



**Hassan & another v Abdullahi & 2 others; Cargo & Clearing Limited  
(Interested Party) (Judicial Review Application E284 of 2024)  
[2025] KEHC 8677 (KLR) (Judicial Review) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8677 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW**

**JUDICIAL REVIEW APPLICATION E284 OF 2024**

**RE ABURILI, J**

**JUNE 19, 2025**

**BETWEEN**

**DAUD ALI HASSAN ..... 1<sup>ST</sup> APPLICANT**

**YUSSUF MOHAMMED ABDULLAHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**YUSSUF MOHAMMED ABDULLAHI ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE AT MAKADARA ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CARGO & CLEARING LIMITED ..... INTERESTED PARTY**

**RULING**

1. On 7<sup>th</sup> April, 2025, this Court delivered judgment in this matter dismissing the applicants' judicial review application dated 31<sup>st</sup> December, 2024, which sought several judicial review orders of prohibition, certiorari and declaration.
2. Essentially, the applicants sought to prohibit the DCI from investigating them for alleged conspiracy to defraud and or stealing by servant by the applicants. The DCI had sought and obtained a search warrant vide Makadara CM MISC CR Application No. E1715 of 2025 to have access to and to recover suspected stolen goods allegedly held at the applicants' premises. The applicants sought to prohibit any investigations into the complaint lodged by the interested party, or the mounting of any prosecution for alleged conspiracy and or theft of the interested party/ complainant's goods.



3. Aggrieved by that judgment dismissing the application on all fronts, the applicants have filed a notice of appeal and memorandum of appeal to the Court of Appeal, challenging the orders of dismissal.
4. The applicants are now before this court seeking for stay of execution of the judgment of this Court dismissing their case, pending the hearing and determination of their appeal.
5. The application for stay of execution is dated 23<sup>rd</sup> April, 2025 supported by the affidavit sworn by Hakim Suleiman Rajab on the same date. It is deposed that the applicants will suffer irreparable harm unless the stay is granted since the applicants have lodged an appeal which is arguable. That if the DCI continues to mount criminal proceedings against the applicants, that will amount to abuse of court process as there is no evidence to support the charge of theft against the applicants who were not privy to any arrangements between the interested party and the third party hence the investigations are intended to disrupt the applicant's company business, to the applicants' detriment.
6. It is further deposed that the appeal will be rendered nugatory unless the stay sought is granted and that the applicants are willing to abide by any conditions that this Court may impose.
7. Further, that the applicants are apprehensive of imminent police harassment, intimidation and incarceration and that they stand to be prejudiced hence the court should intervene to stop the impunity and complete disregard of the constitutional rights and fundamental freedoms of the applicants, guaranteed under the Bill of Rights.
8. The applicant's counsel also swore a further affidavit annexing the notice of appeal, memorandum of and index to the record of appeal filed before the Court of Appeal. They also annexed copies of letters which they have written to the respondents responding to summons for the applicants to appear and notifying the respondents that the applicants have filed notice of appeal and appeal to the Court of Appeal against the judgment of this Court
9. Opposing the application for stay of execution of judgment of this Court, the respondents filed grounds of opposition dated 2<sup>nd</sup> May 2025 contending that the applicants had not demonstrated that they had an arguable appeal with reasonable chances of success nor that they would suffer substantial loss if the stay is not granted, rendering the appeal nugatory both which are key legal thresholds for the grant of stay orders pending appeal
10. That the dismissal of the judicial review application confirmed the lawfulness of the impugned administrative action and that there is therefore nothing left to stay by the court, the court having pronounced itself on the matter.
11. That the balance of convenience tilts in favour of allowing the respondents to discharge their legal and constitutional duties and the public interest weighs heavily against the granting the stay, in a matter involving enforcement of the law.
12. That the application is designed tactically to delay and frustrate lawful proceedings and enforcement and is not made in good faith. Counsel prayed for dismissal of the application for being unmeritorious, frivolous and an abuse of the court process.
13. The interested party filed a replying affidavit sworn by Nuh Abdille Hassan on 12<sup>th</sup> June, 2025 asserting that the dismissal of the application by the applicants was on firm principles of law that the court cannot usurp the constitutional mandate of the DPP to investigate crimes; that no miscarriage of justice is disclosed in the memorandum of appeal; that no violation of rights has been demonstrated to warrant stay; that this court cannot stay performance of constitutional functions by the respondents and that



no substantial loss has been demonstrated to occur if stay is not granted. The interested party urges this court to dismiss the application for stay.

14. The application was argued orally on 16<sup>th</sup> June 2025 with Mr. Hakim advocate submitting and relying on the grounds and affidavit sworn by himself on behalf of his clients. He submitted that this court has jurisdiction as was stated in Owners of Motor Vessel Lilian S V Caltex Oil Kenya Limited case. Counsel relied on Order 42 of the Civil Procedure Rules on the conditions that have to be met for stay pending appeal to be granted. On substantial loss, he cited Order 42(6)(2) of the Civil Procedure Rules and submitted that the dispute between the applicants and the interested party is clearly a commercial dispute and that if stay is not granted, the applicant's business continues to suffer in a purely a business matter.
15. Counsel further submitted that the application has not been made with delay. That the application was filed within 14 days of 7/4/2025 and that all conditions for stay of execution had been satisfied.
16. Mr. Mulati on behalf of the respondents opposed the application relying on the grounds of opposition dated 2/5/2025. He submitted that there is no likelihood of success of the appeal, that the loss contemplated is not the type that cannot be adequately compensated by an award of damages and that there is no evidence that if stay is not granted, then the appeal if successful will be rendered nugatory. He urged the court to dismiss the applicants' application.
17. Mr. Agoi Polycap on behalf of the interested party submitted opposing the application for stay and relying on his client's replying affidavit dated 12/6/2025. He submitted that there is no prima facie case on appeal and that there is no substantive loss. He relied on this Court's impugned judgment and precedents cited at paragraphs 54 & 55 of the said judgment.
18. Further, that there is no indication in the memorandum of appeal that the Respondents are acting in unreasonable manner and that neither does the memorandum of appeal indicate any substantial loss that the applicants will suffer if the Respondents continue with their investigations and reach a conclusion whether to charge the applicants or not. Counsel for the interested party maintained that there can be no loss where investigations are being carried out.
19. In a rejoinder, Mr. Hakim for the applicants submitted that the applicants' company has been unable to operate for the last 7 months and that the loss cannot be compensated by an award of damages. That they filed the appeal as demonstrated by the memorandum and record of appeal. He prayed for the orders of stay as sought.

### **Analysis and determination**

20. I have considered the application, the grounds and supporting affidavit. I have also considered the opposition by the respondents and the interested party, as well as the oral submissions by counsel for the respective parties. The main issue for determination is whether the applicants merit the order of stay of execution of the judgment of this court rendered on 7<sup>th</sup> April 2025, pending the hearing and determination of the appeal as filed before the Court of Appeal.
21. In the judgment which is sought to be stayed, this Court dismissed the applicants' judicial review application seeking to quash the decision of the DCI and the DPP to investigate a complaint raised by the interested party of alleged conspiracy to defraud the complainant/interested party herein of his goods and to prohibit the Directorate of Criminal Investigations (DCI) from investigating a complaint against the said applicants.



22. The jurisdiction of the court to grant stay of execution pending appeal in judicial review matters is governed by Order 42 Rule 6 of the Civil Procedure Rules, which provides the legal framework for preserving the subject matter of a dispute pending the outcome of an appeal.
23. Although judicial review proceedings are sui generis and governed in the first instance by Order 53 of the Civil Procedure Rules and the *Fair Administrative Action Act* and Rules, which latter Rules came into effect in October 2024, where applicable, Order 42 principles have been applied mutatis mutandis when stay is sought post-judgment.
24. Order 42 Rule 6(2) of the Civil procedure Rules provides:
- “No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made;
  - (b) the application is made without unreasonable delay; and
  - (c) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
25. These conditions are cumulative and failure to meet any one of them is fatal to the application. The guiding principle is that stay is not granted as a matter of right, but upon satisfactory demonstration of necessity and justice.
26. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal laid down the guiding principles as follows:
- 1. The power of the court to grant or refuse an application for a stay of execution is discretionary;
  - 2. The discretion should be exercised in such a way as not to prevent an appeal
  - 3. The general principle is that a successful litigant should not be deprived of the fruits of his judgment;
  - 4. A stay should be granted where there is sufficient cause; and
  - 5. The court should consider whether the intended appeal has merit.
27. Thus, the purpose of stay is to preserve the status quo pending appeal and to prevent an appeal from being rendered nugatory. In *RWW vs EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal and stated as follows:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
- Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



28. On whether the conditions for stay have been met, first, is that the application was made without unreasonable delay. On substantial loss, the applicants claim that they stand to suffer substantial loss because the dispute is of a business nature between them and the interested party. However, the nature of the loss is not quantified. On whether security for due performance of decree is offered, the applicants state that they are willing to abide by any conditions that the court may impose.
29. I must clarify that in this Court, the arguability of the appeal as submitted by the respondents' counsel, is not a factor to be considered in deciding whether or not to grant stay. That is a parameter applicable in the Court of Appeal since this Court cannot determine arguability or otherwise, of an appeal which is before a Court superior to it.
30. So, do the applicants merit the order of stay of execution or enforcement of the judgment of this Court rendered on 7<sup>th</sup> April 2025 dismissing the judicial review application to prohibit the DCI and DPP from investigating into a complaint filed by the interested party against the applicants of crimes allegedly committed by the applicants against the interested party?
31. In the context of judicial review, as is in the instant case, where the reliefs sought are often prohibitory, declaratory, or quashing in nature, stay of execution may only be granted where the decision being appealed is positive and capable of execution.
32. A negative order, such as a dismissal, is not capable of being stayed, as confirmed by Muchemi J in Githau *v Kagiri & Another (Civil Appeal 314 of 2023)* [2024] KEHC 6320 (KLR) that:

“I have further perused the court record and noted that the judgment dated 17th May 2023 dismissed the applicant's suit and the respondent's counterclaim. Notably, the court cannot grant stay of the impugned judgment dated 17th May 2023 as it dismissed the entire suit which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”

Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:

“In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”



The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

37. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order. A dismissal of a suit is a negative order incapable of execution. The court cannot stay what does not exist to be enforced.”

33. In *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] KECA 418 (KLR) the Court of Appeal emphasized that:

“We have revisited those grounds and considered them in light of the above principles. We are satisfied that the applicants intend to present an arguable appeal. This is nonetheless with the usual caution that it may not ultimately succeed as in law an arguable appeal need not be one that will ultimately succeed.

The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of *Western College Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light



of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.

As regards the nugatory test, we are not satisfied that the appeal will be rendered a mere paper victory if it succeeds. As the Court reiterated in *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* (supra) and which we fully adopt:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.” [emphasis added]

34. From the above decisions, it is clear to this court that a negative order does not require any act to be done or not done hence, there is nothing to stay.
35. In the present case, the dismissal of the applicants' judicial review application is a negative order. The Court did not direct any party to do or refrain from doing anything; it simply declined to grant the reliefs sought by the applicants. Therefore, there is no executable order against which a stay can be granted.
36. I reiterate that the judgment delivered on 7th April, 2025 was a dismissal of the applicant's judicial review application. The Court declined to grant orders of certiorari and prohibition and did not impose any positive obligation on the applicant or direct the respondent to do anything. The result of the dismissal was to leave the DCI at liberty to proceed with investigations, which they were lawfully entitled to do prior to the applicants filing of the judicial review application.
37. Furthermore, there is no irreparable loss that has been demonstrated, which cannot be compensated by an award of damages or costs.
38. For the above reasons, in the absence of an executable decree, the application for stay is legally misconceived. I find and hold that the applicant's request for stay which in effect seeks to restrain actions that the Court has already declined to prohibit, or quash and no positive or executable order having been issued against the applicant, is not available
39. The application dated 23<sup>rd</sup> April, 2025 for stay of execution is, therefore, dismissed.
40. Each party to bear their own costs of the application.
41. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE, 2025**

**R.E. ABURILI**

**JUDGE**

