IN THE COURT OF APPEAL AT MOMBASA

(CORAM: MUSINGA (P), MURGOR, & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO E112 OF 2023

BETWEEN

BERLIN EQUIPMENT LIMITED.....APPELLANT

AND

MASCOR KENYA LIMITED.....RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court at Mombasa (**Kizito Magare, J**.) delivered on 28th April 2023*

in

Mombasa Commercial Case No. E051 of 2022)

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****** JUDGMENT OF THE COURT**

1. In the ruling giving rise to this appeal, the High Court at Mombasa dismissed the appellant's application for a temporary injunction, struck out the appellant's suit in its entirety, and awarded costs to the respondent on the basis that the court lacked jurisdiction to restrain a party from invoking the insolvency process.
2. The background to this appeal as set out in the plaint dated 3rd

August 2022 and filed contemporaneously with a notice of motion of the same date is that the appellant and the respondent had a

business relationship dating back to 2018. Under that relationship, the respondent supplied mechanical spare parts to the appellant for use primarily in Kwale County. Although the relationship was not reduced into a written contract, it followed a settled and consistent course of dealing, with supplies made pursuant to purchase orders and supported by delivery notes and invoices forming part of a running account.

3. According to the appellant, it was an agreed and consistent term of the relationship that payment would be made by instalments over time, with the frequency and amounts agreed on a case-by-case basis. This credit arrangement was fundamental to the parties' dealings and was reinforced by a guarantee dated 13th September 2019 procured by the respondent, securing the appellant's indebtedness up to USD 500,000.

4. The appellant contended that it regularly serviced the account and only experienced payment difficulties in 2021 due to the economic effects of the Covid-19 pandemic. Despite this, it remained willing to continue liquidating the account and proposed structured repayment. However, and in disregard of this established arrangement, the respondent issued a demand dated 18th July 2022, requiring immediate payment of Kshs.

34,821,644.13 within

twenty-one days and threatened liquidation proceedings against the appellant in default.

5. The appellant further contended that the demand was issued in bad faith and as a means of exerting pressure, rather than addressing any genuine insolvency. According to the appellant, the respondent declined to engage in repayment proposals despite being aware that the appellant was undergoing a group restructuring with its lenders, and that liquidation proceedings would cause severe and irreparable commercial harm. On that basis, the appellant argued that the threatened insolvency process was oppressive and an abuse of the court's jurisdiction, warranting injunctive intervention.

6. In the plaint, the appellant sought a permanent injunction restraining the respondent, whether by itself or through its advocates, agents, servants, or employees, from instituting, presenting, or otherwise prosecuting a liquidation petition against the appellant pursuant to the demand notice dated 18th July 2022, or any other statutory demand founded on the same alleged debt. In the notice of motion dated 3rd August 2022, the appellant sought substantially similar relief, but on a temporary basis pending the hearing and determination of the application and the main suit.

7. In response, the respondent contended that the debt giving rise to the statutory demand was admitted and undisputed. It asserted that the sum demanded arose from the supply of goods and services to the appellant from April 2020, and that, as at August 2022, the outstanding balance stood at approximately Kshs. 36.6 million from Kshs. 34 million. According to the respondent, the appellant had acknowledged the indebtedness but persistently failed to make meaningful payment despite repeated engagements and indulgence.

8. While accepting that the parties transacted through purchase orders supported by delivery notes and invoices, the respondent maintained that the arrangement obligated the appellant to pay all amounts due, and that it retained the right, at any time, to withdraw credit facilities and demand immediate payment of the full outstanding balance. It asserted that although it accommodated the appellant during the Covid-19 period and even agreed to structured instalment payments of about Kshs. 2.8 million per month, the appellant defaulted and made no genuine effort to clear the arrears.

9. The respondent denied having acted in bad faith or without reasonable cause, stating that it engaged the appellant through

correspondence, but that the appellant repeatedly made payment promises which were not honoured. It took particular issue with the appellant's proposal to pay Kshs. 750,000 per month, describing it as commercially untenable given the magnitude of the debt and the period it would take to extinguish it. The respondent further asserted that it had suffered, and continued to suffer loss as a result of the appellant's non-payment.

10. In its counterclaim, the respondent prayed that the appellant's suit be dismissed with costs and that the court make a finding that the appellant is indebted to it in the sum of Kshs. 36,597,897.95.

11. In its ruling delivered on 28th April 2023, the court (**Kizito Magare, J**.) held that the appellant had not met the legal threshold for the grant of injunctive relief, having failed to establish a *prima facie* case under the principles in ***Giella v Cassman Brown & Co Ltd 1973 EA 358*.** It found that the suit and the accompanying application were fundamentally misconceived as they sought to permanently restrain the respondent from accessing the insolvency process, which the court held it had no jurisdiction to bar. In its view, restraining a party from approaching the court would violate the

constitutional right of access to justice. In reaching that conclusion, the court relied on Article 159(2) of the Constitution,

particularly the principles that justice shall be done to all, justice shall not be delayed, and that courts must administer justice without undue regard to procedural technicalities while promoting access to justice.

12. The court consequently held that both the application and the suit were unconstitutional and bereft of merit and that there was nothing capable of proceeding to trial. It dismissed the application, struck out the suit as unsalvageable, and awarded costs to the respondent in the sum of Kshs. 30,000 for the application and Kshs. 550,000 for the suit. The court further directed that the respondent's counterclaim be listed for hearing within sixty days, and that the awarded costs to be paid within thirty days, failing which execution was to issue.

13. Being aggrieved and dissatisfied with the decision, the appellant lodged this appeal, contending that the learned judge erred both in law and in fact by, *inter alia*, introducing and determining the matter on the basis of constitutional provisions that were neither pleaded nor canvassed by the parties; misapprehending and misapplying those constitutional provisions to the facts before the court; striking out the suit without affording the parties notice or an opportunity to be heard; taxing and awarding costs of both the

application and the suit without hearing the parties on costs; ordering execution for costs in the absence of an application under section 94 of the Civil Procedure Act; and generally exercising his discretion in a manner that was manifestly erroneous.

14. At the hearing of this appeal, learned counsel Mr. Kongere appeared for the appellant, while the respondent was represented by learned counsel Mr. Otieno. Both counsel elected to rely entirely on their respective clients' written submissions without making any oral highlights.

15. In its written submissions, the appellant reiterates that the High Court erred in law and principle by striking out both the interlocutory application for injunction and the substantive suit on constitutional grounds that were neither pleaded nor argued by the parties. In this regard, it contended that applications for injunction are argued on the well-known principles in **Giella v Cassman Brown**. Instead, the learned judge departed from those principles and determined the matter on an unpleaded constitutional issue, namely, an alleged violation of the respondent's right of access to justice. According to the appellant, this amounted to a fundamental misdirection.

16. Relying on the decision of this Court in ***Global Vehicles Kenya Limited v Lenana Road Motors*** *[2015] KECA 473 (KLR),* the appellant asserts that parties as well as the court are bound by the pleadings and issues framed by the parties and that therefore, it is a violation of due process for a court to decide a matter on a point not raised or argued.

17. The appellant further submits that the learned judge compounded the error by striking out not only the interlocutory application but also the entire suit without notice and without affording the parties an opportunity to be heard before taking that drastic course of action. It is contended that striking out is a draconian remedy which must be exercised sparingly and only as a last resort, after hearing the parties. In this regard, reliance is placed on ***Gideon Munyao Mutiso v Sarah Wanjiku Mutiso*** *[1984] eKLR* which underscored that striking out should be employed only in the clearest of cases. The appellant submits that the approach adopted by the learned judge, apart from violating the appellant's right to a fair hearing, also denied the public the benefit of a fully reasoned judicial determination. According to the appellant, decisions of superior courts have implications beyond the immediate parties, particularly for members of the public facing similar issues.

18. On the constitutional reasoning underpinning the impugned decision, the appellant submits that the learned judge erred in anchoring the striking out of the suit on the respondent's right of access to justice under Article 48 of the Constitution. It is contended that this reasoning was legally unsound, incomplete, and detached from both precedent and the broader constitutional framework, including Article 159. In particular, the appellant faults the learned judge for advancing the far-reaching proposition that a suit seeking to restrain the presentation of a liquidation petition violates the right of access to justice, without citing any authority in support of that conclusion.

19. The appellant contends that an injunction restraining threatened liquidation proceedings does not, of itself, deny a party access to justice. Rather, it merely regulates the forum in which a disputed claim may be pursued by preventing the use of insolvency proceedings as a debt-collection tool, leaving intact the respondent's right to litigate the alleged debt through ordinary civil proceedings. The appellant points out that this position is borne out by the record as the respondent filed a counterclaim for the same sum, even while the injunction application was pending. In the appellant's view, this

conclusively demonstrates that the

respondent's right of access to justice was preserved at all material times.

20. The appellant further submits that the High Court misdirected itself by treating Article 48 as conferring an absolute and unqualified right to pursue any procedural avenue of choice. Relying on ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators–Kenya Branch (Interested Party)*** *[2019] eKLR*, the appellant asserts that directing parties to the proper forum does not amount to a constitutional violation. In this case, since the allegation by the respondent was that it is owed money by the appellant, that debt ought to have been proved in an ordinary suit but not through a liquidation petition. Further reliance was placed on ***Karen Njeri Kandie v Alassane Ba & another*** *[2015] eKLR* for the argument that the right to access justice is not open-ended and is subject to lawful regulation inherent in the administration of justice. According to the appellant, Article 48 does not shield abusive or oppressive litigation tactics and that if the learned judge's arguments were to hold, then it would mean that the liquidation jurisdiction will be open to all and sundry, however absurd and spurious their claims may be, and that a company threatened with liquidation would be

powerless to prevent it and must go through the rigors of a full hearing, complete with the attendant risks.

21. Crucially, the appellant submits that the High Court's analysis ignored Article 159 of the Constitution which obliges courts to administer justice in a manner that advances substantive justice and guards against abuse of process. According to the appellant, a proper application of Article 159 supports, rather than precludes, judicial intervention to restrain the misuse of insolvency procedures and does not warrant their constitutional insulation from scrutiny.

22. The appellant further contends that the learned judge erred in treating the respondent's right to commence liquidation proceedings as absolute and beyond judicial control. In this regard, reliance is placed on ***Kenya Power & Lighting Company Limited v Matic General Contractors Limited*** *[2000] eKLR*, where the Court held that winding-up proceedings are not intended to be used as a mechanism for enforcing payment of debts that are genuinely disputed. The appellant emphasizes that this decision affirms the court's jurisdiction to restrain winding-up proceedings where they are invoked oppressively or as a means of coercing payment rather than addressing true insolvency.

23. On that basis, the appellant submits that the High Court's conclusion that liquidation proceedings cannot be restrained is contrary to settled law and amounts to a misdirection on the scope of the court's supervisory and injunctive powers. According to the appellant, the court's power to restrain the commencement of frivolous or abusive liquidation petitions remains intact under the Insolvency Act, 2015, as held in ***Flower City Limited v Polytanks & Containers Kenya Limited*** *[2021] eKLR*, where the Court recognized its injunctive jurisdiction to prevent winding-up proceedings from being deployed as a pressure tactic to compel payment of disputed claims.

24. With respect to the orders on costs and execution, the appellant reiterates that the learned judge misdirected himself by summarily assessing costs at Kshs. 580,000 instead of leaving that to the taxing officer. Reliance is placed on ***Donholm Rahisi Stores (Suing as a Firm) v East Africa Portland Cement Limited*** *[2005] eKLR*, where the Court held that taxation of costs, whether between party and party or between advocate and client, is a special jurisdiction reserved to the taxing officer under the Advocates Remuneration Order and not to the trial judge.

25. According to the appellant, by undertaking the taxation himself, the learned judge infringed the appellant's right to a fair hearing by by-passing the procedural safeguards provided under the Advocates Remuneration Order, including the right to notice, itemization, and the opportunity to object. It is further contended that this approach deprived the appellant of the statutory right to challenge taxation by way of reference to a judge under **paragraph 11** of the **Advocates Remuneration Order**.

26. The appellant further submits that the learned judge erred in permitting execution of costs within thirty days, notwithstanding that the respondent's counterclaim remained pending. While acknowledging that section 94 of the Civil Procedure Act vests the court with discretion to allow execution, the appellant contends that this discretion was improperly exercised in the circumstances and resulted in manifest injustice. It is argued that section 94 contemplates a formal application to the court, and that in the absence of such an application, the court was not entitled to invoke the discretion. Reliance is placed on ***Commercial Bank of Africa v Lalji Karsan Rabadia & 2 Others*** *[2012] eKLR,* where it was held that an application under section 94 must be formally made.

27. According to the appellant, in the present case, the learned judge effectively initiated and granted the order on his own motion. Further, even assuming that the court could act *suo motu*, the learned judge failed to appreciate the purpose of section 94 which is to avoid multiplicity of proceedings and to ensure the orderly conduct of litigation, particularly where the file must move between the taxing officer and the judge.

28. In conclusion, the appellant submits that the High Court committed multiple errors of law and fact, and accordingly urges this Court to allow the appeal, set aside the ruling and order of the High Court in their entirety, and substitute them with an order allowing the notice of motion dated 3rd August 2022 with costs.

29. For the respondent, it is submitted that the learned judge properly exercised his discretion in dismissing both the interlocutory application and the substantive suit, and that his decision was firmly grounded in the overriding objectives set out under sections 1A, 1B, and 3A of the Civil Procedure Act. On the question of the injunction, the respondent relies on ***Nguruman Limited v Jan Bonde Nielsen & 2 Others*** *[2014] eKLR,* where this Court restated that an applicant must satisfy all three conjunctive requirements for interlocutory relief: the existence

of a *prima facie* case, the

likelihood of irreparable harm not compensable by damages, and a balance of convenience in the applicant's favour. Applying those principles, the respondent contends that the appellant failed at the threshold stage, as the debt forming the basis of the liquidation proceedings was admitted, and no credible evidence was placed before the court to demonstrate a violation of any legal right or the existence of a serious triable issue. It is further argued that alleged reputational harm could not override a creditor's statutory right to pursue recovery of a liquidated commercial debt, particularly where damages would be an adequate remedy.

30. The respondent also supports the High Court's decision to strike out both the application and the suit, submitting that the court was entitled to act *suo motu* in the exercise of its inherent jurisdiction under section 3A of the Civil Procedure Act to prevent abuse of process. The suit, it is argued, was fundamentally defective as its sole purpose was to restrain insolvency proceedings arising from an admitted debt without disclosing any independent or sustainable cause of action. In this regard, reliance is placed on ***Gwer & 5 Others v Kenya Medical Research Institute & 3 Others*** *[2020] KESC 66 (KLR),* where the Supreme Court affirmed that courts may

decline to prolong proceedings or remit matters

where no useful purpose would be served and the ends of justice would be better achieved through finality. Further reliance is placed on ***Wachira Karani v Bildad Wachira*** *[2016] KEHC 6334 (KLR),* where the High Court underscored the breadth of judicial discretion to strike out defective pleadings and to intervene where necessary to prevent dilatory tactics and ensure substantive justice.

31. On the constitutional dimension, the respondent aligns itself with the High Court's finding that the appellant's suit offended the respondent's right of access to justice under Article 48 of the Constitution. It is contended that the appellant was improperly invoking the court's process to bar a creditor from accessing legitimate remedies provided under the Insolvency Act. In support of the centrality of timely and effective access to justice, the respondent cites ***Hon. Gitobu Imanyara & 2 Others v The Hon. Attorney General***, Supreme Court Petition No. 15 of 2017, where the Supreme Court emphasized that courts must avoid procedural outcomes that unduly delay justice and affirmed their power to grant appropriate reliefs without unnecessary remittal where constitutional rights are implicated. Against this backdrop, the respondent maintains that once the High Court found the statutory

demand to be proper and the injunction unsustainable, the suit, being wholly dependent on that relief, was rendered moot and incapable of proceeding to trial.

32. Finally, on the issue of costs, the respondent submits that the High Court acted well within its discretion in awarding costs in its favour, having successfully opposed both the interlocutory application and the substantive suit. It is submitted that costs are governed by **section 27** of the **Civil Procedure Act,** which vests the court with wide discretion to determine by whom and to what extent costs are to be paid, subject only to the general principle that costs follow the event, unless the court orders otherwise for good reason. The respondent contends that no exceptional circumstances were demonstrated by the appellant to justify a departure from this settled principle. The respondent further submits that where a court determines a matter on its merits, it is not required to invite separate submissions on costs and that the costs awarded by the trial court were neither punitive nor excessive but proportionate to the nature and breadth of the litigation. According to the respondent, the High Court therefore exercised its discretion on costs judiciously, and there is no basis upon which this Court should interfere with that determination.

33. The respondent therefore urges that the appeal be dismissed in its entirety, with costs, as the High Court's ruling was a proper and judicious exercise of discretion at every stage.

34. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co.*** *[1968] EA 123*, thus:

> "**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

35. We have reviewed the record, considered the submissions of counsel and examined the ruling of the trial court. In our view, this appeal turns on four interrelated issues: first, whether the High Court erred in law in holding that it lacked jurisdiction to restrain threatened insolvency proceedings notwithstanding the allegation that the insolvency process was being invoked to

enforce a

genuinely disputed debt; second, whether the court misapplied the principles in **Giella v Cassman Brown** in determining the interlocutory application; third, whether the trial court erred in striking out the entire suit on unpleaded constitutional grounds and without affording the parties an opportunity to be heard; and fourth, whether the consequential orders on costs were properly made.

36. As regards the first issue, the pleadings and material placed before the High Court demonstrate that what was before that court was essentially a commercial dispute arising from a trading relationship involving the supply of goods on credit and a disagreement over the amount allegedly due, the applicable repayment arrangements and the propriety of invoking liquidation proceedings to enforce the claimed indebtedness. The appellant's case was that the respondent abruptly demanded immediate payment of the entire outstanding balance, whose quantum was disputed, and threatened liquidation notwithstanding an established instalment arrangement and ongoing negotiations. The High Court, however, determined both the interlocutory application and the substantive suit together and dismissed them principally on the ground that it lacked jurisdiction to grant the reliefs sought.

37. In declining jurisdiction, the learned judge held, *inter alia*, that the court could not issue an injunction barring a party from approaching the court and that any challenge to a statutory demand could only be raised within insolvency proceedings themselves, there being no such petition before the court. While we appreciate that courts possess inherent authority to prevent abuse of their processes, including the misuse of insolvency mechanisms, the exercise of that authority, in our view, does not amount to barring access to justice, but rather ensures that disputes are litigated in the appropriate forum.

38. This Court has consistently affirmed that insolvency proceedings are not intended to serve as a substitute for ordinary civil proceedings where the debt is disputed on substantial grounds. In ***Intona Ranch LTD. v Joseph Thomas O' Brien*** *[1992] KECA 55 (KLR)* and later in ***Universal Hardware Limited v African Safari Club Limited*** *[2013] KECA 507 (KLR),* this Court reiterated that a creditor's petition for liquidation founded on a debt that is bona fide disputed constitutes an abuse of process, and that the proper course in such circumstances is for the creditor to pursue the claim through the ordinary civil process. In ***Universal Hardware Limited v African Safari Club Limited*** (supra),

Makhandia, JA. after analyzing various decision and texts on the issue concluded thus:

> **"The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is *bona fide*. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a *bona fide,* proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt. In *Tanganyika Produce Agency Limited (1957) E.A. 241*, commenting on the issue, the court observed that:**
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> > *"... If it is shown that the alleged dispute is not bona fide one the objection to the petition fails. Thus, it is not uncommon for a company, after again and again begging for time for payment of the debt to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion and meets with no favour from the court ..."*

39. In light of the foregoing, it follows that the High Court erred in concluding that it lacked jurisdiction to intervene, notwithstanding the appellant's contention that the threatened liquidation was being used to pressure payment of a debt that was disputed within a commercial relationship.

40. Turning to the interlocutory application, the learned judge was

required, in accordance with the well-established principles in

Giella v Cassman Brown, to determine whether the appellant had established a *prima facie* case with a probability of success, including whether the material disclosed a bona fide and substantial dispute more appropriately resolved through the ordinary civil process rather than through the insolvency mechanism. Instead, the court declined jurisdiction at the outset and therefore did not undertake the necessary inquiry. Given the appellant's contention that both the existence and the exact amount of the alleged debt were disputed, it cannot be said that the application and indeed the main suit, were devoid of triable issues.

41. The misdirection was, in our view, compounded when the learned judge proceeded, without notice, to strike out the entire suit on constitutional grounds that had neither been pleaded nor canvassed by the parties. It is trite that courts determine disputes within the framework of the pleadings and issues framed by the parties. See ***Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others*** *[2014] eKLR.* Therefore, by introducing and relying upon an unpleaded constitutional issue to dispose of both the interlocutory application and the entire suit, the trial court denied the parties an

opportunity to be heard on a decisive point and thereby misdirected itself in law.

42. In addition, striking out is a draconian remedy reserved for the clearest of cases. As held by Madan, JA. in ***D.T. Dobie & Company (Kenya) Limited v Muchina*** *[1980] eKLR*, a suit should not be summarily dismissed unless it plainly and obviously discloses no reasonable cause of action and is beyond redemption. The appellant's claim, which questioned the propriety of the threatened liquidation proceedings and alleged abuse of process in the context of a disputed commercial account clearly raised triable issues requiring determination. The summary termination of the main suit at an interlocutory stage was therefore an improper exercise of discretion.

43. Having found that the striking out of the suit was erroneous, the consequential orders on costs cannot stand. In any event, the summary assessment of substantial costs by the trial court as opposed to leaving the issue of assessment of costs to the taxing officer in accordance with the established procedure under the Advocates Remuneration Order, in our view, departed from the proper procedural framework and deprived the appellant of the safeguards attendant to taxation.

44. In the end, we are satisfied that the High Court erred in law in holding that it lacked jurisdiction to restrain threatened insolvency proceedings, in failing to apply the principles governing interlocutory relief, and in striking out the suit on unpleaded constitutional grounds. This appeal is therefore merited and is accordingly allowed. The orders of the High Court are hereby set aside and instead substituted with an order allowing the Notice of Motion dated 3rd August 2022. We further order that the main suit be and is hereby remitted to the High Court for hearing and determination on its merits before a judge other than **Kizito Magare, J.** The respondent shall bear the costs of the appeal.

Dated and delivered at Mombasa this 13th day of March 2026.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DEPUTY REGISTRAR.

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

Signed

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JAMILA MOHAMMED

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JUDGE OF APPEA