



**UDV (Kenya) Limited v Bia Tosha Distributors Limited & 3 others (Civil Application E165 of 2025) [2025] KECA 1862 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1862 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E165 OF 2025  
W KARANJA, M NGUGI & LA ACHODE, JJA  
NOVEMBER 7, 2025**

**BETWEEN**

**UDV (KENYA) LIMITED ..... APPLICANT**

**AND**

**BIA TOSHA DISTRIBUTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BIA TOSHA DISTRIBUTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DIAGEO PLC ..... 3<sup>RD</sup> RESPONDENT**

**COGNO VENTURES LIMITED ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of the Ruling and Orders of the High Court of Kenya (L. Mugambi, J.) dated 4th March 2025 in HCC No. 249 of 2016)*

**RULING**

1. In its application dated 13<sup>th</sup> March 2025, the applicant, UDV (Kenya) Limited, seeks orders for stay of the ruling and orders delivered by the High Court (Hon. L. Mugambi, J.) on 4<sup>th</sup> March 2025 in Nairobi High Court Constitutional Petition No. 249 of 2016-Bia Tosha Distributors Limited v. Kenya Breweries Limited and Others. The applicant also seeks stay of further proceedings in the said petition pending hearing and determination of an intended appeal against the said ruling.
2. The application is brought under rule 5(2)(b) of this Court's Rules and is based on the grounds on its face and further elucidated in the affidavit in support sworn by Ms. Karen Mate-Gitonga, the applicant's Legal Manager, on 13<sup>th</sup> March 2025.
3. The averments by the applicant, which are not disputed by the 1<sup>st</sup> respondent in material respects, indicate that the application has its genesis in a ruling of the High Court in Constitutional Petition No. 249 of 2016 in which the 1<sup>st</sup> respondent sued the applicant and the 2<sup>nd</sup> respondent with



respect to contracts for distributorship routes for the applicant's and 2<sup>nd</sup> respondent's products. The petition challenged, inter alia, the termination of distribution rights and alleged violations of the 1<sup>st</sup> respondent's constitutional rights to property.

4. The constitutional petition was accompanied by an application for conservatory orders in which the first respondent sought orders, pending the hearing and determination of the petition, preserving the 1<sup>st</sup> respondent's exclusive territory under the area of operation arrangements obtaining as at 2<sup>nd</sup> February 2006. In his ruling dated 29<sup>th</sup> June 2016, Onguto J. granted orders preserving the 1<sup>st</sup> respondent's territories under the area of operation arrangement obtaining as at 2<sup>nd</sup> February 2006, save with respect to the distribution of keg beer.
5. Aggrieved by the decision, the 2<sup>nd</sup> respondent and the applicant filed an appeal to this Court, being Civil Appeal No. 163 of 2016- Kenya Breweries Limited v Bia Tosha Distributors Limited. In its decision, this Court stayed the orders of the High Court and ultimately determined the appeal in favour of the applicant and 2<sup>nd</sup> respondent.
6. On a further appeal to the Supreme Court by the 1<sup>st</sup> respondent, which was aggrieved by the judgment of this Court, in Supreme Court Petition No. 15 of 2020- Bia Tosha Distributors Limited v Kenya Breweries Limited, the Supreme Court, in its judgment dated 17<sup>th</sup> February 2023, determined the appeal in favour of the 1<sup>st</sup> respondent. It set aside the judgment of this Court in its entirety; reinstated the orders of the High Court dated 29<sup>th</sup> June 2016; directed the High Court to consider the consequences of disobedience of any of those orders; and remitted the matter to the High Court for disposal of the amended petition dated 20<sup>th</sup> June 2016.
7. Following this judgment, an application was made to the apex court for review of its judgment, which resulted in a clarification ruling dated 26<sup>th</sup> May 2023. In this ruling, the Supreme Court stated that the issue of contempt of the orders of the High Court was still a live issue before the High Court, and that is why it had remitted the matter back to the High Court to deal with the pending contempt application on merit. It further stated that the High Court was expected to punish the applicant and the 2<sup>nd</sup> respondent for contempt only if it was satisfied about the nature and extent of the contempt.
8. Prior to the Supreme Court Clarification Ruling dated 26<sup>th</sup> May 2023, the applicant had filed an application dated 23<sup>rd</sup> February 2023 seeking an order to confirm that it was not the subject of the conservatory orders issued by the High Court on 29<sup>th</sup> June 2016 and could, therefore, not be in contempt of the said orders. The High Court (Ong'udi J.), in a ruling dated 28<sup>th</sup> April 2023, issued directions for the hearing and determination of the applicant's application; and further held that the High Court had the jurisdiction to interpret the conservatory orders to enable a party to comply or purge its contempt.
9. The matter then came up before the High Court (Mwita J.) who, in a ruling dated 13<sup>th</sup> December 2024, struck out the applicant's application on the basis that in its judgment, the Supreme Court had found the applicant in contempt of the orders of the High Court. That ruling resulted in yet another application to this Court dated 18<sup>th</sup> December 2024 seeking, among others, stay of the ruling of Mwita J. and of further proceedings in the petition before the High Court.
10. At the hearing before this Court, the application was compromised upon concession by the 1<sup>st</sup> respondent that Mwita J was in error in failing to consider the Supreme Court's Clarification Ruling dated 26<sup>th</sup> May 2023. Accordingly, orders were issued, by consent, that the matter be remitted to the High Court for the Court to proceed with the matter in terms of the decision of the Supreme Court dated 17<sup>th</sup> February 2023 and its Clarification Ruling dated 26<sup>th</sup> May 2023.



11. Pursuant to the consent order before this Court, the parties appeared before Mugambi, J. on 24<sup>th</sup> February 2025 for directions on the hearing of the applications pending before the High Court. The applicant argued that its application should be heard first, while the 1<sup>st</sup> respondent insisted that its application for contempt dated 23<sup>rd</sup> August 2016 should be prioritised.
12. In the ruling dated 4<sup>th</sup> March 2025 which is the subject of this application, the High Court held that by its judgment dated 17<sup>th</sup> February 2023, the Supreme Court had found that there was contempt of the court orders issued on 29<sup>th</sup> June 2016, and that the High Court should proceed to assess suitable punishment arising out of the 1<sup>st</sup> respondent's contempt application pending before it. The High Court ruled that the applicant must purge its contempt before being granted audience before the High Court, otherwise the High Court would be going against the decision of the Supreme Court should it entertain the applicant's application. This is the ruling that precipitated the present application.
13. The applicant avers that by its ruling, the High Court has erroneously held it to be in contempt, even though it has not been given an opportunity to be heard on the issue, and even though the issue had been clarified and the finding of contempt set aside in the Supreme Court's Clarification Ruling. Further, that the said High Court ruling of 4<sup>th</sup> March 2025 is res judicata, there having been no appeal or review of the ruling of Ong'udi J. dated 28<sup>th</sup> April 2023; and further, that it is unconstitutional as it results in denying the applicant its fundamental rights under Articles 25, 48, and 50 of *the Constitution*.
14. In its written submissions dated 1<sup>st</sup> April 2025, the applicant reiterates the facts of the dispute which we have set out above. It submits that it has an arguable appeal, citing the decisions in ICEA Lion General Insurance Company Limited v. Board of Governors Rioma Mixed Secondary School [2019] KEHC 4825 (KLR) for the proposition that demonstration of even one arguable ground of appeal is sufficient; and Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Limited & 2 Others [2008] KECA 327 (KLR) for the holding that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully.
15. On whether the appeal would be rendered nugatory, the appellant submits that unless the orders sought are granted, its fundamental right to hearing under article 50 and right to freedom of movement under article 39 will be violated; and it is likely to be subjected to punishment for contempt without being heard. It cites in support the decisions in Butt v. Rent Restriction Tribunal [1979] KECA 22 (KLR); Reliance Bank Limited v. Norlake Investments Limited [2002] 1 E.A. 227 and Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013] KECA 378 with respect to the import and implication of an appeal being rendered nugatory.
16. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents supported the application.  
  
The 5<sup>th</sup> respondent filed an affidavit in support sworn by Shadrack Onyango Oriah on 15<sup>th</sup> May 2025 which mirrors, in material respects, the averments by the applicant. In submissions dated 15<sup>th</sup> May 2025, the 5<sup>th</sup> respondent argues that the applicant's intended appeal is arguable as, by the impugned ruling, the High Court disregarded the consent order of this Court dated 3<sup>rd</sup> February 2025 and the earlier ruling of the High Court (Ong'udi J.) directing that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' applications dated 23<sup>rd</sup> February 2023 proceed to hearing. It submits that the appeal will be rendered nugatory if the stay orders are not granted as the court will proceed to hear the 1<sup>st</sup> respondent's application for contempt and the petition without the applicant, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents being heard, thus rendering the intended appeal nugatory.
17. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn by its Managing Director, Ms. Anne-Marie Burugu, on 25<sup>th</sup> March 2025, and submissions dated 19<sup>th</sup> May 2025. The



essence of its opposition was that the High Court ruling and order of 4<sup>th</sup> March 2025 was a negative order, incapable of being stayed; that all the parties before the High Court were agreed that the High Court was in error in its finding in the impugned ruling; and that the applicant did not have an arguable appeal, the 1<sup>st</sup> respondent having conceded the substance of the intended appeal; and the present application was an abuse of the court process. The 1<sup>st</sup> respondent relied on, inter alia, the decisions in *Beatrice Yagan vs Joseph Yator Civil Appeal No. 164 of 1997* and *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Limited & Others [2009] KECA 453 (KLR)*.

18. When the matter came up for hearing before us on 26<sup>th</sup> May 2025, learned counsel, Mr. George Oraro, SC, appeared with learned counsel, Mr. William Ochieng and Alphonse Oduor for the applicant; learned counsel, Mr. Fred Ngatia, SC, Mr. Oriema Okoth and Dr. Kiplagat appeared for the 1<sup>st</sup> respondent; learned counsel, Mr. Kamau Karori, SC, appeared with Ms. Odari for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents; while learned counsel, Prof. Githu Muigai, SC, and Mr. Issa Mansur were present for the 5<sup>th</sup> respondent. We heard the respective representations and submissions of the parties as presented by learned counsel, Mr. Oraro, Mr. Ngatia, Prof. Muigai, Mr. Karori and Dr. Kiplagat.
19. While all learned counsel were in agreement that the ruling of Mugambi, J. was made in error in light of the Clarification Ruling of the Supreme Court and the consent order recorded before this Court on 3<sup>rd</sup> February 2025, an apparently insurmountable hurdle was how to move forward from there. In light of the parties' irreconcilable positions on what appears to be a fairly straightforward matter, we address ourselves to the application before us against the established principles to be satisfied in an application under rule 5(2)(b) of this Court's Rules.
20. It is settled that an applicant seeking orders of stay of execution under rule 5(2)(b) must satisfy this Court on two principles: that it has an arguable appeal and, absent stay, the appeal, if successful shall be rendered nugatory-see *Stanley Kang'ethe Kinyanjui v Tony Ketter & Others [2013] eKLR*.
21. It is common ground that in rendering the ruling dated 4<sup>th</sup> March 2025, the learned Judge acted in error in light of the Clarification Ruling of the Supreme Court and the consent order before this Court. The superior court below held in its ruling that the "respondent had to proceed and purge the contempt before being granted audience before this court." The applicant has argued, an argument that is supported by the 2<sup>nd</sup> -5<sup>th</sup> respondents, that the effect of this ruling is to deny it audience. The 1<sup>st</sup> respondent takes the contrary position.
22. Having considered the ruling and the averments and submissions of the parties, we take the view that the applicant is correct in arguing that this holding effectively denies it audience (as an alleged contemnor) before it has been heard and adjudged to be in contempt. It has an application before the High Court seeking to clarify the orders of 29<sup>th</sup> June 2016. That application had been before the High Court, and in the ruling dated 28<sup>th</sup> April 2023, Ong'udi J. held that the import of the said order should be clarified before the contempt application was heard.
23. The 1<sup>st</sup> respondent has countered that it has conceded the High Court's error in the ruling the subject of this application, but the ruling is in force and has not been reviewed, the applicant electing to challenge it on appeal.
24. Further, the applicant has raised, in its Memorandum of Appeal, the question of the aforesaid ruling of Ong'udi J. dated 28<sup>th</sup> April 2023, which addressed itself to the issue of clarification of the orders of 29<sup>th</sup> June 2016; and which had not been appealed from. The 1<sup>st</sup> respondent's response with regard to this ruling is that its import was altered by the later Clarification Ruling of the Supreme Court dated 26<sup>th</sup> May 2023. Perhaps. This, however, is an issue that can only be determined on a full consideration



of the respective arguments of the parties on appeal. Suffice to say that the applicant has an arguable appeal as defined in the jurisprudence of this Court.

25. Will the appeal be rendered nugatory if the orders sought are not granted? The applicant argues, a position supported by the 2<sup>nd</sup> - 5<sup>th</sup> respondents, that the impugned ruling denies it (and the 2<sup>nd</sup> - 5<sup>th</sup> respondents) audience before the trial court until it purges the contempt, yet it has not been heard on the application seeking to punish it for contempt; that should the order remain in force and the hearing of the contempt application and the petition before the High Court proceed, it will be condemned unheard, resulting in a violation of its right to a hearing. On the basis of the facts before us, this appears to be the likely outcome if the orders sought are not granted. Further, a finding of contempt may result in penal consequences that, as the applicant submits, will affect liberty and property, thus rendering its appeal against the said ruling nugatory-see *Egerton University v University Academic Staff Union* [2023] KECA 795).
26. We are, therefore, satisfied that the application dated 13<sup>th</sup> March 2025 is merited, and we hereby grant the orders sought therein.
27. In closing, we observe that ideally, this is a matter that the parties, with a little less intransigence, could easily settle, so that the substantive issues raised in the petition, which has been in the High Court for well-nigh a decade, can be addressed on their merits.
28. The costs of the application shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL MUMBI NGUGI**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

