REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 15 OF 2020

-BETWEEN-

BIA TOSHA DISTRIBUTORS LIMITED ..... PETITIONER

-VERSUS-

KENYA BREWERIES LIMITED ..... 1ST RESPONDENT

UDV (KENYA) LIMITED ..... 2ND RESPONDENT

COGNO VENTURES LIMITED ..... 3RD RESPONDENT

EAST AFRICAN BREWERIES LIMITED ..... 4TH RESPONDENT

DIAGEO PLC ..... 5TH RESPONDENT

KAMAHUHA LIMITED ..... 6TH RESPONDENT

FOUR WINDS TRADING COMPANY LIMITED.....7TH RESPONDENT

(*Being an appeal from the Judgment and Orders of the Court of Appeal Kenya sitting at Nairobi (**Koome (as she then was), Okwengu & Mohammed JJ.A**.) delivered on the 10th July 2020, in **Civil Appeal No. 163 of 2016***)

Representation:

Dr. Kiplagat for the appellant
(Okoth & Kiplagat Advocates)

Kamau Karori for the 1st, 4th and 5th respondents
(Iseme, Kamau& Maema Advocates)

Mr. George Oraro, SC for the 2nd respondent
(Oraro & Company Advocates)

Mr. Issa Mansur & Ms. Ahomo for the 3rd respondent
(Issa & Company Advocates)

Mr. Kiragu Kimani h/b for Mr. Koyyoko for the 6th respondent
(Wagara Koyyoko & Co. Advocates)

Mr. Guto Mogere for the 7th respondent
(John Mburu & Co. Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of Appeal herein is dated 20th August 2020 and was lodged on 21st August 2020. The Appellant, Bia Tosha Distributors Limited, seeks to set aside the Judgment of the Court of Appeal in ***Civil Appeal No. 163 of 2016*** delivered on 10th July, 2020 which allowed the appeal against the High Court's (*Onguto, J*) ruling in ***Constitutional Petition No. 249 of 2016*** delivered on 29th June, 2016.

B. BACKGROUND

[2] In the year 1997, the appellant was appointed as a distributor for the 1st respondent's products *within Gachie, Mwimuto, Kanunga, Kiambaa, Banana, Karura, Gathanga, Ndenderu, Ndumberi, Tinganga, Riabai, Kanguya, Wangige, and Ridgeways*. Subsequently, in the year 2000, vide a letter dated 20th July, 2000 the appellant was offered new distribution areas namely: *Baba Dogo, Kariobangi North, Dandora I, and Dandora II* on the condition that the appellant would pay a non-refundable goodwill of Kshs. 6,630,000/- to the 1st respondent.

[3] In the year 2005, the appellant was offered a larger distribution area comprising of *Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C.* For these territories the appellant was asked to pay goodwill amounting to Kshs.31,668,000/- out of which it paid Kshs.27,300,000/-.

[4] Sometime thereafter, the 1st respondent re-possessed *Baba Dogo, Dandora I and II,* and *Kariobangi North*, from the appellant to enable the appellant to serve the new areas whereupon the appellant requested to be refunded the goodwill for the territories that were repossessed. This, the 1st respondent declined, indicating that the amounts were non-refundable, and further claimed that it was within their discretion to appoint other distributors as the agreement was non-exclusive. Furthermore, based on world practices, the 1st, 2nd, 4th and 5th respondents' implementation of goodwill payments were terminated as being irrational, illegal and improper scheme to lock out competing international beverage manufacturers. The 4th respondent owns majority shareholding in the 3rd respondent who wholly owns the 1st and 2nd respondent.

[5] The appellant paid goodwill for the routes it operated along and this amount was appropriated directly to the 1st respondent. The refusal by the 1st respondent to refund the goodwill paid by the appellant, coupled with the former's repossession of most distribution areas initially allocated to the appellant and which were then reallocated to other distributors, triggered this dispute.

C. LITIGATION HISTORY

(i) Proceedings at the High Court

[6] The appellant lodged against the 1st, 2nd 4th and 5th respondents ***Constitutional Petition No. 249 of 2016*** at the High Court which was amended on 20th June, 2016, claiming that the respondents' trade practices were unreasonable, unfair, anti-competitive, discriminatory, and contrary to public

policy, and in breach of its fundamental freedoms as enshrined in the Constitution. The petition alleged infringement of the appellant's rights under Articles 19, 36 and 27 of the Constitution being the right to freedom of association and freedom from discriminatory conduct by the respondents in renewing the distributorship contracts on different terms. The appellant also claimed that the actions of the 1st and 2nd respondents of refusing to pay back goodwill amounted to a violation of the appellant's right to property under Article 40 of the Constitution as it claimed goodwill is an asset, and therefore, property. The appellant sought the following reliefs:

(a) *A declaration that the distribution routes to which the appellant has paid goodwill on, that is to say Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDV A, UDV B, UDV C, belong to and are owned by the appellant exclusively and to the exclusion of the respondents, their employees, agents, servants or any person acting for or connected with the respondents.*

(b) *A declaration that the goodwill paid by the appellant to the respondents for distribution routes creates protected property over the said routes under Article 40 of the Constitution.*

(c) *A declaration that the respondents' conduct in relation to settling arbitrary and uniform margins, settling a unilateral maximum resale price, compelling the use of a closed data management system and the branding of the appellant's motor vehicles and staff are unreasonable, unfair, anticompetitive and are therefore contrary to public policy.*

(d) *A declaration that the respondents' conduct with regard to the purported termination of the petitioner's contract is null and void as*

it is discriminatory, unreasonable, unfair, lacking in bona fides and is contrary to public policy.

(e) Any other order that this Honourable court may deem fit to grant.

[7] The petition was filed together with an application for conservatory orders seeking the following orders:

(a) ...

(b) That pending the hearing and final determination of the petition herein, a conservatory order in the nature of an injunction do issue directed at the respondents, their agents, servants, employees or any person acting for or connected with the respondents barring them from interfering with the exclusive management, control and distributorship of the respondent's products in the following routes, that is to say, Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDVA, UDV B, UDV C, which are owned by the appellant by virtue of goodwill paid.

(c) ..."

[8] This prompted the 1st and 2nd respondents to file an application seeking to have the proceedings stayed and or dismissed and direct the dispute to be referred to arbitration pursuant to clause 15.2 of the agreement dated 3rd June 2016. They objected to the High Court's jurisdiction to hear and determine the petition in place of arbitration.

[9] The trial court (*Onguto J*) established the two main issues for determination as *whether the court had jurisdiction to entertain the petition* and, *whether the appellant was entitled to conservatory orders.*

[10] On the court's jurisdiction, the learned Judge, while noting that the High Court indeed had jurisdiction under Article 165(3)(b) of the Constitution to

consider the constitutional petition, proceeded to consider the question of whether the matter was one to be referred to arbitration despite the appellant alleging infringement of constitutional rights and freedoms. He found that where a dispute or claim is laid out as a constitutional issue, then the High Court must deal with the dispute. Further, that since third parties, who were not parties to the arbitration agreement had been joined in the proceedings, it would not be appropriate to dispatch the parties to arbitration. For these reasons, the learned Judge held that the court had the requisite remit. Consequently, he proceeded to issue the conservatory orders as prayed.

(ii) Proceedings at the Court of Appeal.

[11] Aggrieved by the High Court's ruling, the 1st and 2nd respondents filed ***Civil Appeal No. 163 of 2016*** raising 17 grounds of appeal. The same were summarized by the appellate court as follows: that the learned Judge erred in granting the conservatory orders; elevating a purely commercial dispute to a constitutional dispute thus breaching the cardinal rule of party autonomy and freedom of contract; making a ruling that went contrary to the provisions of Section 21 of the Competition Act; violating the 1st and 2nd respondents right to property under Article 40; misinterpreting provisions of Article 159 (1) (c) of the Constitution; interfering with the dispute resolution procedure set out in the agreement between the 1st respondent and the appellant; violating the 1st and 2nd respondents' fundamental freedom of contract; and for exceeding the court's jurisdiction by entertaining, hearing and determining issues raised by the appellant in the application dated 14th June 2016.

[12] The 1st and 2nd respondents also sought, under Rule 5(2)(b) of the Court of Appeal Rules, stay of execution of the High Court orders pending the hearing and determination of the appeal. On 11th August, 2016, the Appellate court ordered that *status quo* be maintained pending the hearing of the appeal, in consideration of

the long-standing special relationship between the appellant and the 1st and 2nd respondents and the hearing of the appeal to be fast-tracked.

[13] Before the appeal could be heard, the appellant filed a Notice of Motion application dated 23rd August 2016 seeking to cite the 1st and 2nd respondents for contempt of the court orders issued on the 11th of August, 2016. The 1st respondent also filed an application dated 7th December 2016 seeking to adduce additional evidence. A third application for joinder was filed by the Chartered Institute of Arbitrators.

[14] In a ruling dated 30th May 2017, the Court of Appeal *(Waki, Nambuye and Kiage JJ. A)* directed that the appeal must proceed to its substantive hearing without being sidetracked by any pending applications and that all applications filed before the court be held in abeyance pending the hearing of the appeal.

[15] That decision prompted the appellant to file ***Supreme Court Application No. 10 of 2017***, seeking a stay of proceedings and the ruling delivered by the appellate court on 30th May 2017. In a ruling delivered on 11th December, 2018 this Court declined to assume jurisdiction reasoning that the appellant had not properly invoked our jurisdiction under Article 163 (4)(a) of the Constitution since the main petition was still pending before the High Court. Consequently, the Court remitted the matter back to the Court of Appeal for disposal on priority basis culminating in a judgment delivered on 10th July 2020.

[16] In its decision, now challenged in this appeal, the appellate court identified three issues for determination: *whether the learned Judge wrongly assumed jurisdiction and granted orders while ignoring party autonomy and freedom of contract in the face of an arbitration agreement; whether the learned Judge issued final orders which conferred rights not in the contract before the petition was heard and evidence tested;* and *whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles.*

[17] On the first issue, the appellate court found that, the constitutional breaches complained about were predicated on the distributorship agreement which provided mediation and arbitration as a medium for dispute resolution, and that avenue ought to have been exhausted first. It held that there is no way infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which are allegedly breached.

[18] On the learned Judge's exercise of discretion in granting the conservatory order, the appellate court faulted the learned Judge's conclusion as arising from failure to consider the respective interest of the parties and the fact that the appellant would be entitled to damages and/or restitution as an alternative remedy. The judges of appeal were of the view that there were serious triable issues on whether the goodwill was refundable and whether the routes were exclusive to the appellant, which required serious interrogation and required evidence to resolve before a determination could be made. Further that the conservatory orders issued gave the appellant exclusive control over some disputed territories where there may be other distributors, locking them out of the market.

[19] As a result, the Court of Appeal set aside the conservatory order made on the 26th June 2016 and substituted it with one that stayed the proceedings before the High Court pending the dispute being referred to arbitration. It then ordered that the dispute between the appellant and the 1st respondent be referred to arbitration per the respective parties' distributorship agreements.

(iii) Proceedings before the Supreme Court

[20] Aggrieved by the judgment and orders of the appellate court, the appellant filed this Petition of Appeal dated 20th August 2020 on the main grounds that the Court of Appeal erred:

a) In making a final determination of the rights of the parties herein at an interlocutory stage.

b) In making a final determination of the subject matter of the dispute herein rendering the Court of Appeal's order to refer the matter to arbitration ineffectual.

c) In not recognizing that the appellant's causes of action are outside the commercial contracts executed between the parties.

d) In failing to appreciate that the court was obligated to determine all pending applications before dealing with the appeal determination of which would have produced a totally different outcome in the appeal and altered the final judgment.

e) In refusing to investigate and determine the contempt of court application and proceeding to the hearing of the main appeal without first disposing of the said application or determining the application in its judgment thereby establishing a chaotic new legal paradigm that allows disobedience of court orders provided that an appeal has been lodged.

f) In accepting and adopting a novel jurisdictional granting competence to private arbitrators by expanding that jurisdiction to encompass constitutional determinations, public policy pronouncements and statutory declarations.

[21] The appellant now seeks the following reliefs:

(a) ***THAT*** *the Appeal be allowed and the Court of Appeal decision dated 10th July, 2020 be set aside in its entirety and the matter be remitted to the High Court for the determination of the rights of the parties on merit and for the High Court orders of 29th June, 2016 to be deemed and restored in full.*

(b) ***THAT*** *this Honourable Court be pleased to grant any or further relief in the interest of justice.*

(c) *Costs.*

D. PRELIMINARY OBJECTIONS

[22] The 3rd respondent filed a notice of preliminary objection dated 14th September, 2020 on the following grounds:

(i) That this Honourable Court has no jurisdiction to entertain the instant Petition of Appeal as it stems from an Appeal on the Conservatory order of the High Court, which does not involve the interpretation or application of the Constitution.

(ii) That the instant Petition of Appeal has been brought without certification as required under Article 163(4)(b) of the Constitution and the same is fatally defective and should be struck out with costs.

[23] Similarly, the 1st, 4th and 5th respondents have filed a notice of preliminary objection dated 13th October, 2020 on the grounds:

(i) That this Honourable Court lacks jurisdiction to hear and determine the appeal under Article 163(4) (a) of the Constitution;

(ii) That the Petition is hinged on contested factual matters which have not been a subject of determination by the High Court or the Court of Appeal. In the circumstances, the issues raised in the Petition are not ripe for determination by this Honourable Court.

E. SUBMISSIONS

(a) Appellant

[24] The appellant filed submissions on 1st October, 2020. The appellant submits that the appellate court erred in its refusal to decide on pending applications, ignoring settled law and precedent as well as the Supreme Court's order in this matter, where it remitted the case for determination of all pending applications and the main appeal. Citing Supreme Court of Nigeria in ***Hon. Alhaji Muhammadu Maigari Dingyadi & anor. v. Independent National***

Electoral Commission & 2 Ors (2010) 4 – 7 SC (Pt.1) 76, the appellant urges that it would be remiss of a court to proceed to treat an appeal to its conclusion when other processes are pending and proceed not to decide on the pending applications.

[25] The appellant claims that the appellate court erred in deciding the case based on contracts that were neither the subject matter of their case nor the High Court ruling. That the appellate court overturned the High Court's decision by relying on purported contracts that contained arbitration clauses yet this was not the case before it. The appellant further asserts that the appellate court erred in applying an arbitration clause retrospectively hence misdirected itself by formulating a dispute based on *post facto* contracts and purported to compel the parties to abide by the contracts that were not contemplated by the parties when they started their trading relationship.

[26] It is the appellant's submission that the Court of Appeal eroded with finality the appellant's rights as it overturned the trial court's decision depriving the appellant of an opportunity to present its evidence and call witnesses on whether goodwill could be categorized as property under Article 40. That the court breached settled law in ***Deynes Muriithi & 4 Others vs Law Society of Kenya & Another [2016] eKLR*** where this Court warned against the rush to make factual and final determination of matters at an interlocutory stage. In that regard, the appellant alleges that the impugned judgment suggests that a determination by a private arbitrator can set a constitutional precedent that would have precedential value.

[27] The appellant further submits that the Court of Appeal erred in formulating a "Contested – Facts" standard as the basis for granting or rejecting interim relief, and arriving at its decision by purporting to analyze whether the facts relied upon by the High Court were agreed on or were disputed. The appellant urges that it is not the contestation of facts that is the material consideration in the grant of

interim relief, but that such a decision should be based on a *prima facie case* made out by an Applicant, as in all applications for interim reliefs, the facts are almost always contested.

[28] The appellant argues that the Court of Appeal misread the Competition Act 2010 and wrongly relied on Section 21 (3) of the Competition Act to find that exclusive territorial control was barred by the Act. That there must be no statutory bar to a supplier appointing a distributor on an exclusive basis to manage an exclusive territory.

[29] The appellant submits that the Court of Appeal fell into further error when it purported to base its judgment on the alleged infringement of the rights of other third parties including the 3rd respondent. The appellant deems false the statement by the Court of Appeal that allowing conservatory orders to stand will occasion financial loss to the other distributors and inconvenience their customers and employees.

[30] Addressing the unconscionable conduct of the 1st and 2nd respondents, the appellant submits that its trading relationship with these parties is illegal and unconstitutional. To buttress this argument, the appellant relied on ***LTI Kisii Safari Inns LTD & 2 Others vs Deutsche Investitions – Und Enwicklungsgellschaft ('Deg') & Others*** **[2011]eKLR** where the court held that where persons with their eyes open willfully and knowingly enter into unconscionable bargains, the law has no right to protect them. The appellant argues that the 2010 Constitution materially changed the previous narrative towards preserving the old notion of the sanctity of contract.

[31] The appellant concludes by stating that it was clear that the Court of Appeal replaced the High Court's *prima facie* findings with its own preferred and idiosyncratic view; that the respondents did not satisfy the requirements for the

setting aside of discretionary interlocutory orders; and that the appeal herein should be allowed as prayed.

(a) 1st, 4th, and 5th Respondents

[32] The 1st, 4th and 5th respondents filed their submissions relating to their preliminary objection, and on the substantive appeal on 18th November 2020.

[33] They submit that the appeal is incompetent and ought to be dismissed as the Court does not have jurisdiction under Article 163(4) (a) of the constitution to hear this appeal nor does it meet the threshold set in ***Lawrence Nduttu & 6000 Others v Kenya Breweries Limited & Another*** [2012] eKLR and ***Bia Tosha Limited v. Kenya Breweries Ltd & 6 others*** [2018] eKLR. They argue that the case stems from an interlocutory appeal challenging the exercise of discretion by the High Court which did not call for interpretation or application of the Constitution and neither has the appellant identified any instance of interpretation or application of the Constitution in the judgment appealed from.

[34] Regarding the Petition, the respondents submit that the Court of Appeal did not err in not determining the interlocutory applications since the complaint was the subject of ***Supreme Court Application No. 10 of 2017*** which was resolved by a ruling dated 11th December, 2018 and the Supreme Court found that the ruling of the Court of Appeal did not involve the interpretation and application of the Constitution and neither was it a pronouncement of the appellate court but was an exercise of discretion whose main aim was to give procedural direction as to the conduct of the substantive matter before it. Therefore, the issue of disregarding court orders does not arise since this Court did not make an order directing the Court of Appeal to hear the applications. Further, the respondents submit that the pre-trial conference was held on 1st November 2016 and the Court directed that the appeal would be heard in priority over the interlocutory applications noting that none of the interlocutory applications had ever been fixed or listed for hearing.

[35] As to whether the Court erred in determining the appellant's case based on contracts, it is submitted that the issue is still alive at the High Court and the Court cannot, therefore, address its mind in respect of disputed facts currently before the High Court. It is the respondents' contention that the Court of Appeal did not apply an arbitration clause retrospectively for the reason that the arbitration clause contained in a contract that is entered into post conclusion of negotiations is and by itself, not a factor to render the arbitration agreement inoperable as was explained in the Court of Appeal of the State of California Fourth Appellate District Division Three case of ***Quiroz Franco vs Greyston Ridge Condominium, 39 Cal. App. 5th 221 (2019)***.

[36] On whether the Court of appeal determined the issues of the parties with finality, it is submitted on behalf of the respondents that the Court exercised constitutional avoidance which requires that where there are other mechanisms other than the Constitution through which a dispute can be resolved, the said mechanisms ought to be utilized to resolve the dispute as was held in the case of ***Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others*** [2014] eKLR. Furthermore, it is the respondents' case that the breach of constitutional rights is arbitrable as the reliefs sought by the appellant are rights *in personam* and there can be no basis to argue that such dispute is not arbitrable. Towards this, they rely on the case of ***Booz Allen & Hamilton Inc v SBI Home Finance Limited (2011) 5 SCC 532*** by the Supreme Court of India.

[37] They further submit that the Court of Appeal was right in rejecting interim relief under section 3 (2) of the Appellate Jurisdiction Act (Cap 9). That the court derives jurisdiction to reappraise the facts and arrive at its own conclusion. That the court considered all relevant factors including the possibility of the appellant suffering losses if it was not allowed to carry on the distribution *vis a vis* the

respondents' contention that the goodwill was non-refundable and that the appellant did not have exclusive rights over the territory.

[38] As to whether the Court of Appeal made a false determination on the Competition Act the respondents submit that the appellant's submissions are contested and are yet to be determined and are therefore prematurely before the Court.

[39] On the concept of ongoing business, it is submitted that the two-month contracts between the appellant and the 1st and 2nd respondents dated 3rd June 2016 expired by effluxion of time on 2nd August 2016 and were not renewed. That that was the *status quo* that existed when the Court of Appeal made the order of 11th August 2016.

[40] Concerning the issue of unconscionable conduct, they urge that it is not ripe for determination by this Court as it is the subject of the Amended Petition before the High Court.

(b) 2nd Respondent

[41] In its submissions dated 27th November 2020, the 2nd respondent contends that this Court is not clothed with the requisite jurisdiction as the petition having arisen from an interlocugtory ruling, does not involve the interpretation and/or application of the Constitution and neither do the High Court nor the Court of Appeal delve into constitutional issues. To this end, they cite this Court's decisions in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR***, ***Erad Suppliers & General Contractors Ltd –vs- National Cereals & Produce Board [2012] eKLR*** and ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another [2012] eKLR.***

[42] As to the issue of its joinder as a party to the petition, they submit that there was no claim against it with regard to orders sought or granted before the High Court or Court of Appeal.

[43] On whether the Court of Appeal erred in its refusal to decide on pending applications, the 2nd respondent submits that the issue of pending applications was determined by the Court of Appeal from which an appeal was filed to this Court in ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2018] eKLR*** and a ruling delivered on 11th December 2018. Accordingly, if the Court declares that this issue has been determined, then the same is *res judicata* and cannot be revisited through another appeal.

[44] On whether the Court of Appeal erred in considering the appellant's case based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling, it is the 2nd respondent's submission that the existence of the contract between the appellant and the 1st respondent incorporating the dispute settlement provision was at the core of the dispute, which was confirmed by the High Court ruling. Therefore, as the appeal is on matters of law and not facts, the issue of commercial agreements was not one to be argued before this Court.

[45] On whether the Court of Appeal erred in applying an arbitration clause retrospectively, it is urged that there was in existence an arbitration clause, which clause the appellant acknowledged, and that the claim by the appellant of the contracts being *post facto* and thereby belatedly applying the arbitration provision is being raised before this Honorable Court for the first time. The 2nd respondent contends that an arbitration agreement may be applied prospectively or retroactively so long as the intention of the parties can be derived from the agreement and depending on its terms.

[46] On whether the Court of Appeal erred in determining with finality the rights of the parties, it is submitted that the Court of Appeal rightly decided the issue of constitutional protection by holding that it can only be determined at the hearing since the commercial relationship between the appellant and the 1st and 2nd respondents was not disputed.

[47] It is their further submission that the parties have agreed to a dispute settlement procedure which involves arbitration, and that the arbitrator and the parties are guided by the principles of the Constitution, and should any constitutional indication arise from the proceedings, then the matter was to be resolved within the same forum. They, therefore, urge that the appellant's contention that arbitrators have no jurisdictional competence about public policy decisions has no basis in law.

[48] They conclude that this Court is without jurisdiction, and that the Court of Appeal applied the correct principles and arrived at the correct, fair, and just determination. They add that the appellant has refused, failed, and/ or neglected to proceed to a full hearing with its case so that the respective rights can all be fully determined on merit. Accordingly, they pray for the petition to be struck off or in the alternative be dismissed with costs.

(c) 6th Respondent

[49] In its submissions dated 2nd July 2021 and filed on 28th September 2021, the 6th respondent contends that the essence of this appeal is whether an arbitration clause in a standard distribution contract is a bar to class action in court by the distributors. It is the 6th respondent's submission that the proceedings before the High Court did not arise under the individual distributorship agreements but were an assault on an entire system of distribution, undermining enshrined constitutional rights, and is not an inquiry that can be undertaken under private individual arbitral proceedings before an arbitrator.

[50] The 6th respondent urges that the High Court has the authority as well as a duty under Articles 22, 165(3)(,b) and 258 of the Constitution to undertake a proper investigation into the complaints raised in the petition and, if well-founded, grant effective relief in terms of Article 23.

[51] It further submits that it is a reversible error for the Court of Appeal not to address at all, how the presence of the 6th and 7th respondents impacted the proceedings before the High Court, as well as arguments being pressed before them for arbitration by the 1st, 2nd, 4th and 5th respondents (*hereinafter Diageo respondents*) given the adverse impact that such stay of proceedings and referral would have had on the 6th and 7th respondents.

[52] It is its case that the issues raised by the distributors were clearly outside of the contract and did not relate to any breach of contract at all but instead address what the distributors allege were practices *"... so grave, so manifestly wrong..."* and had been subject of discussion between the parties but did not bear any fruits. That the case by the appellant, the 6th and 7th respondent can only be resolved through coercive orders of a court or public institutions and not by a private arbitrator who would have no jurisdiction over the matters raised either contractually or otherwise, nor the power to grant effective relief.

[53] They urge this Court to reverse the Court of Appeal decision and reinstate the orders of the High Court.

(d) 7th Respondent

[54] In its submissions dated 29th June 2021, the 7th respondent submits that while the matter may have originated from an interlocutory application, it has always involved the interpretation and application of the Constitution. They contend that this Court is clothed with the requisite jurisdiction to entertain this matter, and that it meets the conditions set by this Court in ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Anor [2012] eKLR*** as it originated from a constitutional petition which called upon the High Court to determine if it had jurisdiction to hear the appellant's constitutional grievances under Article 165(3)(c) of the Constitution of Kenya, 2010 as well as the importance of private personal agreement as considered with Article 159(2)(c) of the Constitution of Kenya, 2010.

[55] It is their further submission that in deciding if it should grant conservatory orders, the High Court found that the power to grant these orders originated from Article 23(3) of the Constitution of Kenya, 2010. It also analyzed if goodwill could fall within the definition of property under the Constitution. Similarly, the Court of Appeal also delved into the issue of constitutional interpretation.

[56] As to the main appeal, it is their contention that the High Court had the jurisdiction to hear and determine the constitutional grievances raised by the appellant and that they ought not to be left to an arbitrator, as the appellant has raised the issue of the infringement of their property rights, their right not to be discriminated against and their right to associate freely.

[57] Citing the Supreme Court of India in ***UNITECH Limited & Others v Telangana State Industrial Infrastructure Corporation (TSIIC) & Others 2021 SCC Online SC 99***, it submits that the presence of an arbitration clause does oust the jurisdiction under Article 226, and is adamant that the question of the High Court's jurisdiction should depend on the nature of the grievance being made and not its origin. They argue that the Constitution not only governs the relationship between the State and its citizens but also extends to those between its citizens, therefore, private relationship agreements do not give parties immunity to provisions of the Constitution.

[58] It is the 7th respondent's submission that the appellant, and the 6th and 7th respondents did not approach the Constitutional Court to solely interpret the agreements they had made with the 1st and 2nd respondents. They instead presented evidence of how they had been treated by the 1st and 2nd respondents, referred to their rights in the Constitution, and requested the Court to determine if those rights had been infringed. They agree with the Court of Appeal that the origins of their relationship with the 1st and 2nd respondents formed a part of their dispute, but it was just a part of the dispute and not the whole of it. They had constitutional grievances which they had justifiably pleaded, therefore, the matter

took a constitutional trajectory, as required by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR.

[59] It is the 7th respondent's further submission that the dispute dividing the parties cannot be adequately resolved in arbitration as ordered by the Court of Appeal. That arbitration may only be compelled in a dispute which falls squarely within the four corners of a contract, and which relates to a breach of the contract containing an arbitration clause. All other causes of action unrelated to a breach of contract if brought within arbitral proceedings cannot be arbitrated under such contract. (***Addis v. Gramophone Co. (1908-1910) All ER 1***).

[60] The 7th respondent contends that by ruling in the manner that it did, the Court of Appeal expressly and effectively terminated the rights of the 6th and 7th respondents without hearing them and inadvertently shielded the 2nd, 4th, and 5th respondents from the claims lodged by the appellant and the 6th and 7th respondents. That this was a clear breach of the rights of the 7th respondents to access justice under Article 48 of the Constitution of Kenya and a fair hearing under Article 50. It is argued that the expertise of the arbitrator is an additional limiting factor to the arbitral process. Even if all the constitutional issues raised by the appellant could legitimately be put to an arbitrator, which is denied, the arbitrator may not possess the legal expertise and experience to understand and resolve the issues raised by the appellant.

[61] The 7th respondent urges the Court to set aside the judgment of the Court of Appeal and restore the orders of the High Court.

E. ISSUES FOR DETERMINATION

[62] The appellant in its submissions framed the following issues for determination:

a) Whether the Court of Appeal erred in its refusal to decide on pending applications;

b) Whether the Court of Appeal erred in considering the appellant's case based on contracts which were neither the subject matter of the appellant's case nor the High Court ruling;
c) Whether the Court of Appeal erred in applying arbitration clauses retrospectively;
d) Whether the Court of Appeal erred in determining with finality the rights of the parties;
e) Whether the Court of Appeal erred in its decision on the jurisdictional competence of private arbitrators with regard to public policy decisions;
f) Whether the Court of Appeal erred in its interpretation of the Competition Act, 2010;
g) Whether the Court of Appeal erred in basing its judgment on the infringement of the rights of other third parties;
h) Whether there was unconscionable conduct on the part of the Respondents.

It is on this basis that the respondents filed their submissions in response to the appeal.

[63] Two preliminary objections have been raised by the 3rd respondent and the 1st, 4th and 5th respondents, respectively, on grounds that this court has no jurisdiction to entertain this appeal. This is because the appeal stems out of an interlocutory conservatory order which does not involve the interpretation or application of the Constitution and that the petition has been brought without certification; and that this Court lacks jurisdiction under Article 163(4)(a) since the appeal is hinged on contested factual matters that have not been the subject of determination in the superior courts, respectively.

[64] Having carefully considered and evaluated the two preliminary objections, pleadings, arguments and submissions in this appeal, we are of the considered view that the following issues suffice to dispose of the appeal:

(i) Whether this Court has jurisdiction to determine this appeal;

(ii) Whether the Court of Appeal erred in declining to decide on pending applications;

(iii) Whether the Court of Appeal erred in granting the reliefs contained in its judgment.

A consideration of the above issues, shall have addressed the rest of the issues as framed, some of which form the basis of the decision of the Court of Appeal or arise as a consequence thereof.

F. ANALYSIS AND DETERMINATION

i. Whether this Court has jurisdiction.

[65] Our jurisdiction having been challenged, it must follow that the question be determined *in limine*. This is because in the event that we uphold the objection, that would determine the whole matter, without need to venture into the merits or lack thereof. The jurisdiction question now before us arises in two respects, all arising from the preliminary objections by the respondents as earlier pointed out – the general jurisdiction under Article 163(4)(a) of the Constitution and the specific jurisdiction to deal with a matter emanating from an interlocutory application for conservatory relief.

[66] As we have variously stated before, our jurisdiction stems from the Constitution itself, and also from Statute. While it is for the litigant to choose which jurisdiction to invoke, once that decision is made, the same must meet our set threshold. In this instance, the appellant maintains that this Court has jurisdiction as the determination subject to the appeal regards the constitutionality of the appellant's rights. The appellant invokes Article 163(4)(a) of the Constitution in approaching us. That being the case, the issue of Certification under Article 163(4)(b) does not arise. This is because, as we held in ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others*** SC Civil Application No. 35 of 2014 [2015] eKLR

it bears restating that the litigant coming before the Supreme Court has the duty of categorizing his or her case, so as to beckon the specific constitutional opening under which the matter falls. The Court cannot exercise concurrent jurisdiction simultaneously.

[67] The established guiding principles when invoking Article 163(4)(a) were indeed pronounced in cases such as ***Lawrence Nduttu (supra), Hassan Ali Joho (supra), Gatirau Peter Munya (supra)*** and ***Peter Oduor Ngoge (supra).*** As can be deduced from the above quoted cases, in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior Courts below leading to the present appeal. In order to establish that fact, the Court needs to ask itself the following questions: *(i) What was the question in issue at the High Court and the Court of Appeal? (ii) Did the superior Courts below dispose of the matter after interpreting or applying the Constitution? (iii) Does the instant appeal raise a question of constitutional interpretation or application which was the subject of judicial determination at the High Court and the Court of Appeal?* This is a test that was aptly captured in ***Rutongot Farm Ltd v Kenya Forest Service & 3 others*** SC Petition No. 2 of 2016 [2018] eKLR.

[68] Applying the above test to the present circumstances, what then was the question in issue at the High Court? It is not in dispute that the appellant filed a petition under Article 22 alleging violation of certain articles of the constitution. Notably, the appellant called in aid Articles 19, 36, 27(2) and 40 of the Constitution. More pronounced is the relief sought in the nature of a declaration that the goodwill the appellant had paid *creates protected property over the said routes under Article 40 of the Constitution* and the relief seeking to declare the respondents' conduct in terminating the appellant's contract as null for*, inter alia, being discriminatory, unreasonable and unfair*. While we note that the petition

was yet to be heard on the merits, it is evident that whatever determination that would be made by the court eventually, a decision would have to be made one way or the other in relation to the said quoted provision of the Constitution. This decision would involve testing the evidence and arguments leading the court to either agreeing or disagreeing with the appellant. This decision, in our view inevitably involves interpreting and/or applying the Constitution in the matter before court, in line with the first test.

[69] Article 165(3)(b) of the Constitution clothes the High Court with jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. In determining whether it had jurisdiction, the High Court established that the matter raised constitutional issues and questions that were not appropriate for arbitration.

[70] What about the second test? Again, we note that the High Court's jurisdiction was challenged on account that the dispute was of a commercial and not constitutional nature. Of interest to us is whether in the decision now subject of appeal, it can be concluded that the Court interpreted or applied constitutional provisions. This is key because, despite it being a ruling on grant of conservatory orders, the test is whether any interpretation or application of the constitution can be readily identified from the pleadings and from the court decision. Looking at the ruling, the High Court was no doubt being asked to directly determine whether the matter involved constitutional questions or was merely a dispute arising out of a purely commercial agreement. On that invitation, the High Court stated:

> *"My view is that the Petition as drawn reveals that there did and do exist commercial agreements between the parties. For stated consideration certain proprietary rights are alleged to have been acquired and the same rights are also alleged to be taken away. Relevant Articles of the Constitution have been identified and stated. The question for the court at the hearing of the Petition will be whether what has been identified as constituting proprietary interest is*

'property' within the provisions of Article 40 and whether the same has been arbitrarily expropriated or whether the expropriation is, if at all, justified. That is the core question in this Petition and it is purely a question of constitutional interpretation and determination, in my view. This court has the requisite remit in my view."

This finding by the High Court appreciated that there existed a constitutional question arising out of Article 40 of the Constitution in so far as it related to the dispute at hand.

[71] On appeal, the Court of Appeal, overturning the decision of the High Court addressed itself to, *inter alia*, whether the dispute was purely a commercial dispute elevated to a constitutional petition against established principles. In differing with the High Court, the appeal judges rendered themselves thus:

"[41] ... In our considered view therefor in as much as the constitutional breaches complained about by the 1st respondent which are supported by the 5th and 6th respondents, were predicated on the distributorship agreements which provided mediation and arbitration as a medium for dispute resolution, that avenue ought to have been exhausted first. It is apparent from the record that the appellants filed a motion under **Section 6 (1)** *of the* ***Arbitration Act*** *seeking* inter alia, *stay and/or dismissal of the court proceedings; and the dispute being referred to arbitration as per the agreement.*"

[72] The Court of Appeal went ahead to further state that:

"[46] We differ with the learned Judge's conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together

by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned Judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See **Section 97** *of the* ***Evidence Act)****. The learned Judge also failed to give due consideration to the provisions of* **Article 159 (2) (c)** *of the Constitution that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned Judge did not heed to the dictates thereto to promote alternative dispute resolution in this matter but rather downgraded it."*

[73] The appellate court, acknowledging the existence of complaints of constitutional breaches, favoured the exhaustion of the alternative dispute resolution mechanism as permitted under Article 159(2)(c) of the Constitution predicated on the distributorship agreements. Moreover, in considering whether the High Court had judicially exercised discretion in granting the conservatory relief, the learned judges of appeal stated:

"*[47] ... It is in that context that we will examine this issue by first setting out the guiding principles on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution...."*

[74] For our purpose, this is an indication that indeed the Court of Appeal appreciated that constitutional questions were not only before it but also the guiding principles within the constitutional framework were applicable to the matter. The court eventually was of the view that the resolution of those

acknowledged constitutional breaches would be done under commercial dispute resolution mechanisms.

[75] The last test on whether the appeal raises a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal is a no brainer as the appellant challenges the rationale for the Court of Appeal decision and its resultant effect on the infringement of rights. This includes a challenge on the preferred forum as directed by the Court of Appeal in the use of a private arbitrator to determine the arising constitutional question and the attendant recourse by third parties in that particular forum as well as the principles for grant of conservatory relief. This test, we find, is satisfied.

[76] As to the second front of the preliminary objection, should we down our tools on account of the appeal having emanated from conservatory orders? This is the import of the objection by the 3rd respondent. In dealing with this objection, we must first distinguish between an appeal emanating from an interlocutory ruling such as a decision emanating from an application under Rule 5(2)(b) of the Court of Appeal Rules and an appeal from a conservatory order.

[77] Our position on an appeal from a ruling emanating from the Court of Appeal's exercise of its discretion is that we would not ordinarily entertain such an appeal, more so since the substantive appeal at the Court of Appeal would still be pending. In ***Teachers Service Commission v Kenya National Union of Teachers & 3 others*** SC Application No.15 of 2015 [2015] eKLR the Court decided with finality, in our view, on the question of whether Article 163 (4) of the Constitution confers upon this Court the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule (5)(2)(b) of that Court's Rules of 2010. Citing the ***Joho case*** we stated:

> *"In the* **Joho** *case, we heard and determined an appeal* emanating from a substantive determination by the Court of Appeal of a constitutional

question. *The appeal had originated from an interlocutory application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal."*

[78] Similarly, as we noted in ***Geoffrey M. Asanyo & 3 others v Attorney-General*** [2020] eKLR, we do not venture into administrative judicial processes. This followed from our earlier pronouncement in ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*** SC Civil Application No.3 of 2014 [2015] eKLR:

"***[21]*** *We are in agreement with the Court of Appeal. For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject- matter of judicial determination. It is clear to us that this Court had not been conceived as just another layer in the appellate - Court structure. Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate.* ***Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution***. (Emphasis ours)"

[79] This is because, unlike the High Court which has express supervisory jurisdiction over the subordinate courts, we do not, under the existing constitutional structure, enjoy similar powers over other superior courts. This is notwithstanding the apex nature that the Court is placed under the Constitution and our decisions being binding under the doctrine of *stare decisis*.

[80] In ***Gatirau Peter Munya*** *(supra)* we held that:

> *" 'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the 'prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."*

[81] Thus, conservatory orders are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. Indeed, the appeal emanates from the learned Judge's exercise of discretion under *Rule 23 (1)* of the *Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012)* and to that extent the Constitution itself. Article 23 (3) of the Constitution empowers the court to, *inter alia*, grant conservatory orders. Just as we held in the ***Joho case***, in the course of issuing the ruling, the learned judge made certain pronouncements touching on the interpretation and application of the Constitution, which have now found their way to this Court.

[82] It is worthy of note that the way the dispute is prosecuted through litigation and the surrounding issues determine whether indeed it qualifies to be considered as a constitutional question or not. It is readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It is therefore best left to the court on a case to case basis upon critically evaluating the facts, evidence and arguments before it. There will be a level of factual contestations that will inform the court's determination even at an interim stage to determine whether or not the court should exercise its discretion in favour of the applicant seeking conservatory orders.

[83] This matter emanates from commercial agreements between the appellant and the 1st and 2nd respondents concerning the distribution of the 1st respondent's products. The 1st respondent sought to repossess the distribution territories of *Baba Dogo, Dandora 1 and II, and Kariobangi North* that had been previously granted to the 1st appellant in the year 2000 and declined to refund goodwill paid by the appellant, on the ground that the amounts were non-refundable. The 1st respondent further appointed other distributors to that distribution territory. In reaction to the 1st respondent's measures, the appellant chose to pursue the constitutional path by instituting the petition before the High Court. The appellant alleges that following the coming into force of the Competition Act in 2011, the relationship between it and the Diageo respondents was re-ordered as it was no longer permissible for the appellant as an independent distributor to commit exclusively to serve the Diageo respondents. The appellant therefore moved to challenge not just the contract but more so the conduct of the Diageo respondents which the appellant stated, stifled the appellant's enjoyment of the benefits of the new legal environment as protected by the constitution that had just come in place.

[84] Secondly, in the year 2012, distributors came together and registered a new association by the name of Beverage Distributors of Kenya (BDK). This was to bring together beverage distributors from across the country to address matters of

common interest in the beverage industry. According to the appellant, the Diageo Respondents violently resisted engaging BDK and insisted on dealing with BDK members individually. The appellant has pleaded that this was a clear effort to prevent the appellant from benefitting from the gains resulting from the adopting of a common strategy. As a result, the appellant alleges that that is a term of a contract that is contrary to the values enshrined in the Constitution. This, we understand, is the basis of the decisions of the superior courts below although with diametrically opposed outcomes, and we strongly uphold that that it is a matter that can and must be resolved by this court by dint of its mandate under section 3 of the Supreme Court Act.

[85] To this end therefore, we see no difficulty in assuming jurisdiction over the present matter. We affirm that we have the requisite jurisdiction to hear and dispose of this matter and none of the preliminary objections is merited and consequently all of them are hereby dismissed.

[86] In the same breadth, in ***Rutongot*** *[supra]* and ***University of Eldoret & another v Hosea Sitienei & 3 others*** SC Petition No.33 of 2019 [2020] eKLR, we were persuaded that the disputes did not involve interpretation of the Constitution after all and upheld objections raised in those matters. This is something we can only do once the superior courts below have conclusively expressed themselves on the merits, the parties being entitled to and having taken up the appellate mechanisms. We reiterate that both objections are unmerited and are hereby dismissed.

[87] With the above finding on the preliminary objections, we now proceed to consider the appeal before us on merit.

ii. Whether the Court of Appeal erred in its refusal to decide on the pending applications;

[88] As earlier pointed out, among the grievances by the appellant on the decision of the Court of Appeal is that court's failure to determine the pending applications. In essence there were three applications before the Court of Appeal. On the application by the 1st and 2nd respondents for stay pending appeal under Rule 5(2)(b) of the Court of Appeal Rules, the Court of Appeal had directed that parties maintain the *status quo*. Then there were three other applications. The first one was an application by the appellant to cite the 1st and 2nd respondents for contempt of court of the *status quo* orders. The second application was by the 1st respondent to adduce additional evidence while the third one was for joinder of the Chartered Institute of Arbitrators. None of these three applications was ever heard as applications nor determined in the eventual judgment.

[89] The Court of Appeal judgment ably captures the situation thus:

> *"[13] In an Extempore ruling dated 30th May, 2017, this Court reiterated the directions given on 1st November, 2016 by the Court, regarding a priority hearing date to be given for the main appeal in lieu of all the applications. This is what the Court stated- in a pertinent paragraph of the said Ruling: -*
>
> > *'Having given the matter full and anxious consideration, we are quite clear that this Court (differently constituted) did direct in unequivocal terms on 1st November, 2016 (and in answer to an attempt to agitate an application in lieu of the appeal proper on that day) that the dispute between the parties herein must be fully and finally resolved by the hearing and determination of the appeal itself and that interlocutory matters or issues cannot take precedence over hearing of the appeal itself.'*
>
> *[14] This prompted the 1st respondent to file an application before the Supreme Court seeking a declaration that its constitutional rights had*

been violated by the Court. However, the Supreme Court held that the petition before the Supreme Court failed to properly invoke the provisions of ***Article 163(4)(a)*** *of the Constitution since the main petition before the High Court was still pending and the Court of Appeal was as yet to exercise its appellate jurisdiction, thus there was no substantive decision from which the 1st respondent could appeal. Declining to exercise its jurisdiction, the Supreme Court remitted the matter to this Court for hearing on priority basis.*

[15] Even in the face of the said Ruling by the Supreme Court, and prior directions given by this Court on the hearing of the appeal in lieu of the applications, when the appeal came up for hearing before us on 4th March, 2020, **Mr. Nowrojee***,* **Senior Counsel** *appearing with* **Dr. Kiplagat** *for the 1st respondent still insisted that the notice of motion dated 23rd August, 2016 seeking to commit the appellants for contempt of court be heard first. This argument was met by stiff opposition by counsel for the appellants who urged us to follow the earlier directions of this Court and proceed with the main appeal which was also in line with the direction made by the Supreme Court. We stuck to the directions given earlier by this Court and proceeded to hear the main appeal.*"

[90] What is manifestly clear is that the appellant was keen to prosecute its application for contempt of court at every available window of opportunity. The other parties seemed satisfied with the directions of the Court of Appeal on focusing on the main appeal and did not make any concerted effort to bring to the court's attention their desire to prosecute the applications. The matter therefore proceeded for hearing and the court reserved its judgment. We have perused the judgment and note that upon conclusion of the submissions, the judges of appeal

in distilling issues before them for determination made the following remark regarding these pending applications:

> "*[31]…It is also our considered view that many other issues arising from the grounds of appeal not considered in this judgment* ***were deliberately left out for the obvious reason that we must consider only issues that do not compromise the actual hearing and determination of the dispute****."* (Emphasis ours)

[91] In the end, despite the spirited attempt by the appellant, the court went ahead to render its judgment without addressing the fate of the appellant's application for contempt or any other application for that matter. This was a deliberate step by the appellate court as noted above, the court having considered that the applications fell within the realm of those issues that did not compromise the actual hearing and determination of the dispute. Bearing in mind that the nature of the judgment was a final decision on the dispute, coupled with the final orders which had reversed the High Court orders and divested the dispute from the courts to the arbitrator, what is the appellant left with?

[92] It is trite that every litigant before court is entitled to a decision. In ***Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*** SC Petition No.12 of 2019 [2020] eKLR, we were faced with a situation whereby the Court of Appeal, though referred to the cross appeal in its judgment, failed to determine it. We held that "*there is no doubt that, for the regularity and normalcy of the trial process, the cross-appeal ought to have been determined. As the opportunity was missed, we addressed ourselves to the proper remedy to be granted."* It was clear in that matter that the substance of the judgment rendered the cross appeal to be without merit and it would serve no purpose to refer the cross appeal back to the appellate court.

[93] By dint of the above, it therefore follows that the Court of Appeal fell into error by not making any determination on the application for contempt, both when

the same was live before it and in the judgment that disposed of the matter with finality.

[94] Before addressing ourselves to the available remedy, it is imperative that we first address ourselves to our exceptional jurisdiction to determine this issue, the same not having transcended through the court hierarchy but having emanated from the Court of Appeal. The issue before us, despite having arisen at the Court of Appeal, requires our intervention. In doing so, we echo the position we adopted in ***Geoffrey M. Asanyo & 3 others v Attorney General*** SC Petition No. 21 of 2015 [2018] eKLR in which we stated as follows:

> "*We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs. In stating so, we reiterate our holding in* ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others****, Petition No. 6 of 2014; [2017] eKLR ("****Outa*** *case") that:*
>
> > *'The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all.'"*

[95] We also underscored the place of contempt proceedings in invoking our jurisdiction in the ruling delivered on 4th September 2020, in ***Stephen Maina Githiga & 5 others v Kiru Tea Factory Company Ltd*** SC Application No. 12 of 2019 [2020] eKLR pitting parties who were keen on participating in all manner of duels between them as a result of competing factions. There, we stated:

> "***[33]*** *As stated above, we have in a separate ruling determined that we have the jurisdiction to hear the Petitioners' appeal and have, in that ruling,* ***stated that the controversy around conduct of contempt proceedings by the Court of Appeal will require this Court's interrogation against constitutional principles.*** *The Respondent's submissions on jurisdiction in the present application are therefore overruled*." (Emphasis ours)

In that case, just like in the present one, throughout the proceedings before the Court of Appeal, the sword of contempt had continuously been pointed at the appellants before the Court. The contest was so pronounced that in that case, the substantive appeal had been shelved and contempt proceedings took centre stage. Summing up the position of the parties, we held as follows:

> "***[35]*** *Lastly, we have no doubt that contempt proceedings are a matter of public interest more so where allegations are made that one party is misusing the same to get at another without due process. Contempt proceedings may lead to imprisonment and therefore, where allegations of breach of the right to fair hearing are raised, this Court ought to lend an ear to the complaining party*."

[96] We also find it necessary to consider the nature and impact of the application for contempt that was held in abeyance. In doing so, did our earlier ruling in which we declined to accept jurisdiction over the appeal against the court of appeal ruling validate the position eventually taken by the appellate court? We do not think so. Just as we did in ***Geoffrey M. Asanyo & 3 others v Attorney-General*** SC Petition No. 7 of 2019 [2020] eKLR, we only pointed out that the appeal was premature as the Court of Appeal was yet to determine the dispute with finality. It was not for this Court to direct how the appellate court would have dealt with the matters before it. That was a matter properly before that court which court knew or ought to have known how to deal with all issues placed before it for determination.

[97] At the same time, there is no doubt that contempt is something to be taken most seriously in the administration of justice. As we noted in ***Republic v Ahmad Abolfathi Mohammed & another*** SC Criminal Application No. 2 of 2018 [2018] eKLR:

> *"[28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen."*

[98] We reiterated this position in the same ***Republic v Ahmad Abolfathi Mohammed & another*** SC Petition No. 39 of 2018 [2019] eKLR by stating:

> *"[28] There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice."*

In our view, just like a preliminary objection, when an issue of contempt of court arises, it is one which should be prioritised and determined *in limine* as soon as it arises. Authority of the courts over a matter is an ongoing process that should be safeguarded during and after the court process. The effect of taking court processes and in particular court orders lightly even in the face of the court is that it is likely to encourage descend into anarchy and loss of confidence in the court process.

[99] It was an unfortunate misdirection, in our view, that the appellate court, in the wake of such an application, deliberately ignored the same and shelved it as a side show. It is more disturbing that such an omission did not find any place for explanation in the judgment. The appellant argues that had the Court of Appeal

dealt with the pending applications, it would have made a different determination. The 1st and 2nd respondents, in their submissions made the argument that the distributorship agreement in issue between the parties had since lapsed and that the orders of *status quo* made by the Court of Appeal should be construed in that context. We reiterate our edict in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)*** SC Petition No. 7 of 2018 [2019] eKLR that:

> *"[83] It is our position that, in the absence of a determination by the Court of Appeal on an issue, no appeal can properly fall before the Supreme Court in exercise of its appellate jurisdiction. In* ***Basil Criticos v. Independent Electoral and Boundaries Commission & 2 Others*** *[2015] eKLR, we posed the following question:*
>
> > *'In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over?'"*

[100] The inevitable conclusion that we make from the above position is to agree with the appellant and find that the Court of Appeal erred in its refusal to decide on the pending applications either in a Ruling or indeed in the judgment. We shall address the consequences of this error at the opportune time when dealing with reliefs. As to whether that court would have arrived at a different determination had it considered the application, the same is otiose, hypothetical, speculative and overtaken by events.

iii. Whether the Court of Appeal erred in granting the reliefs contained in its judgment

[101] The appellant effectively challenges the Court of Appeal judgment in its entirety. In considering the extent of the Court of Appeal judgment, we note that it not only overturned the ruling of the High Court, but also granted relief in favour

of the respondent and adverse to the appellant, while at the same time denying the High Court jurisdiction over the dispute between the parties. Contextualizing the dispute, the appellant's amended petition filed at the High Court, as we have found, raised constitutional questions that required resolution as such.

[102] Notwithstanding the underlying commercial transaction between the parties, there was no basis under these circumstances for the Court of Appeal to resolve the dispute based on contracts which were neither the subject matter of the appellant's case nor the High Court Ruling. In making the orders, the Court of Appeal completely changed the landscape of the dispute. First, it deprived the appellant of its recourse since the distribution territories subject to the dispute were no longer available to the appellant but were instead granted to third parties. Secondly, the third parties were not privy to or expected to be bound by the said commercial agreement and third, the decision inversely created obligations and rights of the parties, with the interim relief resulting to a finality of the rights of the parties.

[103]Why do we say so? In granting the conservatory orders, the High Court retained control over the dispute as it was seized of the case and all parties were before it without any recourse to arbitration. In total contrast, the Court of Appeal, in overturning the conservatory orders and issuing further interim relief while referring the matter to the arbitrator, thereby divested itself of control over the case as the parties were deprived the liberty to proceed with the litigation. No further recourse by the parties on the interim orders was available to them before the High Court as it is equally bound by the decision of the Court of Appeal. And the Court of Appeal had on its part ceded its potential intervention in the matter to the arbitrator.

[104] The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred to as "party autonomy". Breaches, violations

and infringements of the Constitution do not fall within the jurisdiction of arbitrators and such breaches cannot be the basis of setting aside arbitral awards. We asserted this position in the case of ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*** SC Pet. No. 12 of 2016 [2019] eKLR:

> *"[76] Reading each of the above provisions, alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution are properly governed by Articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of Section 35 of the Arbitration Act."*

[105] What is more, there are parties in this matter who were not privy to the commercial transactions upon which arbitration would accrue. For instance, while the dispute was initially between the appellant and the 1st and 2nd respondents, other parties had since been added to the suit through the pleadings filed. The 3rd respondent is purported to have taken over distribution of the 1st and 2nd respondents' products within the appellant's distribution area; the 4th respondent is the holding company controlling the operations of the 1st and 2nd respondents; the 5th respondent is the 1st, 2nd, and 4th respondents' controlling entity of these entities and their operations; the 6th and 7th respondents are distributors of the 1st and 2nd respondents. In stating so we bear in mind the doctrine of corporate personality as enunciated in ***Salomon v A Salomon & Co. Ltd*** [1897] AC 22 by the House of Lords in the United Kingdom and accepted in our jurisdiction.

[106] This Court has insisted on the exhaustion of the local remedies in ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on***

behalf of the Plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme SC Petition No.3 of 2016 [2019] eKLR. This, however, refers to remedies set out in statutory provisions. The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.

[107] It is now clear that the Court of Appeal, by overturning the ruling by the High Court, fell into error in more than one respect. This was by failing to appreciate and uphold that the dispute before the court related to breach of constitutional rights. In issuing the relief countermanding that made by the High Court and by referring the matter to the arbitrator, and making a full and final determination on matters still pending before the High Court, the Court of Appeal fell into further error. We hereby correct those errors by overturning the Court of Appeal decision in its entirety. In doing so, we are alive to the fact that arbitration must remain an option open to any party within their understanding of their contract and we have seen no bar to any of them invoking any arbitral clause to assert their rights under the said contract. The filing of proceedings under the Constitution cannot *per se* be a bar.

G. RELIEFS

[108]What commends itself for our determination at this moment is the consequential reliefs to be granted in line with our finding. We note that the appellant asks the Court to set aside in entirety the Court of Appeal decision and remit the matter to the High Court for determination on merit. The appellant also seeks the full restoration of the High Court orders issued on 29th June 2016.

[109] In addressing this grievance, we cannot lose sight of the fact that, sadly the substantive petition before the High Court is yet to be determined since the year 2016 when the appellant first approached court. As the dispute is still live at the High Court, it is only proper that the High Court be allowed to proceed to hear the matter on its merits on the basis of the amended petition filed in ***Constitutional Petition No.249 of 2016***.

[110] As already observed, the Court of Appeal erred in not making any determination on the applications pending before it, what then becomes of these applications? In our view, the applications can be disposed of in two ways because the applicants were entitled to a decision one way or the other. The first option is for this Court to assume jurisdiction and deal with the applications on merit within this judgment. The other option is to remit the applications back to the Court of Appeal which was seized of them for disposal.

[111] In determining the appropriate path, we note that the Court of Appeal already having rendered itself in its judgment, now the subject of this appeal, that court is *functus officio*. In ***Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others*** [2013] eKLR, the Court cited with approval an excerpt from an article by Daniel Malan Pretorius titled, *"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832* which reads: -

> "*The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter…The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.*"

In the present matter, the Court of Appeal was aware of the pending applications, yet did not find a place to decide on the same in its final decision. In rendering the judgment, the matter concluded. There is therefore no entry window upon which that court may entertain any matter, considering that the nature of the pending applications required that they be handled in the course of the proceedings, prior to the final judgment.

[112] This leaves us with the second option of seizing the jurisdiction. This is permitted under section 21(1)(a) of the Supreme Court Act 2011 which provides:

> "(1) *On appeal in proceedings heard in any court or tribunal, the Supreme Court -*
>
> (a) *May make any order, or grant any relief, that could have been made or granted by that court or tribunal; and "*

Moreover, no purpose would be served by reopening the entire judgment of the Court of Appeal on the limited but crucial issues of contempt of court proceedings, application for joinder of a party and application for adducing more evidence in view of our finding on the fate of the Court of Appeal judgment. In addition, the inherent jurisdiction of the Court as observed in ***Geoffrey M. Asanyo; Fredrick Outa*** and ***Stephen Maina Githiga*** cases (supra) point to our need to exercise such jurisdiction to remedy any apparent wrongs arising from the

decision of the Court of Appeal. Article 159(2)(b) of the Constitution implores the courts to ensure that in exercising judicial authority, they are guided by the principle that justice should not be delayed. This matter having started in 2016, needs to have closure as quickly as possible, including the disposal of the applications that were undetermined by the Court of Appeal.

[113] In ***Hon. Gitobu Imanyara & 2 others v The Hon. Attorney General*** SC Petition No.15 of 2017, we expressed ourselves in the following manner:

> "*[72] … We further note the gravity of the admitted constitutional breach and violations, and the amount of time and expense, it has taken to prosecute the matter before court. In the peculiar circumstances of this case, referring the matter back to the trial court for purposes of assessing damages while this Court has the power to grant appropriate reliefs for constitutional violations as set out above, would further delay access to justice. …"*

The present matter calls for application of the above principle that calls for our determination of the issues as opposed to remittance to the superior courts below.

[114] With the above background, what then is our position on the application for contempt? We appreciate that the contempt proceedings arise out of the Court of Appeal's orders on an application made for stay pending appeal under rule 5(2)(b) of the Court of Appeal Rules. In order to expedite the proceedings before it, the Court of Appeal, ordered that the *status quo* as at the 11th August 2016 be maintained. On 31st October 2016, the appellants made an application for the Court of Appeal to find the appellants to have breached the '*status quo'* orders that were issued, the compliance of which is the gravamen of the contempt application.

[115] Having underscored the centrality of the contempt of court proceedings within any judicial proceedings, we are of the considered position that such an application must be most expeditiously dealt with as soon as it arises. The

approach taken by the Court of Appeal was to subordinate this application to the main hearing as parties were instead directed to engage their energies towards the substantive appeal. That being said, from the record before us, it is certain that there is a contest on what exactly amounted to '*status quo*' which the Court of Appeal desired to preserve. It is desirous that this *status quo* be ascertained as it is only upon such ascertainment that it will be possible to discern whether any contempt occurred as urged or not.

[116] The general divergence on the extent of the *status quo* position pits two sides, understandably. On one hand, the appellant is of the view that the *status quo* means the position accruing from the High Court orders made on 29th June 2016. The alternative position by the 1st, 4th and 5th respondents is that the *status quo* refers to the position of the parties as at 11th August 2016. Adopting the latter position would mean that as at 11th August 2016, there was no subsisting contractual relationship between the appellant and the 1st, 4th and 5th respondents.

[117] Without descending into the factual contestation, the record shows that the appellant, upon the issuance of the *status quo* orders on 11th August 2016 by the Court of Appeal, approached the High Court on 23rd August 2016 seeking to cite the 1st and 2nd respondents for contempt of the High Court order issued on 29th June 2016 and to have its key personnel punished for such contempt by way of fine and committal of the Directors of the 1st and 2nd respondents to civil jail. This application before the High Court was opposed by way of a replying affidavit on behalf of the 1st and 2nd respondents. In the said affidavit, the nature of the court of appeal orders and the contempt thereon is brought out, the basis upon which we distilled the two competing positions stated above.

[118] At this juncture, we need to caution that courts should be careful when issuing conservatory and other interim relief to parties. In particular, while it is well intended to preserve the substratum of the case by way of *status quo* orders, sight should never be lost of the fact that parties appearing before courts for such

urgent relief are always at the height of their contest. If indeed the courts must use the term *status quo*, it is only practical that the same be accompanied by the descriptive particulars of the exact position that the Court seeks to preserve. This will avoid situations like the present one where each party is left to its own perception as to what the court meant. This ultimately erodes the very essence of court intervention and subjects the court to undesirable controversy regarding compliance with the said order.

[119] This is a position that the Court of Appeal itself has previously grappled with. In ***Saroj K. Shah vs. Naran Mani Patel & 2 others*** [2015] eKLR it expressed itself regarding the lack of clarity on *status quo* orders as follows:

> *"We need to state, however, that counsel for the respondents is justified in raising concerns about the issuance of generic status quo orders. An order to maintain the status quo can mean anything, everything and nothing. Unless it is clearly spelt out in precise and unambiguous terms what the status at a particular point in time is, it is a recipe for frustration and embarrassment for the court to simply order, without more, that the status quo be maintained. Such vague and imprecise orders serve only to embolden individuals so-minded to do that which is intended to be prohibited or injuncted secure that they can escape because status quo was never spelt out clearly."*

[120] In our view, there is no doubt that the Court of Appeal *status quo* order with which we are faced fits in the foregoing crucible of unclarity. The order of the Court made on 11th August 2016 provided:

> "*...In the interim however there is* ***apparent disagreement as regards the current status quo****. There is however no dispute that the parties* ***continue to trade and have done so over a long period****. To fast track the hearing of the appeal, we make the following orders and give the following directions.*

...

(5) *In the interim as the parties have been trading and have a special relationship we order that the status quo obtaining* ***as at today*** *be maintained pending the hearing and determination of the appeal.*

..." (Emphasis ours)

This was not made any better by the failure of the Court of Appeal to explain itself in the judgment in regard to the meaning of the three short sentences under (5) above.

[121] To us, the above orders appreciate the existence of certain facts. First, the parties were not in agreement as to what the prevailing position was and second, the parties were still trading, as they had done over a period of time. The High Court was caught up in this predicament as captured in ***Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 4 others*** [2016] eKLR when, in a ruling made on 24th October, 2016 on the 2nd respondent's preliminary objection to the appellant's application dated 23rd August, 2016 for contempt, stated as follows:

> *"It is not in doubt that a status quo order was issued by the Court of Appeal on 11 August 2016. A status quo order simply maintains a state of affairs between the parties. It is best suited and applied by the court when the state of affairs is pellucidly defined.* ***Unfortunately, and with unfeigned respect to the Court of Appeal, it would not be wrong to state the state of affairs it intended to have the parties herein maintain simply left the parties in an apparent quagmire.*** *(sic)* ***I will however not endeavour to try and demystify the state of affairs as of 11 August 2016 which obtains till now."*** (Emphasis ours)

[122] So, what then was the *status quo*? After our careful consideration, we are persuaded that it could only mean the position as obtaining at the High Court. Our underpinning of this position is that the proceedings before the Court of Appeal

only ensued as a result of the decision by the High Court made on 29th June 2016. A perusal of the said application made before the Court of Appeal by the 1st and 2nd respondents dated 6th July 2016 resulting in the *status quo* orders reveals that the applicants therein sought four main prayers, to wit:

a) Stay of the orders made by the Honourable Mr Justice Onguto on 29th June 2016 allowing the appellant's application dated 14th June 2016 pending the *inter partes* hearing and determination of the appeal;
b) Stay of further proceedings in High Court Petition No.249 of 2016 pending the hearing and determination of the appeal filed before the Court of Appeal;
c) An order of injunction restraining the appellant, its principals, agents, servants, employees or any other person from interfering with the distributorship of the products pending the *inter partes* hearing and determination of the appeal;
d) In the alternative, an order for parties to resume the *status quo* obtaining before 14th June 2016.

[123] The application was grounded on the position that had been argued before the High Court calling for referral of the matter to arbitration pursuant to clause 15.2 of the agreement dated 3rd June 2016. No evidence has been presented to demonstrate that it was brought to the Court of Appeal's attention that the situation had changed either at the time of filing the application or at the time the order of 11th August 2016 was made by the Court of Appeal. It is indeed the very basis of the High Court proceedings that the respondents sought to refer the matter to the arbitrator under the situation that was prevailing at the time, the merits of which are still pending before the High Court. The reason the said respondents moved to the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules was to prevent the execution and implementation of the decision of the High Court.

[124] What we make of the order by the Court of Appeal is that the issues raised were to be resolved in the substance of the appeal and that no direct orders sought

were granted as to affect the orders of the High Court in place as at 11th August 2016. It is for this very reason that the appeal was fast tracked for determination. For avoidance of doubt, the position then obtaining is as in the High Court orders of 29th June 2016, preserving the dealings of the parties as at 2nd February 2006. The High Court had rendered itself as follows:

> *"133. The application dated 14 June 2016 succeeds on the following terms:*
> *a) Pending the hearing and final determination of the Petition herein a conservatory order will issue preserving the Petitioner's Bia Tosha territory exclusively to the Petitioner under the area of operation arrangement obtaining as at 2nd February 2006.*
> *..."*

[125] The rationale by the High Court in basing its decision as at 2nd February 2006 is that the appellant had paid goodwill to the 1st respondent in the sum of Kshs.27,300,000/= on that day which must have accrued some rights over a distribution route. The High Court had initially granted *ex parte* orders on 14th June 2016 which the 1st and 2nd respondents on the one hand and the 3rd respondents on the other hand had unsuccessfully tried to vary. This can only mean that the appellant, by the conservatory orders issued had its routes stated in the petition and the application for conservatory orders being *Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satelitte, Dagoretti, UDV A, UDV B, and UDV C,* protected.

[126] We cannot, by this judgment, conclusively determine the merits of the case by the appellants that is otherwise pending before the trial court. However, we can deduce and establish from the declaration by the superior courts below that there existed continuing business arrangement with the 1st and 2nd respondents as at 2nd February 2006 which the High Court preserved. The *status quo* orders by the Court of Appeal did not vary this position by the High Court and that explains why the

appellant moved the Court of Appeal for contempt proceedings against the 1st and 2nd respondents.

[127] It is ingenious for the respondents to now turnaround and raise expiry of contract that was never the subject of the court proceedings and determination. Even if that were to be the case, it is absurd that the 1st, 4th and 5th respondents would on one hand invoke the expiry of the contract to justify noncompliance with the court orders while at the same time relying on the same 'expired' contract to refer the matter to the arbitrator. One cannot simultaneously simply approbate and reprobate. Moreover, the order of the Court of Appeal affirms that as at 11th August 2016, when the contract relied upon by the respondents had ostensibly expired, the parties were still trading. This is the trading arrangement that both superior courts below preserved during the pendency of the hearing.

[128] This, in our view, points to the fact that there was breach of the *status quo* orders. This was manifest in the 1st and 2nd respondents' attempt to terminate the contract with the respondent or otherwise interfere with the said routes as revealed in the position on record taken by the said respondents. In the Replying Affidavit sworn by Nadida Rowlands in response to the appellant's Application dated 23rd August, 2016 the 1st and 2nd respondents state that the routes allocated under the two-month agreement were: Hurlingham, Industrial Area, Kenyatta, Langata, Nairobi West, South B and Upper Hill**.** In the letter dated 5th August, 2016 the 1st and 2nd Respondents' Advocates request for evidence from the appellant of distribution routes as at 2nd February, 2006 was in our view mischievous in view of their long-standing partnership. This by extension amounted to contempt of court on the part of the 1st and 2nd respondents and prompted the applications to court by the appellant.

[129] Having overturned the Court of Appeal judgment and having established that there was contempt of court, the same should not go unpunished. The Supreme Court has, under section 28(4) of the Supreme Court Act the same powers

and authority as those of the High Court to punish for contempt of court. The Supreme Court may also, under section 22 of the Supreme Court Act, remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter. We have already stated that the dispute is live before the High Court. We also note that the application for contempt was promptly filed by the appellant both at the High Court and at the Court of Appeal once the appellant noticed that the respondents had altered the obtaining status.

[130] For these reasons we direct the High Court to, on the basis of our finding on contempt, issue suitable punishment for contempt of court on priority basis as it deals with the petition pending before it on its merits. We note that there is a pending application before the High Court for contempt arising out of what we have now set out to be the status *quo*. The said respondents can only appear at this point before the High Court to purge the contempt before they can be allowed audience before the court, now seized with the matter. This is not novel. It is the position we took in ***Hon. Gitobu Imanyara & 2 others v The Hon. Attorney General (supra)*** wherein we found as follows:

> "*[102] …We do therefore find that the losses suffered by the Finance Magazine was as a result of an infraction of the 2nd appellant's fundamental rights and freedoms. Consequently, we will allow his prayer but subject to the matter being referred back to the trial court to determine the 2nd appellant's claim and quantum for special damages based on the evidence on record.*"

[131] The logical upshot of this finding is that the orders of 29th June 2016 made by the High Court be, and are so fully restored to enable the Court resume the hearing on merit of the amended petition pending before it. Having found that there was contempt of court, the High Court should also proceed to assess the suitable punishment arising out of the contempt application dated 23rd August 2016 by the appellant pending before it. As for costs, it is the settled principle that

costs follow the event. Accordingly, the appellant is awarded costs in the Court of Appeal and in this Court as against the 1st and 2nd respondents who are the primary disputants.

[132] Before we conclude, we thank all Counsel for their erudite input, research and presentation in the course of the hearing of this matter.

[133] In conclusion and for all the reasons given, we find merit in this appeal and grant relief as set out hereunder.

H. ORDERS

[134] Consequently, upon our conclusion, we order that:

(i) The appeal dated 20th August 2020 be and is hereby allowed;

(ii) The judgment and orders of the Court of Appeal in Civil Appeal No. 163 of 2016 delivered on the 10th July 2020 be and are hereby set aside in entirety;

(iii) The High Court orders of 29th June, 2016 be and are hereby reinstated and the Court do consider the consequences of any disobedience of those orders;

(iv) The matter be and is hereby remitted to the High Court for disposal of the Amended Petition dated 20th June 2016 pending before the High Court on priority basis; considering the age of this matter;

(v) Costs in the Court of Appeal and in this Court are awarded to the appellant as against the 1st and 2nd respondents.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **17th** of **February, 2023**

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

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