



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E001 OF 2026

-BETWEEN-

CYTONN INVESTMENTS PARTNERS FOUR LLP..... 1ST APPELLANT
CYTONN INVESTMENTS PARTNERS FIVE LLP 2ND APPELLANT
CYTONN INVESTMENTS PARTNERS TEN LLP 3RD APPELLANT
CYTONN INVESTMENT PARTNERS ELEVEN LLP..... 4TH APPELLANT
EPAZEC COMPANY LLP..... 5TH APPELLANT
CYTONN INTEGRATED PROJECT LLP..... 6TH APPELLANT
CYTONN INVESTMENTS PARTNERS SIXTEEN LLP... 7TH APPELLANT

—VERSUS—

THE OFFICIAL RECEIVER..... RESPONDENT
CHYS CREDITORS'
COMMITTEE 1ST PROPOSED INTERESTED PARTY
SBM BANK (KENYA)
LIMITED 2ND PROPOSED INTERESTED PARTY

(Being an application for conservatory orders pending appeal from the judgment of the Court of Appeal (Kiage, Jamila Mohammed & Odunga, JJA) in Civil Appeal No. E927 of 2024 as consolidated with Civil Appeal Nos. E928 of 2024, E929 of 2024, E930 of 2024, E931 of 2024, E932 of 2024, E934 of 2024 & E032 of 2025 dated 21st November 2025; an application for joinder by the CHYS Creditors' Committee; an application for joinder by SBM Bank (Kenya) Limited; and a Preliminary Objection)

Representation:

Ms. Koile & Mr. Dudi for the Appellant.
(C. Koile & Company Advocates)
Petition (Application) No. E001 of 2026

Judy Mugo & Sylvia Githungo for the Respondent.
(Office of the Attorney General)

Kavita Mwanzia for the 1st Proposed Interested Party (CHYS Creditors Committee).
(Kiroga Kuria & Co. Advocates)

Mutonyi for the 2nd Proposed Interested Party (SBM Bank (Kenya) Ltd).
(Walker Kontos Advocates)

RULING OF THE COURT

[1] This ruling disposes of three Notices of Motion and a Preliminary Objection, all of which are related in tenor and substance. The first Motion, filed by the appellants (Cytonn Investments Partners Four LLP & 6 Others), seeks conservatory orders pending the hearing and determination of their Petition of Appeal. In the second and third Motions, CHYS Creditors' Committee (the 1st proposed interested party) and SBM Bank (Kenya) Limited (the 2nd proposed interested party) seek to be joined in these proceedings, respectively. The respondent (the Official Receiver), by way of Preliminary Objection, challenges the Court's jurisdiction to hear and determine the Petition of Appeal on the ground that it does not fall under Article 163(4)(a) of the Constitution.

[2] UPON READING the appellants' Notice of Motion dated 22nd January 2026, brought under Sections 3, 21 and 24 of the Supreme Court Act and Rules 31 and 32 of the Supreme Court Rules, 2020, for orders inter alia that:

- i. *This application be certified as urgent and heard ex-parte in the first instance;*
- ii. *Pending the hearing and determination of this application, an interim temporary injunction be issued restraining the respondent, their servants, agents, officers or any other person acting for and/or on their behalf from acquiring provisional titles over the properties owned and/or held by the applicants; conducting valuations over the properties owned and/or held by the applicants; and advertising for sale, disposing of, selling by private treaty or otherwise howsoever leasing or otherwise interfering with the applicant's possession, occupation, use and/or ownership of title and/or interest in the properties known as L.R. No. Kiambaa/Ruaka/6667 (Alma), L.R. No(s) 13208/2, 28055 and 28056 (Mystic Plains/Newtown), L.R. Petition (Application) No. E001 of 2026*

5910, Ruiru (Riverrun), L.R. Kiambaa/Ruaka/520 (Taraji), LR. No. 28223/3 (The Ridge), LR No. 1055/29, Miotoni, Karen (Applewood) and L.R. No 2/85 (Originally 2/44/2), L.R. 2/86 (Originally 2/44/3) and L.R. 2/87 (Originally 2/44/4) Kilimani;

- iii. Pending the hearing and determination of the Petition of Appeal, this Honourable Court be pleased to issue conservatory orders restraining the respondent, by themselves, their servants, agents or any other person acting for and/or on their behalf from enforcing and/or implementing the vesting orders affirmed by the Court of Appeal in respect of the properties known as L.R. No(s) 13208/2, 28055 and 28056 (Mystic Plains/Newtown), L.R. 5910, Ruiru (Riverrun), L.R. Kiambaa/Ruaka/520 (Taraji), LR. No. 28223/3 (The Ridge), LR No. 1055/29, Miotoni, Karen (Applewood) and L.R. No 2/85 (Originally 2/44/2), L.R. 2/86 (Originally 2/44/3) and L.R. 2/87 (Originally 2/44/4) (Kilimani);
- iv. In the alternative, and without prejudice to Prayer iii. above, the Honourable Court be pleased to grant a stay of execution of the vesting orders over the properties known as L.R. No(s) 13208/2, 28055 and 28056 (Mystic Plains/Newtown), L.R. 5910, Ruiru (Riverrun), L.R. Kiambaa/Ruaka/520 (Taraji), LR. No. 28223/3 (The Ridge), LR No. 1055/29, Miotoni, Karen (Applewood) and L.R. No 2/85 (Originally 2/44/2), L.R. 2/86 (Originally 2/44/3) and L.R. 2/87 (Originally 2/44/4) (Kilimani) affirmed by the Court of Appeal in the judgment dated 21st November 2025; and

[3] UPON CONSIDERING the supporting affidavit sworn on 22nd January, 2026 by Veronica Maina, the Legal Officer of the Cytonn Investment Group, together with the written submissions dated 22nd January, 2026, wherein it is contended that: the appeal is arguable and raises substantial constitutional questions regarding the interplay between Article 40 of the Constitution and Sections 444 and 445 of the Insolvency Act; the Petition of Appeal will be rendered nugatory unless the stay is granted as the respondent will proceed to value, sell, and transfer the suit properties to third parties; the balance of convenience and

public interest tilts in favour of granting the orders sought; and the Court has jurisdiction under Article 163(4)(a) of the Constitution; and

[4] HAVING REGARD to the Replying Affidavit sworn on 6th February 2026, by Mark Gakuru, the Official Receiver & Liquidator, together with the Grounds of Objection and submissions dated 6th February 2026, in opposition to the appellants' Motion to the effect that: the Petition of Appeal is fatally flawed as it does not meet the jurisprudential threshold required under Article 163(4)(a) of the Constitution; the subject matter is a purely commercial insolvency dispute governed by the Insolvency Act, not a constitutional question; the appellants are attempting to constitutionalize ordinary commercial issues by merely appending constitutional provisions; and the Petition offends the doctrine of constitutional avoidance; and

[5] UPON READING the Notice of Motion dated 17th February 2026 filed by the CHYS Creditors' Committee (the 1st proposed interested party) seeking to be joined as an interested party to these proceedings, supported by the affidavit of Michael Mutua Mwinzi, a member of the Creditors' Committee, sworn on 17th February 2026, and written submissions dated 17th February 2026, to the effect that the Creditors' Committee is a statutorily constituted body representing over 3,000 creditors of CHYS, that it participated in the proceedings before the High Court and Court of Appeal, and that it stands to be prejudiced if not joined; and

[6] UPON CONSIDERING the appellants' Replying Affidavit sworn by Veronica Maina on 26th February 2026, and the corresponding written submissions dated 26th February 2026, in opposition to the CHYS Creditors' Committee's joinder application to the effect that: the application is procedurally incompetent for non-compliance with the timelines issued by the Deputy Registrar on 10th February 2026; the Creditors' Committee lacks juristic personality to sue or be sued in its own name; the Official Receiver is already a party and sufficiently represents the interests of the creditors; and the joinder would unduly expand the scope of the proceedings; and

[7] UPON READING the Notice of Motion dated 17th February, 2026 filed by SBM Bank (Kenya) Limited (the 2nd proposed interested party) seeking to be joined

as an interested party and for a stay of proceedings, supported by the affidavit of Paul Kaguru, its Director, Legal, sworn on 17th February, 2026 and written submissions dated 17th February, 2026, to the effect that the Bank is a secured creditor over the property known as Title Number Kiambaa/Ruaka/6667 (the Alma), a subject matter of the appeal, and that its proprietary rights will be directly affected by the orders sought by the appellants; and

[8] UPON REVIEWING the appellants' Replying Affidavit sworn by Veronica Maina on 5th March 2026, and the corresponding written submissions dated 5th March 2026, in opposition to SBM Bank's joinder application to the effect that: the application is procedurally incompetent for non-compliance with the timelines issued by the Deputy Registrar on 10th February 2026; the Bank's interest as a secured creditor is a commercial matter pending before the High Court in separate proceedings and does not fall within the narrow constitutional questions raised in this Petition; the Bank's proprietary rights are not affected by the determination of the constitutional issues herein; and the joinder would unduly expand the scope of the proceedings and transform the constitutional appeal into a commercial recovery dispute; and

[9] NOTING the Supplementary Submissions filed on behalf of the CHYS Creditors' Committee on 4th March 2026, in reply to the appellants' opposition, wherein the proposed interested party contends that any procedural delay was caused by e-filing system failure, that it has *locus standi* as a statutorily constituted body representing over 3,000 creditors, and that it would be prejudiced if not allowed to participate in the Petition which directly affects the liquidation process; and

[10] FURTHER NOTING the Supplementary Affidavit sworn by Paul Kaguru on 12th March 2026 and the Supplementary Submissions filed on behalf of SBM Bank on 11th March 2026, in reply to the appellants' opposition, wherein the proposed interested party contends that: the affidavit sworn by Paul Kaguru is competent as the law does not require a written authority to be annexed to an affidavit, and in any event, an Authority to Act has since been filed; the application was filed within the seven-day timeline as evidenced by the official receipt dated

17th February 2026; the appellants' objection is a mere technicality that should be disregarded; and consolidation of the appeals before the Court of Appeal means the proposed interested party, having been the 3rd respondent in the consolidated appeal, cannot be excluded from the instant Petition; and

[11] TAKING INTO ACCOUNT the Preliminary Objection dated 30th January, 2026 filed by the respondent, challenging this Court's jurisdiction to hear the Petition of Appeal and the application, on the grounds, *inter alia*, that the Petition does not involve the interpretation or application of the Constitution as required by Article 163(4)(a), that the dispute is a commercial insolvency matter, and that the Petition offends the doctrine of constitutional avoidance; and

[12] FURTHER TAKING into account the appellants' rejoinder to the Grounds of Objection dated 13th February, 2026 and submissions dated 9th February, 2026 made in response to the Preliminary Objection, wherein it is contended that the Court of Appeal's reasoning took a trajectory of constitutional application, that the dispute squarely invokes Articles 40, 24, and 50 of the Constitution, and that the appeal lies to this Court as of right; and

[13] COGNIZANT OF the attendances by counsel before the Hon. Deputy Registrar of the Court on 10th February 2026, 18th February 2026, and 6th March 2026, for directions on compliance, and noting that the Deputy Registrar on 18th February 2026, directed that the appellants' application be placed before the Honourable Chief Justice for empanelment of a Bench; and

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

- i. In response to the appellants' application and the Petition of Appeal, the respondent has challenged our jurisdiction by way of a Preliminary Objection. In line with the Court's discretion to determine preliminary objections *in limine*, the primary issue for determination at this juncture, therefore, is whether the Petition of Appeal correctly invokes this Court's appellate jurisdiction as of right, under Article 163(4)(a) of the Constitution. It is only upon surmounting the jurisdictional threshold,

- that the Court will examine the prayer for interim conservative orders and the applications for joinder by the proposed interested parties.
- ii. Article 163(4)(a) of the Constitution provides that the Supreme Court shall have appellate jurisdiction to hear appeals, as of right, in any case involving the interpretation or application of the Constitution. The parameters for an appeal as of right are set out by this Court in ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** [2012] KESC 9 (KLR), where we held that the appeal must originate from a case where issues of contestation revolved around the interpretation or application of the Constitution, and the appellant must be challenging the Court of Appeal's interpretation or application of the Constitution.
 - iii. Further, in ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others*** [2014] KESC 38 (KLR), (***Munya Case***) we refined this position, holding that an appellant must demonstrate that the Court of Appeal's reasoning and conclusions, which led to the determination of the issue, can properly be said to have taken a trajectory of constitutional interpretation or application. Moreover, the issues of constitutional contestation must transcend the court hierarchy.
 - iv. In their petition of appeal, the appellants contend that the central question for determination is whether the interpretation of insolvency law adopted by the High Court and affirmed by the Court of Appeal is compatible with Article 40 of the Constitution, read together with Articles 24 and 50, in circumstances where proprietary interests held by separate and solvent legal persons were subjected to preservation and vesting orders due to a lender-borrower relationship with an entity under liquidation. They urge that the gravamen of the appeal raises a substantive constitutional question for determination by this Honourable Court, namely: whether vesting orders issued under Section 444 and 445 of the Insolvency Act may lawfully limit the right to property guaranteed under Article 40 of the Constitution in respect of solvent entities that are not themselves subject to insolvency proceedings.
 - v. A careful review of the appellants' own pleadings and the judgment of the Court of Appeal reveals that while the substratum of the dispute is a

commercial matter involving insolvency proceedings, the appellants, in their grounds of appeal and submissions specifically raised arguments hinging on the interpretation and application of the Constitution. These stemmed from the Memorandum of Appeal that formed the basis of the appeal before the Court of Appeal.

- vi. For instance, the Court of Appeal observed that, according to the appellants, despite acknowledging the rights of *bona fide* purchasers in its ruling, the trial court failed to independently determine their rights and, in breach of the respondents' right to an impartial hearing under Article 50(1) of the Constitution, the learned Judge transferred that responsibility to the Official Receiver. In respect of the 2nd appellants before the Court of Appeal, ***Charles K. Wambu & 6 Others***, the appellate court noted that they grounded their appeal on the contentions that the learned Judge erred: by unlawfully denying the creditors the right to a meeting to deliberate on the proposed debt settlement plan, thereby infringing their constitutional right to freedom of association under Article 36 of the Constitution; and by denying the creditors a fair opportunity to participate in the decision-making process regarding the debt settlement plan thereby violating their right to fair administrative action under Article 47 of the Constitution;
- vii. In the end, the Court of Appeal framed, as part of its issues for determination, the following - Whether the Rights of *bona fide* purchasers were violated (Article 40) and whether the ***appellants' right to fair hearing were violated***. It is therefore reasonable to conclude, as we do, that the Court of Appeal, in its determination engaged, albeit partly, in the interpretation and application of the Constitution in the context of the insolvency proceedings before it, notwithstanding that the appeal was ultimately found to be lacking in merit.
- viii. In ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others*** [2023] KESC 14 (KLR) we observed as follows:

“82. It is worthy of note that the way the dispute is prosecuted through litigation and the surrounding issues determine whether indeed it qualifies to be

considered as a constitutional question or not. It is readily determinable for some of them and almost improbable to distinguish constitutional and other underlying issues in others. It is therefore best left to the court on a case to case basis upon critically evaluating the facts, evidence and arguments before it. There will be a level of factual contestations that will inform the court's determination even at an interim stage to determine whether or not the court should exercise its discretion in favour of the applicant seeking conservatory orders."

In the said case, just like the present case, we are persuaded that, despite it having been challenged as a commercial dispute, the same raises constitutional questions as we have already noted, worthy of our assumption of jurisdiction. The applicable test was whether any interpretation or application of the Constitution could be readily identified from the pleadings and the court decision.

- ix. In relation to the disclosure by the appellants in their rejoinder to the Grounds of Objection dated 13th February 2026 that there are pending applications before the Court of Appeal, namely ***Civil Application SUP No. E023 of 2025*** and ***Civil Application SUP No. E024 of 2025***, seeking certification that the matters raised therein are of general public importance under Article 163(4)(b) of the Constitution, we can only reminisce our position in ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others*** SC Civil Application No 35 of 2014 [2015] eKLR. Since we cannot exercise concurrent jurisdiction over an appeal as of right and an appeal involving matters certified as involving great public importance, the appellants, having invoked our jurisdiction as of right, the appeal has to be subjected to that jurisdictional threshold. Thus, the applications for certification do not arise and in any event are not before us.
- x. For the reasons above, we do not find merit in the preliminary objection dated 30th January, 2026 and partly disallow the same. We affirm that the

Petition of Appeal meet the threshold set out in Article 163(4)(a) of the Constitution.

- xi. Turning to the prayer for stay of execution, the principles set out in ***Munya Case*** are instructive. The appellant, or intending appellant, must satisfy the court that the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted. Further, the element of an arguable appeal and the nugatory aspect should be established conjunctively and not disjunctively in an application for stay and conservatory orders. This is so bearing in mind that stay or conservatory orders deny a successful litigant the fruits of his judgment, albeit temporarily.
- xii. On arguability, it is undoubted that the appellant raises several arguments including on the right to property under Article 40 and the right to fair hearing under Article 50 of the Constitution. The Court does not concern itself as to the merit but only as to the existence of the argument, which the appellants have satisfied.
- xiii. On whether the appeal will be rendered nugatory, the appellants submit that in the absence of the preservation orders, the suit properties may be valued, sold, and transferred to third parties. In opposition thereto, the respondent, in addition to raising an objection on jurisdiction, maintains that any further dealings on the suit properties would be in furtherance of the court decision as a successful litigant. As we had noted earlier, stay or conservatory orders deny a successful litigant the fruits of his judgment albeit temporarily in order to preserve the substratum of the suit, in the event that the appeal is successful.
- xiv. Examining the nature of the suit properties and having assumed jurisdiction over the appeal, we are inclined towards preservation of the suit properties particularly noting that this is the final court whose decision would conclusively set out the parties' legal position. Besides, *prima facie*, we are unconvinced that the ramifications would be reversible in the absence of stay. See ***Cabinet Secretary for the***

National Treasury and Planning & 4 others v Okoiti & 52 others [2024] KESC 47 (KLR).

- xv. On public interest, the appellants argue that it is in the public interest that this Court stays the vesting orders pending the hearing and determination of the appeal to prevent the valuation and sale of these properties to innocent third parties who stand to have their proprietary interests defeated or challenged by the applicants. Additionally, that the sale of these properties will disenfranchise many *bona fide* purchasers who acquired an interest in these properties, and whose property rights are still pending recognition and registration. Consequently, that it is in public interest to maintain the status quo. In opposition, the Official Receiver's position is that it being a commercial dispute, the same should be allowed to proceed to a logical conclusion in line with the decision of the Court.
- xvi. Insolvency proceedings, the crux upon which the appeal is founded alongside the constitutional issues we have pointed out, would require a balancing of the interests of the debtor, creditors and all interested parties. We are also aware of the significant interest generated in the proceedings. We have on one hand, the appellants, subject to the insolvency processes, the members of the public who had invested in the projects undertaken on the suit property and on the other hand the Official Receiver in exercise of its statutory mandate. It is not lost to us that we have intended interested parties with one of them representing over 3,000 creditors. In the circumstances, we are persuaded that the public interest pivots towards allowing the stay of execution to maintain the status quo pending the conclusive determination of the parties' rights through the appeal. Consequently, we allow the prayer for conservatory orders as sought.
- xvii. As for the applications for joinder, the test is set out in Rule 24 of the Supreme Court Rules, 2020. The applicant has to demonstrate that it has a stake/ interest in the matter, stands to suffer prejudice should it not be joined, advanced relevant arguments as a proposed interested party relevant to the petition. This flows from our edicts in ***Francis Karioki***

Muruatetu & another v Republic & 5 others, SC Petitions No 15 and 16 of 2015; [2016] eKLR and ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others***, SC Petition No 12 of 2013; [2014] eKLR.

- xviii. It is common ground that both proposed interested parties participated in the proceedings before the High Court and Court of Appeal, and that they stand to be prejudiced if not joined. It is also common ground that the Court of Appeal handled the appeal as a consolidated one arising from various appeals filed against the ruling of the High Court. We are contented that they have demonstrated a sufficient stake to participate in the appeal. We say so given that at this stage, we are unable to distil whether the appeal is limited to the exclusion of the interested parties, as urged by the appellants, as to justify their exclusion in the present appeal. Besides, the nature of the dispute favours all affected persons to be allowed to have their day in court to enable the just determination of the matter at hand.
- xix. The contention that the applications were not filed within the timelines issued by the Hon. Deputy Registrar on 10th February 2026 is not sufficient as to disallow the application for joinder. During the mention before the Hon Deputy Registrar, it was clear that the proposed interested parties were keen on joining the proceedings, the appellants having excluded them in the pleadings filed before the Court. It has also not been disproved that the delay in filing the virtual copies was attributed to the system failure through the e-filing court virtual platform.
- xx. The upshot of our findings is that the applications are allowed as set out in the final orders of this Court.
- xxi. On costs, we are guided by our position in ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others*** [2014] eKLR, that costs follow the event. However, as the main dispute is still pending by way of the appeal, we order that the costs of these applications abide the outcome of the appeal.

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

- (i) ***The Preliminary Objection dated 30th January 2026, by the respondent is disallowed.***
- (ii) ***The Notice of Motion dated 22nd January, 2026 by the appellants is allowed to the extent that this Honourable Court grants conservatory orders restraining the respondent, by themselves, their servants, agents or any other person acting for and/or on their behalf from enforcing and/or implementing the vesting orders affirmed by the Court of Appeal in respect of the properties known as L.R. No(s) 13208/2, 28055 and 28056 (Mystic Plains/Newtown), L.R. 5910, Ruiru (Riverrun), L.R. Kiambaa/Ruaka/520 (Taraji), LR. No. 28223/3 (The Ridge), LR No. 1055/29, Miotoni, Karen (Applewood) and L.R. No 2/85 (Originally 2/44/2), L.R. 2/86 (Originally 2/44/3) and L.R 2/87 (Originally 2/44/4) (Kilimani);***
- (iii) ***The Notice of Motion dated 17th February, 2026 for joinder by the proposed 1st interested party (CHYS Creditors' Committee) is allowed.***
- (iv) ***The Notice of Motion dated 17th February, 2026 for joinder by the proposed 2nd interested party (SBM Bank (Kenya) Limited) is allowed.***
- (v) ***Costs of these applications to abide the outcome of the appeal.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 3rd day of July, 2026.

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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

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

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA

