

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI- CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC APPEAL NO. E016 OF 2025**

**BOB KEPHAS OTIENO.....1ST
APPLICANT
CAROLYNE CHEPKEMOI SANG.....2ND
APPLICANT
MAURICE ODIWUOR AMEK.....3RD
APPLICANT
EVERLYNE AWINO OGUTU.....4TH
APPLICANT
DAVID OBONYO MRERI.....5TH
APPLICANT
LILIAN ACHIENG OLOO.....6TH
APPLICANT**

VERSUS

**ETHICS & ANTI-CORRUPTION COMMISSION.....
RESPONDENT**

RULING

1. The applicants have moved the court by way of the application dated the 3rd day of June, 2025, under **Article 50, 159 (2) (b)** of the **Constitution, Section 356 (1)** of the **Criminal Procedure Code** and all the enabling provisions of the law. The application is premised on the grounds set out on the body of the same and it is supported by the annexed affidavit sworn

by BOB Otieno Kephas, on even date. Through the application, the applicants have sought the following Orders:

1) Spent.

2) That this Honourable Court be pleased to grant a stay of proceedings in Homa Bay Chief Magistrate's Court in Homa-Bay Anti-Corruption Case no. E001 of 2021 pending the hearing and determination of this application.

3) That this Honourable Court be pleased to grant a stay of proceedings in Homa Bay Chief Magistrate's Court in Homa-Bay Anti-Corruption Case no. E001 of 2021 pending the hearing and determination of the Appeal filed in the High Court at Millimani Law courts, Anti-Corruption & Economic Crimes Division.

4) That a date for inter-partes hearing of this application be given.

5) That the costs of this application be provided for."

2. The applicants have averred that they have filed a Petition of appeal at the High Court Anti- Corruption and Economic Crimes Division against the ruling and Orders of the trial Magistrate in a ruling that was delivered on the 28th May, 2025 (Homa-Bay Chief Magistrate's court Anti -Corruption Case No. E001 of 2021).

3. The applicants contend that the appeal has good chances of success and it raises issues of violation of their rights as

enshrined under **Article 50(2) (j) & (k)** of the **Constitution**, and Fundamental Freedoms which include the right to a fair hearing by impartial court. That the applicants have an arguable appeal as can be discerned from the Petition of Appeal.

4. They further aver that the balance of convenience tilts in favour of the applicants in that, in the event that the intended appeal is unsuccessful, the applicants would still be put on their defence without prejudice and/or in violation of their constitutional rights.
5. The respondent filed a replying affidavit sworn by Ishmael Nyamache who is the investigating officer in the matter. Through the deponent, the respondent avers that the application is vexatious and an abuse of the court process and the same ought to be dismissed.
6. The respondent states that the appeal has a low probability of success and thus not suitable for grant of conservatory orders as the appeal lean heavily on the pursuit of procedural rather than substantive justice which is contrary to **Article 159 (2)** of

the **Constitution** which require that justice be administered without due regard to procedural technicalities.

7. That the learned Magistrate in making her determination examined the facts and the arguments that were presented before him. That even where a party does not file a response to an application, the applicant must establish a prima facie case and demonstrate entitlement to the reliefs sought, as Judicial officers are not rubber stamps to applications presented before them but they are required to evaluate each application on its own merits regardless of opposition.
8. The respondent avers that the applicant has not met the threshold for the grant of the temporary stay/conservative orders sought herein as he has not placed before the court material facts demonstrating a prima facie case with a probability of success and that public interest heavily outweighs the applicants' interest, and issuing the orders sought will frustrate an ongoing lawful process.
9. That the case before the trial court has been pending for three and a half years and the speedy determination of the matter is in line with the provisions of **Article 159 (2) (b)** of the

Constitution which requires that justice shall not be delayed. Further, that the applicants have numerous remedies available to them should the matter proceed for hearing which include but not limited to an appeal of the final decision of the High court.

10. The respondent states that the Petition of Appeal filed by the applicants does not have a high likelihood of success and thus does not warrant the grant of conservatory orders sought and that the grant of the Orders will interfere with the lawful and constitutional discharge of the respondent's mandate and will set a dangerous precedent by curtailing the exercise of discretion based on unproven allegations.

11. The interested party filed a replying affidavit sworn by Maryanne Mwangi, on the 1st day of August, 2025 which substantially rehearses the contents of the respondent's replying affidavit and it would not serve any useful purpose to reproduce the same but just the high lights. Through the deponent, the interested party avers that the applicants have failed to demonstrate a clear violation or threatened violation of their constitutional rights that warrants urgent

conservatory relief. That the grounds advanced in the Petition of appeal are speculative, unsubstantiated and capable of redress through alternative legal process.

12. The interested party contends that the applicants have not demonstrated that unless the orders are not granted, they stand to suffer prejudice that is incapable of being remedied through subsequent judicial intervention. That the balance of convenience and the public interest weighs heavily against issuance of the orders as doing so would frustrate an ongoing lawful process.

13. That the grant of the conservatory orders will be detrimental to the public interest as the Anti- Corruption case before the Homa-Bay trial court relates to the embezzlement of Ksh.99 million Shillings and it has been pending for three and a half years and its speedy determination is in line with **Article 159(2) (d)** of the **Constitution**.

14. That the applicants have numerous remedies available to them should the matter proceed to hearing which include but not limited to an appeal of the final decision of the trial court should a judgement be entered against them. That the

Petition of appeal filed by the applicants does not have a high likelihood of success and thus does not warrant the grant of the conservatory orders sought herein.

15. That the trial court has shown admirable patience and fairness in accommodating defence requests despite apparent untruths and procedural delays, including those related to the application to recall witnesses, and expunge documents. That the applicants are bent on delaying the conclusion of the matter before the trial court and which is the basis for the filing of this application and seeking stay of the proceedings, and since they obtained the interim conservatory orders, they lost the urgency to prosecute their application and have began to delay the hearing of this matter.

16. On the merit of the appeal, the interested party contends that the appeal has a low probability of success as it does not relate either to the exclusion of admissible evidence, to the question of recusal of the Honourable trial Magistrate neither is it one whose importance justifies the filing of an appeal.

17. The applicants filed a supplementary affidavit sworn on the 18th August, 2025 reiterating the contents of their supporting

affidavit and contended that the appeal raises issues of violation of their rights under **Article 50** of the **Constitution** and thus the appeal is arguable as can be discerned from the Grounds of appeal. That the delay in the hearing of the matter before the trial court can only be associated to the laxity on the part of the respondent and the interested party as the applicants have never sought for an adjournment in the matter all along.

Applicant's Submissions

18. The applicants submitted that the scope of their appeal falls within exceptional circumstances under which stay of proceedings would be granted as it seeks to question the admissibility of certain and particular documents, which the applicants are contesting admissibility of, whose evidence will have a bearing on the case depending on whether they are admitted or not. That the appeal also questions the conduct of the trial Magistrate before whom an application for recusal is pending. Reliance was placed on the case of **Wycliffe Oparanya Ambesta Vs Director of Public Prosecutions,**

SC Petition 14 of 2016; (2017) eKLR and that of **Joseph Lendrix Waswa Vs Republic** as cited in the case of **Opwondo and 2 Others Vs Republic (2020) (Criminal Appeal E007 of 2025 KEHC 442 (KLR) (7 April 2025)**.

- 19.** The applicants submitted that this Court is clothed with the requisite jurisdiction to issue the orders that they have sought in the application and have relied on the case of **Opwondo & 2 others Vs Republic (supra) and that of Diana Kethi Kilonzo vs Republic (2016) KECA 19 (KLR)** on the principles that should guide the court when dealing with an application for stay of proceedings in criminal cases.
- 20.** On whether the appeal has chances of success, the applicants have averred that the same is grounded on violation and infringement of the applicants' sacrosanct rights as enshrined under **Article 50** of the **Constitution** and if the application is not allowed, the appeal will be rendered nugatory. Reliance was placed on the case of **Reliance Bank Limited vs Norlake Investments Limited (2002) 1 EA 227** in which the court stated that an arguable appeal is not one that must

necessarily succeed, but is simply one that is deserving the court's consideration.

21. The applicants have further submitted that if the order of stay is not granted, the matter before the subordinate court will proceed and that will pave the way for the prosecution to close its case, thus, denying the applicants the right to a fair hearing as enshrined in the Constitution. That the applicants will not have an opportunity to question the admissibility of the crucial pieces of evidence in the documents that are contested thus denying them a right to fair hearing. The applicants urged the court to issue an order for stay to preserve the status quo and prevent interim harm and to ensure that the appeal is not rendered an empty ritual. Reliance was placed on the case of **Samuel Otieno Obudo vs DPP and 6 others 2017, eKLR** and the case of **Francis Karioko Muruatetu and Another (2017)**.

22. The interested Party submitted on the general principles Governing the Grant of conservatory orders as set out under **Article 23(3)(c)** of the **Constitution** which provides that the court may grant conservatory orders in appropriate cases to

preserve the subject matter of litigation or to avoid prejudice to the applicant and to **Rule 23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which provides for enforcement of Fundamental rights and freedoms.

23. The interested party further submitted that an order for stay of proceedings, particularly for stay of proceedings in criminal proceedings is made sparingly and only in exceptional cases and that it is upon the applicant who seeks to stop the criminal proceedings to prove that unless stay of proceedings in question is granted, there is imminent threat of the impugned proceedings being undertaken and determined before the occurrence of an event that would render the outcome of the later nugatory. That the applicants have not disclosed a prima facie case to warrant the grant of the order sought.

24. The interested party avers that the applicant had previously made an application to recall five (5) witnesses and upon the trial court considering the application directed that for the

sake of orderly proceedings, it was prudent for the court to hear the investigating officer who had already taken the stand and that the issues raised in the application would be dealt with thereafter. That it was therefore misleading for the applicants to now claim that they were denied an opportunity to recall the witnesses.

25. It was also submitted that the applicants in their Petition have failed to demonstrate a clear violation or threatened violation of a Constitutional right that warrants urgent conservatory orders as the document now sought to be expunged was subjected to an extensive cross-examination by the defence and no objection was raised at the time. That expunging it at this stage would leave a gap in the record, thereby hampering the court's ability to fully appreciate and evaluate the evidence in its totality during judgement.

26. That the applicants have failed to show how they will suffer harm, let alone irreparable harm and that their constitutional rights including the right to a fair trial has not been curtailed. That the Anti- Corruption and Economic Crimes Act requires

that cases of this nature be heard and determined expeditiously.

27. It was also submitted that the application has not been made in good faith and all that the applicant seeks, is to delay the ultimate conclusion of the matter before the trial court. That the balance of convenience and the public interest weighs heavily against the issuance of the orders, as doing so would frustrate an ongoing lawful process. Further, that courts ought to exercise their discretion in order to ensure good judicial administration, a balance of the public interest is catered for, and the criminal justice system is not abused or placed in disrepute. Reliance was placed on the case of **Tom Onyango & 5 Others vs Independent Police Oversight Authority & 4 Others (2015) eKLR.**

28. It was also submitted that there is no provision in both the Constitution and the Criminal Procedure Code for interlocutory appeals and that the applicants appeal hinges on arguments that seek procedural rather than substantive justice. The interested party has relied on the case of **John Njenga Kamau Vs Republic, Criminal appeal No. 63 of 2014**

(2014) eKLR, Sheila Kinya Maingi vs Republic, Criminal Appeal No. 388 of 2008 (2016) eKLR and that of Maur Abdalla Bwanamaka vs Director of Public Prosecutions & another, Petition No.23 of 2018 (2019) eKLR.

29. That the applicants have failed to make full and frank disclosure, particularly that the matters raised herein have already been adjudicated and declined by the trial court and there is no material change in circumstances to warrant interference by this Honourable court. That the applicants Motion is devoid of merit, its an abuse of the court process and the legal threshold for conservatory relief has not been met under any of the above recognized principles.

Analysis and Determination

30. The court has considered the application and the material placed before it in support of and in opposition to the application, including the written Submissions. The singular issue for determination is whether the Prayer sought by the applicants for conservatory Orders pending the hearing and determination of the appeal should be granted.

31. The applicants herein have sought for an order for stay of proceedings pending the hearing and determination of the appeal. The appeal is against the ruling delivered by Hon. Jacinta Orwa CM on the 28th May, 2025 at Homa -Bay.

32. As rightly submitted by the interested Party, there is no provision in both the Constitution and the Criminal Procedure Code for interlocutory Criminal appeals. In the case of **John Njenga Kamau (supra)**, the court held;

“The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This Court’s considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during the trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case.”

33. Further, in the case of **Sheila Kinya Maingi Vs Republic, Criminal Appeal No. 388 of 2008 (2016) eKLR** the court had this to say about stay of proceedings;

“In criminal cases, it is good practice that an accused person who is aggrieved by an interlocutory decision made

during trial should await the conclusion of the trial, and if convicted, challenge that decision in a substantive appeal to the High court. Interlocutory appeals from decisions of trial courts have justifiably been discouraged because if they were to be entertained, then it would infringe on the accused person's constitutional right to a fair trial under Article 50(2) (e) of the Constitution that behooves the court to begin and conclude the trial of such an accused person without unreasonable delay."

34. The Courts have made determination on the principles governing the grant of stay of proceedings. The Supreme Court when dealing with an application for stay of proceedings in the case of **Edwin Harold Dayan Dande & 3 others Vs The DPP & 2 others in Petition Number 4 (E005) of 2022** held that the applicant could only apply for stay of Criminal Proceedings upon conviction and sentence either by the Subordinate Court or the High Court. An order for stay of proceedings should not be granted as a matter of course but upon the sparing exercise of judicial discretion and in the most exceptional cases. An order for stay will be granted in the following instances;

- 1. The appeal or the intended appeal is arguable and not frivolous**
- 2. Unless the order of stay sought was granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory; and**
- 3. It is in the Public interest that the Order of stay be granted.**

35. In the case of **Goddy vs Mwakio & another Republic (2011) eKLR**, the Court of Appeal in observing when Stay of Proceedings ought to be granted stated;

“An order for stay of proceedings, particularly stay of criminal Proceedings is made sparingly and only in exceptional circumstances.”

36. Similarly, in the case of **R Vs Rupert John Massey (2001) EWCACrim 2850 (20th December, 2001)**, the court in considering the factor of delay in stay proceedings in criminal trial held that;

“At common law, therefore, a stay should only be imposed in exceptional circumstances, and even more rarely in the absence of fault on the part of the complainant or prosecution, and no stay should be imposed unless a defendant has established, on the balance of probabilities, that he would suffer serious prejudice to the extent that no fair trial could be held.”

37. The Court has perused the grounds of appeal and this court has noted that the applicants have mainly challenged the exercise of judicial discretion by the learned Magistrate. The case before the trial court has substantially proceeded and 25 witnesses have already testified with the investigating officer as the last witness on the stand.

38. The applicants have not demonstrated that, unless the Orders sought herein are granted the appeal will be rendered nugatory or that their constitutional right to a fair trial will be violated. **Article 159 (2) (b)** of the **Constitution** requires that justice be administered without undue regard to procedural technicalities and without undue delay. In any event once the trial is concluded, the applicants will have a right to file a substantive appeal if they are convicted and the High court will consider all the issues that they shall in the appeal and grant the appropriate orders including and not limited to, a re-trial.

39. In the end, it is the finding of this court that the application has no merits and it is hereby dismissed.

40. It is so ordered.

Signed, dated and delivered virtually on this 15th day of
October 2025.

.....
L.M. NJUGUNA
JUDGE

In the presence of

Mr. Oriwa for the Appellant

M/s Wangia for the Interested Party

Miss Yattoo for the 1st Respondent

Court assistant - Adan

ORIGINAL