



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola SCJJ)

APPLICATION NO. E012 OF 2021

VULCAN LAB EQUIPMENT LTDAPPLICANT

VERSUS

ETHICS AND

ANTI CORRUPTION COMMISSION.....1ST RESPONDENT

SCHOOL EQUIPMENT PRODUCTION UNIT.....2ND RESPONDENT

(Being an Application for Review of the Ruling of the Court of Appeal at Nairobi (Warsame, Asike-Makhandia & Kantai, JJA) delivered on 16th March 2021 in Civil Application No. Sup. 12 of 2020)

Representation

Mr. Aluoch h/b for Mr. Mogere for the Applicant

Mohammed Muigai LLP

Ms. Lunyolo for the 1st Respondent

Ethics and Anti-Corruption Commission

Mr. Korongo for the 2nd Respondent

M. Korongo & Co. Advocates

RULING OF THE COURT

[1] This Ruling will dispose of two applications by Vulcan Lab Equipment Ltd, the Applicant. The first is an Originating Motion dated 30th April 2021 seeking review of the ruling declining to grant certification. The second is the Notice of Motion dated 13th April 2023 and filed on 7th June 2023 seeking leave to amend the Originating Motion dated 30th April 2021 and filed on 7th June 2023.

[2] UPON perusing the Originating Motion dated 30th April 2021 brought under Article 163(4)(b) of the Constitution of Kenya, Section 16 of the Supreme Court Act, and Rule 33(2) and (3) of the Supreme Court Rules seeking a determination of the following questions:

- i) *Whether the indoor management rule is binding on semi-autonomous government agencies;*
- ii) *Whether the Supreme Court should determine the conflicting position taken by Court vis a vis the indoor management rule's applicability to semi-autonomous government agencies and government agencies;*
- iii) *Whether an acquitted/innocent contracting party can be faulted on account of the failure of a semi-autonomous government agency to follow its own internal procurement procedures;*
- iv) *Whether imputations of corruption can legitimately be attached or attributed to a litigant who has already been acquitted by the Criminal Court on the basis of the indoor management rule;*
- v) *Whether an acquittal from which there is no challenge, entitles the acquitted party the presumption of innocence in law and whether another Court can separately condemn the innocent party based on the same set of facts;*
- vi) *Whether the presumption of innocence can be displaced by the Civil Court (Court of Appeal) in making a decision to deny the Applicant a contractual remedy;*
- vii) *Whether innocent third parties, in dealing with a semi-autonomous government agency, are required to be satisfied that its officials have followed relevant statutory requirements, and if so, (i) to what extent does*

the law impose such a duty, and (ii) to what extent should an innocent third party look into the internal arrangements of the government agency during its procurement process;

- viii) Whether the Civil Court should deny an innocent contracting party its contractual and legal remedies where there are public servants that have been found guilty and convicted of the offence;*
- ix) Whether the application of the indoor management rule to transactions with semi-autonomous government agencies or government agencies transcends the specific circumstances of this particular case and has a significant bearing on the public interest;*
- x) Whether the determination of this issue shall have a significant bearing on the public interest; and*

[3] UPON also considering the grounds in support of the application in the supporting affidavit sworn on 30th April 2021 by Vishal Kochar, the applicant's managing director, where he further contends that the Court of Appeal in declining to grant certification, failed to appreciate that private citizens enter into contracts with government agencies all the time and the procurement law is structured in a way that private citizens lack the means of knowing whether the officials of those government agencies have complied with their statutory obligations and internal policies, before entering into such contracts;

[4] ALSO considering the applicant's written submissions dated 10th January 2022 contending that the applicant's intended appeal meets the threshold to be certified as a matter of general public importance having met the principles outlined in ***Town Council of Awendo v Nelson Oduor Onyango & 13 Others [2015] eKLR***; that the issue(s) 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 and that the issues raised in the intended appeal raise questions with a bearing on the proper conduct of the administration of justice; and

[5] FURTHER considering the 1st respondent's written submissions dated 14th July 2023 wherein it is urged that the application for review has not met the requirements for the grant of orders under Article 163(4)(b) and Article 163(5) of the Constitution as was set out in ***Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione [2013]***

eKLR as it fails to raise issues of general public importance; that there is nothing novel about the issues raised by the applicant; that the application fails to raise any issue where the law requires clarification or the uncertainty that the Court needs to clear and clarify; that the applicant has also failed to demonstrate that the intended appeal raises matters that are relevant to real public interest and concern since the questions raised by the applicant as issues of public importance are purely contractual, arising out of a transaction executed between the applicant and the School Equipment Production Unit, the 2nd respondent, therefore not capable of transcending the circumstances of the case; and

[6] NOTING the averments in the 2nd respondent's replying affidavit sworn on 17th July 2023 by George Korongo, Advocate, the grounds of opposition and written submissions dated 17th July 2023, wherein it is contended that the questions raised by the applicant do not transcend the circumstances of this particular case; that the application does not meet the requirements of Article 163(4)(b) of the Constitution; that the applicant has failed to demonstrate that there is uncertainty regarding the state of the law and; that the determination of facts in context between parties cannot be in itself a basis for granting certification for an appeal to the Supreme Court; and

[7] BEARING IN MIND that the applicant has also filed a Notice of Motion dated 13th April 2023 pursuant to the provisions of Article 163 of the Constitution, Section 3 & 3A of the Supreme Court Act and Rules 3 and 31 of the Supreme Court Rules seeking leave to amend its Originating Motion dated 30th April 2021 on grounds that the applicant failed to include the orders it is seeking in the Originating Motion being:

- i) *The Supreme Court does review and set aside the decision of the Court of Appeal in Nairobi Civil Application No. Sup 12 of 2020 declining to certify the questions as raising matters of general public importance;*
- ii) *The Supreme Court does review and set aside the said decision rejecting the request for certification on the grounds that the issues raised in the intended appeal are not novel and they do not transcend the dispute between the parties herein;*
- iii) *The Supreme Court does review the said ruling and declare that the Court of*

Appeal erred in law in failing to certify the matters herein as raising questions of general public importance deserving to be considered by the Supreme Court on appeal;

- iv) The Supreme Court does grant leave to the applicants to appeal against the decision of the Court of Appeal in Nairobi Civil Appeal No. 197 of 2018;*
- v) Costs of this application to be provided for; and*

[8] NOTING the grounds in the applicant's supporting affidavit sworn by Vishal Kochhar on 13th April 2023 and the written submissions dated 13th April 2023 where the applicant submits that the application for amendment of the Originating Motion is meritorious; that this Court has the inherent power to make such Orders or give such directions as may be necessary for the ends of justice; that the application seeks to correct an inadvertent mistake to the extent of including the Orders sought in the application to enable the Court to adjudicate over the real issues in dispute and that the respondents are not likely to suffer any prejudice; and

[9] ALSO CONSIDERING the 1st respondent's grounds of opposition and written submissions dated 14th June 2023 opposing the Notice of Motion on grounds that the application was filed two years after the original Originating Motion of 30th April 2021, hence the inordinate delay in filing the application has not been explained; that should such an extension be granted, it will have been extended by a huge margin and; that the application is a futile exercise and an abuse of the court's process;

[10] WE NOW OPINE as follows:

- i) As a matter of fact, the applicant filed its Originating Motion dated 30th April 2021 on this Court's e-filing online platform on 30th April 2021, which was the last day for filing an application seeking review of a certification ruling from the Court of Appeal. The invoice from the e-filing platform proves this. As per Rule 33(2) of this Court's rules, such a review should be sort within 14 days. Rule 33(2) of this Court's Rules provides that:

“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.

- ii) However, the applicant failed to also file the printed copy of the Originating Motion and only proceeded to present the physical copy on 7th June 2023, almost two years after filing the electronic copy. Rule 12 of this Court's rules is instructive as it provides that:

“(1) Pleadings and any other document filed in the court shall be in both printed and electronic form.

(2) A party filing any document shall ensure consistency in the printed and the electronic forms.

(3) In case of any inconsistency between the hard copy and soft copy, the hard copy shall prevail.

(4) Where a document is lodged in a sub-registry, the deputy registrar receiving the same shall transmit it to the Registry.”

- iii) In *Sonko v Clerk, County Assembly of Nairobi City & 11 others*, SC Petition (Application) No. 11 (E008) of 2022; [2022] eKLR, we discussed the import of Rule 12 of the Supreme Court Rules by finding that:

“A plain reading of the rule would lead to the simple conclusion, as properly expressed by the Registrar in her letter of May 18, 2022 that the printed copy of any pleading, while matching the electronic copy, shall be filed simultaneously with the latter. This must remain the operative rule in this court.” [Emphasis added]

- iv) There is no doubt that the applicant has physically filed its Originating Motion almost two years from the date of delivery of the ruling, more specifically, a delay of 1 year and 11 months. What do we take of the applicant's actions of sitting on the printed copy for a period of almost two years? Can the Motion be deemed to be properly before us? The Originating Motion, although filed electronically, failed to comply with the procedure provided for under Rule 12 of the Court's Rules. In *Kenya Hotel Properties Limited v Attorney General & 5 Others*, SC

Application No. 2 (E004) of 2021 [2021] eKLR, we specifically held that filing is complete when a party submits pleadings and documents in both printed and electronic form. It was our finding that:

“Be it as it may, we have perused the record and noted that the said Supplementary Record, although electronically filed, did not comply with the filing procedures provided for under Rule 12(1) of the Supreme Court Rules, 2020 which state that filing is complete when a party submits both printed and electronic form. Therefore, for our purpose, the said Supplementary Record is not properly filed.”

- v) The applicant did not provide an explanation as to why he failed to present the printed copies to the registry as is required under this Court’s Rules. Instead, the applicant proceeded to file another application seeking leave to amend its application for review, though being fully aware that it had sat on the printed copy of the Originating Motion. We thus find that the Originating Motion dated 30th April 2021, having been filed on 7th June 2023 was not properly filed. As a corollary, the applicant’s Notice of Motion dated 13th April 2023 and filed on 7th June 2023 falls by the wayside as it has no leg to stand on.
- vi) Costs follow the event, and therefore the applicant shall bear the costs of the respondents.

[11] Consequently, and for the reasons aforesaid, we make the following Orders:

ORDERS:

- i) The Originating Motion dated 30th April 2021 and filed on 7th June 2023 be and is hereby dismissed;***
- ii) The Notice of Motion dated 13th April 2023 and filed on 7th June 2023 be and is hereby dismissed;***
- iii) The applicant shall bear the 1st and 2nd respondents’ costs.***

[12] Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th Day of September 2023

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**P.M MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT**

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**M.K IBRAHIM
JUSTICE OF THE SUPREME COURT**

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**S.C WANJALA
JUSTICE OF THE SUPREME COURT**

.....
**NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA
JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**