



Director of Public Prosecutions v Coco & 12 others; Law Society of Kenya & another (Interested Parties) (Civil Application E026 of 2025) [2025] KECA 1519 (KLR) (12 September 2025) (Ruling)

Neutral citation: [2025] KECA 1519 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E026 OF 2025
DK MUSINGA, AK MURGOR & GWN MACHARIA, JJA
SEPTEMBER 12, 2025**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

DANIEL LO COCO 1ST RESPONDENT

MASSIMI NATIVI 2ND RESPONDENT

RAFIKI LIMITED 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 5TH RESPONDENT

DAVID K SIELE 6TH RESPONDENT

COSMO ARMENO MODUGNO 7TH RESPONDENT

MARIA GRAZIA MOSCONE 8TH RESPONDENT

FLORENZO GIROLA 9TH RESPONDENT

ROSSY TETAMANTI 10TH RESPONDENT

RITA NAPPO 11TH RESPONDENT

CHIEF MAGISTRATE'S COURT, KILIFI 12TH RESPONDENT

THE HON ATTORNEY GENERAL 13TH RESPONDENT

AND

THE LAW SOCIETY OF KENYA INTERESTED PARTY

RAFIKI RESORT MANAGEMENT LIMITED INTERESTED PARTY



*(Being an application for stay of proceedings before the High Court of Kenya
at Malindi (Thande, J.) in Constitutional Petition No. E006 of 2024)*

RULING

1. This ruling is in respect of the Director of Public Prosecutions' (the applicant) application dated 14th July 2025. The application is brought pursuant to the provisions of rule 5(2)
 - b. of the Court of Appeal Rules, 2022, and the applicant is primarily seeking:
 - a. An order staying proceedings in Daniel Lo Coco & 2 Others vs. Director of Public Prosecutions & 10 Others, Malindi High Court Constitutional Petition No. E006 of 2024 pending the hearing and determination of the Appeal;
 - b. An order that the Chief Magistrate's Court sitting in Kilifi Criminal Case No. 328 of 2024 do proceed to deliver its ruling as to whether the 1st and 2nd respondents, the accused therein, have a case to answer; and
 - c. Any other order and/or further order as may be necessary to meet the ends of justice.
2. The background that gave rise to Malindi High Court Petition No. E006 of 2024 (the High Court petition) stems from the criminal proceedings before Kilifi Chief Magistrate's Court Criminal Case No. E384 of 2024 (the criminal proceedings). The criminal proceedings were founded on the allegations that Daniel Lo Coco (the 1st respondent) and Massimo Nativi (the 2nd respondent), who are the directors of Rafiki Limited (the 3rd respondent), received money by way of false pretence for the sale of Villas at Rafiki Village in Watamu with intention to defraud contrary to sections 313 and 317 of the Penal Code, and that they failed to execute the leases. The complainants in the criminal proceedings were Florenzo Girola (the 9th respondent) and Rita Nappo (the 11th respondent).
3. During the pendency of the criminal proceedings, the 1st, 2nd and 3rd respondents filed the High Court petition which is dated 31st May 2024 contemporaneously with an application of even date, basically seeking to stop their continued prosecution in the criminal proceedings and/or any other investigations in relation to the sale of the Villas.
4. The 1st to 3rd respondents contended that the applicant, the Inspector General of Police (the 4th respondent), the Director of Criminal Investigations (the 5th respondent) and David K. Siele (the 6th respondent), conspired to arrest, charge and prosecute them in Kilifi Senior Principal Magistrate's Criminal Case No. 506 of 2023, but that later, the applicant withdrew the charges under section 87(a) of the Criminal Procedure Code; and that after reviewing the decision to withdraw the charges, the 1st, 2nd and 3rd respondents' criminal charges were reinstated.
5. The 1st to 3rd respondents complained that the decision to charge them with obtaining money by false pretence was malicious since the applicant failed to consider that Cosmo Armeno Modugno (the 7th respondent), Maria Grazia Moscone (the 8th respondent) and Rossy Tetamanti (the 10th respondent) did not wish to have the leases registered in their names, but that instead, they filed civil suits seeking recovery of the purchase prices.
6. The 1st to 3rd respondents further complained that the Chief Magistrate's Court (the 12th respondent) failed to note that the matter ought to have been filed at Malindi as opposed to Kilifi; that the rulings and orders made by the trial court were not being made in good faith or in lawful performance of a



- judicial function; and that when the 12th respondent was reviewing their bail terms, they were allowed to travel out of the country and their passports were released to them.
7. The 5th and 6th respondents opposed the application vide a replying affidavit dated 28th August 2024 sworn by PC Phoenix Oduya Onyango, denying the allegations that they are acting under the direct control of the 7th respondent; and that the decision to charge the 1st and 2nd respondents at the Kilifi Law Courts was actuated by malice, but because their counsel was seen to have an ulterior interest in Malindi Law Courts. It was also denied that the 9th and 11th respondents were in possession of the Villas; and that, the 1st and 2nd respondents deceived them (the 9th and 11th respondents) that they were selling to them the Villas, but instead made them shareholders in a holding company without their knowledge and consent.
 8. The rest of the respondents in the High Court petition did not file responses.
 9. In making her determination, the learned Judge (M. Thande, J.) referred to Article 23 of the Constitution which gives the Court authority to uphold and enforce the Bill of Rights and grant appropriate reliefs. The court held that one of the reliefs which can be granted is of conservatory orders to a party who alleges and proves denial, violation, infringement of, and threat to, a right or fundamental freedom in the Bill of Rights. Acknowledging that statutory bodies such as the applicant, the 4th and the 5th respondents must be given space to discharge their statutory mandate, in instances where they are acting ultra vires, or in breach of the Constitution or the law, a constitutional court is mandated to intervene.
 10. The learned Judge formulated three issues which she opined were critical for determination, namely: whether the complaint of the sale of the Villas should be the subject of criminal investigations and charges, or civil proceedings; whether the decision to charge the 1st, 2nd and 3rd respondents in Kilifi and not Malindi will result in violation of their constitutional rights; and whether the applicant, the 4th and 5th respondents exercised their mandate in line with the law.
 11. In a ruling dated 25th April 2025, the learned Judge proceeded to make a finding to the effect that the substratum of the petition should be preserved pending determination of the petition. She consequently made the following orders:
 - i. pending the hearing and determination of this petition, the court hereby prohibits the applicant from continued prosecution of the 1st and 2nd respondents in Kilifi Senior Principal Magistrate Criminal Case No. 328 of 2024;
 - ii. pending the hearing and determination of this petition the court hereby prohibits the 4th, 5th and 6th respondents and their officers from any further criminal investigations of the 1st, 2nd and 3rd respondents on any matter arising from the sale and occupation of any Villa at Rafiki Village, Watamu; and
 - ii. all other prayers are declined.
 12. The 1st to 3rd respondents further filed an application dated 20th November 2024 seeking among others, that the orders made on even date by the 12th respondent be stayed. In the said application, these respondents stated that the 12th respondent maliciously ordered that the 1st and 2nd respondents deposit their passports in court; that the 1st respondent had to travel to Italy for personal reasons; and that curtailing their (the 1st and 2nd respondents’) movements was an intrusion to their privacy.



13. The applicant opposed the application by stating that the application was misconceived, and that it was an abuse of the court process as it was at variance with the High Court petition; and that entertaining the application would be tantamount to amending the petition to accommodate the prayers sought in the application which orders should be challenged by way of an appeal.
14. The 12th and 13th respondents filed grounds of opposition dated 25th November 2024 stating that the application was misplaced as the orders sought ought to be filed separately in an appeal but not within the petition.
15. In a ruling also dated 25th April 2025, the learned Judge simply held that: “After allowing the application dated 31.5.2024 staying the prosecution of the petitioners (the 1st, 2nd and 3rd respondents) in Kilifi Chief Magistrate Criminal Case No. E328 of 2024 (Republic vs. Daniele Lo Loco & Massimo Nativi) pending the hearing and determination of the petition, it follows that the orders sought herein are also allowed.”
16. Aggrieved by the orders issued on both applications, the applicant appealed to this Court vide Malindi Civil Appeal No. E029 of 2025, and through the instant application seeks an interim stay of proceedings of the High Court petition. The application is supported by the affidavit of Joseph Mwangi Kamanu, the applicant’s Principal Prosecution Counsel, sworn on 14th July 2025. It is deposed that the two rulings dated 25th April 2025 are bad in law as they curtailed the powers of the applicant and the Inspector General of Police given to them under Articles 157 and 243 of *the Constitution* to prosecute and investigate the 1st to 3rd respondents respectively; and that the decision to stay the order of the Magistrate’s Court which ordered the 1st and 2nd respondents to deposit their passports in court, was done without calling for the lower court file.
17. It is stated that the orders issued by the learned Judge were already overtaken by events for the reasons that the prosecution had already closed its case and a date reserved for a ruling on a case to answer; that, as such, the petition had no enforceable effect on the role of the prosecution; that the impugned rulings and orders issued on 25th April 2025 gravely affected its powers to investigate and prosecute the 1st, 2nd and 3rd respondents; and that in the event that the 1st and 2nd respondents’ passports are released, they will leave the county thereby jeopardizing the on-going investigations, and consequently render the appeal and the application before this Court not only nugatory but also an academic exercise.
18. The 7th, 8th, 9th, 10th and 11th respondents support the application.
19. Rita Nappo, the 11th respondent, filed a replying affidavit dated 18th July 2025. She deposes that, together with the 9th respondent, they are the complainants in the criminal proceedings against the 1st, 2nd and 3rd respondents in which they were charged with the offence of obtaining money by false pretence. She deposes that the 1st to 3rd respondents misrepresented the fact that they were selling to them the Villas while they had irregularly obtained the title documents to the property in conflict with the laws of Kenya since they are foreign citizens; that the ruling of the High Court of 25th April 2024 will interfere with their rights as victims in the criminal proceedings as enshrined in the *Victim Protection Act* as the ruling on a case to answer is yet to be delivered; and that, as a victim, she has the right to have the case heard and concluded without unreasonable delay as provided for under section 9(1) of the *Victim Protection Act*; and that ultimately, the orders issued by the High Court will likely cause a miscarriage of justice.
20. The 11th respondent posits that should the 1st and 2nd respondents’ passports be released, they will leave the country and never to return, consequent to which all their investments will go to waste; and that



justice demands that there be a stay of proceedings in the High Court petition, and the ruling on a case to answer in the criminal proceedings be delivered.

21. The 1st, 2nd and 3rd respondents oppose the application by way of a replying affidavit dated 25th July 2025 sworn by the 2nd respondent, Massimo Nativi, the 3rd respondent's director, and a further affidavit dated 4th August 2025 sworn by learned counsel Mr. Kinyua Kamundi.
22. Massimo Nativi states that the application has been brought under the wrong provisions of the law, being the Civil Procedure Rules instead of the Court of Appeal Rules, 2022; that this Court has no jurisdiction to issue mandatory orders of mandamus; that the applicant is not seeking to stay the orders issued by the High Court, and that, therefore, since they remain in force, this Court cannot compel the Chief Magistrate to deliver his ruling in the proceedings that have been stayed; that the applicant withdrew his application filed before this Court, namely, Civil Application No. E018 of 2025 which had sought to stay the High Court orders for want of competence.
23. It is contended that the applicant alleged that the 3rd respondent had built and sold Villas on Plot No. Kilifi/Jimba/1544; that the applicant amended the charge sheet and referred to the suit property as Kilifi/Jimba/544 which is unknown to the 1st, 2nd and 3rd respondents; that the amended charge sheet was meant to maintain malicious charges against the 1st, 2nd and 3rd respondents as all the documentary evidence produced related to Kilifi/Jimba/1544, but not Kilifi/Jimba/544.
24. It is also argued that the fact that the case is scheduled for a ruling on a case to answer, it means that there is no intention by the applicant to call for further evidence; that the complainants in the criminal proceedings testified that they were given possession of the Villas in issue; that for these reasons, it cannot be said that the appeal is arguable; and that the appeal cannot also be rendered nugatory if the orders sought are not granted because any party who is dissatisfied with the judgment in the High Court petition has a right to appeal.
25. It is also contended that an application dated 30th May 2025 has been filed under rule 86 of this Court's Rules seeking to strike out Civil Appeal No. E029 of 2025 as there is no record of appeal filed together with the memorandum of appeal in violation of rule 84(1) (b); that the 1st, 2nd and 3rd respondents perceive that the investigating and prosecuting agencies were abusing their offices and working under the direction of the 7th respondent, an Italian lawyer; and that they reported the alleged corrupt dealings to the Ethics and Anti-Corruption Commission in Malindi.
26. The 2nd respondent further states that the High Court has no obligation to call for the court file from a court of inferior jurisdiction; that the orders being appealed against were overtaken by events; that the 7th and 11th respondents filed an application seeking recusal of Thande, J. on the ground that their counsel, Mr. Kamundi, is related to her; and that it would be prejudicial for this Court to determine a rule 5(2)(b) application before determining their earlier application seeking to strike out the Notice of Appeal and the appeal upon which the present application under rule 5(2) (b) is also based.
27. In the further replying affidavit, learned counsel Mr. Kamundi deposed that his firm acted for the 1st, 2nd and 3rd respondents in Malindi ELC Appeal Nos. 22, 23, 24 and 25 of 2023 which appeals arose from the decision of Malindi ELC Chief Magistrate's Court delivered in favour of the 8th, 9th and 10th respondents; that the suits were in respect of the sale agreement of the Villas sold to them by the 3rd respondent on its Plot Kilifi/Jimba/1544, and that the judgements in respect of those appeals were delivered by Makori, J. on 4th June 2025; and that after the Judge pronounced himself on the subject matter, the 12th respondent while hearing the criminal case cannot make a contrary determination in favour of the complainants in the criminal proceedings over the same subject matter.



28. Counsel states that the decision to charge the 1st and 2nd respondents was based on a misapprehension of Article 65(1) of *the Constitution*, and amounts to abuse of prosecutorial authority in violation of Article 157(11) of *the Constitution*; that the freehold interest in Plot No. Kilifi/Jimba/1544 was converted into a 99-year leasehold under Article 65(2) of *the Constitution*; and that the applicant's continued assertion that the 3rd respondent built and sold Villas in a property it did not own is furtherance of abuse of his power.
29. Counsel posits that the record of appeal in Civil Appeal No. E029 of 2025 - Republic vs. Daniel Lo Coco & 9 Others, was served out of time, and not by the applicant but by the 'Republic'; that the applicant is not one and the same as the Republic of Kenya and vice versa; that when he cross-examined the 7th, 9th and 11th respondents in the criminal proceedings, some of them agreed that the 3rd respondent is the owner of Plot No. Kilifi/Jimba/1544, and that it built and sold them the Villas on the property, hence, the decision to report the applicant's Prosecution Counsel, Mr. Joseph Mwangi Kamanu and other officers to the Ethics and Anti- Corruption Commission for abuse of office.
30. In the applicant's further affidavit dated 29th July 2025, it is deposed that the 1st and 2nd respondents' application in the High Court dated 28th July 2025 seeking to have their passports released to them, is scheduled for a ruling on 19th September 2025; that in the event that the application is allowed, there is no guarantee that the 1st and 2nd respondents will return to the court's jurisdiction since they have asked for unconditional release of the passports; that it is erroneous for the 1st, 2nd and 3rd respondents to claim that the impugned orders do not affect the 8th, 9th, 10th and 11th respondents whereas they are the complainants; that it was imperative that stay of proceedings be granted since the applicant wishes to know, as an issue for determination in the appeal, whether the 4th, 5th and 6th respondents can be barred from exercising their mandate as conferred upon them under Article 157 of *the Constitution*; and that it was true that Malindi Civil Application No. E018 of 2025 was withdrawn after it was agreed that the orders sought could not be granted under rule 5(2) (b) of this Court's Rules.
31. It is stated that the application to strike out the appeal was filed out of time contrary to rule 86 of this Court's Rules, 2022; that no prejudice will be occasioned to the respondents, and that it is in the interests of justice that the High Court petition proceedings be stayed pending the hearing and determination of the appeal.
32. We heard this application on 12th August 2025. Learned Principal Prosecution Counsel Mr. Mwangi Kamanu appeared for the applicant, learned counsel Mr. Kinyua Kamundi for the 1st, 2nd and 3rd respondents, and learned counsel Mr. Ndegwa Njiru alongside Mr. Makworo appeared for the 7th, 8th, 9th, 10th and 11th respondents. The 4th, 5th, 6th, 12th and 13th respondents did not participate in the proceedings despite being served with a hearing notice. Each of the participating parties filed their respective written submissions which they extensively orally highlighted in Court.
33. Both the written and oral submissions are substantially a regurgitation of the averments in support of, and in opposition to, the application. Accordingly, we find no reason to replicate them in this ruling, save for very salient issues where need be.
34. According to the applicant, pursuant to the High Court ruling and orders issued on 24th May 2025, he and the 5th respondent are in limbo as to whether to continue investigating and prosecuting the 1st, 2nd and 3rd respondents; that there is a real likelihood that the 1st and 2nd respondents' passports will be released to them pursuant to their application before the High Court whose ruling has been reserved for 19th September 2025; that should the passports be released and the 1st and 2nd respondents leave the court's jurisdiction, there is a danger that the criminal proceedings and the appeal before this Court will be rendered nugatory, more so because there is no mutual extradition treaty signed between the



- Kenyan and Italian Governments that would facilitate the return of the 1st and 2nd respondents to the country to enable continuation with the criminal investigations and trial. Reference was made to this Court's decision of Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) KECA 378 (KLR) for the principles that the Court should consider in an application of stay of proceedings.
35. On his part, Mr. Ndegwa, while supporting the application, additionally submitted that the orders issued by the High Court were adverse in that they prohibited further investigations against the 1st, 2nd and 3rd respondents and also stayed the criminal proceedings when the Magistrate was about to deliver a ruling as to whether the accused have a case to answer; that the consequential effect of the orders was that the 1st, 2nd and 3rd respondents could not be investigated by the police on any crime whatsoever; that Article 27 of *the Constitution* requires that all persons be subjected to equal treatment before the law, including foreigners; that the intended appeal is arguable, particularly as to whether a court can issue a blanket immunity to foreigners, and whether the court can give blanket orders that affect the constitutional mandate of independent bodies.
 36. As to whether the appeal will be rendered nugatory if the High Court petition proceedings are not stayed, counsel submitted that the 1st, 2nd and 3rd respondents are currently within the Court's jurisdiction by dint of orders issued by the Magistrate's Court to deposit their passports in court; that in the event that the orders are varied, these respondents will benefit to the detriment of the other respondents as they are likely to flee the country. Reliance was placed on the Supreme Court case of Speaker of the Senate & Another vs. Attorney General & 4 Others (2013) KESC 7 (KLR), this Court's decision of Mumo Matemu vs. Trustee Society of Human Rights Alliance & 3 Others (2013) KECA 445 (KLR) and the High Court's decisions in Community Advocacy and Awareness Trust & Others vs. The Attorney General & Others (2012) KEHC 5589 (KLR) and The Kenya Youth Parliament & 2 Others vs. AG & Another (2012) KEHC 5436 (KLR), to advance the argument of the doctrine of separation of powers.
 37. Mr Kinyua Kamundi submitted that the prayer by the applicant urging this Court to compel the Magistrate to deliver the ruling as to whether his clients have a case to answer amounts to contempt of the High Court orders; and that such a prayer leads to the speculation of the possibility that the applicant and the 6th to 11th respondents know about the outcome of the criminal proceedings, and that the presiding Magistrate was under the control of some of the said respondents.
 38. On the allegations that his clients were likely to be accorded blanket immunity against investigation and prosecution, it was submitted that the orders sought by the 1st to 3rd respondents was in relation to the sale of the Villas but not to other crimes which may arise; that the investigations began in 2022 and the decision to charge the 1st and the 2nd respondents was made in August 2023 in Criminal Case No. E056 of 2023; that later, the senior to Prosecution Counsel Mr. Mwangi ordered that the criminal proceedings be withdrawn after a complaint was raised by the 1st to and 3rd respondents; and that the decision to charge the 1st to 3rd respondents was malicious since there was documentation to support the ownership of the plot and the Villas constructed thereon.
 39. Counsel further stated that petitions under Articles 22 and 23 of *the Constitution* do not require the High Court to call for the lower court file; that in this instance, the learned Judge already had all the necessary documents before her that enabled her to write the ruling and make the orders in respect of the application; and that, therefore, there was no need to call for the trial court file.
 40. Counsel took issue with the way the parties in the Notice of Appeal and in the Record of Appeal are named, who, he states, are at variance; that the Notice of Appeal has been filed by the applicant and the 5th respondent, while the Record of Appeal was filed by the Republic; that accordingly, the first test



under rule 5(2)(b) of arguability of the appeal fails since the applicant has not filed an appeal before this Court.

41. Counsel further argued that no further investigations against his clients were needed or required; that this is in view of the fact that there were only two complainants in the criminal proceedings, namely the 9th and 11th respondents, yet the prosecution's case has already closed; that the 7th, 8th and 10th respondents are not complainants; and that, therefore, the prosecution cannot re-open its case.
42. Counsel discounted the apprehension that there are no extradition treaties between Kenya and Italy by stating that the 1st to 3rd respondents have continued to invest in the country even after being charged and their passports being seized. Touching on the civil proceedings from the appeals before Makori, J., counsel submitted that the decision of the learned Judge exonerated the 1st and 2nd respondents; and that the learned Magistrate cannot overrule a Judge on the same subject matter.
43. Counsel submitted that stay of proceedings should only be granted sparingly and in the rarest of cases; that should the application be allowed, the High Court petition will remain in limbo, while the criminal proceedings will stall; and that furthermore, the 1st to 3rd respondents were on stringent bond terms, one of which is that in the event they travel to Italy, they should not stay for more than 90 days; and that they had strictly adhered to the bond terms until their passports were confiscated by an order of the trial court.
44. In a brief rejoinder, Mr. Mwangi submitted that the trial court ordered for the deposit in court of the passports because the 1st and 2nd respondents were moving in and out of the country as they wished just before the trial commenced; that the surrender of the passports was intended to ensure seamless proceedings when the hearing started; the orders issued by the High Court prohibiting investigations against sale of the Villas in Rafiki Village in Watamu are erroneous since Rafiki Village in Watamu is non-existent; and that there was no guarantee that the 1st and 2nd respondents will return to the country if they leave since they are under investigations for other complaints filed against them.
45. On his part, Mr. Ndegwa contended that the fact that the High Court stayed the trial court proceedings is not tantamount to terminating them; that therefore, the 1st to 3rd respondents remain subject to the lower court's jurisdiction; that this Court is clothed with jurisdiction to interrogate the decision of the High Court ; that although the 1st and 2nd respondents in the petition initially only named the 9th and 11th respondents as the complainants, they later joined the 8th, 9th and 10th respondents to the petition since there are active investigations going on, and which investigations have now been stayed by the High Court; that the motivation of the 1st and 2nd respondents to leave the country is to interfere with the investigations and court proceedings by ensuring that the complaints by the 8th and 10th respondents will not be investigated.
46. On the issue of competence of the appeal, counsel argues that this is a matter to be determined during the hearing of the 1st to 3rd respondents' application challenging its competence; that it was common ground that criminal proceedings have always been filed in the name of the Republic; that pursuant to Article 159(2) (d) of *the Constitution*, this Court should disregard procedural technicalities, more so as to the form of pleadings which do not affect the competence of the appeal; and that the appeal being one that raises substantive points of law should be heard on its merit.
47. We have considered the application, the very lengthy and extensive written and oral responses thereto, the respective rival submissions, the authorities relied upon and the law. In our view, the only issues that fall for our determination is whether we should order a stay of proceedings in Malindi High Court Constitutional Petition No. E006 of 2024 -Daniel Lo Coco & 2 Others vs. Director of Public Prosecutions & 10 Others, pending the hearing and determination of the appeal; and whether we



should order that the Chief Magistrate's Court sitting in Kilifi Criminal Case No. 328 of 2024 to proceed to deliver its ruling as to whether the accused in that case have a case to answer.

48. At the outset, we wish to make a critical observation relating to the second prayer in the application, which is, an order that the Chief Magistrate's Court sitting in Kilifi Criminal Case No. 328 of 2024 do proceed to deliver its ruling as to whether the accused have a case to answer. As a matter of law, this Court under Article 164(4)(a) and (b) of *the Constitution* is conferred with jurisdiction to hear appeals arising from the High Court and any other court or tribunal as prescribed by an Act of Parliament. This implies that unless, and in the rarest of circumstances, this Court does not superintend over proceedings that are pending before a Magistrate's Court unless the law dictates, or if the interests of justice so demand.
49. The criminal proceedings before the Magistrate's Court in Kilifi are still active, and this Court being at the second-tier of an appeal that may arise from the decision of the trial Magistrate has no business micro-managing how the Magistrate should conduct his proceedings. This is the acceptable practice, that appellate courts should as much as possible restrain themselves from micro-managing proceedings in the courts below them. In *Joseph Nduvi Mbuvi vs. Republic* [2019] eKLR - Criminal Revision No. 4 of 2019, the High Court at Machakos, in downing its tools over revisionary jurisdiction in an order of acquittal had this to say:

“It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion.”

50. We also find persuasion in the decision of this Court in the case of *Kenya Deposit Insurance Corporation vs. Richardson & David Limited & another* - Civil Appeal No. 66 of 2016 consolidated with Civil Appeal No. 67 of 2016 where one of the grounds of appeal in the two appeals was a complaint against the learned Judge of the High Court in micro-managing the appellants as institutions. The Court in part delivered itself thus:

“

- “24. It is clear from the reading of Section 5(1) of KDI Act that, the power to receive, liquidate and wind up an institution is vested in KDIC only. In issuing the orders as it did, the court stepped beyond the amplitude of its powers. It substituted itself in place of CBK. It had no inherent powers to make orders that were outside the purview of its jurisdiction. The law does not give the court the power to substitute itself in place of an institution where the latter is alleged to have erred in discharge of its duty. The role of the court is to sanction what is done in the right way or invalidate what is improperly done. The court is not entitled to discharge the duties of the institution it censures or whose decisions it invalidates. Parliament has not given the court the power to step into the shoes of such institution.... It exercised its discretion. The orders issued by the court clearly show that the court took up the role of CBK and KDIC. That is not the province of a Judge. As correctly pointed out by Odunga, J. in *Republic v. KRA expert Interactive Gaming & Lotteries Ltd Misc Civil*



Application 251 of 2014, “specialized bodies created by statute ought to be given leeway to conduct their proceedings freely... where such bodies act within their jurisdiction the court ought only step in to ensure that the proceedings are conducted fairly.”

51. That said, we find and hold that it is not within our purview to order in a rule 5(2)(b) application the learned trial Magistrate to deliver the pending ruling. This now leaves us to determine whether we should stay the proceedings in the High Court petition.
52. The application is primarily hinged on rule 5(2)(b) of this Court’s Rules, 2022. The principles that guide this Court in determining an application under the rule are well settled and have been well summarized in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (supra). The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted the appeal, if successful, shall be rendered nugatory.
53. Further, it is now settled that granting of stay of proceedings is a discretionary power that should be exercised sparingly as it interrupts the normal court process, and is a serious remedy that should only be granted in exceptional circumstances. See the Supreme Court decision in James Nthuku Kithinji vs. The Director of Public Prosecutions & The Chief Magistrate’s Court at Nairobi Kibera Law Courts, Petition (Application) No 29 (E033) of 2022 where the Court held that “stay of criminal proceedings is not granted as a matter of course but upon the sparing exercise of judicial discretion and only in exceptional circumstances as enunciated in Dande & 3 Others vs. Director of Public Prosecutions & 2 Others Petition 4 of 2022 [2022] KESC 23 (KLR). See also this Court’s ruling in Waithaka vs. Tribunal appointed to investigate the conduct of the Honourable Lady Justice Lucy Njoki Waithaka & another; Kenya Magistrates & Judges Association (Interested Party) (Civil Application 8 of 2020) [2020] KECA 571 (KLR) (19 June 2020) (Ruling)
54. It is a long-standing principle that an arguable appeal is not one which must necessarily succeed but one which is not frivolous. It is sufficient to establish a single bona fide ground of appeal. This Court in R.F.S. vs. J.D.S (2013) eKLR held that:

“Now an appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of juridical investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists and the same need not be one that must necessarily succeed in an appeal.”
55. Further, in Cleophas Wasike vs. Mucha Swala (1984) eKLR, this Court held that an applicant need not show that his appeal has an overwhelming probability of success; an applicant just needs to show that there is merit in his appeal.
56. Further, in Stanley Kangethe Kinyanjui vs. Tony Ketter (supra) which was aptly relied on by the applicant, this Court explained on the limb of arguability as follows:
 - i. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
 - ii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See



57. We have perused and appreciated the grounds of appeal. The applicant in the draft Memorandum of Appeal dated 12th May 2025 annexed to the application has faulted the learned Judge for, among other things: erroneously staying the proceedings in Kilifi Chief Magistrate’s Court Criminal Case No. E384 of 2024 despite the fact that the matter was at an advanced stage in that it was pending a ruling on a case to answer; erroneously issuing two rulings made in Kilifi Chief Magistrate’s Court Criminal Case No. E384 of 2024 without calling for the lower court file in exercise of its supervisory powers; and for erroneously barring the State from conducting investigations against the 1st and 2nd respondents thereby granting them immunity to commit criminal offences with impunity.
58. We are also cognizant that even as we consider whether the appeal is arguable, we must not delve into the merits or demerits of the appeal so as not to embarrass the bench hearing the appeal. The significance of rule 5(2) (b) is to preserve the substratum of an appeal or the intended appeal.
59. Having isolated three out of the five grounds of appeal that the applicant intends to ventilate, we think that the applicant has raised issues which are not frivolous and, therefore, merit consideration. We are satisfied that the intended appeal is arguable.
60. On the nugatory aspect, the applicant averred that the appeal, if successful, will be rendered nugatory if stay of proceedings is not granted for the reasons that in the event that the High Court grants the pending ruling in favour of the 1st and 2nd respondents and thereby orders the release of their passports, there is every likelihood that the two respondents will return to Italy and may not return to this country for the hearing of both the criminal case and the High Court petition. This is an exceptional circumstance that we cannot disregard. While we are alive to the fact that in the past, and during the pendency of the criminal proceedings the accused have exited the jurisdiction of the trial court and returned without any coercion, in the prevailing circumstances, there is no foretelling whether the accused, if they travel out of the trial court’s jurisdiction, will return or not, and we think the trial court is best placed to speak to the issue of the accused’s desired travels during the pendency of the case.
61. We take to mind that having been persuaded that the appeal is arguable, and further having regard to the fact that the learned Judge issued a blanket order staying investigations against the 1st to 3rd respondents, we are also persuaded to believe that if the High Court petition proceedings are not stayed, there lies a danger of jeopardising not only the petition but also the criminal proceedings. We cannot second-guess the likely outcome of the pending ruling with respect to the release of the passports due for delivery on 19th September 2025.
62. To preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour, it is necessary that we safeguard the substratum of the appeal. We think that justice lies in staying the High Court petition proceedings and in expediting the hearing of the appeal so that the concerns raised by all the parties can be addressed substantively and conclusively.
63. Finally, we wish to observe that it is not within our purview at this juncture to determine whether or not the pending appeal is competent or not. The application challenging the competency of the appeal is a matter for consideration and determinately separately. We rest this issue at that.
64. Accordingly, we allow the Notice of Motion dated 14th July 2025 in the following terms:
 - a. That there be a stay of proceedings in Malindi High Court Constitutional Petition No. E006 of 2024 - Daniel Lo Coco & 2 Others vs. Director of Public Prosecutions & 10 Others, pending



hearing and determination of the appeal, namely Malindi Civil Appeal No. E029 of 2025-Republic vs. Daniel Lo Coco & 10 others.

- b. That Malindi Civil Appeal No. E029 of 2025- Republic vs. Daniel Lo Coco & 10 others shall be heard on a priority basis, within the next sixty (60) days from the date of delivery of this ruling.
- c. That costs shall be in the appeal.

DATED AND DELIVERED AT MALINDI THIS 12TH DAY OF SEPTEMBER, 2025.

D. K. MUSINGA (P)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

