



Heineken East Africa Import Company Limited & another v Heineken International BV & 2 others (Petition (Application) E027 & E028 of 2024 (Consolidated)) [2024] KESC 59 (KLR) (Civ) (18 October 2024) (Ruling)

Neutral citation: [2024] KESC 59 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL**

PETITION (APPLICATION) E027 & E028 OF 2024 (CONSOLIDATED)

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK
IBRAHIM, SC WANJALA & N NDUNGU, SCJJ**

OCTOBER 18, 2024

BETWEEN

HEINEKEN EAST AFRICA IMPORT COMPANY LIMITED PETITIONER

AND

HEINEKEN INTERNATIONAL BV 1ST RESPONDENT

MAXAM LIMITED 2ND RESPONDENT

AS CONSOLIDATED WITH

PETITION (APPLICATION) E028 OF 2024

BETWEEN

HEINEKEN INTERNATIONAL BV PETITIONER

AND

HEINEKEN EAST AFRICA IMPORT COMPANY LIMITED . 1ST RESPONDENT

MAXAM LIMITED 2ND RESPONDENT

(Being applications for stay of execution of the decree/order of the Court of Appeal (Nyamweya, Ali-Aroni and Mativo JJA) in Civil Appeal No. E403 of 2020 as consolidated with Civil Appeal No. 404 of 2020 dated 24th May, 2024 and applications to strike out the Petitions of appeal)



Supreme Court strikes out application for lack of jurisdiction

The dispute arose from a Distribution Agreement granting Maxam Limited exclusive rights to distribute Heineken products in Kenya. After Heineken International B.V. terminated the agreement in 2016, Maxam challenged the termination, resulting in a High Court award of Kshs. 1,799,978,868.00 in special damages, upheld by the Court of Appeal. The petitioners sought the Supreme Court's intervention, arguing constitutional interpretation issues. The Supreme Court found that the matter primarily involved contractual disputes, with minimal reliance on constitutional provisions, which failed the jurisdictional threshold under article 163(4)(a) of the Constitution. It struck out the petitions and applications, including for stay of execution, citing lack of jurisdiction.

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals that raise matters of general public importance and constitutional interpretation - whether an appeal to the Supreme Court, grounded on the Court of Appeal's reference to the application of national values and principles under article 10 of the Constitution in a commercial dispute, met the threshold for invoking the Supreme Court's appellate jurisdiction – Constitution of Kenya 2010, articles 10 and 163(4)(a)

Brief facts

The dispute arose from a Distribution Agreement dated May 21, 2013, between Heineken East Africa Import Company Limited and Maxam Limited. The agreement provided for the exclusive distribution of Heineken products in Kenya. On January 27, 2016, Heineken International B.V. issued a termination notice to Maxam, leading to the filing of suits contesting the validity of the termination and seeking damages. The High Court awarded Maxam special damages of Kshs. 1,799,978,868.00, which the Court of Appeal upheld. The petitioners sought redress from the Supreme Court, challenging the jurisdiction and decisions of the lower courts.

Issues

Whether an appeal to the Supreme Court, grounded on the Court of Appeal's reference to the application of national values and principles under article 10 of the Constitution in a commercial dispute, met the threshold for invoking the Supreme Court's appellate jurisdiction.

Held

1. Jurisdiction was a preliminary issue and ought to be dealt with at the onset. Without jurisdiction a court was obligated to down its tools as it did not have the power to adjudicate upon the proceedings before it. Not all intended appeals lie from the Court of Appeal to the Supreme Court. It was only those appeals arising from cases involving the interpretation or application of the Constitution that can be entertained by the Supreme Court.
2. Whereas there was mention of constitutional provisions by the High Court and the Court of Appeal, the material question before the two superior courts was on the validity of the termination notice issued to the 2nd respondent. In adjudicating the dispute, the two courts examined the Distribution Agreement and granted of the orders sought. The courts' final determinations were therefore not pegged on and indeed had nothing to do with the interpretation or application of the Constitution.
3. Whereas there was a mention of article 10(2) of the Constitution at the Court of Appeal, that was only to aid the court but it had no impact on the final decision as the court. Further, the appellate court even held that the law of contract was sufficient in determining the matter and found that the trial court erred in basing its findings on the renewal of the Kenya Distribution Agreement on the application of public law principles or interpretation of the Constitution. The Supreme Court had no jurisdiction to determine the appeals.

Petition partly allowed.



Orders

- i. *The application dated June 26, 2024 and filed on June 26, 2024 was allowed.*
- ii. *The application dated July 8, 2024 and filed on even date was allowed;*
- iii. *The application dated June 24, 2024 and filed on June 27, 2024 was struck out for want of jurisdiction.*
- iv. *The application dated June 1, 2024 and filed on June 13, 2024 was struck out for want of jurisdiction.*
- v. *The Petition of Appeal No. E027 of 2024 dated June 1, 2024 and filed on June 13, 2024 was struck out for want of jurisdiction.*
- vi. *The Petition of Appeal No. E028 of 2024 dated June 24, 2024 and filed on June 27, 2024 was struck out for want jurisdiction;*
- vii. *The sum of Kshs. 6,000/= deposited as security for costs in Petition of Appeal No. E027 of 2024 and Appeal No. E028 of 2024 was to be refunded to the petitioner.*
- viii. *No orders as to costs.*

Citations

Cases

Kenya

1. *Adega & 2 others v Kibos Distillers Limited & 5 others* Petition 3 of 2020; [2020] KESC 36 (KLR) - (Followed)
2. *Anami v Independent Electoral & Boundaries Commission & 2 others* Petition 30 of 2018; [2019] KESC 55 (KLR) - (Mentioned)
3. *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* Petition 4 of 2015; [2017] KESC 11 (KLR) - (Mentioned)
4. *Board of Governors, Moi High School, Kabarak & Daniel Toroitich Arap Moi v Malcolm Bell* Civil Application 12 & 13 of 2012; [2013] KECA 13 (KLR) - (Explained)
5. *Dande & 3 others v Director of Public Prosecutions & 2 others* Petition 4 (E005) of 2022; [2022] KESC 23 (KLR) - (Followed)
6. *Geo Chem Middle East v Kenya Bureau of Standards* Petition 47 of 2019; [2020] KESC 1 (KLR) - (Mentioned)
7. *Joho & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Mentioned)
8. *Kenya Airports Authority v Otieno Ragot and Company Advocates* Petition E011 of 2023; [2024] KESC 44 (KLR) - (Followed)
9. *Kenya Electricity Transmission Co Limited (Ketraco) v Instalaciones Inabensa S.A* Miscellaneous Application E56 of 2021; [2021] KECA 151 (KLR) - (Mentioned)
10. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR); [2014] 3 KLR 36 - (Followed)
11. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Mentioned)
12. *Njuguna & 46 others v Spire Properties (K) Limited & 12 others* Petition 28 (E030) of 2022; [2023] KESC 37 (KLR) - (Mentioned)
13. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Followed)
14. *Wanjohi v Kariuki & 2 others* Civil Application 6 of 2014; [2014] KESC 24 (KLR); [2014] 3 KLR 151 - (Mentioned)

United Kingdom

Attorney General v Blake [2000] 4 All ER 385 - (Followed)

Statutes

Kenya



1. Constitution of Kenya articles 10, 10(2); 19; 25(c); 27(2); 40; 47; 48; 50(1-2); 159(2)(d); 163(3)(b); 163(4)(a); 163(8); 164(3) — (Interpreted)
2. Employment Act (cap 226) In general — (Cited)
3. Labour Relations Act (cap 233) In general — Cited
4. Supreme Court Act (cap 9B) sections 3, 3A, 21(1)&(2); 23(A); 23(2)(i); 24; 29D — (Interpreted)
5. Supreme Court Rules (cap 9B Sub Leg) rules 3(5); 31(1-3); 31(6); 32(1)(a-b); 36(2)(a) — (Interpreted)

Advocates

Fred Ngatia and *Victor Mailu* for the petitioner in Petition No E027 of 2024 & for the 1st respondent in Petition No E028 of 2024.

2. *Ikoba Mubindi*, *Faith M Macharia* and *Aisha Abdallah* for the 1st respondent in Petition No. E027 of 2024 & for the petitioner in Petition No E028 of 2024

3. *Philip Nyachoti* for the 2nd respondent

RULING

1. Two separate appeals, being Petition No E027 of 2024 and Petition E028 of 2024 have been lodged before this court arising out of the Court of Appeal Judgment in Civil Appeal No 403 of 2020 as consolidated with Civil Appeal No E404 of 2020. In Petition No E027 of 2024, the petitioner, Heineken East Africa Import Company Limited has filed a notice of motion application seeking stay of execution of the Court of Appeal Judgment. The 2nd respondent, Maxam Limited on the other hand has filed a notice of motion application seeking to strike out the petition of appeal. In Petition No E028 of 2024, the petitioner, Heineken International BV has similarly filed a notice of motion application seeking stay of execution of the Judgment of the Court of Appeal while the 2nd respondent has equally filed a notice of motion application seeking to strike out the petition of appeal. In order to save on precious judicial time and in view of the related nature of the applications, this ruling disposes the four (4) applications set out above.

i. Petition No E027 of 2024

a. Notice of Motion Application dated 1st June, 2024

2. The notice of motion application dated June 1, 2024 and filed on June 13, 2024 pursuant to sections 3, 3A, 21(1)&(2) and 23(A) of the *Supreme Court Act*, and rule 32 of the *Supreme Court Rules*, seeks, *inter alia*, an order of stay against the execution and or enforcement of the Judgment delivered on May 24, 2024 by the Court of Appeal at Nairobi in Civil Appeal No. 403 of 2020 as consolidated with Civil Appeal No. E404 of 2020. The application is supported by the affidavit of Kevin Santry, a director of Heineken East Africa Import Company Limited, sworn on June 1, 2024. The petitioner additionally filed submissions dated June 1, 2024, a supplementary affidavit sworn by Victor Mailu, the applicant's counsel on July 4, 2024, and a Rejoinder dated July 4, 2024.
3. The petitioner avers that: in a Judgment delivered on July 29, 2019 the High Court awarded the 2nd respondent special damages of Kshs 1,799,978,868.00 and a declaration that the 2nd respondent's constitutional rights under article 19 and 27 were violated; the Court of Appeal suo moto upheld the High Court's decision predicated on the imperatives of article 10 of the *Constitution* when applying or interpreting contract law; it did not consider that the Distribution Agreement expressly excluded compensation for any such losses; and that parties did not have an opportunity to be heard in relation to the novel application of article 10, thereby occasioning violation of article 25(c) of the *Constitution*.



4. The petitioner contends that its appeal is arguable and not frivolous, and that unless the order of stay is granted, the appeal, if it were to succeed would be rendered nugatory. It urges that it is in the public interest that the order of stay be granted. To support its averments, it cites this court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC App No 5 of 2014 [2014]eKLR and *Kenya Airports Authority vs. Otieno Ragot & Company Advocates* SC App No E011 of 2023 [2024] KESC 44 (KLR).
5. The petitioner further submits that the Court of Appeal perceived a normative basis for award of the special damages as the equity set out in article 10 of the *Constitution* whereas no such claim was advanced by the 2nd respondent. It urges that its petition raises eight pertinent questions for determination, inter alia: whether the Court of Appeal erred in law by holding that it is an imperative of article 10 when applying or interpreting contract law; whether it is an imperative of article 10(2) of the *Constitution* that investments made by beer distributors in Kenya constituted irrebuttable goodwill constituting as property; whether the Court of Appeal erred by holding that there was clear presumption that unilateral termination is not available in the distributorship agreement; whether the distributorship agreement could only be terminated by "mutual separation" and which was to be guided by, conform and be consistent with, the imperatives of article 10(2) of the *Constitution*, and adds that the decision of the Court of Appeal took a trajectory of constitutional interpretation or application which became the basis of the financial award.
6. It is the petitioner's case that a bank guarantee for the substantial sum of Kshs 1,799,978,868.00 is at risk of being called in any time by the 2nd respondent. It adds that once it is paid out it will be out of this court's reach, and further that restitution may be impossible as the 2nd respondent has no known assets, and there is no certainty that the assets will be available at the time of restitution.
7. The 1st respondent (Heineken International BV), as indicated by its counsel during the mention before the Hon. Deputy Registrar, is not opposed to the petitioner's application for stay, and therefore did not file a response or submissions to the notice of motion dated June 1, 2024.
8. In response and in opposition to the application, the 2nd respondent filed the replying affidavit of Ngugi Kiuna, its Managing Director, sworn on July 1, 2024 and submissions dated July 1, 2024. The 2nd respondent contends that: the petitioner has failed to discharge the burden for the grant of an order for stay of execution to the required standard; the Judgment of the Court of Appeal is incapable of execution in any manner whatsoever to warrant an order for stay of execution as it upheld and affirmed the High Court Judgment. This court's decision in *Edwin Harold Dayan Dande & 3 others v Director Public Prosecutions & 2 others* Petition 4(E005) of 2024 [2022] KESC 23 (KLR) is cited in this regard. It further avers that the Supreme Court cannot stay execution of a decree pending before the High Court and the proceedings therein, adding that the bank guarantee was issued in compliance with the High Court order made on November 14, 2019 as security for the decretal sum. Therefore, it urges that all matters pertaining to the guarantee can only be addressed before the High Court.
9. The 2nd respondent avers that: the appeal is not arguable; the issue for determination at the Court of Appeal was a pure and singular contract principle on "repudiatory breach" of the Distribution Agreement; the Court of Appeal did not interpret or apply the *Constitution* in reaching its determination, but did the opposite, admonishing the High Court for elevating a matter in the realm of private law into a public law dispute by introducing constitutional issues, which were totally unnecessary in the determination of the dispute at the High Court; and further annulled all constitutional interpretations and applications including public law remedies and reliefs introduced by the High Court.



10. The 2nd respondent further urges that: this court does not have jurisdiction to determine the matter as the Court of Appeal decision was on simple principles of the law of contract; it is not enough to generally plead that the case involves issues of constitutional interpretation and application; only cardinal issues of constitutional law or of jurisprudential moment, legal issues founded on cogent constitutional controversies deserve further input of the Supreme Court under article 163(4)(a); and that challenges of finding or conclusions on matters of fact by the trial court of competent jurisdiction after taking and evaluating evidence do not bring an appeal under the ambit of article 163(4)(a) of the Constitution.
11. According to the 2nd respondent, the petition seems to be seeking an advisory opinion on matters that may have been discussed by the Court of Appeal, on the effects and consequences of article 10 of the Constitution on private contracts, which did not affect the decision of the Court of Appeal. The 2nd respondent contends that the matters on the face of the notice of appeal require certification under article 163(4)(b) of the Constitution on matters of general public importance before lodging the appeal. It adds that the dispute between the parties is a private contract and therefore the circumstances of public interest do not arise.
12. On the issue of restitution, the 2nd respondent avers that it was the sole distributor of the petitioner's Heineken products throughout the Republic of Kenya for over four (4) years with a turnover of billions of shillings per year. It therefore argues that failure of restitution, in the event the petition succeeds is therefore unfounded and is made in bad faith. It adds that in any event the petitioner's breach of the Agreement had a bearing on the 2nd respondent's financial status, and it is entitled to enjoy the fruits of the Judgment of July 29, 2019. It submits that it is only just, equitable and in the interest of justice that the petitioner's application dated June 1, 2024 be dismissed with costs.

b. Notice of Motion Application dated 26th June, 2024

13. The 2nd respondent filed the notice of motion application dated June 26, 2024 on June 27, 2024 pursuant to articles 163(3)(b), 163(4)(a) and (b), 163(8) of the Constitution, sections 21(1) and (2), 23(2)(i) and 29D of the Supreme Court Act 2011, rules 31(1),(2) and (3), 32 (1)(a) and (b) of the Supreme Court Rules, 2020. The petitioner seeks, *inter alia*, that the petition of appeal dated June 1, 2024 and filed on June 13, 2024 be struck out for want of jurisdiction, and consequently the notice of motion application dated June 1, 2024 and filed on June 13, 2024 be struck out. The application is supported by the affidavit sworn on June 26, 2024 and the further affidavit sworn on July 15, 2024 both by Ngugi Kiuna.
14. The 2nd respondent contends that: this court does not have jurisdiction to hear and determine the matter pursuant to article 163(4)(a) as the grounds of appeal set out do not disclose a case involving the interpretation and application of the Constitution; the Court of Appeal determined that it was an error for the trial court to base its findings on the renewal of the Kenya Distribution Agreement on the application of public law principles or interpretation of the Constitution as the law of contract is sufficient in the adjudication of contractual cases.
15. It further argues that: the judges of appeal made minimal and brief reference to article 10 of the Constitution, which reference does not have any significant effect on the final outcome of the Judgment; the petitioner has not demonstrated the impact or the effect the reference of article 10 had on the entire judgment; the reference on article 10 was peripheral and not central to the final determination; the Court of Appeal was clear on the import of article 10 of the Constitution; it expressly stated that its decision was based on the principles of the "law of contract" and not the interpretation of the



- Constitution; and further that the petitioner has not controverted the deficiency and incompetence of the notice of appeal, and therefore admits and concedes that the court does not have jurisdiction.
16. Its case is that the petitioner and the 1st respondent succeeded in eliminating all references to the interpretation and application of the Constitution which the High Court had erroneously relied upon, and it is only the 2nd respondent that can competently urge the reinstatement of the constitutional interpretation and application which were in its favour, but dismissed by the Court of Appeal. The 2nd respondent further urges that the petitioner cannot invent a cause of action that has not been declared in the limited and self-contained Notices of Appeal to revive the dismissed constitutional matters in order to impermissibly base its appeal to the Supreme Court. It adds that the constitutional anchoring is not disclosed on the face of the notice of appeal, references to article 10 of the Constitution is an afterthought to circumvent the mandatory requirement of seeking certification, and that the decision of the Court of Appeal is based on the concept of “repudiatory breach” and not on any constitutional premise.
 17. The 2nd respondent avers that the Judges of the Court of Appeal evaluated all the evidence, submissions and documents tendered during the trial at the High Court in arriving at the conclusion that the letter and Notice of Termination dated January 27, 2016 issued by the petitioner and the 1st respondent on a “without prejudice” basis could not be construed as amounting to a lawful or valid Notice of Termination under Clause 17 of the Distribution Agreement. It adds that in its dispositive decision, the Court of Appeal relied on the House of Lords decision in Attorney General v Blake [2000] 4 All ER 385 on the award of restitutionary damages for breach of contract and not on any interpretation or application of the Constitution. To support its case, it relies on this Court’s decisions in Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd. & Another [2012]eKLR, Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others [2014] eKLR and Espie Njuguna & 46 others vs. Spire Properties K Limited & 12 others Pet.No.28 (E030) of 2022 [2023] KESC 37 (KLR) to urge that this court does not have jurisdiction to hear and determine the matter pursuant to article 163(4)(a) of the Constitution.
 18. In response and in opposition to the application, the petitioner filed the replying affidavit of Victor Mailu, its counsel on record sworn on July 11, 2024 and submissions dated 1July 1, 2024. The petitioner urges that: contested issues before the superior courts revolved around the interpretation or application of various constitutional provisions; in the Re-Amended Plaintiff filed at the High Court, the 2nd respondent alleged that the petitioner’s and the 1st respondent’s actions were in violation of Articles 19 and 27 of the Constitution; the High Court in its Judgment applied or interpreted the constitutional issues declaring that the petitioner’s and 1st respondent’s actions were in violation of article 19 and 27(2) of the Constitution; the Court of Appeal held that the declarations under article 19 and 27(2) were unnecessary under the principle of constitutional avoidance; the Court of Appeal invoked article 10 of the Constitution as a normative basis for application of ‘good faith, equity and fairness’ as applicable in interpreting contract law, and justified the award of special damages; the interpretation of contract law took a constitutional trajectory as the court stated that, the law of contract must now be read and applied inside the baseline threshold prescribed by article 10(2)(b) of the Constitution; the appeal before this court challenges the application of article 10 of the Constitution to private contracts; and the points of law raised and facts in the petition of appeal are based on the application or interpretation of constitutional issues.
 19. The petitioner further avers that: the application and interpretation of contract law within imperatives set by article 10 was invoked by the appellate court in its Judgment whereas no party made a plea nor arguments; the appellate court further held that the commercial relationship between the parties was sui generis and the award of special damages was justified on the basis on article 10 of the Constitution; its notice of appeal meets the requirements of rule 36(2)(a) of the Supreme Court Rules by specifying



the dispositive parts of the appellate court's judgment which is subject of the appeal; and that the 2nd respondent's application is bad in law and an abuse of the court process. To support its averments, the petitioner relies on this court's decisions in *Peter Munya (supra)*; *George Mike Wanjohi vs. Steven Kariuki & 2 others* App. No. 6 of 2014 [2014]eKLR; *Geo Chem Middle East vs. Kenya Bureau of Standards* SC Pet. No. 47 of 2019 [2020] KESC 1 (KLR) and *Anami Silverse Lisamula vs. Independent Electoral and Boundaries Commission & 2 others* [2019] KESC 55 (KLR) and urge that the appeal took a trajectory of constitutional interpretation or application.

(ii) Petition No E028 of 2024

a. Notice of Motion Application dated 24th June, 2024

20. The petitioner, Heineken International BV has filed the notice of motion application dated June 24, 2024, but within Application No. E021 of 2024. The application is filed pursuant to sections 3, 3A, 21(1) and (2), 23A and 24 of the *Supreme Court Act*, 2011 and rules 3(5) and 31(6) of the *Supreme Court Rules*, 2020 seeking, *inter alia*, a stay of execution and/or enforcement of the entire Judgment and resultant order of the Court of Appeal delivered on May 24, 2024 in Civil Appeal No 403 of 2020 as consolidated with Civil Appeal No E404 of 2020.
21. The application is premised on the grounds on the face of the application and the supporting affidavit sworn on June 24, 2024 by Kevin Santry, a director of Heineken International BV and submissions dated July 24, 2024. The petitioner avers that its appeal is arguable with decent prospects of success, and has met the threshold set in *Kenya Electricity Transmission Ltd v Instalaciones Inabensa S.A* [2021] eKLR. It argues that the appeal raises weighty constitutional issues premised on the Court of Appeal's erroneous introduction of new issues and article 10(2) of the *Constitution* suo moto as they were never pleaded or submitted upon by the parties at the High Court or Court of Appeal. It avers that the appellate court exceeded its jurisdiction under article 164(3) of the *Constitution* and was in violation of the petitioner's right to property, fair trial, fair administrative action and access to justice provided under articles 40, 25(c), 47, 48 and 50(1) and (2) of the *Constitution*.
22. According to the petitioner, the Court of Appeal erred gravely by *suo moto* applying the national values and principles of governance under article 10(2) to: establish and make a finding of a repudiatory breach of the Distributorship Agreement; to determine and award special damages to the 2nd respondent for loss of business amounting to Kshs 1,799,978,868.00 in violation of the petitioner's constitutional rights; to find that the 2nd respondent created substantial goodwill for the petitioner; and holding that the special relationship between beer manufacturers and distributors creates an inherent power imbalance favouring manufacturers was sui generis and therefore any mutual separation must conform to the imperatives of article 10(2) of the *Constitution*.
23. The petitioner contends that the appeal will be rendered nugatory if the execution of the appeal is not stayed, the Court of Appeal having ordered and upheld the High Court award of the sum of Kshs.1,799,978,868.00. It argues that the amount is colossal and cannot be recovered from the 2nd respondent, who had previously admitted that it is financially ailing and has no known assets. Further, the 2nd respondent has taken positive steps to commence execution including filing of an application dated June 6, 2024 seeking leave to execute the High Court's decree issued on August 15, 2019 before taxation and the final determination of its bill of costs dated August 1, 2019. It avers that the High Court issued directions for the expedited hearing of the application and directed parties to return to court on July 4, 2024 to obtain a ruling date.
24. The petitioner posits that the petition raises issues pertinent to the public interest as the consolidated Judgment of the Court of Appeal will affect contract law in Kenya and the manner in which



distribution agreements particularly in the beer industry will be performed, enforced and interpreted going forward. It relies on this court's decisions in *Peter Munya (Supra)*, *Board of Governors, Moi High School Kabarak & Ano. vs. Malcolm Bell* [2013] eKLR where it was held that the court's capability to arrive at a just decision on the merits of the appeal would be substantially diminished unless the court was able to make an interlocutory order to preserve the subject matter of the dispute.

25. The 1st respondent (Heineken East Africa Import Company Limited), informed the court during the mention before the Hon Deputy Registrar that it supports the petitioner's application for stay, and therefore did not file a response or submissions to the notice of motion dated June 24, 2024.
26. In response to the application, the 2nd respondent filed the replying affidavit of Ngugi Kiuna sworn on July 5, 2024, and submissions dated July 8, 2024. The deponent reiterates the averments as was set out in the replying affidavit sworn on July 1, 2024 in response to the 1st respondent's application for stay dated June 1, 2024 filed in Petition No E027 of 2024. The 2nd respondent's submissions are also a replica of the submissions dated July 1, 2024 filed in Petition No E027 of 2028 and therefore we shall not rehash the averments therein. The 2nd respondent urges that: the court does not have jurisdiction to stay the proceeding pending before the High Court; the petition is not arguable as it is incompetent for want of jurisdiction; the court does not have jurisdiction pursuant to article 163(4) (a) of the Constitution and therefore, the application dated June 24, 2024 ought to be dismissed with costs to it.

b. Notice of Motion Application dated 8th July, 2024

27. The 2nd respondent, Maxam Limited filed the notice of motion application dated July 8, 2024 pursuant to articles 163(3)(b), 163(4)(a) & (b)163(8) of the Constitution, sections 21(1) & (2), 23(2)(i) and 29D of the Supreme Court Act 2011, rule 31(1),(2)&(3), 32 (1)(a)&(b) of the Supreme Court Rules 2020, seeking, *inter alia*, that the petition of appeal dated June 24, 2024 and filed on June 27, 2024 be struck out for want of jurisdiction, and consequently the notice of motion application dated June 24, 2024 and filed on June 27, 2024 be struck out for want of jurisdiction.
28. The application is supported by the affidavit of Ngugi Kiuna sworn on July 8, 2024. The 2nd respondent also filed submissions dated July 8, 2024. The application and submissions are similar to those dated June 26, 2024 filed in Petition No E027 of 2024. The 2nd respondent additionally filed a further affidavit sworn on July 17, 2024 by Ngugi Kiuna and further submissions of even date. The 2nd respondent maintains that this court does not have jurisdiction to hear and determine the petition of appeal citing this court's decisions in *Espie Njuguna (supra)*, *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] KESC 36 (KLR), *Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others* [2017] KESC 11 (KLR) to urge that the Court of Appeal did not interpret or apply the Constitution and adds that the petition is an attempt to craft a backdoor jurisdictional creep to this court.
29. In response and in opposition to the notice of motion application dated July 8, 2024, the petitioner filed the replying affidavit of Ikoha Muhindi, the petitioner's Counsel on record sworn on July 16, 2024, and submissions dated July 16, 2024. The petitioner urges that: its application dated June 24, 2024 is properly before court as the proceedings in the matter relate to interpretation and application of the Constitution and therefore within the purview of article 163(4)(a) of the Constitution; the High Court applied both article 19 and 27(c) of the Constitution and issued declarations that the petitioner's and 1st respondent's actions were in violation of article 19 of the Constitution and that the conduct of offering lower market prices to other distributors of the Heineken Lager beer, approving higher market prices to the 2nd respondent on the same products and arbitrarily reducing the 2nd respondent's



approved margins as discriminatory and offended article 27(2) of the Constitution; and that the Court of Appeal engaged in and analysed the application of article 19 and 27(c) of the Constitution, and *suo moto* introduced and determined interpretation and application of article 10(2) of the Constitution on the Distribution Agreement.

30. The petitioner further submits that the crux of the Court of Appeal's decision was premised on heavy reliance and novel interpretation and application of article 10(2) of the Constitution to the Distribution Agreement on: the extension of national values and principles of governance to a private agreement between the 1st and 2nd respondents; interpretation of article 10(2) to conclude that the investments made by beer distributors constitute irrebuttable goodwill protected as property under constitutional principles; by applying article 10(2) the appellate court concluded that the appointment of third party distributors by the petitioner and the 1st respondent constituted a repudiatory breach of the Distribution Agreement leading to the award of special damages for business losses; holding that the relationship between beer manufactures and distributors was *sui generis* creating a power imbalance that must conform to the principles of article 10(2) of the Constitution; and that it applied article 10(2) to find that the 2nd respondent was in fact and in law a business joint venture of the petitioner and the 1st respondent entitling the 2nd respondent to share in the petitioner's profits thus redefining the nature of the contractual relationship implying that the constitutional principles of fairness and equity necessitate profit sharing arrangements even in the absence of explicit contractual terms.
31. The petitioner further avers that its notice of appeal meets the statutory requirements of rule 36(2) (a) of the Supreme Court Rule. It urges that the 2nd respondent's application lacks any legal basis and is intended to delay the hearing and determination of the petition and stay application, thus it ought to be dismissed with costs.

Analysis and Determination

32. Jurisdiction is a preliminary issue and ought to be dealt with at the onset. Without jurisdiction a court is obligated to down its tools as it does not have the power to adjudicate upon the proceedings before it.
33. This court has settled with finality its jurisdiction pursuant to article 163(4)(a) of the Constitution in several of its decisions. We have held that not all intended appeals lie from the Court of Appeal to the Supreme Court. It is only those appeals arising from cases involving the interpretation or application of the Constitution that can be entertained by this court. In Lawrence Nduttu (*supra*) we stated as follows

“(27) ... it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application. [28] 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. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4)(a), the court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a). It is the court's duty as the ultimate



custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold.”

34. In Hassan Jobo (*supra*) we stated that:

” [37] ...the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution.”

35. As we determined in Rutongot Farm Ltd v Kenya Forest Service & 3 others SC Petition No 2 of 2016 [2018] eKLR, the questions that need to be answered are: (i) What was the question in issue at the High Court and the Court of Appeal? (ii) Did the superior courts below dispose of the matter after interpreting or applying the Constitution? (iii) Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?

36. The genesis of the dispute between the parties is the Distribution Agreement dated May 21, 2013 made between Heineken East Africa Import Company Limited and the 2nd respondent, for a term of three (3) years with effect from May 1, 2013. The Agreement was to automatically be extended for a period of one year and subsequent one-year periods unless terminated by either party giving the other written notice of termination within three (3) months. On January 27, 2016 Heineken International BV issued Maxam Limited, the 2nd respondent with a termination notice. Aggrieved by this action, the 2nd respondent instituted a suit *vide* a Re-Amended Complaint dated December 18, 2013 seeking several orders inter alia: a permanent injunction restraining the petitioner and the 1st respondent from, (a) terminating the Distribution Agreement and (b) appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya; a declaration that the Notice of Termination from the 1st respondent to the 2nd respondent was unlawful, irregular, unprocedural and therefore null and void *ab initio*; a declaration that the Kenyan Distribution Agreement dated May 21, 2013 between the petitioner and the 1st respondent is in full force and effect as per the terms and conditions set out therein; a declaration that the petitioner and 1st respondent’s actions and breaches aforesaid have infringed on the 2nd respondent’s rights as protected by article 19 of the Constitution; and a declaration that the petitioner and 1st respondent’s conduct of offering lower market prices to other distributors of the Heineken Lager Beer, approving higher market prices to the 2nd respondent on the same products and arbitrarily reducing the 2nd respondent’s approved margins is discriminatory and offends the provisions of article 27(2) of the Constitution.

37. We note that in its judgment, the High Court framed the issues for determination as: whether the Distribution Agreement is admissible for want of Stamp Duty; whether there was breach of legitimate expectation; whether the termination notice was valid and whether the 2nd respondent is entitled to any remedy. From the issues set out, we note that none concerned an interpretation or application of the Constitution. In its Judgment the court mainly addressed the termination of the Distribution Agreement. It held that: the termination notice was not issued in accordance with clause 18 of the Agreement as no reason was given for termination of the agreement; the notice thus did not result in termination of the subsisting Agreement of May 21, 2013; and the Agreement was constructively terminated by the deliberate appointment of numerous other distributors even after the reinstatement



of interim orders by the trial court on August 28, 2017 without the issuance of any fresh legally binding Termination Notice.

38. On the award of the claim of special damages, reliance was placed on a Valuation Report produced by an expert witness to prove the claim of Kshs 1,799,978,868.00. The trial court found that the special damages were pleaded and proved. It noted that the Valuation Report was also neither challenged nor controverted by any expert witness of equal measure on the part of the petitioners and as such was an admission on their part. The court thus amongst other orders, awarded the sum of Kshs.1,799,978,868.00 as special damages for loss of business as tabulated by the 2nd respondent. Although one of the prayers sought by the 2nd respondent in the re-amended plaint and the declaration made in the Judgment that the petitioner and the 1st respondent's actions were in violation of article 19 and 27(2) of the *Constitution*, this order had no impact on the main question on the validity of the termination notice issued to the 2nd respondent.
39. The petitioners anchor their respective appeals on what the Court of Appeal stated concerning article 10 of the *Constitution*. From a perusal of the appellate court's Judgment we note that the court made findings concerning article 10 of the *Constitution* at paragraphs 63, 130, 131 and 145 of the Judgment. This is to the effect that, "the law of contract must now be read and applied inside the baseline threshold prescribed by article 10(2)(b) of the *Constitution*" and that "the courts are therefore bound by the imperatives set out in article 10 when applying or interpreting contract law." The Court of Appeal further stated that, "in the assessment of damages arising from a breach of exclusive beer distribution agreements, being a sui generis class, requires that the special commercial and legal characteristics of these agreements are taken into account. We also accept the proposition that, consistent with the sui generis nature of this commercial relationship, and as an imperative of article 10(2) of the *Constitution* investments made by beer distributors in Kenya constitute irrebuttable goodwill, automatically qualifying as property."
40. We however note that the Court of Appeal held that it was in error for the trial court to base its findings on the renewal of the Kenya Distribution Agreement on the application of public law principles or interpretation of the *Constitution*. In this respect, it found that the Law of Contract was sufficient in the adjudication of contractual cases when applied in the context of the procedural imperatives contained in article 159(2)(d) (without undue regard to procedural technicalities) and article 10 (national values) of the *Constitution*. The Court of Appeal dismissed the appeals save for the grounds of legitimate expectation and the order for account for profits. It set aside the injunction order terminating the distribution agreement and appointing any other distributor including the declaration that there was a violation of article 19 and 27(2) of the *Constitution*. The appellate court upheld the award of special damages for loss of business of Kshs.1,799,978,868.00 to be paid by the petitioners arising from their repudiatory breach of the Kenya Distribution Agreement and the declaration issued by the High Court that the Notice of Termination was unlawful, irregular, unprocedural and therefore null and void.
41. It is clear that whereas there was mention of constitutional provisions by the High Court and the Court of Appeal, the material question before the two superior courts was on the validity of the termination notice issued to the 2nd respondent. In arriving at its final orders, the two courts examined the Distribution Agreement, in the grant of the orders sought. Its final determination was therefore not pegged on and indeed had nothing to do with the interpretation or application of the *Constitution*. The petitioners have urged that the Court of Appeal's decision took a constitutional trajectory based on its finding on article 10 of the *Constitution*. An examination of the judgment of the appellate court demonstrates that whereas there was a mention of article 10(2) of the *Constitution*, this was only to aid the court but had no impact on the final decision as the court. Further, the appellate court even held



that the law of contract was sufficient in determining the matter and found that the trial court erred to base its findings on the renewal of the Kenya Distribution Agreement on the application of public law principles or interpretation of the Constitution.

42. In Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others Petition 4 of 2015 [2017] KESC 11 (KLR) where this court was faced with a similar issue, we stated as follows:

“...Although the superior courts may have made reference to certain provisions of the Constitution, it was only in broad terms in the spirit of the new constitutional order, which requires that all decisions made by any public organ, officer or person, must lie in consonance with certain constitutional signals. In that regard, the Constitution is a living charter which governs our daily lives. Hence the pertinence of the Industrial Court’s finding that the 1st respondent, in making its decisions, is to be guided by the values and principles enshrined in article 10 of the Constitution. To answer the question, therefore, whether article 10 of the Constitution was the subject of the court’s interpretation, we find that the appellant’s case at the Industrial Court, as well as the 1st respondent’s case at the Court of Appeal, squarely entailed the interpretation and application of the terms of the Employment Act and the Labour Relations Act, in so far as their focal point was the issue of redundancy. All references to the terms of the Constitution were guided only by the object of incorporating this charter’s spirit, values and principles.”

43. In Benson Ambuti Adega (supra) we held that where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this court may not be properly invoked. The mere reference to the rich generality of a constitutional principle as the Court of Appeal did in the present case on article 10 is not a sufficient ground to invoke article 163(4)(a). A perusal of the judgment of the Court of Appeal demonstrates that the main issue concerned the validity of the termination notice pursuant to the Distribution Agreement. We note that the court based its decision mainly on the repudiatory breach of the contract. At paragraph 108, the court held as follows:

“The appointment of the third party distributors by Heineken EA and Heineken B.V during the litigation between the parties was accordingly in breach of Clause 26 of the Kenya Distribution Agreement. In addition, since the appointment of the third party distributors essentially terminated the exclusive nature of the Kenya Distribution Agreement, we find it to have been a repudiatory breach by Heineken E.A and Heineken BV, as it essentially deprived Maxam Ltd of the core benefit of the Kenya Distribution Agreement.”

44. Further in its final orders at paragraph 155, Order No 5 it stated; “We affirm and uphold the award by the High Court to Maxam Ltd of special damages for loss of business of Kshs 1,799,978,868.00 to be paid by Heineken EA and Heineken BV, arising from their repudiatory breach of the Kenya Distribution Agreement.” This was not based on the interpretation or application of the Constitution, specifically of article 10(2). The interpretation or application of article 10 therefore had a limited bearing to the decision of the Court of Appeal. It is crystal clear to us that the petitioners’ cases do not meet the requisite jurisdictional threshold under article 163(4)(a) of the Constitution.
45. Having determined that we have no jurisdiction to determine the appeals, the notice of motion applications seeking stay of execution fall by the way side.
46. Consequently, for reasons aforesaid, we make the following orders:



- i. The notice of motion application dated June 26, 2024 and filed on June 26, 2024 be and is hereby allowed;
- ii. The notice of motion application dated July 8, 2024 and filed on even date be and is hereby allowed;
- iii. The notice of motion application dated June 24, 2024 and filed on June 27, 2024 is hereby struck out for want of jurisdiction;
- iv. The notice of motion application dated June 1, 2024 and filed on June 13, 2024 is hereby struck out for want of jurisdiction;
- v. The Petition of Appeal No E027 of 2024 dated June 1, 2024 and filed on June 13, 2024 is hereby struck out for want of jurisdiction;
- vi. The Petition of Appeal No E028 of 2024 dated June 24, 2024 and filed on June 27, 2024 is hereby struck out for want jurisdiction;
- vii. We hereby direct that the sum of Kshs 6,000/= deposited as security for costs in Petition of Appeal No E027 of 2024 and Appeal No E028 of 2024 herein be refunded to the petitioner.
- viii. There shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

