



**Kabuito Contractors Ltd v Attorney General (Civil Application  
E025 of 2023) [2023] KESC 89 (KLR) (Civ) (6 October 2023) (Ruling)**

Neutral citation: [2023] KESC 89 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**CIVIL APPLICATION E025 OF 2023**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ**

**OCTOBER 6, 2023**

**BETWEEN**

**KABUITO CONTRACTORS LTD ..... APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

*(Being an application for review of the Order of the Hon.  
Justice I. Lenaola, SCJ dated and issued on 26th May 2023)*

**The guiding principles for the review of a decision of the Supreme Court**

*The application sought the review and setting aside the order issued by a single judge of the court marking a notice of appeal as withdrawn. The court highlighted the guiding principles for review of a decision of the court made in exercise of discretion.*

Reported by Kakai Toili

***Jurisdiction*** – jurisdiction of the Supreme Court – jurisdiction to review the decision of a single judge of the court – What were the guiding principles for review of a decision of the Supreme Court made in exercise of discretion –, No 7 of 2011, section 23(C).

**Brief facts**

The application sought the review and setting aside of the order of May 26, 2023 by a single judge of the court (the judge) marking the notice of appeal dated March 8, 2023 from the decision of the Court of Appeal in Civil Appeal No. 638 of 2019, *Attorney General v Kabuito Contractors Ltd* as withdrawn. The applicant contended that on March 10, 2023, it filed a notice of appeal before the instant court evincing his intention to appeal against the decision of the Court of Appeal. The applicant further contended that the matters in dispute were of general public importance.

The applicant stated that it filed an application for certification dated March 31, 2023 at the Court of Appeal and that by May 22, 2023 the Court of Appeal had not issued directions on the application for certification.



The applicant further averred that on May 26, 2023, the court (the judge) issued an order deeming the notice of appeal filed before the court withdrawn for failure to file an appeal within the period stipulated by the Supreme Court Rules.

### **Issues**

What were the guiding principles for review of a decision of the Supreme Court made in exercise of discretion?

### **Relevant provisions of the Law**

#### **Supreme Court Rules, 2020**

#### **Rule 36 - Notice of Appeal**

*(1) A person who intends to make an appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal.*

*(4) In lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal.*

#### **Rule 38 - Institution of appeal**

*(1) An appeal to the Court shall be filed within—*

*(a) thirty days of the date of filing the notice of appeal, where the appeal is as of right; or*

*(b) thirty days after the grant of certification, where such certification is required.*

### **Held**

1. Section 23(C) of the conferred upon the court the jurisdiction to review the decision of a single judge by five or more judges, upon application by a party aggrieved by the decision of a single judge. The guiding principles for review of a decision of the court made in exercise of discretion were that the applicant had to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise of discretion and;

1. as a result a wrong decision was arrived at; or
2. it was manifest from the decision as a whole that the judge had been clearly wrong and as a result, there had been an apparent injustice.

2. The applicant contended that the order of May 26, 2023 deeming the notice of appeal as withdrawn was made by the single judge, unaware of the pending certification application at the Court of Appeal. The court had discretion under rule 46(1) of the Supreme Court Rules, 2020 on its own motion, or on application by any party, to make such orders as may be necessary in instances where a party lodged a notice of appeal but failed to institute the appeal within the prescribed time.

3. The applicant had not satisfactorily demonstrated that the judge misdirected himself in the exercise of the powers conferred under rule 46(1) of the Supreme Court Rules. It was not manifest from the decision that the judge was wrong and as a result, there had been an apparent injustice. Although the applicant had attached a notice of appeal and an application for certification at the Court of Appeal, there was no evidence that the notice, though filed, was lodged before the Registrar of the Court of Appeal or that the application for certification filed at the Court of Appeal was eventually lodged.

4. The applicant made no attempt to justify the continued existence of the notice of appeal on the court's record for a period outside that permitted by rules 36 and 38 of the Supreme Court Rules. The belated explanation by the applicant did not suffice at that late stage. In any event, if the application before the Court of Appeal succeeded -if it existed at all- the applicant would have sufficient time to move the court under the relevant rule and if it did not succeed, the procedure for review of that decision was available to the applicant. The notice of appeal was deemed as withdrawn.

*Application dismissed.*

### **Orders**

*No orders as to costs.*



## Citations

### Cases

1. Parliamentary Service Commission v Wambora, Martin Nyaga, County Assembly of Embu, Speaker of the County Assembly, Speaker of the Senate, Senate, Andrew Ileri Njeru & 31 others (Application 10 of 2016; [2017] KESC 19 (KLR)) — Mentioned
2. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Petition 18 (E020) of 2022; [2023] KESC 28 (KLR)) — Applied

### Statutes

1. Constitution of Kenya, 2010 — article 50 — Interpreted
2. Supreme Court Act (Act No. 7 of 2011) — section 3A, 21A,23(C) — Interpreted
3. Supreme Court Rules, 2022 (Act No 7 of 2011 sub leg) — rule 36 (4), 38 (1) (b) — Interpreted

### Advocates

*Kithinji Marete* for Applicant

*Emmanuel Kiarie* for Respondent

## RULING

### Representation

Kithinji Marete for the applicant

(Kithinji Marete & Company Advocates)

Emmanuel Kiarie for the respondent

(Attorney General)

1. Upon reading the notice of motion by the applicant dated June 23, 2023 and filed on July 24, 2023, brought pursuant to articles 50 and 163(4)(b) of the *Constitution*, sections 3A, 15B and 21A of the *Supreme Court Act*, rules 33 and 36 of the Supreme Court Rules 2020 seeking orders that;

' This honourable court be pleased to review and set aside its Order of May 26, 2023 by the Honourable Justice Lenaola marking the notice of appeal dated March 8, 2023 from the decision of the Court of Appeal in Civil Appeal No 638 of 2019, *Attorney General v Kabuito Contractors Ltd* as withdrawn; and'

2. Upon considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Kithinji Marete on June 23, 2023 wherein he contends that; on March 10, 2023, the applicant filed a notice of appeal before this court evincing his intention to appeal against the decision of the Court of Appeal in Civil Appeal No 638 of 2019, *Attorney General v Kabuito Contractors Ltd* delivered on March 3, 2023 overturning the judgment in HCCC No 284 of 2008 issued in favour of the applicant; the matters in dispute being of general public importance, the applicant filed an application for certification dated March 31, 2023 at the Court of Appeal; by May 22, 2023 the Court of Appeal had not issued directions on the application for certification; on May 26, 2023, this court (Lenaola, SCJ) issued an order deeming the notice of appeal filed before the court withdrawn for failure to file an appeal within the period stipulated by the court's Rules; and that no appeal can be filed until the same is certified as a matter of general public importance; and
3. Upon considering the applicant's submissions dated June 23, 2023 and filed on June 24, 2023 in which the applicant submits that; the court has discretion under sections 3A and 21A of the *Supreme Court*



Act to review any of its decisions in instances where the court considers it meritorious, exceptional and in the public interest; the application is meritorious because the order subject of the application was grounded on failure to institute its appeal within the prescribed time; the notice of appeal deemed withdrawn by the court was proper pursuant to rule 36 of the Supreme Court Rules, 2022 and that rule 36(4) provides that it is not mandatory to obtain certification at the Court of Appeal before filing the notice of appeal; rule 38(1)(b) of the Supreme Court Rules provides that an appeal to this court where certification is required ought to be filed within 30 days of the grant of certification; by the time of grant of the order of May 26, 2023, the applicant was yet to receive any directions from the Court of Appeal on its application for certification; in issuing the order, the Judge was not aware of the foregoing proceedings and proceeded in the mistaken belief that it was the applicant's mistake in not lodging an appeal within the prescribed period; the applicant is keen on pursuing the appeal as evidenced by the filing of the notice of appeal as was held by this court in Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Petition 18 (E020) of 2022) [2023] KESC 28 (KLR) (21 April 2023)(Ruling);

'should the order of the judge not be reviewed and set aside, the applicant will suffer grave injustice as it shall be deprived of the right to fair hearing as provided under article 50 of the Constitution; and'

4. Upon considering the replying affidavit sworn on behalf of the respondent on August 4, 2023 by Emmanuel Kiarie, Principal State Counsel in the office of the respondent and filed on August 7, 2023 where it opposes the application on the grounds that; the applicant has failed to establish any new and important matters of evidence which were not within its knowledge after the exercise of due diligence or that such matters or evidence could not be produced by it at the time when the order of May 26, 2023 was issued by Justice Lenaola; it was not necessary to obtain certification before lodging the notice of appeal on matters of general public importance and the application lacks merit and should be dismissed. The deponent also downplays the matters which the applicant will ultimately seek certification on before this court for lack of lacunae in the law of contract and failure to specify the articles of the Constitution for which the matters alluded to will assume a constitutional trajectory.
5. Having therefore considered the application, response, and submissions before us, we now opine as follows:
  - i. Section 23(C) of the Supreme Court Act confers upon the court the jurisdiction to review the decision of a single Judge by five or more judges, upon application by a party aggrieved by the decision of a single judge.
  - ii. This court set the guiding principles for review of a decision of the court made in exercise of discretion in Parliamentary Service Commission v Martin Nyaga Wambora & others SC Application No 8 of 2017; [2018] eKLR where it, *inter alia*, stated that;  
(31)  
...
    - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise [of] discretion and:
      - a. as a result a wrong decision was arrived at; or
      - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.'



- iii. In the instant application, the applicant contended that the order of May 26, 2023 deeming the notice of appeal as withdrawn was made by the single judge, unaware of the pending certification application at the Court of Appeal. Rules 36(1) and (4) of the *Supreme Court Rules 2020* provide that:
- (1) A person who intends to make an appeal to the court shall file a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal...
  - (4) In lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal. (Emphasis ours).
- iv. On the other hand, rule 38(1) of the *Supreme Court Rules* provides for the timelines for filing an appeal in the following manner:
- (1) An appeal to the court shall be filed within—
    - a. thirty days of the date of filing the notice of appeal, where the appeal is as of right; or
    - b. thirty days after the grant of certification, where such certification is required.'
- v. The court has discretion under rule 46(1) of the *Supreme Court Rules, 2020* on its own motion, or on application by any party, to make such orders as may be necessary in instances where a party lodges a notice of appeal but fails to institute the appeal within the prescribed time.
- vi. Taking the above into consideration, has the applicant satisfactorily demonstrated that the Judge misdirected himself in the exercise of the powers conferred under rule 46(1) and as a result arrived at a wrong decision? Or is it manifest from the decision that the judge was wrong and as a result, there has been an apparent injustice? The answers to the above questions are in the negative. We note that although the applicant has attached a notice of appeal and an application for certification at the Court of Appeal, there is no evidence that the notice, though filed, was lodged before the Registrar of the Court of Appeal or that the application for certification filed at the Court of Appeal was eventually lodged.
- vii. Furthermore, the applicant made no attempt to justify the continued existence of the notice of appeal on the court's record for a period outside that permitted by rules 36 and 38 of the *Supreme Court Rules*. The belated explanation by the applicant does not suffice at this late stage. In any event, if the application before the Court of Appeal succeeds -if it exists at all- the applicant will have sufficient time to move this court under the relevant rule. And if it does not succeed, the procedure for review of that decision is available to the applicant.
- viii. Having stated as above, we concur with the decision made by the Honourable Justice I Lenaola on May 26, 2023 deeming the notice of appeal withdrawn. Consequently, the applicant's application dated June 23, 2023 must be dismissed.
- ix. The notice of appeal having been deemed as withdrawn, we see no reason to award costs.
6. Accordingly, we make the following orders:
- a. The notice of motion dated June 23, 2023 be and is hereby dismissed.



b. There shall be no orders as to costs.

7. It is so ordered.

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

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**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M.K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S.C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

