



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

APPLICATION NO. E020 OF 2023

– BETWEEN –

**STANDARD CHARTERED
FINANCIAL SERVICES LIMITED APPLICANT**

– AND –

**MANCHESTER OUTFITTERS (SUITING
DIVISION) LIMITED NOW CALLED KING
WOOLEN MILLS LIMITED 1ST RESPONDENT**

GALOT INDUSTRIES LIMITED 2ND RESPONDENT

A. D. GREGORY & C. D. CAHILL 3RD RESPONDENT

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

Representation:

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

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

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

RULING OF THE COURT

[1] **COGNISANT** that this Court (*Lenaola, SCJ*) by an order dated 26th May 2023, issued pursuant to Rule 46 of the Supreme Court Rules, 2020, deemed the Notice of Appeal dated 19th December 2022, which was filed in **Civil Appeal No. 88 of 2000** and transmitted to this Court on 21st December 2022 by the applicant, as withdrawn for failure to institute the appeal within the prescribed time; and

[2] **UPON** perusing the Amended Notice of Motion dated 30th October, 2023 and lodged on 3rd November, 2023 by the applicant under Article 50 of the Constitution, Sections 3A, 15B, 21A & 23(2C) of the Supreme Court Act and Rules 33 & 36 of the Supreme Court Rules seeking the following orders:

“ ...

ii. *Review and setting aside of this Honourable Court’s (Lenaola, SCJ) order dated 26th May, 2023 withdrawing the applicant’s Notice of Appeal dated 19th December, 2022 which was filed pursuant to Rule 36(4) of the Supreme Court Rules.*

...

iv. *Costs of the motion be provided.”*

[3] **UPON** considering the affidavit in support of the motion sworn by Dr. Davidson Mwaisaka, the Head of Legal (Kenya & East Africa) of Standard Chartered Bank Kenya Limited, on 30th October, 2023 and the applicant’s submissions of even date to the effect that; the Court of Appeal by a judgment dated 16th December, 2022 allowed **Civil Appeal No. 88 of 2000** which had been filed by the 1st and 2nd respondents; in turn, the applicant filed the Notice of Appeal dated 19th December, 2022 in the Court of Appeal and transmitted the same to this Court on 21st December 2022, intimating its intention to challenge the said judgment in this Court; thereafter, the applicant filed a Notice of Motion dated 20th January 2023, **Civil Applic. No. Sup. E001 of 2023** (certification motion), anchored on Article 163(4)(b) of the Constitution in the Court of Appeal, seeking

leave to file an appeal to this Court or certification that its intended appeal raises matters of general public importance; the Court of Appeal on 26th April, 2023 certified the certification motion as urgent and issued directions with respect to its disposal, which the applicant complied with; and

[4] FURTHER NOTING that the applicant urged that, its advocates on record received an email from this Court on 29th May, 2023 concerning the order of 26th May, 2023; the said order is erroneous as firstly, the applicant opted to file the Notice of Appeal prior to obtaining certification or leave to appeal to this Court in line with Rule 36(4) of the Supreme Court Rules; secondly, the certification motion was heard on 3rd July, 2023 by three Judge Bench of the Court of Appeal (*Warsame, M'Inoti & Mativo, J.J.A*) and the ruling thereof is set to be delivered on notice; consequently, time for filing the appeal could only commence running after the certification motion is determined, and certification or leave to appeal is granted as set out in Section 15B(1) of the Supreme Court Act; and unless the order dated 26th May, 2023 is reviewed and set aside, the applicant will be stripped of its right to a fair hearing by prematurely denying it audience before this Court; and

[5] TAKING INTO ACCOUNT the replying affidavit sworn on behalf of the 1st and 2nd respondents by Mohan Galot, the Principal Shareholder, Governing Director and Chairman of the Board of Directors of the said respondents, on 7th November, 2023 and submissions of even date. The tenor of which is that, the motion is an abuse of this Court's process as it is misconceived and fatally defective; the applicant has not met the threshold of review since it has failed to demonstrate that the impugned order was obtained through fraud, deceit or misrepresentation or was rendered by an incompetent court; likewise, the applicant has not pointed out any error on the face of the record; and as such, the motion should be dismissed with costs; and

[6] APPRECIATING that when the motion was mentioned before the Deputy Registrar of this Court on 17th November 2023, counsel for the 3rd respondent,

Mr. Paul Chege, indicated that the 3rd respondent does not oppose the motion; and

[7] **BEARING IN MIND** that the learned Judge exercised his discretion under Rule 46(1) of the Supreme Court Rules in withdrawing the applicant's Notice of Appeal as appreciated in ***Kabuto Contractors Ltd v. The Attorney General***, SC Applic. No. E025 of 2023; and

[8] **UPON DELIBERATIONS ON THE MOTION AND THE RIVAL SUBMISSIONS, WE OPINE** as follows:

- i. The long and short of the applicant's motion is that it seeks this Court to review and set aside the decision of a single Judge of this Court. Towards that end, the applicant invoked Section 21A of the Supreme Court Act, which delineates exceptional circumstances under which this Court can review its decision. Nonetheless, the applicant has not demonstrated how the order of 26th May, 2023 falls within the said exceptional circumstances. In any event, Section 21A is not applicable in this case. See ***Florence Wairimu Mbugua & Sylvia Murugi Mbugua (Suing as the administrators of the Estate of Joseph Kiarie Mbugua) & Another v. Timber Manufacturers & Dealers Limited***, SC Applic. No. E019 of 2023.
- ii. Be that as it may, the applicant also invoked Section 23(2C) of the Supreme Court Act which provides as follows:

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

- iii. In ***Parliamentary Service Commission v. Martin Nyaga Wambora & Others***, SC Applic. No 8 of 2017; [2018] eKLR, this Court set the guiding principles for review of a decision of a single Judge or limited

Bench of the Court made in exercise of the Judges' discretion. This Court held *inter alia* that-

“ ...

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

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

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

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

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

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

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

“15B.

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

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

“38.

- 1) An appeal to the Court shall be filed within—*
- (a) thirty days of the date of filing the notice of appeal, where the appeal is as of right; or*
- (b) **thirty days after the grant of certification, where such certification is required.** [Emphasis added]*

- vii. We note that at the time the learned Judge issued the order of 26th May 2023, the foregoing was not brought to the attention of the Court. Thus, the learned Judge cannot be faulted for deeming the Notice of Appeal as withdrawn. That notwithstanding, we find that the said order will not prejudice the applicant from getting a fair hearing or audience before this Court should its certification motion be successful. In the event that certification is issued, the applicant will be at liberty to move the Court either by filling a Notice of Appeal pursuant to the certification or as the case may be under the relevant provision of law. In the circumstances, we decline at this juncture to review and set aside the order of 26th May, 2023.
- viii. Taking into account the foregoing and this Court’s decision in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] eKLR, we deem it fair to order each party to bear their own costs of this motion.

[9] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. The Amended Notice of Motion dated 30th October, 2023 and filed on 3rd November, 2023 is hereby dismissed.***
- ii. Each party shall bear its own costs of the Motion.***

It is so ordered

DATED and DELIVERED at NAIROBI this 28th day of December, 2023.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

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

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

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

**I certify that this is a true copy
of the original**

**REGISTRAR
SUPREME COURT OF KENYA**

