REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E011 OF 2026

–BETWEEN–

AFRICAN COTTON INDUSTRIES LIMITED.....APPLICANT

–AND–

RURAL DEVELOPMENT SERVICES LIMITED..... RESPONDENT

(Being an application for conservatory orders and temporary injunction pending an appeal from the Judgment and Orders of the Court of Appeal at Nyeri ***(Kantai, Lesiit & Aroni, JJ.A)*** *delivered on 25th March 2026 in Civil Appeal No. E062 of 2021.)*

Representation:

Mr. Njoroge Regeru for the Applicant
(Njoroge Regeru & Company Advocates)

Mr. Ochieng h/b for Ms. Muema for the Respondent
(Waweru Gatonye & Company Advocates)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 29th April 2026 and filed on 8th May 2026 under Articles 50(1), 163(3)(b)(i) and (4)(a) of the Constitution, Sections 3A, 21, 23A and 24 of the Supreme Court Act and Rules 31(6) and 32(1) of the Supreme Court Rules, 2020, *seeking, conservatory orders and temporary injunctions restraining the respondent whether by itself, its agents, employees, servants or any person acting on its behalf from selling, transferring, alienating, charging, or in any manner dealing with the land known as Kakuzi/Kirimiri Block 7/281,* ***(the suit property)*** *pending the hearing and determination of the appeal and instant application; such further or alternative orders as may be necessary to safeguard the subject matter of appeal and to meet the ends of justice; and costs*; and

[2] UPON EXAMINING the grounds on the face of the application and supporting affidavit sworn by the applicant's director, *Mohamed Abdulkadir Mohamed Esmail* on 29th April 2026, to the effect that the appeal is arguable, as the Court of Appeal failed to interpret the constitutional issues raised before it, occasioning an injustice to the applicant; the appeal raises weighty and substantial questions under Article 163(4)(a) of the Constitution; unless the orders sought are granted, the respondent will be at liberty to deal with the suit property, rendering the appeal nugatory; the applicant has expended substantial resources and preparatory commercial commitments and stands to suffer irreparable loss; the balance of convenience tilts in favour of preserving the substratum of appeal; and it is in the interest of justice to grant the orders sought; and

[3] UPON CONSIDERING the applicant's submissions dated 7th May 2026, restating the grounds in support of the application, and urging that the application meets the test for grant of interlocutory reliefs as settled in ***Munya Vs Kithinji & 2 Others*** (Application 5 of 2014) [2014] KESC 30 (KLR) ***(Munya 1 Case)***; the

appeal raises constitutional questions, *to wit*, the constitutional place of the equitable doctrine of constructive trust within the framework of the national values and principles of governance under Article 10(2)(b) and the right to property under Article 40 of the Constitution; the right of access to justice, and to appropriate remedies pursuant to Articles 48 and 159 of the Constitution; whether specific performance is an appropriate and constitutional remedy under Articles 10(2)(b) and 159(2)(b) of the Constitution; and whether legitimate expectation arising from contractual arrangements is protected under Articles 10(2)(b) and 48 of the Constitution; and

[4] UPON PERUSING the respondent's notice of preliminary objection dated 22nd May 2026 and submissions in support of even date, wherein the respondent asserts that the appeal fails to meet the principles settled in ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** [2012] KESC 9 (KLR) (***Lawrence Nduttu* Case)**; does not fall under the ambit of Article 163(4)(a) of the Constitution; and, therefore, this Court lacks jurisdiction to hear and determine the appeal and the instant application. The respondent contends that the dispute comprises a private commercial contract of sale of the suit property and does not raise any questions of law concerning the interpretation of the Constitution; no issues of constitutional contest were raised or canvassed by the superior court below; instead, the appeal challenges legal and factual findings, which the Environment and Land Court, and the Court of Appeal have fully determined; in the alternative, the applicant has not obtained certification under Article 163(4)(b) of the Constitution; and in the foregoing, the appeal is an abuse of the court process and should be struck out with costs; and

[5] FURTHER NOTING the applicant's submissions in opposition to the preliminary objection dated 4th June 2026, wherein it argues that the preliminary objection is devoid of merits, incompetent and upsets ***Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors*** [1969] EA 696; and that the preliminary objection fails to raise pure points of law. Instead it

raises contested facts that can only be resolved through a full evidentiary interrogation. In the alternative, the appellant contends that the appeal falls within the jurisdiction of this Court under Article 163(4)(a) of the Constitution as elucidated in ***Lawrence Nduttu Case*** and ***Munya Vs Kithinji & 2 Others*** (Petition 2B of 2014) [2014] KESC 38 (KLR) ***(Munya 2 Case)***; the appeal raises questions on the interpretation and application of Articles 10(2)(b), 20, 40, 48 and 159(2)(d) and (e) of the Constitution; the appeal further raises issues of substantive justice and the proper interpretation of the Land Control Act within the constitutional parameters; and in the very least, it has been demonstrated that the appeal has taken a trajectory of constitutional interpretation and application, more so the constitutional issue of access to justice under Article 48 of the Constitution and the right to appropriate remedies, which arose post the Court of Appeal decision; and

[6] BEARING IN MIND that the dispute emanates from the sale of the suit property, which was reneged on by the respondent; as a result, the applicant moved the trial court in ***ELC No. 25 of 2018*** alleging breach of contract and seeking, among others, reliefs for speficic performance and special damages; the respondent opposed the suit alleging mental incapacity on one of its directors who was key in the negotiations leading to the sale agreement and duress on the part of the other director, who had executed the sale agreement; the ELC *(Kemei, J.)* by a Judgment delivered on 10th February 2021 ruled in favour of the applicant and ordered specific performance; the trial court reasoned that there existed a valid contract, the claim for mental incapacity and duress had not been proved, the absence of the Land Control Board consent would not invalidate the sale agreement and a constructive trust in favour of the applicant had been established; and

[7] NOTING that the aggrieved respondent filed ***Civil Appeal No. E062 of 2021***, wherein the Court of Appeal by its Judgment dated 26th March 2026 set aside the orders for specific performance, finding that: the claim for customary

trust relied on by the respondent was neither pleaded nor canvassed before the trial court and therefore could not be raised on appeal; the respondent could not use its failure to obtain the Land Control Board consent to defeat the sale agreement; the doctrine of constructive trust could not be implied in favour of the applicant because the full purchase price had not been paid at the time the respondent rescinded the sale agreement; the 10% deposit was refunded to the applicant before the completion date; the applicant had not taken possession; and there were no developments or improvements by the applicant on the suit property. On specific performance, the appellate court found that, for the reasons given above and the fact that under the Special Conditions, the applicant had an option to mitigate any losses. As such, the applicant's failure to do so disentitled it to the discretionary equitable remedy; and

[8] FURTHER NOTING THAT the applicant in its petition of appeal dated 27th April 2026, contends that the central issues for determination are whether it is consistent with the Constitution, particularly Articles 10, 40, 48 and 159(2)(d), for a party in breach of a commercial or contractual obligation to be permitted to benefit from its own breach and avoid legal and equitable consequences of such breach; whether in the context of Article 48 on access to justice, an innocent party to a commercial or contractual arrangement can be left without a rememdy; whether the Court of Appeal judgment promoted the values and principles of the Constitution as required under Article 159(2)(d), including justice, fairness, equity and substantive justice; whether equitable interests in land arising from part performance, constructive trust or analogous equitable doctrines constitute property under the meaning of Article 40; whether the absence of statutory approvals or consent including under the Land Control Act bars the grant of equitable reliefs under Articles 10(2)(b) and 40 of the Constitution; whether there exists conflicting jurisprudence of the Court of Appeal on the effect of the absence of the Land Contol Board consent; whether refund of a deposit in a sale agreement

constitutes full discharge of contractual obligations; and whether the reliefs sought should be granted; and

[9] COGNISANT OF THE FACT THAT in response to the instant application, the respondent has challenged our jurisdiction by way of a preliminary objection; the primary issue for determination at this juncture is whether the appeal and this application correctly invoke this Court's appellate jurisdiction as of right, under Article 163(4)(a) of the Constitution; it is only upon surmounting the jurisdictional question that the Court can examine the prayer for interim conservative and injunctive orders; and

[10] NOW GUIDED by the provisions of Article 163(4)(a) of the Constitution; and the threshold for admission of an appeal as of right as settled in the ***Lawrence Nduttu Case,*** 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. .... Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.***
>
> ***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."***; and

[11] FURTHER GUIDED by our Decision in the ***Munya 2 Case***, where we refined this position, holding that:

> ***"In summary, the guiding principles that we have articulated under Article 163(4)(a) are:***
>
> ***i) a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
>
> ***ii) the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;***
>
> ***iii) the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;***
>
> ***iv) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;***
>
> ***v) With regard to election petitions, the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution."***;and

[12] HAVING CONSIDERED the decisions of the superior courts, the totality of the pleadings, affidavits, and submissions by the parties herein, **WE NOW OPINE** as follows:

i. A careful review of the pleadings before the trial and appellate courts as well as the judgments of the two superior courts, reveals that the

substratum of the dispute was a private contract involving the sale and purchase of the suit property; validity or otherwise of the agreement of sale; the effects of failure to obtain consent from the Land Control Board; and the available remedies for any such breach, particularly remedies of constructive trust and specific performance.

ii. It is therefore evident that the issues framed and determined by both the ELC and the Court of Appeal did not involve any questions of interpretation or application of the Constitution. Similarly, the Court of Appeal's reasoning and conclusions leading to the impugned judgment did not involve a trajectory of constitutional interpretation or application. Further, the issues now framed by the applicant as raising questions of constitutional interpretation and application were not canvassed through the courts' hierarchy.

iii. Consequently, we find that the appeal fails to meet the threshold set out by Article 163(4)(a) of the Constitution, and find merit in the preliminary objection dated 22nd May 2026. As regards the conservatory and injunctive reliefs sought in the application, it follows that, consequent upon our finding above, this Court must down its tools. As for costs, the established principle is that costs follow the event. We see no need to deviate from the same.

[13] ACCORDINGLY, we make the following **Orders**:

(i) The Notice of Preliminary Objection dated 22nd May 2026 is hereby upheld.

(ii) The Petition dated 27th April 2026 and filed on 7th May 2026 is hereby struck out for want of jurisdiction.

(iii) The Notice of Motion dated 29th April 2026 and filed on 8th May 2026 is hereby dismissed.

(iv) The costs of this application shall be borne by the applicant.

(v) The sum of Kshs. 6,000.00 deposited as security shall be refunded to the appellant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** Day of **October, 2026.**

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

.....	**.....**
S. C. WANJALA	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
W. OUKO	**M. A. WARSAME**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original.

REGISTRAR,
SUPREME COURT OF KENYA