



Attorney General & 3 others v Initiative & 3 others (Civil Application E155 of 2025) [2025] KECA 1847 (KLR) (6 November 2025) (Ruling)

Neutral citation: [2025] KECA 1847 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E155 OF 2025
M NGUGI, AO MUCHELULE & WK KORIR, JJA
NOVEMBER 6, 2025**

BETWEEN

**HON. ATTORNEY GENERAL 1ST APPLICANT
THE CABINET SECRETARY FOR INTERIOR & COORDINATION OF
NATIONAL GOVERNMENT 2ND APPLICANT
DIRECTOR OF NATIONAL REGISTRATION BUREAU 3RD APPLICANT
COMMISSIONER FOR REFUGEE AFFAIRS 4TH APPLICANT**

AND

**HAKI NA SHERIA INITIATIVE 1ST RESPONDENT
HAMDI MUHUMED 2ND RESPONDENT
SAHAL ABDI AMIN 3RD RESPONDENT
DEKA MUKTAR GURE 4TH RESPONDENT**

(An application seeking stay of execution of the decision and orders of the High Court of Kenya at Garissa (Onyiego, J.) dated 21st January 2025 in Petition No. E008 of 2021)

RULING

1. In the motion dated 24th February 2025, the applicants have moved the Court for orders staying the execution of the judgment delivered on 21st January 2025 by Onyiego, J. pending the hearing and determination of an intended appeal against the judgment. The application is premised on the grounds on its face as well as the averments in the supporting affidavit sworn on 24th February 2025 by Mr. John Burungu, the Commissioner for Refugee Affairs.



2. The gist of the petition presented to the High Court was that there were Kenyans, including the 2nd to 4th respondents who, for various reasons, had registered themselves as refugees and after being vetted and confirmed to be Kenyans, were now seeking orders compelling the applicants to register them as such. Upon hearing the petition, the learned Judge agreed with the respondents and issued, among other orders, an order of mandamus compelling the applicants “to deregister within 60 days names of victims of double registration who have been screened, vetted, cleared and declared to be Kenyan citizens from the refugees’ data base.” The applicants are aggrieved by the orders of the trial court and argue that the learned Judge misapprehended the law and the facts presented before him, leading to an incorrect decision. They aver that if the judgment is implemented, it will significantly disrupt registration services across the country and may result in instances of double registration. Furthermore, they express concern that deregistering individuals identified as doubly registered within the provided short timeframe poses serious risks to the security of personal data thereby potentially exposing them to identity theft, fraud, or the misuse of their data by malicious actors. The applicants also point out that implementing the judgment within the proposed 60-day period would impose substantial and unplanned costs on the Government and taxpayers. They contend that the directive to deregister individuals within this period is operationally challenging and may hinder the Government’s ability to effectively manage the registration system, risking wrongful removal of legitimate registrants. Lastly, they aver that if the judgment is not stayed, the appeal, if successful, will be rendered academic and meaningless.
3. The application was opposed by the respondents through a replying affidavit sworn on 19th May 2025 by Ms. Haretha Bulle, the Chairperson of the 1st respondent. The respondents aver that the application and the intended appeal are simply meant to obstruct justice as they are without merit. They assert that an order of stay will subject the 2nd to 4th respondents to continued denial of national identity cards and violation of their fundamental rights. They emphasize that the issue of double registration is a long-standing challenge owing to systemic failures by government agencies and this has resulted in negative socio-economic impact on the affected individuals. Further, the respondents aver that granting an order of stay would cause significant prejudice to the 2nd to 4th respondents and other victims of double registration. They contend that the affected individuals have continually been subjected to an unfair vetting process, leading to unreasonable and disproportionate delays, thus hindering their access to basic services and socio-economic rights, including education, healthcare and employment. According to the respondents, any further delay would result in continued violation of constitutional rights to identity, dignity and free movement, as well as missed employment and business opportunities.
4. The respondents further fault the applicants for failing to establish a clear mechanism to guide the vetting committee, leaving no recourse for those unjustly denied vetting. The respondents aver that an order of stay will lead to lack of clarity and concrete timelines regarding how the applicants will uphold the rights and nationality of the affected persons. Rejecting the averment that there are no funds for the exercise, the respondents state that resources allocated for issuance of national identity cards come from public funds and are intended for all Kenyans. Further, that allowing the application would reduce the constitutional right of access to courts to mere rhetoric as there will be no practical remedy for individuals seeking justice. According to the respondents, such an order will not only undermine the authority of the High Court and perpetuate the infringement of fundamental rights, but also pose serious threat to justice, fairness and the rule of law. The respondents argue that conversely, the applicants will not be prejudiced should the application be declined, and that in any event the applicants’ intended appeal is not arguable.



5. When this application came up for hearing learned counsel, Mr. Weche appeared for the applicants while learned counsel, Mr. Olweya was present for the respondents. Counsel for the parties made brief oral highlights on top of the written submissions. We highlight the respective submissions hereunder.
6. Submitting in support of the application, learned counsel for the applicants referred to Apungu vs. Justinice Limited [2024] KECA 99 (KLR) to point out that in an application for stay of execution, the applicant must disclose an arguable appeal that is likely to be rendered nugatory should the order sought be declined. Counsel submitted that the appeal raises arguable points in that the learned Judge failed to consider the respondents' contribution to the double registration and their intention to benefit from refugee status as well as citizenship. Counsel argued that the learned Judge did not factor in the complexity of deregistration when ordering compliance within 60 days. Relying on the definition of the term 'nugatory' in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR) as worthless, futile, invalid or trifling, Mr. Weche submitted that the subject of the intended appeal is an issue of great public interest and failure to grant an order of stay will render the intended appeal nugatory. According to counsel, failure to grant stay will cause the Government to incur unplanned costs resulting in severe disruption of registration services and most certainly occasion double registration. Counsel maintained that such damage will be irreversible and will affect national security. He therefore urged that we allow the motion.
7. In opposition to the application, learned counsel, Mr. Olweya submitted that the same was filed in bad faith, contending that the intended appeal is not arguable and that the applicants have not indicated the amount of time they need to implement the orders. Counsel argued that the applicants intend to bundle the 2nd to 4th respondents together with other victims of double registration and keep them in limbo, not knowing when their rights will be enforced. Counsel submitted that allowing the application would amount to an endorsement of the applicants' inaction, and the Court should not accede to such conduct. Further, that the applicants have not specified the alleged security concerns and data privacy risks.
8. With regard to the nugatory aspect, counsel referred to Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 Others [2014] KECA 689 (KLR) to urge that an order under rule 5 (2) (b) being an equitable remedy, the applicants ought to come to Court with clean hands and not with the intention of defeating justice or limiting the respondents' enjoyment of the fruits of the judgment. Counsel submitted that the public interest aligns with upholding the Bill of Rights and the rule of law. Counsel submitted that allowing the application will adversely deny the respondents their right to nationality. Additionally, Mr. Olweya contended that the cumulative loss endured by the respondents is immeasurable, extending to their identity and dignity, and that they will not receive any reasonable compensation for the time wasted waiting for the applicants to act. It was counsel's ultimate urging that the application be dismissed with costs.
9. The principles governing an application for stay of execution under rule 5(2)(b) of the Court's Rules are well demarcated. Thus, among the principles distilled in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (supra) in regard to the exercise of the Court's jurisdiction under rule 5(2)(b) are: that the discretion of the Court to grant orders is wide and unfettered: that the applicant must establish the twin principles of arguability of the appeal and nugatoriness; that the jurisdiction of the Court only accrues once a notice of appeal is filed; that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; that a single bona fide arguable ground of appeal is sufficient to make an appeal arguable; that in considering the application the court must not make definitive findings of either fact or law so as not to embarrass the ultimate hearing of the main appeal; and, that 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, and if not reversible whether damages will reasonably compensate the party aggrieved.

10. We agree with the stated principles and shall apply them in determining the application at hand. The orders made by Onyigo, J., which are the subject of this application were as follows:

“In view of the above holding, I find that the petition herein is merited and the same is allowed with the following reliefs/orders granted;

- a. A declaration be and is hereby issued that refusal by the respondents to deregister the 3rd and 4th petitioners from the refugees' data base even after being vetted and declared to be Kenyan citizens is unconstitutional and an infringement of their constitutional rights under Article 14 (1) of *the constitution*.
 - b. A declaration be and is hereby issued that the 3rd and 4th petitioners are Kenyan citizens by birth as provided under Article 14(1) of *the constitution* and are entitled to the rights of a citizen as provided under Article 12(1) of *the constitution*.
 - c. A declaration be and is hereby issued that failure by the respondents to act or give sufficient reasons within reasonable time why the 2nd, 3rd and 4th petitioners could not be issued with identification documents such as an ID card is unconstitutional and in breach of Article 47 of *the constitution*.
 - d. That an order of Mandamus be and is hereby issued directed to the 1st and 2nd respondents to direct and compel the 4th and 5th respondents to deregister and or remove with immediate effect the names of the 3rd and 4th petitioners from the refugees' data base.
 - e. That an order of mandamus be and is hereby issued directed at the 1st, 2nd and 3rd respondents to facilitate registration and issuance of identification documents inter alia ID card and or pass port to the 3rd and 4th petitioners within 60 days from the date of this judgment.
 - f. That an order of mandamus be and is hereby issued to the respondents to deregister within 60 days names of victims of double registration who have been screened, vetted, cleared and declared to be Kenyan citizens from the refugees' data base.
 - g. That a mandamus order be and is hereby issued directed to the 2nd and 4th respondents in collaboration with other relevant agencies to within 60 days constitute vetting committees or if already constituted to re-activate them and to within six months from the date of delivery of this judgment commence screening and vetting process. A report on the progress of the process to be filed in court by the respondents upon the expiry of six months.
 - h. That each party shall bear own costs.”
11. In making a case that the intended appeal is arguable, the applicants exhibited a 12-point memorandum of appeal. It must be recalled that a single arguable point is sufficient to pass muster under the arguable appeal test. One of the salient themes in the memorandum of appeal is the challenge mounted against the learned Judge's exercise of discretion to issue an order of mandamus compelling the applicants to alter the contents of the register of persons. In our view, that is an arguable point and we need not say more save to agree with the applicants that their intended appeal is indeed arguable.
12. Turning to the nugatory aspect, the applicants contend that if stay is not granted and the judgment is implemented, there will be significant disruption of registration services and there may be instances of double registration. Their concern is that deregistering individuals identified as doubly registered



within the provided short timeframe poses serious risks to personal data security, thus potentially exposing individuals to identity theft, fraud, or misuse of their information by malicious actors. Similarly, they contend that implementing the judgment within the proposed 60 days imposes substantial and unplanned costs on the Government, and may hinder its ability to effectively manage the registration system, thus risking wrongful removal of legitimate registrants.

13. Opposing the application, the respondents assert that granting an order of stay would cause significant prejudice to them and other victims of double registration and subject them to an unfair vetting process, leading to unreasonable and disproportionate delays, thus, hindering their access to basic services and enjoyment of socio-economic rights due to a lack of national identity cards. They argue that any further delay would result in immeasurable cumulative loss of identity and dignity, along with missed opportunities for employment, business, and free movement, all being rights guaranteed under *the Constitution*.
14. Whereas the respondents have a right to registration to enable them access basic rights and social services as Kenyan citizens, there is need to consider the applicants' lamentation that complying with the judgment within the limited timeframe poses several risks. The applicants have indeed made a strong case for the conservation of the register of persons, the difficulty in adhering to the timelines set by the learned Judge and the likely impact of compliance with the orders on national security, public finances and personal data. This Court cannot overlook the explicit apprehensions and their likely impact should an order of stay be declined. In *Munya vs. Kithinji & 2 Others* [2014] KESC 30 (KLR), the Supreme Court, in advancing a case for consideration of public interest in applications such as the one at hand, expressed itself as follows:

“Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.”

15. It is not lost upon us that the competing claims in this matter lie in favour of public interest, national security, rights of other citizens and good governance. All these factors converge with the constitutional principle that public money should be used prudently.
16. Still on the issue, Article 238 of *the Constitution* defines national security as:

“The protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.”

17. There is a greater mandate bestowed on the State through the applicants to guarantee national security. This Court in discharging its mandate must also be alive to this mandate and seek to strike a balance between the State's duty and the respondents' rights. In that regard, it was held in *Attorney General & Another vs. Coalition for Reform and Democracy & 7 Others* [2015] KECA 994 (KLR) that:

“We agree with Prof. Muigai that in an application of this nature, which is not seeking entirely private law remedies, the Court must also consider where the public interest lies. In *Planned Parenthood Of Greater Texas Surgical Health Services* case, (*supra*), it was held that when the State is the appealing party in an appeal where the constitutionality of a statute is the



subject matter for determination, the State interest and harm merges with that of the public. There is also the doctrine of presumption of constitutionality which must be borne in mind. The impugned Act is intended to serve the public.”

18. We agree with the above views. We also wish to highlight that in *Director General National Intelligence Service & Another vs. Vincent Konga Chelimo* [2019] KECA 171 (KLR), the Court considered the sensitivity of national security and public interest in granting stay.
19. Even though it cannot be affirmed at this stage that the intended appeal will succeed, there remains a possibility that the applicants’ success, even if on some aspects of the appeal, will result in the judgment being overturned. Allowing implementation of the judgment in light of such a possibility would unnecessarily negatively impact the public interest, national security and data privacy of citizens. On the other hand, the sufferings alluded to by the respondents can be alleviated through damages. We are therefore minded, just like the Supreme Court in *Munya vs. Kithinji & 2 Others* (supra) to safeguard national resources and security. Consequently, we would agree with the applicants that the possible impacts of complying with the orders of the High Court during the pendency of the intended appeal would be dire, some with no antidote for reversing them. In essence, the intended appeal would be rendered nugatory.
20. From the foregoing, we are satisfied that the applicants have satisfied the dual principles for the grant of the order sought. As such, the notice of motion dated 24th February 2025 is merited and is hereby allowed. The costs of the application shall abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

