IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA),WARSAME & OUKO, JJ.A.)

CIVIL APPLICATION NO. SUP 12 OF 2014

BETWEEN

YUSUF ALI ABDI …….....…..……..…… APPLICANT

AND

KENYA POWER & LIGHTING COMPANY …...…….....…… RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi, (Karanja, Mwilu & M'Inoti, JJ.A) dated 25th October, 2013

in

Civil Appeal No. 12 of 2011)

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RULING OF THE COURT

(1) By his notice of motion dated the 11th June, 2014, and taken out under ***Articles 163 (b)*** and ***159*** of the Constitution, ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act and ***section 95*** of the Civil Procedure Act, the applicant, ***Yusuf Ali Abdi*** seeks the following orders:

> ***"(i) That this Honourable Court certifies this matter as one of general public importance in which the applicant may apply to the Supreme Court for appeal;***
>
> ***(ii) That the applicant be granted leave to appeal against the whole judgment of the Honourable W. Karanja, Honourable P. M. Mwilu and Honourable K. M'Inoti delivered on 25th October 2013;***
>
> ***(iii) That the applicant be granted leave to appeal out of time against the whole judgment of the Honourable W. Karanja, Honourable P. M. Mwilu and Honourable K. M'Inoti delivered on 25th October 2013; and***
>
> ***(iv) That costs of this application be provided for."***

(2) From the outset, we must point out, as this Court did in ***Greenfield Investment Ltd vs. Baber Alibhai Mwaji, C A No. 5 of 2012*** that ***Article 164 (3) (b)*** of the Constitution does not contemplate an

application for leave to apply to the Supreme Court. Rather, that provision requires this Court to certify, before an appeal is lodged in the Supreme Court, that a matter of general public importance is involved in the intended appeal. The applicant's prayer No. 2 above, for leave to appeal to the Supreme Court, is therefore totally unnecessary as the applicant has already prayed for certification in prayer No. 1. In any case the Supreme Court has, in **Lawrence Nduttu & 6000 Others vs Kenya Breweries Ltd & Anor, S. C. Pet. No. 3 of 2012** held that the words "leave" and "certification" bear the same legal meaning because it is the certification that constitutes leave toappeal to the Supreme Court.

(3) Even before considering the question whether the applicant's intended appeal involves a matter of general public interest, there are serious procedural hurdles that the applicant must surmount in the application before us. ***Rule 39 (b)*** of the Rules of this Court requires that where an appeal lies with the leave of the Court (or in this case certification of the Court), such leave or certification shall be applied for in the manner provided in ***Rules 42*** and ***43 within fourteen days of the decision against which it is desired to appeal***. The judgment in respect of which certification is sought was delivered on the 25th October, 2013 and this application for leave and extension of time was not made until eight months later, in June 2014. Instead of first seeking extension of time before a single judge as required by ***Rule 4***, as read with ***Rule 53*** of the Rules of this Court, the applicant filed this application for certification before a bench of three judges and purported to seek extension of time before the same bench.We are satisfied that the applicant cannot proceed as he purports to do and therefore there is no competent application before us for extension of time. We think the application, but in respect only of the prayer for extension of time must fail on that ground alone. Nonetheless, we deem it fit to interrogate on merit.

(4) As regards the matter of general public importance involved in the applicant's intended appeal, it is apposite to restate briefly the background to this appeal for proper context. The applicant filed HCCC No. 645 of 2004 against the respondent, Kenya Power & Lighting Company Limited. He pleaded that the respondent had unlawfully and in breach of a contract for the supply of electricity between the parties, disconnected power to his premises as a result of which he suffered losses amounting to the sum of Kshs.143,884,940/=. The applicant therefore prayed for a permanent injunction to restrain the respondent from disconnecting electric supply to his premises, special damages of Kshs.143,884,940/=, general and exemplary damages, interest and costs. The matter was heard before the High Court, through a full trial.

(5) Having considered the entire evidence, Kimaru J. dismissed the suit with costson the 29th October, 2010, prompting the applicant to lodge in this Court Civil Appeal No. 12 of 2011. After re-evaluating and reappraising the evidence tendered before the High Court, the Court ***(****Karanja, Mwilu & M'Inoti, JJ.A****)*** dismissed the appeal. The Court concluded as follows:

"Having carefully reviewed and re-evaluated the evidence on record regarding the alleged contract of electricity supply between the appellant and the respondent, we find the evidence tendered by the appellant, when considered in light of that of the respondent, to be mutually inconsistent and contradictory to the point that we cannot say, on a balance of probability, that we are convinced it proves existence of the contract. On whether the supply of electricity to the suit premises was illegal or unlawful, the inescapable conclusion, from the evidence on record, is in the affirmative and the trial judge cannot be faulted for his conclusion."

(6) Aggrieved by the judgment, the applicant filed the motion now before us.The matters of general public importance involved in the intended appeal, as disclosed by the applicant's affidavit sworn on the 11th June, 2014 and the submissions of his learned counsel, Mr. Amos Omolo, are the legality of the activities of the respondent as a national monopoly in the provision and supply of power; contravention of "several statutes" by the judgment of this Court; fraudulent acts perpetrated by government entities in contracts; substantial miscarriage of justice and errors by this Court in its findings, analysis and application of evidenceTo illustrate the public importanceaspect of the intended appeal, it was submitted that being a monopoly in the provision and supply of power, the injustices visited upon the applicant by the respondent might be perpetuated on other Kenyans, thus disrupting the economy.

(7) Mr. Gitonga Murugara, learned counsel for the respondent, opposed the application submitting that no matter of general public importance was involved in the intended appeal. He submitted that this Court

and the High Court had made concurrent findings that there was no contract for the supply of electricity between the applicant and the respondent. Counsel argued further that a contract for the supply of power is an issue between the consumer and the supplier and does not implicate the public at large. It was finally submitted that no issue transcending the applicant's personal circumstances or interests were involved and that the application was totally devoid of merit. The respondent relied on the Supreme Court decisions in **Styne vs. Gnecchi-Ruscone, S C App No. 4 of 2012; Ngoge vs. Ole Kaparo & Others; S C P No. 2 of 2012, Bell vs. Arap Moi & Another, S C App No. 1 of 2013;** and **Koinange Investments Development Ltd vs. Ngether, S C App No. 4 of 2013**, as well as the decisions of this Court in ***George Chege Kamau vs. Esther Wanjira Kamau***, ***C Appl. No. Sup 16 of 2013*** and ***Murumia vs. M'murithi & Another, C A No. Sup 1 of 2013*** regarding what constitutes a matter of general public importance.

(8) We have carefully considered the application, the judgment of the High Court, the judgment of this Court, the submissions of both learned counsel and the authorities that they cited. There are now many consistent decisions of the Supreme Court and of this Court as to what constitutes a matter of general public importance. We need only cite the decision of the SupremeCourt in **Styne vs. Gnecchi-Ruscone (supra)** where it was held, among other things, that to constitute a matter one of general public importance, it must be a matter the determination of which transcends the circumstances of the particular case with ***significant bearing*** on the public interest and that where the matter involves a point of law, the point must be ***substantial*** so that its determination will have significant bearing of the public interest.

(9) The Supreme Court has also stated consistently that mere apprehension of miscarriage of justice is not a proper basis for certification unless the matter is within the terms of ***Article 163 (4) (b)*** of the Constitution; that determinations of fact in contests between parties are not by and of themselves a proper basis for certification; that only ***exceptional cases*** that raise ***cardinal issues of law*** or of ***jurisprudential moment*** deserve certification; that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law; and that the jurisdiction of the Supreme Court under ***Article 163 (4) (b)*** is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law - (See **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo & 5 Others, S C Petition No. 2 of 2012,** and **Bell vs. Arap Moi & Another (supra).**

(10) In its judgment dated the 25th October, 2013, this Court found that there was no contract for the supply of electricity between the applicant and the respondent; that the electric power to the applicant's premises was illegally connected; and that disconnection of the illegally connected power by therespondent did not constitute breach of contract.With respect therefore, we do not see, in the circumstances of that appeal, how the interest of the general public would be implicated in the intended appeal.

(11) Moreover, the applicant faults the findings and conclusions of fact by both the High Court and this Court. In our view those are precisely the determinations of facts in contests between the parties, which the Supreme Court has held are not by themselves a proper basis for certification that a matter of general public interest is involved.

(12) In an attempt to give this matter a public interest face, the applicant invokes the monopolistic character of the respondent and alleged threat to the national economy. The real issue before the High Court and in the appeal before this Court was a straightforward question as to whether or not there was a contract for supply of electricity between the parties and whether the same had been breached when the respondent disconnected the supply of electricity. We do not see how the national economy is threatened by disconnection of an illegally connected power supply to an individual; maybe the converse is more likely to be the case. Neither do we see how the general public interest is involved in this issue or the relevance of the respondent's legal character.

(13) We are satisfied that the intended appeal to the Supreme Court is not exceptional and that it raises no cardinal issues of law or of jurisprudential moment deserving the attention of the Supreme Court. In the premises, the notice of motion dated the 11th June, 2014 be and is hereby dismissed withcosts to the

respondent and we so order.

Dated and delivered at Nairobi this 28th day of November, 2014.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

M. WARSAME

……..

JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR