



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram; Mwilu (DCJ & VP), Ibrahim, Wanjala, Lenaola & Ouko SCJJ)*

**PETITION (APPLICATIONS) NO. E006 OF 2022**

–BETWEEN–

**KIMANI GACHUHI .....1<sup>ST</sup> PETITIONER**

**PETER MBUTHIA GACHUHI ..... 2<sup>ND</sup> PETITIONER**

–AND–

**EVANGELICAL MISSION FOR AFRICA .....1<sup>ST</sup> RESPONDENT**

**CINDY SANYU OKOVA ..... 2<sup>ND</sup> RESPONDENT**

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*(Being applications for stay of execution and to strike out the Petition dated 10<sup>th</sup> March 2023 against the Judgment and Orders of the Court of Appeal at Nairobi (Okwengu, Makhandia & M’Inoti, J.J.A) delivered in Civil Appeal No. 159 of 2015 on 3<sup>rd</sup> February 2023*

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**Representation:**

Kamau Karori, SC..... for the petitioners  
*(Iseme, Kamau & Maema Advocates)*

Ahmednasir Abdullahi, SC..... for the respondents  
*(Ahmednasir Abdullahi Advocates LLP)*

## **RULING OF THE COURT**

[1] **WHILE** appreciating their correlation, this Ruling will dispose of two Notices of Motion, the first by the petitioners dated 23<sup>rd</sup> March 2023, seeking stay of execution and injunctive Orders and the second by the respondents dated 30<sup>th</sup> March 2023, seeking to strike out the petition dated 10<sup>th</sup> March 2023 for want of jurisdiction.

[2] **UPON** perusing the first Notice of Motion dated 23<sup>rd</sup> March 2023 and filed on 28<sup>th</sup> March 2023 brought pursuant to Section 3, 3A, 21, 23 (A) of the Supreme Court Act, 2011 and Rule 32 of the Supreme Court Rules, 2020, seeking;

*stay of execution of the Judgment and Orders of the Court of Appeal delivered in **Civil Appeal No. 159 of 2015** on 3<sup>rd</sup> February 2023; an order restraining the 1<sup>st</sup> respondent, its principals, agents or those authorized by it from excavating, developing or carrying out any developments or activities that alter the parcel of land known as L.R No. 2951/84 (**hereinafter the Suit Property**); and an order of injunction restraining the 1<sup>st</sup> respondent, its principals, agents or those authorized by it from denying the petitioners access to the suit property, (pending the hearing and determination of the instant application and the appeal thereof); and*

[3] **UPON** considering the petitioners' grounds on the face of the application and affidavit in support sworn by the 1<sup>st</sup> petitioner on 23<sup>rd</sup> March 2023, in which he contends that; the appeal is arguable with high chances of success, (they restate the 10 grounds in their Memorandum of Appeal to support this argument); unless stay is granted, they are apprehensive the appeal will be rendered nugatory as the respondents have threatened to proceed with the transfer of the suit property; there is a real danger the respondents will continue excavation and construction activities on the suit property; the Court of Appeal granted stay of execution and/or access to the petitioners in similar applications filed during the pendency of

proceedings therein; proceedings before the High Court are ongoing and the matter was scheduled for mention on 27<sup>th</sup> March 2023 to ensure compliance with the directions for appointment of arbitrators by the parties; otherwise the petitioners will suffer irreparable damage; and it is in the interest of justice to grant the prayers sought; and

[4] UPON considering the petitioners' submissions dated 23<sup>rd</sup> March 2023 and supplementary submissions dated 6<sup>th</sup> April 2023, to the effect that the appeal upon which the application is anchored raises issues of constitutional interpretation and application, hence this Court is clothed with jurisdiction under Article 163 (4) (a) of the Constitution; and similarly, the Court's jurisdiction to grant stay and injunctive orders is donated by Sections 3, 3(A), 21 and 23(A) of the Supreme Court Act. Moreover, it is contended that, the petitioners have met the principles for grant of stay of execution and injunction; the appeal raises weighty and *bona fide* issues; meets the public interest requirement; and the respondents stand to suffer no prejudice. The petitioners also restate their grounds in support of the Motion and cite this Court's decisions in ***Board of Governors, Moi High School, Kabarak & Another v. Malcom Bell***, SC Application No. 1 of 2013; [2013] eKLR; and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Application No. 5 of 2014; [2014] eKLR and the Court of Appeal in ***Reliance Bank Limited v. Norlake Investment Limited*** [2002] 1 E.A 227; and ***Kenya Power & Lighting Company Ltd v. George Joseph Kang'ethe & Another*** [2020] eKLR to urge the Court to grant the prayers sought; and

[5] NOTING the respondents' preliminary objection dated 30<sup>th</sup> March 2023 and submissions of even date, filed on 4<sup>th</sup> April 2023, wherein it is urged that this Court lacks the requisite jurisdiction to hear the Motion as the same is premised on an incompetent petition. It is the respondents' further case that the Judgment of the Court of Appeal was solely premised on a judicious inquiry to ascertain whether or not the High Court, in setting aside the arbitral award, adhered to the four corners

of Section 35 of the Arbitration Act. Furthermore, it is submitted that the impugned Judgment did not raise issues of interpretation and application of the Constitution. They cite various decisions of this Court, including **Hassan Ali Joho & Another v. Suleiman Said Shabal & 2 Others**, SC Petition No. 10 of 2013; [2014] eKLR; **Erad Suppliers General Contractors Limited v. National Cereals & Produce Board**, SC Petition No. 5 of 2012; [2012] eKLR; and **Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others**, SC Petition No. 2 of 2012; [2012] eKLR to buttress this argument. Therefore, it is urged that since the underlying petition is not one grounded on Article 163 (4) (a) or (b) of the Constitution, the same ought to be struck out *in limine*. The respondents further cite **The Owners of Motor Vessel Lillian 'S' v. Caltex Oil (Kenya) Ltd** [1989] KLR; and **Samuel Kamau Macharia & Another v. KCB Ltd & 2 Others**, SC Application No. 2 of 2011; [2011] eKLR to urge that, without jurisdiction, this Court must down its tools; and

[6] UPON considering the second Notice of Motion dated 30<sup>th</sup> March 2023 and filed on 4<sup>th</sup> April 2023 brought under Article 163 (4) (a) and (b) of the Constitution, Sections 12, 15, 21 (2) of the Supreme Court Act, 2011, and Rules 3 (4) and (5), 31 (6) and 40 (1) of the Supreme Court Rules, 2020 seeking to *strike out the Petition dated 10<sup>th</sup> March 2023 with costs*; and

[7] UPON considering the grounds in support, the respondents' supporting affidavit sworn by Hwa Ock Im, the grounds of opposition dated 24<sup>th</sup> March 2023, submissions dated 30<sup>th</sup> March 2023, and submissions in rejoinder dated 26<sup>th</sup> April 2023, wherein the respondents reiterate their arguments and submissions to the preliminary objection, the first Motion and further urge that; the High Court in Civil Application No. 479 of 2014 heard and allowed an application to set aside the arbitral award in issue under Section 35 of the Arbitration Act on grounds that the same was against public policy; the Court of Appeal, in its impugned Judgment upheld the High Court guided by the law settled by this Court in **Synergy Industrial Credit Limited v. Cape Holdings Limited**, SC Petition No. 2 of

2017; [2019] eKLR (**Synergy Case**) and **Nyutu Agrovet v. Airtel Networks Kenya Limited & Another**, SC Petition No. 12 of 2016; [2019] eKLR (**Nyutu Case**); the Court of Appeal Judgment was exclusively based on Section 35 of the Arbitration Act; the appeal before this Court is not grounded on either Article 163 (4) (a) or (b) of the Constitution; this Court determined in **Geochem Middle East v. Kenya Bureau of Standards**, SC Petition No. 47 of 2019; [2002] eKLR (**Geo Chem Case**) that it lacks jurisdiction to entertain an appeal emanating from an application to set aside an arbitral award under Section 35 of the Arbitration Act; the petitioners are challenging the appellate court's *obiter dictum* as opposed to the *ratio decidendi*; and consequently the petition is incompetent, vexatious and an abuse of the court process; and

[8] UPON considering the petitioners' replying affidavit sworn by Kimani Gachuhi on 14<sup>th</sup> April 2023 and submissions of even date both filed on 24<sup>th</sup> April 2023, wherein they restate the grounds of appeal relied on in their petition and their submissions to the first Motion adverted to earlier. They further urge, that; the petitioners have an automatic right of appeal; this Court has jurisdiction to determine the appeal under Article 163 (4) (a) of the Constitution (in addition to the authorities on jurisdiction cited by the respondents, they rely on **Rutongot Farm Ltd v. Kenya Forest Services & 3 Others**, SC Petition No. 2 of 2016; [2018] eKLR); the parties substantively submitted on and the superior courts below interpreted and applied Articles 10 (1) (a) to (c) and (2) (a), 40, 163 (7) and 165 of the Constitution when considering the application for setting aside the arbitral award; it is the interpretation of these provisions that is challenged before this Court; and the respondents have preferred the application to strike out the petition with a view to pre-empting the substantive issues raised therein; and

[9] CONSIDERING that the parties herein voluntarily referred their dispute to arbitration and by an award delivered on 19<sup>th</sup> August 2014, the tribunal directed the 1<sup>st</sup> respondent to vacate and hand over the suit property to the petitioners; aggrieved, the respondents sought to set aside the arbitral award by way of an

application filed pursuant to Sections 35 and 39 of the Arbitration Act; by a Ruling delivered on 19<sup>th</sup> May 2015, the High Court set aside the award under Section 35 (2) (b) (ii) for being in conflict with public policy and referred the matter to arbitration for the second time; aggrieved and on application for leave, the petitioners were granted leave to file an appeal under Section 35 of the Arbitration Act; the petitioners appealed to the Court of Appeal and by a Judgment delivered on 3<sup>rd</sup> February 2023, the appellate court dismissed the appeal and affirmed the trial court; and

**[10] NOTING** that a preliminary objection on jurisdiction has been raised by the respondents on the question *whether this Court has jurisdiction under Article 163 (4) (a)*, it is our considered view that the challenge of our jurisdiction goes to the competency of the application for stay as well as the appeal. It is therefore apposite to deal with this issue in the first instance; and

**[11] BEARING IN MIND** that this Court settled with finality the question of the Court of Appeal's and our jurisdiction to hear and determine appeals on a determination made under Section 35 of the Arbitration Act in the *Nyutu Case* [supra] wherein we stated:

***“[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.”***

[Emphasis added].

[12] NOTING that, subsequently in the **Synergy case** [supra], we affirmed our decision in the **Nyutu Case** and succinctly reiterated the requirements to be met by a party who wishes to be heard by the Court of Appeal on an appeal from a decision of the High Court made under Section 35 of the Arbitration Act; and

[13] CONSIDERING that in the **Geo Chem Case** [supra] we expressly limited our jurisdiction and clarified that;

***“41. ...we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. .... .., one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.”*** [Emphasis added]

[14] WE NOW OPINE as follows:

- (i) Examining the record and the Judgments of the superior courts below, it is inarguably clear that the High Court interrogated and applied the requirements for setting aside an arbitral award under Section 35 of the Arbitration Act and set aside the same on grounds

that it upset Sections 35 (2) (b) (ii) of the Arbitration Act and was against public policy;

- (ii) Similarly, in its Judgment, the Court of Appeal confined itself to the issue, *whether the High Court erred in setting aside the arbitral award under Section 35 of the Arbitration Act*. To answer this question, it interrogated the findings of the trial court within the parameters settled by the jurisprudence of this Court. It affirmed the trial court's decision;
- (iii) Consequently, we agree with the respondents that no issues of contestation revolving around the interpretation or application of the Constitution have arisen to warrant the exercise of this Court's jurisdiction under Article 163 (4) (a) of the Constitution;
- (iv) Guided by our finding in ***Geo Chem*** [supra], we find that we lack the jurisdiction to entertain the petitioners' application for stay of execution and the petition dated 10<sup>th</sup> March 2023; and
- (v) Having so found, the other issues arising from the parties' rival submission must fall by the way side.

**[15] CONSEQUENTLY** and for reasons aforesaid, we make the following Orders:

- (i) *The Notice of Motion dated 30<sup>th</sup> March 2023 and filed on 4<sup>th</sup> April 2023 be and is hereby allowed;***
- (ii) *The Notice of Motion dated 23<sup>rd</sup> March 2023 and filed on 28<sup>th</sup> March 2023 be and is hereby dismissed;***



**SUPREME COURT OF KENYA**

