Maina v Gachagua & 66 others (Civil Application E534 of 2025)
[2025] KECA 1946 (KLR) (21 November 2025) (Ruling)

Neutral citation: [2025] KECA 1946 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E534 OF 2025

PO KIAGE, AO MUCHELULE & WK KORIR, JJA

NOVEMBER 21, 2025

BETWEEN

HON JANE NJERI MAINA ..... APPLICANT

AND

HE RIGATHI GACHAGUA ..... 1ST RESPONDENT

THOMAS KIMOTHO MAINGI ..... 2ND RESPONDENT

HON DAVID MUNYI MATHENGE ..... 3RD RESPONDENT

PETER GICHOBI KAMOTHO ..... 4TH RESPONDENT

MUTHONI MWANGI ..... 5TH RESPONDENT

CLEMENT MUCHIRI MURIUKI ..... 6TH RESPONDENT

EDWIN MUNENE KARIUKI ..... 7TH RESPONDENT

HON JANE NJERI MAINA ..... 8TH RESPONDENT

SHERIA MTAANI NA SHADRACK WAMBUI ..... 9TH RESPONDENT

FATHER EDDIE WAIGURU ..... 10TH RESPONDENT

ANTHONY MWITHAGA ..... 11TH RESPONDENT

VICTOR NGATIA ..... 12TH RESPONDENT

ASSUMPTA WANGUI MUIRURI ..... 13TH RESPONDENT

CHRISTINE MUKAMI NJUGUNA ..... 14TH RESPONDENT

PETER KIMANI KOIRA ..... 15TH RESPONDENT

ALICE WAMUHU MBUGUA ..... 16TH RESPONDENT

MWANGI MANYEKI ..... 17TH RESPONDENT

MBUGUA WA MUMBI ..... 18TH RESPONDENT

KIGO KAHARI ..... 19TH RESPONDENT

PRISCILLAH WAMBUI GITARI ..... 20TH RESPONDENT

F MUCHIRI NGATIA ..... 21ST RESPONDENT

MARIA NJERI ..... 22ND RESPONDENT

ERICK WARUI MWANIKI ..... 23RD RESPONDENT

BRIAN HUNJA ..... 24TH RESPONDENT

SERAH MUMBI N ..... 25TH RESPONDENT

MARGARET WANJIRA ..... 26TH RESPONDENT

SAMUEL NJENGA ..... 27TH RESPONDENT

HEBRON GAKIRU ..... 28TH RESPONDENT

SAMWEL NGARI ..... 29TH RESPONDENT

JULIET WANGARE ..... 30TH RESPONDENT

JAMES NYAGA ..... 31ST RESPONDENT

DERRICK MAINA ..... 32ND RESPONDENT

JOHN NJOROGE ..... 33RD RESPONDENT

BONIFACE MUNIU ..... 34TH RESPONDENT

PETER WAWERU ..... 35TH RESPONDENT

RUTH M KAMAU ..... 36TH RESPONDENT

JANE NAMU ..... 37TH RESPONDENT

MERCY NKATHA ..... 38TH RESPONDENT

ANN KARIMI MBAE ..... 39TH RESPONDENT

DANIEL MUNGAI ..... 40TH RESPONDENT

GEMA WATHO ASSOCIATION ..... 41ST RESPONDENT

BERNARD WANGOMBE KIRUGUMI ..... 42ND RESPONDENT

MORARA OMOKE ..... 43RD RESPONDENT

DEPUTY SPEAKER OF THE NATIONAL ASSEMBLY ..... 44TH RESPONDENT

HON MWENGI MUTUSE ..... 45TH RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY OF KENYA ..... 46TH RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA ..... 47TH RESPONDENT

THE SPEAKER OF THE SENATE OF KENYA ..... 48TH RESPONDENT

THE SENATE OF KENYA ..... 49TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 50TH RESPONDENT

HE WILLIAM RUTO ..... 51ST RESPONDENT

THE LAW SOCIETY OF KENYA ..... 52ND RESPONDENT

KITHURE KINDIKI ..... 53RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 54TH RESPONDENT

DR JOHN KHAMINWA ..... 55TH RESPONDENT

MT KENYA JURISTS ASSOCIATION ..... 56TH RESPONDENT

KATIBA INSTITUTE ..... 57TH RESPONDENT

JUBILEE PARTY OF KENYA ..... 58TH RESPONDENT

WIPER DEMOCRATIC PARTY ..... 59TH RESPONDENT

UNITED DEMOCRATIC ALLIANCE ..... 60TH RESPONDENT

ORANGE DEMOCRATIC PARTY (ODM) ..... 61ST RESPONDENT

KENYA KWANZA ALLIANCE ..... 62ND RESPONDENT

FORD KENYA PARTY ..... 63RD RESPONDENT

AMANI NATIONAL CONGRESS ..... 64TH RESPONDENT

REGISTRAR OF POLITICAL PARTIES ..... 65TH RESPONDENT

DR CLARENCE EBOSO MWERESA ..... 66TH RESPONDENT

WANJIRU MWANGI ..... 67TH RESPONDENT

(Being an Appeal arising from the Ruling of the High Court at Nairobi Milimani (E. Ogola, Mrima & F. Mugambi, JJ.) dated 25th October 2024 in Petition No. E565 of 2024 As consolidated with Kerugoya Petitions Nos. E013, E014 & E015 of 2024, Nairobi Petitions Nos. E550,E570 & E572 of 2024)

RULING

1. By her motion dated 4.9.25 as amended on 9.9.25, brought under Rule 5 (2) (b) of the Court's Rules, the applicant Hon. Jane Njeri Maina prays in the main as follows;

    3. That pending the hearing and determination of the intended appeal, there be stay and suspension of all proceedings, directions or steps whatsoever in High Court Constitutional Petition No. E565 of 2024 as consolidated with Kerugoya Petitions No. E013 of 2024, Kerugoya Petition No. E014 of 2024, Kerugoya Petition No. E015 of 2024, Nairobi Petition No. E550 of 2024, Nairobi Petition No. E522 of 2024, Nairobi Petition No. E570 of 2024 and Nairobi Petition No. E572 of 2024.

4. That such further or other orders as this honourable court may deem fit to preserve the substratum of the intended appeal."

2. The motion is founded on grounds appearing on its face to the effect that the applicant lodged a notice of appeal against directions given by the High Court on 31.8.25 "which extinguished the applicant's application as 'spent' on account of rulings rendered void by the quashing by this Court of the bench that made them in Civil Appeal Nos E829 of 2024 and E022 of 2025 (consolidated)." The High Court proceeded to hold that various applications then pending had been "overtaken by events following the ruling before the Court of Appeal and by this Bench. What is now pending is (sic) the substantive consolidated petitions" and directed that;

   i. "All parties to amend their petitions within 14 days and respondents to equally amend their responses within 14 days if need be.

   ii. The petitioners file and serve written submissions and authorities within 14 days of service of amended petitions and responses and the respondents and interested parties to likewise file and serve written submissions also within 14 days.

   iii. Time is of the essence in the above directions and that any defaulting party shall suffer the consequences; and

   iv. Highlighting of submissions on 23rd and 24th October, 2025 at 10.00am."

3. A further ground is that the applicant's intended appeal is arguable raising questions whether;"A High Court can treat rulings of a void bench as existing and binding.The orders of the Court of Appeal in Civil Appeal Nos. E829 of 2024 & E022 of 2025 (Consolidated) at paragraph 215(3) required the new bench to hear and determine all the petitions and applications the subject of its orders;The applicant's and other petitioner's rights under Article 47 and 50 were violated by declaring their applications overtaken by event and spent without hearing and or determination;lis pendens and constitutional supremacy bar the High Court from overriding an express judgment of this Court."The final grounds are that;"Unless proceedings are halted in their entirety, select applications and the substantive petitions will be heard and determined before the intended appeal is considered, rendering it nugatory.The balance of convenience and public interest strongly support preserving the status quo, given that the petitions touch on the Office of the Deputy President and the extraordinary constitutional process of impeachment."

4. The same grounds are replicated in the supporting affidavit sworn by the applicant on 4.9.25.

5. The 56th respondent, the Mount Kenya Jurists Association filed a Replying Affidavit sworn on 2.10.25 by an advocate named Charles Mabiru which supported the motion in its terms. Some other respondents did also support the motion.

6. The 53rd respondent, H. E. Prof. Kithure Kindiki by way of opposition to the motion filed a document called "Grounds of Opposition." Our Rules (unlike the Civil Procedure Rules applicable at the High Court) do not envisage that mode of response to an application. Rule 52 ordains that the mode of response by a person served with an application is by way of a replying affidavit. That said, our perusal of the said grounds reveals that they speak to the twin legal principles that fall for consideration on a Rule 5 (2) (b) application by stating that; first, the applicant's intended appeal is not arguable and is foredoomed to fail by operation of law for reasons that he lists and; second, its being rendered nugatory does not arise and; third, that "public interest favours allowing the logical conclusion of the proceedings before the High Court bench to the extent that they relate to the office of the Deputy

President of the Republic of Kenya, the second-highest office in the republic that *the Constitution* assigns sensitive, critical and non-delegable functions."

7. At the hearing of the application, learned counsel Mr. Muge appeared for the applicant. Learned Senior Counsel Mr. Muite appeared with seven other counsel including Mr. Ogeto, Mr. Macharia, and Mr. Ochiel Dudley for the 1st respondent; Mr. Ndegwa Njomo appeared with Mr. Kibe Mungai for the 56th respondent; Mr. Ogada and Mr. Sakimpa for the 4th to 8th respondents and Ms. Kimotho for the 2nd respondent. All these respondents supported the application.

8. On the opposite side, learned counsel Mr. Karanja held brief for Mr. Mukele and Prof. Ojienda, SC for the 49th respondent; Ms. Nganyi held brief for Mr. Kuyuni for the 44th and 45th respondents;

> Mr. Bitta appeared for the 50th respondent, Mr. Kang'u held brief for Mr. Kibogey for the 47th and 48th respondents and for Mr. Thiankolu for the 53rd respondent; while Mr. Ombongi held brief for Dr. Kamotho for the 60th respondent.

9. Going first, Mr. Muge contended that the applicant does have an arguable appeal as gleaned from the draft memorandum of appeal that raises seven grounds. The grounds include the question whether the learned Judges could hold as overtaken by events various applications on the basis of the rulings made by the bench the empanelment of which by the Hon. Deputy Chief Justice was quashed by this Court. Those rulings stood null and void on account of this Court's holding he urged, and cited PHOENIX E.A ASSURANCE CO. LTD Vs. S.M THIGA t/a NEWSPAPER SERVICE [2019] KECA 767 (KLR) and MACFOY Vs. UNITED AFRICA CO. LTD [1961] 3 ALL ER 1169. To him, it was not possible for the learned Judges to resurrect the void proceedings and treat them as valid, and accused them of impermissibly and ignoring and disobeying the orders of this Court.

10. Counsel urged that unless the stay sought is granted "the interlocutory applications well be finally lost" and the contempt of court applications will also never be heard, for which there will be no remedy. He stated that the irregularity of the rulings previously made by the learned Judges was not cured by their re-empanelling by the Hon. Chief Justice. He insisted that the directions made by the learned Judges were not routine as they extinguished pending applications without a hearing. Should the appeal succeed, he concluded, the judgment will be pyrrhic if no stay is granted.

11. Going next, Mr. Muite, SC contended that in stating that the pending applications were spent without affording parties the right to be heard, the learned Judges put a dagger through the right to fair hearing. He urged us to exercise our discretion favourably "in this weighty matter whose implications are serious and cries to high heaven for a Rule 5 (2) (b) intervention." Mr. Ndegwa was of the same view, emphasising that the High Court made a blanket observation that the pending applications had been overtaken by events in abrogation of its judicial duties. In like view, Mr. Sakimpa contended that the learned Judges chose procedural convenience over justice and urged that the intended appeal is arguable as all orders and proceedings made by the stricken bench were null and void, for which he cited Karisa Chengo & 2 Others Vs. Republic [2015] KECA 756 (KLR). Ms. Kamotho added her voice by stating that a court should give a fair hearing no matter how hopeless a case looks and those pending applications should therefore have been heard on merit.

12. First to oppose the motion was Mr. Kangu who submitted that this Court's decision made a limited order touching on the empanelment of the bench only, but there was no prayer to quash or set aside the proceedings before that bench. It was not therefore available to the applicant to seek to review that decision on matters that were not litigated. The appeal is thus not arguable. On the nugatory aspect, he argued that there is a significant public interest that there should be no delay in the substantive determination of the petitions at the High Court, which is what the stay sought would lead to. He

was joined by Ms. Karanja who stated that the intended appeal was unarguable for the same reasons advanced. She added that the application is brought in bad faith seeking a backdoor review of the decision of this Court. She defended the High Court's direction that the pending matters had been overtaken by events and so the application before us is "trifling and of little importance." She concluded that the petitions pending at the High Court are novel and weighty, staying which will violate the right to fair hearing.

13. Going next, Mr. Bitta posited that the intended appeal is not arguable as the applicant and her supporters could have prayed for a nullification of all proceedings of the bench but they did not. They were, therefore, stopped from engaging in piecemeal litigation. He went on to state that the provisions of Article 165 regarding empanelment did not divest any Judge of jurisdiction, and any High Court Judge can hear and determine conservatory applications. The orders made by the learned Judges are, therefore, clothed with the presumption of legitimacy until set aside by a higher court and this Court did not do so, dealing only with the empanelment. Mr. Bitta next urged that the petitions pending before the High Court having been certified as raising substantial questions of law, any delay in hearing them would be against the public interest. He went on that the contempt applications are capable of being heard at any time, even after judgment is rendered, and therefore there would be no prejudice to be suffered were the petitions to proceed to hearing.

14. Ms. Nganyi associated herself with the submissions made in opposition to the motion and added that it "is trite" that no appeal can lie against procedural directions such as were made by the learned Judges as they do not determine substantive rights. Mr. Ombogi also associated himself with the submissions of counsel opposed to the application.

15. Making reply to those submissions, Mr. Muge reiterated that the applicant does have an arguable appeal. When asked by the Court whether it might not have been neater for the applicant to expressly ask the bench of this Court that nullified the empanelment to also nullify the proceedings, orders, decisions and rulings made by the impugned bench of the High Court, Mr. Muge stalled and prevaricated but in the end conceded as he had to, that it would have been so.

16. We have given due consideration to the motion before us, the rival affidavits and the contending submissions made around it. For all the public interest and importance of the matter, it is a straight-forward Rule 5 (2) (b) application for stay of proceedings pending the hearing and determination of an intended appeal. The principles upon which this Court exercises its jurisdiction under Rule 5 (2) (b) are settled and they were aptly propounded in Stanley Kangethe Kinyanjui Vs. Tony Ketter & 5 OTHERS [2013] KECA 378 (KRL) which counsel for the applicant quite rightly characterizes as "the foundational authority on stay pending appeal applications being the dual limb test of the intended appeal being arguable and likely to be rendered nugatory unless stay is granted." On arguability of the intended appeal we did hear robust arguments on either side, with the applicant and some of the supporting respondents accusing the learned Judges of denying them opportunity to be heard on their applications by declaring them spent or overtaken by events. They also contend that once the bench was found by this Court to have been unlawfully empanelled, its every act up to that point also became automatically null and void as nothing can come out of nothing.

17. The opposed respondents hold the diametrically opposite view, urging that the issue of the validity of the proceedings taken before the impugned bench was never raised before the bench of this Court that heard the empanelment challenge, and cannot now arise. Moreover, they decry what they see as the applicant's impermissible attempt to litigate in instalments. They also take the view that there can be no arguable appeal where, as here, there is no right of appeal in the first place because what is sought to be challenged is not a substantive decision on rights or interests but merely directions given by the court below.

18. We think, with respect, that viewed from the prism that an arguable appeal is one that raises even a single bona fide point of law or fact that calls for an answer from the respondent and is worthy of jural consideration and decision, the threshold is a low one, and easily met. An arguable appeal is not one that must necessarily succeed and at interlocutory stage we are obligated to avoid making any determinative position on the prospects of an appeal that is not for consideration before us. This proceeds from a pragmatic and deferential posture that avoids the spectre of embarrassing the bench that eventually hears the appeal. Only in the plainest, clearest cases would we pronounce ourselves thereon with finality. Being of that view, we have no difficulty holding that the intended appeal is arguable.

19. As to whether the intended appeal would be rendered nugatory if the proceedings at the High Court are not stayed, the main apprehension, as we understand it, is that the substantive petitions will proceed to final determination with the right to have the pending interlocutory applications, including for contempt of court forever lost. The counter argument is that those applications and issues can be subsumed in the petitions and that the contempt applications can still be argued and the contemnors, if so adjudged, punished even after the hearing of the petitions. It is also argued that it is in the interests of justice that there be a speedy and just conclusion of the petitions, which are patently of great public interest as they touch on the Office of the Deputy President, and there is need for finality on the question of the legality and constitutionality of the impeachment of the 1st respondent who formerly occupied it.

20. From first principles, disputes filed before our courts must be heard and determined expeditiously and the need for expedition is greater when what is at stake implicates sensitive State offices where the constitutionality of ascension to, or removal therefrom, is at stake. In such matters, the guiding principle in Article 159 (2) b. that justice shall not be delayed takes on a more urgent and peremptory aspect. Having that principle in view, courts must do all in their power to see that the wheels of justice move apace and must avoid and remove obstacles, hurdles and impediments to speedy substantive and just determination of the cases before them. That must also mean, in the context of applications such as the one before us, that appellate courts must be slow to impede progress towards final merit based determination of disputes and must not aid and facilitate the truncation of litigation, save in the most necessary and compelling instances. Orders to stay proceedings ought to be the exception rather than the rule, when the entire justice project is properly understood.

21. We accept the reasoning of Gikonyo, J. which align with our way of thinking, in Kenya Wildlife Service Vs. James MuteMbei, High Court Civil Appeal No. 40 of 2018, [2019] eKLR;

> Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. See Ringera, J. in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;
>
> "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ....
>
> the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of

not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously." (Emphasis his)

5. See also illumination on the threshold for stay of proceedings in the following passages in Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

22. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

23. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

See also, the ruling of Aburili, J. in Makena Vs. Nalwa [2014] KEHC KLR which is equally apposite and has our approval.

24. The Supreme Court has authoritatively pronounced itself on these very considerations and we are bound by its guidance in KHAN Vs. International Commercial Company (k) Ltd [2023] KESC 84 (KLR);

"7. We have considered the application, the supporting affidavit, and the submissions in support thereof. We remain alive to the fact that the grant of an order for stay of proceedings is to be entertained only in deserving cases as it impacts the right to expeditious trial. Such orders are discretionary in nature, exercisable by the court upon consideration of the facts and circumstances of each case. In Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell [2013] eKLR, we specially held:

But in addition to this foundation, it now emerges that the court, in its exercise of discretion, may consider the convenience of interlocutory orders within the context of the appeal itself ...

Where necessary, this court may also exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the court – to render justice in accordance with *the Constitution* and ordinary law."

25. Applying those principles to the matter before us, we are not at all persuaded that a case has been made out for the exceptional intervention of stay of proceedings. We think, to the contrary, that it is a blight on our system of justice that a matter of such importance has been bogged down by all manner of procedural battles and an almost bewildering array of interlocutory skirmishes while the main legal constitutional issue, the substance of the multiple petitions, remains pending and undetermined. It is a grave and important feature of the administration of courts that justice must not be unduly delayed, and to this end judges retain and must deploy their case management mandate to make such orders and issue such directions as conduce to the just, expeditious and proportionate determination of the real issues in controversy before them. That also means that appellate courts must be deliberately

slow to issue orders of stay of proceedings that only serve to derail, delay and defeat the expeditious determination of cases before trial courts.

26. We do not see what real prejudice the applicant stands to suffer from continuation and conclusion of the substantive petitions pending at the High Court. The inverse is true that a stay of proceedings will further prolong a state of legal and constitutional uncertainty that this Court should not condone, less still abet, by ordering a stay of proceedings.

27. Being so-minded, we find the motion before us to be devoid of merit. It is accordingly dismissed, with costs, thereof abiding the outcome of the intended appeal.

So ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2025.

P. O. KIAGE

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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 the original.

Signed

DEPUTY REGISTRAR