



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

CIVIL APPLICATION NO. E025 OF 2023

BETWEEN

KABUITO CONTRACTORS LTD.....APPLICANT

-AND-

THE ATTORNEY GENERAL.....RESPONDENT

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

Representation

Kithinji Marete for the Applicant
(Kithinji Marete & Company Advocates)

Emmanuel Kiarie for the Respondent
(Attorney General)

RULING OF THE COURT

[1] UPON reading the Notice of Motion by the applicant dated 23rd June 2023 and filed on 24th July 2023, brought pursuant to Articles 50 and 163(4)(b) of the Constitution, Sections 3A, 15B and 21A of the Supreme Court Act, Rules 33 and 36 of the Supreme Court Rules 2020 seeking orders that;

“This Honourable Court be pleased to review and set aside its Order of 26th May 2023 by the Honourable Justice Lenaola marking the

*Notice of Appeal dated 8th March 2023 from the decision of the Court of Appeal in **Civil Appeal No. 638 of 2019, Attorney General vs Kabuito Contractors Ltd** as withdrawn; and*

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on 26th May 2023, this Court (*Lenaola, SCJ*) issued an Order deeming the notice of appeal filed before the Court withdrawn for failure to file an appeal within the period stipulated by the Court's Rules; and that no appeal can be filed until the same is certified as a matter of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

[3] UPON considering the applicant's submissions dated 23rd June 2023 and filed on 24th June 2023 in which the applicant submits that; the Court has discretion under Sections 3A and 21A of the Supreme Court Act to review any of its decisions in instances where the Court considers it meritorious, exceptional and in the public interest; the application is meritorious because the Order subject of the application was grounded on failure to institute its appeal within the prescribed time; the notice of appeal deemed withdrawn by the Court was proper pursuant to Rule 36 of the Supreme Court Rules, 2022 and that Rule 36 (4) provides that it is not mandatory to obtain certification at the Court of Appeal before filing the notice of appeal; Rule 38 (1) (b) of the Supreme Court Rules provides that an appeal to this

Court where certification is required ought to be filed within 30 days of the grant of certification; by the time of grant of the Order of 26th May 2023, the applicant was yet to receive any directions from the Court of Appeal on its application for certification; in issuing the Order, the Judge was not aware of the foregoing proceedings and proceeded in the mistaken belief that it was the applicant's mistake in not lodging an appeal within the prescribed period; the applicant is keen on pursuing the appeal as evidenced by the filing of the notice of appeal as was held by this Court in ***Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others*** (Petition 18 (E020) of 2022) [2023] KESC 28 (KLR) (21 April 2023) (Ruling); should the Order of the Judge not be reviewed and set aside, the applicant will suffer grave injustice as it shall be deprived of the right to fair hearing as provided under Article 50 of the Constitution; and

[4] UPON considering the replying affidavit sworn on behalf of the respondent on 4th August 2023 by Emmanuel Kiarie, Principal State Counsel in the office of the Respondent and filed on 7th August 2023 where it opposes the application on the grounds that; the applicant has failed to establish any new and important matters of evidence which were not within its knowledge after the exercise of due diligence or that such matters or evidence could not be produced by it at the time when the Order of 26th May 2023 was issued by Justice Lenaola; it was not necessary to obtain certification before lodging the Notice of Appeal on matters of general public importance and the application lacks merit and should be dismissed. The deponent also downplays the matters which the applicant will ultimately seek certification on before this Court for lack of *lacunae* in the law of contract and failure to specify the Articles of the Constitution for which the matters alluded to will assume a constitutional trajectory.

[5] Having therefore considered the application, response, and submissions before us, **WE NOW OPINE** as follows:

- i. Section 23(C) of the Supreme Court Act confers upon the Court the jurisdiction to review the decision of a single Judge by five or more judges, upon application by a party aggrieved by the decision of a single judge.
- ii. This Court set the guiding principles for review of a decision of the Court made in exercise of discretion in ***Parliamentary Service Commission v Martin Nyaga Wambora & others***, SC Application No 8 of 2017 [2018] eKLR where it, *inter alia*, stated that;

“[31] ...

(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise [of] discretion and:

(a) as a result a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

- iii. In the instant application, the applicant contended that the Order of 26th May 2023 deeming the notice of appeal as withdrawn was made by the single judge, unaware of the pending certification application at the Court of Appeal. Rules 36 (1) and (4) of the Supreme Court Rules 2020 provide that:

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

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

iv. On the other hand, Rule 38(1) of the Supreme Court Rules provides for the timelines for filing an appeal in the following manner:

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

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

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

- v. The Court has discretion under Rule 46(1) of the Supreme Court Rules, 2020 on its own motion, or on application by any party, to make such orders as may be necessary in instances where a party lodges a notice of appeal but fails to institute the appeal within the prescribed time.
- vi. Taking the above into consideration, has the applicant satisfactorily demonstrated that the Judge misdirected himself in the exercise of the powers conferred under Rule 46(1) and as a result arrived at a wrong decision? Or is it manifest from the decision that the judge was wrong and as a result, there has been an apparent injustice? The answers to the above questions are in the negative. We note that although the applicant has attached a notice of appeal and an application for certification at the Court of Appeal, there is no evidence that the notice, though filed, was lodged before the Registrar of the Court of Appeal or that the application for certification filed at the Court of Appeal was eventually lodged.
- vii. Furthermore, the applicant made no attempt to justify the continued existence of the notice of appeal on the Court’s record for a period outside that permitted by Rules 36 and 38 of the Supreme Court Rules. The belated explanation by the applicant does not suffice at this late stage. In any event, if the application before the Court of Appeal succeeds -if it exists at all- the applicant will have sufficient time to move this Court under the relevant

rule. And if it does not succeed, the procedure for review of that decision is available to the applicant.

viii. Having stated as above, we concur with the decision made by the Honourable Justice I. Lenaola on 26th May 2023 deeming the notice of appeal withdrawn. Consequently, the applicant's application dated 23rd June 2023 must be dismissed.

ix. The notice of appeal having been deemed as withdrawn, we see no reason to award costs.

[6] ACCORDINGLY, we make the following Orders:

a. The Notice of Motion dated 23rd June 2023 be and is hereby dismissed.

b. There shall be no orders as to costs.

[7] It is so ordered.

DATED and DELIVERED AT NAIROBI this 6th day of October, 2023.

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P.M MWILU

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

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

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

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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**

