



**Benjamin v Safaricom Plc & 2 others; Consumers Federation of Kenya
(COFEK) & another (Interested Parties) (Petition E554 of 2022)
[2025] KEHC 9995 (KLR) (Constitutional and Human Rights) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9995 (KLR)

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

PETITION E554 OF 2022

EC MWITA, J

JULY 11, 2025

BETWEEN

MAGARE GIKENYI J BENJAMIN PETITIONER

AND

SAFARICOM PLC 1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA (CAK) 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

CONSUMERS FEDERATION OF KENYA (COFEK) INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. This is a ruling on the 1st respondent’s notice of motion application dated 9th April 2025 for stay of execution of this court’s judgement delivered on 22nd November 2024, pending appeal. The application is supported by an affidavit sworn by Cerere Kihoro on 28th February 2025. The application is said to have been brought under rules 30 and 32 (2) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules).
2. The application is premised on the grounds that on 22nd November 2024, this court declared the 1st respondent’s public notice issued on 28th October 2022 giving expiry dates on bonga joint Loyalty programme and non-merchandise bonga redemption unconstitutional, null and void and issued an



order of certiorari quashing that notice and an order prohibiting the 1st respondent from giving effect to that notice.

3. The 1st respondent stated that being dissatisfied with that judgment, it filed a Notice of Appeal and requested for typed copies of proceedings in a letter dated 6th December 2024. The 1st respondent instructed new counsel in the matter hence the reason for the delay in filing this application.
4. The 1st respondent states that it has an arguable appeal and unless stay of execution is granted, the impugned notice will remain ineffective to its detriment since the bonga points held by subscribers would have been expended and it would be impossible to recover them.
5. The 1st respondent states that its right of appeal will be compromised and the appeal rendered nugatory. The application has been brought in good faith and without inordinate delay.

Response

6. The petitioner has opposed the petition through a replying affidavit, contending that the application does not meet the threshold for granting stay of execution; there was inordinate delay in filing the application without reasonable excuse; no substantial loss will be occasioned and no practical security may be furnished.
7. According to the petitioner, it is surprising that the 1st respondent has changed tune since during highlighting of submissions in the petition its counsel then on record informed the court that the 1st respondent had abandoned the idea of expiry of bonga as was initially planned.
8. The petitioner has refuted the 1st respondent's assertion that the appeal will be rendered nugatory because subscribers might spend the bonga points awarded arguing that the 1st respondent can still recover the loss from the customers.

1st respondent's submissions

9. Mr. Gachuhi, learned counsel for the 1st respondent, argues in highlighting their written submissions arguing the 1st respondent has an arguable appeal that raises triable issues of fact and law, including the fact that the court failed to appreciate that it did not have jurisdiction to determine the petition owing to the doctrine of exhaustion. Learned counsel relies on the decisions in *Cabinet Ministry of Health v Aura & 13 others* [2024] KECA 2 (KLR); *Transouth Conveyors Limited v Kenya Revenue Authority & another* [2007] eKLR and *John Mwangi Ndiritu v Joseph Ndiritu Wamathai* [2016] eKLR.
10. Mr. Gachuhi reiterates that the effect of the court's decision is that there is a risk that the 1st respondent's customers will utilize and deplete bonga points older than three years and should the appeal succeed, the decree will be incapable of enforcement and the effect would be irreversible. Reliance is placed on the decision in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
11. Learned counsel has urged the court to protect the 1st respondent's interests by staying execution of the judgment and decree since the 1st respondent's customers would easily get their bonga points back in case the appeal did not succeed. He relied on the decision in *Ndubiu Gitabi and Another v Anna Wambui Warugongo* [1988] 2 KAR.
12. Mr. Gachuhi maintains that the application was filed without undue delay and delay, if any, has been explained. He relies on the decision in *Samiyan Kaur Devinder Singh v Speedway Investment Limited & another* [2014] eKLR in urging the court to allow the application.



Petitioner's submissions

13. The petitioner (Dr. Magare Gikenyi) has also highlighted his written submissions and relied on Order 42 rule 6 of the [Civil Procedure Rules](#); rule 32 of the [Mutunga Rules](#) and the decision in [Antoine Ndiaye v African Virtual University](#) [2015] KEHC 6783 (KLR) on the threshold for granting of stay of execution.
14. Dr. Magare Gikenyi maintainSd that there was inordinate delay in filing the application which has not been explained and that no evidence has been adduced on the irreparable loss that will be suffered that cannot be recovered from customers. He relies on the decision in [Machira t/a Machira & Co. Advocates v East African Standard](#) [2002] KEHC 1167 (KLR).
15. Dr. Magare Gikenyi again relies on the decision in [Absalom Dova v Tarbo Transporters](#) [2013] eKLR on the importance of balancing rights and argues that the 1st respondent has not demonstrated that balancing of rights tilts in its favour. Dr. Magare Gikenyi has urged the court to dismiss the application.

Determination

16. I have considered the application, the response, arguments by parties and the decisions relied on.
17. The 1st respondent has urged this court to grant stay of execution of the judgment delivered on 22nd November 2024 pending appeal. In that judgment, this court held that bonga points once earned by customers become customers' property thus, the 1st respondent ceases to have control over them. The notice giving expiry date was therefore declared unconstitutional and illegal. It is that decision that the 1st respondent has sought to stay pending the hearing and determination of its intended appeal to the Court of Appeal.
18. The issue before this court in that petition was the constitutionality of the action the 1st respondent was taking regarding loyalty bonga points awarded to customers which action the court held to be unconstitutional. The 1st respondent intends to appeal against that decision and has now sought stay of execution of that decision. The application has been opposed by the petitioner.
19. The court was moved under article 22 and exercised its jurisdiction conferred by article 23(1) as read with article 165 of the [Constitution](#) to determine whether a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened and whether anything said to have been done under the authority of the [Constitution](#) or the law was inconsistent with, or in contravention of, the [Constitution](#).
20. This court heard the petition and determined that the action was unconstitutional and illegal and issued a declaration to that effect. The court also issued an order of certiorari quashing the notice giving dates on expiring of bonga points as well as a prohibitory order. The declaration was issued in terms of article 23(3)(a) of the [Constitution](#).
21. Article 165(3) (b) and (d) puts the court on an investigative mode to determine specific questions, namely; whether a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or is threatened and whether anything said to have been done under the authority of the [Constitution](#) or the law is inconsistent with, or in contravention of, the [Constitution](#). If the court returns a positive finding that the action or law complained of violates rights and fundamental freedoms in the Bill of Rights or what has been done is in contravention of the [Constitution](#) or the law, article 2(4) of the [Constitution](#) kicks immediately kicks in and the declaration issued by the court is to reinforce what article 2(4) has automatically invalidated and the law or action ceases to be of any legal effect. This is because article 2(4) is clear that any act or omission in contravention of the [Constitution](#) is invalid.



22. The fact that a declaration of invalidity take effect immediately was stated in *Speaker of the National Assembly & another v Orange Democratic Movement Party & 8 others* [2025] KECA 681 (KLR) citing *National Assembly & 47 Others v Okioti Omtatab & 169 Others* [2024] KECA 39 (KLR)(26 January 2024) that the essence of granting stay would mean that a law or [an action] that has been found to be constitutionally infirm, will continue being in operation pending the hearing of the appeal.
23. In *National Assembly & 47 Others v Okioti Omtatab & 169 Others* (*supra*) the court of Appeal stated that the presumption of constitutional validity in respect of impugned sections [or action] was extinguished the moment the trial court issued the declaration. The Court of Appeal held that it would not be in public interest to grant a stay whose effect is to allow what had been found to be constitutionally infirm to continue, pending the hearing of an appeal.
24. The 1st respondent wants the court to stay execution of the judgment in this matter. This court takes the view, that a reading of article 165(3) (b) and (d) shows that the court is to investigate whether a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and whether anything said to have been done under the authority of the *Constitution* or the law is inconsistent with, or in contravention of, the *Constitution*. If the court finds that there is violation of rights and fundamental freedoms or contravention of the *Constitution*, article 2(4) invalidates the actions or omissions. As a trial court, it retains no residual jurisdiction that would allow it to stay the declaration whose effect would imply suspension of the coming into effect of article 2(4) of the *Constitution* an action this court as a creature of the *Constitution* cannot do since there is no constitutional provision allowing to suspend a provision of the *Constitution* from taking effect.
25. In the circumstances, it would be inappropriate and possibly contrary to article 2(4) of the *Constitution* for this court, as the trial court, to grant stay of its decision declaring the 1st respondent's notice constitutionally infirm.
26. Consequently, and for the above reasons, the application is declined and dismissed. Each party will bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2025

E C MWITA

JUDGE

