



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

**PETITION (APPLICATION) NO. E008 OF 2025 &
APPLICATION NO. E006 OF 2025**

B. N. KOTECHA & SONS LTD 1ST PETITIONER

HEMAL KOTECHA 2ND PETITIONER

-VERSUS-

AMALO COMPANY LIMITEDRESPONDENT

*(Being applications for conservatory and stay orders, and to strike out the
Petition dated 5th March 2025 against the Judgment and Orders of the Court of
Appeal (Okwengu, H.A. Omondi & Ngugi, JJ.A) delivered in Kisumu Civil
Appeal No. 81 of 2019 on 24th January 2025)*

Representation:

Mr. Ogada Meso for the petitioners
(Prof. Tom Ojienda & Associates)

Mr. Isaac Okero for the respondent
(Behan & Okero Advocates)

RULING OF THE COURT

[1] WHILE APPRECIATING their correlation, this Ruling will dispose of two Notices of Motion, the first by the petitioners dated 5th March 2025 seeking conservatory and stay orders, and the second by the respondent dated 20th March 2025 seeking to strike out the petition dated 5th March 2025 and the first application (for conservatory and stay orders), for want of jurisdiction. In addition, the respondent filed a preliminary objection dated 20th March 2025 contending that the Court lacks jurisdiction to determine the petition and the application for conservatory and stay orders.

[2] UPON PERUSING the Notice of Motion by the petitioners dated 5th March 2025 and filed on 14th March 2025, brought pursuant to Sections 21 and 24 of the Supreme Court Act, 2011 and Rules 3(5), 31 and 32 of the Supreme Court Rules, 2020, seeking: *conservatory orders staying execution of the Judgment by the Court of Appeal (Okwengu, H.A. Omondi & Ngugi, JJ.A) delivered in **Kisumu Civil Appeal No. 81 of 2019** on 24th January 2025, pending the hearing and determination of the application and the petition both dated 5th March 2025; conservatory orders staying execution of the Ruling of the **High Court in Kisumu Civil Suit No. 11 of 2018** pending the hearing and determination of the application and the petition both dated 5th March 2025; such other appropriate reliefs; and costs; and*

[3] UPON CONSIDERING the petitioners' grounds on the face of the application and affidavit in support sworn by *Harshil Kishore Kotecha* on 5th March 2025, in which it is contended that the application meets the threshold for grant of conservatory and stay of execution orders, particularly that: the appeal is arguable and raises weighty issues for consideration by this Court; unless stay is granted, the appeal will be rendered nugatory as the respondent is at liberty to

proceed with execution and any attendant proceeding during the pendency of the appeal; and that it is in the public interest to grant the prayers sought; and

[4] UPON CONSIDERING the petitioners' submissions dated 5th March 2025 in support of the application for stay, and supplementary submissions dated 26th March 2025 in opposition to the respondent's preliminary objection, to the effect that the appeal upon which the application is anchored raises issues of constitutional interpretation and application of Articles 25(c) and 50 of the Constitution on the right to be heard; and that this issue was the subject of determination by the superior courts. They cite this Court's decisions in *Hassan Ali Joho & Another Vs Suleiman Said Shabal & 2 Others* [2024] eKLR; and *Paul Mungai Kimani & 20 Others (on behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney General & 2 Others* [2020] eKLR. Similarly, the petitioners urge that the Court has jurisdiction to grant interlocutory reliefs. They rely on this Court's decision in *Board of Governors, Moi High School, Kabarak & Another Vs Malcom Bel*, SC Application No 12 & 13 of 2013; [2013] eKLR. The petitioners further restate that they have met the principles for grant of stay of execution, as established in *Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others*, SC Application No 5 of 2014; [2014] eKLR; and *George Mike Wanjohi Vs. Steven Kariuki & 2 Others*, SC Application No. 6 of 2014 [2014] eKLR; and

[5] NOTING the respondent's preliminary objection dated 20th March 2025 and submissions of 1st April 2025, wherein it is urged that: this Court lacks the jurisdiction to hear the application as the same is premised on an incompetent petition; and that the Judgment of the Court of Appeal and the Ruling by the High Court solely concerned a matter of private law, the decisions of which had nothing to do with the interpretation or application of the Constitution; and

[6] UPON PERUSING the Notice of Motion by the respondent dated 20th March 2025 and filed on 3rd April 2025, brought under Rule 31(6) of the Supreme Court Rules, 2020, seeking: *to strike out the petition dated 5th March 2025 and filed on 14th March 2025; and the motion of even date for want of jurisdiction; and costs;* and

[7] UPON CONSIDERING the grounds in support of the application, the respondent's supporting affidavit sworn by *Anil Kumar D. Shah*, submissions dated 20th March 2025 and rejoinder submissions dated 1st April 2025, wherein the respondent reiterates that this Court lacks jurisdiction to determine both the appeal and application herein; that neither the High Court nor the Court of Appeal interpreted or applied the Constitution; it is contended that the High Court (*Cherere J.*) rightfully exercised discretion under Order 10 Rule 11, in setting aside the interlocutory judgment and dismissing the petitioners' application for setting aside on the ground that there was no defence on the merits. Additionally, that the issue before the Court of Appeal did not involve the interpretation or application of the Constitution, but only determined whether the trial court exercised its discretion rightfully, reasonably or rationally; and

[8] UPON CONSIDERING the petitioners' replying affidavit sworn by *Harshil Kishore Kotecha* on 26th March 2025 in opposition to the respondent's application, and submissions of even date, wherein they restate their submissions on jurisdiction in the first motion adverted to; while further urging that by dint of Article 163(4)(a) of the Constitution, this Court has the requisite jurisdiction to hear and determine the appeal and application for conservatory orders; that the superior courts below interpreted and applied the provisions of Articles 25(c) and 50 of the Constitution; that it is the interpretation and application of these provisions that is challenged before this Court; and that the respondent's application is fatally defective, bad in law and an abuse of the court processes; and

[9] **NOTING** that a preliminary objection on jurisdiction has been raised by the respondent on the question whether this Court has jurisdiction under Article 163(4)(a), it is our considered view that the challenge to 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 *limine*; and

[10] **BEARING IN MIND** this Court's decision regarding the proper invocation of its jurisdiction under Article 163(4)(a) of the Constitution in ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012], eKLR, wherein we stated:

*“This Article must be seen to be laying down the principle that **not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court...***

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.”

[11] **FURTHER BEARING IN MIND** the principle in ***Nduttu*** (Supra) emphatically restated in ***Hassan Ali Joho & Another Vs Suleiman Said Shahbal & 2 Others*** SC Petition No. 10 of 2013 [2014] eKLR and ***Gatirau Peter Munya Vs Dickson Mwenda & 2 Others*** SC Application No. 5 of 2014 [2014] eKLR; and

[12] **HAVING CONSIDERED** the totality of the applications, responses thereto, and submissions made by the parties, **WE NOW OPINE** as follows:

- i) Examining the records and decisions by the superior court below, it is clear that the High Court interrogated and exercised its discretion in dismissing the application for setting aside an interlocutory judgment on the ground that the draft defence did not raise any triable issue;
- ii) Similarly, in its Judgment dismissing the appeal, the Court of Appeal confined itself to the question as to whether the High Court had judiciously exercised its discretionary powers in dismissing the application for setting aside an interlocutory Judgment; and
- iii) Guided by the foregoing principles, we find that the appeal before us does not involve the application or interpretation of the Constitution and therefore falls outside the jurisdictional ambit of this Court under Article 163(4)(a).
- iv) In the absence of jurisdiction, we cannot delve into the application for conservatory orders staying execution of the Judgment by the Court of Appeal as sought by the petitioners in their ***Notice of Motion dated 5th March 2025 and filed on 14th March 2025.***

[13] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- i) ***The Preliminary Objection dated 20th March, 2025 be and is hereby allowed;***
- ii) ***The Notice of Motion dated 20th March 2025 and filed on 3rd April 2025, be and is hereby allowed;***
- iii) ***The Notice of Motion dated 5th March 2025 and filed on 14th March 2025, be and is hereby dismissed;***
- iv) ***The Petition of Appeal No. E008 of 2025 dated March 5th March 2025 and filed on 14th March 2025 be and is hereby struck out;***
- v) ***The petitioners shall bear the respondent's costs; and***

