



**Cogno Ventures Limited & 4 others v Bia Tosha Distributors Limited & 15 others; Kenya Breweries Limited & 6 others (Interested Parties); Ferran & 24 others (Contemnor) (Application E005, E006 & E012 of 2023 (Consolidated)) [2023] KESC 33 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KESC 33 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION E005, E006 & E012 OF 2023 (CONSOLIDATED)  
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ  
MAY 26, 2023**

**BETWEEN**

**COGNO VENTURES LIMITED ..... APPLICANT**

**AND**

**BIA TOSHA DISTRIBUTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA BREWERIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**UDV (KENYA) LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**EAST AFRICAN BREWERIES PLC ..... 4<sup>TH</sup> RESPONDENT**

**DIAGEO PLC ..... 5<sup>TH</sup> RESPONDENT**

**KAMAHUHA LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**FOUR WINDS TRADING COMPANY LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
APPLICATION E006 OF 2023**

**BETWEEN**

**ANDREW KILONZO ..... 1<sup>ST</sup> APPLICANT**

**JANE KARUKU ..... 2<sup>ND</sup> APPLICANT**

**ANDREW COWAN ..... 3<sup>RD</sup> APPLICANT**

**AND**

**BIA TOSHA DISTRIBUTORS LIMITED ..... RESPONDENT**



**AND**

**KENYA BREWERIES LIMITED ..... INTERESTED PARTY**  
**UDV (KENYA) LIMITED ..... INTERESTED PARTY**  
**COGNO VENTURES LIMITED ..... INTERESTED PARTY**  
**EAST AFRICAN BREWERIES PLC ..... INTERESTED PARTY**  
**DIAGEO PLC ..... INTERESTED PARTY**  
**KAMAHUHA LIMITED ..... INTERESTED PARTY**  
**FOUR WINDS TRADING COMPANY LIMITED ..... INTERESTED PARTY**

**AS CONSOLIDATED WITH**  
**APPLICATION E012 OF 2023**

**BETWEEN**

**BIA TOSHA DISTRIBUTORS LIMITED ..... APPLICANT**

**AND**

**KENYA BREWERIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**UDV (KENYA) LIMITED ..... 2<sup>ND</sup> RESPONDENT**  
**COGNO VENTURES LIMITED ..... 3<sup>RD</sup> RESPONDENT**  
**EAST AFRICAN BREWERIES LIMITED ..... 4<sup>TH</sup> RESPONDENT**  
**DIAGEO PLC ..... 5<sup>TH</sup> RESPONDENT**  
**NGONG MATONYOK WHOLESALERS LIMITED ..... 6<sup>TH</sup> RESPONDENT**  
**MANARA LIMITED ..... 7<sup>TH</sup> RESPONDENT**  
**TONY WEST LIMITED ..... 8<sup>TH</sup> RESPONDENT**  
**OUTLOOK INDEX LIMITED ..... 9<sup>TH</sup> RESPONDENT**  
**JANE KARUKU ..... 10<sup>TH</sup> RESPONDENT**  
**ANDREW KILONZO ..... 11<sup>TH</sup> RESPONDENT**  
**ANDREW COWAN ..... 12<sup>TH</sup> RESPONDENT**

**AND**

**JAVIER FERRAN ..... CONTEMNOR**  
**IVAN MENEZES ..... CONTEMNOR**  
**LAVANYA CHANDREASHEKAR ..... CONTEMNOR**  
**SUSAN KILSBY ..... CONTEMNOR**  
**MELISSA BETHELL ..... CONTEMNOR**  
**KAREN BLACKETT ..... CONTEMNOR**



VALERIE CHAPOULAUD ..... CONTEMNOR  
LADY MENDELSON ..... CONTEMNOR  
ALAN STEWART ..... CONTEMNOR  
IREENA VITTAL ..... CONTEMNOR  
TOM SHROPHIRE ..... CONTEMNOR  
MARTIN ODUOR OTIENO ..... CONTEMNOR  
ORY OKOLLO ..... CONTEMNOR  
JOHN ULANGA ..... CONTEMNOR  
LEO BREEN ..... CONTEMNOR  
CAROL MUSYOKA ..... CONTEMNOR  
JIMMY MUGERWA ..... CONTEMNOR  
DAYALAN NAYAGER ..... CONTEMNOR  
DORICE ACHIENG' OMOLO ..... CONTEMNOR  
SHADRACK ANTHONY ONYANGO ORIAH ..... CONTEMNOR  
JASON NJUGUNA GAITHUMA ..... CONTEMNOR  
BERNARD GAITHUMA NJUGUNA ..... CONTEMNOR  
BERNARD GAITHUMA NJUGUNA ..... CONTEMNOR  
NDUVA MULI ..... CONTEMNOR  
ELIZABETH WANJAMA MULI ..... CONTEMNOR

AND

KAMAHUHA LIMITED ..... INTERESTED PARTY  
FOUR WINDS TRADING COMPANY LIMITED ..... INTERESTED PARTY

*(Being an application for committal for contempt for disobeying the judgment of the Supreme Court delivered on 17th February 2023 in Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 6 others; SC Petition No. 15 of 2020.)*

**Jurisdiction of the Supreme Court to clarify its own judgments.**

*In an application which sought for the Supreme Court to clarify its own judgment, the court held that whereas the court did not have jurisdiction to issue clarification on its own judgments, to the extent that there was need to avert protracted legal battles, more so when the substantive dispute was pending at the High Court, it exercised its inherent powers to determine whether there was any matter to be clarified, and if so, to what extent. In its final determination the court held that the applicant was not seeking clarification or review but rather, was attempting to enforce the Supreme Court's orders as it understood them. That was untenable considering the matter had been referred back to the High Court for it to determine issues of contempt of court and whether orders on status quo should be issued. The Supreme Court's jurisdiction over such a matter could only arise in the course of proceedings before judgment was issued.*

Reported by John Ribia



**Jurisdiction** – jurisdiction of the Supreme Court – appellate jurisdiction – review jurisdiction – supervisory jurisdiction - whether the Supreme Court had supervisory jurisdiction over the Court of Appeal and the High Court - what were the circumstances under which the Supreme Court could review its own decisions - whether the Supreme Court had the jurisdiction to interpret its own judgments to parties who misunderstood the judgment - whether the Supreme Court could make substantive orders in a matter that it had referred back to the High Court for determination - Supreme Court Act, sections 21, 21A, 23 and 27.

**Civil Practice and Procedure** – parties to a suit – parties in contempt proceedings – where one sought to institute contempt proceedings against parties that were not privy to the suit - whether third parties who were not parties to a suit could be joined in the suit in contempt proceedings as contemnors.

**Civil Practice and Procedure** – parties to a suit – where the Supreme Court had struck out submissions filed by a party to a suit because they were filed out of time - whether the action of striking out submissions for late filing was equivalent to striking out a party from the suit.

### **Brief facts**

The appellants approached the Supreme Court seeking to understand the orders that the court made in their appeal and seeking to file contempt proceedings. The initial judgment of the Supreme Court had referred the matter back to the High Court where the Supreme Court held that the High Court had the jurisdiction to determine contempt proceedings and to decide on whether orders of *status quo* would be granted. The appellant contended that there was a point of misunderstanding the finding of contempt and the consequences.

### **Issues**

- i. Whether the Supreme Court had supervisory jurisdiction over the Court of Appeal and the High Court.
- ii. What were the circumstances under which the Supreme Court could review its own decisions?
- iii. Whether the Supreme Court had the jurisdiction to interpret its own judgments to parties who misunderstood the judgment.
- iv. Whether the Supreme Court could make substantive orders in a matter that it had referred back to the High Court for determination.
- v. Whether the action of striking out submissions for late filing was equivalent to striking out a party from the suit.
- vi. Whether third parties who were not parties to a suit could be joined in the suit in contempt proceedings as contemnors.

### **Held**

1. The parties either misunderstood the Supreme Court’s judgment rendered on February 17, 2023 or were outrightly mischievous. The Supreme Court having authoritatively made its decision, it expected that all parties would act in accordance with what the Supreme Court meant. It was not for the Supreme Court to interpret its decisions or those of other courts to the different litigants. With the issuance of the judgment, the Supreme Court became *functus officio*. The only narrow opportunity for the court’s jurisdiction was by way of review vide an application as permitted by the *Supreme Court Act* and Rules.
2. To the extent that there was need to avert protracted legal battles, more so when the substantive dispute was pending at the High Court, the Supreme Court exercised its inherent powers to determine whether there was any matter to be clarified, and if so, to what extent.
3. Part of the grounds of appeal was that the application for contempt of the *status quo* orders was undetermined by the Court of Appeal. It was the contempt application that the Supreme Court determined. The Supreme Court appreciated that it was a factual contest and that no responses were filed or considered by the Court of Appeal, as the application was neither heard nor determined, the court opting, instead, to deal with the merits of the appeal. The Supreme Court was limited to what



- was before it, cautioning itself that the main dispute among the parties was still live at the High Court. There was also a contempt application pending before the High Court in which responses had been filed.
4. It was on the basis of the importance of contempt proceedings in the administration of justice that the Supreme Court remitted the matter back to the High Court. The High Court was seized of the matter and could contemporaneously address the contempt application on merit.
  5. The High Court had to, not only establish what the *status quo* was but to also punish for contempt, and expect the same to be purged before the contemnors could be allowed audience, in the event that the High Court was satisfied of the nature and extent of the contempt. The final orders issued reminisced the Supreme Court's deliberate intention to allow the High Court the liberty to address any disobedience, without falling into the same error as the Court of Appeal, of procrastinating such a serious matter of disobedience of court orders. There was no reason to infringe, at the instant stage, on the High Court's jurisdiction to competently address the issues before it.
  6. In Application No E005 of 2023, the appellant was a party having joined before the High Court as an interested party. In Petition No 15 of 2020, the appellant was a substantive respondent who had participated in the appeal, save for late filing of submissions which prompted the Supreme Court striking their submissions out of the record. The Supreme Court did not strike out the appellant as a party to the appeal. It was within its liberties to invoke the Supreme Court's jurisdiction to seek review. However, the appellant instead invoked sections 3, 21 (2) and 24 (1) of the *Supreme Court Act* and rule 28 (5) of the Supreme Court Rules which did not readily come to its aid.
  7. Section 3 of the *Supreme Court Act* set out the objective of the court and could not, on its own, form the basis of invoking the Supreme Court's jurisdiction. The court's jurisdiction was operationalized by a substantive provision. Section 21(2) of the *Supreme Court Act* granted general powers in any proceedings to make any ancillary or interlocutory orders, including any orders as to costs that it thought fit to award. Section 24 of the *Supreme Court Act* on the other hand dealt with interlocutory directions. It was surprising that the applicant had not invoked the appropriate statutory provisions in seeking to review the Supreme Court's decision.
  8. It mattered not which party filed the application for review. It was to be considered on its merits once filed by a party to the decision sought to be reviewed.
  9. The applicants were not parties to Petition No 15 of 2020 or the resulting judgment sought to be reviewed. The word party as used in section 21A of the *Supreme Court Act*, for purposes of an appeal to the Supreme Court presupposed one whose *locus standi* was not in issue, either as an appellant, respondent, interested party or *amicus curiae*. The standing of the three applicants, appearing individually, regardless of their status in any of the corporate litigants in the proceedings before the court was something that could only be addressed in a substantive suit and not through an application. It mattered not that they considered themselves personally affected by the decision or that they were principals of any of the corporate parties before the court.
  10. Application No E012 of 2023 by the respondent was also under challenge. They were entitled to approach the court, having been parties to the appeal that resulted in the judgment that sought contempt of court orders. However, the extent of what they could seek before the court under the circumstances could only be addressed when dealing with the specific prayers sought in their application.
  11. The matter in Petition No 15 of 2020 had a total of eight litigants. The instant application had dropped two of the litigants by unilaterally relegating them to interested parties and at the same time expanded the respondents to twelve by introducing 7 persons as respondents/contemnors. It had gone further to introduce twenty-five individuals who were termed as contemnors. The restructuring of litigants, stood on all fours with what the respondent complained of against Application No E006



- of 2023. Introducing parties to the Supreme Court at the first instance in such an application was untenable in law.
12. On the basis of the correct parties to the respective applications as permitted under the Supreme Court Rules, only application No E005 of 2023 met the threshold. Application No E006 of 2023 was struck out. Similarly, Application No E012 of 2023 was struck out to the extent of striking out the parties introduced for the first time through the application. All the pleadings filed by and on behalf of such parties that had been struck out from the proceedings. Only the original litigants could process the application.
  13. The prayer by the respondent to strike out High Court proceedings was superfluous. The Supreme Court was not seized of matters that were pending before the High Court. Being an appellate apex court, such decisions of superior courts below could only ascend through the litigation hierarchy to the Supreme Court subject to satisfying the narrow jurisdictional threshold.
  14. Under section 21A of the *Supreme Court Act* the Supreme Court had neither jurisdiction to sit on appeal over its own decisions nor to review its decisions. The circumstances under which the Supreme Court could review its own decision, either on its own motion, or upon application by a party accrued in any of the following conditions:
    1. where the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts;
    2. where the judgment, ruling or order was a nullity by virtue of being made by a court which was not competent;
    3. where the court was misled into giving judgment, ruling or order under the belief that the parties had consented; and
    4. where the judgment, ruling or order was rendered on the basis of a repealed law or as a result of a deliberate concealment of a statutory provision.
  15. The Supreme Court did not make any new orders in regard to the High Court orders of June 29, 2016 beyond what had been issued by the High Court, the basis for the appeal. The only logical consequence upon setting aside the Court of Appeal judgment was to reinstate the orders as had been issued by the High Court, which the court did and no more. The said orders issued by the High Court were made following *inter partes* hearing in which the appellant had participated as an interested party.
  16. The applicant did not point the court to the specific conditions enumerated under section 21A of the *Supreme Court Act* upon which it grounded its application. The amended petition before the High Court was still pending. The issues of non-exclusive distribution agreements and restrictive trade practices under section 21(3) of the *Competition Act* or whatever else was pending threat were things that could only be articulated at the High Court, for a determination based on a factual contest and evidence. Those issues were not before the Supreme Court on appeal. The dispute should be determined by the High Court as the constitutional court or by an arbitrator as a commercial contract. Any and all contested issues of exclusivity were the purview of the High Court where the matter was still pending in a full hearing. Acceptance of such a request would result in the Supreme Court exercising a jurisdiction that it lacked.
  17. It had not been demonstrated that the impugned ruling was obtained by fraud or deceit, was a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented. The application failed the dictates of section 21A of the *Supreme Court Act* and was ripe for dismissal.



18. The Supreme Court's final orders were very specific in so far as the court remitted the matter back to the High Court which was directed to deal with consequences of any disobedience of the orders. The order was informed by various factors.
  1. The Supreme Court's judgment was final and not in the nature of a structural interdict. Once the Supreme Court delivered the judgment, it became *functus officio* and nothing was expected of the Supreme Court in terms of supervised compliance with any of the orders.
  2. The Supreme Court invoked section 22 of the *Supreme Court Act* to remit the proceedings to the High Court which had jurisdiction to deal with the matter. As noted in section 28 of the *Supreme Court Act*, the High Court had similar powers to those of the Supreme Court to deal with the issue of contempt including punishment.
  3. The Supreme Court did not have supervisory jurisdiction over courts below it.
  4. The decisions of the Supreme Court were enforced by the High Court as provided under section 27 of the *Supreme Court Act*
19. The applicant was not seeking a review but rather, attempting to enforce the Supreme Court's orders as it understood them. That was untenable. The Supreme Court's jurisdiction over such a matter could only arise in the course of proceedings before judgment was issued.
20. The matter was already concluded and any attempt to argue the instant application could only be through a separate appeal being presented before the court, taking into account the court's jurisdiction and other imponderables. That was not the case for the court's assumption of jurisdiction, more so, not in a manner where the non-compliance remained highly disputed.
21. A finding that results in the potential deprivation of personal liberty by way of civil jail should leave the parties with an avenue for appeal in the event either of them was dissatisfied. Undertaking such an exercise at the appellate and final stage of the litigation process before the apex court did not augur well for the right to access justice including, exhaustion of appellate mechanisms. The parties were at liberty to raise all their issues for determination by the High Court, which was competently seized of the dispute.

*Application dismissed.*

### **Orders**

- i. *Application No E005 of 2023 - Cogno Ventures Limited vs Bia Tosha Distributors Limited & 6 others was struck out.*
- ii. *Application No E006 of 2023 – Andrew Kilonzo & 2 others vs Bia Tosha Distributors & 7 Interested Parties was hereby struck out.*
- iii. *The 6<sup>th</sup> to 9<sup>th</sup> respondents/contemnors and the 1<sup>st</sup> to 25<sup>th</sup> contemnors in Application No E012 of 2023 – Bia Tosha Distributors Limited vs Kenya Breweries Limited & 11 others; Javier Ferran & 24 others (interested parties) were struck out of the proceedings.*
- iv. *Application No E012 of 2023 – Bia Tosha Distributors Limited vs Kenya Breweries Limited & 11 others; Javier Ferran & 24 others (interested parties) were dismissed.*
- v. *The matter to proceed before the High Court on priority basis as already ordered the judgment of February 17, 2023.*
- vi. *Costs to abide the outcome of the High Court's determination*

### **Citations**

#### **Cases**

1. Abdallah, Yusuf Gitau v Building Centre & 4 others (SC Petition No 27 of 2014 [2014] eKLR) — Applied
2. Githiga & 5 others v Kiru Tea Factory Company Limited (Petition (Application) 13 of 2019; [2022] KESC 35 (KLR)[2020] eKLR) — Explained



3. Kanjama v Attorney General & 82 others (Petition E017 of 2021; [2022] KESC 11 (KLR)) — Explained
4. Mwau, John Haron v Independent Electoral and Boundaries Commission, Chairperson of Independent Electoral and Boundaries Commission, Uhuru Muigai Kenyatta & Edward Kings Onyancha Maina (Presidential Election Petition 2 of 2017; [2017] KESC 4 (KLR)[2017] eKLR) — Explained
5. Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR)[2017] eKLR) — Explained
6. Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta (Election Petition 1 of 2017; [2017] KESC 32 (KLR)[2017] eKLR) — Explained
7. Outa, Fredrick Otieno v Okello, Jared Odoyo, Independent Electoral And Boundaries Commission, Returning Officer, Nyando Constituency & ODM Party (Petition 6 of 2017; [2017] KESC 25 (KLR) [2017] eKLR) — Applied
8. Parliamentary Service Commission v Wambora, Martin & others (SC Application No 8 of 2017 [2018] eKLR) — Applied
9. Pkosing v National Super Alliance & 12 others (Petition 19 of 2017; [2017] KESC 9 (KLR)[2017] eKLR) — Explained
10. Rai, Jasbir Singh & 3 others v Rai, Tarlochan Singh & 4 others, (SC Petition (Application) No 4 of 2012) — Applied
11. Republic v Mohammed, Ahmad Abolfathi & Sayed Mansour Mousavi (Petition 39 of 2018; [2019] KESC 48 (KLR) [2019] eKLR) — Explained
12. Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others (Application 7 (E013) of 2022; [2023] KESC 1 (KLR)) — Mentioned
13. Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others (Application 4 (E010) of 2022; [2022] KESC 34 (KLR)) — Applied
14. Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012; [2015] KECA 945 (KLR)[2015] eKLR) — Applied

#### **Statutes**

1. Competition Act (act no 12 of 2010) — Section 21(3) — Interpreted
2. Constitution of Kenya, 2010 — Article 10(1),50(1)(2),159(2)(d)(e),163(3)(b)(4)(7),259(1)(a)(b)(c) — Interpreted
3. Judicature Act (cap 8) — Section 5 — Interpreted
4. Supreme Court Act (act no 7 of 2011) — Section 3(a)(b)(e),(a)(b),20(4),21A(2),22,24(1),27,28(4)(6) — Interpreted
5. Supreme Court Rules, 2020. (act no 7 of 2011 sub leg) — Rule 3,28(5),31,32 — Interpreted

#### **Advocates**

*Mr. Issa & Ms. Jacinta Abomo* for Cogno Ventures Limited

*Mr. Kiplagat* for Bia Tosha Distributors Limited

*Mr. Kamau Karori, SC* for Kenya Breweries Limited, East African Breweries PLC and Diageo PLC

*Mr. Chacha Odera b/b for Mr. Oraro, SC* for UDV (Kenya) Limited

*M. Kiragu Kimani, SC & Bernard Koyyoko* for Kamahuha Limited

*Mr. Munyororo b/b Mr. John Mburu* for Four Winds Trading Company Limited

*Mr. Njoroge Regeu & Mr. Suo* for Andrew Kilonzo, Jane Karuku & Andrew Cowan

*Dr. Muthomi* for Ngong Matonyok Wholesalers Limited & Manara Limited

*Mr. Manyonge* for Tony West Limited and Outlook Index Limited



## RULING

### Representation:

Mr Issa & Ms Jacinta Ahomo for Cogno Ventures Limited (*Issa & Company Advocates*)

Mr Kiplagat for the Bia Tosha Distributors Limited (*Okoth & Kiplagat Advocates*)

Mr Kamau Karori, SC for, Kenya Breweries Limited, East African Breweries PLC and Diageo PLC  
(*Iseme Kamau & Maema Advocates*)

Mr Chacha Odera h/b for Mr Oraro, SC for UDV (Kenya) Limited (*Oraro & Company Advocates*)

Mr Kiragu Kimani, SC & Bernand Koyyoko for Kamahuha Limited (*Wagara Koyyoko & Co Advocates*)

Mr Munyororo h/b Mr John Mburu for Four Winds Trading Company Limited  
(*John Mburu & Company Advocates*)

Mr Njoroge Regeru & Mr Suo for Andrew Kilonzo, Jane Karuku & Andrew Cowan  
(*Njoroge Regeru & Company Advocates*)

Dr Muthomi for Ngong Matonyok Wholesalers Limited & Manara Limited (*Muthomi & Karanja Advocates*)  
*Manyonge Wanyama & Associates LLP*

### **A. Background**

1. On February 17, 2023, the Supreme Court issued a judgment in *Bia Tosha Distributors Limited vs Kenya Breweries Limited & 6 others* SC Pet 15 of 2020 in the following terms:

' (134) Consequently, upon our conclusion, we order that:

- i. The appeal dated August 20, 2020 be and is hereby allowed;
- ii. The judgment and orders of the Court of Appeal in Civil Appeal No 163 of 2016 delivered on the July 10, 2020 be and are hereby set aside in entirety;
- iii. The High Court orders of June 29, 2016 be and are hereby reinstated and the Court do consider the consequences of any disobedience of those orders;
- iv. The matter be and is hereby remitted to the High Court for disposal of the amended petition dated June 20, 2016 pending before the High Court on priority basis; considering the age of this matter;
- v. Costs in the Court of Appeal and in this court are awarded to the appellant as against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.'

The court found merit in the appeal paving way for the resumption of the proceedings that had been instituted before the High Court.



2. As we perceived it, the dispute emanates from commercial agreements between Bia Tosha Distributors Limited ('Bia Tosha') and Kenya Breweries Limited (KBL) and UDV (Kenya) Limited ('UDV') concerning the distribution of KBL's products. KBL sought to repossess some of the distribution territories previously granted to Bia Tosha and declined to refund goodwill paid by Bia Tosha, on the ground that the amounts were non-refundable. KBL further appointed other distributors to that distribution territory. In reaction to KBL's measures, Bia Tosha chose to pursue the constitutional path by instituting a petition before the High Court. It also invoked the [Competition Act](#) in so far as it affected the exclusivity of the distributorship arrangement.
3. What escalated to this court on appeal revolved around conservatory orders granted by the High Court regarding constitutional rights violations within the commercial contracts between the parties.

## **B The Applications**

4. The judgment by this court gave rise to action both before the High Court and now before us by the main disputants, their representatives and third parties. Three applications have been filed before us. Two of them seek a review of the judgment issued on February 17, 2023 while the third one is for committal for contempt for disobeying the said judgment.

### **a. Application No E005 of 2023**

5. This is an application by Cogno Ventures Limited ('Cogno') dated February 24, 2023 and filed on February 28, 2023 pursuant to sections 3, 21(2) and 24(1) of the [Supreme Court Act](#) and rule 28 (5) of the [Supreme Court Rules, 2020](#). It seeks, inter alia, to review, vary and set aside the judgment made on February 17, 2023. It is supported by a supporting affidavit and further affidavit sworn on February 24, 2023 and March 6, 2023 respectively by Shadrack Onyango Oriah; and written submissions dated February 24, 2023 and filed on February 28, 2023;
6. Cogno faults this court for failing to take into account that the distribution agreements as at February 2, 2006 between Bia Tosha and KBL did not confer exclusive control to Bia Tosha to distribute and sell KBL's products in the prescribed routes; that the order affects other distributors like the applicant who have non-exclusive distribution agreements with KBL and UDV, to distribute and sell their products on some routes shared with Bia Tosha; and that it stands to suffer enormous loss and damage at an interlocutory stage since the Amended Petition before the High Court is yet to be heard on merit. Besides, that the provisions of section 21(3) of the [Competition Act](#) prohibits restrictive trade practices. Thus, there is sufficient grounds for this court to invoke its inherent power and review its orders based on its guiding principles laid down in [Parliamentary Service Commission v Martin Wambora & others](#) SC Application No 8 of 2017 [2018] eKLR;
7. In response, Bia Tosha filed a notice of preliminary objection dated March 3, 2023 and filed on March 6, 2023; additional notice of preliminary objection dated March 4, 2023 and filed on March 6, 2023; replying affidavit sworn by Anne – Marie Burugu on March 3, 2023 and filed on March 6, 2023; and written submissions dated March 3, 2023 and filed on March 6, 2023. Bia Tosha urges that the review application be struck out in limine given that the applicant has approached the High Court and this court seeking conflicting orders that resulted in the High Court injuncting the recognition and application of this court's judgment. Furthermore, that since Cogno's submissions were expunged by this court at the hearing of the appeal on May 17, 2022, it was barred from referring to this court; hence, this is a backdoor entry to this court by reproducing applications which KBL and UDV respondents have filed before the High Court to circumvent this court's Orders that deny the said respondents audience until they purge their contempt before the High Court; that the application is a defiance of this court's judgment which compounds the disobedience of the orders of this court;



8. Bia Tosha further argues that Cogno has no legal standing because it was not in existence when the cause of action arose; that Cogno is not a competitor of Bia Tosha or the other distributors of KBL and UDV given that distributors of KBL and UDV do not compete with each other. Accordingly, the application fails the test in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*; SC Petition No 6 of 2014; [2017] eKLR and ought to be dismissed with costs;
9. KBL, East African Breweries PLC ('EABL') and Diageo PLC ('Diageo') filed a replying affidavit sworn on March 3, 2023 by Nadida Rowlands affirming that KBL did not issue exclusive contracts on any of the routes and more than one distributor could be appointed to serve specific routes; that the KBL was specifically warned by the Competition Authority of Kenya against contracting with exclusivity clauses; and that Cogno and Bia Tosha have over the years been operating as distributors of the KBL on these routes.
10. UDV filed a replying affidavit sworn on March 3, 2023 by Karen Mate- Gitonga confirming averments made in the applicant's supporting affidavit with regard to the distribution agreement between UDV and the applicant. It asserts that UDV only filed an application before the High Court in compliance with the directive issued by this court to purge the contempt before they are allowed audience before this court;
11. Kamahuha Limited's ('Kamahuha') written submissions dated March 3, 2023 and filed on March 6, 2023 in opposing the application, argue that only KBL and UDV could possibly be aggrieved and thus gain from a review. That filing the application on behalf of the said respondents, amounts to abuse of the court process; that even if the merits of the application were to be addressed, the application has not met the exceptional five circumstances elucidated by this court in the Fredrick Otieno Outa case; that it is not for this court to delve into the minutiae of evidence as to the factual position obtaining either on February 2, 2006 or any other period prior to the grant of Onguto J's order. Hence, the application should be dismissed with costs;
12. Four Winds Trading Company Limited ('Four Winds') grounds of opposition dated March 2, 2023 and filed on March 6, 2023 and written submissions dated March 2, 2023 and filed on March 6, 2023 argue that the application is brought in bad faith and is an abuse of the court process as the application falls outside the exceptional circumstances set out in the *Fredrick Otieno Outa* case (*supra*). That the grounds of review raised are disguised to have this court sit on appeal over its own judgment and re-litigate the appeal;

#### **b. Application No E006 of 2023**

13. This is an application by Andrew Kilonzo, Jane Karuku and Andrew Cowan (hereinafter the applicants) dated February 27, 2023 and filed on March 2, 2023 pursuant to articles 10(1), 50(1) & (2), 159(2)(d) & (e), 163(3)(b), (4) and (7) and 259(1)(a)(b) and (c) of the *Constitution of Kenya 2010*, sections 3(a)(b) and (e), 3A, 21A, 20(4) and 23A of the *Supreme Court Act, 2011*; and rules 3, 31 and 32 of the *Supreme Court Rules, 2020*. It also seeks to review and set aside the orders of this court's judgement delivered on February 17, 2023. The application is supported by the supporting affidavit and supplementary affidavit sworn on February 27, 2023 and March 8, 2023 respectively by Andrew Kilonzo; written submissions dated February 27, 2023 and supplementary submissions dated March 9, 2023.
14. The applicants contend that there is non-disclosure and misrepresentation of facts on the part of the respondent who did not serve the applicants with contempt applications filed at the High Court and Court of Appeal, the orders alleged to have been disobeyed, notice of penal consequences or the petition and pleadings filed before this court. That this is evidenced through the difficulty occasioned



on the respondent who sought substituted service by advertisement to serve two of the applicants and non-service of the applicants has been raised at the High Court by some parties and the respondent is yet to respond to the same. That it is this concealment that led to this court in, its judgment at paragraphs 128 and 129, finding KBL and UDV in contempt of orders issued by the High Court on June 29, 2016; and at paragraphs 130 and 131 found the contempt suitable for punishment on a priority basis to be assessed by the High Court. That even though the KBL, UDV, EABL & Diageo herein are the respondents in the contempt application pending before the High Court, the respondent has sought an order for the committal of the applicants to civil jail for six (6) months.

15. The applicants contend that if this information was available to this court then it would not have arrived at the findings it did. Subsequently, that this court considered a weighty issue with far reaching ramifications without full facts denying the applicants their inalienable right to a fair hearing as guaranteed under article 50 of the *Constitution of Kenya, 2010*. Therefore, the circumstances of this application are so grave and exceptional that a review is necessary to meet the ends of justice. They cite this court's decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition (Application) No 4 of 2012 and *Fredrick Otieno Outa* case (*supra*).
16. Bia Tosha filed a notice of preliminary objection dated March 5, 2023 and filed on March 6, 2023; replying affidavit sworn on March 5, 2023 and filed on March 7, 2023 and written submissions dated and filed on March 6, 2023. It opposes the application arguing that there is no jurisdiction to entertain the application since it is brought in defiance of an existing order barring the applicants approaching this court without first purging their contempt; that KBL and UDV having been found guilty of contempt necessarily means that its officers are equally guilty of contempt; therefore, the two companies cannot purport to circumvent their conviction by propping up its senior officers as parties in an application to gain audience before this court.
17. Bia Tosha asserts that this court's judgment is plainly clear that it the KBL and UDV parties for disobeying the Court of Appeal status quo order of August 11, 2016; that it did not convict the applicants for their disobedience of the High Court order of June 29, 2016, the applicants have failed to disclose to the court the existence of stay of those contempt proceedings which this court directed the matter be heard, determined and punishment issued against the contemnors. Alternatively, that the applicants having authorized Nadida Rowlands at the Court of Appeal to seek stay of the contempt proceedings which were about to commence before the High Court illustrates that they were aware of the contents of the order;
18. Further, that the misrepresentation of this court's judgment is mischievous as it has resulted in Diageo applicants (KBL, UDV, EABL and Diageo) filing applications at the High Court seeking interpretation of this court's judgment; that similarly, in two matters, they acquiesced to the grant of orders at the High Court compelling them to continue trading with third parties against the judgment of this court; that there is a direct bar against the applicants approaching any court on this matter without first purging their contempt.
19. Moreover, that in a suit filed by the respondent against Waweru Gatonye, SC, who was their previous lead counsel being defended by the firm of Njoroge Regeru Advocates, who are the applicants advocates herein, amounts to conspiracy to pervert the course of justice given that Waweru Gatonye, SC, would need to share all the relevant confidential information with his lawyers; that this will affect the right of the respondent to receive a fair hearing; and that all things considered the standard of review is not satisfied to demonstrate exceptional circumstances to warrant this court to interrogate its judgment.



20. KBL, EABL and Diageo's replying affidavit sworn on March 5, 2023, filed on March 7, 2023 by Nadida Rowlands avers that from the chronology of this matter, the order for stay of the first contempt application filed at the High Court was made by the Court of Appeal on November 9, 2016 which is still in force; that this has resulted in there being two conflicting decisions, one by the Court of Appeal staying the first contempt application and the other by this court directing the High Court to proceed to deal with the same first contempt application; that since advocates did not make any submissions on the merits and or demerits of the two contempt applications when this court heard Petition No 15 of 2020, KBL did not have an opportunity to inform the court of the status of the first contempt application and granted stay; and there is need to safeguard the right to be heard.
21. UDV's replying affidavit sworn on March 3, 2023 by Karen Mate- Gitonga argues that since both applications for contempt before the High Court and Court of Appeal were not heard at the time this court was delivering its judgment on February 17, 2023; this court's holding UDV and Cogno in contempt of court was arrived at from the documents on record without recourse to the parties; as a result, UDV should be allowed to preserve the applicants' rights under article 50 of the Constitution.
22. Cogno's written submissions dated March 4, 2023 and filed on March 14, 2023 support the application. They affirm the grounds raised by the applicants as sufficient for this court to invoke its inherent power and review its judgment since the applicants were not accorded a fair hearing under article 50 of the Constitution. They rely on this court's decisions in the *Fredrick Otieno Outa case, Parliamentary Service Commission Case and the Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly & 10 others* SC Application No 4 (E010) of 2022 (Unreported to support its submissions.
23. Kamahuha opposes the application through its written submissions dated March 6, 2023 and filed on March 7, 2023. It argues that this court has no jurisdiction under section 21A of the Supreme Court Act or at all as this issue has not percolated through the judicial hierarchy; and given that the High Court has not expressed itself on the merits of the Bia Tosha's application pending before it, any comment or determination will prejudice the just and fair resolution of those pending applications by the High Court;
24. Four Winds filed grounds of opposition and written submissions both dated March 5, 2023 and filed on March 7, 2023. It contends that the applicants have failed to establish any exceptional circumstances that would warrant this court to review its judgement as was set in the *Fredrick Otieno Outa* case; that the applicants hold senior positions in the 4<sup>th</sup> and 5<sup>th</sup> interested party companies or companies affiliated with the EABL who have always been represented in these proceedings and, therefore, information has always been available to them. Further, that they authorized an official of the KBL and UDV to respond to the contempt application dated August 23, 2016 on their behalf. Relying on the Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya* [2015] eKLR Four Winds states that jurisprudence has developed beyond necessity of personal service of penal notices and orders to knowledge of the orders. And that the applicants must have been aware of the contempt proceedings.

### c. Application No E012 of 2023

25. This application by Bia Tosha is dated March 16, 2023 and filed on March 17, 2023 pursuant to article 163(7) of the Constitution of Kenya, 2010, section 5 of the Judicature Act and sections 3A, 21(1), (2), (3); 28(4) and (6) of the Supreme Court Act. It seeks, inter alia:
  - i. That this honourable court do find the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents/contemnors are in contempt of the judgment and order of this honourable court dated February 17, 2023.



- ii. That Application No E005 of 2023 – *Cogno Ventures Limited v Bia Tosha Distributors Limited & 6 others*, Application No E006 of 2023 – *Andrew Kilonzo & 2 others v Bia Tosha Distributors & 7 Interested Parties*, be struck out for being in contempt of the authority of this Honourable Court and an abuse of process.
- iii. That Nairobi High Court Civil Suit No Comm Misc E127 of 2023 – *Ngong Matanyok Wholesalers Limited & another vs Kenya Breweries Limited & another* and Nairobi High Court Civil Suit No Comm E075 of 2023 – *Tony West & another Limited & Another vs Kenya Breweries Limited & another*, and in as far as the said suits are premised on contract allegedly granted to the plaintiffs in contravention of the Court of Appeal status quo orders and the reinstated High Court order of June 29, 2016, and in as far as the said suits purport to supervise the jurisdiction and judgment of the Supreme Court of Kenya herein, and further in as far as they violate the provisions of article 163(7) of the Constitution of Kenya, 2010 which directs that all courts are bound by the decisions of the Supreme Court, be struck out.
- iv. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents/contemnors, on conviction for the contempt in 2 above, be condemned, individually and collectively, to pay a fine equivalent to twenty percent (20%) of their individual gross company turnovers as reflected in their respective 2021 – 2022 published accounts and in addition pay a further one percent (1%) of their individual gross company turnover per day as reflected in their respective 2021 – 2022 company accounts for violation of the judgment of this court from February 18, 2023 until the said contempt ceases or until further orders of this honourable court.
- v. That in addition or alternatively, the 1<sup>st</sup> to 25<sup>th</sup> contemnors named herein, and upon conviction for contempt in 2 above, be committed to civil jail for a term not exceeding six months.
- vi. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents/contemnors and the 1<sup>st</sup> to 25<sup>th</sup> contemnors and all officers of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> respondents/contemnors be denied audience in all courts handling this matter for a period of eighteen (18) months.
- vii. That in the meanwhile and pending the determination of this Application No E005 – *Cogno Ventures Limited vs Bia Tosha Distributors Limited & 6 others* and Application No E006 – *Andrew Kilonzo & 2 others v Bia Tosha Distributors & 7 interested parties* be stayed.
- viii. That in accordance with the Judgment of the Supreme Court the 1<sup>st</sup> and 2<sup>nd</sup> respondents/contemnors immediately recompense the applicant in the amount of Kshs 1,073,700,000 to place the applicant where it was before the contempt in 2016.
- ix. That pending the recompense in (9) above, the respondents/ contemnors be barred from trading in the Bia Tosha Territory absolutely.



- x. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents provide such security and guarantees to secure the enforcement of the Supreme Court judgment given the known fact that the 5<sup>th</sup> respondent intends to exit the Kenyan market.
26. The application is supported by the supporting and supplementary affidavit sworn on March 16, 2023 and March 23, 2023 respectively by Anne- Marie Burugu; written submissions dated March 16, 2023 and supplementary written submissions dated March 23, 2023; The applicant submits that:
- a. Jane Karuku, Andrew Kilonzo and Andrew Cowan and the 13<sup>th</sup> to 19<sup>th</sup> contemnors are officers and directors of EABL who control the affairs of the KBL and UDV, which are wholly owned subsidiaries of the said EABL; the 1<sup>st</sup> to 12<sup>th</sup> contemnors are officers and directors of Diageo which is the majority shareholder of EABL and controls all the operations of the said EABL as its alter ego; the 20<sup>th</sup> and 21<sup>st</sup> contemnors are officers and directors of the Cogno and Tony West Limited; the 22<sup>nd</sup> and 23<sup>rd</sup> contemnors are the officers and directors of the 9<sup>th</sup> respondent; and the 24<sup>th</sup> and 25<sup>th</sup> contemnors are officers and directors of Outlook Index Limited ('Outlook').
  - b. This court found KBL and UDV in contempt of the Court of Appeal status quo order of August 11, 2016 and directed that they appear before the High Court for punishment upon conviction but, meanwhile, they lack audience at the High Court until punishment has been served and contempt purged;
  - c. That the respondents have demonstrated total disregard to this court's judgment in the exact manner they did before the Court of Appeal;
  - d. This court having found KBL and UDV guilty of contempt of the Court of Appeal status quo orders of August 11, 2016 and in continuing to breach the terms of this Court that reinstated the order of Onguto J; that KBL and UDV have directly defied this court's orders.
27. KBL, EABL and Diageo filed a preliminary objection dated March 22, 2023 and filed March 23, 2023; replying affidavit sworn on March 22, 2023 by Nadida Rowlands; written submissions dated March 22, 2023 and filed on March 24, 2023. Similarly, UDV preliminary objection dated March 22, 2023 and filed on March 23, 2023; replying affidavit sworn on March 22, 2023 by Karen Mate-Gitonga; and written submissions dated March 22, 2023 and March 23, 2023, objecting to our jurisdiction.
28. Cogno and the 20<sup>th</sup> & 21<sup>st</sup> alleged contemnors replying affidavit sworn on 22<sup>nd</sup> March by Shadrack Onyango Oriah; and written submissions dated March 22, 2023 and filed on March 24, 2023 in opposition to the application, Ngong Matonyok Wholesalers Limited ('Matonyok') and Manara Limited and 24<sup>th</sup> and 25<sup>th</sup> contemnors also filed a replying affidavit sworn on March 22, 2023 by Joseph William Nduva Muli; and written submissions dated March 21, 2023 and filed on March 23, 2023.
29. Tony West Limited and Outlook's preliminary objection dated and filed on March 22, 2023; and replying affidavit sworn on March 22, 2023 by Shadrack Onyango Oriah contend that the application is incompetent and bad in law for: the same is on an alleged contempt of this court's orders in SC Petition No 15 of 2020, cites the 8<sup>th</sup> and 9<sup>th</sup> respondents yet the two were never parties neither were they heard, there is no proof that they were served with the orders, this issue is within the High Court's jurisdiction in line with this court's remittance order, this court and the High Court cannot concurrently be seized of the same matter for the applicant who seeks to join the proceedings in Civil Suit No E075 of 2023;



- Tony West Limited & another v Kenya Breweries Ltd & another* seeking the High Court to discharge its orders issued on March 6, 2023 while in this application the applicant seeks this court to strike out the High Court orders, and that by virtue of this court's judgment this court is *functus officio*;
30. They further contend that Tony West Limited, through distributorship agreements with KBL and UDV, was granted non-exclusive distributorship rights in view of the *Competition Act* No 12 of 2010. That Tony West Limited, invested heavily in infrastructure, personnel, commercial trucks, bank guarantees and loans to facilitate execution of the agreements. That when they were informed that they should cease operations, they filed Civil Suit No E075 Of 2023 where the High Court issued orders maintaining the status quo pending hearing and determination of the application dated March 24, 2023; that thereafter the applicant filed an application to join the proceedings seeking the court to discharge its orders issued on March 7, 2023;
  31. Tony West Limited and Outlook, through their written submissions dated and filed on March 23, 2023 rely on this court's decision in *Yusuf Gitau Abdallah v Building Centre & 4 others* SC Petition No 27 of 2014 [2014] eKLR in faulting jurisdiction to issue orders finding them in contempt because the matter is live for determination before the High Court. Further, that this court did not make an order directed at Tony West Limited and Outlook capable of disobedience; that it would amount to an injustice upon the 8<sup>th</sup> and 9<sup>th</sup> respondents if they should pay the fine as particularized by the applicant since it aims to cripple their business. That striking out of the Civil Suit No E075 of 2023 would infringe upon the Tony West Limited and Outlook's right to be heard. That the applicant having failed to discharge the standard of proof as stipulated by this court in *Republic v Ahmad Abolfathi Mohammed & another* SC Petition No 39 of 2018 [2019] eKLR that Tony West Limited and Outlook are in contempt, its prayer to deny them audience in court should not be granted;
  32. Jane Karuku, Andrew Kilonzo, Andrew Cowan, through a replying affidavit sworn on March 22, 2023 by Andrew Kilonzo; written submissions dated March 22, 2023 and filed on even date oppose the application. They state that the applicant ought to be specific in the allegations made against each alleged contemnor; that in this case the application is incompetent and frivolous given that the applicant has lumped up Jane Karuku, Andrew Kilonzo and Andrew Cowan with other entities without any distinction to their respective cases against them and other respondents as well. They deny instituting 'surrogate litigations' or that other parties have litigated on their behalf as the only litigation they have instituted is the review SC Application No E006 of 2023.
  33. They further argue that it is the applicant who has lumped them together with KBL. UDV, EABL and Diageo erroneously equates service to the latter as service on Jane Karuku, Andrew Kilonzo and Andrew Cowan who are personally exposed to deprivation of personal liberty through incarceration in civil jail; that they were entitled to personal service right from the High Court up to the Supreme Court to enable them to defend themselves. They rely on the Court of Appeal decision in *Akber Abdullah Kassam Esmail v Equip Agencies Ltd & 4 others* [2014] eKLR which underlies the need for personal service.
  34. To them, striking out of their application for review would be extremely prejudicial to them considering they are pursuing their right to be heard as provided for under article 50 of the *Constitution* before findings of contempt of court can be made against them. Similarly, that the prayer to deny them audience before this court is prejudicial given that review is a statutory right. Moreover, that no basis has been given for the contention that the firm of Njoroge Regeru and Company Advocates is conflicted in this matter.
  35. Jane Karuku, Andrew Kilonzo and Andrew Cowan rely on and reiterate averments made in Andrew Kilonzo's supplementary affidavit sworn on March 8, 2023 in SC Application No E006 of 2023; that



considering this Court's finding in *Stephen Maina Githiga & 5 others v Kiru Tea Factory Company* SC Application No 12 of 2019 [2020] eKLR that contempt proceedings are a matter of public interest more so where allegations are made that one party is misusing the same to get at another without due process; and that in *Republic v Ahmad Abolfathi Mohammed & another (supra)* this court stated that the standard of proof in contempt cases is higher than in civil cases since a party can be denied their liberty, that that standard has not been met by the applicant. They also point out that the applicant has filed applications in the High Court which are similar to the application herein thereby creating a multiplicity of suits. They pray that the application be dismissed with costs to the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> respondents.

### C. Determination

36. The centrality of the judgment of this court made on February 17, 2023 has necessitated a consolidated determination of these three applications. From our perusal of the applications and the positions adopted by the parties, we can sum up the issues arising for our disposal as follows:
- a. The competency of the respective applications;
  - b. Whether to review, vary and /or set aside our judgment made on February 17, 2023 and if so in what manner;
  - c. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents/contemnors are in contempt of the judgment and order of this honourable court dated February 17, 2023 and if so the appropriate punishment and /or consequences for such contempt;
  - d. Whether to strike out Nairobi High Court Civil Suit No Comm Misc E127 of 2023 – *Ngong Matanyok Wholesalers Limited & another v Kenya Breweries Limited & another* and Nairobi High Court Civil Suit No Comm E075 of 2023 – *Tony West & another Limited & Another vs Kenya Breweries Limited & another*;
37. Before delving into the identified issues, we note that there was a prayer in Application No E012 of 2023 seeking stay of Application Nos E005 and E006 of 2023 pending the determination of the said Application No 12 of 2023. However, preliminary objections have also been raised challenging the sustainability of Application No E012 of 2023. As already noted, the manner in which the court has opted to dispose the applications and the attendant need for prudent use of judicial time and resources, this prayer is best subsumed in the substantive determination. In the same manner, the preliminary objections raised in each of the applications are addressed in the course of disposal of the respective issues.
38. It emerges that the parties either misunderstood our judgment rendered on February 17, 2023 or are outrightly mischievous. Having authoritatively made our decision on the issues before us in Petition No 15 of 2020, it was this court's expectation that all parties thereto, would act in accordance with what the court meant. It is not for this court to interpret its decisions or those of other courts to the different litigants. With the issuance of the judgment, the court became *functus officio*. The only narrow opportunity for the court's jurisdiction is by way of review *vide* an application as permitted by the *Supreme Court Act* and Rules.
39. However, to the extent that there is need to avert protracted legal battles, more so when the substantive dispute is pending at the High Court, we shall invoke the inherent powers of this court to determine whether there is any matter for clarification and if so, to what extent we can exercise the power of review



as sought in the two applications or deal with contempt as raised in the third application. In doing so, we echo our determination in the ruling rendered on October 17, 2017 in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* SC Election Petition No 1 of 2017; [2017] eKLR where we stated as follows:

' (58) In exercise of the inherent powers of this court, we shall therefore proceed to determine whether there is any matter to be clarified, and if so, to what extent. This assumption of jurisdiction, is all the more necessary, so as to avert the danger of an impression being created in the mind of the public, that there exists an ambiguity, in the court's Judgment, even where there might be none. If indeed there is an ambiguity, the assumption of jurisdiction will help eliminate the same.'

40. Similarly, in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* SC Petitions Nos 2 and 4 of 2017; [2017] eKLR, we found it necessary to clarify certain aspects of our judgment by stating as follows:

'[266] These two paragraphs have assumed judicial prominence since the nullification of the Presidential election of August 8, 2017 by this court. Not only have they been subject to contradictory interpretations by parties to the petitions before us, they have also elicited varying 'expert' comment from many quarters.'

41. The apparent point of misunderstanding of our judgment is the import of paragraphs 128 to 131 and in particular, the finding of contempt and the consequences thereof. For context, the appeal before us was against the decision of the Court of Appeal, not a direct appeal against the High Court ruling. Part of the grounds of appeal, which we eventually agreed on with Bia Tosha was that the application for contempt of the status quo orders was undetermined by the Court of Appeal. It is this contempt application that we proceeded to determine. In doing so, we, however, appreciated that this is a factual contest and that no responses were filed or considered by the Court of Appeal, as the application was neither heard nor determined, the court opting, instead, to deal with the merits of the appeal. We were limited to what was before us, cautioning ourselves that the main dispute among the parties was still live at the High Court. At the same time, it was not lost to us that there was a contempt application pending before the High Court in which responses had been filed. We stated as much.

42. In our judgment, we were emphatic that the place of contempt proceedings in the administration of justice cannot be downplayed. It is on this basis that we remitted the matter back to the High Court which is seized of the issue to contemporaneously address the contempt application on merit, in view of our findings on contempt. We left it to the High Court, to, not only establish what the status quo was but also punish for contempt, and expect the same to be purged before the contemnors could be allowed audience, in the event that the High Court was satisfied of the nature and extent of the contempt. A perusal of the final orders issued reminisces our deliberate intention to allow the High Court the liberty to address any disobedience, without falling into the same error as the Court of Appeal, of procrastinating such a serious matter of disobedience of court orders. We therefore see no reason to infringe, at this stage, on the High Court's jurisdiction to competently address the issues before it.

43. With the backdrop of the above position, we now proceed to address the issues as we framed them.



### Competency of the respective applications.

44. Each of the applications filed has come under attack on the dual issues of competency and on the merits. It is therefore incumbent upon us to determine whether each of the applications can surmount the respective challenges.
45. In regard to Application No E005 of 2023 – *Cogno Ventures Limited v Bia Tosha Distributors Limited & 6 others* and Application No E006 of 2023– *Andrew Kilonzo & 2 others vs Bia Tosha Distributors & 7 Interested Parties*, the main argument proffered for their striking out is that the applicants are in contempt of this court’s proceedings and ought to purge their contempt before being granted audience. In addition, Bia Tosha urges that since the submissions by Cogno were struck out at the hearing, it no longer enjoys standing before court. Additionally, that Andrew Kilonzo, Jane Karuku and Andrew Cowan, having not been direct parties to the matter and the appeal before the Supreme Court lack standing to file an application.
46. In Application No E005 of 2023, Cogno is a party having joined before the High Court as an interested party. In Petition No 15 of 2020, Cogno was a substantive respondent who had participated in the appeal, save for late filing of submissions which prompted our striking their submissions out of the record. We did not strike out Cogno as a party to the appeal. It is therefore within its liberties to invoke this court’s jurisdiction to seek review. However, we note that it has instead invoked sections 3, 21(2) and 24(1) of the *Supreme Court Act* and rule 28(5) which do not readily come to its aid.
47. Section 3 of the *Supreme Court Act* sets out the objective of the court and cannot, on its own, form the basis of invoking our jurisdiction. Our jurisdiction is operationalized by a substantive provision. Section 21(2) of the *Supreme Court Act* grants general powers in any proceedings to make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award. Section 24 of the *Supreme Court Act* on the other hand deals with interlocutory directions. It is therefore surprising that the applicant has not invoked the appropriate statutory provisions in seeking to review the court’s decision.
48. Having said that, it matters not in our considered view, whether the application was brought by Cogno or by EABL or KBL. The application for review is to be considered on its merits once filed by a party to the decision sought to be reviewed.
49. Turning to Application No E006 of 2023, brought by Andrew Kilonzo, Jane Karuku and Andrew Cowan, it is a no brainer that they were not parties to the Petition No 15 of 2020 or the resulting judgment sought to be reviewed. To the extent that they have, inter alia, sought a review of our decision under section 21A of the *Supreme Court Act*, it behoves us to satisfy ourselves as to their capacity to file the application. Section 21A provides:
- ' 21A. Review of own decision
- The Supreme Court may review its own decision, either on its own motion, or upon application by a party in any of the following circumstances.'
50. The word 'a party' for purposes of an appeal to the Supreme Court presupposes one whose locus standi is not in issue, either as an appellant, respondent, interested party or amicus curiae. In the circumstances, the standing of the three individuals, appearing individually, regardless of their status in any of the corporate litigants in the proceedings before us is something that can only be addressed in a substantive suit and not through an application of this nature. In saying so, we echo the position taken



by Lenaola SCJ in *Kanjama v Attorney General & 82 others* (Petition E017 of 2021) [2022] KESC 11 (KLR) (19 May 2022) (Ruling as follows:

' (3)

- b. The applicant is also seeking a determination of issues regarding who may file an appeal to this court generally and the issue of whether the Deputy Registrar should always communicate reasons for rejecting an appeal and how that communication should be made. It is my finding that such matters relate to substantive issues which cannot be decided in an otherwise straight forward interlocutory application seeking an order of review.'

It matters not, in our view, that they consider themselves personally affected by the decision or that they are principals of any of the corporate parties before us.

51. Application No E012 of 2023 by Bia Tosha is also under challenge. Like Cogno, they are entitled to approach this court, having been parties to the appeal that resulted in the judgment that it now seeks to have the court mete out punishment for disobedience of by way of contempt of court proceedings. However, the extent of what they can seek before the court under the circumstance can only be addressed when dealing with the specific prayers sought in their application. We note that Bia Tosha in this application primarily seeks to enforce this court's orders, something that we shall address at the opportune moment.
52. It has also not escaped our attention that the matter before us in Petition No 15 of 2020 had a total of eight litigants. This application has dropped two of the litigants namely Kamahuha and Four Winds by unilaterally relegating them to interested parties and at the same time expanded the respondents to twelve by introducing Matonyok, Manara Limited, Tony West Limited, Outlook, Jane Karuku, Andrew Kilonzo and Andrew Cowan as respondents/ contemnors. It has gone further to introduce twenty-five individuals who are termed as contemnors. This restructuring of litigants, in our view, stands on all fours with what Bia Tosha complained of against Application No E006 of 2023. Introducing parties to this court at the first instance in an application of this nature is untenable in law.
53. On the basis of the correct parties to the respective applications as permitted under our rules, only Application No E005 of 2023 meets the threshold. Application No E006 of 2023 has to be and is hereby struck out. Similarly, Application No E012 of 2023 is struck out to the extent that the parties introduced for the first time through the application have to be and are hereby struck out. All the pleadings filed by and on behalf of such parties that have been struck out from the proceedings have to suffer the same fate and are hereby struck out. Only the original litigants can process the application.

**Whether to strike out Nairobi High Court Civil Suit No Comm Misc E127 of 2023 – *Ngong Matanyok Wholesalers Limited & another v Kenya Breweries Limited & another* and Nairobi High Court Civil Suit No Comm E075 of 2023 – *Tony West & another Limited & another vs Kenya Breweries Limited & another***

54. The main grievance by Bia Tosha in this regard is that the said suits before the High Court are premised on contract allegedly granted to the plaintiffs therein in contravention of the Court of Appeal status quo order and the reinstated High Court order of June 29, 2016. Further, that the said suits purport to supervise the jurisdiction and judgment of the Supreme Court of Kenya herein, and violate the



provisions of article 163(7) of the [Constitution of Kenya, 2010](#) on the binding nature of the decisions of the Supreme Court to the lower courts. It is faulted by the 8<sup>th</sup> and 9<sup>th</sup> respondents who have raised an objection on the grounds that the High Court cannot concurrently be seized of the same matter for the applicant who seeks to join proceedings in Civil Suit No E075 of 2023; *Tony West Limited & another v Kenya Breweries Ltd & another* seeking the High Court to discharge its orders issued on March 6, 2023 while in this application the applicant seeks this court to strike out the High Court orders.

55. In view of our finding by which we struck out all the parties that were not part of Petition No 15 of 2020, the prayer to strike out High Court proceedings remains superfluous. In any event, this court is not seized of matters that are pending before the High Court, another competent forum under our constitutional architecture. This being an appellate apex court, such decisions of superior courts below can only ascend through the litigation hierarchy to this court subject to satisfying our narrow jurisdictional threshold and not in the manner proposed by the applicant. We think we have said enough on this issue.
- c. Whether to review, vary and/or set aside our judgment made on February 17, 2023 and if so in what manner
56. The authority of this court to review its own decision was set out in *Fredrick Otieno Outa* case wherein, we found that as a general rule, this court has neither jurisdiction to sit on appeal over its own decisions nor to review its decisions other than in the manner enunciated therein. This is now codified by section 21A of the [Supreme Court Act](#). The circumstances under which this court may review its own decision, either on its own motion, or upon application by a party accrues in any of the following conditions, that is where:
- a. The judgment, ruling or order is obtained through fraud, deceit or misrepresentation of facts;
  - b. The judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;
  - c. The court was misled into giving judgment, ruling or order under the belief that the parties have consented; and
  - d. The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision.
57. Based on our earlier finding hereinabove, we are only left with the review prayer in Application No E005 of 2023. The applicant's ground for the application is that this court fell into error in failing to consider other distribution agreements entered into by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents when reinstating the status quo orders of June 29, 2016.
58. At the onset, the applicant seeks that we 'review, vary and set aside the judgment', without proposing the exact nature and extent of review, variation or setting aside of our judgment of February 17, 2023. With respect to Cogno, this court did not make any new orders in regard to the High Court ones of June 29, 2016 beyond what had been issued by the High Court, the basis for the appeal. The only logical consequence upon setting aside the Court of Appeal judgment was to reinstate the orders as had been issued by the High Court, which we did and no more. The said orders issued by the High Court were made following inter partes hearing in which Cogno had participated as an interested party.
59. The applicant does not point us to the specific conditions enumerated under section 21A of the [Supreme Court Act](#) upon which it grounds its application. As rightly noted, the amended petition before the High Court is still pending. The issues of non-exclusive distribution agreements and



restrictive trade practices under section 21(3) of the Competition Act or whatever else is pending thereat are things that can only be articulated at the High Court, for a determination based on a factual contest and evidence. These issues were not before us on appeal as we were constricted in determining whether the dispute, based on the conservatory orders issued by the High Court, should be determined by the High Court as the constitutional court or by an Arbitrator as a commercial contract.

60. A cursory perusal of the orders of the High Court, now reinstated, reveals that any and all contested issues of exclusivity are the purview of the High Court where the matter still pending in a full hearing. We perceive Cogno's argument to be an invitation to revisit a highly contested factual finding as to the position obtaining at the time of issuance of the High Court orders. We have to decline that invitation at the earliest as it would result in our exercising a jurisdiction we lack, that to appeal or relitigate the questions which this court has settled with finality. (see Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others (applicants)) Application 7 (E013) of 2022 [2023] KESC 1 (KLR) (January 18, 2023) (Ruling) .
61. It has not been demonstrated by the applicant to our satisfaction that the impugned ruling was obtained by fraud or deceit, is a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented. The application fails the dictates of section 21A and the principles in *Fredrick Otieno Outa* case and is ripe for dismissal.
62. We are also not available to address ourselves to the potential conflicting orders as urged by Bia Tosha. We can only determine what is before us and the parties are at liberty to pursue their rights before the High Court to avert any arising conflicting decisions, as it deals with the factual contests.
- d) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents/contemnors are in contempt of the judgment and order of this honourable court dated February 17, 2023 and if so the appropriate punishment and /or consequences for such conviction
63. The 6<sup>th</sup> to 9<sup>th</sup> respondents having been struck out from the proceedings, leaves the consideration of the prayers against the 1<sup>st</sup> to 5<sup>th</sup> respondents. The application is based on section 28(4) and (6) of the Supreme Court Act. Section 28(4) of the Act grants this court the power and authority similar to that bestowed upon the High Court, to punish for contempt. The competence of this court to punish for contempt was affirmed in our ruling made on March 15, 2019 in *Republic v Ahmad Abolfathi Mohammed & another* SC Petition No 39 of 2018; [2019] eKLR as follows:
- ' (27) We have taken note that the functioning of the reparatory aspect of the Contempt of Court Act (s 24A), at the moment, and with regard to the operations of the High Court and the Court of Appeal, admits of uncertainty quite apart from the fact that we are not applying them here but we affirm such not to be the case as regards the Supreme Court's competence, which is founded upon the Supreme Court Act, 2011 (Act No 7 of 2011), Section 28(1), (3), (4) and (5).'
64. The starting point is to first determine whether there was contempt of our court orders. Our final orders were very specific in so far as we remitted the matter back to the High Court which was directed to deal with consequences of any disobedience of the orders. To rehash, we directed that:
- '(iv). The High Court orders of June 29, 2016 be and are hereby reinstated and the court do consider the consequences of any disobedience of those orders.'

In reinstating the orders of June 29, 2016, we were mindful that the High Court contempt application is still pending determination and it is only proper that it be allowed to proceed with it to its logical



conclusion. The allegations of non-disclosure, concealment and misrepresentation of facts is best dealt with by the High Court in line with the directive of this court as it is a question of fact and evidence.

65. Our above order was informed by various factors. The first and paramount consideration was that, our judgment was final and not in the nature of a structural interdict. This is to say, once we delivered the judgment, we became *functus officio* and nothing was expected of us in terms of supervised compliance with any of the orders. Secondly, we invoked section 22 of the *Supreme Court Act* to remit the proceedings to the High Court which has jurisdiction to deal with the matter. As already noted in section 28 of the *Supreme Court Act*, the High Court has similar powers to those of this court to deal with the issue of contempt including punishment. Thirdly, we held that this court does not have supervisory jurisdiction over subordinate courts below. In our words:

' (79) This is because, unlike the High Court which has express supervisory jurisdiction over the subordinate courts, we do not, under the existing constitutional structure, enjoy similar powers over other superior courts. This is notwithstanding the apex nature that the court is placed under the *Constitution* and our decisions being binding under the doctrine of *stare decisis*.'

Finally, but importantly, the decisions of this court are enforced by the High Court. Section 27 of the *Supreme Court Act* provides:

' 27. Decisions of the court may be enforced by the High Court. A judgment, decree, or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court. The Supreme Court may also, under section 22 of the *Supreme Court Act*, remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter.'

In this regard, it is not the first time that the High Court is being called upon to enforce the orders of this court. In *David Pkosing v National Super Alliance & 13 others [2017] eKLR*, Mwita J stated:

'55. I must admit however, that this court has power to enforce decisions of the Supreme Court. Section 27 of the *Supreme Court Act* (No 7) of 2011 provides that a judgment, decree, or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court. For this to happen, there must be a judgment or decree capable of being enforced if this court were to call into operation section 27 of the *Supreme Court Act*.'

In *John Harun Mwau* case (*supra*) we also noted an instance where we had declined to assume jurisdiction over a matter relating to our earlier judgment in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Judgment)* Petition 5, 3 & 4 of 2013 (Consolidated) [2013] KESC 6 (KLR) (April 16, 2013). We observed:

' (193) This court declined to hear the matter on the basis that it had no jurisdiction, directing the deponent to the High Court. In the High Court, Mativo J rendered a decision in *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR, the effect of which was to order the inclusion of the deponent, as well as all the candidates who had participated in the August 8, 2017 elections, if they had not formally withdrawn.'



- 66. In our view, the applicant is not seeking a review of our decision but rather, attempting to enforce our orders as it understood them. This is untenable. Our jurisdiction over such a matter can only arise in the course of proceedings before judgment is issued. In this instance, the matter is already concluded and any attempt to argue the present application can only be through a separate appeal being presented before us, taking into account our jurisdiction and other imponderables. This, just like in the *David Pkosing* case (*supra*) is not the case for our assumption of jurisdiction, more so, not in a manner where the non-compliance remains highly disputed.
- 67. Furthermore, a finding that results in the potential deprivation of personal liberty by way of civil jail should leave the parties with an avenue for appeal in the event either of them is dissatisfied. Undertaking such an exercise at the appellate and final stage of the litigation process before the apex court does not augur well for the right to access justice including, exhaustion of appellate mechanisms. For these reasons, this application should, for this reason, fail and it so fails.
- 68. The award of costs is discretionary. As determined by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012; [2014] eKLR, costs follow the event. However, since the substantive matter is still live before the High Court, we order that costs shall abide the outcome of the proceedings now pending before the High Court.
- 69. In the result, and having remitted the dispute to the High Court, we reiterate that the parties are at liberty to raise all their issues for determination by the High Court, which is competently seized of the dispute.

**D. Disposition**

- 70. Consequently, we make the following orders:
  - a. Application No E005 of 2023 - *Cogno Ventures Limited v Bia Tosha Distributors Limited & 6 others* be and is hereby struck out.
  - b. Application No E006 of 2023 – *Andrew Kilonzo & 2 others v Bia Tosha Distributors & 7 Interested Parties* be and is hereby struck out.
  - c. The 6<sup>th</sup> to 9<sup>th</sup> respondents / contemnors and the 1<sup>st</sup> to 25<sup>th</sup> contemnors in Application No E012 of 2023 – *Bia Tosha Distributors Limited v Kenya Breweries Limited & 11 others; Javier Ferran & 24 others (interested parties)* be and are hereby struck out of the proceedings.
  - d. Application No E012 of 2023 – *Bia Tosha Distributors Limited v Kenya Breweries Limited & 11 others; Javier Ferran & 24 others (interested parties)* be and is hereby dismissed.
  - e. Matter to proceed before the High Court on priority basis as already ordered in our judgment of February 17, 2023.
  - f. Costs to abide the outcome of the High Court determination.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

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**P. M. MWILU**

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

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

