REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ &VP, Wanjala, Njoki & Lenaola SCJJ)

CIVIL APPLIC. SUP. NO. E020 OF 2025

-BETWEEN-

MILLY GLASS WORKS LIMITED.....APPLICANT

-AND-

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

PAMELA JOY OUKO t/a

SADIQUE ENTERPRISES AUCTIONEERS.....2ND RESPONDENT

Being application for review of the decision of the Court of Appeal at Nairobi (Murgor, Laibuta & Ngenye JJ. A) in Civil Application No. E131 of 2024 delivered on 20th June 2025 denying certification and leave to appeal to the Supreme Court

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Representation:

Mr. Kabebe for the Applicant
(Gikandi & Company Advocates)

Mr. Karina for the 1st and 2nd Respondents
(Ndegwa, Sitonik & Karina Advocates)

RULING OF THE COURT

[1] UPON READING the Originating Motion dated 3rd July 2025 and filed on 7th July 2025 pursuant to Article 163 (4) (b) of the

Constitution, Sections 15 & 15B of the Supreme Court Act CAP 9B, and Rule 33 of the Supreme Court Rules 2020 that

seeks a review of the decision of the Court of Appeal (*Murgor, Laibuta & Ngenye JJA*) in *Msa Civil Application No. E131 of 2024* delivered on 20th June 2025 which declined to grant the applicant leave to appeal to the Supreme Court against the Judgment of the Court of Appeal (*Murgor, Laibuta & Odunga JJA*) delivered on 25th October 2024; and to consequently grant the applicant leave to appeal before the Supreme Court, limited to the determination of the following questions of general public importance, or any other questions as the Court may direct:

1. *Whether a premature but unchallenged revision of rent in a lease with a periodic rent review clause precludes the lessor from a further review until the expiry of the review period from the date of the premature review.*
2. *Whether a trial court is empowered, as a consequential order, to order a refund of amounts demanded and received despite a court order barring that demand, or whether a fresh suit must be filed for such recovery.*
3. *Whether Section 88 of the Kenya Railways Corporation Act CAP 397 completely bars execution against the 1st respondent in all circumstances despite Articles 2, 20, 27, 48 & 159 (2) of the Constitution;* and

[2]COGNIZANT that the gist of the matter arises from a lease agreement entered into by the parties dated 16th January 1980 for a term of 81 years, under which the right to review rent was to be exercised at the 30th year; with respect to which, the 1st respondent (*the lessor*) allegedly reviewed the rent on 1st January 1994 and subsequently on 30th September 2011, which prompted the applicant (*the lessee*) to file suit before the Environment and Land Court at Mombasa (***ELC 135 of 2012***); where in its Judgment (*Munyao Sila J*) delivered on 4th November 2011 held that: by increasing the rent in

1994, the 1st respondent had reset the 30 year rent review period, and therefore, had no right to a further review before its expiry; accordingly, the court directed the 1st respondent to refund to the applicant all sums paid in excess; it followed that, in an effort to execute the Judgment, the applicant instituted garnishee proceedings, which the court allowed by a Ruling delivered on 1st November, 2022; and

[3] BEARING IN MIND that aggrieved by both the Judgment and Ruling of the ELC, the respondents filed two appeals, which were later consolidated (***Msa Civil Appeal No. E083 of 2022 as consolidated with Civil Appeal No. E035 of 2023***); wherein the Court of Appeal (*Murgor, Laibuta & Odunga JJ.A*) in its Judgment delivered on 25th October 2024 allowed both appeals; finding that the applicant's continued payment of the revised 1994 rent did not reset the lease's 30- year rent review timeline, as there was no evidence of an agreement to that effect; that the claim for refund of overpayments was untenable, having not been specifically pleaded; and that Section 88 of the Kenya Railways Corporation (KRC) Act barred execution by garnishment against the 1st respondent's bank deposits or the attachment and sale of its property; and

[4]* NOTING THAT** the applicant lodged an application before the Court of Appeal being ***Civil Application No. E131 of 2024 seeking leave to appeal to this Court on the grounds that the appeal raises issues of general public importance; in that regard, the Court of Appeal (*Murgor, Laibuta & Ngenye, JJ.*
A) by a Ruling dated 20th June 2025 declined to grant the leave sought; hence, the subject matter of the current Originating Motion before us; and

[5] CONSIDERING the grounds on the face of the application, and averments contained in the supporting affidavit deponed by Mohamed Rashid, the Managing Director of the applicant, wherein the applicant contends that the questions intended to be raised transcend the private interests of the parties herein: for, while periodic rent review clauses are a common feature which empower the lessor to review rent at agreed intervals, there is no jurisprudence addressing the effect of rent review undertaken before the agreed date, which is accepted and acted upon by the lessee; though this question arises

directly from the facts of the present case, it affects many other lessees who may have accepted premature rent reviews; in a similar context, the Court of Appeal in ***748 Air Services Limited Vs Theuri Munyi*** [2017] KECA 419 (KLR) held that oral variations followed by conduct are valid in an employment; and as a similar position was adopted in ***Kamau James Gitutho & 3 others Vs Multiple Icd (K) Limited & another*** [2019] KECA 379 (KLR) in relation to a construction contract; therefore, it is arguable that a

premature rent review followed by consistent payment by lessee constitutes a lawful variation that precludes any further review before the agreed review period; and

[6] FURTHER CONSIDERING, the applicant's arguments that: the 1st respondent's demand for rent while the case was pending before the trial court amounted to a breach of an existing court order, thereby entitling the applicant to a refund even without a specific relief having been sought in that regard; while numerous decisions affirm that courts can only grant reliefs specifically pleaded, there is a dearth of local jurisprudence on whether an exception exists where the relief sought is a refund of funds received contrary to a court order; in summation, the applicant contends that the Supreme Court needs to settle the law on the extent of protection, if any, afforded by provisions similar to Section 88 of KRC Act; and

[7]TAKING INTO ACCOUNT the applicant's submissions dated 21st July 2025 and filed on 22nd July 2025, wherein the applicant reiterates its earlier averments and submits that the Court of Appeal did not consider the scope of the intended issues to be raised before denying certification; the applicant contends that the questions transcend the interests of parties, akin to the findings in ***Kwanza Estates Limited Vs Jomo Kenyatta University of Agriculture & Technology*** [2023] KECA 1516 (KLR), ***Stanbic Bank Kenya Limited Vs Santowels Limited*** [2023] and ***Shah & 7 others Vs Mombasa Bricks & Tiles & 5 others*** [2022] KESC 25 (KLR) where certification was granted; it further states that while the decision in ***Five Star Agencies Limited & another Vs National Land Commission & 2 others*** [2024] KECA 439 (KLR) addressed the protection afforded to constitutional commissions under Sections 21 and 25 of the Government Proceedings Act, it did not resolve whether similar statutory protections afforded to state corporations can withstand constitutional

scrutiny under Articles 2, 20, 27, 48, and 159(2) of the Constitution; and

[8] HAVING REGARD to the respondents' grounds of objection dated 5th August 2025 and filed on 20th August 2025, replying affidavit sworn by Stanley

Gitari (*Ag. GM, Legal Services and Corporation Secretary of the 1st respondent*), on 6th August 2025 and filed on 20th August 2025, and submissions dated 8th August 2025 and filed on 20th August 2025 wherein the respondents aver, in opposing the application, that: the three proposed questions do not meet the threshold set by this Court in ***Steyn Vs Ruscone*** (Application 4 of 2012) [2013] KESC 11 (KLR), arguing that the dispute does not transcend beyond the parties herein, as it arises solely from contractual rights and obligations under their lease agreement, and is governed by the doctrine of privity of contract; the applicant has not demonstrated that the lease is a standard form contract of wide usage, nor that periodic rent reviews constitute a '*common*' feature. Moreover, the respondents assert that the decisions relied upon by the applicant pertain to certified matters that are distinguishable from the present case; as such, the interpretation of the lease agreement remains a matter of fact, which, as highlighted in ***Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney-General & 2 others*** [2020] KESC 9 (KLR) and ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR) fall outside the jurisdiction of the Supreme Court; and

[9] MINDFUL THAT, with regard to the second proposed question, the respondents contend, to begin with, that there is no lacuna in the law as to whether courts have power to grant reliefs not pleaded, considering that parties are bound by their pleadings; secondly, that the question is speculative and moot, as there was no finding by the superior courts that the alleged demand and receipt of rent was in breach of a court order, nor was any disobedience thereof pleaded; therefore, this issue cannot be introduced at this stage; ultimately, the issue of whether Section 88 of the KRC Act completely bars execution

before the superior courts was not a constitutional challenge to the statutory provision, but rather an inquiry into whether its application barred garnishee proceedings; on that basis, the Supreme Court does not have jurisdiction to try the constitutionality, validity

or legality of the said provision since this jurisdiction is expressly vested in the High Court under Article 165 (3) (d) of the Constitution; and

[10] APPRECIATING the guiding principles governing the certification of a matter as one involving general public importance, as authoritatively laid down by this Court in ***Steyn case*** *(Supra)* and reaffirmed in ***Bell Vs Moi & another*** (Application 1 of 2013) [2013] KESC (KLR); and

[11] HAVING CONSIDERED the totality of the application, response, submissions and issues proposed to be certified as involving general public importance **WE NOW OPINE** as follows:

(i) Article 163 (5) of the Constitution confers the Supreme Court authority to re-examine the certification decision made by the Court of Appeal, with the power to affirm, vary, or overturn it.

(ii) Before the Court of Appeal, the applicant sought leave to appeal to this Court on the basis that its intended appeal involves matters of general public importance, specifically on the first and second questions outlined at paragraph 1 herein. However, in the present application for review before us, the applicant appears to have introduced an additional third question, which was not part of the certification proceedings before the Court of Appeal. As this is a review and not a fresh application, it is improper to introduce a new question at this stage, and the Court cannot address such new issues as presented before us.

(iii) Moreover, it is noteworthy that while the certification was pending before the Court of Appeal, the applicant instituted an appeal before this Court under Article 163 (4) (a) of the Constitution challenging the constitutionality of Section 88 of

the KRC Act, which is the third question the applicant seeks to introduce, as already noted. In ***Milly Glass Works Limited Vs Kenya Railways Corporation & another*** [2025] KESC 26 (KLR) this Court struck out the appeal instituted by the applicant, for want of jurisdiction, holding that the applicant was not challenging the constitutional interpretation rendered by the Court of

Appeal, but rather the manner in which the court applied the statutory provision comprised in section 88 of KRC Act. The applicant now clearly seeks a second bite at the cherry by reintroducing the same issue albeit, through the certification route. As we have previously stated, a party cannot, having failed under one route, return to invoke the other as an alternative path to this Court. See: ***Ibren Vs Independent Electoral and Boundaries Commission & 2 others*** (Petition 19 of 2018) [2018] KESC 75 (KLR).

(iv) Turning to the other two issues, the Court of Appeal, upon applying the principles set out in ***Steyn Case*** held that:

> *"They relate to purely private claims under the terms of a lease agreement in which the public as a whole has no stake. Neither do the findings of this Court on the statute bar of execution of a decree against the 1st respondent (whether by garnishee proceedings or otherwise); or the limitation of the applicant's claim for an account or recovery of any sums allegedly due on account of the unscheduled rent increment complained of, raise substantial and novel points of law of general public importance. To our mind, the issues intended to be escalated to the Supreme Court have no bearing on general public welfare that calls for protection beyond the scope of the law of contract."*

(v) We re-emphasise that. The proposed questions that the applicant seeks to raise before this Court do not transcend the specific circumstances of the parties. The first, concerns the interpretation of the lease, while the second relates to an alleged breach of a court order. At the core, both are purely questions of facts. As rightly noted by the respondents, beyond

merely relying on the Court of Appeal decision in ***748 Air Services Limited Vs Theuri Munyi*** [2017] KECA 419 (KLR) and ***Kamau James Gitutho & 3 others Vs Multiple Icd (K) Limited & another*** [2019] KECA 379 (KLR), the applicant fails to demonstrate the

public importance aspect, or the inconsistencies in the Court of Appeal decisions, warranting our intervention. Breach of court orders can be pursued by way of contempt proceedings before the court that issued the orders. In any event, mere apprehension of a potential miscarriage of justice cannot, of itself, constitute a basis for granting certification.

(vi) In the end, there is no reason to disturb the Court of Appeal's finding and we so find and hold. We state that the Court of Appeal was well guided by the threshold set out in the ***Steyn*** and ***Bell Cases***, the applicant having failed to meet the threshold therein established.

(vii) Having prevailed in these proceedings, the respondent is entitled to an order for costs. In the absence of compelling justification to depart from this norm, and guided by the principles established in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), we are satisfied that an award of costs to the respondents is both fair and appropriate in the circumstances.

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

(i) The Originating Motion dated 3rd July 2025 and filed on 7th July 2025 be and is hereby dismissed.

(ii) The applicant shall bear the costs of the respondent.

It is so ordered.

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

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

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P.M. MWILU **S. C. WANJALA**

DEPUTY CHIEF JUSTICE & VICE COURT PRESIDENT OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…… **……**

NJOKI NDUNGU **I. LENAOLA**

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