Goldenlime International Limited v Bluesea Shopping Mall Limited & 3 others (Motion 21 of 2016) [2021] KESC 2 (KLR) (Civ) (8 October 2021) (Ruling)

Neutral citation: [2021] KESC 2 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

MOTION 21 OF 2016

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

OCTOBER 8, 2021

BETWEEN

GOLDENLIME INTERNATIONAL LIMITED ..... APPLICANT

AND

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

THE CITY COUNCIL OF NAIROBI (NOW) NAIROBI CITY COUNCIL ..... 2ND RESPONDENT

FARAH MOHAMED BAROW ..... 3RD RESPONDENT

ALI SHEIKH MOHAMED ..... 4TH RESPONDENT

(Being an application for review of the Ruling and orders of the Court of Appeal in Civil Application No. 8 of 2015 given at Nairobi (P. Kihara Kariuki, M. K. Koome (as they then were) & J. Mohamed, JJ.A) dated 30th September 2016, dismissing the Applicant's Application for Grant of Certification)

Circumstances in which the Supreme Court can review its decisions.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to review its own decisions - circumstances in which the Supreme Court could review its decisions - whether a bench of five judges of the Supreme Court could review the decisions of a single judge of the court – what were the guiding principles for applications for review of the decisions of the Supreme Court made in exercise of discretion - Supreme Court Act, 2011, section 24(2); Supreme Court Rules, 2012 (repealed), rule 4(4).*

Jurisdiction *– jurisdiction of the Supreme Court – powers of a single judge of the Supreme Court – discretionary powers of a single judge of the Supreme Court - whether a single judge of the Supreme Court could issue interlocutory orders - what was the nature of the discretionary powers of a single judge of the Supreme Court under section 24*

of the Supreme Court Act - Constitution of Kenya, 2010, articles 10, 20 and 163(2); Supreme Court Act, 2011, section 24; Supreme Court Rules, 2012 (repealed), rule 4.

***Civil Practice and Procedure** – appeals – appeals to the Supreme Court – appeals involving matters of general public importance – requirement for certification of appeals as involving matters of general public importance - what were the requirements for a case to be certified as one involving a matter of public importance hence appealable to the Supreme Court – Constitution of Kenya, 2010, article 163(4)(b).*

Brief facts

Sometimes in 2008, the City Council of Nairobi (Nairobi City County), the 2nd respondent, invited the public including, private sector players to partner with it in the development of markets in various locations within the City of Nairobi under the auspices of private/public sector partnership strategy. Eastleigh market that was situated on the suit property was among the markets earmarked for development. The applicant was subsequently awarded the contract. Aggrieved by the 2nd respondent's decision to award the applicant the contract, the 1st respondent filed judicial review proceedings at the High Court seeking *certiorari* and *mandamus* orders to impugn the decision to award the contract to the applicant for failing to follow due procedure. The High Court though finding merit in the application, declined to grant the orders and stated that the matter called for exercise of discretion and that even when merited, a court had the discretion to refuse to grant judicial review orders.

Aggrieved by the High Court's decision, the 1st respondent filed an appeal in the Court of Appeal which was allowed. The Court of Appeal found that the factors considered by the High Court in its decision not to grant the orders sought did not justify refusal of the orders. Aggrieved by that decision, the applicant filed an application seeking certification that a matter or matters of general public importance were involved in the intended appeal and asked to be granted leave to lodge an appeal before the Supreme Court. Dissatisfied with the ruling of the Court of Appeal declining to certify the matter as of general public importance, the applicant filed an originating motion praying that the court determines among others; whether the Supreme Court should review the ruling dismissing the application for grant of certification.

The applicant also filed a notice of motion application dated October 5, 2016 seeking issuance of a conservatory order restraining any further dealing in the suit property. Subsequently, the application was heard by a single judge of the Supreme Court who issued a conservatory order restraining the 2nd respondent from dealing with the suit property in a manner that rendered the originating motion nugatory to the detriment of the applicant. The orders of the single judge aggrieved the 3rd and 4th respondents, necessitating them to file a notice of motion dated October 24, 2016 seeking among others prayers that the orders of the single judge be discharged, set aside and/or vacated in its entirety and that the originating motion be struck out from the court record.

Issues

i. Whether a single judge of the Supreme Court could issue interlocutory orders.
ii. What was the nature of the discretionary powers of a single judge of the Supreme Court under section 24 of the Supreme Court Act?
iii. Whether a bench of five judges of the Supreme Court could review the decisions of a single judge of the court.
iv. What were the circumstances in which the Supreme Court could review its decisions?
v. What were the guiding principles for applications for review of decisions of the Supreme Court made in exercise of discretion?
vi. What were the requirements for a case to be certified as one involving a matter of public importance hence appealable to the Supreme Court?

Relevant provisions of the Law

Supreme Court Act, 2011

Section 24 - Interlocutory orders and directions by the Court

1. *In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.*
2. *Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.*
3. *Any judge of the Supreme Court may review a decision of the Registrar made within the civil jurisdiction of the Court under a power conferred on the Registrar by the rules, and may confirm, modify, or revoke that decision as the judge thinks fit.*

Held

1. Section 24 of the Supreme Court Act empowered a single judge to make any interlocutory orders and give any directions other than an order or direction which determined the proceedings or disposed of the questions in issue. The interpretation and application of section 24 read together with rule 4 of the repealed Supreme Court Rules, 2012, had to be brought within the ambit of articles 10 and 20 of the Constitution of Kenya, 2010 (Constitution)and had to be in accord with the canons of interpretation.

2. Caution had to be sounded to all judges of the court that discretionary powers under section 24 of the Supreme Court Act were not absolute in a similar way that the powers of the Chief Justice under any law were not without limitations. All judges of the court had to appreciate that section 24 was neither a blank cheque giving room for a relapse into the old jurisprudence of technicalities nor was it an invitation to non-adherence of constitutional values and principles of governance.

3. Article 163(2) of the Constitution provided that the Supreme Court was properly constituted for the purposes of its proceedings if it was composed of five judges. A single judge of the Supreme Court, could as a matter of discretion, issue interlocutory orders for a very limited time to ensure that the subject matter of an appeal was not wasted in the intervening period. Section 24(1) of the Supreme Court Act occupied a central place in the operations of the court, and unless orders were issued to declare the same unconstitutional by proper proceedings filed to do so, it remained an operative and lawful provision.

4. Section 24(2) of the Supreme Court Act and rule 4(4) of the repealed Supreme Court Rules, 2012 essentially provided that decisions of a single judge could be reviewed by a bench of five judges. The power of the Supreme Court to review its own decisions was general and was not limited to single judge matters only.

5. Taking into account the edicts and values embodied in Chapter 10 of the Constitution, as a general rule, the Supreme Court had no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner provided. However, in exercise of its inherent powers, the court could, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances were limited to situations where;

1. the judgment, ruling, or order, was obtained, by fraud or deceit;
2. the judgment, ruling, or order, was a nullity, such as, when the court itself was not competent;
3. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;
4. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.

6. The single judge exercised her discretion in allowing the applicant's notice of motion and granted the orders sought albeit for a temporary period. The respondents could have chosen to respond to the substantive application or seek a review of the single judge's orders; they sought the latter. An application for review of a decision was not one to be undertaken in a casual way, since the decision to review was not one falling under the appellate jurisdiction mandate of the court.

7. The guiding principles for application(s) for review of a decision of the court made in exercise of discretion were as follows:

1. A review of exercise of discretion was not as a matter of course to be undertaken in all decisions taken by a limited bench of the court.
2. Review of exercise of discretion was not a right; but an equitable remedy which called for a basis to be laid by the applicant to the satisfaction of the court.
3. An application for review of exercise of discretion was not an appeal or a chance for the applicant to re-argue his/her application.
4. In an application for review of exercise of discretion, the applicant had to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.
5. During such review application, in focus was the decision of the court and not the merit of the substantive motion subject of the decision under review.
6. The applicant had to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and;

i. as a result a wrong decision was arrived at; or
ii. 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.

Instead of focusing on the principles for setting aside a single judge's decision, counsel for the 3rd and 4th respondents had instead engaged in an unwarranted rant on prior decisions of the court on that subject. The rant was of no benefit to his clients.

8. Article 163(4)(b) of the Constitution provided that appeals should lie from the Court of Appeal to the Supreme Court in any other case in which the Supreme Court or the Court of Appeal certified that a matter of general public importance was involved, subject to clause (5). Article 163(5) of the Constitution vested the Supreme Court with jurisdiction to review the Court of Appeal's decision to grant or decline certification that a matter was one of general public importance. Under rule 24(2) of the repealed Supreme Court Rules, where the Court of Appeal had certified or had declined to certify a matter to be of general public importance, an aggrieved party could apply to the Supreme Court for review within fourteen days.

9. The Supreme Court had concurrent jurisdiction and it was in good practice that certification be first sought before the Court of Appeal. Rules 24(1) and (2) of the repealed Supreme Court Rules 2012 provided that an application for certification should first be made in the court or tribunal it was desired to appeal from and where the Court of Appeal had certified a matter to be of general public importance, an aggrieved party could apply to the court for review within fourteen days. Rules 24(1) and (2) were also provided for under rule 33(1) and (2) of the Supreme Court Rules, 2020. The Supreme Court had jurisdiction to hear the instant application.

10. The applicant had not set out the matters of general public importance that required the court's intervention. Nevertheless, from the record, the applicant outlined issues which it claimed touched on application of procurement laws and management of public private partnerships. Whether a matter was one of general public importance was an issue to be determined on a case-to-case basis as guided by its peculiar facts of each case.

11. For a case to be certified as one involving a matter of public importance; the intending appellant had to satisfy the court that the issue to be canvassed on appeal was one, the determination of which transcended the circumstances of the particular case, and had a significant bearing on the public interest. Where the matter in respect of which certification was sought raised a point of law, the intending appellant had to demonstrate that such a point was a substantial one, the determination of which would have a significant bearing on the public interest.

12. The intended appeal did not raise an issue where the court needed to make a pronunciation on clarification of the law to the benefit of the public as opposed to the parties before the court. The applicant had not demonstrated the uncertainty that the court needed to adjudicate and clarify on. The appeal was based solely on exercise of discretion by the High Court which issue had no public importance attached to it on the discretion

of the court. Whether the guidelines could apply retrospectively did not need any clarification by the court since the effect of such application of the guidelines to a case, would vary depending on the facts of each case.

13. Even if the court were to consider the matter as one of general public importance because the suit property was said to be public land with the 2nd respondent being the lessor, the premises were the subject of various suits in the Environment and Land Court as between the 3rd and 4th respondents and the 2nd respondent and other third parties for determination of its ownership. That was well acknowledged by both the High Court and the Court of Appeal, the instant court's intervention would therefore be in vain.

Application dismissed.

Orders

i. *The 3rd and 4th respondents' notice of motion dated October 24, 2016, was dismissed.*
ii. *The applicant's notice of motion dated October 5, 2016, was marked as spent.*
iii. *The originating motion dated October 5, 2016, by the applicant was dismissed.*
iv. *The 1st, 3rd and 4th respondents to have the costs of the originating motion while each party was to bear the costs of the motion dated October 24, 2016.*

Citations

Cases

1. Anami Silverse Lisamula v. Independent Electoral & Boundaries Commission & 3 others — Cited
2. Board of Governors Moi High School, Kabarak & Another v. Malcolm Bell — Cited
3. Deynes Muriithi & 3 Others v. The Law Society of Kenya & Another — Cited
4. Erad Suppliers & General Contractors Limited — Cited
5. Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others — Explained
6. Gatirau Peter Munya v. Dickson Mwenda Kithinji — Cited
7. Hermanus Philips Steyn v. Giovani Gnecchi-Ruscone — Explained
8. In Re the Matter of the Interim Independent Commission — Cited
9. Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate & 4 Others — Cited
10. Kalpana H Rawal & 2 others v. Judicial Service Commission & 2 others — Explained
11. Kenya Civil Aviation Authority vs. African Commuter Services Ltd & Another — Followed
12. Lemanken Aramat vs. Harun Meitamei Lempaka & 2 Others — Cited
13. Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd — Explained
14. Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 others — Cited
15. Parliamentary Service Commission v. Martin Nyaga Wambora & Others — Explained
16. Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others — Cited
17. Republic v. Ahmad Abolfathi Mohammed & Another — Explained
18. Samuel Kamau Macharia & Anor vs. Kenya Commercial Bank — Explained
19. Sum Model Industries Limited v. Industrial and Commercial Development Corporation — Cited
20. Tom Odhiambo Ojienda vs. Kenya Revenue Authority & another — Explained
21. Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others — Explained

Statutes

1. Constitution of Kenya — article 159(2)(e), 163(4), 163(4)(b), 163(5), — Interpreted
2. Supreme Court Rules 2012 — Rule 3(2) & 5, 24 (2) — Interpreted
3. Supreme Court Act, 2011 (Repealed) — section 21, 24, 24 (1), 24(4) — Interpreted

Advocates

None mentioned

RULING

A. Introduction

1. Before the Court and as the original pleading for determination is the Originating Motion dated 5th October 2016 and lodged on even date by Golden Lime International Limited (the Applicant). The Application is brought pursuant to article 163(5) of the *Constitution of Kenya*, rules 3(2) & 5, 24 (2) of the *Supreme Court Rules 2012* (repealed) challenging the Ruling of the Court of Appeal (Kihara Kariuki, Koome (as they then were), J Mohammed, JJA) which dismissed the applicant's application for grant of certification for leave that the matters arising in the intended appeal to the Supreme Court are matters of general public importance.

2. Also for determination by the court is the 3rd and 4th respondent's notice of motion dated October 24, 2016 and filed on October 25, 2016. The application is brought under articles 159(2)(e) and 163(4) of the Constitution as well as sections 21 and 24 of the Supreme Court Act, 2011 (repealed). The application seeks to review the Single Judge decision of this Court (Njoki Ndungu, SCJ) granting conservatory orders following the filing of the applicant's notice of motion dated 5th October, 2016.

B. Background

3. The tussle between the parties involves the re-development of Eastleigh Market on a property known as LR 36/VII/1037 (the suit property) which, on record, is said to be public property, but to which the 3rd and 4th respondents, are laying claim to. Sometimes in 2008, the City Council of Nairobi (now Nairobi City County), the 2nd respondent, by way of an advertisement in a local daily, invited the public including, private sector players to partner with it in the development of markets in various locations within the City of Nairobi under the auspices of Private/Public Sector Partnership strategy. Eastleigh market that is situate on the suit property was among the markets earmarked for development. The applicant and Blue Sea Shopping Mall Limited, the 1st respondent, made proposals to the 2nd Respondent for consideration in that regard. The applicant was subsequently awarded the contract through a contract document dated 18th November 2008.

i. Proceedings at the High Court

4. Aggrieved by the 2nd respondent's decision to award the applicant the contract aforesaid, the 1st respondent, with leave of the High Court, filed Judicial review proceedings at the High Court being Misc Application No 808 of 2008, seeking *certiorari* and *mandamus* orders to impugn the decision to award the contract to the applicant for failing to follow due procedure. The 3rd and 4th respondents were enjoined to the proceedings as interested parties.

5. The 1st respondent in the Judicial Review proceedings contended that the 2nd respondent awarded the Public-Private Partnership contract to the applicant contrary to section 92 of the Public Procurement and Disposal Act, regulation 64 of the Public Procurement and Disposal Regulations, 2006 as well as Rules of natural justice.

6. The High Court (Nyamu, J (as he then was) though finding merit in the 1st respondent's judicial review application, declined to grant the orders. The learned judge in doing so, found that though the 1st respondent had participated in the process leading to the award of the tender, it was common ground that the applicant had taken possession and commenced development. He further stated that the matter called for exercise of discretion and that even when merited, a Court has the discretion to

refuse to grant judicial review orders. The learned judge in that context electively chose not to exercise that discretion.

ii.Proceedings at the Court of Appeal

7. Aggrieved by the above decision, the 1st respondent filed an appeal in the Court of Appeal being Civil Appeal No 129 of 2013 where the court distilled two issues for determination; Whether there were circumstances that militated against the grant of the orders of *certiorari* and *mandamus* and whether the learned judge exercised his discretion properly in declining to grant the orders sought.

8. In a judgment delivered on May 22, 2015 (Karanja, GBM Kariuki and M'Inoti, JJA), in allowing the appeal, found that the factors considered by the High Court in its decision not to grant the orders sought did not justify refusal of the orders or the application which admittedly had merit. The Court of Appeal thus found that the learned judge misdirected himself in his consideration of those factors and as a result arrived at a wrong decision. The Court thus set aside the High Court's decision and granted the Orders sought by the 1st respondent before the High Court.

iii.Certification before the Court of Appeal

9. Aggrieved by the decision of the Court of Appeal, the applicant filed a notice of motion, Civil Application No. 8 of 2015, brought under article 163(4) (b) of the Constitution seeking certification that a matter or matters of general public importance were involved in the intended appeal and asked to be granted leave to lodge an appeal before the Supreme Court. The Court of Appeal (Kihara Kariuki, Koome (as they then were), J Mohammed, JJA) vide a ruling delivered on September 30, 2016 declined to grant the certification and observed that the applicant had not demonstrated any outstanding issue that constitutes a matter of general public importance that can warrant certification. It further held that a matter of general public importance can only arise from a definitive determination of a matter by the Court of Appeal in substantive grey areas of law or policy that cut across a broad spectrum of the public. They held that the role or mandate of the Supreme Court is clearly spelt out in the Constitution and the application fell short of the criteria set in the Constitution or decided cases.

iv.Proceedings at the Supreme Court

a. Originating motion dated October 5, 2016

10. Dissatisfied with the ruling of the Court of Appeal declining to certify the matter as of general public importance, the applicant filed the originating motion aforesaid. In that application, the applicant prays that this honourable court determines the following questions:

    1. Whether this honourable court should review the Ruling delivered by the Court of Appeal on 30th September 2016 in Civil Application No 8 of 2015 (Hon P Kihara Kariuki (PCA), MK Koome, J Mohamed JJA) dismissing the applicant's application for grant of certification that the matters arising in an intended Appeal to the Supreme Court are matters of general public importance;

    2. Whether a certificate that a matter or matters of general public importance is or are involved in the intended appeal to the Supreme Court against the decision of the Court of Appeal delivered on May 22, 2015 by the Hon Justice Karanja, GBM Kariuki and M'Inoti JJA in Civil Appeal No 129 of 2013.

3. Whether Leave should be granted to the applicant to lodge an appeal to the Supreme Court of Kenya against the decision of the Court of Appeal delivered on May 22, 2015 by the Hon Justice Karanja, GBM Kariuki and M'Inoti JJA in Civil Appeal No 129 of 2013.

b. Notice of motion dated October 5, 2016

11. The applicant also filed a notice of motion application dated October 5, 2016 seeking issuance of a conservatory order restraining any further dealing in the suit property. The main prayers in the application were:

    a. The originating motion filed herein be certified urgent.

    b. Pending inter-parties hearing and determination of the originating motion filed herein, a conservatory order do issue restraining any further dealings in the property comprised in Plot No LR 36/VII/1037 in Nairobi County.

    c. This court be pleased to make any further Order it deems mete and just.

    d. That the costs of this application abide the determination of the originating motion.

12. Subsequently, the application was heard by a single judge of the court, Njoki Ndungu, SCJ, on October 7, 2016 who made the following orders:

    1. The application is certified urgent and service of the certificate of urgency is dispensed with at this instance.

    2. Pending the hearing *inter-partes* of the originating motion No 21 of 2016, for review of the Court of Appeal Ruling, Civil Application No Sup 8 of 2015, delivered on 30th September, 2016 a conservatory order is hereby issued restraining the 2nd Respondent from dealing with the suit property LR No 36/VII/1037, in a manner that renders the originating motion No 21 of 2016 in this court nugatory to the detriment of the applicant.

    3. Pending hearing and determination of the originating motion No 21 of 2016, for review of the Court of Appeal Ruling, Civil Application No Sup 8 of 2015, delivered on September 30, 2016 a conservatory order is hereby issued suspending the decision of the Court of Appeal in Civil Appeal No 129 of 2013 quashing the award of contract to the Applicant to redevelop the subject property, LR No 36/VII/1037 and allowing the 2nd respondent to undertake a fresh retendering and award of the partnership contract.

    4. All respondents be immediately served with the order of the Court as issued.

    5. All respondents further be served with all documents relating to the originating motion No 21 of 2016 which is the main application before this court for the review of the Court of Appeal decision denying leave to appeal to the Supreme Court.

    6. The hearing of the originating motion No 21 of 2016 for review of the Ruling of the Court of Appeal, Civil Application No Sup 8 of 2015, denying leave to appeal to the Supreme Court, will be heard before a five judge bench on a priority basis, at a time when the Supreme Court has regained its requisite constitutional quorum and on a date to be given by the Registrar of the Court.

13. These orders of the single judge aggrieved Farah Mohamed Barrow and Ali Sheikh Mohamed, the 3rd and 4th respondents, necessitating them to file a notice of motion dated 24th October, 2016 seeking orders as herebelow.

c. Notice of Motion dated October 24, 2016

14. The application seeks the following orders:

    a. The application herein be certified as urgent and service of the same upon the respondents be disposed within the first instance.

    b. The Order of the October 7, 2016 issued by the Hon Lady Justice NS Ndungu SCJ be discharged, set aside and/or vacated in its entirety.

    c. The originating motion dated October 6, 2016 be struck out from the court record and with cost to the 3rd & 4th respondents/applicants

15. The application is supported by an affidavit sworn by the 3rd respondent on October 24, 2016 who depones that a single judge of the Supreme Court lacks jurisdiction to grant *ex parte* orders at an interlocutory stage as is in this case where Golden Lime International Limited (Applicant) has lodged an originating motion petitioning the court for leave to lodge an appeal after certification was declined by the Court of Appeal. The applicant thus depones that the Supreme Court cannot grant any reliefs or orders to a party before one is granted leave to lodge an appeal pursuant to article 163(4)(b) of the Constitution.

16. The application is opposed by a replying affidavit sworn by Mahamud Sheik Hussein on behalf of the applicant on February 7,2017, where he depones that, in issuing the conservatory order, the single judge acted judiciously and regularly by exercising the constitutional and statutory power bestowed on her and laid a basis for the fair hearing of the litigants in this matter.

C. Parties' Respective Submissions

i. Applicant's submissions

17. On 24th July 2018, the applicant filed its submissions in regard to its originating motion dated October 5, 2016 and the 3rd and 4th respondents' notice of motion dated October 24, 2016. It identified two issues for determination by the court, namely: the jurisdiction of this court and the exercise thereof and the manner in which this Court may interpret the Constitution generally.

18. It was argued that the court had jurisdiction to answer the questions raised in the originating motion and to grant it leave to commence an appeal from the decision of the Court of Appeal delivered on May 22, 2015. The applicant further submits that the question of jurisdiction in our judicial system has long been considered by courts even before the creation of the Supreme Court. Reliance was placed on the case of *Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd* [1989] eKLR which has been a point of reference on the question of jurisdiction. The Applicant also relies on the case of *Samuel Kamau Macharia & Anor vs Kenya Commercial Bank* [2012] eKLR where this Court held that; "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law".

19. The applicant furthermore submits that Njoki Ndungu SCJ was right in giving her orders of October 7, 2016 when she sat as a single judge considering an interlocutory application and that she acted within her jurisdiction and did not in any manner whatsoever determine the proceedings before this Court as suggested by the 3rd and 4th Respondents. The applicant further submits that the position was reiterated by Ibrahim SCJ through the orders he issued on October 28, 2016 extending the initial orders.

ii. The 1st respondent's case

20. In its written submissions dated March 6, 2017, and filed on 7th March 2017, the 1st respondent submits on both the notice of motion dated 5th October 2016 and the 3rd and 4th respondents' notice of motion dated 24th October 2016. In supporting the 3rd and 4th respondents' motion, the 1st respondent argues that this court lacks the requisite jurisdiction to grant the conservatory orders to the applicant as there is no appeal filed within the meaning of rule 32 of the Supreme Court Rules, 2012. The 1st respondent thus outlined two issues for determination; jurisdiction to grant conservatory orders and discharge of interim orders.

21. On jurisdiction, the 1st respondent submits that the appellate jurisdiction of the honourable court is anchored on article 163(4) of the Constitution as well as section 19 of the Supreme Court Act 2011 and that the court has a duty to and must operate within its jurisdictional limits. The 1st respondent further contends that jurisdiction flows from the law and no Court can arrogate itself jurisdiction. The cases of *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [2012] eKLR and *In Re the Matter of the Interim Independent Commission* [2011] eKLR were relied on in support of this submission.

22. Citing the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji* [2014] eKLR, the 1st respondent submits that interim orders should and can only be granted on the inherent merit of the case and that the originating motion filed by the Applicant was yet to admitted by the Court, heard and determined hence the conservatory orders issued therein were premature.

23. In addressing the second issue of discharge of interim orders, the 1st respondent argues that whereas section 24 (1) of a Supreme Court Act, 2011 allows this court the discretion to grant interlocutory orders, section 24(4) of the Act also grants this court the power to discharge an interlocutory order made by a single judge of this court.

24. The 1st respondent specifically contends that Order No 3 granted by the single judge has the most far reaching effect as it seeks to operate not only as a stay of execution of the substantive judgment of the main appeal from the decision of the Court of Appeal, but also seeks to overturn the Judgment at the *ex-parte* level. The 1st respondent concludes by reaffirming that interlocutory orders can only be granted if there is an appeal as was held in the case of *Board of Governors Moi High School, Kabarak & Another v Malcolm Bell* [2013] eKLR thus the single judge lacked discretion to grant the interlocutory orders and urges the court to allow the 3rd and 4th respondent's motion.

iii. The 3rd and 4th respondent's submissions

25. The 3rd and 4th respondents filed unnecessarily verbose and largely irrelevant and partly demeaning 90 paged written submissions dated May 31, 2017 and filed on June 2, 2017.

26. In summary and of relevance, on the issue of jurisdiction, Counsel for the 3rd and 4th respondents began by urging us that there is need for this Court to redeem its reputation for various violations of the Constitution and law, leading the Court to make "bad precedents" as the Apex Court. Citing *Anami Silverse Lisamula v. Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR, Counsel urged the Court to find as it did therein, that if at the start of a matter it lacks jurisdiction, it cannot entertain it as the same is null and void ab initio.

27. Counsel further argues that this court, in arrogating itself a new kind of jurisdiction, ie residual/ generic and or special jurisdiction like the American Supreme Court, through expansionist extra-constitutional exercise of power, is wrong as its jurisdiction is limited by statute, and cannot grant itself jurisdiction where it's not available in its creating statute. To support these assertions, counsel relied

on the dissenting Judgment of Mutunga, CJ (as he then was) in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR.

28. The court was also urged to be consistent in its interpretation and application of the law so that there is transparency and accountability to Kenyans in its Orders and Judgments, which bind all other courts. Counsel further faulted this Court's interpretation of the Constitution as a single document, with no single technique developed on how it's to be interpreted so far, as to method, tactic and strategy. In so saying, he submits that the cases of *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate & 4 Others* [2013] eKLR, *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission & 2 Others* [2014] eKLR, *Hon Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others* [2014] eKLR and *Deynes Muriithi & 3 Others v The Law Society of Kenya & another* [2016] eKLR are bad jurisprudence when it comes to the court's jurisdiction, and more specifically, that the cases were bad law for attempting to expand the Court's jurisdiction.

29. Counsel for the 3rd and 4th respondents further submits that the court needs to engage in constitutional interpretation by paying attention to the whole document rather than a piece of it ie, adopt a broad contextual, purposive approach method of interpretation; to stay away from the danger of substituting clear provisions of the Constitution with the Court's preferred policy solution and; considering that there exists a delicate equilibrium between the three Arms of Government so as not to unsettle it through expansionist interpretation.

30. Circling back to their motion and with the above submissions as their justification, the 3rd and 4th respondents argue that this court lacks the jurisdiction to have a single judge grant the conservatory orders aforesaid. On this point, they re-emphasized their earlier submission that this court cannot arrogate itself jurisdiction further from what is provided for in the Constitution.

    They thus argue that under article 163 of the Constitution, the court's jurisdiction is very specific and faults the Court for adjudging cases where it lacked jurisdiction to do so.

31. The 3rd and 4th respondents proceed to fault the single judge for granting order No 3 in the Order dated 7th October 2016, arguing that the prayer was not one of those contained in the applicant's motion for grant of conservatory orders. They furthermore argue that the order granted had the effect of locking out the respondent parties from being heard on the merits of the application, hence infringing on their right to a fair hearing as provided for under article 50 of the Constitution. They thus submit that a single judge is prohibited from making final orders in proceedings and that, by granting final orders at an interlocutory stage, the orders granted meant the motion was spent, without the respondents arguing their case, which went against the provisions of section 24 of the Supreme Court Act 2011.

32. It is the 3rd and 4th respondents further case that, this Court has in its decisions, expressed the extent to which all courts must exercise their jurisdiction and their powers. The decisions by this Court in the cases of *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others* (*supra*), *Re The Matter of the Interim Independent Commission* (*supra*) and *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited and 2 Others* [2012] eKLR were cited in support of this submission. It is their further submission that in these cases, the Court delved into the Court's jurisdiction in a context that cannot be extended by judicial craft, and for purposes of consistency can only be departed from only when need arises in exceptional cases. It was further submitted that in cases of lacunae in the law, the same should be filled by common law, and interpretation of the Constitution should be based on the words used and not based on policy or employment of an approach aimed at legislation through interpretation.

33. Regarding the merit of the prayer asking for the dismissal of the Original Motion dated 5th October 2016, the 3rd and 4th respondents submit that this court lacks the jurisdiction to review and/or grant

the certification sought. First, they contend that the court was not properly constituted to grant the conservatory orders. They argue that the Constitution does not provide for a single judge or a two-Judge Bench, arguing that under article 163(2) of the Constitution, the Supreme Court is said to be properly constituted for its proceedings if it is composed of five judges and that any sitting below five Judges amounts to improper constitution of the court.

34. Second, the 3rd and 4th respondents' submit that the provisions of section 23(1) of the Supreme Court Act, 2011, affirm the Constitution's edict that the Court shall be comprised of five judges, but notes that section 23(2) of the Act departs from this provision by providing that "any two or more Judges of the Supreme Court may act as the court" which provision they submit, is unconstitutional as it sets to introduce the notion that any two or more Judges may act as the court in certain circumstances. The 3rd and 4th respondents further add that Section 24 of the Supreme Court Act, which grants a single judge the power to grant any order in an interlocutory application is in conflict with the Constitution and hence submits that in this case, article 163 of the Constitution should prevail. In support of this, they cite the case of *Erad Suppliers & General Contractors Limited* [2012] eKLR where this Court decided on the question whether a two-judge bench of the Supreme Court has the capacity to sit and held that such a Bench as constituted, may handle preliminary questions before hearing the substantive matter. This case, according to the 3rd and 4th respondents' is wrong law and not good authority, and argue that, it promulgates the notion that any proceedings before the court before the hearing of the substantive case are not "proceedings" within the meaning of article 163(2) of the Constitution, including matters handled by a two-Judge bench.

35. The 3rd and 4th respondents also submit that article 163(4) of the Constitution provides two distinct and separate rights of certification for leave to appeal to the Supreme Court; One, to the Court of Appeal and secondly, directly to the Supreme Court. It is their case that these are two very distinct constitutional rights that are independent of each other. Under this head, first, the 3rd and 4th respondents argue that under article 163(4) of the Constitution, if a party elects to seek certification at the Court of Appeal, if certification is allowed, the Constitution allows an aggrieved party to appeal the decision before the Supreme Court. The Applicants hence go on to fault this Court's decision in *Sum Model Industries Limited v. Industrial and Commercial Development Corporation* [2011] eKLR where they claim that the two-judge bench of this Court erred in finding that an application for certification of a matter as one of general public importance should originate at the Court of Appeal, arguing that this case was wrongly decided in comparison to the *Hermanus Philips Steyn v. Giovani Gnecchi-Ruscone* (2013) eKLR where this Court decided that certification may be sought by a litigant before the Court of Appeal or the Supreme Court.

36. Further to the above, the 3rd and 4th respondents' submit that, under article 163(5) of the Constitution, this court lacks the jurisdiction to review a denial of certification for leave to appeal to the Supreme Court by the Court of Appeal. They argue instead that, article 163(4)(b) should only apply where the Court of Appeal certifies that a matter is of general public importance and that should the Court of Appeal fail to certify a matter as one of general public importance, the right of appeal to the Supreme Court does not exist for the litigant and that only a party aggrieved with the grant of the certification by the Court of Appeal can apply to the Supreme Court for a review of the Certification. That, upon filing of the review application, the options available to this court in that regard are either to affirm/uphold the certification order, vary the certification or overturn the Court of Appeal's certification.

37. In conclusion, the 3rd and 4th respondents urge the Court to appreciate and internalize the very limited original and appellate jurisdiction of the Supreme Court and to depart from the allegedly bad precedents created as the Constitution does allow the Court to depart from its own precedents.

D. Issues for Determination

38. Three issues arise for determination in this matter, namely;

    i. Whether this Court has jurisdiction to determine the review application against conservatory orders granted; and if yes,

    ii. Whether a case has been made to warrant that review.

    iii. Whether the Court of Appeal erred in declining to certify the matter as one of general public importance

39. In framing these issues, we have decided that the application seeking conservatory orders by the applicant no longer requires our intervention in view of the lapse of time since interim orders were granted. Instead, we shall focus on the motion for setting aside of those orders and then determine the originating motion with finality, one way or the other.

E. Analysis

40. We note that the 3rd and 4th respondent's in their application, have moved this Court under sections 21 and 24 of the Supreme Court Act No. 7 of 2011 (repealed). The 1st, 3rd and 4th Respondents' contention in that regard is that the single Judge lacked the requisite jurisdiction to grant conservatory orders. It is also their argument that, by granting the conservatory orders, the single Judge determined the issues in the Notice of Motion with finality rendering the Motion spent without according the Respondents an opportunity to be heard.

41. The 1st, 3rd and 4th respondents also argue that the single Judge lacks jurisdiction to issue interlocutory orders to a party seeking leave to appeal under article 163(4)(b) of the Constitution. Put in a simple and much clearer form, they argue that the interlocutory orders sought could not be granted when there is no substantive appeal filed for determination before us.

42. The determination of the above question and not in the convoluted language of Counsel for the 3rd and 4th respondents, shall require us to interrogate whether the single Judge correctly exercised the powers donated by section 24(1) of the Supreme Court Act which provides;

    (1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.

    (2) Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.

    (3) Any judge of the Supreme Court may review a decision of the Registrar made within the civil jurisdiction of the Court under a power conferred on the Registrar by the rules, and may confirm, modify, or revoke that decision as the judge thinks fit.

43. Subsection (4) then lists the powers of a five-Judge bench in adjudicating on orders granted by a single Judge. The said provision states:

    1(4) The judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—

    (a) discharge or vary an order or direction made or given under subsection (1); or

(b) confirm, modify, or revoke a decision confirmed or modified under subsection (2).

44. Rule 4 (3) of the Supreme Court (Amendment Rules) 2016 provides that:

> Without prejudice to the provisions of sub-rule (1) or sub-rule (2), a single Judge of the Court may hear applications and make Orders with regard to-
>
> i. change of representation;
>
> ii. admission of consent;
>
> iii. consolidation of matters;
>
> iv. dismissal of a matter for want of prosecution;
>
> v. correction of errors on the face of the record;
>
> vi. withdrawal of documents;
>
> vii. review of the decision of the registrar;
>
> viii. leave to file additional documents;
>
> ix. admission of documents for filing in the Registry; or
>
> x. substitution of service."

It is these provisions we must apply in determining the application for setting aside the conservatory orders issued by Njoki Ndungu, SCJ.

i. Does the Court have jurisdiction to grant interlocutory orders?

45. This Court in the case of Board of Governors, Moi High School, Kabarak & another vs. Malcolm Bell, Sup. Ct. Petitions 6 & 7 of 2013 [2013] eKLR considered the standing of interlocutory applications before the Supreme Court and the import of Section 24(1) of the Supreme Court Act, 2011 as well as the powers of the Supreme Court to grant interlocutory orders, within the substantive matter of an appeal. The Court held thus:

> " Does the grant of interlocutory relief in the instant matter encroach on the jurisdiction of the Court of Appeal? We do not think so. For interlocutory applications in the nature of injunctions and stay of execution are made within the substantive matter of the appeal; and that is the case, in this instance. The Court has jurisdiction to hear and determine such interlocutory applications with special regard to the circumstances of each case. Where necessary, this Court mayalso exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the Court – to render justice in accordance with the Constitution and the ordinary law." [Emphasis ours]

46. The Court went on to discuss the Supreme Court's jurisdiction in respect of interlocutory orders, its origins and the principle behind it. The Court held:

> " In our opinion, the Supreme Court's jurisdiction in respect of interlocutory orders, such as stay-of-execution orders, firstly, emanates directly from the statute law and the rules; and secondly, rests on the rational principle that the appellate power of "review and possible

reversal" of the substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was made...

It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of the appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case."

47. So then, how does the above finding resonate with the issue of whether a single Judge may give/grant in proceedings, interlocutory directions? What has been the practice and position of this Court in this regard?

48. The case of *Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others* Sup. Ct. Petition No. 27 of 2014 [2014] eKLR, presented a similar situation, in which the single Judge, Ibrahim SCJ, in considering the provisions of Section 24(1) of the Supreme Court Act held thus:

> " As I make the determination herein, I am conscious of the provisions of Section 24(1) of the Supreme Court Act 2011 which provides as follows:-
>
> " 24. (1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.

The meaning and effect of the said provision is that a single judge in a proceeding or proceedings may give any interlocutory order and give any interlocutory directions as he/she think fit other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceedings."

49. Another case where this Court considered the standing of the provisions of Section 24 of the Supreme Court Act 2011, is *Kalpana H Rawal & 2 others v. Judicial Service Commission & 2 others* Sup. Ct. Application No. 11 0f 2016 [2016] eKLR where a single Judge issued conservatory orders ex-parte. Though the Court, by majority, ruled to vacate the conservatory orders that were granted,the meaning and effect of Section 24(2) of the Supreme Court Act was discussed earnestly. Mutunga, CJ (as he then was) in that regard expressed himself thus;

> " Section 24 of the Act empowers a single judge to make any interlocutory orders and give any directions other than an order or direction which determines the proceedings or disposes of the questions in issue. This provision of the Act has yet to be interpreted by this Court. In my view, the interpretation and application of Section 24 of the Act read together with Rule 4, as I have signalled above must be brought within the ambit of Articles 10 and 20 of the Constitution and must accord with the canons of interpretation established in other decisions of this Court...
>
> Caution must be sounded to all judges of this Court that discretionary powers under Section 24 are not absolute in a similar way that the powers of the Chief Justice under any law are not without limitations. All judges of this Court must appreciate that Section 24 is neither a blank cheque giving room for a relapse into the old jurisprudence of technicalities n0r is it an invitation to non-adherence of constitutional values and principles of governance..."

50. Counsel for the 3rd and 4th Respondent has, also in adopting the above view, argued that under the provisions of Article 163(2) of the Constitution, a proper Bench before this Court is constituted by five Judges and that a single Judge sitting alone cannot constitute the Supreme Court. It was his argument therefore that a single Judge, cannot in that capacity, issue orders that are interlocutory in nature.

51. In that context, Article 163(2) of the Constitution provides that:

> " The Supreme Court shall be properly constituted for the purposes of its proceedings if its composed of five Judges."

52. Wanjala, SCJ in his Ruling in Kalpana H. Rawal & 2 others v. Judicial Service Commission & 2 others (supra), discussed the powers of a single Judge by reading Section 24(1) of the Supreme Court Act alongside Article 163(2) of the Constitution by holding as follows:

> " It is my view that Section 24(1) of the Supreme Court Act must be read alongside Article 163 (2) of the Constitution...
>
> Strictly speaking therefore, in the light of Article 163(2) of the Constitution, a single Judge sitting before the empaneling of a five-Judge Bench cannot constitute the Supreme Court. A single Judge issues ex parte Orders not in his or her capacity as the Supreme Court, but as an agent of the yet to be empaneled Bench of the Court. This explains why such orders must be very temporary in nature and only last up to and until a five-Judge Bench is constituted by the Chief Justice."

53. On reflection, whereas the 3rd and 4th Respondents are correct in their interpretation of Article 163(2), we are inclined to agree with Wanjala, SCJ that, a single Judge, can as a matter of discretion, issue interlocutory orders for a very limited time to ensure that the subject matter of an appeal is not wasted in the intervening period and that the caution expressed by Mutunga, CJ in Kalpana H. Rawal & 2 others vs. Judicial Service Commission & 2 others (supra)must be at the back of each Judge's mind.

54. Section 24(1) of the Supreme Court Act occupies a central place in the operations of the Court, and unless orders are issued to declare the same unconstitutional by proper proceedings filed to do so, remains an operative and lawful provisions, the protestations of Counsel for the 3rd and 4th Respondents notwithstanding.

ii. Can this Court review interlocutory orders granted by a single Judge?

55. The next question for determination before us is; can interlocutory orders granted by a single Judge be reviewed? Section 24(2) of the Supreme Court Act, 2011 and Rule 4(4) of the Supreme Court Rules, 2012 essentially provide that decisions of a single Judge may be reviewed by a bench of five Judges. This Court in the case of *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others* Sup. Ct. Petition No. 6 of 2014 [2017] eKLR addressed the question, in detail, as to whether the Supreme Court has jurisdiction to review its own decisions and the inherent powers and jurisdiction of the Court in that regard. This power is general and is not limited to single Judge matters only. The Court held thus:

> " Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders,

in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

i. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;

ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;

iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;

iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision. [Emphasis ours]

56. In the present case, we note that the single Judge exercised her discretion in allowing the Applicant's Notice of Motion and granted the orders sought albeit for a temporary period. The Respondents could have chosen to respond to the substantive application or seek a review of the single Judge's orders. They sought the latter. The jurisdiction of this Court on the conditions for grant of a review order was as found in the case of *Parliamentary Service Commission v. Martin Nyaga Wambora & Others* Sup. Ct. Application No. 8 of 2017. The Court, in the above context discussed whether it can interfere with the exercise of discretion of one or a limited Bench and held:

> " Can this Court, constituted as a five Judge Bench interfere with the exercise of discretion by a Two Judge Bench? The answer is yes. This Court has the power to rise above a decision of one or a limited Bench, where compelling reasons are given that the decision given was erroneous. However, as such a review will entail an interference with the exercise of a judge's discretion, it is guided by stringent legal principles."

57. The Court even as it expressed itself above, went on to caution and draw strong emphasis to the point that, an application for review of a decision is not one to be undertaken in a casual way, since the decision to review is not one falling under the appellate jurisdiction mandate of the Court. The Court expressed itself as follows in that regard:

> " We reiterate that an application for review of a decision of a single or Limited Bench of this Court by a Bench of five or more, is not as a matter of course to be undertaken in a casual way. The provisions in the Act and the Rules allowing review of such a decision before a bench of five or more are not part of the normal appellate jurisdiction mandates of this Court so that any decision made by a limited Bench of the Court will automatically be 'reviewed' by a Bench of five Judges or more. That will be tantamount to abuse of Court. The review window is to be exercised sparing and only deserving cases have to be allowed.
>
> This Court notes with concern that if caution is not taken, then in the ultimate, the abuse of Section 24(2) and Rule 4(4) by filing of frivolous applications seeking review will defeat the whole essence and spirit of the legislation and the jurisprudence in Erad suppliers (above), which is the law to date, that procedural matters be handled by a limited Bench. And while these provisions were meant to speed up access to justice, their abuse will in turn inhibit access to justice by allowing all and sundry review applications to clog the system and take up precious judicial time.

58. The Court then went on to lay down the guiding principles for a review of the decision of the Court made in exercise of its discretion by holding as follows;

> " Consequently, drawing from the case law above,particularly Mbogo and Another vs. Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
>
> (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
>
> (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
>
> (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
>
> (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
>
> (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
>
> (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."

59. Further, in the case of *Tom Odhiambo Ojienda vs. Kenya Revenue Authority & another* Sup. Ct. Petition No. 6 of 2019 [2019] eKLR this Court pronounced itself as follows in regard to review of decisions of a single Judge and flowing from the general principles above. We stated thus:

> " On our part, we find that Section 24(2) of the Supreme Court Act, 2011 and Rule 4(4) of the Supreme Court Rules, 2012 contemplates that decisions of a single Judge may be reviewed by a bench of five Judges. Further, that the jurisprudence of this Court on the conditions for grant of a review order was well expressed in the case of Parliamentary Service Commission v. Martin Nyaga Wambora & Others Sup. Ct. Application No. 8 of 2017; [2018] eKLR in which we held that in an application for review, the Applicant has to demonstrate how a single Judge erred in making the impugned decision or how the said decision is clearly wrong as a result of which there has been an apparent injustice."

60. We reiterate the above decisions as solid and flow from a holistic interpretation of the Constitution and Statute. Nothing, in the scornful submissions of Counsel for the 3rd and 4th Respondents' have had the effect of swaying our collective mind to the contrary. Instead of focusing on the principles for setting aside a single Judge's decision, Counsel has instead engaged in an unwarranted rant on prior decisions of the Court on this subject. The rant has been of no benefit to his clients and that is all we have to say on the prayer for setting aside and/or review of the single Judge's order.

iii. Whether the Court of Appeal erred in declining to certify the matter as one of general public importance

a. Jurisdiction of the Court

61. Counsel for the 3rd and 4th respondents contests this Court's jurisdiction to review, set aside or discharge an order of refusal of certification by the Court of Appeal declining to certify a matter as one of general public importance. It is their claim that under the provisions of article 163(4)(b) of the Constitution, only a litigant aggrieved with the grant of certification by the Court of Appeal can apply to the Supreme Court for a review of the certification. It is also Counsel's argument therefore that an application for review filed before this court only applies in cases where certification has been granted by the Court of Appeal and not in cases where the certification was denied in the literal reading of the provisions of Article 163(5) of the Constitution. To this end, counsel sought to have the Supreme Court declare that this court's findings in the Sum Model Case and the Hermanus Case were in conflict with the Constitution.

62. The decision in the Hermanus Case is also the basis of Counsel's submission that there are two distinct and separate rights of certification for leave to appeal to the Supreme Court; from the Court of Appeal, and directly to the Supreme Court and therefore, the two Courts have concurrent original jurisdiction in the matter. In that regard, he faults this Court's decision in the *Sum Model* Case arguing that the Court's finding that certification should be first sought at the Court of Appeal denies a party the right of choice as provided for under Article 163(4)(b) of the Constitution.

63. In that regard, article 163(4)(b) of the Constitution provides that appeals shall lie from the Court of Appeal to the Supreme Court 'in any other case in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved, subject to clause (5). Article 163(5) goes on to state that 'a certification by the Court of Appeal under clause 4(b) may be reviewed by the Supreme Court and either affirmed, varied or overturned'.

64. In the *Sum Model* case, the court was of the view that the Supreme Court and the Court of Appeal must both be satisfied that a matter of general public importance arises, upon which the courts may issue a certificate for leave to appeal. Further to this, the court found that it would be best practice for the matter to originate before the Court of Appeal, upon which, should an applicant be aggrieved with the Court of Appeal's decision, a review of that decision by this court is then allowed under article 163(5) of the Constitution. The court held thus:

> " This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by article 163 (5) of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this court in search of a certificate for leave, would lead to Abuse of the Process of Court."

65. Further to the above finding, in the Hermanus case, it was our finding that any party may approach the Supreme Court for review of the decision of the Court of Appeal granting leave or denying leave under article 163(5) of the Constitution, even in instances where an applicant has not been granted leave by the Court of Appeal. The court then went on to acknowledge its mandate under articles 159 and 259 of the Constitution by harmonising its mandate with the fundamental rights under the Constitution on equal right of access to justice for all parties and non-discrimination. The court held as follows;

> "(32) The second question was in relation to the extent of this review jurisdiction, with the respondent averring that it only lies where a matter has been certified as of general public importance. In answering this question, the court is alive to its mandate under articles 159 and 259 of the Constitution, which provide:
>
> > "259(1) This Constitution shall be interpreted in a manner that-
> >
> > e. promotes its purposes, values and principles;
> >
> > f. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
> >
> > g. permits the development of the law; and
> >
> > h. contributes to good governance.
>
> 33) Hence, in interpreting the review competence of the Supreme Court, the mandate must be harmonised with the Constitution. One of the fundamental rights under the Constitution is access to justice for all, and non-discrimination. Consequently, all litigants are to be accorded equal right of access to the Court. Either party can approach the Supreme Court for review under article 163(5). A party may come for review of the decision granting leave or denying leave. Hence, we hold that certification under article 163(5) should be broadly read as alluding to certification by the Court that a matter of public importance is involved, or is not involved. Hence, the applicant is rightly before the court, despite seeking a review where there was no leave granted by the Court of Appeal." [Emphasis ours]

66. The same submissions by counsel for the 3rd and 4th Respondent were also argued before us in the case of *Republic v. Ahmad Abolfathi Mohammed & Another* Sup. Ct. Criminal Application No. 2 of 2018 [2018] eKLR where the issue of this Court's jurisdiction under the provisions of article 163(5) to review a denial of certification by the Court of Appeal is provided for. We reiterated our finding in the *Sum Model* case and the Hermanus case by finding that under article 163(5) of the Constitution, the Supreme Court has jurisdiction to review a decision by the Court of Appeal granting or declining certification. We also went on to reiterate that to deny a party aggrieved by the decision of the Court of Appeal declining certification audience would amount to violation of the provisions of articles 27 and 50 of the Constitution. We rendered ourselves thus on that issue:

> "(19) ...As this court observed in the Hermanus case, in interpreting the review jurisdiction in article 163(5), regard should be had to the dictum of harmonization under article 259(1) of the Constitution and giving the term

"certifies" or "certification" in article 163(4)(b) of the Constitution a broad interpretation. In that regard therefore, and on the facts of this case, the principles of non-discrimination under article 27 and fair hearing under article 50 should never be lost sight of. We therefore find that to deny a party aggrieved by a refusal to grant certification that a matter is one of general public importance is discriminatory and contrary to article 27 and a denial of the right to a fair hearing under article 50(1) of the Constitution.

(20) In the circumstances, we reiterate this Court's finding in both the *Sum Model* and Hermanus cases that article 163(5) of the Constitution vests the Supreme Court with jurisdiction to review the Court of Appeal's decision to grant or decline certification that a matter is one of general public importance. We therefore also affirm the words of rule 24(2) of the Supreme Court Rules, 2012 that "[w]here the Court of Appeal has certified or has declined to certify a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days."

67. We also adopted this position in the case of *Kenya Civil Aviation Authority vs. African Commuter Services Ltd & Another* Sup. Ct. Civil Application No. 7 of 2015 [2018] eKLR where we were of the view that the Hermanus Case is still good law and with no proper principles invoked to convince the Supreme Court to depart from the findings in the *Sum Model* Case and the Hermanus Case, then the same stands as good law.

68. Further, the question on concurrent jurisdiction was settled in the Hermanus case where it was the Court's finding that we indeed have concurrent jurisdiction and further reiterated our finding above in the *Sum Model* case that it is in good practice that certification be first sought before the Court of Appeal. This court duly noted thus;

> " The other issue raised was as to the concurrent jurisdiction of both the Court of Appeal and the Supreme Court, in granting leave to appeal to the Supreme Court. The respondent averred that once the concurrent original jurisdiction has been exercised under article 163(4) (b) by the Court of Appeal, it was no longer tenable for the Supreme Court to exercise the same jurisdiction. Adopting the definition in Black's Law Dictionary on 'concurrent jurisdiction': 'Concurrent jurisdiction. (17c)1. Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action,' we would agree with counsel that, indeed, we have concurrent jurisdiction; and when one opts to exercise one's right under either of the entities with jurisdiction, one cannot again go before the other entity with the same subject matter. This is the reasoning behind the principle of *res judicata* in civil matters, in choosing the Court (forum) in which to institute a matter. This is the reasoning held sacrosanct in criminal matters under the doctrine of double jeopardy (especially with reference to international crimes like genocide, piracy and war crimes where all nations have jurisdiction)...
>
> The question then is whether, by coming to the Supreme Court, the applicant is invoking the original jurisdiction of the Court. The answer readily emerges from the Sum model Case...

> Consequently, it is our decision that, by first proceeding to the Court of Appeal as in this case, and then to the Supreme Court, one does not invoke the original jurisdiction, so as to warrant a question of "*res judicata*..."

69. We see no reason to depart from this finding and affirm the provisions of rule 24 (1) and (2) of the Supreme Court Rules 2012 (repealed) that "An application for certification shall first be made in the court or tribunal it is desired to appeal from and (2) Where the Court of Appeal has certified a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days.

70. The said provisions are also provided for under rule 33 (1) and (2) of the Supreme Court Rules, 2020 that (1) An application for certification shall, in the first instance, be made in the court from which the appeal originates and that (2) Where the Court of Appeal has certified or has declined to certify a matter as one of general public importance, an aggrieved party may apply to the Court for review, within fourteen days.

71. In the circumstances and based on the above findings, we find that we have jurisdiction to hear this application.

b. The Substantive Application

72. Having affirmed our jurisdiction and that the originating motion dated 5th October 2016 is properly before us, we now proceed to consider the question whether it raises issues of general public importance.

73. We note that the applicant has not set out the matters of general public importance that require our intervention. Nevertheless, from the Record, the applicant outlined issues which it claimed touched on application of procurement laws and management of Public Private Partnerships, which are;

    i. The parameters and threshold that should govern the Court's intervention in a concluded contract by a State Organ on the basis of procurement laws noting that the propensity in recent time to so intervene invites the definitive and authoritative pronouncement of the highest Court in the land as to such threshold and parameters.

    ii. The doctrine of the separation of powers between devolved Government and the Judiciary under the 2010 Constitution.

    iii. The applicability of the Transitional Provisions in the 2010 Constitution which constituted the Nairobi City County as a Government and the successor in title to properties and contractual properties and contractual relationships entered into by the former Nairobi City Council in accordance with the then applicable Laws and Regulations.

74. This court in the Hermanus case held that whether a matter is one of general public importance is an issue to be determined on a case to case basis as guided by its peculiar facts of each case and that for a case to be certified as one involving a matter of 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;
>
> ii. 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;

75. From the record, the suit before the High Court and the Court of Appeal was on the exercise of discretion to grant judicial review orders of *certiorari* and *mandamus.* The crux of the dispute was on whether the 2nd respondent had complied with the provisions of the Public Procurement and Disposal Act 2005 in awarding the tender to the Applicant. The trial Court found that there was procedural impropriety by the 2nd respondent in awarding the tender but declined to grant the orders sought.

76. The Court of Appeal, while determining the appeal, noted that the main issue for its consideration was whether the trial Court properly exercised its discretion in failing to grant the orders. In its decision, the Court noted that there were no circumstances that militated against the grant of the orders of *certiorari* and *mandamus*, noting that the High Court, having found that the provisions of the Public Procurement and Disposal Act 2005 were not complied with, erred in declining to exercise its discretion by its refusal to grant the orders sought in the judicial review application.

77. The Court of Appeal, while considering the application for certification noted;

> "(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...
>
> (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... 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*) ..."

78. We agree with the Court of Appeal's observation that the intended appeal does not raise an issue where we need to make a pronunciation on clarification of the law to the benefit of the public as opposed to the parties before us. The Applicant has not demonstrated the uncertainty that we need to adjudicate and clarify on. We are also in agreement with the Court of Appeal that the appeal was based solely on exercise of discretion by the High Court which issue has no public importance attached to it on the discretion of the court. We are in further agreement with the Court of Appeal that whether the guidelines could apply retrospectively does not need any clarification by this court since the effect of such application of the guidelines to a case, would vary depending on the facts of each case.

79. Even if we were to consider the matter as one of general public importance because the suit property is said to be public land with the 2nd respondent being the lessor, the premises are the subject of various suits in the Environment and Land Court as between the 3rd and 4th respondents and the 2nd respondent and other third parties for determination of its ownership. This was well acknowledged by both the High Court and the Court of Appeal. Our intervention would therefore be in vain.

80. Accordingly, the application fails to comply with the principles in the *Hermanus* case and is therefore one for dismissal.

F. Conclusion

81. Turning back to the issues placed before us for determination, we have declined the invitation to overturn the decision of the single judge and have also declined to certify the originating motion as raising issues involving great public importance. We have also stated that all prior decisions that the 3rd and 4th respondents' seek to be declared bad law shall remain binding on all parties and the threshold in article 163(7) of the Constitution has not been met. Similarly, we have declined the unprocedural invitation and attempt at declaring section 24 of the Supreme Court Act, unconstitutional. On costs, the 1st, 3rd and 4th respondents' shall have costs of the originating motion but each party should bear its costs of the review application.

G. Disposition

82. For the above reasons, the final orders to be made are that:

    i. The 3rd and 4th respondents' notice of motion dated 24th October 2016 is hereby dismissed.

    ii. The applicant's notice of motion dated 5th October 2016 is hereby marked as spent.

    iii. The originating motion dated 5th October 2016 by the applicant is hereby dismissed.

    iv. The 1st, 3rd and 4th respondents shall have the costs of the originating motion while each party shall bear the costs of the motion dated 24th October 2016.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

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

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA