

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, ALI - ARONI & MUCHELULE,  
JJ.A.) CIVIL APPLICATION NO. E055 OF 2025**

**BETWEEN**

**PETER KARIUKI GITHII.....APPLICANT  
PETER NDEGWA MWANGI.....INTERESTED**

**PARTY AND**

**COUNTY GOVERNMENT OF NYERI.....RESPONDENT**

*(An application for temporary injunction staying the enforcement, effectuation, implementation and operationalization of the impugned Nyeri County Alcoholic Drinks and Control Act, 2024 against the Judgment of the High Court of Kenya at Nyeri (D.M. Kizito, J.) delivered on 8<sup>th</sup> April, 2025*

*in*

***Constitutional Petition No. E016 of 2024.)***

**\*\*\*\*\***

**RULING OF THE COURT**

The prayers in the High Court of Kenya at Nyeri **Constitutional Petition No. E003 of 2024** where the petitioner was Nyeri County Bar Owners Association against County Government of Nyeri were for a declaration that the Nyeri County Alcoholic Drinks Control Act was unconstitutional and invalid and the petitioner prayed for costs of the petition. The petition was heard and dismissed by **Magare, J.** in a judgment delivered on 26<sup>th</sup> September, 2024.

That was followed by High Court of Kenya at Nyeri **Constitutional Petition No. E013 of 2024** where the petitioner was **Teobald Mukundi Wambugu** (suing as the Chairman on his own behalf and on behalf of Members of Nyeri County Bar Owners Association) against the County Government of Nyeri. Prayers were: a declaration that the provisions of sections 5(3), 7(3), 22(1) (c ), ( e ), (f) & (h), 23 (1) (a) & (b), 24, 26 (1) (b), 2 (b) & (c ), 27 (5) (b) & ( c), 33 (1), 43 (1) (2) (a) & (b) and 48 of the Nyeri County Alcoholic Drinks Control Act 2024 were unconstitutional and null and *void ab initio*; that the said provisions of that Act are inoperative in so far as they are inconsistent with the County Government Act, Alcoholic Drinks Control Act and the regulations made thereunder; and that an order of permanent injunction restraining the respondent from enforcing the provisions be issued and costs. That petition was also heard and dismissed by Magare, J. in a judgment delivered on 10<sup>th</sup> March, 2025.

There was also a petition in the High Court of Kenya at Nyeri Constitutional and Human Rights Division (HCCHR PET 016/2024) Peter Kariuki Githii & Peter Ndegwa Mwangi vs. County Government of Nyeri which was initially filed at the High Court of Kenya at Kerugoya (Petition Cause No. E016 of 2024) which was transferred to Nyeri by order of Mwongo, J. made on 23<sup>rd</sup> October, 2024 having found that the matters in issue fell within the jurisdiction of the High Court at Nyeri. This is how Magare, J. delivered himself on 8<sup>th</sup> April, 2025 in respect of that petition:

**“Many years ago, it was understood that once a decision is rendered in rem, it applies to all and sundry. This may have changed over time while I was away. The various alcohol wars have raged with the filing of various matters attacking the Nyeri County Alcoholic Drinks and Control Bill and subsequent Acts. This Petition dated 22.10.2024 was filed in Kerugoya High Court before it was rerouted to this court...”**

The petition sought the following relief:

**“The Respondent be put to strict proof as regards the alleged publication of the Nyeri County Alcoholic Drinks Control Bill, 2023 on 12<sup>th</sup> October, 2023, in the Kenya Gazette.**

**The Nyeri County Alcoholic Drinks and Control Bill, 2023 be declared unconstitutional null and void**

**Costs.”**

The petition was considered and dismissed in the judgment delivered on 8<sup>th</sup> April, 2025 and there was a Notice of Appeal against the entire judgment lodged on 8<sup>th</sup> April, 2025.

We have not seen any notice of appeal against the other judgments.

The applicant before us is **Peter Kariuki Githii** who is joined by **Peter Ndegwa Mwangi** as an Interested Party. They were petitioner and interested party in the High Court in Petition No. E016 of 2024. It is prayed in the Motion before us brought under various provisions of law including the Court of Appeal Rules and Civil Procedure Rules that pending the hearing and determination

of the application we issue a temporary injunction staying the enforcement, effectuation, implementation and operationalization of the impugned Nyeri County Alcoholic Drinks and Control Act, 2024; that *status quo* to issue until the intended appeal is heard and determined; that the respondent be put to strict proof as regards the alleged publication of the Nyeri County Alcoholic Drinks and Management Control Bill, 2023 on 12<sup>th</sup> October, 2023, in the Kenya Gazette; that Nyeri County Alcoholic Drinks and Control Bill, 2023 be declared unconstitutional null and void as it violates Article 199(1) of the Constitution of Kenya for failure of gazettelement in the Kenya Gazette on 12<sup>th</sup> October, 2023; that the court be pleased to issue any other order and/ or directions it deems fit to grant in the circumstances; that the court be pleased to consolidate and merge the Notice of Motion under Certificate of Urgency dated 5<sup>th</sup> February, 2025 with the current application “... *in order to expeditiously, justifiably, proportionately and in an affordable manner adjudicate over this matter.*” We observe here that this omnibus way of framing prayers where we are asked to declare laws unconstitutional in an application for stay of execution pending appeal and where we are asked to consolidate a motion with another which is not before us is not convenient or justifiable at all and it cannot certainly expeditiously adjudicate over the matter.

Peter Kariuki Githii (the applicant) says in grounds in support of the motion and in the supporting affidavit that he is aware of the provisions of the Court of Appeal Rules on grant of stay of execution pending appeal; that he knows that some of the

prayers in his

application should be heard by a single Judge of this Court not the full court; that Magare, J. overlooked some of the procedural steps in handling a constitutional petition; that Nyeri County Alcoholic Drinks and Control Bill, 2023 was not published in the Kenya Gazette as required; that his rights and those of others have been violated.

**Joseph Wamathai**, the respondent's Director of Alcoholic Drinks Control and Management in a replying affidavit depones that the motion is premature, unmeritorious, speculative and fails to meet the legal threshold for granting of a stay of execution. He says that the applicant has not attached a draft Memorandum of Appeal; that the question of constitutionality of Nyeri County Alcoholic Drinks Control Act 2024 was substantially determined in Nyeri High Court Constitutional Petition No. E003 of 2024 and Nyeri High Court Constitutional Petition No. E013 of 2024 and the application is *res judicata*; that the application is overtaken by events as the impugned bill has since been enacted into law and is now the Nyeri County Alcoholic Drinks Control Act 2024; that the application raises a new issue being the unconstitutionality of the Nyeri County Alcoholic Drinks Control Act, 2024 which was not an issue for determination before the trial court neither was it pleaded in the applicant's petition. He stated that:

**“...the unconstitutionality of the said Act cannot therefore be subjected to an appeal process if it was not determined at the trial stage...”**

He further depones that the application has been overtaken by events after the enactment of the said bill into law; that the Bill was published in Kenya Gazette as required in law; that the applicant has not shown how the intended appeal would be rendered nugatory:-

**“16. THAT the public interest being served by the 2024 Act is to fight the manufacture, sale, distribution and consumption of illicit and lethal alcoholic drinks in Nyeri County therefore granting an injunction to suspend its enforcement would not only frustrate these critical and constitutional objectives but also expose the public to continued harm.**

**17. THAT accordingly, the respondent and the public stand to suffer significant prejudice if the injunction is granted as the orders sought are contrary to the overriding public interest.”**

We have considered the motion and the written submissions filed by the parties.

When the application came up for hearing before us on 9<sup>th</sup> June, 2025 learned counsel **Mr. Tumu** held brief for **Mr. Muturi** for the applicant while learned counsel **Miss Muraguri** appeared for the respondent. Mr. Tumu fully relied on written submissions while in a highlight of written submissions Miss Muraguri pointed out that the applicant had not attached a draft Memorandum of Appeal to enable us appreciate what was to be argued on appeal. According to counsel there was no arguable appeal; the application has been overtaken by events and no prejudice could be suffered by the applicant.

The application, as stated has omnibus prayers and the prayer we consider in this ruling is where we are asked to stay the execution of the judgment of the High Court pending appeal or to grant an injunction under rule 5(2)(b) of the Court of Appeal Rules.

The principles that apply in an application for stay of judgment or order pending appeal or injunction were well summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR**. For an applicant to succeed he must show that the appeal or intended appeal, as the case may be, is arguable which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay. Emerging jurisprudence shows that where appropriate, the court should also consider the public interest.

We began this ruling by showing the various petitions that were filed by the applicant or his associates against a proposed bill. All the petitions gravitated around an attack on Nyeri County Alcoholic Drinks Control Bill. All the Petitions - E003 of 2024, E013 of 2024 and E016 of 2024 were dismissed. There was no notice of appeal against the dismissal of E003 of 2024 and E013 of 2024.

We are informed by the respondent in the replying affidavit and in the submissions that the Bill was gazetted and enacted into law and is now operational.

The applicant has not annexed a draft Memorandum of Appeal to the application and has not set out either in the body of the Motion or in the affidavit in support what grounds of appeal he intends to argue in the intended appeal.

We agree with the respondent that the petition in the High Court was not a challenge on the Act but it was an attack on the Bill in its infancy stage. It is doubtful that the law would allow the applicant to argue any ground of appeal against the Act which was not the subject of the petition before the High Court.

We note that the orders made by the Judge in the judgment which provoked notice of appeal dismissed the petition, therefore negative in nature. This Court does not ordinarily stay negative orders where the High Court has not ordered anyone to do anything

- see the case of **Mbaruk vs. Mwasi & 6 Others** (Civil Application E006 of 2020)[2022] KECA 520 (KLR) (6 May 2022) (Ruling):

**"In response to that challenge, we shall rely and adopt this Court's ruling in the case of County Secretary of Kajiado & 47 others v Salaries & Remuneration Commission & another [2021] eKLR where the Court observed:**

**"In addition, in Daniel Lomagul Kande & 2 Others v. Kamanga Holdings Limited & 40 Others (2017) eKLR this Court expressed itself as follows:-**

**"In the motion before us the applicants sought a stay of the striking out of the O.S.**

This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”

We are told by the respondent that consumption of illicit drinks in Nyeri County is a public menace and that it would not be in the interest of the public to issue an injunction in this case.

All in all we have not found any ground that can be argued on appeal. The applicant has failed to show that the intended appeal is arguable and having so found we need not examine whether the intended appeal would be rendered nugatory.

The Motion fails and is dismissed with costs to the respondent.

**Dated and delivered in Nyeri this 5<sup>th</sup> day of December, 2025.**

**S. ole KANTAI**

.....  
**JUDGE OF APPEAL**

**ALI-ARONI**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

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

***Signed***  
**DEPUTY REGISTRAR**