



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. E039 OF 2024**

**BETWEEN**

**JOVET (KENYA) LIMITED.....APPELLANT**

**VERSUS**

**BAVARIA N. V.....RESPONDENT**

---

*(Being an appeal from the Judgment of the Court of Appeal in Nairobi (Kairu, Ole Kantai & Ali-Aroni JJA) in Civil Appeal No. 158 of 2019 delivered on 11<sup>th</sup> October, 2024)*

---

**Representation**

Mr. Kent Omondi for the Petitioner

*(Okoth & Kiplagat Advocates)*

Cecil Kuyo for the Respondent

*(Coulson Harney LLP)*

**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

[1] The petition of appeal before this Court is dated 22<sup>nd</sup> November, 2024 and was filed on 25<sup>th</sup> December, 2024 as of right pursuant to Article 163(4)(a) of the Constitution. It is challenging the decision of the Court of Appeal at Nairobi (*Kairu, Ole Kantai & Ali-Aroni JJA*) in **Civil Appeal No. 158 of 2019** delivered on 11<sup>th</sup>

October, 2024 which upheld the High Court’s finding that the appellant had not proved its claim on the right to payment of goodwill emanating from an alleged distribution arrangement for the respondent’s beverages by the appellant. The appellant in that regard urges this Court to interpret the definition of *goodwill*, determine whether it constitutes property that is protectable under Article 40 of the Constitution and assess whether the trial court and the Court of Appeal erred by overlooking the constitutional dimensions of the dispute, thereby infringing on its rights under Article 50 of the Constitution.

## **B. LITIGATION BACKGROUND**

[2] The appellant, Jovet (Kenya) Limited, is a limited liability company incorporated in Kenya and undertaking the business of distribution of certain beverages in Kenya. The respondent (formerly Bavaria N.V. and now Swinkels Family Brewers N.V.) is a company incorporated in the Netherlands and describes itself as an independent brewery in Netherlands and produces and exports alcohol-free and speciality beers to various countries around the world including Tanzania and Kenya.

[3] The dispute concerns the importation, distribution and marketing of the various alcoholic and nonalcoholic drinks “under the Bavaria Label N. V. Holland (Bavaria)” in Kenya with the appellant contending that it had sole rights to market and distribute the drinks in Kenya and that the respondent had breached their unwritten agreement when it improperly terminated the same by a notice of 28<sup>th</sup> August, 2015; a claim the respondent, Bavaria continues to deny. Following the termination, the appellant, Jovet (Kenya) Ltd, filed **Civil Suit No. 1756 of 2016** before the Chief Magistrate’s Court at Milimani, Nairobi, seeking to stop the respondent from terminating the distribution arrangement. The suit was however withdrawn before it was heard or determined on merits.

### ***i. Proceedings before the High Court at Nairobi***

[4] In 2017, Jovet (Kenya) Ltd filed a constitutional petition dated 4<sup>th</sup> April 2017 before the Constitutional and Human Rights Division of the High Court in ***Petition No. 134 of 2017*** averring that the respondent had engaged it to distribute its products in Kenya which contract was independent of the one the respondent had with Jovet (Tanzania) Ltd. It was further contended that, on being so engaged, the appellant deployed its own funds and capital to ensure an elaborate distribution network and outlet of the respondent's products in Kenya which included the construction of warehouses, branded outlets, procurement of transport vehicles, and creation of a sales infrastructure, significantly boosting the respondent's market presence in Kenya. The appellant further alleged that its financial contributions created *goodwill* for the respondent's products and provided evidence of loans taken to support these efforts. Additionally, the appellant highlighted its marketing initiatives, such as advertisements in major newspapers and securing product placements in leading supermarkets. It further referenced communications with Bavaria's personnel to demonstrate the existence of a direct working relationship.

[5] The appellant furthermore asserted that its significant investment in the marketing and distribution of the said products generated *goodwill that constitutes property protected under Article 40 of the Constitution of Kenya*, and the expiration or termination of the appellant's distributorship by the respondent was and is unconstitutional, null and void as it is arbitrary, unfair, unconscionable, discriminatory, lacking in bona fides and violates public policy.

[6] As a result, the appellant sought the following orders:

- a. *A declaration that the appellant has and continues to have exclusive distributorship of all of the respondent's products within the territory of Kenya.*

- b. *A declaration that the goodwill generated, acquired and produced by the appellant in respect of the respondent's products in Kenya is property and is protected under Article 40 of the Constitution of Kenya.*
- c. *A declaration that the respondent's-imposed terms of trade in relation to the distributorship herein are arbitrary, unfair, unconscionable, discriminatory, coloured in bad faith and otherwise violate the public policy of Kenya and are to that extent null and void.*
- d. *A declaration that the respondent's conduct with regard to the purported termination of the appellant's distributorship or the purported expiry of the said distributorship is null and void on the grounds that such termination or expiry/offends the Constitution of Kenya for being unreasonable, unfair, lacking in bona fides and is contrary to public policy.*
- e. *Pending the hearing and determination of the Petition herein that a temporary and subsequent permanent conservatory/injunctive orders do issue preserving the appellant's distributorship in Kenya in respect of all the Respondent's products.*
- f. *Damages as particularized in the Petition.*
- g. *Any other or further reliefs that this honourable court may deem fit to grant.*
- h. *Costs.*

[7] According to the respondent, it was engaged in several contractual distributorship agreements with Jovet (Tanzania) Limited, since 1<sup>st</sup> December, 2004. On 27<sup>th</sup> June 2011, it entered into an agreement (*hereinafter "the Distribution Agreement"*), giving Jovet (Tanzania) Limited the right to exclusive distribution of the respondent's products in Kenya and Tanzania. The Distribution

Agreement was valid till the end of December 2015 but open to possible renewal for an additional 5 years from the date of expiration.

[8] The respondent's case was that the Distributorship Agreement was strictly between itself and Jovet (Tanzania) Limited and it never had any contract with the appellant. It was further contended that any possible agreement regarding the distribution of the respondent's products within Kenya, was privately arranged between the Jovet (Tanzania) Limited and the appellant. Additionally, the respondent averred that all orders placed for the respondent's products were undertaken by the aforementioned company in Tanzania and never the appellant.

[9] The respondent further asserted that, following the ineffective fulfilment of the Distribution Agreement by Jovet (Tanzania) Limited regarding the distribution of the respondent's products, the respondent communicated its decision not to renew the aforementioned agreement, which was set to expire on the 31<sup>st</sup> of December 2015, in a letter to Jovet (Tanzania) Limited dated 28<sup>th</sup> August 2015.

[10] The respondent averred that it then entered into a new and exclusive Distribution Agreement, dated 17<sup>th</sup> December 2015 and commencing on 1<sup>st</sup> January 2016, with Jovet (Tanzania) Limited for the distribution of the respondent's products within the Tanzanian market alone. Within this new agreement, the respondent argues that Jovet (Tanzania) Limited explicitly expressed that it did not have any claim against the respondent regarding the non-renewal of the Distribution Agreement that expired at the end of 2015 nor any other claim regarding the Kenyan market, but the appellant nonetheless filed **Petition No. 134 of 2017** for reasons set out above.

[11] The respondent, in addition, contended that the appellant has failed to explain the circumstances that led to the withdrawal of **Chief Magistrate Suit No. 1756 of 2016** at Milimani Chief Magistrate's court filed by the appellant before it was heard. The respondent further pointed out to this Court that the appellant secured an injunctive order in that matter that caused the respondent loss and damage and

thus cited this withdrawal in its argument that the appellant abused the court process in lodging the petition, concerning a commercial dispute before the Constitutional and Human Rights Division of the High Court instead of filing it before the Commercial Division of the same court.

[12] The appellant rebutted by arguing that it filed and subsequently withdrew the above case on the advice of counsel-that the Magistrate's Court was not the appropriate court to lodge the appellant's claims. The appellant thus averred that *res judicata* did not apply as the suit was withdrawn before hearing and determination.

[13] In a letter dated 16<sup>th</sup> November 2017 and addressed to the Registrar of the Constitutional and Human Rights Division of the High Court in Nairobi, counsel for both the appellant and respondent consented to transfer ***Petition No. 134 of 2017*** to the Commercial and Admiralty Division of the High Court of Kenya in Nairobi, and it becoming ***Petition No. 491 of 2017***.

[14] The High Court thereafter heard and delineated three issues for determination: *whether there was a contractual relationship between the appellant and the respondent; if such a contractual relationship existed, whether the respondent breached it; what remedy, if any, was available to the appellant; and who should bear the costs of the suit.*

[15] The High court, in its judgment, found that there was no contractual relationship between the appellant and the respondent. The Court further held that the exclusive distributorship agreement in issue existed only as between the respondent and Jovet (Tanzania) Ltd, granting Jovet (Tanzania) Ltd the sole right to import and distribute Bavaria's products in both Kenya and Tanzania. The evidence further showed, according to the High Court, that the appellant had a private arrangement with Jovet (Tanzania) Limited to distribute Bavaria products in Kenya and that the respondent was not party to, nor was it bound by that arrangement. Furthermore, since no contract existed between the appellant and

the respondent, there could possibly be no breach of contract and therefore the appellant was not entitled to any remedy, including damages. Consequently, the High Court (*Kasango, J.*) in her Judgment delivered on 5<sup>th</sup> March, 2019 dismissed the petition, awarding the respondent costs of the suit.

***ii. Proceedings before the Court of Appeal***

[16] Aggrieved by the decision of the High Court, the appellant filed **Civil Appeal No. 158 of 2019** before the Court of Appeal, relying on its Memorandum of Appeal dated 8<sup>th</sup> April 2019, setting out eleven (11) grounds, which are summarized as follows:

- 1. That the Judge erred in law and fact by failing to appreciate the constitutional nature of the appellant's petition, thereby refusing to address the constitutional claims pleaded and argued by the appellant contrary to the dictates of Article 50 of the Constitution which entitles all parties to a fair hearing of their respective cases and instead focused on a different and unrelated cause of action;*
- 2. That the Judge erred in law and fact by determining the appellant's petition on a preliminary objection motion and also determining the singular defence raised by the respondent, failing to appreciate that the petition was to be determined on merits and on all legal and factual issues raised;*
- 3. That the Judge erred in law by ignoring the doctrine of stare decisis and placing the common law and private law principle of "privity of contract" above a constitutional claim, in direct contrast to Supreme Court of Kenya and Court of Appeal holdings;*
- 4. That the Judge erred in law by disregarding the unprecedented nature of the case that required a unique jurisprudential analysis and effecting a total paradigm shift; and*

*5. That the Judge erred in law and fact through her failure to recognize the parties' consent to proceed using affidavit evidence, eschewing viva voce testimony, and were bound by the consequences of the consent, thus making the appellant's testimony and evidence uncontroverted due to the respondent's decision not to cross-examine the appellant's witness.*

**[17]** The appellant as a result thereof sought the following orders:

- a) The appeal be allowed so that the decision made by the High Court dated 5<sup>th</sup> March, 2019 be set aside and replaced by a judgment in favour of the appellant as prayed in the Petition dated 4<sup>th</sup> April, 2017 together with costs, or in the alternative (b) below;*
- b) The appeal be allowed so that the decision made by the High Court dated 5<sup>th</sup> March, 2019 be set aside and the matter be remitted back to the Superior Court for a fresh re-hearing by a Judge other than the Hon. Justice Mary Kasango.*
- c) Costs of the appeal be provided for.*

**[18]** The learned Judges of Appeal in their judgment found that the consent by the parties dated 16<sup>th</sup> November, 2017 transferring the matter to the Commercial and Admiralty Division of the High Court was an acknowledgement by the appellant that the dispute it lodged against the respondent was a commercial dispute and not a dispute on any alleged breach of constitutional rights. The appellate court further found that this was further evidenced by a letter dated 9<sup>th</sup> September, 2015 by the appellant's lawyer, long before filing of the petition, making various demands including demand for compensation for building goodwill for the respondent's Bavaria products; and seeking to negotiate an amicable exit plan. The appellate court also sought to rely on the prayers in the matter filed before the Chief Magistrate's Court- **Civil Suit No. 1756 of 2016**- to bolster its finding that the appellant's matter was commercial in nature. For that reason, the appellate court

held that there was no merit in the appellant's complaint that the trial Judge erred in not treating the petition as one raising constitutional questions.

[19] On the merits of the dispute and based on the totality of the evidence on record, the appellate court found that, at no point in time did the respondent appoint the appellant as a distributor of its products and that the record showed that the appellant only had a distributorship relationship with Jovet (Tanzania) Limited, a separate legal entity from the appellant. That the High Court was therefore right in finding that there was a private relationship between Jovet (Tanzania) Limited and the appellant for the appellant to distribute the respondent's products in Kenya on behalf of Jovet (Tanzania) Limited and further, in finding that there was no contract between the appellant and the respondent that could be breached as none existed.

[20] As a result, in its judgment delivered on 11<sup>th</sup> October, 2024, the Court of Appeal found the appeal lacking in merit and dismissed it with costs to the respondent.

### ***iii. At the Supreme Court***

[21] Aggrieved by the decision of the Court of Appeal, the appellant filed the present appeal and relies on five (5) grounds of appeal; that the learned Judges of Appeal erred when they-

- 1. Held that the doctrine of privity of contract is a prerequisite for the determination of constitutional matters, thereby subordinating constitutional principles to private law doctrines;*
- 2. Notwithstanding the principle established in the **Anarita Karimi Njeru case**, determined that a properly pleaded constitutional claim must necessarily be anchored on a contractual relationship, implying that the absence of such a relationship bars the urging of constitutional reliefs, even where violations are evident;*

3. *Held that the constitutional imperative to determine all issues pleaded and supported by evidence does not apply where a court deems it possible to decide a matter based solely on a single isolated issue, such as privity of contract, thereby disregarding pleaded and proved constitutional questions raised;*
4. *Notwithstanding the principle articulated in the **Mumo Matemu case**, introduced an implied requirement for locus standi that hinges on the existence of an “active” contractual relationship, thereby excluding parties not connected by such a relationship from urging constitutional violations; and*
5. *Held that a constitutional issue cannot be raised or adjudicated in a matter before the Commercial and Tax Division of the High Court, effectively limiting the jurisdiction of the High Court to resolve constitutional disputes embedded in commercial matters, contrary to Article 165(3) of the Constitution.*

**[22]** The appellant for the above reasons now seeks the following reliefs:

1. *That the appeal be allowed and both the Court of Appeal Judgment dated 11<sup>th</sup> October 2024 and the High Court Judgment delivered on the 5<sup>th</sup> March 2019 be set aside and the Petition dated 4<sup>th</sup> April, 2017 be allowed as prayed.*
2. *That in alternative to prayer (1) above, the matter be remitted back to the High Court for a merit determination on the pleaded constitutional questions.*
3. *That this Honourable Court be pleased to grant any or further relief it deems just.*
4. *Costs to be awarded to the appellant.*

**[23]** In opposing the appeal, the respondent has filed its Grounds of Objection dated 9<sup>th</sup> December, 2024 and a Replying Affidavit sworn by Peter-Jan Joost Marie Swinkels, the Chief Executive Officer for the respondent on 9<sup>th</sup> December, 2024. The respondent contends that the appeal to the Supreme Court does not lie as of right, under Article 163(4)(a) of the Constitution of Kenya, as it does not comprise any issue on the interpretation or application of the Constitution but it is and has been a purely commercial dispute. Additionally, the respondent averred that the Supreme Court's jurisdiction has not been appropriately invoked under Article 163(4)(b) of the Constitution as there is no certificate granting leave to appeal to the Supreme Court either by this Court or the Court of Appeal.

**[24]** Further, that the appellant's right to fair hearing under Article 50 of the Constitution was not violated as there was no error committed when the superior courts below identified and determined the single issue of breach or otherwise of the Distribution Agreement. It is, in that context, reiterated that the respondent had a distributorship agreement with Jovet (Tanzania) Limited and not the appellant and the appellant is precluded from making any claims under a distributorship agreement to which it was not a party. Additionally, that the Distributorship Agreement of 27<sup>th</sup> June, 2011 did not grant the appellant any rights or benefits over the respondent, either expressly or impliedly.

### **C. PARTIES' SUBMISSIONS**

#### *a) The Appellant's Written Submissions*

**[25]** The appellant relies on its written submissions dated 7<sup>th</sup> February, 2025 and submits that the appeal is lodged under Article 163(4)(a) of the Constitution as it involves the interpretation and application of the Constitution, particularly Articles 2, 3, 10, 19, 22, 24, 27, 40, 47, 50 and 159, asserting that specific constitutional questions have been maintained from the High Court to the Court of Appeal. The appellant in that regard faults both superior courts for ignoring the

constitutional nature of the questions raised and mischaracterising the issues as commercial even after acknowledging the existence of the said constitutional questions in their judgments.

[26] The appellant further argues that the superior courts were bound to adjudicate the matter as presented, citing the ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others***; (Petition 15 of 2020) [2023] KESC 14 (KLR) (***Bia Tosha case***) case, rather than formulating and adjudicating a case different from that which was lodged before them and calls on this Court to maintain its reasoning in the ***Bia Tosha case*** and remit the case to the High Court for a fresh hearing and determination with consideration for the constitutional questions raised otherwise the appellant will find itself possessing an unresolved constitutional petition.

[27] The appellant furthermore argues that the transfer of a constitutional petition from the Constitutional and Human Rights Division of the High Court to the Commercial and Admiralty Division of the same court does not alter the constitutional foundation of the petition as the latter Division also possesses the jurisdiction to determine a constitutional petition and the mischaracterisation of the dispute as a commercial one governed by the law of contract resulted in the incorrect dismissal of a constitutional petition on the basis of the doctrine of privity of contract. Furthermore, the appellant has urged the point that the respondent did not challenge the jurisdiction of the Commercial and Admiralty Division of the High Court in hearing the constitutional petition and so the constitutional issues ought to have been determined once raised.

[28] The appellant further avers that it invested heavily in building *goodwill* as the sole distributor of the respondent's products since 2006 and yet the superior courts below failed to address the protection of the said *goodwill* acquired by the appellant through its investment and marketing of the respondent's products in Kenya. It is also argued that the superior courts thereby failed to recognize that

this goodwill is constitutionally protected property under Article 40, and thus deviated from the Court of Appeal's decision in ***Heineken East African Import Company Limited & Another Vs Maxam Limited*** [2024] KECA 625 (KLR) in which it was held that beer manufacturers cannot unilaterally terminate the distribution of their products due to the unequal power balance between the manufacturers and distributors.

[29] It is furthermore submitted that the appellant withdrew ***Chief Magistrate Suit No. 1756 of 2016*** before it was heard, meaning the doctrine of *res judicata* did not apply. In any event, the withdrawal was based on legal advice that the subordinate court was not the proper forum for the claim to have been instituted.

[30] The appellant further posits that, lack of a contractual relationship between parties does not have any bearing as to whether constitutional claims can or cannot be addressed and further asserted that it never raised any claim that a valid contract existed between it and the respondent, therefore, the superior courts ought not to have determined that unasked question. The appellant, to the contrary, submits that it possessed a *sui generis* relationship with the respondent which is guided by the Constitution of Kenya and the doctrine of the privity of contract cannot supersede the Constitution.

[31] Finally it is urged that the High Court and Court of Appeal, by failing to address constitutional issues raised by the appellant, violated Articles 10, 47, and 50 of the Constitution. This omission, in the appellant's view, renders the decisions of the High Court and Court of Appeal erroneous and subject to being set aside.

b) *The Respondent's Written Submissions*

[32] The respondent relies on its written submissions dated 24<sup>th</sup> February 2025 and states that this Court lacks jurisdiction to hear the appeal as the appellant's invocation of Article 163(4)(a) of the Constitution is misguided because both the superior courts below framed the main issue for determination as being of a commercial rather than constitutional nature. Further, that this Court cannot

examine the question as to whether the respondent violated the constitutional rights of the appellant if that issue was not addressed by the superior courts below for the reason that this Court is not a court of first instance.

**[33]** The respondent, in answer to the claim that the appellant's claim was mischaracterized by the superior courts, submits that the appellant has shifted its assertion from having an unwritten contractual relationship with the respondent to claiming the existence of a *sui generis* relationship with the latter and which lasted over a decade. This change in position, it is urged, has fundamentally altered the basis of the appellant's claim regarding *goodwill as intangible property under Article 40 of the Constitution*. Additionally, the respondent submits that, as the case did not proceed with one party making a claim and the other opposing it, the Court possessed the liberty to frame the issues for determination according to Rule 21(3) of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013. Additionally, the respondent argues that the transfer of the petition to the Commercial and Admiralty Division of the High Court underscored the commercial nature of the dispute and even though the said Division possesses the jurisdiction to interpret and apply the Constitution, such jurisdiction must be executed within the context of a commercial dispute.

**[34]** The respondent further argues that, in the absence of a valid contract, *the constitutional claim relating to goodwill and the resulting property rights under Article 40 of the Constitution* are invalid. Furthermore, the superior courts correctly applied the doctrine of constitutional avoidance and that principle calls for the resolution of a dispute without reliance on constitutional remedies where the facts and the law point the court to other remedies outside the Constitution.

#### **D. ISSUES FOR DETERMINATION**

**[35]** From the pleadings and the submissions of the parties, the following issues crystallize for our determination:

*i. Whether this Court has jurisdiction to hear and determine the appeal?*

- ii. *Whether the superior court below were duty-bound to address all the issues raised by the appellant, and whether their failure to do so amounted to a violation of the appellant's rights under Article 50 of the Constitution.*
- iii. *Whether **goodwill** is intangible property and ought to be protected under Article 40 of the Constitution.*
- iv. *Whether the appellant is entitled to the reliefs sought including costs.*

## **E. ANALYSIS AND DETERMINATION**

- i. *Whether the Court has jurisdiction to hear and determine the appeal*

**[36]** The appeal before us is filed as of right under Article 163 (4) (a) of the Constitution. The respondent however contends that the decision from which the appeal is brought does not involve any issue regarding the interpretation or application of the Constitution and therefore the right of appeal under Article 163 (4) (a) of the Constitution does not lie. On our part, we note that in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & another***, SC. Pet. No 3 of 2012; [2012] eKLR, this Court set the guiding principles on that subject as follows:

***“The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”***

[37] Further, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, S.C App. No 5 of 2014; [2014] eKLR (*Munya 1*) we stated that, where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal and any court below it, the very least an appellant should demonstrate is that the superior courts' reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

[38] Does the present appeal involve any question concerning the interpretation and application of the Constitution, and have any such issues been addressed by the superior courts and advanced through the ordinary appellate process to arrive before this Court?

[39] Upon our review of the pleadings and submissions before the superior courts we note that one of the reliefs sought before the High Court was *a declaration that the goodwill generated, acquired, and developed by the appellant in relation to the respondent's products in Kenya constitutes property under Article 40 of the Constitution*. The appellant has further invoked Article 50 of the Constitution, contending that the superior courts failed to address the constitutional issues raised in the original petition. In our view, and without saying more at this point, these two matters constitute constitutional questions that form the basis of the present appeal. We are also certain that the appellant has consistently raised the first issue- *goodwill as property under Article 40 of the Constitution*-in both superior courts below. Moreover, from the summary of the grounds of appeal raised by the appellant before the Court of Appeal as delineated earlier (see paragraph 21 above), the appellant's constitutional course has remained consistent. We therefore hold that this Court has jurisdiction to hear and determine the appeal in the manner we have expressed above.

***ii. Whether the superior courts were duty-bound to address all the issues raised by the appellant, and whether their failure to do so***

***amount to a violation of the appellant's rights under Article 50 of the Constitution?***

**[40]** Two arguments have been raised in regard to this issue. The first concerns the transfer of the petition filed at the High Court from the Constitutional and Human Rights Division to the Commercial and Admiralty Division. On its part, the respondent argues that this transfer effectively deprived the latter Division of jurisdiction to address the constitutional issues raised in the petition. The appellant disagrees.

**[41]** The second relates to whether the trial and appellate courts were obligated to address all the issues raised in the petition. The appellant, in addressing that issue, contends that the courts below were obligated to determine all the issues raised in its petition but did not. In contrast, the respondent maintains that, where the determination of a single issue is sufficient to dispose of a matter, a court is not required to consider the remaining issues and which are irrelevant to the determination of that core issue.

**[42]** We note that the High Court and the Court of Appeal took different approaches in addressing the constitutional issues raised in the petition. The trial court acknowledged that the case before it was a constitutional petition and cited the articles invoked by the appellant in paragraph 3 of its judgement. However, upon the finding that no contract existed as between the parties, it proceeded to dismiss the petition without rendering a determination on the constitutional issues. The Court of Appeal, on the other hand, while determining whether the trial court's actions violated the appellant's rights analyzed the basis of the transfer of the dispute to the Commercial and Admiralty Division, finding that the consent to transfer the matter entered by the parties was an acknowledgement by the appellant that the dispute it had lodged against the respondent was a commercial dispute and not a dispute on any alleged breach of constitutional rights. That the consent letter which was filed in court and forms part of the record specifically

requested the High Court's Constitutional & Human Rights Division to transfer the petition to the Commercial and Admiralty Division and it followed therefore that the matter was to be heard and determined purely as a commercial dispute.

**[43]** The Court of Appeal also addressed its mind to the previous proceedings in the Chief Magistrate's Court, and the initial demand letter issued by the appellant to the respondent, to conclude that the dispute was a commercial one and no constitutional issue of any significance arose for determination. The Court of Appeal therefore found no merit in the complaint that the trial judge erred in not treating the petition as one raising constitutional questions.

**[44]** We have equally considered the basis of the transfer from the Constitutional division to the Commercial and Admiralty Division of the High Court. In the consent letter filed in the trial court, the parties only agreed as follows:

*“The Petition dated 4 April 2017 (“the Suit) be transferred to the Commercial and Admiralty Division of the High Court of Kenya at Nairobi...”*

**[45]** From the consent order later issued by the trial court, there were no orders divesting the constitutional issues in the constitutional petition. To our mind, the transfer of the dispute was based on the fact that the substratum of the case originated from a commercial dispute. Regardless, the petitioner raised constitutional issues which the Commercial and Admiralty Division, being part of the High Court, and owing to its mandate under Article 165 of the Constitution, had jurisdiction to consider. We further find that the appellant, even at the Commercial and Admiralty Division reiterated numerous in its submissions that the issue before the court was not a case filed by way of plaint but the same was a petition raising constitutional issues and at no point did it waver on that submission.

**[46]** Divisions of the High Court were established solely for the proper administration of the Court. Section 11 of the High Court (Organization and Administration) Act Cap 8C in this regard specifically provides thus:

*“11. Establishment of Divisions*

*(1) For purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—*

*(a) the Family and Children Division;*

*(b) the Commercial Division;*

*(c) the Admiralty Division;*

*(d) the Civil Division;*

*(e) the Criminal Division;*

*(f) the Constitutional and Human Rights Division;*

*(g) the Judicial Review Division; and*

*(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine...”*

[47] Each Division was therefore established to address novel issues within its specific area of administration. The establishment of these Divisions did not, in any way, diminish their mandate or oust their original High Court jurisdiction as conferred by Article 165 of the Constitution including the determination of constitutional questions. Consequently, the transfer of the dispute from the Constitutional and Human Rights Division to the Commercial and Admiralty Division did not divest the court of its jurisdiction to hear and determine the constitutional issues raised in the matter.

[48] As to whether the trial court ought to have considered each and every pleaded issue, the Court of Appeal in ***Heineken East Africa Import Company Limited & another v Maxam Limited*** (Civil Appeal E403 & E404 of 2020 (Consolidated)) [2024] KECA 625 (KLR) (24 May 2024) (Judgment) when faced with a similar question determined as follows:

***“It is also notable in this respect that in delivering a reasoned judgment, courts are not required to give a detailed answer to every argument, and they have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties’ submissions, as guided by the rules of evidence and applicable law. In exercising the judicial function, a judge chooses the more meritorious legal position after taking into account evidence that is properly admitted, evaluating evidence, and where required, resolving uncertainties and filling gaps in the law by considering the applicable legal principles and values. In the event that a judge applies an insufficient judicial decision-making method, the avenue available to a litigant is to appeal or seek a review of the decision on legal grounds, and not as in the present case, to engage in a personal assault of the Judge in the name of bias...” (Emphasis ours)***

[49] While we partly concur with the Court of Appeal’s decision in ***Heineken East Africa Import Company Limited*** (supra), which affirms that courts are not obliged to provide detailed responses to every argument, we are constrained to add that, it remains prudent for a court-especially at the trial level- to expressly consider and make a finding on each ground raised unless there is good reason not to do so and the reason ought to be given to the parties in any event. Even where a ground is ultimately dismissed or deemed unnecessary in light of the court’s overall findings, a clear determination should nonetheless be made. As a rule of thumb therefore, once a matter is pleaded, a party is entitled to a definitive resolution and should not be left to draw inferences as to the outcome of that issue subject to the proviso above.

[50] In finding as we have above, in ***Dhanjal Investments Limited Vs Kenindia Assurance Company Limited*** SC Petition No. 7 of 2016 [2018]

eKLR we found that the Court of Appeal failed to determine the grounds of affirmation raised when we held as follows:

**“...While the above position was convenient to the Court of Appeal, it was prudent for it to specifically address the grounds and make a finding on each of them even if to dismiss them later or find that there was no need to consider them in light of its findings. In failing to do so, the court rendered the issue undetermined putting the appellant in a state of uncertainty even though the appellant could have made an inference of the appellate court’s decision from the judgment. Rule 94(1) of the Court of Appeal Rules is not academic and in vain and once it is invoked, the court is moved appropriately and like every other manner that a court is moved, a decision has to be taken one way or the other. (Emphasis ours)**

[51] Further, in ***Bia Tosha Distributors Limited Vs Kenya Breweries Limited and 6 Others*** SC Petition No. 15 of 2020 [2023] KESC 14 (KLR), we held that the Court of Appeal fell into error by not making any determination on an application for contempt when the same was live before it. And 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, having made reference to a cross-appeal in its judgment, failed to determine it. We held that for the regularity and normalcy of the trial process, the cross-appeal ought to have been determined.

[52] To our mind therefore, for a court to render a determination, it must be guided by the pleadings filed by the parties (see ***Raila Amolo Odinga & Another vs. IEBC & 2 others*** (2017) eKLR). However, the court may also base its decision on an issue that was not specifically pleaded if it is evident from the conduct of the trial that the issue was left for the court to decide (See, ***Odd Jobs***

–*vs- Mubia* [1970] EA 476). In some cases, a matter may also be determined on a single issue, particularly where a preliminary objection is raised and upheld. This is understandable as without jurisdiction, the court has no basis to wade into the merits of the parties’ arguments. During a pre-trial conference or in its judgment, a court must however narrow down and define the specific issues it will consider. As the trial progresses, certain issues may of course fall away, either through the parties recording a consent, by the lapse of time in time-sensitive disputes, or by concessions made in pleadings, responses, or during the hearing itself. It is imperative that any issues conceded and the manner in which they were resolved must be reflected in the court record. Ultimately, it is the responsibility of the court to determine the remaining issues in controversy. Once those issues are preserved, the trial court must ensure that each is addressed comprehensively in its final judgment. That is the essence of the right to a fair hearing and the right to be heard in our Constitution.

**[53]** In this case, the constitutional issue under Article 40 of the constitution was not addressed by the trial court. The Court of Appeal, equally, and in re-assessing the evidence presented overlooked this failure by the trial court and proceeded on the same trajectory. The trajectory taken by the courts is akin to constitutional avoidance which entails that a court will not determine a constitutional issue, when it may properly be decided on another basis.

**[54]** This Court has previously adopted the principle of constitutional avoidance in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* at paragraphs 256- 258 when it found that a copyright infringement claim would be best canvassed in a different forum although it was couched as a constitutional issue. The Court in doing so, relied on the South African decision in *S v Mhlungu*, 1995 (3) SA 867 (CC) where the Constitutional Court (*Kentridge AJ*), articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]:

***“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”***

[55] Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (See ***Ashwander v. Tennessee Valley Authority***, 297 U.S. 288, 347 (1936)).

[56] There has always been tension between the doctrine of constitutional avoidance and the primacy of rights approach to adjudication as envisaged in Article 20 (3) of the Constitution. Walter Khobe Ochieng in ***“From constitutional avoidance to the primacy of rights approach to adjudication in Kenya: A case study of the interplay between constitutional rights and the law of contract”*** *Kabarak Journal of Law and Ethics* Volume 6 [2022] pg. 161-162 reflects on this topic when he opines thus:

*“The obligation to the courts to develop the law is not discretionary. The courts are under a general obligation to develop the law where it falls short of the standards in the Bill of rights. Meaning that where a law that is being applied to resolve a particular dispute does not guarantee an outcome reflecting the values embodied in the Bill of Rights, then the values that underpin the Bill of Rights ought to be integrated into the subject non-constitutional law intermediary norm and guide the development of the norm. Such norm will thereafter be applied to resolve the dispute in a transformed form”.*

*In effect, in contrast to the approach of constitutional avoidance that advises courts to refrain from applying constitutional values and norms in disputes, the commitment to constitutional justice in Article 20(3) of the Constitution encourages proactive invocation of the normative standards*

*in the constitution in resolving disputes. This approach of primacy to adjudication imposes an obligation on courts to actively or enthusiastically use the values of the Bill of Rights in the resolution of disputes....”*

[57] In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others***, SC Application 16 of 2014, (2015) eKLR (Ruling) *Mutunga CJ (as he then was)*, albeit dissenting, lamented on the majority’s use of the common law doctrine of judicial notice and the Evidence Act to an issue brought to their attention through a letter by stating as follows:

***“The provisions of Article 20(3)(a) and (b) have, indeed, torn away the last shreds of that perhaps comforting illusion, especially in the context of human rights, that judges in the common law system do not make law. As I read these provisions they mean that if any existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop the rule so that it does comply. Additionally, the court has the obligation to interpret statute in a way that also complies with the Bill of Rights....”***

[58] We have reproduced the above opinions to enable us reflect on the pertinent question before us and in light of our decision in ***Communications Commission of Kenya (supra)*** which affirms the legal principle that forbids the engagement of the Constitution in all manner of litigation. In that context, did the issues before the superior courts below warrant a primary constitutional adjudication and were the courts justified in adopting the constitutional avoidance doctrine? The appellant, at the trial court, sought reliefs including a declaration that *the goodwill it generated, acquired, and established in relation to the respondent’s products in Kenya constituted property protected under Article 40 of the Constitution of Kenya*, and a declaration that the imposed distributorship terms were arbitrary, unfair, unconscionable, discriminatory, tainted with bad

faith, and contrary to Kenya’s public policy. These reliefs clearly called for an interpretation and application of constitutional principles even as the superior courts below set out to resolve the foundational question of a commercial nature particularly *whether goodwill is intangible property under Article 40 of the Constitution*. Therefore, it would have been appropriate for the superior courts to expressly state any reservations they may have had regarding the primacy approach to constitutional adjudication, rather than maintaining a conspicuous silence while defaulting to constitutional avoidance.

**[59]** We therefore find that both the High Court and the Court of Appeal fell into error in not considering and answering the constitutional issue(s) raised by the appellant. We shall however consider whether the failure aforesaid amounted to violation of the appellant’s rights under Article 50 of the Constitution, as we discuss the other issues in this appeal.

**[60]** Should we then remit the matter back to the trial court to consider the constitutional issues, as suggested by the appellant, or should we render a decision on the said issue(s)? The basis of remitting a matter back to a trial court is Section 22 of the Supreme Court Act 2011, which empowers the Court to remit proceedings in the following terms:

*“22. Power to remit proceedings*

*The Supreme Court may remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter.....”*

**[61]** This Court has applied this provision in various decisions. In ***Francis Karioko Muruatetu & another v Republic*** SC Petition No. 15 & 16 of 2015 [2017] eKLR we remitted the matter back to the High Court for resentencing. In ***Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others*** SC Petition E004 & E003 of 2023 [2024] KESC 3 (KLR) we remitted a matter to the Court of Appeal to determine the substantive merits of the appeal from a Judgment rendered by the

Employment and Labour Relations Court. In ***Hon. Gitobu Imanyara & 2 others v The Hon. Attorney General*** SC Petition No.15 of 2017, we remitted a dispute involving the loss incurred by a company back to the High Court for determination of the appellant’s claim and quantum for special damages while retaining the Court’s jurisdiction to issue appropriate reliefs for constitutional violations. In the determination we expressed ourselves as follows:

***“[72] ... We further note the gravity of the admitted constitutional breaches 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....”***

**[62]** In ***Westmont Holdings SDN BHD Vs Central Bank of Kenya & 2 others*** (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR), despite the fact that the matter had taken time in the corridors of justice, we reiterated the position we took in ***Gitobu Imanyara case*** but still remitted the matter to the Court of Appeal to be determined on merit. The appeal before us in ***Westmont*** (supra) largely turned on the right to access to justice, and in particular the payment of security for costs.

**[63]** The upshot of the above decisions, particularly in ***Gitobu Imanyara***, (supra) is that the Court should *inter alia* consider the time and resources required to prosecute a matter before remitting it. Issues that necessitate factual determination are for example more appropriately referred back to the trial court for consideration. Further, under Section 21 (1) (a) of the Supreme Court Act, this court retains the jurisdiction to grant suitable remedies, especially in cases involving constitutional violations. The Section 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”*

[64] Applying the above principles to the present case, we find that the dispute in this matter centers on the interpretation and protection of *goodwill as property within Article 40 of the Constitution* and specifically; *what constitutes goodwill?* whether it must necessarily arise from a contractual relationship; and whether the principles of privity of contract should be determined without any constitutional claim being considered as well. As the factual issues are not contested, there is no need for a re-evaluation of the evidence, although the existing record will still be duly considered. These issues require our attention for reasons that shall shortly be apparent and we therefore find that the appropriate course of action is for this Court to hear and determine the issues at hand, rather than remitting the matter to the High Court.

***iii. Whether goodwill is property and ought to be protected under Article 40 of the Constitution***

[65] *Goodwill* has been described as a benefit or advantage arising from the reputation and trade connections of a business and, in particular, the likelihood that existing customers will continue to patronize it. It is the benefit which a business enjoys in connection with its customers; the attractive element to which customers are drawn; the one thing which distinguishes an old business establishment from a newly established venture (See **K.I. Laibuta “Principles of Commercial Law”** *Law Africa* at pg. 341).

[66] Lord Macnaghten also defined *goodwill* in the case of **Commissioner of Inland Revenue Vs Muller & Co. Margarine Ltd.** [1900-1903] All ER 413 as follows:

***“It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in customers. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.”***

[67] The **Black’s Law Dictionary 11<sup>th</sup> Edition** pg. 839 also describes goodwill as:

*“A business’s reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. Because an established business’s trademark or service mark is a symbol of goodwill, trademark infringement is a form of theft of goodwill. By the same token, when a trademark is assigned, the goodwill that it carries is also assigned”.*

[68] The law protects goodwill to the same extent that tangible property is protected. Briggs, L.L. (1929) ***“Some Legal Aspects of Goodwill,”*** Vol. 47, Issue 6 *Journal of Accountancy* Article 3 highlights various aspects of goodwill and notes that if goodwill is unlawfully destroyed or taken from the owner, the courts will award damages to the injured party. If a buyer is induced by fraud to purchase goodwill, he is entitled to damages from the seller. Goodwill can also be taxed if its value can be ascertained. Goodwill may also be the subject of a contract. Since it is a property right it may be transferred with the business to which it is an incident or upon which it depends. Under a general assignment of a firm’s property for the benefit of creditors, the goodwill of the business passes to the purchaser at the

assignee's sale. Any purchaser of a business with its goodwill may also assign such business and its goodwill to another. In **Bradbury Vs Wells**, 138 Iowa 673 (1908), the court decided that goodwill may be disposed of by means of a Will. Thus, in this respect, goodwill is regarded by the law to be in the same category as other forms of property. Generally, goodwill also terminates with the cessation of a business. It is usually lost when a concern is wound up, its liabilities discharged and its assets collected and distributed.

[69] To therefore assign goodwill as property Ian Tregoning in "**FCT v Murry: The Federal Court takes licence with goodwill**" *Deak in Law Review* pg. 201 argues that the real issue is the legal recognition of goodwill as an asset separate from those other assets that may contribute to its existence; with existence being evidenced by an amount that a purchaser is willing to pay above the market values of the identifiable assets. This amounts to a recognition of the commercial reality of goodwill and its accounting form as an amount apart from other assets of a business.

[70] Based on the above definition, while goodwill is considered an intangible asset, it can still be assigned a value. In the Kenyan context, Article 40(1) of the Constitution provides for the protection of right to property as follows:

*40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*

*(a) of any description; and*

*(b) in any part of Kenya*

[71] Under Article 260 property includes any vested or contingent right to, or interest in or arising from *(b) goods or personal property*. The right to property as provided in Article 40 is, however, not absolute. It can be limited because it is not one of the non-derogable rights enshrined in Article 25 of the Constitution.

[72] Goodwill is also protected by statute and common law. For example, Section 25 (1) of the **Trade Marks Act** Cap 506 provides that *a registered trade mark is*

assignable and transmissible either in connection with the goodwill of a business or not. Section 5 of the Trade Marks Act protects the rights of action against any person for passing off or the remedies in respect thereof. Passing off is a common law tort, much similar to trademark infringement although in this case can be used to enforce unregistered trademark right. Section 12(1)(L) of **Landlord and Tenant (Shops, Hotels and Catering Establishments)** Cap. 301, also gives the Tribunal power to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill.

[73] In *Ramadhan Mohammed Ali v Hashim Salim Ghanim* [2015] KEHC 3899 (KLR) the Court (*Emukule J*) regarded goodwill as property when he determined that:

***“On the other hand, “goodwill” may be regarded as “property”. It occurs in cases where the goodwill operated as an increase of the value of real property, in the sale of a well-customed shop. The revenue would easily be defrauded by dividing the price of the real estate and the goodwill into two portions and paying the duty only on the former part.”***

[74] In *Bia Tosha Distributors Limited v Kenya Breweries Limited & 3 others* [2016] KEHC 4484 (KLR) the High Court (*Onguto J*) recognized goodwill as a constitutionally protected right when he held as follows:

***“I understand ‘goodwill’ generally to mean an intangible and assumed asset or right that assists in generating sales revenue in a business (...) As value can be placed on goodwill as a proprietary interest, I am prepared to find on a prima facie basis that goodwill once paid for and acquired is ‘property’ and is protected under Article 40 of the Constitution. In these respects, therefore, I find that the Petitioner is entitled to state that it***

***acquired a proprietary interest for what he paid for and when the Respondents state that the amount paid could not be refunded it could only be because the proprietary interest in the form of goodwill was also transferred or assigned upon and receipt of the payment to the Petitioner.”***

***(Emphasis ours)***

[75] In the ***Bia Tosha*** case (supra), the court found that the petitioner had established a prima facie case with a likelihood of success, when it stated that it acquired goodwill for value and which the respondents had arbitrarily taken away without any compensation. In addition, the court was satisfied that the petition may be rendered nugatory if the stated territory is disturbed before the ultimate determination of the petition. As a result, the court issued a conservatory order preserving the petitioner’s territory exclusively under the area of operation arrangement obtaining as at 2<sup>nd</sup> February 2006. This Court, while reversing the orders of the Court of Appeal in the same case, partly adopted the decision of the High Court in paragraphs 125 -126 of its decision when it held as follows:

“

***[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, Satelite, Dagoretti, UDVA, 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.....”***

[76] Although goodwill is not strictly considered property in the usual sense, as it is intangible and merely incidental to real and tangible property, it is often more valuable than the tangible assets to which it is connected. In many cases, goodwill is the key factor that motivates individuals to purchase an established business, often at a price significantly higher than the actual value of its physical assets. For this reason, we hold that goodwill qualifies as property only when it is identifiable, whether independently or alongside other assets, and when a measurable value can be attributed to it. Accordingly, this form of goodwill is entitled to protection under Article 40 of the Constitution and we can only but conclude that goodwill constitutes a form of property that is capable of constitutional protection under Article 40 of the Constitution.

***iv. Whether the appellant is entitled to the reliefs sought?***

[77] We understand the appellant's primary argument to be that the absence of a contractual relationship does not preclude the court from addressing the

constitutional issues raised. In this context, the appellant contends that *goodwill constitutes a form of constitutionally protected intangible property*. It argues that goodwill is not simply a derivative of contractual obligations, but rather the result of significant entrepreneurial investment and effort hence its claim for payment of goodwill in this appeal.

**[78]** In *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] KECA 871 (KLR) Odero J at the trial Court, on the question of proof of goodwill determined as follows:

***“It is not sufficient for a party to simply claim goodwill. It must in the first place be demonstrated that such goodwill actually exists. It is upon the person who makes the claim that a business has goodwill to prove the existence of that goodwill...”***

**[79]** In *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* [2015] KEHC 6030 (KLR) Gikonyo J in his determination outlined that ordinarily, damages for loss of goodwill are awarded in an action for defamation or passing off. But, the learned judge stated that, it is also true that in the course of a breach of contract, a tort may arise and damages for the tortious act could be claimed and awarded but it has been acknowledged in law that such possibility is maintainable in very exceptional circumstances. Further, he opined that, even where a claim for goodwill is made in the alternative, the test applicable is one of *“reasonably foreseeable consequence”*. He also held that in arbitration, the availability of a claim for goodwill or any other tortious act is seen only within the contractual framework of the parties. Therefore, an award for damages for tortious acts such as injury to business reputation and goodwill is hemmed by the arbitration clause itself and the terms of the reference.

**[80]** The appellant further to its submissions above contends that the terms of trade between it and the respondent amounted to an unconscionable bargain and were contrary to public policy. In *LTI Kisii Safari Inns Ltd & 2 others v*

***Deutsche Investitions- Und Entwicklungsgesellschaft ('Deg') & others*** [2011] eKLR, the Court of Appeal recognized that courts may, in certain circumstances, intervene in agreements between parties, particularly where the doctrine of sanctity of contract is outweighed by the presence of an unconscionable bargain. With regard to the invocation of public policy in contractual disputes—especially where constitutional rights or values are implicated—the determination of public policy must now be guided by the values enshrined in the Constitution. These include principles such as fairness, justice, and reasonableness, as underscored in ***CIS v Directors, Crawford International School & 3 others*** [2020] KEHC 3394 (KLR).

[81] In this case, there was a clear agreement between the respondent and Jovet Tanzania Limited, which agreement was specific that the rights are neither assignable nor transferrable. And although there was the sole consideration of appointment of a sub-distributor, in such an occasion it was agreed that all legal and financial consequences of such sub-distributors and/or agents remained the sole responsibility of the Distributor (Jovet (Tanzania) Ltd). The appellant in that context concedes that there was no written agreement between it and the respondent but anchors its claim for goodwill on its long working relationship with the respondent. The appellant further bases its case in the determination of the Court of Appeal in ***Heineken East African Import Company Limited & Another vs Maxam Limited*** [2024] KECA 526 (KLR) as follows:

*“The courts are therefore bound by the imperatives set out in Article 10 when applying or interpreting contract law. We therefore find that in the assessment of damages arising from a breach of exclusive beer distribution agreements, being a sui generis class, requires that the special commercial and legal characteristics of these agreements are taken into account. We also accept the proposition that, consistent with the sui generis nature of this commercial relationship, and as an imperative of Article 10(2) of the*

***Constitution, investments made by beer distributors in Kenya constitute irrebuttable goodwill, automatically qualifying as property. We also accept the preponderant view obtaining in most jurisdictions that the special relationship existing between beer manufactures and beer distributors invites the clear presumption that unilateral termination is unavailable to beer manufacturers given the inherent power dynamics obtaining in the relationship between manufactures and distributors which is invariably tilted in favour of manufacturers and, further, that any mutual separation has to be guided by, conform and be consistent with, the imperatives of Article 10(2) of the Constitution.***

[82] On our part, while we agree with the persuasive decisions in ***Hafswa Omar Abdalla Taib*** (per Odero J), ***Kenya Tea Development Authority*** (per Gikonyo J) as well as in ***Bia Tosha*** (per Onguto J) on the meaning of goodwill and the extent and circumstances in which it may be invoked, the decision in ***Heineken East Africa*** (supra) is clearly distinguishable as there was an existing distribution agreement between Heineken E.A. and Maxam Ltd. In that case, the Court of Appeal's reliance on Article 10 (2)-principles of equity and fairness- in its determination of that matter was only made in the assessment of damages and after there was reasonable proof that Maxam limited was entitled to the same.

[83] We have also considered the decision in ***Mohan Oysterbay Drinks Limited Vs British American Tobacco Kenya Limited***, High Court Tanzania Commercial Division Case No. 90 of 2014 where the High Court found that an implied contract existed between Mohan and BAT and also found that BAT's termination of that contract was in bad faith, against equity, justice and good conscience. We note that the determination in the case was overturned by the Court of Appeal of Tanzania at Dar es Salaam in ***British American Tobacco Kenya Limited Vs Mohan's Oysterbay Drinks Limited*** in Civil Appeal No. 209 of 2019 and in doing so, found that there was no privity of contract between

the parties and in further construing the relationship between the parties, the court noted that, while there were repeat proposals for signing of a formal contract and as it was not the intention of the appellant to be governed by implied terms of the contract, nothing would have been said to have been conclusive as between the parties.

**[84]** Further to the above findings, as we understand it, distribution agreements define the rights and obligations of both the parent company and the distributor, including provisions related to goodwill. This privity of contract limits contractual rights and obligations to the parties directly involved in the agreement. A sub-distributor cannot therefore claim goodwill from the parent company unless explicitly stated in the agreement. Demonstrating a direct working relationship does not necessarily imply an agency relationship by analogy. An agency relationship often requires a principal to authorize an agent to act on its behalf, creating legal authority, a direct working relationship, while conversely, demonstrating a working arrangement does not inherently involve this delegation of authority or legal power.

**[85]** In this case, the Exclusive Distribution agreement was between Jovet (Tanzania) Limited and Bavaria N.V. The same was signed on 17<sup>th</sup> December 2015. There were defined terms in the agreement as regards sub-distributors/agents. Article 2 of the Distributorship Agreement particularly provided:

*1. Distributor is entitled to appoint any sub-distributors and/or agent in the Territory. In the event the Principal has serious objections against an appointed sub-distributor and/or agent Distributor will do his utmost best to terminate the appointment of his sub-distributor and/or agent.*

*2. If Distributor has appointed a sub-distributor and/or an agent in the Territory, Distributor undertakes to impose the rights and obligations of this Agreement on the appointed sub-distributors and/or agents insofar as these are applicable. Distributor shall procure any warrants that all sub-*

*distributors and/or agents will adhere to the terms and conditions of this Agreement and shall compensate Principal for all possible damages resulting from infringement of the terms and conditions of this Agreement by any sub-distributor and/or agent. All legal and financial consequences of such sub-distributors and/or agents shall be the sole responsibility of Distributor. (Emphasis ours).*

[86] The Agreement also contained an indemnity clause stipulating that the parties shall indemnify and hold each other harmless from claims arising from third parties. The duration of the agreement was also clearly defined to be for a duration of five (5) years commencing 1<sup>st</sup> January 2016 to 31<sup>st</sup> December 2020.

[87] After reviewing the agreement and the nature of the working relationship between the appellant and the respondent, we find no evidence that would lead us to make any finding that the terms of trade regarding distribution were arbitrary, unfair, unconscionable, or made in bad faith so as to contravene public policy in Kenya. The appellant was fully aware that the agreement was the basis of its engagement with the respondent, and the terms were unambiguous. Any claims involving the respondent and Jovet Tanzania Limited could only arise under and be governed by the terms of the Distribution Agreement and nothing else. Further, while the *Heineken decision* (supra) affirms the position that principles of equity and fairness may be invoked in claims for damages where goodwill is established, no such claim has been proved or substantiated in this case. Accordingly, the appellant has failed to demonstrate a violation of Articles 10, 19, and 27 of the Constitution. And even if the terms were to be viewed as potentially unfair under the agreement, we find no nexus or proximate connection between the respondent and the alleged constitutional violations. The respondent has also not been shown in any way to have breached its terms of the Distribution Agreement to attract any legal sanction including any finding that it breached any rights under Article 40 of the Constitution. We have further determined that the issue of goodwill cannot arise in the present case and while the appellant has

spiritedly argued that it lost goodwill in the entire transaction, neither the facts of its case nor the Constitution support such a claim. Consequently, the reliefs sought in the petition were neither tenable nor grantable.

**[88]** In addition, we concur with the findings of the superior courts below that at no point did the respondent appoint the appellant as a distributor of its products. The record indicates on the contrary that the respondent had a distributorship arrangement with Jovet (Tanzania) Limited and there was a private arrangement between Jovet (Tanzania) Limited and the appellant, whereby the appellant would distribute the respondent's products in Kenya on behalf of Jovet (Tanzania) Limited. However, there was no contractual relationship between the appellant and the respondent that could give rise to a claim for breach, as no such contract existed.

**[89]** Having, on the above limb, reached the same conclusion as the courts below, we find that although the superior courts ought to have addressed the constitutional issue(s) raised in the appellant's petition, the appellant's primary grievance was ultimately considered. Furthermore, all parties were afforded ample opportunity to present their respective arguments and the error in not addressing the issue(s) stated above would not by itself sway us to conclude that the appellant's rights under Article 50 were curtailed or violated. Moreover, having examined the same in detail we have come to our own conclusion that going by the irrefutable facts, the appellant failed to demonstrate how the respondent was culpable for its loss of goodwill.

**[90]** The upshot of the foregoing analysis leads to the inescapable conclusion that, while we have made certain affirmative findings in this judgment-on jurisdiction and goodwill as intangible property-none of the specific reliefs sought by the appellant including the setting aside of the Court of Appeal judgment and the remitting of this matter for hearing by the High Court can be granted. Accordingly, we find that the petition of appeal is without merit and is hereby dismissed.

## F. COSTS

[91] Given the context of the issues raised by the appellant and guided by our determination in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR that the Court, in exercising its discretion to award costs should accommodate the special circumstance of the case, we are inclined to a determination that there shall be no orders as to costs.

## G. ORDERS

[92] We accordingly issue the following orders:

- i. The Petition of Appeal dated 22<sup>nd</sup> November 2024 and filed on 25<sup>th</sup> December 2024 is hereby dismissed.*
- ii. There shall be no orders as to costs.*
- iii. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs upon lodging of this appeal be refunded to the appellant.*

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of May 2025.**

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

.....  
**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**

I certify that this is a true copy of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**

