



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko SCJJ)

PETITION (APPLICATION) NO. E007 OF 2025

– BETWEEN –

**KWALE SUGAR INTERNATIONAL
COMPANY LIMITED.....APPELLANT/APPLICANT**

-AND-

**EPCO BUILDERS LIMITED.....1ST RESPONDENT
CATHOLIC ARCHDIOCESE OF MOMBASA.....2ND RESPONDENT
SOUTHERN ENGINEERING COMPANY LIMITED...3RD RESPONDENT**

(Being an application for Conservatory Orders from the Judgment of the Court of Appeal at Nairobi (Musinga (P), Gatembu & Mativo, JJ.A.) delivered on 7th February 2025 in Civil Appeal No. 208 of 2020)

Representation:

Mr. Billy Kongere for the appellant/applicant
(Muriu, Mungai & Company Advocates LLP)

Ms. Ludia Luther appearing together with Mr. Okwach for the 1st respondent
(Okwach & Company Advocates)

Non-appearance by the 2nd respondent

Mr. Andrew Ombwayo for the 3rd respondent
(Andrew Ombwayo & Company Advocates)

RULING OF THE COURT

[1] UPON READING the applicant's Notice of Motion dated 5th March 2025 expressed to be brought pursuant to Sections 3, 3A, 23A and 24 of the Supreme

Court Act and Rules 31 and 32 of the Supreme Court Rules, 2020 for orders, *inter alia* that, pending the hearing and determination of the petition, the Court be pleased to issue:

- i) ... *Spent*
- ii)... *Spent*
- iii) ... *Spent*;
- iv) *A stay of further proceedings in Nairobi High Court Insolvency Petition No. 007 of 2019; EPCO Builders Limited Vs Kwale International Sugar Company Limited;*
- v) *A temporary injunction restraining the respondents from advertising the filing of Nairobi High Court Insolvency Petition No. 007 of 2019 or taking any action towards publicizing or prosecuting the said petition; and*
- iii) *Costs of this application be in the cause; and*

[2] UPON CONSIDERING the supporting affidavit sworn on 5th February, 2025 by Benson Musili, Group Head, Legal & Board Affairs of the applicant, and the written submissions dated 5th March, 2025, to the effect that the applicant and the 1st respondent entered into a contract of Kshs 2.2 billion to construct a sugar factory in Kwale; that a dispute arose over certificates of payment amounting to Kshs.405,829,106/- which the applicant contends are unmerited due to non-performance; that the 1st respondent commenced insolvency proceedings being ***Nairobi High Court Insolvency Petition No. 007 of 2019*** while the applicant moved to strike them out on grounds of a disputed debt and the existence of an arbitration clause; that the High Court dismissed the application holding there was no substantial dispute; and that the Court of Appeal, while recognizing the dispute, nonetheless, dismissed the applicant's appeal and allowed the insolvency proceedings to proceed; and

[3] NOTING the applicant's contention that the Court of Appeal's decision violates Articles 10, 50 and 159 of the Constitution, and that the appeal has been brought as of right; that there is a real risk the insolvency matter will proceed and be advertised, leading to irreparable harm and a possible run on the applicant by creditors; that the appeal raises arguable issues including whether the Court of Appeal failed to address a core issue and whether it departed from precedent without justification regarding the resolution of disputed debts within insolvency proceedings; and

[4] FURTHER NOTING the applicant's submission that the insolvency proceedings, if not stayed, threaten its existence and may render the appeal nugatory; that the company employs approximately 2,500 people and supports around 300 sugarcane farmers whose livelihoods are at stake; and that the 1st respondent, having already received Kshs. 1.79 billion, can reasonably await the outcome of the appeal. The applicant, therefore, urges that the legal and equitable threshold for conservatory orders has been met; and

[5] UPON CONSIDERING the 1st respondent's replying affidavit sworn on 25th March 2025 by Ramji Varsani, its Managing Director, and the written submissions of even date in opposition to the Motion, to the effect: that the applicant's primary claim, that the Court of Appeal failed to determine the disputability of the debt is unfounded; that the Court of Appeal indeed addressed the issue and directed that it be resolved at trial before the High Court; that the applicant's framing of this as a constitutional violation under Article 50 lacks specificity; and that the appeal does not disclose any issue of constitutional interpretation or application and is therefore without legal foundation; and

[6] TAKING INTO ACCOUNT the 1st respondent's position that the appeal is not arguable, as it merely repackages contractual and procedural grounds as constitutional questions under Articles 10, 50, and 159 of the Constitution without demonstrating their relevance; that the applicant's dissatisfaction with the Court

of Appeal's findings does not elevate the matter to a constitutional controversy; that the applicant has refused to submit to the High Court process where the dispute on the debt can be ventilated; that liquidation cannot occur without a hearing and the applicant is instead engaging in delay tactics; that the applicant's claims of large-scale employment are unsupported by evidence; and that the applicant seeks to delay justice and protect itself at the expense of the 1st respondent's economic survival; and

[7] HAVING CONSIDERED the application, affidavits and rival arguments summarized in the preceding paragraphs **WE NOW OPINE** as follows:

- i. What is sought in the Motion before us is a relief to stay insolvency proceedings before the High Court, being ***Nairobi High Court Insolvency Petition No. 007 of 2019***, and an order of temporary injunction to restrain the respondents from advertising, publicizing or prosecuting the insolvency proceedings. This is intended to protect and safeguard the substratum of the appeal, in this case, the existence of the applicant, which is threatened by insolvency, so that the applicant can pursue its appeal, whose outcome must not be rendered nugatory should it succeed.
- ii. The principles and considerations guiding the grant of interlocutory orders by this Court are that: the appeal is arguable and not frivolous; unless the orders sought are granted, the appeal were it to eventually succeed, would be rendered nugatory; and it is in public interest that the conservatory orders be granted. See ***Munya Vs Kithinji & 2 others*** [2014] KESC 30 (KLR).
- iii. In assessing whether an appeal is arguable, the Court does not examine the merits of the appeal at this stage, nor does it render any conclusive findings on matters of fact or law. An arguable appeal is not one that must necessarily succeed, but one that presents at least one plausible issue to warrant full

consideration at the hearing. It is stressed that even a single arguable point is sufficient to satisfy this threshold.

- iv. Regarding the nugatory aspect, the key question is whether the subject matter to be preserved, if lost, can be reversed or restored. If it cannot be reversed, the Court must consider whether monetary compensation would offer adequate redress. See ***Stanley Kang'ethe Kinyanjui Vs Tony Ketter & 5 Others***, Civil Application No. 31 of 2012; [2013] eKLR. As a third ground, the Court will inquire as to where the public interest lies, considering the parties' respective rights.
- v. Applying these principles to the arguments presented, this Court's jurisdiction to grant interlocutory orders of stay of proceedings is derived from Section 21(2) of the Supreme Court Act in the following terms:

“In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.”; and

- vi. From the plain reading of the Court's jurisdiction under Article 163(4) only appeals from the Court of Appeal lie to this Court. It should follow that this Court can only grant an order of stay of further proceedings in the Court of Appeal and no other court below, and specifically the High Court, as sought in this application. This position was emphasized in ***Dande & 3 others Vs Director of Public Prosecutions & 2 others*** [2022] KESC 23 (KLR) as follows:

“Applying these strictures to this application, it is fairly elementary that this court can only grant an order of stay of a decree or order of the Court of Appeal or stay of further proceedings in the Court of Appeal but not of proceedings pending hearing in the Magistrate's Court, as sought in this application; and

that reference to “any other court or tribunal as prescribed by national legislation” in article 163(3) (b)(ii) is definitely not reference to the Magistrate’s Court; and that this court has, in the cases of Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others, SC Application 22 of 2019; [2019] eKLR and Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others, SC Application 31 of 2019; [2020] eKLR, granted orders to stay the respective decisions of the Court of Appeal and not the proceedings that were pending before the Magistrate’s Courts...”; and

- vii. The Petition of Appeal No. E007 of 2025 filed in this Court only challenges the decision of the Court of Appeal as it should and not that of the High Court. Yet the entire Motion is about the decision of the High Court that gave rise to the first appeal in the Court of Appeal, which is now the subject matter of **Petition of Appeal No. E007 of 2025** pending before the Court. The Court cannot frog-leap the Court of Appeal to provide relief to a party before the High Court. To do so would be inconsistent with its jurisdiction. For these reasons, we find no merit in this application and accordingly dismiss it.
- viii. On costs, the award of the same is discretionary and follows the principle set out by this Court in **Rai & 3 others Vs. Rai & 4 others** [2014] KESC 31 (KLR) that costs follow the event. In the exercise of our discretion, we direct that the costs of the motion shall abide the outcome of the appeal.

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

- i. The applicant's Notice of Motion dated 5th March 2025 is hereby dismissed.*
- ii. Costs of the motion shall abide by the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of May, 2025.

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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

.....
NJOKI NDUNGU
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