



REPUBLIC OF KENYA



British Broadcasting Corporation (BBC) v Wetangula (Civil Application E115 of 2025) [2025] KECA 2027 (KLR) (28 November 2025) (Ruling)

Neutral citation: [2025] KECA 2027 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E115 OF 2025
W KARANJA, K M'INOTI & LA ACHODE, JJA
NOVEMBER 28, 2025**

BETWEEN

BRITISH BROADCASTING CORPORATION (BBC) APPLICANT

AND

SENATOR MOSES MASIKA WETANGULA RESPONDENT

(Application for stay of further proceedings pending the hearing and determination of an appeal from the rulings and orders of the High Court of Kenya at Nairobi (Meoli, J.) dated 5th October 2023 and 27th November 2024 in HCCC No. 44 of 2015)

RULING

1. The applicant, the British Broadcasting Corporation (BBC) has moved the Court vide a motion on notice dated 3rd March 2025 for an order of stay of further proceedings in the High Court pending appeal from two rulings dated 5th October 2003 and 27th November 2024. By the first ruling, the High Court dismissed the applicant's application for a Letter of Request to the High Court of Justice in England requesting the latter court to undertake an examination of relevant witnesses in order to obtain documents and information pertaining to on-going litigation between the applicant and the respondent, Senator Moses Masika Wetangula, in Kenya. By the second ruling, the High Court also dismissed the applicant's application for stay of further proceedings pending the hearing and determination by this Court of an appeal against the first ruling.
2. The background to the application now before us is that the respondent filed suit in the High Court of Kenya at Nairobi against the applicant for damages for defamation following publication by the applicant of a documentary entitled "Panorama: The Secret Bribes of Big Tobacco", on 30th November 2015 and 4th December 2015. The respondent averred that the said documentary was defamatory of him for alleging that he had received a bribe and corrupt benefit from the British American Tobacco Company (BAT). By way of remedies the respondent prayed for a permanent injunction to restrain



- the applicant from further publication or dissemination of the material complained of, general and aggravated damages, costs and interest.
3. In its defence, the applicant admitted publication of the material in question, but denied that it was defamatory of the respondent. It denied having acted recklessly or having been actuated by malice and pleaded that it had interviewed the respondent and published his response. The applicant further pleaded qualified privilege, among the particulars being that BAT had conceded in court proceedings in the United Kingdom that the payments allegedly made to the respondent constituted unlawful bribes.
 4. On 13th July 2022, the applicant applied in the High Court, principally under Section 54 of the *Civil Procedure Act* and Order 28 rule 4 of the Civil Procedure Rules, for a Letter of Request to be sent to the High Court of Justice in England asking it to conduct an examination of the relevant witnesses and to obtain all such documents and information as are produced in the examination and thereafter to return them to the High Court of Kenya. The applicant also prayed for stay of further proceedings pending the outcome of the request.
 5. The respondent opposed the application on several grounds, among them inordinate delay in making the application; foundation of the application on non-existent legal provisions; vagueness, broadness and ambiguity of the application; and inconvenience likely to be wrought by grant of the application.
 6. In a ruling dated 5th October 2023, the High Court declined to grant the Letter of Request on the grounds that the request was too broad and bereft of the particulars of the evidence sought or identity or number of the witnesses desired. As a consequence, the court also denied the prayer for stay of proceedings.
 7. The applicant was aggrieved and lodged a notice of appeal on 17th October 2023, followed by the record of appeal on 3rd March 2025. The appeal in this Court is pending hearing and determination.
 8. On 24th June 2024, the applicant filed in the High Court an application for stay of further proceedings pending the hearing and determination of its appeal. That application was dismissed vide a ruling dated 21st November 2024 on the grounds of inordinate delay, lack of a memorandum of appeal and the finding that it was not in the interest of justice to stay proceedings. The applicant filed a notice of appeal on 4th December 2024, followed by the application now before the Court for stay of further proceedings in the High Court.
 9. In support of the application, Mr. Inamdar, learned counsel for the applicant, relied on his supporting and supplementary affidavits sworn on 3rd March 2025 and 7th May 2025, respectively, the supporting affidavit of Lucy Mwaura, also sworn on 3rd March 2025, and written submissions and a list of authorities dated 8th May 2025.
 10. Counsel submitted that the power of the Court under rule 5(2)(b) of the Court of Appeal Rules is original and discretionary and that the fact that the High Court has dismissed an application for stay of proceedings does not preclude this Court from entertaining a similar application. He added that the application for stay of proceedings was pending the hearing and determination of the appeal already filed, and not the appeal from the ruling of the High Court dismissing the application for stay of proceedings.
 11. It was further submitted that the pending appeal is arguable because it raises, among other issues, whether the High Court erred in holding that the Letter of Request was vague and ambiguous, whereas the applicant had specified that what it sought was the report of the investigations conducted by BAT. It was contended that the report was in the possession of BAT, was referred to in proceedings against BAT in England and that it revealed that BAT's employees had offered corrupt benefits to several



- people, including the respondent. The applicant further submitted that BAT had indicated that it could only release the report pursuant to a court order. It was also contended that the appeal questions the correctness of the High Court's interpretation and application of the law on Letters of Request to a foreign court.
12. Turning to whether the pending appeal will be rendered nugatory if it succeeds absent an order of stay of proceedings, the applicant submitted that if the trial in the High Court proceeds and is determined before resolution of the issues in the appeal, the appeal will be rendered nugatory because the matter will have been determined without important evidence, which the applicant is in law entitled to. The applicant also submitted that conclusion of the High Court trial without the evidence sought will amount to denial of its right to a fair hearing which is guaranteed by Article 50 of *the Constitution* and that damages and costs cannot be an adequate remedy for violation of a right which under *the Constitution* cannot be abridged. In support of the submission the applicant relied on the decisions of this Court in Attorney General & another v. Tolkien Nafula & Another [2021] eKLR and Parliamentary Service Commission v. Okoiti & Another [2021] eKLR.
 13. The respondent opposed the application vide his replying affidavit sworn on 17th March 2025, the further affidavit sworn by Kevin Kang'ethe on 8th May 2025 and submissions and list of authorities dated 22nd April 2025.
 14. The respondent submitted that the application was incompetent because it was supported by an affidavit sworn by the applicant's advocates on matters that are contentious. In that regard, the respondent relied on the decision of the Environment and Land Court in Homeboyz Entertainment Ltd v. Secretary, National Building Inspectorate & 2 Others [2022] eKLR.
 15. It was the respondent's further submission that the intended appeal was frivolous and not arguable because having filed a defence to the respondent's claim, the applicant's Letter of Request was nothing but a stratagem to gather material which it ought to have had at the time of the publication of the report complained of. Citing the decision in Titus Ngenye Muthama & another v. Angelina Nzioka [2019] eKLR and Atek Otech Richard & 11 others v. Stelco Properties & Another [2022] eKLR, the respondent submitted that in an adversarial system, it was not the business of the court to assist parties to obtain evidence.
 16. As regards whether the appeal risked being rendered nugatory, the respondent submitted that the applicant had failed to demonstrate how the appeal would be rendered nugatory. It was submitted that in the absence of an order of stay of further proceedings, the proceedings in the High Court will continue and that if the appeal succeeds, all it will mean is that those proceedings were unnecessary, which does not amount to rendering the appeal nugatory. In support of the contention the respondent relied on Katangi Developers Ltd v. Prafula Enterprises Ltd & Another [2018] eKLR.
 17. The respondent also submitted that the application was undeserved because of inordinate delay and the fact that this Court is reluctant to grant an order of stay of execution due to its implications for timely resolution of disputes. It was contended that the applicant waited for more than nine months after filing the notice of appeal to apply for stay of proceedings in the High Court and that the present application was a reaction to a scheduled pretrial conference. In support of the submission the respondent cited Kuko & Another v. Robinson & Another [2024] KECA 305 (KLR).
 18. We have carefully considered this application. There is no contest between the parties as regards the principles that guide this Court in an application under rule 5(2)(b). Those principles are well articulated in Stanley Kang'ethe Kinyanjui v. Tony Ketter & Others [2013] eKLR and it will serve no purpose to belabour them. All that the applicant is supposed to satisfy the Court is that the appeal is



arguable and unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds. The applicant must satisfy both, rather than only one consideration.

19. On whether the appeal is arguable, the applicant intends to urge on appeal that the Letter of Request has a foundation in our law and that the applicant clearly identified in its application the evidence it is seeking from England. It will be faulting the High Court for holding that the application was vague and ambiguous. The applicant also faults the manner in which the High Court interpreted and applied the provisions of section 54 of the *Civil Procedure Act* and Order 28 rule 4 of the Civil Procedure Rules.
20. On his part the respondent attacks the competence of the application because it is supported by an affidavit sworn by counsel and because of what he considers inordinate delay. He contended that the appeal is not arguable because Letter of Request was nothing but a fishing expedition and that in an adversarial system it is not the duty of the Court to assist parties to obtain evidence. He adds that the applicant ought to have had the evidence it is seeking before publication of the impugned story.
21. At this stage, it is not our province to make definite findings regarding the merits or otherwise of the appeal. That is strictly for the bench which hears the appeal. We are allowed only to have impressions on prima facie basis.
22. On the competence of the application, all we will say is that while agreeing with the respondent that counsel is not permitted to depose to contentious matters, the law allows counsel to depose to matters within his or her knowledge. In this case, counsel for the applicant has deposed to matters within his knowledge as regards the Letter of Request and the issues of law raised therein. The affidavit appears to us to fall properly within the accepted exceptions to the rule that bars affidavits by counsel.
23. As regards inordinate delay, we emphasise the basic point that under rule 5(2) (b), the jurisdiction of the Court is original and discretionary and is not constrained by whether or not the applicant has previously unsuccessfully sought stay of execution in the trial court. In considering whether the application is made after inordinate delay, we ought to be guided by the time the application was made relative to the decision that is challenged on appeal. The application was filed on 3rd March 2025 after the trial court dismissed the application for stay of further proceedings on 27th November 2024, a period of slightly more than three months, which we would not consider in the circumstance of this case inordinate.
24. We further take into account the fact that an arguable appeal does not ultimately have to succeed. To satisfy that description, the appeal should not be frivolous and should raise even one bona fide issue worth of consideration by the Court. Accordingly, we are satisfied that the applicant's appeal is arguable.
25. As regards whether the appeal risks being rendered nugatory, it cannot be gainsaid that an order for stay of execution is granted with circumspection because of its effect on timely resolution of disputes. But there is no rule that stay of further proceedings cannot issue. Such a view is debunked by rule 5(2)(b) itself, which expressly empowers the Court to grant an order of stay of proceedings if the circumstances demand it. Accordingly, whether or not to grant such an order must be determined on case by case basis, taking into account the peculiar circumstances of each case against the overriding need to conclude proceedings without undue delay.
26. In this application the applicant submits that the appeal will be rendered nugatory if the trial in the High Court proceeds and it is ultimately found in the successful appeal that the trial was conducted in violation of the applicant's right to a fair trial. We again bear in mind that the right to a fair trial which the applicant is asserting is a right which by dint of Article 25 (c) of *the Constitution* cannot be derogated from. In these circumstances, the balance tilts in favour of staying further proceedings until



this Court determines whether or not the applicant is entitled to seek the evidence it wants through the Letter of Request.

27. Ultimately, we are persuaded that the applicant has satisfied both considerations under rule 5(2)(b) and is entitled to an order of stay of further proceedings in the High Court, which we hereby issue, until the hearing and determination of the applicant's appeal. Costs will abide the outcome of the appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

