



**Ngong Matonyok Wholesalers Limited & another v Kenya Breweries Limited & 4 others
(Civil Application E200 of 2025) [2025] KECA 2267 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2267 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E200 OF 2025
SG KAIRU, M NGUGI & P NYAMWEYA, JJA
DECEMBER 19, 2025**

BETWEEN

NGONG MATONYOK WHOLESALERS LIMITED 1ST APPLICANT

MANARA LIMITED 2ND APPLICANT

AND

KENYA BREWERIES LIMITED 1ST RESPONDENT

UDV (KENYA) LIMITED 2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED 3RD RESPONDENT

DIAGEO PLC 4TH RESPONDENT

BIA TOSHA DISTRIBUTORS LIMITED 5TH RESPONDENT

(An application for injunction and stay of execution pending the hearing and determination of an appeal from the Ruling of the High Court of Kenya at Nairobi (J. W. W. Mong'are J.) on 19th December 2024 in Commercial Civil Suit No. E127 of 2023)

RULING

1. The applicants herein, Ngong Matonyok Wholesalers Limited and Manara Limited, filed a Notice of Motion application dated 25th March 2025, in which they seek orders of an injunction restraining the respondents from terminating, rescinding, suspending or otherwise adversely altering the applicants' distributorship agreement, pending the hearing and determination of the applicants' appeal from the ruling delivered by the High Court of Kenya at Nairobi (Mong'are J.) on 19th December 2024. They also seek a stay of execution of the order for payment of the costs embodied in the said ruling pending the hearing and determination of the intended Appeal; and that the costs of and incidental to the application abide the outcome of the intended appeal. The impugned ruling dismissed an application



- the applicants had filed in the High Court in HCCOMMISC/E127/2023 seeking an interlocutory injunction, while discharging earlier interim orders that had been issued in favour of the applicants.
2. The applicants stated that they filed HCCOMMMISC/E127/2023 - Ngong Matonyok Wholesalers Limited & Another vs Kenya Breweries Limited & 2 Others in the Commercial Division of the High Court at Nairobi after Kenya Breweries Limited, UDV (Kenya) Limited, East African Breweries Limited and Diageo PLC (the 1st to the 4th respondents herein), issued correspondence evincing an “imminent plan to breach, terminate, rescind, repudiate, suspend or otherwise adversely alter” the applicants’ rights under a prevailing distributorship agreement. The applicants also simultaneously filed an application for an interlocutory injunction restraining the 1st to 4th respondents from “terminating, suspending or in any way howsoever interfering” with the applicants’ rights under the then prevailing distributorship agreements, which was initially granted on a temporary basis by the High Court, but later dismissed by the impugned ruling.
 3. The application before us is supported by an affidavit of even date sworn by Joseph William Nduva Muli, a director of the 2nd applicant, and is based on the grounds that the applicants’ appeal is arguable, since the impugned ruling is anchored on an error on the face of the record. According to the applicants the ruling by the High Court was anchored on the erroneous assumption that there was a finding of contempt of court against the 1st to 4th respondents and the applicants with respect to a conservatory order that the High Court (Onguto J.) issued in favour of Bia Tosha Distributors (the 5th respondent herein) on 29th June 2016 in Constitutional Petition No. 249 of 2016 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 3 others [2016] eKLR, and in a judgment delivered in favour of the 5th respondent by the Supreme Court on 17th February 2023 in Petition No. 15 of 2020 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR).
 4. However, that the Supreme Court clarified and dismissed the allegations of contempt of court in a ruling delivered on 23rd May 2023 in Application No. E005 of 2023 as consolidated with Applications Nos. E006 and E012 of 2023: Cogno Ventures Limited & 4 others vs Bia Tosha Distributors Limited & 15 others; Kenya Breweries Limited & 6 others (Interested Parties); Ferran & 24 others [2023] KESC 33 (KLR). Therefore, that the applicants’ appeal will be rendered nugatory since, despite the Supreme Court’s clarification ruling, the applicants are exposed to risk of contempt proceedings and harassment and intimidation from the 5th respondent, and will suffer irreversible and non-compensable loss and damage including abrupt closure of their respective businesses, insolvency, winding-up and a deluge of multi-billion third-party litigation should the 5th respondent actualise its threat of instituting contempt proceedings.
 5. Lastly, that both the constitutional petition and the commercial suit in the High Court relate to distributorship agreements granted by the 1st to the 4th respondents to the applicants and the 5th respondent, and the applicants’ attempt to have the commercial suit and the constitutional petition either consolidated or heard together was not successful, with the result that the two cases are before different divisions of the High Court, and there is a real likelihood of conflicting decisions by the two High Court divisions and incomplete and ineffectual determination of the dispute in the two cases. The applicants detailed the background to the impugned ruling in their supporting affidavit, which we shall briefly address later on in this ruling, and attached copies of the distribution agreement; correspondence with the 1st to 4th respondents; various pleadings and decisions by the High Court and the Supreme Court on the dispute herein; and a draft memorandum of appeal dated 25th March 2025, in which they have raised 7 grounds of appeal.
 6. These averments were reiterated in submissions dated 18th August 2025 filed by Muthomi and Karanja Advocates, who are on record as the applicants’ advocates, wherein it was urged that the applicants had



met the threshold under rule 5(2)(b) of the Court of Appeal Rules. In particular, that the applicants' appeal was arguable, as the High Court subsequently confirmed that it issued the impugned Ruling in ignorance of the Supreme Court clarification ruling and as demonstrated by the draft memorandum of appeal; and will be rendered nugatory if the application is denied, as it will pave the way for the 1st to 4th respondents to act on their threat to terminate the distributorship agreements.

7. The 1st to 4th respondents did not file any response to the application, nor submissions thereon. During the hearing of the application, their respective counsel indicated that they were in support of the application and would rely on the submission filed by the applicants.
8. In opposition to the application, the 5th respondent filed a replying affidavit sworn on 25th August 2025 by Anne Marie Burugu, its managing director, in which extensive reference was made to the judgment by the Supreme Court in Petition No. 15 of 2020 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others (supra). The gist of the 5th respondent's response was that firstly, the applicants are surrogates of, and acting at the instance of, the 1st to 4th respondents who have not contested or defended the drastic orders sought against them, and which orders are intended to be an illegitimate cover for the 1st to 4th respondents against contempt proceedings pending in the High Court in Constitutional Petition No. 249 of 2016 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 3 others (supra), and are meant to avoid obeying the Supreme Court orders and judgment.
9. The 5th respondent in this regard placed reliance upon various decisions, including of this Court in *The Estate of the Late Mathias Langata vs Cove Investment Limited*, Nakuru Civil Appeal No. E0511 of 2022 and *Mistry Amar Singh vs Kulobya* (1963) EA 408, and the comparative decision in *Lonrho Plc vs Fayed* (1992) 1 AC 448, to urge that where conspirators intentionally injure a plaintiff and use lawful means to do so, it is no defence that their primary purpose was to further or protect their own interest and such actions will be found to be tortious and unlawful; the Court should not condone flagrant conduct which displays total disregard of the rules fair play; or allow itself to be made an instrument of enforcing unfair rule or obligations alleged to arise out of a contract or transaction which is illegal. Accordingly, that to accede to the applicants' application herein will be to offend, in a very direct manner, the Supreme Court's judgment and to offer comfort to the unlawful conspiracy of the applicants and 1st to 4th respondents.
10. Secondly, that the applicants have no arguable appeal, since all the issues, grounds, argument and submission made by the applicants were conclusively heard and determined by the Supreme Court, thus could not be reargued before this Court which lacked jurisdiction to overrule the decisions of the Supreme Court or supervise the Supreme Court in this regard. In particular that the Supreme Court directed that all matters touching on the property rights of the 5th respondent be heard and determined in the High Court Petition and not before any other Court, and reinstated the orders of Onguto J. made on 29th June 2016, which reinstatement was reiterated by the Supreme Court on 26th May 2023. In this respect, that the purported rights the applicants seek to protect were acquired, on the face of the record, in clear breach of the law because they were issued and continued to exist in clear violation of the orders of Onguto J. and the status quo orders of this Court, that the applicants could not in the current application, ask this to change, reverse, or challenge the Supreme Court findings. According to the 5th respondent, its consolidated applications in the Supreme Court being Application No. E005 of 2023 as consolidated with Applications Nos. E006 and E012 of 2023 and No. E012 of 2023 - Bia Tosha Distributor Limited vs Kenya Breweries Limited & 11 others; Javier Ferran & 24 others (Interested Parties) were struck out and the Supreme Court ordered the matter to proceed before the High Court on priority basis as already ordered in the judgment of February 17, 2023.



11. In addition, that the filing of a separate suit by the applicants without joining the 5th respondent was forbidden by section 34 of the *Civil Procedure Act*, since the orders they were seeking arose from a Supreme Court judgment in which the 5th respondent was the successful petitioner, and reference was made in this respect to the decision in the case of *South Nyanza Sugar Co. Ltd vs Alfred Sagwa Mdeizi t/a Pave Auctioneers* [2010] eKLR . In any event, that the applicants who derive all their rights from the 1st to 4th respondents, must look to them for recompense, if any, and not interfere with vested rights of the 5th respondent. Reliance was placed on the decision by this Court in the case of *Heineken East Africa Import Company Limited & Another vs Maxam Limited*, Civil Appeal No. E403 of 2020 as consolidated with Civil Appeal E404 of 2020 for the argument that there was no obligation placed on the 5th respondent to deal with the applicants because it was not privy to the contract between the 1st to 4th respondents and the applicants. Lastly, that both the Supreme Court and this Court have held that there was nothing illegal with grant of exclusive beer distribution rights in the above cited decisions.
12. Thirdly, that the issue of contempt is live in the petition in the High Court, and the invitation to this Court by the applicants to prejudge the contempt applications before the High Court is impermissible; the applicants will not suffer any prejudice whatsoever if the injunction was not granted because they have not suggested that the 1st to 4th respondents cannot settle any losses or damages that they would suffer as a result of the applicant's respecting and honouring the judgment of the Supreme Court of Kenya; and the applicants' purported appeal will not be rendered nugatory because the applicants' alleged rights are justiciable under the High Court petition which the applicants were at liberty to join at any time and had an opportunity to join since 2016, but elected not to do so and preferred to instead initiate separate proceedings. Furthermore, the High Court Judge was correct when she held that to entertain a separate suit such as the one the applicants had filed during the currency of the prior High Court petition which was based on the exact same subject matter would embarrass the Judiciary because different and conflicting outcomes could be pronounced over the exact same subject matter.
13. Okoth and Kiplagat Advocates, who are on record for the 5th respondent, reiterated these arguments in written submissions they filed dated 24th August 2025.
14. These arguments set out hereinabove were highlighted by the parties' counsel during the hearing of the application on 27th August 2025 held on the Court's virtual platform. Learned counsel Mr. Issa Mansur appeared for the applicants; learned Senior Counsel Mr. Kamau Karori, appeared for the 1st 3rd, and 4th respondents; learned Senior Counsel, Mr. George Oraro appeared together with learned counsel Mr. William Ochieng and Mr. Alphonse Oduor for the 2nd respondent; while learned Senior Counsel Mr. Kimani Kiragu appeared together with learned counsel Ms. Millie Nyarega, for the 5th respondent. The 1st to 4th Respondent were in support of the application and opted to rely on the submission filed by the applicants.
15. It is trite law that in applications of this nature the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR.

As regards arguability, an arguable appeal is not one that must ultimately succeed, but one that raises at least a single bona fide issue that deserves full consideration on appeal. The applicants allege that the impugned ruling by the High Court is anchored on an error apparent on the face of the record. After perusal of the said ruling, we note that having extensively cited parts of the judgment by the Supreme



Court in Petition No. 15 of 2020 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others (supra), the learned Judge of the High Court concluded as follows in the impugned ruling:

“As Bia Tosha had always had its routes protected by the conservatory orders and the Supreme Court having found that it was contemptuous for the Defendants to try and vary their agreements with Bia Tosha on the said routes, I find that on a prima face basis, it was improper for the Defendants to enter into the Agreements with the Plaintiffs over the same routes that had been exclusively protected in favour of Bia Tosha. The court cannot therefore injunct the Defendants from interfering with the Agreements in the presence of the conservatory orders preserving the exclusivity of Bia Tosha’s routes. In any event, it is my finding that if at all the Agreements entered into by the Defendants and the Plaintiffs caused any loss to the latter, then the same can be ameliorated by an award of damages. It is also my finding that since Bia Tosha has always had the conservatory orders protecting its territory, the balance of convenience tilts in favour of not granting the injunction as the Defendants can no longer proceed with enforcing and implementing the Agreements with the Plaintiffs, lest they be cited for further contempt.”

16. It is not contested by the parties that the issue of the conservatory orders issued by the High Court on 26th June 2016 and alleged contempt thereof by the 1st to 4th respondents, which is the subject matter of the application herein, has been litigated upto the Supreme Court, and was the subject of a judgment by the said Court dated 17th February 2023 and a ruling dated 26th May 2023. The Supreme Court provided a detailed procedural history of the matter in its judgment of 17th February 2023, whose genesis is the grant by the High Court of conservatory orders to the 5th respondent in a ruling delivered on 29th June 2016 in Constitutional Petition No. 249 of 2016 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 3 others (supra) as against the 1st to 4th respondents. The content of the conservatory orders was as follows:

“That pending the hearing and final determination of the petition herein, a conservatory order in the nature of an injunction do issue directed at the respondents, their agents, servants, employees or any person acting for or connected with the respondents barring them from interfering with the exclusive management, control and distributorship of the respondent’s products in the following routes, that is to say, Namanga, Bissil, Kajiado, Kitengela, Athi River, Industrial Area, South B, Nairobi West, Kenyatta, Langata, Rongai, Kiserian, Magadi, Upperhill, Ngong Road, Hurlingham, Kawangware, Satellite, Dagoretti, UDVA, UDV B, UDV C, which are owned by the appellant by virtue of goodwill paid.”

17. The 1st to 4th respondents appealed against the said ruling to this Court in Civil Appeal No. 163 of 2016, and also filed an application of stay of execution of the orders of the High Court. This Court ordered that status quo be maintained pending the hearing of the appeal, and the hearing of the appeal to be fast-tracked. The parties and an interested party thereupon filed various applications including one by the 5th respondent for alleged contempt by the 1st to 4th respondents of the status quo orders that had been granted by this Court. The Court thereupon directed that the appeal proceeds to its substantive hearing and all pending applications be held in abeyance pending the hearing of the appeal. After considering the appeal, this Court set aside the conservatory orders made by the High Court on the 26th June 2016, and substituted it with one that stayed the proceedings before the High Court, and referred the dispute between the 5th respondent and the 1st respondent to arbitration as per the respective parties’ distributorship agreement. These orders precipitated the filing of an appeal in the Supreme Court by the 5th respondent, and after considering the various issues raised by the parties, the



Supreme Court set aside the judgment by the Court of Appeal and concluded in its judgment delivered on 17th February 2023 as follows:

“The logical upshot of this finding is that the orders of June 29, 2016 made by the High Court be, and are so (sic) fully restored to enable the court resume the hearing on merit of the amended petition pending before it. Having found that there was contempt of court, the High Court should also proceed to assess the suitable punishment arising out of the contempt application dated August 23, 2016 by the appellant pending before it”.

18. This conclusion and other findings made by the Supreme Court triggered three applications by different parties in the Supreme Court. Two of the applications (Application No. E005 of 2023 filed by Cognito Ventures Limited a distributor of the 1st to 4th respondents’ products, and Application No. E006 of 2023 filed by Andrew Kilonzo, Jane Karuku and Andrew Cowan, who were officials of the 1st to 4th respondents, sought a review of the judgment issued on 17th February 2023; while Application No. E012 of 2023 filed by the 5th respondent sought the committal of various alleged contemnors, including the applicants, for contempt for disobeying the said judgment, and also sought the striking out of a suit filed by the applicants in the High Court, being Nairobi High Court Civil Suit No. Comm Misc E127 of 2023 – Ngong Matanyok Wholesalers Limited & another vs Kenya Breweries Limited & another as well another suit being Nairobi High Court Civil Suit No. Comm E075 of 2023 – Tony West & another Limited & another vs Kenya Breweries Limited & another. The Supreme Court struck out all the applications in the ruling delivered on 26th May 2023, including striking out parties that were not part of Petition No. 15 of 2020, and dismissed the 5th respondent’s prayers for citation for contempt against the remaining parties and for striking out of Nairobi High Court Civil Suit No. Comm Misc E127 of 2023 and Nairobi High Court Civil Suit No. Comm E075 of 2023. The Supreme Court’s reasoning was that it was not seized of matters that were pending in the High Court, which was the forum competently seized of the disputes; all contested issues of exclusivity were the purview of the High Court where the matter was still pending full hearing; and having remitted the dispute to the High Court, the parties were at liberty to raise all their issues therein for determination.
19. This is the contextual backdrop of the various arguments made by the applicants and the 5th respondent as regards the arguability of the applicants’ appeal. The applicants in this regard contend that the learned Judge of the High Court erred by not taking into account and misapplying some aspects of the decisions by the Supreme Court, while the 5th respondent argues that all the issues raised by the applicants have been determined with finality by the Supreme Court. We have perused the grounds in the applicants’ draft memorandum of appeal which appear to raise issues whether the findings by the High Court on contempt of court were incompatible with the ruling made by the Supreme Court in Civil Applications E005 of 2023 as consolidated with Applications Nos. E006 and E012 of 2023; whether the High Court erred in relying on the conservatory orders issued in Constitutional Petition No. 249 of 2016 - Bia Tosha Distributors Limited vs Kenya Breweries Limited & 3 others; and whether *the Constitution* and *Competition Act* forbid the 1st to 4th respondents from granting exclusive distributorship rights to the 5th respondent. In our view, the intended appeal is not frivolous. To this extent, we do find that the applicants have demonstrated that the appeal is arguable.
20. Turning to the nugatory aspect, this Court stated in Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others (supra) that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen is reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved. We have great difficulty in appreciating how the applicants’ appeal will be rendered nugatory if we decline to grant the orders they seek, for two reasons. The first reason is that applicants’ appeal is an interlocutory appeal on an injunction, yet the factors that they



have raised as rendering their appeal nugatory, being that the 1st to 4th respondents are likely to terminate their distributorship leading to loss and damage, turn on substantive issues that are yet to be determined in the suits pending in the High Court. In addition, there are clear and repeated directions by the Supreme Court that the pending issues arising from the 5th respondent's distributorship including that of exclusivity and contempt by the 1st to 4th respondents are to be determined by the High Court. Secondly, we are of the view that the alleged loss and damage that the applicants' claim will arise if an injunction or stay is not granted can be quantified and adequately compensated in monetary terms by the 1st to 4th respondents, given that the nature of their relationship is largely commercial, and the said respondents did not indicate that there were any challenges in paying such compensation.

21. Consequently, although their appeal is arguable, the applicants have not established that it will be rendered nugatory in the absence of the injunction or stay orders that they seek. Since the applicants were required to satisfy both limbs and have not, the Notice of Motion dated 25th March 2025 is accordingly dismissed, and the applicants shall pay the 5th respondent the costs of the Motion.

22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2025.

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

