



**Telcom Kenya Limited & 7 others v Attorney General & 5 others;
Director of Public Prosecutions (Interested Party) (Petition E423 of 2021)
[2025] KEHC 3490 (KLR) (Constitutional and Human Rights) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E423 OF 2021

EC MWITA, J

MARCH 21, 2025

BETWEEN

**TELCOM KENYA LIMITED 1ST PETITIONER
MICHAEL GHOSSEIN 2ND PETITIONER
LOIS ALLELLA 3RD PETITIONER
MUGO KIBATI 4TH PETITIONER
DR EDDY NJOROGE 5TH PETITIONER
JINARO KIBET 6TH PETITIONER
DORCAS KOMBO 7TH PETITIONER
SAYYID SAID 8TH PETITIONER**

AND

**THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
THE CHIEF MAGISTRATES COURT AT NAIROBI LAW
COURTS 2ND RESPONDENT
POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED ... 3RD RESPONDENT
HENRY BELSOI 4TH RESPONDENT
AMSON KABII 5TH RESPONDENT
STEPHEN MAGOMA 6TH RESPONDENT**

AND



RULING

1. This is a ruling on the application dated 30th October 2024, seeking stay of execution of the decision of the magistrate's court in Misc Criminal Case No. E2366 of 2021. The petitioners' petition challenging that decision was dismissed in a judgment of this Court delivered on 25th October 2024.
2. Following that judgment, the petitioners filed this application seeking stay of execution of the orders issued by the 2nd respondent on 8th October 2021 in Nairobi Chief Magistrate Misc. Criminal Application No. E2366 of 2021 (Postal Housing Co-op Society & Others v Director of Public Prosecutions & others) and any other proceedings and or consequential action(s) arising from or in connection with those orders, pending the hearing and determination of their intended appeal to the Court of Appeal.
3. The motion is supported by an affidavit sworn by the 4th petitioner. The petitioners argued that owing to the dismissal of the petition, the 3rd to 6th respondents are at liberty to proceed with the private prosecution against them. The petitioners asserted that they have lodged a Notice of Appeal and applied for copies of proceedings to enable them file the Record of Appeal; that the intended appeal is arguable and has high chances of success. Unless the orders sought are granted, the intended appeal will be rendered nugatory.
4. It is the petitioners' case that unless the orders sought are granted, the 2nd to 8th petitioners risk losing their positions and damage to their reputation in the event they are charged and prosecuted through the private prosecution, which cannot be remedied in the event the intended appeal succeeds.
5. The petitioners further argued that the 2nd to 8th petitioners will be arrested and charged based on false claims. This is because, the Environment and Land Court in ELC Petition No. 11 of 2021- Telkom Kenya Limited v Ministry of Sports, Culture and Heritage & 4 others-Ministry of Public Service, Youth, and Gender Affairs and 2 others, has already determined the issue of ownership of the suit property in favour of the 1st petitioner.
6. The petitioners argued that as a result, the intended private prosecution will cause embarrassment to the Courts if the trial court in the criminal case is to be asked to determine the issue of ownership of the suit property. The petitioners further argued that the respondents and interested party will not suffer any prejudice if stay is granted. They relied on several decisions to support the application.
7. The 1st and 2nd respondents and the interested party did not respond or take part in the application.
8. The 3rd to 6th respondents opposed the application through a replying affidavit. They contended that in dismissing the petition, the court issued a negative order which is incapable of being stayed. They urged the Court to dismiss the application with costs.
9. The application was heard orally on 21st November 2024. Mr. Nyaburi, learned counsel for the petitioners, relied on the application, supporting affidavit and the list and bundle of authorities in urging the application. Learned counsel relied on the decision in Madhupaper International Limited v Kerr [1985] eKLR for the proposition that this Court has discretion to issue conservatory orders to preserve the subject matter of the appeal and urged that the application be allowed.
10. Mr. Gakuyo, learned counsel for the 3rd to 6th respondents, opposed the application and relied on the decisions in Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] eKLR and



Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others [2016] eKLR to urge the Court to dismiss the application with costs.

11. I have considered the application, the response and arguments by counsel for the parties. The petitioners have sought stay of execution of the orders issued in the magistrate's court in Misc. Criminal Application No E2366 of 2021, pending the hearing and determination of the intended appeal against the judgment of this Court.
12. They have argued that they will suffer substantial loss; the intended appeal is arguable and that the appeal will be rendered nugatory if the application is not granted.
13. The 3rd 4th 5th and 6th respondents on their part, have argued the Court dismissed the petition which is a negative order that cannot be stayed.
14. Rule 32(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules) provides that an appeal or second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed. Rule 32(3) which deals with formal applications for stay, provides that a formal application may be filed within 14 days of the decision appealed from or within such time as the court may direct.
15. Rule 32 (3) confers on the Court unfettered discretion to grant stay of execution. The rule does not impose any conditions on the party when filing an application for stay or on the Court when considering such an application, except that the application be filed within 14 days from the date of the decision to be appealed against.
16. The judgment of this Court was delivered on 25th October 2024, while the application was filed on 30th October 2024, 5 days after the judgment thus, satisfied the condition that an application be filed within 14 days.
17. In considering an application brought before it, the Court has to, among others, pay attention to rule 3(2) on the overriding objective. The rule provides that the overriding objective of the rules is to facilitate access to justice for all persons as required under Article 48 of *the Constitution*.
18. Rule 3(3) requires the Court to interpret the rules in accordance with Article 259(1) of *the Constitution* and apply the rules with a view to advancing and realising rights and fundamental freedoms enshrined in the Bill of Rights and values and principles in *the Constitution*.
19. Under rule 3(4), the Court, when exercising its jurisdiction under the rules, should facilitate the just, expeditious, proportionate and affordable resolution of disputes.
20. It follows, that the overriding objective of the rules, is to facilitate access to justice. It must also be appreciated that that rule 32 (3) confers on the court unfettered discretion to consider an application for stay, leaving the matter entirely at the discretion of the court so as to facilitate access to justice depending on the circumstances of each case. Unlike the Civil Procedure Rules, the Mutunga Rules do not impose any conditions to an applicant seeking stay, such as substantial loss or security. The only condition is that the application be filed without delay and, in any case, within 14 days.
21. In *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*, (Civil Appeal No. 161 of 1999) [2000] eKLR, the Court of Appeal stated that the overriding principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. The Court emphasised that the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. It is to embolden the court to be guided by a broad sense of justice and fairness.



22. The petitioners have exercised their right of appeal to test the correctness of this Court’s decision at the Appellate Court. This is a legal right granted to them to access justice in the Court of Appeal. They filed this application timeously as required by the rules of this Court.
23. The respondents argue that the court made a negative order which is incapable of being stayed. This court was moved under its rules and has an obligation to determine the application in exercise of its jurisdiction under rule 32(3). For avoidance of doubt, the petitioners have sought an order staying the orders made on 8th October 2021 in Nairobi Misc. Criminal Application No. E2366 of 2021 allowing private prosecution to be commenced against them.
24. Even though the rules of this Court do not impose conditions when considering an application for stay, the petitioners have argued that if the orders sought are not granted, they will be prosecuted and thus, suffer prejudice or substantial loss while still pursuing their appeal. It is appropriate for the Court to address this issue.
25. In *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331, the court stated that that “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
26. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court opined that the fact that the process of execution has been put in motion, or is likely to be put in motion, does not by itself amount to substantial loss. An applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal....“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
27. The petitioners are facing real possibility of being privately prosecuted while at the same time they are pursuing an appeal against the judgment of this Court. There is no guarantee that the Court of Appeal will hear and determined their appeal before the prosecution against them commences. This leaves a factual situation where they may be called upon to take plea anytime which will change the character of their case as they await the hearing and determination of their appeal. This, in my view, is real and foreseeable loss or prejudice that cannot in any way be remedied if stay is declined and eventually the appeal succeeds.
28. As to whether the appeal will be rendered nugatory, I do not think that is an issue for this court’s determination given what the court has stated about substantial loss.
29. In the end, and for the above reasons, this court is inclined to allow the application. Consequently, the application dated 30th October 2024 is allowed. An order is hereby issued staying execution of the orders issued on 8th October 2021 in Misc. Criminal Application No. E2366 of 2021-Postel Housing Co-op Society Limited & others v Director of Public Prosecutions and others, until the hearing and determination of the intended appeal to be filed in the Court of Appeal. There will be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025

E C MWITA

JUDGE

