the act defines an “administrative action” to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

23. On the face of all the above constitutional provisions and in particular the right to access justice, the question that arises

is whether a citizen citing violation of a constitutional right requires the leave of the Court to apply for Judicial Review Orders.

30. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by the Constitution.

31. It is therefore my conclusion that in cases citing violation of the Bill of Rights or violation of the Constitution, leave of the Court is not a prerequisite before instituting the proceedings nor is it necessary to invoke the provisions of Order 53 of the Civil Procedure Code, 2010 or sections 8 and 9 of the Law Reform Act. No matter how noble and worthy of admiration Court procedures are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.”

31. In the instant application, we now consider and determine whether the two questions posed by the applicant raise a substantial point of law the determination of which will have a significant bearing on the public interest. The other issue is whether the applicant has set out specific elements of general public importance which it attributes to the questions to be urged before the Supreme Court in the intended appeal.

32. The applicant submitted that the question whether Tribunals are bound by the doctrine of precedent is novel and has never been determined in Kenya. It was urged the answer to this question transcends the private interests of the applicant. We have considered this submission. In principle, it is only courts of record that are bound by the doctrine of precedent. However, it is debatable whether Tribunals are similarly bound by the doctrine. Without prejudice to the powers of the Supreme Court to review certification from this Court, on this narrow issue as identified by the applicant, we are satisfied that this is a question that befits consideration and determination by the Supreme Court as a matter of general public importance. We are satisfied the determination on the issue transcend the private interests of the parties in this matter. Accordingly, we hereby certify and grant leave to appeal to the Supreme Court specifically on the two questions identified in the instant application.

33. We now turn to consider the twin limbs of the application for stay. The applicant seeks two orders of stay namely:

“a) Pending the hearing and determination of the instant application, this Court do stay enforcement of the judgment of this Court dated 11th May 2018.

b) Pending the hearing and determination of the instant application and the intended appeal thereafter, this Court to stay the re-advertisement and tender process by the 1st respondent, the Energy Regulatory Commissions or its staff or agents of Tender Number ERC/PROC/4/3/17-19/016 for the Provision of Marking and Monitoring of Petroleum Products.”

34. The first limb of the stay application is spent. The stay was sought pending hearing and determination of the instant application. This application having been heard and determined, the first limb of the application for stay is spent and we grant no orders in respect thereof.

35. The second limb of the stay application is for stay of advertisement and tender process in regard to Tender Number ERC/PROC/4/3/17-19/016 for Provision of Marking and Monitoring of Petroleum Products. This application for stay is baffling. The applicant seeks an order from an appellate court to stay award of tender at the **Energy Regulatory Commission**. This is not a court with original or first instance appellate jurisdiction. In addition, the tender number cited to be stayed is not the tender number that was subject to litigation before the Review Board, High Court or this Court. For these reasons, we decline to grant stay.

36. The second limb of the application for stay as crafted and urged by the applicant is for this Court to grant stay pending hearing and determination of the intended appeal before the Supreme Court. The applicant urged us to grant stay on the basis that public good will be served in that the consumers in Kenya will not be exposed to the risk of adulterated motor fuel. We have considered the submission. However, a jurisdictional issue is arises. This Court **Dickson Muricho Muriuki vs. Timothy Kagondu Muriuki & 6 others [2013] eKLR** expressed 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.

21. If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.

37. Persuaded by the sound reasoning in **Dickson Muricho Muriuki vs. Timothy Kagondu Muriuki & 6 others [2013] eKLR**, the applicant has not given us good reasons to depart from it. If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court.

38. Accordingly, we decline to grant stay orders as we re-affirm that this Court becomes *functus officio* after pronouncement and delivery of its judgment. Any application for stay of a judgment of this Court should be made before the Supreme Court.

39. In totality, the upshot of our consideration of the Notice of Motion dated 5th June 2018 is that the Motion partially succeeds to the extent that certification and leave is granted and stay order is declined. The final orders of this Court are as follows:

i. Leave be and is hereby granted to the applicant to move to the Supreme Court in the intended appeal against the judgment of this Court in Civil Appeal No. 341 of 2017 delivered on 11th May 2018.

ii. No stay order is granted.

iii. Each party to bear its own costs in this application.

Delivered and at Nairobi this 19th day of December, 2018

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR