REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 17 (E024) OF 2021

— BETWEEN —

KENYA ELECTRICITY TRANSMISSION CO. LIMITED (KETRACO) ..... APPELLANT

-AND-

INSTALANCIONES INABENSA S.A ..... RESPONDENT

(Being an appeal from the Ruling of the Court of Appeal at Nairobi (Makhandia, Mbogholi & M. Ngugi, JJ.A.) dated 19th November, 2021 in Miscellaneous Application No. E.56 of 2021)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion taken out by the Appellant/Applicant on 6th May, 2022 and filed on 27th May, 2022, pursuant to Sections 21 and 24 of the Supreme Court Act 2011, Rule 31 as well as Rule 32 of the Supreme Court Rules 2020, for the following Orders:

> *"i) ...Spent*
>
> *ii) ...Spent*
>
> *iii)* ***THAT*** *a* ***CONSERVATORY ORDER*** *do issue maintaining the status quo prevailing prior to the Court of Appeal Ruling delivered on 19th November 2021 and to prevent the Respondent from executing the Arbitration Award dated 30th July, 2019 and recognized as a Decree of the High Court by a Ruling delivered by*

the High Court on 12th February 2021 (M. Odero, J.) pending the hearing and determination of the Petition of Appeal.

iv) That costs of this Application be provided for."

[2] UPON reading the affidavit by Ms. Lydia Wanja, the Applicant's Manager Legal Services, sworn on 6th May, 2022 in support of the Motion; and

[3] UPON considering the applicant's submissions dated 6th May, 2022 wherein the applicant contends that it has a right of appeal under Article 163(4)(a) of the Constitution; that the Court of Appeal failed to properly invoke its jurisdiction under Article 164(3) of the Constitution to determine whether or not to grant leave to appeal a decision of the High Court under Section 35 of the Arbitration Act in the manner stipulated by this Court in the decisions in ***Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)***, SC Petition No. 12 of 2016; [2019] eKLR and ***Synergy Industrial Credit Limited v. Cape Holdings Limited,*** SC Petition No. 2 of 2017; [2019] eKLR; that the failure has led to infringement of the applicant's rights under Articles 25(c) and 50(1) of the Constitution; that the appeal has a constitutional trajectory; and that Section 24 of the Supreme Court Act grants this Court the jurisdiction to grant the orders sought herein; and

[4] FURTHER, that the applicant has an arguable appeal for the reason that instead of applying the threshold enunciated by this Court in the ***Nyutu Case*** the Court of Appeal based its decision on the validity of a Notice of Appeal under Section 75 of the Civil Procedure Act, as a result of which the applicant's rights have been infringed; that the court's interrogation on the validity of the Notice of Appeal was unlawful as no leave to appeal had been granted. In view of the foregoing, the applicant posits that the appeal will be rendered nugatory because: colossal sums are involved in the dispute and the Respondent is facing financial difficulties

following its listing as a debtor in a voluntary petition for Non-Individual filing for Bankruptcy by its affiliate company, Albeinsa Holdings Inc. being cause No.16-10790 filed in the United States of America Bankruptcy Court of the District of Delaware; that should the appeal succeed after the funds have been paid out to it, the respondent will not be able to make restitution to the applicant; and finally, that the applicant being a public institution, it is in the public interest that the funds be secured from the risk of execution pending determination of the appeal; and

[5] UPON reading the respondent's replying affidavit by Mr. Pablo Infante Cossio, the General Manager of the respondent, sworn on 14th June 2022 in opposition to the motion; and

[6] UPON considering the respondent's submissions dated 16th June, 2022 to the effect that the Motion is devoid of merit and is solely intended to deny the respondent the fruits of judgment made in its favour; that it has been over 6 years since the dispute arose on 25th April, 2016 contrary to the fundamental pillars of arbitration that emphasizes on party autonomy, finality of arbitral awards and non- interference by courts; and that the application does not meet the conditions for the grant of conservatory orders, first for having failed to demonstrate that the appeal is arguable in the absence of leave to appeal as set out in the ***Nyutu Case***. On the nugatory aspect, the respondent submits that this being a money decree and in view of the fact that the award can be reversed, the appeal, if successful will not be rendered nugatory; and that, in any case the applicant has not offered security as a condition precedent for the conservatory orders sought. Finally, the respondent submits that the only argument advanced by the applicant is that it is a public institution run on public funds, yet both courts below have found that the dispute was purely commercial and not one relating to public funds; and that it is not enough for the applicant to claim that it is a custodian of public funds for which reason it ought to be shielded from execution without demonstrating the jeopardy

likely to be suffered should the funds, the subject of the award be paid to the respondent; and

In the above context, **WE NOW OPINE** as follows:

[7] ACKNOWLEDGING that the applicant did not have an automatic right of appeal to the Court of Appeal from a decision of the High Court under Section 35 of the Arbitration Act, it must, of necessity follow that the question whether or not to grant leave to appeal was a discretionary exercise of judicial power by the Court of Appeal. In an appeal from a decision based on the exercise of discretionary powers, an applicant has to show that the decision was based on a whim, was prejudicial or was capricious and this Court stated in ***Deynes Muriithi & 4 others v. Law Society of Kenya & Another***, SC Application No. 12 of 2015; [2016] eKLR, that, as the ultimate custodian of constitutional integrity, it may interfere with the exercise of discretion by another court where it is satisfied that that court misapplied the law or the orders made by that other courts are in conflict with express provisions of the Constitution and destined to occasion grave injustice.

[8] FURTHER, we stress, as we did in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another*** SC Application No. 3 of 2014; [2015] eKLR, that not all decisions of the Court of Appeal are subject to appeal to this Court. For example, discretionary pronouncements by the Court of Appeal is one of the categories of decisions falling outside the set of questions appealable to this Court. Such discretionary decisions are by no means the occasion to turn this Court into a first appellate Court.

[9] RESTATING the settled position that the mere citing of Article 163(4)(a) and pleading that a question of application and interpretation of the Constitution is involved in an appeal *per se* would not be sufficient to clothe this Court with

jurisdiction to entertain the appeal. See ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another,*** SC Petition No. 3 of 2012; [2012] eKLR.

[10] Secondly, for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination. See ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others,*** SC Petition No. 2 of 2012 [2012] eKLR. This principle emphasises the limits of the power exercised by the Supreme Court. It cannot extend it beyond its jurisdictional limits prescribed to those of the courts and tribunals below it.

[11] BEARING in mind that the application seeks a conservatory order, it is important to observe here that in the entire text of the Constitution the phrase "conservatory order" appears only in Article 23 of the Constitution, as one of the instruments available to courts in the protection and enforcement of constitutional freedoms and fundamental rights.

[12] THAT being the case, the next and final principles applicable to an application for conservatory order is that, a party seeking the relief must demonstrate that, unless the Court grants the order, there will be real danger of that party suffering prejudice as a result of the violation or threatened violation of the party's constitutional rights. Therefore, an application for conservatory orders as enunciated in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others***, SC Application No. 5 of 2014; [2014] eKLR, must satisfy the following strictures;

a) The Appeal or intended appeal is arguable and not frivolous,

b) Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory, and

c) That it is in the public interest to grant the conservatory orders sought.

[13] To determine the question whether or not an appeal is arguable, the Court must not interrogate the merit of the appeal or make definitive findings of either fact or law at this stage as doing so may embarrass the Court when finally called upon to determine the appeal itself. An arguable appeal is, therefore not one which must necessarily succeed, but one which ought to be argued fully on its merits before the court.

[14] On the nugatory aspect, the court is only concerned with the question whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See the decision of the Court of Appeal in ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others*** Civil Application No 31 of 2012; [2013] eKLR.

[15] Is it in the public interest to grant the conservatory orders? A matter will qualify as one of public interest if it is one in which a class of the community has a pecuniary interest or some interest by which their legal rights or liabilities are affected. See ***Nubian Rights Forum & 2 others v. Attorney General & 6 Others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae)***, Consolidated HC Petition Nos. 56, 58 & 59 of 2019; [2019] eKLR. A matter is in the public interest if is presented as a means of advancing human rights and equality, or raises issues of broad public concern.

[16] GUIDED by all the foregoing principles we consider, first that from the dispute before the arbitrators (Tribunal) was one of breach of contract with the High Court declining to set aside the award and instead recognizing it as binding and enforceable. Before the Court of Appeal, the applicant sought an order to stay the decision of the High Court and leave to challenge it. It is therefore doubtful, for these reasons, that any question of interpretation or application of the Constitution would arise from the determination of the two courts. We do not think it is enough to clothe the Court with jurisdiction to merely make reference in the application

before the two courts to the fact that the application was anchored on certain provisions of the Arbitration Act, Civil Procedure Act as well as the Court of Appeal Rules "as read with" certain Articles of the Constitution.

[17] CONSEQUENTLY we take the view, without conclusively determining the issues in contention, that these principles have not been satisfied and the three conditions precedent for the grant of a conservatory relief have not been met. For the reasons given in paragraph 16 above, the appeal is not arguable. We too are not convinced that the appeal will be rendered nugatory, or that it is in the public interest to grant the conservatory orders sought.

The motion, for these reasons fails and is dismissed with costs.

[18] ACCORDINGLY, we make the following orders:

i) The Notice of Motion dated 6th May, 2022 is hereby dismissed.

ii) Costs are awarded to the Respondent.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **7th** Day of **October, 2022.**

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

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

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

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA