



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. E008 OF 2026

— BETWEEN —

KELLER KUSTOMS KENYA LIMITED.....APPLICANT

— AND —

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

SAINAJ HOLDING LIMITED.....3RD RESPONDENT

HYPER ATLANTIC TRANSPORTER LIMITED.....4TH RESPONDENT

*(Being an application for review of the Ruling of the Court of Appeal in Mombasa (**Gatembu, Murgor & Nyamweya JJ. A**), delivered on 13th February 2026 in Civil Appeal (Application) No. E001 of 2025 denying certification and leave to appeal to the Supreme Court)*

Representation:

Mr. Oluga for the Applicant and 4th Respondent
(Oluga & Company Advocates)

Ms. Kagoi for the 1st Respondent
(State Law Office)

Ms. Nyambura for the 2nd Respondent
(Alakonya & Associates Advocates)

No appearance for the 3rd Respondent

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 25th February 2026 and filed on 26th February 2026, brought under Article 163(4)(b) & (5) of the Constitution, and Rule 33 of the Supreme Court Rules, seeking to review the Ruling of the Court of Appeal (*Gatembu, Murgor & Nyamweya JJ. A*) delivered on 13th February 2026, declining to certify the intended appeal to this Court against the Judgment of the Court of Appeal delivered on 17th February 2025 in **Civil Appeal No. E001 of 2025** as constituting matters of general public importance; certify the intended appeal as constituting matters of general public importance and grant leave to the applicant to file an appeal to this Court; and

[2] UPON EXAMINING the grounds on the face of the application, the supporting and supplementary affidavits sworn by Jane Mombi Abeid on 25th February 2026 and 18th March 2026 respectively, wherein the litigation history is set out in detail, the applicant contends that the Court of Appeal erred in holding that: the issues concerning the 1st respondent's jurisdiction and the alleged inconsistency between the prescribed Form in the Fourteenth Schedule to the Public Procurement and Asset Disposal Regulations and Section 170 of the Public Procurement and Asset Disposal Act were new issues incapable of being raised before this Court; no uncertainty in the law, substantial question of law, or matter transcending the circumstances of the case had been demonstrated; and no evidence had been presented of similar prejudice suffered by other litigants. The applicant further asserts that any defect in the supporting affidavit cannot render the originating motion, which conforms with statutory Form E, fatally defective; and

[3] UPON FURTHER EXAMINING the questions of general public importance identified by the applicant before the Court of Appeal, namely;

- i. *Whether there is a requirement in the law to name the accounting officer of a procurement entity as a respondent to a Request for Review filed before the Public Procurement Administrative Review Board, the 1st respondent herein, and whether failure to name the accounting officer of a procurement entity as a respondent to a Request for Review renders the Request for Review fatally defective.*
- ii. *Whether the Public Procurement Administrative Review Board has jurisdiction to declare the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations to be at variance or inconsistent with Section 170 of the Public Procurement and Asset Disposal Act and if in the affirmative, whether such declaration can be made without a formal application and without hearing the Minister in charge and Parliament of Kenya.*
- iii. *Whether the Form set out in the Fourteenth Schedule of the Public Procurement and Asset Disposal Regulations is at variance with Section 170 of the Public Procurement and Asset Disposal Act.*
- iv. *Whether the Public Procurement Administrative Review Board has jurisdiction to hear and determine a notice of preliminary objection filed outside the timeframe set out in Regulation 209(1) of the Public Procurement and Asset Disposal Regulations; and*

[4] UPON CONSIDERING the applicant's submissions dated 25th February 2026 and supplementary submissions dated 18th March 2026, reiterating the grounds set out in the affidavits and further urging that, the application satisfies the grounds for certification. Specifically, the issues raised therein transcend the litigation interests of the parties and have a bearing on the public interest; there exists an uncertainty in the application of the law, arising from the inconsistency between the prescribed statutory Form in the Fourteenth Schedule to the Regulations and the requirement that the accounting officer be named as a party to a Request for Review; and the questions framed for determination by this Court

arose in the courts below and have been the subject of judicial determination. To this end, the applicant relies on the Court's decision in ***Steyn Vs Ruscone*** [2013] KESC 11 (KLR); and

[5] NOTING the 2nd respondent's Notice of Preliminary Objection, replying affidavit and submissions, all dated 12th March 2026, contending that the application raises no substantial question of law or matter of general public importance warranting certification; the proposed issues are neither novel nor unsettled, having been determined by the superior courts; and the question concerning the alleged inconsistency between the prescribed Form and Section 170(b) of the Public Procurement and Asset Disposal Act, was not litigated before the courts below and cannot be raised before this Court in the first instance. The 2nd respondent further asserts that the applicant's supporting affidavit is incurably defective for non-compliance with Sections 2(2) and 4(1) of the Oaths and Statutory Declarations Act. Relying on ***Steyn Vs Ruscone*** [supra] and ***Bell Vs Moi & another*** [2013] KESC 23 (KLR), he urges the Court to dismiss the instant application with costs; and

[6] FURTHER NOTING the 1st respondent's submissions dated 30th March 2026, contending that the present dispute does not transcend the litigation interests of the parties herein; no uncertainty in the law has been demonstrated; and the application introduces new issues not canvassed before the superior courts below. It relies on ***Steyn Vs Ruscone*** [supra] and ***Sum Model Industries Ltd Vs Industrial & Commercial Development Corporation*** [2011] KESC 5 (KLR) to urge that the application fails to meet the threshold for certification; and

[7] COGNISANT THAT the 3rd respondent did not oppose the application despite being served with the Originating Motion, as evidenced by the Affidavit of Service sworn by the applicant's counsel on 23rd March 2026, and filed electronically on the same date; and

[8] BEARING IN MIND the facts which precipitated the dispute arising from the award of Tender No. KPA/284/2023-24/LP for the provision of Boat and 25-seater Minibus Transport Services for the Port of Lamu by the 2nd respondent to five successful bidders, including the 3rd respondent, and the ensuing decisions of the 1st respondent and the superior courts below; in particular, the 1st respondent, in its decision dated 4th November 2024, upheld the 3rd respondent's Preliminary Objection and struck out the applicant's Request for Review for failure to enjoin the Accounting Officer of the procuring entity as required under Section 170(b) of the Public Procurement and Asset Disposal Act, 2015. The 1st respondent held that the prescribed Form under the Fourteenth Schedule to the Regulations could not override the Act pursuant to Section 31(b) of the Interpretation and General Provisions Act, and consequently found the Request fatally defective and incompetent; and

[9] NOTING that the High Court (*Mutai, J*) in its judgment dated 30th December 2024 in Judicial Review Application No. E037 of 2024, dismissed the applicant's application with each party bearing its own costs. The court upheld the 1st respondent's decision on the basis that it was neither illegal, irrational, nor procedurally improper. It determined that the rules of natural justice were observed, noting that the *ex parte* applicant was duly afforded an opportunity to be heard. In conclusion, the court reiterated that judicial review is primarily concerned with the propriety of the decision-making process rather than the merits of the decision itself. It was satisfied that the proceedings before the 1st respondent were conducted in full compliance with the law; and

[10] TAKING INTO ACCOUNT that the Court of Appeal (*Murgor, Laibuta & Ngenye, JJ. A*), vide its judgment delivered on 17th February 2025 in Civil Appeal No. E001 of 2025, upheld the High Court's decision; that the Appellate Court found that objections to jurisdiction may be raised at any stage of proceedings and the applicant's failure to enjoin the accounting officer of the procuring entity, as required under Section 170 of the Public Procurement and Asset Disposal Act,

rendered the Request for Review fatally defective; that the Court further noted that Sections 168 and 170 of the Act, read together with Regulation 205(1) of the Regulations and Section 31 of the Interpretation and General Provisions Act, made it mandatory to name the accounting officer as a party to the Request for Review; that the Court found no merit in the applicant's claims of legitimate expectation, fair hearing, and fair administrative action, and held that the 1st respondent acted lawfully and in compliance with due process, and consequently dismissed the appeal with costs; and

[11] **GUIDED** by the principles enunciated by this Court in *Steyn Vs Ruscone* [2013] KESC 11 (KLR) and *Bell Vs Moi & another* [2013] KESC 23 (KLR) that:

“...for a case to be certified as one involving a matter of general 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...

... 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;

...such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;” and

[12] **HAVING CONSIDERED** the decisions of the Public Procurement and Administrative Board (1st respondent) and the superior courts below, totality of the pleadings, affidavits, and rival arguments by the parties, **WE OPINE** as follows:

- i. The applicant has not satisfactorily demonstrated that the issues to be canvassed on appeal transcend the circumstances of the case and have a significant bearing on the public interest, to justify a review of the Court of Appeal's ruling denying certification. Further, the applicant has not established the existence of contradictory precedents that have created a state of uncertainty in the law.
- ii. The question regarding the alleged inconsistency between the prescribed Form in the Fourteenth Schedule to the Public Procurement and Asset Disposal Regulations and Section 170(b) of the Public Procurement and Asset Disposal Act was not the subject of judicial determination before the superior courts below. Consequently, the same cannot be raised before this Court in the first instance. The other issues raised by the applicant, including the validity of a Request for Review that fails to join the accounting officer of a procuring entity, are matters long settled by the superior courts.
- iii. Consequently, we find that the applicant has not satisfied the now firmly established test for certification under Article 163(4)(b) of the Constitution. We are also not persuaded that there are matters of public interest that deserve the Supreme Court's further input.
- iv. Ultimately, we find no fault in the Court of Appeal's conclusion that the proposed issues do not meet the threshold set out in **Steyn** [supra] and **Bell** [supra].

[13] **ACCORDINGLY**, we make the following orders:

- i) ***The Originating Motion dated 25th February 2026 and filed on 26th February 2026 is hereby dismissed.***
- ii) ***The Ruling of the Court of Appeal delivered on 13th February 2026 denying leave to appeal to this Court is hereby upheld.***

iii) The costs of this application shall be borne by the applicant.

It is so ordered.

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

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA