IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, P.C.A., KOOME & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. SUP. 8 OF 2015

BETWEEN

GOLDEN LINE INTERNATIONAL LIMITED ……..……. APPLICANT

AND

BLUESEA SHOPPING MALL LIMITED ……..……..... 1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI

(NOW NAIROBI COUNTY) ……..…….…..... 2ND RESPONDENT

FARAH MOHAMMED BARROW …..…….…….....…. 3RD RESPONDENT

ALI SHEIKH MOHAMMED ……...…….....…. 4TH RESPONDENT

(Being an application for leave to appeal against the decision made on 22nd May, 2015 by the Court of Appeal (Karanja, G.B.M. Kariuki & M'Inoti, JJ.A) and for a certificate that a matter of General Public Importance is involved in the intended appeal

in

Civil Appeal No. 129 of 2013)

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RULING OF THE COURT

[1] The Notice of Motion dated 8th June, 2015 is by Golden Line International Co. Ltd. (applicant). It is brought under **Article 163 (4) (b)** of the Constitution; the applicant is seeking for certification that a matter or matters of general public importance is or are involved in an intended appeal from the judgment of the Court of Appeal delivered on 22nd May, 2015 in Civil Appeal No. 129 of 2013. Upon certification as aforesaid, the applicant is seeking to be granted leave to lodge an appeal before the Supreme Court.

[2] The dispute that has crystallized into what the applicant refers to as matters of general public importance started and was litigated before the High Court in Misc. Civil Appl. No. 808 of 2008. Blue Sea Shopping Mall (1st respondent) filed a judicial review application seeking an order of *certiorari* and

mandamus to quash the decision of the City Council of Nairobi (2nd respondent) dated 18th November, 2008 that awarded a contract to the applicant to redevelop Eastleigh Market situated on plot No. LR 36/V11/1037 Nairobi County (suit premises). An order compelling the City Council of Nairobi to undertake fresh tendering, while observing in awarding the tender that public private partnership contracting is in compliance with the Public Procurement **Act 2005** and Regulations **2006,** made pursuant to the **Act**.

[3] After hearing the application, Nyamu J. (as he then was) held in pertinent portions of his judgment as follows:

> ***"Ordinarily, I would have granted an order for certiorari as against the award of the tender. However, I have declined to do so for the reasons set out hereinafter.***
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> ***In my view, as the subsequent contract was not challenged in the statement I cannot pronounce a judgment on it and while I wish to reaffirm the authorities cited above concerning the effect of not addressing the applicable law or for public authorities to act within jurisdiction they are not relevant here because the contract was never challenged.***
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> ***As regards the grant of an order of mandamus, the same cannot issue in the circumstances because it would result in the court making the actual decision for the parties and perhaps directing the rewriting of the unchallenged contract. I find and hold that any aggrieved party can seek appropriate reliefs pursuant to contract law and in private law courts.***
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> ***Although the thrust of my findings above lean heavily in favour of granting an order of certiorari, I am constrained to set out certain factors which I have had to consider and which militate against the order of certiorari. The factors are:***
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> ***(i) ……***
>
> ***(ii) ……***
>
> ***(iii) ……***
>
> ***(iv) The idea of Public Private Partnership is a novel one in Kenya and now that this court has declared the law that Procurement Laws apply to them, it is important in m y view to ensure that the first fruits of this idea are not unnecessarily made stillborn by the court. The needs of good public administration demand that such projects be executed with speed and efficiency so as to maximize on the gains. In the circumstances, failure to grant an order at all would in the view of the court result in a win win situation (subject to determination concerning other issues such as the validity of the contract and the ownership of land). In this regard, I have taken into consideration that it is common ground that the applicants had participated in the process leading to the award of the tender as well. It was also common ground that the 2nd respondent had taken possession and commenced redevelopment.***
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> ***(v) It is for the above reasons that I exercise my discretion by refusing or declining to grant an otherwise merited order of certiorari as against the award of tender. In the case of Pareno Misc. Civil Appl. No. 1025 of 2003, I held that even when merited a court has the discretion to refuse judicial review orders. I must of course add that I have after so many years only exercised the discretion to decline the order only in the case of PARENO and the current case. The court has the discretion and I have chosen to walk the talk here.***
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> ***In the result, as I had declined to grant the order for mandamus earlier, I further decline to grant the order of certiorari as sought or at all. Parties to bear their respective costs."***

[4] Blue Sea Shopping Mall, was dissatisfied with the aforesaid judgment of the High Court, thus an appeal was filed in the Court of Appeal. The appeal was allowed with the result that the orders sought by

Blue Sea Shopping Mall in the High Court in the notice of motion dated 5th January, 2009 (that is *certiorari* and *mandamus*) were granted with costs. This is the judgment of the Court of Appeal that the applicant intends to be certified as giving rise to a matter or matters of general public importance and to be granted leave to appeal before the Supreme Court.

[5] The application is supported by the grounds that suggest there was justification for the learned Judge of the High Court to decline interference in the public private partnership contract between the applicant and the then City Council of Nairobi for the redevelopment of the Eastleigh Market. By allowing the orders of certiorari and mandamus, the judgment of the Court of Appeal retrospectively applied procurement regulations to public private partnership contract and thereby interfered with the learned Judge's unfettered discretion which is sparingly done. According to the applicant, the Court of Appeal should not have interfered with a matter of a concluded contract which was by a state organ on the basis that Procurement laws were not followed. The Nairobi City Council's autonomy to render services to the residents of Nairobi should not be interfered with by the Courts as they should observe the doctrine of separation of powers given to County Governments by the Constitution.

[6] The instant application is further supported by an affidavit of Mohammed Sheikh Hussein sworn on 5th June, 2015 which gives essential background information of how the applicant submitted a proposal to the City Council of Nairobi for redevelopment of Eastleigh Market. There is also a further affidavit sworn on 20th May, 2016 by the same deponent, where the applicant has exhibited proceedings in Constitutional Petition that was filed before the Constitutional and Human Rights Division of the High Court dated 4th November, 2015. It is a claim against the Nairobi City Council who are alleged to have irregularly alienated public property being the Eastleigh open market to private developers. It is the applicant's contention that the contract was awarded to them within the frame work of private public sector partnership strategy which called upon private sector investors to partner with public bodies to develop social amenities.

[7] The contract was awarded after Nairobi City Council through its social services and housing committee requested for proposals for redevelopment of the suit premises which is a public market place. Blue Sea Shopping Mall submitted a proposal but the bids were not subjected to a tendering process, thus the tender was awarded to the applicant without following the prescribed procedure under the Public Procurement Act of 2005. That is why Blue Sea Shopping Mall moved to the High Court to quash the decision that was made contrary to law. It is also acknowledged the subject matter, that is Eastleigh Market Plot No. 36/V11/1037, is a subject of litigation involving the City Council of Nairobi, Farah Mohammed Baru the 4th respondent and Ali Sheikh Mohamed the 3rd respondent who are litigating in another suit before the Environment and Land Court. The applicant contends that it started the implementation of the project and incurred considerable expenses running into millions of dollars, thus the judgment of the Court of Appeal left unresolved issues of law regarding public private partnership which fall within the category of matters of general public importance.

[8] The applicant was of the view the reasoning by the learned Judge of the High Court was well founded in law and even the overriding objective principles of rendering substantive justice that allow a Judge unfettered latitude in exercise of judicial discretion. Further, the learned Judge appreciated public private partnership was a novel way of doing business that had started in Kenya and although the procurement laws applies to such contracts, the Judge found the interest of justice would be served by exercising his discretion to decline the orders of certiorari even though they were merited and took a different trajectory while declining to grant the orders.

[9] The matters stated in the said affidavit were amplified by the applicants' written submissions which were argued before us by Mr. Marete learned counsel for the applicant. According to Mr. Marete, this matter raises issues of general public importance because an agreement was entered into on behalf of the public by the Nairobi City Council which transcends the applicants and touches on the public. The Nairobi City Council is a public body. It entered into an agreement which has financial implications, and should that agreement not be honoured, the public will have to bear the consequences. Since the agreement was entered into on behalf of the public, the public should expect optimal return from the

contracts. The property where the market was to be built is public land which attracts public interest and that fact was confirmed by the National Land Commission that Eastleigh Market is situated on public land; the issue of whether the Public Procurement Regulations as held by the Court of Appeal can be applied in retrospect is a matter of general public importance.

[10] Further, counsel submitted that at the time of the subject procurement, the rules and regulations (2006) had not been enacted and therefore they did not apply to public private partnerships. This according to Mr. Marete is an issue to be resolved by the Supreme Court on whether those rules could be applied in retrospect. Counsel cited among others the cases of;- ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR*** and ***R. vs. Somerset [1995] QBD 513*** which was cited with approval by the learned Judge as follows:-

> ***" But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all its dealings constitute the fulfillment of duties it owes to others; indeed it exists for no other purpose" .***

[11] This application was fully supported by the City Council of Nairobi, the 1st respondent who were represented in this appeal by Ms. Mercy Mabusu. She relied on the written submissions filed by Momanyi and Associates Advocates, on 20th November, 2015. She associated herself with the submissions by the applicant and agreed there are matters of general public importance that arise from the judgment of the Court of Appeal that need to be canvassed before the Supreme Court.

[12] The application was nonetheless opposed by Ms. Wang'ombe for the 1st respondent; she submitted there are no matters of general public importance that are discernable in the judgment because the only issue for determination before the High Court whether the tender awarded in the public private partnership contract by Nairobi City Council was in compliance with the law of Procurement. The learned judge of the High Court found as a matter of fact that the way the tender was awarded flouted certain clauses of the Procurement Act and was thus flawed. The only issue therefore the Court of Appeal determined was whether the exercise of judicial discretion by the learned Judge, met the threshold as set out by law; judicial discretion is exercised according to law and not capriciously or whimsically. As regards the fate of the contract procured for the development of Eastleigh Market, it is also a matter of public interest that procurements of contracts that affect a cross section of people of Nairobi who use the market and pay rates and taxes should not be flawed. The issuance of the contract for redevelopment of a public market should not be shrouded with irregularities and by the Court of Appeal setting aside the tender gave all parties an opportunity to follow the law which is in the public interest.

[13] Counsel went on to argue that the Court of Appeal also acknowledged there were ongoing proceedings regarding the ownership of the suit land although the issue of ownership of land cannot appropriately be determined through judicial review proceedings. On the issue of retrospective application of the law, this issue was settled by the Supreme Court in the case of ***Samuel Kamau Macharia & Ano. vs. Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR*** where it was held:

> ***"As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature".***

[14] According to the 1st respondent, the issue of retroactivity was well considered by the Court of Appeal while dealing with the provisions of **Regulation 64 (4)** of the **Public Procurement and Disposal Regulations 2006** as the Court found the regulations had not been issued by the Public Procurement Oversight Advisory Board at the time. Therefore, the 1st respondent or the applicants could not be blamed for the absence of the guidelines. The Court found the circumstances of the matter required that all parties be given equal treatment by going back to the drawing board to resubmit their proposals to a fresh tendering process. Also, the Court of Appeal just like the High Court found the regulations could not be

applied retrospectively. Regarding the issue of the succession of Nairobi City Council to Nairobi City County that is governed by the transitional provisions in the Constitution of Kenya 2010, this issue was not canvassed before the High Court or the Court of Appeal and cannot therefore be introduced in the Supreme Court. Since the tender process culminating in the award of contract to the applicant was flawed, the contract was null and void under the basic law of contracts; and a Court of law cannot enforce an illegal contract. For this preposition, counsel for the 1st respondent cited the case of ***David Sironga ole Tulai vs. Francis Arap Muge & 2 Others*** *[*2014] eKLR where the Court held that:-

> ***"No court of law will enforce an illegal contract or one, which is contrary to public policy…."***

According to counsel for the 1st respondent, the issues were conclusively determined by the Court of Appeal by finding the learned trial Judge wrongly exercised his discretion by declining to grant orders that he agreed were merited.

[15] The 3rd and 4th respondents were represented by Ms Hanan holding brief for Mr. Ahmed Nassir who also opposed the application. Counsel largely associated herself with the submissions by the 1st respondent and relied on the written submissions. Ms. Hanan reiterated that the law and the principles that guide the Courts in matters of judicial review is clear; that is when the High Court can interfere with the process of decision making by an inferior Tribunal or a public body; the learned trial Judge clearly found there were grounds for interfering with the procurement process for the development of Eastleigh Market but exercised his discretion to decline to grant otherwise merited order. The reasons the Judge gave to justify the orders made were not founded in law. All what the decision of the Court of Appeal did was to redirect the parties to go back to the tendering process and follow the laid down procedure. Thus there is no uncertainty that was created. This was a simple case of tender and it is also in the public interest that the tendering process be done according to the laid down procedures.

[16] In a brief rejoinder, Mr. Marete for the applicant submitted that matters of procurement are very significant to the Kenyan public. They are provided in the Constitution therefore it was not only a judicial review matter but one of Constitutional moment; the learned trial Judge issued derivative orders which are well founded in the jurisprudence especially the case of ***Pareno Misc. Appl. No. 1025 of 2003*** which was relied on.

[17] We have gone through the application and the rival submissions as per the above summary; it is important to locate the present application within the provisions of the ***Constitution Article 163(4) (b)*** which provide that appeals lie from the Court of Appeal 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".***

The phraseology in ***Article 163(4) (b)*** does not refer to questions of law or questions of law of great public importance or to points of law of exceptional public importance or to a matter of great general public importance. It merely refers to "a matter."

[18] However, by ***Article 163(5),*** such certification may be reviewed by the Supreme Court and can either be affirmed, varied or overturned. Although a certificate can be sought either from the Supreme Court or from this Court, the Supreme Court has held that it is a good practice to originate the application in the Court of Appeal. See the case of; - **Sum** ***Model Industries Limited v. Industrial and Commercial Development Corporation – SC Civil Application No. 1 of 2011 (UR).*** Before a matter is certified for an appeal before the Supreme Court, the constitutional requirement that a matter of general public importance exists must be demonstrated by the applicant to the satisfaction of this Court. Are there matters of general public importance raised in the judgment of the Court of Appeal? The matter before the learned Judge of the High Court was a judicial review matter seeking to quash a decision by the Nairobi City Council which awarded a tender pursuant to a private public partnership agreement for the re development of the suit property that is a public market in Eastleigh Nairobi. It is evident from the

judgment of the trial Judge that he found there was merit in granting the orders sought but proceeded to dismiss the application in exercise of his discretion in what he referred to as an attempt to save or nurture the nascent and novel private public partnership agreement. These are the exact words used by the Judge**;-**

> ***"The idea of Public Private Partnership is a novel one in Kenya and now that this court has declared the law that Procurement Laws apply to them, it is important in m y view to ensure that the first fruits of this idea are not unnecessarily made stillborn by the court".***

[19] It is also evident the applicant did not frame the issues that are matter(s) of general public importance. However, from the arguments by counsel for the applicant, it appears to us that the matter of exercise of judicial discretion is the only issue as the issue of whether the Court of Appeal held the Procurement Rules and Regulations ought to have been followed retrospectively did not stand the test in view of the finding by the Court of Appeal that the Public Procurement and Disposal Regulations were not issued and therefore they could not be applied retrospectively.

[20] The principles applicable to judicial review matters are completely settled by our homegrown jurisprudence, the High Court is given jurisdiction to quash a decision or order which was arrived at in excess of jurisdiction, failure to comply with the rules of natural justice, issues of illegality for failure to follow the law, irrationality for failing to take into consideration relevant matters and failure to follow due process are but some of the grounds for judicial review. In the instant judgment, the learned judge found the proper laid down procedure as provided under the public procurement Act was not followed; nonetheless for reasons that he wanted to nurture the private public partnership concept he declined to exercise his discretion nonetheless and declined to grant the orders. This is the judgment that was set aside by the Court of Appeal on the grounds that the judge improperly exercised his discretion by declining to grant an order that was otherwise merited. The law on this issue of exercise of judicial discretion is now settled. As held by the Court of Appeal in the case of ***MBOGO –V- SHAH,*** **[1968] E.A. 93:**

> ***"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".***

[21] We have gone through the judgment of this court and find this issue of discretion was thrashed to a pulp as the judges gave a very lengthy exposition on why the learned trial judge's exercise of discretion was patently wrong in the circumstances of the matter. In a nutshell they found that discretion cannot be exercised to defeat clear provisions of the statute, and this is trite; they clearly explained why the learned Judge was in error, and the reasons are well set out. It is therefore not surprising that the applicant was not able to formulate any issues of law that constitute matter (s) of general public importance for certification arising on the said judgment as set out in the case of; - ***Hermanus Philipus Steyn*** **(supra)** This application has not at all demonstrated any outstanding issue that constitutes a matter of general public importance that can warrant a certification. We agree with the position taken by 1st respondent that a matter of general public importance can arise only from a definitive determination of a matter by the Court of Appeal of substantive grey areas of law or policy that cut across a broad spectrum of the members of public. The role or mandate of the Supreme Court is clearly spelt out in the Constitution. This is the Apex Court with a relatively small number of cases that are recognized as raising matters of general public importance. The instant application falls short of the criteria spelt out in the Constitution or decided cases.

[23] In the upshot, we find no merit in this application which we order be dismissed with costs to the 1st, 3rd and 4th respondents.

Dated and delivered at Nairobi this 30th day of September, 2016.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR