

**IN THE COURT OF
APPEAL AT
NAKURU**

**(CORAM: WARSAME, MATIVO, & GACHOKA,
JJ.A.) CIVIL APPEAL (APPLICATION) NO. E125
OF 2025**

BETWEEN

**THE ATTORNEY GENERAL.....1ST
APPLICANT THE CABINET SECRETARY, MINISTRY
MINING,
BLUE ECONOMY & MARITIME AFFAIRS.....2ND
APPLICANT THE INSPECTOR GENERAL
NATIONAL POLICE SERVICE.....3RD
APPLICANT AND
BAO GOLD HILL KENYA LIMITED.....RESPONDENT**

(An application for stay of execution from the ruling and orders

**in
ELC Petition No. E002 of 2025)**

RULING OF THE COURT

- 1.** In their Notice of Motion dated 21st November 2025, the applicants have invoked Article 164 (3) (a) of the Constitution, sections 3, 3A and 38 of the Appellate Jurisdiction Act and rule 5 (2) (b) of the Court of Appeals Rules 2010 (*sic*) seeking an order of stay of execution of the ruling and orders issued on 7th October 2025 in the Narok

ELC in ***Petition No. E002 of 2025; Bao Gold Hill Kenya Limited vs. the Cabinet Secretary,***

Ministry of Mining, Blue Economy & Maritime Affairs

pending the hearing and determination of an intended appeal. It is hinged upon the grounds on its face together with the supporting affidavit of Thomas Mutwiwa, sworn on 18th November 2025.

2. To put the application in context, we shall capture the background as narrated by the parties who have taken opposed positions on the facts and the law. According to the applicant, the respondent applied for a Mining License on 23rd July 2019 through the online mining cadastre, covering approximately 4.7808 km squared in Narok County, for the extraction of gold, with a requested licence duration of 25 years.
3. In its meeting held on 27th September 2024, the Mineral Rights Board (MRB) recommended the rejection of the application due to the respondent's failure to submit the required documents in accordance with Section 101 of the Mining Act, Cap 306. Those recommendations were approved by the Cabinet Secretary for Mining on 30th September 2024.
4. Further, on 27th April 2024, the applicants carried out a

compliance and inspection exercise countrywide for illegal

mining operations. Its findings revealed that the respondent was illegally conducting mining and gold processing operations without a valid mining licence. This also led to the arrest and deportation of foreign nationals during the operation. According to the applicants, this led to a loss of revenue in terms of lost royalty and ground rent revenue amounting to Kshs. 622,280,800.00.

5. The applicants continued that as of 26th May 2021, the period in which the mining licence was allegedly granted to the respondent, there existed a moratorium barring any issuance of any mining or prospecting license. In any event, the applicants stated that the respondent's application for a mining license, which had pegged the areas/coordinates of interest, was removed from the Ministry's online mining cadastre.
6. Thus, on 19th November 2024, the Secretary to the Mineral Rights Board, wrote to the respondent informing it of its decision. The respondent was given 7 days to upload the said documents in the online mining cadastre, failure to which would lead to removal of the application from the cadastre. That the applicants wrote a demand letter on 31st

October 2024.

7. The applicants stated that the respondent's application for a mining licence was reconsidered on 14th March 2025. It was resolved that its application referenced M1/2019/0072 be removed from the mining cadastre system due to continued non-compliance and illegal activity.
8. The applicants continued that as a result of the respondent's continued illegal mining activities, the Migori Regional Mining Officer issued to the respondent, a stop orders vide letters dated 19th June 2025 and 20th June 2025 requiring it to immediately stop all mining activities in their site until such a time when it would have obtained the requisite mining licences.
9. The applicants added that the above was acknowledged in the respondent's letter dated 21st June 2025. It was contended further that the respondent agreed to fully comply with the orders and to suspend with immediate effect, all mining and mineral processing operations. In the applicants' comprehension of that letter, the respondent essentially admitted to the irregularity of their mining license.
10. The applicants contended that in fact, by letter dated 21st

June 2025, the respondent agreed to suspend all mining
and

processing activities until they obtained the necessary documentation and authorization, synonymous with an admission that indeed they lacked valid mining and processing licenses to continue operations.

11. The applicants conceded that the respondent was issued with a Mineral Dealer's Licence under Registration No. MDL/P: DPL/2024/2329 on 19th March 2024 following an application made in 2023. However, that licence expired on 31st December 2024 in line with Section 161 (1) of the Mining Act, Cap 306. They explained that the royalties demanded from the respondent related to mineral sales and exports made by the respondent in 2023 and 2024 when they exported minerals through mineral purchase agreements for the supply of ore and tailings in compliance with license conditions for their Mineral dealer's License Registration No. MDL/P:DPL/2024/2329.

12. It is those reasons that precipitated the respondent to file Narok **ELC Petition No. E002 of 2025**. Contemporaneously, the respondent filed a Notice of Motion dated 8th August 2025 seeking conservatory orders. In her ruling dated 7th October 2025, *Gacheru, J.* issued the

following orders:

- a. "That pending the hearing and determination of the Petition a Conservatory Order be issued compelling the 1st Respondent to immediately restore the Petitioner's name and Mining Licence No. ML2019/0072/103B/3 in the mining cadaster.**
- b. That pending the hearing and determination of the Petition herein a Conservatory Order be issued compelling the 2nd Respondent to immediately withdraw the Mining Police Unit from the Petitioner's mining site in Lolgorian, Narok County, and to cease all interference with the Petitioner's lawful mining operations.**
- c. That Pending the hearing and determination of the Petition herein a Conservatory Order be and is hereby issued restraining the 2nd Respondent from raiding, intimidating, harassing and/or threatening the Petitioner's personal and employees' liberty under the guise of effecting arrest."**

13. The said conservatory orders were directed to remain valid for a period of 12 months. During the intervening period, the respondent was directed to prosecute the petition expeditiously.
14. The applicants are aggrieved by those orders hence the application. They filed their notice of appeal dated 16th October 2025 and annexed their draft memorandum of appeal dated 21st November 2025. They contended that the appeal was arguable and of considerable public interest as

the effect of the conservatory orders was to fully resolve the dispute at its interlocutory stage.

15. On the nugatory aspect, the applicants contended that the conservatory orders had the irreversible effect of negatively affecting government revenue at the risk of losing more than Kshs. 600,000,000 in royalties and land rent. They further stated that execution was imminent as the respondent had already filed an application for contempt.
16. They further argued that the conservatory orders sanctioned the illegal operations of the respondent who did not have a valid mining licence. Finally, the applicants stated that the respondent's application and the basis for which the conservatory order was granted was spurious necessitating the present application.
17. The respondent opposed the application. It relied on the replying affidavit of Qiu Chengfu, the respondent's general manager, sworn on 2nd December 2025. The deponent deposed that the applicants had not met the threshold for the exercise of discretion by this Court. It was deposed that the respondent was granted a Prospecting Licence No. PL/2018/0072 on 18th August 2018, valid until 17th August 2021, upon payment of the requisite amount. Upon conclusion of the prospecting phase, it

applied for a mining licence, wherein on 26th May 2021, it was granted mining licence No. ML/2019/0072, registered under entry number ML/2019/0072/1038/3, commencing 1st August 2021 and expiring on 31st July 2046.

18. The respondent contended that it was on the basis of the issuance of that licence, signed by the then Cabinet Secretary for the Ministry of Petroleum and Mining, Hon. John Munyes, that it proceeded to make several investments and obtain several approvals. Further, its details, including its licensed area, were uploaded and visible on the official ministry of Mining Cadastre for several years. For that reason, it argued that the moratorium letter dated 18th December 2019 could not apply as its application commenced long before its existence.
19. The respondent further stated that it also held a valid mineral dealer's licence No. MDL/P/DPL/2024/2329, which expired on 31st December 2024. An application for its renewal was duly submitted on 27th November 2024 and remains pending before the 2nd applicant. It also pointed out that in 2023, notwithstanding that the respondent held a valid licence no. ML/2019/0072, issued on 1st August 2021, it carried out no

mineral processing activities in 2023 on account of unavailability of resources. For that reason, it obtained official tax exemption letters. It also denied that it was operating illegally having obtained the necessary permits.

20. The respondent disputed the loss of revenue contended by the applicants to the tune of Kshs. 622,280,800.00 on account of several reasons. It argued that contrary to the assertion that the applicants were losing revenue, the Government of Kenya stood to gain significant revenue if the respondent's operations were allowed to operate peacefully since several processes required authorization from government entities. Thus, to stop its operations, it contended, was akin to revenue loss as no funds would be collected from the respondent's activities.

21. The respondent continued that it had the financial muscle and would readily satisfy a decree entered against it. There was therefore no proof of irrevocable loss. It was of the view that if the orders sought are granted, it would suffer prejudice as it would suffer loss of return on investments, job loss of its employees, the opportunity was nigh to mine the finite mineral deposits and the

orders, if granted against it, would send a chilling discouraging message to potential international investors.

22. Regarding the decision of the MRB recommending for rejection of its licence, the respondent contended that it was illegal, unconstitutional and illogical when a mining licence had already been duly issued on 26th May 2021. Furthermore, no prior statutory notice was ever issued to the respondent as required under section 173(2) of the Mining Act before removal of its licence from the cadastre. Besides, the letter dated 19th November 2024 was not addressed to the respondent.

23. The respondent explained that though it acknowledged receipt of the stop order in its letter dated 21st June 2025, and agreed to suspend operations, the same was done under extreme duress as its premises were militarized and their staff arrested. It explained that the trial court only restored the situation to a constitutional one as the actions of the applicants were unconstitutional. The respondent pointed out that the contempt application was necessitated by the applicants' refusal to comply with court orders. It prayed that the application be dismissed with costs.

24. The application was heard virtually on 3rd December 2025 in the presence of learned counsel Mr. Eredi for the applicants and learned counsel Mr. Oduol for the respondent. Both counsel relied on their respective written submissions that were briefly orally highlighted.

25. The applicants filed written submissions dated 1st December 2025. They urged this Court to find that their application was merited as they had an arguable appeal that would be rendered nugatory if stay was not granted. They prayed that the application be allowed. The respondent filed written submissions, a case digest and a bundle of authorities, all dated 2nd December 2025. Its argument was that the applicants had failed to demonstrate that the appeal was arguable and would be rendered an academic exercise if stay is not granted. They prayed that the appeal be dismissed with costs.

26. We have anxiously considered the application, the affidavits as well as the annexures thereto. We have also considered the oral and written submissions of the parties and analyzed the law. This is an application for stay governed by rule 5 (2) (b) of the Court of Appeal Rules 2022. To succeed, an

applicant must

satisfy the following twin conjunctive principles: that the appeal is arguable; and that the appeal would be rendered nugatory if stay is not granted.

27. On the arguability of the appeal, it is trite law that an arguable appeal does not necessarily mean one which will succeed. Furthermore, the applicant needs to demonstrate that only one ground is arguable. (See, **Yellow Horse Inns Limited vs. A. A. Kawir Transporters Ltd & 4 Others** (2014) eKLR and **David Morton Silverstein v Atsango Chesoni** [2002] eKLR.
28. The applicants and respondent took hard diametrically opposed stances on several issues. These included *inter alia*, whether or not the respondent held a valid mining licence, whether the respondent was operational in 2023, whether there was a valid and subsisting moratorium as envisioned in the letter dated 18th December 2019 and whether the respondent's licence was lawfully removed official ministry of mining cadastre.
29. Additionally, the applicants annexed their draft memorandum of appeal dated 21st November 2025 that raised 6 grounds of appeal. Amongst the grounds raised are that the orders

granted by the trial court were in their nature final orders that ought not

to have been granted at that interlocutory stage of the proceedings. Without delving into the merits or otherwise of those grounds, we are satisfied that the grounds raised in this application and the draft memorandum of appeal are arguable. However, merits or otherwise of those grounds will be determined by the bench that will hear and determine the appeal.

30. Turning to the nugatory aspect, this Court in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013]

KECA 378 (KLR)

held 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; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In **Reliance Bank Ltd vs. Norlake Investments Ltd** [2002] 1 EA 227 at page

232, the term “nugatory” was defined to mean that it was not only worthless, futile or invalid. It could also mean “trifling”.

31. We have looked at the prayers sought by the applicant. We have also scrutinized the nature of the impugned orders granted on 7th October 2025. We note that the orders were in

their nature conservatory. In light of this, we illuminate the ruminations of

our Apex Court in **Munya vs. Kithinji & 2 others** (Application 5 of 2014) [2014] KESC 30 (KLR) when it held as follows:

“Conservatory orders” bear a more decided public- law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the suppliant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

32. The Supreme Court was alive to the fact that though applications for stay invoke the requirements for arguability and the nugatory aspect, courts have also been urged to take into account a third limb: whether it is in the public interest that stay ought to be granted. In so doing, the Court held:

“This third condition is dictated by the expanded scope of the Bill of Rights, and the public- spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the

dispute, hence the public interest.”

33. Taking the above into consideration, we are of the view, that if the respondent is allowed to extract the minerals pending the determination of the intended appeal, if they are not successful, the orders granted would be irreversible. This is because the minerals would have been significantly depleted from the earth's surface to the detriment of the public. That depletion would not be recovered. However, if the converse is allowed to remain, then the public is assured of conservancy measures until the dispute is resolved. In any event, the applicants are government agencies that can compensate the respondent if it succeeds in opposing the appeal.
34. In addition to the above, we are cognizant of the foreign status of the respondent. This leaves this court with no assurances that the respondent will remain in the Court's territorial jurisdiction until the issues before the Court are resolved. All these grounds undeniably demonstrate that the intended appeal will be rendered nugatory if we do not grant an order for stay of execution. We are also satisfied that public interest tilts in favour of granting an order for stay for the reasons given.

35. The upshot of the above is that we find that the applicants have met the threshold under rule 5 (2) (b) having satisfied the twin limbs and the additional limb of public interest. Accordingly, an order of stay of execution of the ruling and orders issued on 7th October 2025 in Narok Environment and land Court in ***E002 of 2025; Bao Gold Hill Kenya Limited vs. the Cabinet Secretary, Ministry of Mining, Blue Economy & Maritime Affairs*** be and is hereby granted pending the hearing and determination of an intended appeal to this Court. The costs of the application shall abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nakuru this 10th day of December 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.

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JUDGE OF APPEAL

*I certify that this is a
True copy of the original
Signed*
DEPUTY REGISTRAR