REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Lenaola & Ouko, SCJJ)

APPLICATION NO. E039 OF 2025

–BETWEEN–

KABUITO CONTRACTORS LIMITED ..... APPLICANT

–AND–

ATTORNEY GENERAL ..... RESPONDENT

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*(Being an application for review of the decision of the Court of Appeal Nairobi (**Karanja, Tuiyott &Nyamweya, JJ.A**.) dated 21st November 2025 in Civil Application No E123 of 2023, declining to certify the intended appeal as one raising matters of general public importance)*

Representation:

Mr. Kithinji Marete for the Applicant
(*Kithinji Marete & Company Advocates)*

No appearance for the Respondent

RULING OF THE COURT

[1] UPON PERUSING the Originating Motion dated 4th December 2025 and filed on 9th December 2025 by the applicant pursuant to Article 163(5) of the Constitution and Rule 33(2) to (5) of the Supreme Court Rules, 2020, seeking review of the Court of Appeal's ruling dated 21st November 2025 in **Nairobi Civil Appl. No. E123 of 2023,**

which declined to certify that the applicant's intended appeal to this Court raises issues of general public importance; and

[2] COGNISANT of the pertinent facts which culminated in this Motion *to wit*, that, by a contract dated 14th March 1997, the applicant was engaged through the Ministry of Local Government to undertake repairs on certain roads within the Central Business District of Nairobi. The said repairs were completed and the contract sum paid. Subsequently, the said contract was mutually extended on two occasions and the consideration therein was equally paid. In dispute between the parties is an alleged third extension of the said contract. The applicant contends that, in February 1998, the Permanent Secretary, Ministry of Local Government verbally instructed it to carry out emergency repairs on roads which had been extensively damaged by the El- Nino rains; the applicant carried out the repairs and submitted monthly statements of work done for certification and payment by the Ministry; the Ministry declined to make any payments, which in March 2008 stood at Kshs.114,068,444.10 and as such, it was alleged that the respondent had breached the extended contract. In that regard, the applicant filed a suit in the High Court, **HCCC No. 284 of 2008**, claiming Kshs.1,122,668,596.71/= being the outstanding payment for work done plus the accrued interest therein at commercial rates; and

[3] NOTING that on its part, the respondent denied the existence and/or validity of the alleged third extension of the contract, asserting that on 16th April 1998 the Central Tender Board of the Ministry declined to approve a third extension of the contract and recommended a fresh tendering process to be undertaken. Consequently, the respondent maintained that any works performed under the alleged third extension and any supervision thereof by the Ministry's engineers was done without any authority and approval, respectively. Moreover, it was argued that, the Pending Bills Closing Committee, which was established to evaluate contracts that had been awarded during the El-Nino rains, found that, firstly, the alleged third extension of the contract was not formalized hence there was no valid contract; secondly, that it could not assess the value

of the work done since there was no information on the state of the roads prior to and after the works allegedly done by the applicant; and therefore, the applicant's claim was not payable; and

[4] BEARING IN MIND that the High Court (*Sergon, J.*) vide a judgment dated 25th May 2018 found that the Permanent Secretary did give oral instructions to the applicant to carry out the emergency road repairs, which it did in good faith. Further, that the Ministry was not only aware of the works being undertaken under the third extension but also approved the same through its agents. Accordingly, the court held that the respondent was estopped from alleging that the contract was not valid, having benefited from the same. In any event, the court went on to hold that Section 3(1) of the Law of Contract does not bar the applicant from enforcing the oral agreement against the respondent. In the end, the learned Judge awarded the applicant Kshs. 3,170,908,263.25/= being the outstanding amount under the third extension, plus the accrued interest as at 30th June 2017; and

[5] APPRECIATING that the applicant challenged the High Court's decision in the Court of Appeal, **Civil Appeal No. 638 of 2019**; in a judgment dated 3rd March 2023, the appellate court found that, the applicant had only produced selected pages of the original contract hence it was not possible to determine whether the original contract provided for its variation or extension; that the applicant had failed to establish that the alleged third extension was a valid contract; that the Central Tender Board of the Ministry declined a third extension of the original contract and recommended a fresh tender process; and that there was nothing to demonstrate that the Permanent Secretary had the authority to veto the Central Tender Board and/or unilaterally award a contract in the absence of tender process. In the circumstances, the Court of Appeal allowed the appeal, set aside the High Court's judgment, and substituted the same with an order dismissing the applicant's suit; and

[6] FURTHER NOTING that the applicant subsequently filed a Notice of Motion dated 31st March 2023 before the same court seeking certification that its intended

appeal to this Court against the Court of Appeal judgment (impugned judgment) raises issues of general public importance; and that by a ruling dated 21st November 2025, the appellate court (*Karanja, Tuiyott & Nyamweya, JJ.A*.) dismissed the application on the grounds that the intended appeal to the Supreme Court did not raise any issue of general public importance, hence the present Motion; and

[7] UPON CONSIDERING the affidavit sworn by Amip Patel, the applicant's Managing Director, on 4th December 2025 in support of the Motion and the applicant's submissions of even date, to the effect that, the impugned judgment of the Court of Appeal deprived it of its right to payment for the works carried out at the behest of the Government; the said judgment left the applicant with no remedy; its intended appeal raises weighty issues that warrant this Court's consideration; the said issues take a constitutional trajectory since they speak to the rights of Kenyan contractors whose services are procured by the Government under Article 227 of the Constitution; and the issue of pending and unpaid bills by the Government is a matter of public interest as it affects the Kenyan economy; and

[8] TAKING INTO ACCOUNT that the applicant delineated similar issues of general importance as it had set out in the Court of Appeal, namely:

i. *Whether the Government of Kenya bears any liability for contracts entered whether expressly or impliedly.*

ii. *Whether the Government of Kenya bears any liability for contracts performed with its acquiescence.*

iii. *Whether the Government of Kenya can benefit from the performance of contracts which the provider has not been compensated.*

iv. *Whether the principle of Quantum Meruit applies to the Government of Kenya.*

v. *Whether all contracts entered into or performed at the behest of the Government of Kenya must be in writing, and whether there is any implied or express exception to the such requirement and the implication of this on the constitutional right of a party dealing in good faith with the Government of Kenya*; and

[9] BEARING IN MIND that no response has been filed by the respondent despite service of the Motion; and

[10] ACKNOWLEDGING that this Court has jurisdiction to review the Court of Appeal's ruling declining certification as set out under Article 163(5) of the Constitution and Rule 33 (2) of the Supreme Court Rules; and that the parameters for such review are well settled in ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR) (***Steyn***) and ***Bell Vs Moi & Another*** [2013] KESC 23 (KLR) (***Bell***); and

[11] UPON DELIBERATIONS on the Motion**, WE OPINE** as follows:

i. It is trite that a matter(s) of general public importance which would warrant the exercise of this Court's appellate jurisdiction under Article 163(4)(b) of the Constitution should transcend the dispute between the parties, and have a significant bearing upon public interest. Further, the onus is upon the applicant to demonstrate that the matter in question carries specific elements of real general public importance and concern. ***See Faraj Vs Mwawasi & 2 Others*** [2024] KESC 61 (KLR).

ii. It is common ground that the issues which the applicant has set out as of general public importance in this Motion are a replica of the issues it had delineated at the Court of Appeal. Therefore, the question we have to ask and answer is whether those issues meet the criteria set out in this Court's decision in ***Steyn*** and ***Bell.***

iii. We do not think so. To begin with, we concur with the Court of Appeal that the issues raised by the applicant do not transcend the dispute between the parties.

This is an alleged verbal extension of a construction contract by the Permanent Secretary. Like the Court of Appeal, we find the facts and circumstances surrounding the dispute are peculiar to the parties and do not transcend the parties dispute. Furthermore, the applicant has not demonstrated how the particular set of circumstances, that is, the terms of an alleged oral contract entered into with the respondent, would affect the general public. To this extent, we find no reason to interfere with the following findings by the Court of Appeal:

> ***"22. While the intended appeal may be said to raise points of law, those points are, in our considered view, of no general public importance. They relate to purely private claims under the terms of a contract entered into by the two parties herein, in which the public as a whole has no stake. Neither do the findings of this Court on the failure by the applicant to attach the entire contract between it and the respondent to justify compensation for works done; the doctrine of quantum meruit; or the applicant's claim for payment after performance of contracts for which the provider has not been compensated, raise substantial and novel points of law of general public importance. Those, in our view, are issues that were peculiar to the specific case before the Court.***
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> ***...***
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> ***24. The applicant seems to question why the learned Judge arrived at particular conclusions on the evidence presented before them, ... This in our view goes to the root of the reasoning and merit of the judgment, and given that the Supreme Court will not be hearing an appeal on the merit of the impugned decision, there is nothing identified***

to us, within the parameters listed above, to qualify for reference to the Supreme Court for interpretation."

iv. Moreover, we cannot help but note that the applicant has introduced a new angle in this Motion that was not raised before the Court of Appeal while it was considering the application for certification. This is the submission that the issues the applicant deems are of public importance have a constitutional trajectory in light of Article 227 of the Constitution, which regulates public procurement by government entities. This Court has time without number, held that a party approaching the Court in its appellate jurisdiction under Article 163(4) of the Constitution, can either invoke the appellate jurisdiction as of right, that is, in relation to the application and interpretation of the Constitution (Article 163(4)(a)); or seek certification that the intended appeal raises issues of general public importance or leave to appeal to this Court (Article 163(4)(b)). A party cannot have both. Needless to say, under Article 163(4)(a), the issue for interpretation and application of the Constitution must have been litigated before the two superior courts below. It cannot be introduced like the applicant has done, in an application for certification.

v. In totality, we find that the Motion falls short of demonstrating to our satisfaction beyond a mere restatement that the intended appeal raises issues of general public importance. Therefore, we find the instant Motion lacking in merit and is hereby dismissed.

vi. Taking into account this Court's decision in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), and the fact that the respondent did not participate in this Motion, we make no orders as to costs.

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

i. The Originating Motion dated 4th December 2025 and filed on 9th December 2025 is hereby dismissed.

ii. There shall be no orders as to costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of **June**, 2026.

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

.....	**.....**
P.M. MWILU	**S.C. WANJALA**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA