



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION NO. E007 OF 2025

-BETWEEN-

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

—VERSUS—

EPCO BUILDERS LIMITED1ST RESPONDENT
CATHOLIC ARCHDIOCESE OF MOMBASA2ND RESPONDENT
SOUTHERN ENGINEERING COMPANY LIMITED ...3RD RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(Musinga (P), Gatembu & Mativo, JJ.A.) dated 7th February, 2025 in Civil Appeal No.
208 of 2020)*

Representation:

Mr. Billy Kongere for the Appellant.
(Muriu, Mungai & Company Advocates LLP)

Ms. Ludia Luther & Mr. Okwach for the 1st Respondent.
(Okwach & Company Advocates)

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

No appearance for the 2nd Respondent.

RULING OF THE COURT

[1] COGNIZANT THAT this Court's appellate jurisdiction as circumscribed by Article 163(4) of the Constitution, which provides for appeals as of right only in
Petition No. E007 of 2025

matters involving the interpretation or application of the Constitution; and mindful that, consistent with the Court's prior dicta and inherent powers, the Court retains the discretion to determine preliminary objections, *in limine*, where a petition is wholly defective on the face of it, as was done in ***Ngao Vs Kitheka*** [2025] KESC 1 (KLR); and

[2] ACKNOWLEDGING THAT this Court has elected to exercise its discretion to address, *in limine*, the Notice of Preliminary Objection dated 25th March 2025, filed by the 1st respondent, challenging our jurisdiction to entertain the Petition of Appeal dated 5th March 2025, on the ground that it fails to meet the constitutional threshold set under Article 163(4)(a) of the Constitution; and

[3] NOTING THAT the dispute giving rise to this appeal originates from a construction contract dated April 2012 between the appellant and the 1st respondent, which contained an arbitration clause; that the 1st respondent, claiming an unpaid debt of Kshs. 712,481,950.65, issued a statutory demand and subsequently presented an insolvency petition against the appellant; that the appellant disputed the debt, alleging fraudulent certification and the existence of a *bona fide* dispute requiring arbitration; that the High Court (*Okwany, J.*) dismissed the appellant's application to strike out the insolvency petition, finding that the debt was not genuinely disputed; and that the Court of Appeal, while dismissing the appeal, directed that the substantive petition proceed to a full hearing before a different judge; and

[4] UPON READING the 1st respondent's Notice of Preliminary Objection, and submissions dated 25th March 2025 and filed on 26th March 2025, in support thereof, wherein it is contended that: this Honourable Court lacks jurisdiction as the appeal does not involve the interpretation or application of the Constitution; the judgment of the Court of Appeal revolved around the application of the Insolvency Act and contractual disputes, not constitutional principles; the petition of appeal is an attempt to dress ordinary contractual and insolvency grievances in constitutional guise; and the authorities of ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Limited & Another*** [2012] eKLR and ***Trattoria***

Limited Vs Maina & 3 Others [2022] KESC 75 (KLR) are squarely applicable; and

[5] UPON CONSIDERING the appellant's submissions dated 28th March 2025, and filed on 28th March 2025, in response to the Preliminary Objection, wherein it is contended that: the Court's jurisdiction is properly invoked as the Court of Appeal's failure to conclusively determine the disputability of the debt violated the appellant's right to a fair trial under Article 50 of the Constitution; the matter took a "constitutional trajectory" as outlined in ***John Florence Maritime Services Limited & another Vs Cabinet Secretary for Transport and Infrastructure & 3 others*** [2019] KESC 20 (KLR); and the decision of the Court of Appeal causes grave injustice by overturning settled insolvency jurisprudence; and

[6] TAKING INTO ACCOUNT the Record of Appeal and the Judgment of the Court of Appeal delivered on 7th February 2025, in Civil Appeal No. 208 of 2020, which reveals that the issues for determination before the appellate court were: whether the High Court had jurisdiction to entertain the insolvency petition in light of an arbitration clause; whether the debt was disputed and the petition premature; the validity of the statutory demand; and whether the advertisement of the petition should be recalled; and

[7] NOTING the Replying Affidavit sworn on 20th March 2025, by Ramji Devji Varsani, the Managing Director of the 1st respondent, in opposition to the Petition of Appeal, wherein he deposes that: the Petition is incompetent as it was improperly lodged under Article 163(4)(a), the impugned judgment not having involved the interpretation or application of the Constitution; the substratum of the dispute is a private commercial debt arising from a construction contract; the appellant's conduct demonstrates an intention to bury the 1st respondent in litigation and avoid a trial on the merits; the Court of Appeal correctly directed that the issue of the debt's disputability be determined at trial, consistent with established insolvency jurisprudence; and the appellant's allegations of constitutional violations are a guise to delay the insolvency proceedings; and

[8] APPRECIATING the appellant's rejoinder contained in the Further Affidavit of Benson Nzuka Musili, sworn on 2nd April 2025, maintaining that: the appellant's contention is not that a constitutional issue was determined by the courts below, but that the Court of Appeal's conduct in refusing to resolve the preliminary issue of the debt's disputability violated its right to a fair hearing under Article 50 of the Constitution; this failure transformed an ordinary civil dispute into one with a constitutional dimension; the 1st respondent's position before this Court is inconsistent with its arguments in the lower courts and established jurisprudence; and the appellant is not forum shopping but consistently seeking a determination on the genuine dispute of the debt before facing insolvency proceedings; and

[9] HAVING CONSIDERED all the foregoing, **WE NOW OPINE** as follows:

- i. The sole and pivotal issue for our determination at this stage is whether this Court possesses the jurisdiction to entertain the instant appeal. It is trite law that jurisdiction is everything, and without it, a court must down its tools. The burden lies upon the appellant to demonstrate that this appeal properly falls within our ambit under Article 163(4)(a) of the Constitution.
- ii. Article 163(4)(a) of the Constitution provides a right of appeal to this Court only in cases "involving the interpretation or application of the Constitution." This jurisdictional gateway is narrow and specific. It is not an avenue for a second appeal on matters of statutory interpretation or factual disputes, and the mere invocation of constitutional provisions in pleadings does not, without more, confer jurisdiction upon this Court.
- iii. The appellant's core complaint is that the Court of Appeal violated its right to a fair hearing under Article 50 of the Constitution by failing to conclusively determine whether the debt was genuinely disputed before allowing the insolvency petition to proceed to trial. While this is framed as a constitutional issue, a holistic examination of the proceedings reveals that the substantive contest between the parties has always been a quintessential commercial dispute, centering on the existence and validity of a debt arising from a construction contract, and the proper forum for its resolution between arbitration and insolvency proceedings.

- iv. The references to Articles 50 and 159(2)(c) of the Constitution in the appellant's grounds are, in the context of this case, incidental to the core commercial dispute. The Court of Appeal judgment was primarily an application of the principles under the Insolvency Act and the jurisprudence governing the interplay between arbitration clauses and winding-up petitions. Its reasoning did not, in the circumstances, amount to a substantive trajectory of constitutional interpretation.
- v. We echo this Court's holding in **Lawrence Nduttu case** (*supra*), that "*the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application*" is insufficient. The constitutional issue must have been the subject of litigation and determination in the courts below. Here, the substratum of the litigation in both the High Court and the Court of Appeal was the application of insolvency law, not the development of constitutional doctrine.
- vi. The appellant's reliance on **John Florence Maritime case** (*supra*) does not aid its cause as the same is distinguishable. The alleged procedural unfairness in this case, the deferral of a merits-based decision on the debt's disputability to a full trial, is, a function of the application of insolvency procedure. It does not, in our view, rise to the level of a fundamental breach of the right to a fair trial that would trigger this Court's jurisdiction under Article 163(4)(a) of the Constitution. The Court of Appeal's direction for the matter to be heard by a different judge was, in fact, a measure to ensure impartiality and a full hearing on the merits, without extinguishing the appellant's appellate rights.
- vii. Consequently, we find that the appellant has not demonstrated that this appeal meets the jurisdictional threshold. The Preliminary Objection is therefore merited and is for upholding.
- viii. As costs follow the event, we see no reason to depart from the general principle. However, as the 2nd and 3rd respondents did not appeal and/or file any pleadings in this matter, no costs are awardable to them.

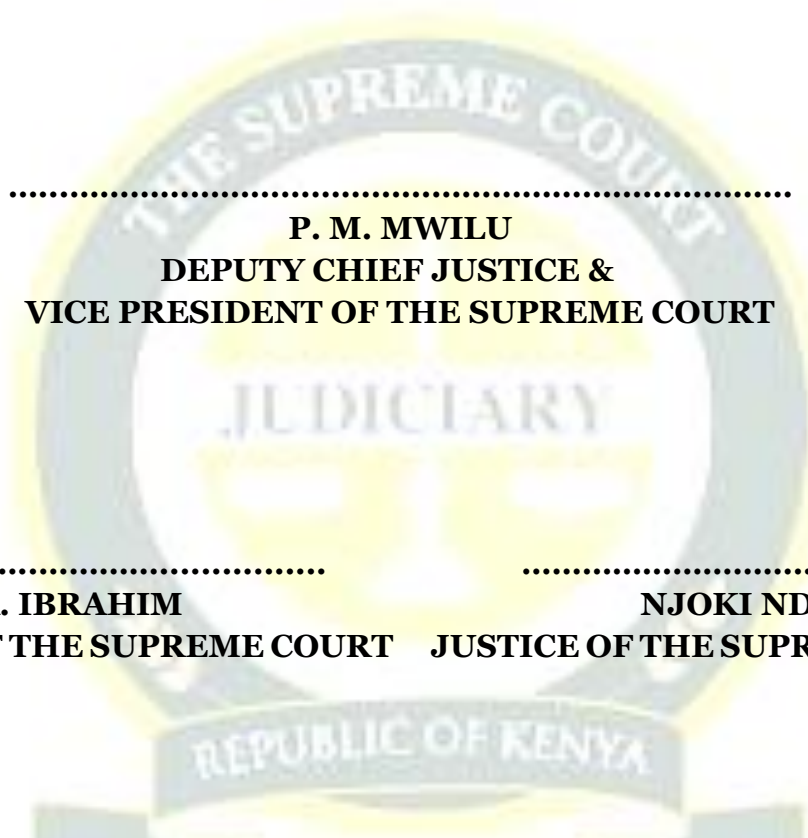
[10] CONSEQUENTLY, for reasons aforesaid, we make the following orders:

- (i) *The Notice of Preliminary Objection dated 25th March 2025 filed by the 1st respondent is upheld.*

- (ii) *The Petition of Appeal dated 5th March 2025 is hereby struck out for want of jurisdiction.*
- (iii) *The sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.*
- (iv) *Costs of the Petition of Appeal and this Preliminary Objection are awarded to the 1st respondent.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 5th day of December, 2025.



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

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

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

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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

