



**Standard Chartered Financial Services Limited v Manchester Outfitters  
(Suiting Division) Limited Now Called King Woolen Mills Limited & 2 others  
(Application E020 of 2023) [2023] KESC 110 (KLR) (28 December 2023) (Ruling)**

Neutral citation: [2023] KESC 110 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION E020 OF 2023  
MK KOOME, CJ, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ  
DECEMBER 28, 2023**

**BETWEEN**

**STANDARD CHARTERED FINANCIAL SERVICES LIMITED ..... APPLICANT**

**AND**

**MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED NOW CALLED  
KING WOOLEN MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GALOT INDUSTRIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**A. D. GREGORY & C. D. CAHILL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for review and setting aside of the order  
of the Supreme Court (Lenaola, SCJ) dated 26th May, 2023  
withdrawing the Notice of Appeal filed in Civil Appeal No. 88 of 2000)*

**Notice of appeal can be filed afresh at the Supreme Court after obtaining certification where it had been previously withdrawn**

*The case under consideration involves an application for the review of a decision by the Supreme Court, grounded in the provisions of the Supreme Court Act. The applicant sought to challenge the Supreme Court's ruling by invoking section 21A of the Supreme Court Act, which outlined specific circumstances under which the Supreme Court may review its decisions. However, the applicant failed to demonstrate that the case fell within the exceptional circumstances as stipulated in section 21A, leading to the conclusion that the section was not applicable to the instant case. Furthermore, the applicant attempted to seek redress under section 23(2C) of the Supreme Court Act, which allowed for the review of decisions made by a single judge or two judges of the Supreme Court by a larger bench of five or more judges. The Supreme Court held that the applicant had not secured the certification, as the motion for certification was still pending before the Court of Appeal at the time of filing the appeal. That procedural lapse led the Supreme Court to deem the notice of appeal as withdrawn, although it was noted that it would not preclude the applicant from obtaining a fair hearing or presenting before the Supreme Court if the certification motion were to be subsequently granted.*



Reported by John Ribia

**Civil Practice and Procedure** – review – review of a decision of a single judge of the Supreme Court – requirement for appeals on grounds of general public importance to be certified by the Court of Appeal – where an appellant filed a notice of appeal before the Supreme Court without obtaining certification - whether an applicant that had not obtained certification from the Court of Appeal prior to filing a notice of appeal at the Supreme Court had grounds to seek a review of a decision to withdraw the notice of appeal - whether an appellant that had their notice of appeal withdrawn by the Supreme Court for failure to obtain certification could file a subsequent notice of appeal after obtaining certification – Constitution of Kenya, 2010 article 163(4)(b), section 21A and 23(2)(C).

### **Brief facts**

The applicant sought for the Supreme Court to review and set aside the decision of a single Judge of the Supreme Court. The applicant sought to appeal a decision of the Court of Appeal and as such filed a notice of appeal. The notice was however filed without obtaining certification from the Court of Appeal. The Supreme Court withdrew the notice of appeal on grounds that the applicant had not sought certification from the Court of Appeal before filing the notice of appeal. Aggrieved the applicant filed the instant application to review the decision of the Supreme Court.

### **Issues**

- i. Whether an applicant that had not obtained certification from the Court of Appeal prior to filing a notice of appeal at the Supreme Court had grounds to seek a review of a decision to withdraw the notice of appeal.
- ii. Whether an appellant that had their notice of appeal withdrawn by the Supreme Court for failure to obtain certification could file a subsequent notice of appeal after obtaining certification.

### **Held**

1. Section 21A of the delineated exceptional circumstances under which the Supreme Court could review its decision. The applicant had not demonstrated how the order it sought to review fell within the said exceptional circumstances. Section 21A was not applicable in the instant case.
2. Section 23(2)(C) of the provided that a party aggrieved by the decision of a single judge or two judges may apply for review of the decision by five or more judges of the court. The applicant had not obtained certification by the Court of Appeal under article 163(4)(b) of prior to filing the notice of appeal. The certification motion was still pending before the Court of Appeal. Since the certification motion was yet to be determined at the time of filing the appeal, and since at the time of making the decision the Supreme Court was not made aware of it, the Supreme Court could not be faulted for deeming the notice of appeal as withdrawn.
3. The order by the Supreme Court would not prejudice the applicant from getting a fair hearing or audience before the Supreme Court should its certification motion be successful. If thereafter certification was issued, the applicant would be at liberty to move the court either by filling a notice of appeal pursuant to the certification or as the case may be under the relevant provision of law.

*Application dismissed.*

### **Orders**

*Each party was to bear its own costs.*

### **Citations**

#### **Cases**

1. asbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others (Petition 4 of 2012) — Explained
2. Kabuito Contractors Ltd v Attorney General (Civil Application E025 of 2023; [2023] KESC 89 (KLR)) — Applied



3. Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Limited (Civil Application E019 of 2023; [2023] KESC 86 (KLR)) — Mentioned
4. Parliamentary Service Commission v. Martin Nyaga Wambora & others, (Application 8 of 2017) — Explained
5. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Mentioned

#### **Statutes**

1. Constitution of Kenya, 2010 (Const2010) — article 50,163(4)(b) — Interpreted
2. Supreme Court Act (No. 7 of 2011) — section 3A, 15B, 21A,23(2C) — Interpreted
3. Supreme Court Rules, 2020 (No. 7 of 2011 Sub Leg) — rule 33,36,38(1); 46 — Interpreted

#### **Advocates**

*Ms. Anne Kadima h/b for Mr. George Oraro for Applicant*

*Ms. Brenda Onchagwa h/b for Mr. Philip Nyachoti for 1st and 2nd Respondents*

## **RULING**

#### **Representation:**

Ms Anne Kadima h/b for Mr George Oraro, SC for the applicant (Oraro & Company Advocates)

Ms Brenda Onchagwa h/b for Mr Philip Nyachoti for the 1st and 2nd respondents (Nyachoti & Company Advocates)

Mr Paul Chege for the 3rd respondent (Amolo & Gachoka Advocates)

1. Cognisant that this court (Lenaola, SCJ) by an order dated May 26, 2023, issued pursuant to rule 46 of the [Supreme Court Rules, 2020](#), deemed the notice of appeal dated December 19, 2022, which was filed in Civil Appeal No 88 of 2000 and transmitted to this court on December 21, 2022 by the applicant, as withdrawn for failure to institute the appeal within the prescribed time; and
2. Upon perusing the amended notice of motion dated October 30, 2023 and lodged on November 3, 2023 by the applicant under article 50 of the [Constitution](#), sections 3A, 15B, 21A & 23(2C) of the [Supreme Court Act](#) and rules 33 & 36 of the [Supreme Court Rules](#) seeking the following orders:

“ ...

- ii. Review and setting aside of this honourable court’s (Lenaola, SCJ) order dated May 26, 2023 withdrawing the applicant’s notice of appeal dated December 19, 2022 which was filed pursuant to rule 36(4) of the Supreme Court Rules.

...

- iv. Costs of the motion be provided.”

3. Upon considering the affidavit in support of the motion sworn by Dr Davidson Mwaisaka, the Head of Legal (Kenya & East Africa) of Standard Chartered Bank Kenya Limited, on October 30, 2023 and the applicant’s submissions of even date to the effect that; the Court of Appeal by a judgment dated December 16, 2022 allowed Civil Appeal No 88 of 2000 which had been filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents; in turn, the applicant filed the notice of appeal dated December 19, 2022 in the Court of Appeal and transmitted the same to this Court on December 21, 2022, intimating its intention



to challenge the said judgment in this court; thereafter, the applicant filed a notice of motion dated January 20, 2023, Civil Applic No Sup E001 of 2023 (certification motion), anchored on article 163(4) (b) of the Constitution in the Court of Appeal, seeking leave to file an appeal to this court or certification that its intended appeal raises matters of general public importance; the Court of Appeal on April 26, 2023 certified the certification motion as urgent and issued directions with respect to its disposal, which the applicant complied with; and

4. Further noting that the applicant urged that, its advocates on record received an email from this court on May 29, 2023 concerning the order of May 26, 2023; the said order is erroneous as firstly, the applicant opted to file the notice of appeal prior to obtaining certification or leave to appeal to this Court in line with rule 36(4) of the Supreme Court Rules; secondly, the certification motion was heard on July 3, 2023 by three judge bench of the Court of Appeal (Warsame, M’Inoti & Mativo, JJA) and the ruling thereof is set to be delivered on notice; consequently, time for filing the appeal could only commence running after the certification motion is determined, and certification or leave to appeal is granted as set out in section 15B(1) of the Supreme Court Act; and unless the order dated May 26, 2023 is reviewed and set aside, the applicant will be stripped of its right to a fair hearing by prematurely denying it audience before this court; and
5. Taking into account the replying affidavit sworn on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by Mohan Galot, the Principal Shareholder, Governing Director and Chairman of the Board of Directors of the said respondents, on November 7, 2023 and submissions of even date. The tenor of which is that, the motion is an abuse of this court’s process as it is misconceived and fatally defective; the applicant has not met the threshold of review since it has failed to demonstrate that the impugned order was obtained through fraud, deceit or misrepresentation or was rendered by an incompetent court; likewise, the applicant has not pointed out any error on the face of the record; and as such, the motion should be dismissed with costs; and
6. Appreciating that when the motion was mentioned before the Deputy Registrar of this court on November 17, 2023, counsel for the 3<sup>rd</sup> respondent, Mr Paul Chege, indicated that the 3<sup>rd</sup> respondent does not oppose the motion; and
7. Bearing in mind that the learned judge exercised his discretion under rule 46(1) of the Supreme Court Rules in withdrawing the applicant’s notice of appeal as appreciated in Kabuito Contractors Ltd v Attorney General, SC Applic No E025 of 2023; and
8. Upon deliberations on the motion and the rival submissions, we opine as follows:
  - i. The long and short of the applicant’s motion is that it seeks this court to review and set aside the decision of a single judge of this court. Towards that end, the applicant invoked section 21A of the Supreme Court Act, which delineates exceptional circumstances under which this court can review its decision. Nonetheless, the applicant has not demonstrated how the order of May 26, 2023 falls within the said exceptional circumstances. In any event, section 21A is not applicable in this case. See Florence Wairimu Mbugua & Sylvia Murugi Mbugua (Suing as the administrators of the Estate of Joseph Kiarie Mbugua) & another v Timber Manufacturers & Dealers Limited, SC Applic No E019 of 2023.
  - ii. Be that as it may, the applicant also invoked section 23(2C) of the Supreme Court Act which provides as follows:

“ A party aggrieved by the decision of a single judge or two judges may apply for review of the decision by five or more judges of the court.”



iii. In *Parliamentary Service Commission v Martin Nyaga Wambora & others*, SC Applic No 8 of 2017; [2018] eKLR, this court set the guiding principles for review of a decision of a single Judge or limited Bench of the court made in exercise of the Judges’ discretion. This court held *inter alia* that-

“ ...

- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise 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.

iv. It is not in dispute that following the Court of Appeal’s judgment dated December 16, 2022 in Civil Appeal No 88 of 2000, the applicant filed the notice of appeal dated December 19, 2022 in the Court of Appeal and transmitted the same to this court on November 21, 2022. Moreover, the applicant had not obtained certification by the Court of Appeal under article 163(4)(b) of *the Constitution* prior to filing the notice of appeal. The applicant contends that it intends to invoke this court’s appellate jurisdiction under article 163(4)(b) of the *Constitution*. Therefore, it filed the notice of appeal pursuant to rule 36(4) of the *Supreme Court Rules* which reads as follows:

“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.”

The import of rule 36(4) is that an intending appellant may opt to file a notice of appeal either before or after certification in a matter of general public importance. See *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others*, SC Applic No 3 (E008) of 2022; [2022] KESC 25 (KLR).

v. Further, the applicant urged that it filed the certification motion dated January 20, 2023 before the Court of Appeal and annexed directions issued thereto by the said court on April 26, 2023 to the motion at hand. The applicant submitted that the application was heard on July 3, 2023 and the ruling is set to be delivered on notice. The respondents did not deny the foregoing. Therefore, as it stands the certification motion is still pending before the Court of Appeal. By dint of section 15B(1) of the *Supreme Court Act*, an appeal under article 163(4)(b) of the *Constitution* can be filed as follows:

“ 15B.

- 1. Any appeal to the Supreme Court involving a matter of general public importance shall only be made—
  - a. upon certification by the Court of Appeal; or
  - b. upon certification by the Supreme Court in accordance with article 163 (4)(b) of the *Constitution*.”



- vi. It follows therefore that since the certification motion is yet to be determined that time for filing the appeal is as provided under rule 38(1)

“ 38.

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.  
[Emphasis added]

vii. We note that at the time the learned judge issued the order of May 26, 2023, the foregoing was not brought to the attention of the court. Thus, the learned judge cannot be faulted for deeming the notice of appeal as withdrawn. That notwithstanding, we find that the said order will not prejudice the applicant from getting a fair hearing or audience before this court should its certification motion be successful. In the event that certification is issued, the applicant will be at liberty to move the court either by filling a notice of appeal pursuant to the certification or as the case may be under the relevant provision of law. In the circumstances, we decline at this juncture to review and set aside the order of May 26, 2023.

viii. Taking into account the foregoing and this court’s decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, we deem it fair to order each party to bear their own costs of this motion.

9. Consequently and for the reasons afore-stated, we make the following orders:

- i. The amended notice of motion dated October 30, 2023 and filed on November 3, 2023 is hereby dismissed.
- ii. Each party shall bear its own costs of the motion.

It is so ordered

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF DECEMBER, 2023.**

.....  
**M. K. KOOME**

**CHIEF JUSTICE & 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**

