IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPLICATION NO. E400 OF 2025

IN THE MATTER OF THE INTENDED APPEAL

BETWEEN

GIOVANNI GNECCHI-RUSCONE.....APPLICANT

AND

THE ESTATE OF HERMANUS PHILLIPUS STEYN.....RESPONDENT

(An application for stay of execution of judgment and decree the High Court of Kenya at Nairobi ***(Freda Mugambi, J.)*** *dated 10th May, 2025*

in

Commercial Suit No. 291 of 2013)

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******* RULING OF THE COURT**

The motion dated 4th July 2025 and expressed as brought "under Rule 5 (2) (b) and 42 and 43 of the Court of Appeal Rules 2020" (sic) asks this Court for the following orders;

1. *Spent*
2. *Spent*
3. *Spent*

4. *That this honourable court be pleased to stay execution of the judgment and resultant decree by Justice Freda Mugambi delivered on 16th May 2025 in High Court Commercial Case No. E291 of 2013 Hermanus Phillips Steyn vs Giovanni Gnecchi-Ruscone, pending the filing, hearing and determination of the applicant's intended appeal against the said judgment and decree.*

5. *That this honourable court be pleased to order the respondent to deposit the judgment sum of USD 1,206,015.25, together with accrued interest at 14% per annum from 17th December 1993 to date (USD 6,531,301) into a joint interest-earning account in the name of the advocates representing the applicant and the respondent, as security for the due performance of the High Court Judgment affirmed by the Court of Appeal in Civil Appeal No. 171 of 2009 Hermanus Phillipus Steyn vs Giovanni Gnecchi-Ruscone pending the filing, hearing and determination of the applicant's intended appeal against the said judgment and decree.*

In the grounds on the face of the motion, the applicant states that he is a decree holder in Nairobi **Milimani HCCC No. 51 of 2005** in which judgment was entered on 7.9.17 by Waweru, J. The respondent's appeal against the said judgment, being **Civil Appeal No. 171 of 2009** was dismissed by this Court Bosire, Waki & Aganyanya, JJ.A) on 22.10.10 and his applications for "leave to appeal to the Supreme Court (sic) were dismissed by this Court and the Supreme Court." The respondent thereafter filed a fresh suit at the High Court being H.C. Commercial Case No. E291 of

2013 by which he sought to nullify Waweru, J's judgment for, in the applicant's words "allegations of perjury and new evidence that allegedly proves that the respondent was not paid by the Government of Tanzania." The High Court (F. Mugambi, J.) on

16.5.25 set aside the judgment by Waweru, J. which she declared *void ab initio* barred the applicant from executing it, and "ordered a retrial on the ground that there is new evidence that the respondent was not paid by the Government of Tanzania."

He asserts further that;

> *"7. Unless this application is urgently set down for hearing, there would be a subsisting grave affront to the principle of finality of judgments, hierarchy of the courts, and jurisdictional overreach, as the High Court lacks jurisdiction to set aside a concurrent High Court Judgment that has been affirmed by the Court of Appeal and to which the Supreme Court has declined to entertain any further appeal.*
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> *8. Unless execution of the impugned judgment is urgently stayed, and/or the judgment sum secured, the applicant stands to suffer irreparable loss, including the risk of never recovering the judgment sum, which has been due since 1993 and has accrued substantial interest, now valued at approximately US Dollars 6,000,000."*

He states that he has an arguable appeal, in demonstration of which he attaches a draft memorandum of appeal to his supporting affidavit which also repeats the foregoing assertions

and further avers that his intended appeal would be rendered nugatory for reasons that;

> *"a. The respondent passed away on 29th May 2024. The Estate has already instituted petitions in High Court Family Probate and Administration E543 of 2024, E546 of 2024, E548 of 2024 and E549 of 2024 In the Estate of Steyn Hermanus Phillipus. There is a real risk that the Estate's assets will be distributed to beneficiaries. This would render the intended appeal futile and nugatory, as the intended appeal's subject matter – the initial High Court judgment and decree, which has been affirmed by the Court of Appeal – would be impossible to enforce. If stay is not granted, the applicant will be unable to assert his position as a creditor in the respondent's petition for grant of representation.*
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> *(b) If the stay is not granted, and the ordered re-trial commences, the subject matter of the intended appeal – namely to challenge the High Court's order declaring a final judgment void and ordering a re-trial – will be entirely defeated. The re-trial would occur before the Court of Appeal has had an opportunity to determine. The intended appeal, thereby rendering the appeal nugatory.*
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> *(c) If stay is not granted, the applicant will be subjected to irreparable prejudice, and re-litigation in respect of a matter that has already been conclusively determined by the Court of Appeal. The prejudice cannot be compensated by monetary damages. There is a real risk that the re-trail may result in conflicting decisions with that of the subsisting Court of Appeal judgment.*
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> *(d) Despite an existing Court order dated 1st July 2011 prohibiting the transfer of the respondent's shares in companies, the respondent commenced such transfers. If a stay is not granted, the applicant will continue to irreversibly deplete the estate, placing it beyond reach of execution, and rendering the intended appeal nugatory. The*

respondent's estate will in an effort to frustrate execution, transfer assets out of reach of the Court and the applicant.

(e) The respondent has already filed a Party and Party Bill of Costs arising from the impugned High Court judgment delivered by Justice Freda Mugambi, claiming Kes 501,295,720 with taxation scheduled for 10th July 2025. Absent a stay, the applicant risks being unjustly burdened with substantial costs arising from a re-trial that contradicts a final judgment of the Court of Appeal. If he intended appeal ultimately succeeds, such payment in addition to the initial decree, would be irrecoverable – rendering the intended appeal nugatory.

(f) If a stay is granted, the doctrine of finality in litigation will be fundamentally undermined, exposing the applicant to renewed proceedings in a matter already determined by the appellate hierarchy. The intended appeal would be rendered nugatory, as its outcome would be overtaken by the event it seeks to prevent."

He also swears that he filed a notice of appeal and requested typed proceedings, and the balance of convenience overwhelmingLY favours him while the respondent does not have the wherewithal to settle the decretal sum emanating from the judgment of Waweru, J.

By a replying affidavit sworn on 29.7.25 Martin Richard Steyn averred that he obtained letters of administration *ad litem* and he was substituted at the High Court as plaintiff and is therefore the respondent herein. He swore that the learned Judge found that the applicant deceived Waweru, J. with barefaced lies

in order to obtain judgment and was a dishonest litigant who obtained the said judgment by fraud which she then set aside for being null and void *ab initio*. He asserted that by making no mention that Waweru, J's judgment was set aside because it was procured by fraud, the applicant fails to make a frank disclosure, conceals his fraudulent conduct, and is guilty, not only of "dishonest abuse of process," but also committed the crime of perjury and subordination of perjury which are punishable by imprisonment for 7 years. He should thus not be granted any relief as a matter of public policy and is disentitled to any discretionary remedy such as injunction or stay of proceedings as he is guilty of serious misconduct and his hands are tainted.

The respondent swears that he reserves the right to file a cross appeal against the retrial ordered by the learned Judge as the proper course should have been a striking out of the applicant's entire claim as being an abuse of process. Moreover, the applicant's fraud jeopardized the fairness of a retrial as the original respondent has since died on 24.6.24 and can no longer testify or participate in the new trial. The courts are under a legal duty in such circumstances as obtain herein to terminate further proceedings (i) as judicial retaliation for the affront to the

court

and (ii) in order to protect the innocent party from further injustice. A party who pursues proceedings with the object of defeating fairness should not be entertained. He charged that the applicant's insistence that this Court's judgment on the appeal from Waweru's, J's judgment is an attempt to retain the fruits of his fraudulent conduct. The Court had agreed with Waweru, J. that the respondent had received compensation from the Government of Tanzania and the majority decision in the Supreme Court also endorsed the factual findings that the respondent had been paid. The learned Judge having held the judgment of Waweru to be null and void ab initio, the affirming judgment of this Court was unravelled and any advantage arising from Waweru, J's judgement was cancelled for having been fraudulently obtained thus the learned Judge was correct to injunct the applicant from executing it.

Consequently, swears the respondent, the Court lacks jurisdiction under Rule 5(2) (b) to direct a security deposit of USD 6531,30 for due performance of Waweru, J's nullified judgment. Moreover, the orders of the learned Judge made on 16.5.25 that set aside Waweru, J's judgment are not positive orders capable of execution by enforcement. He pointed out that the

applicant did

not seek a stay of proceedings and the Court would be bereft of jurisdiction to grant an order not sought. The Court also lacks jurisdiction to make orders in an application the effect of which would be to reverse the learned Judge and restore the nullified judgment of Waweru, J.

The respondent denies the applicant's claims that the estate of the original defendant is under threat of dissipation through succession, and asserts that no petition for grant of probate has been filed and thus the applicant's apprehension that he will be unable to assert his position as creditor of the estate is unfounded. He repeats that the claim of his inability to settle the decretal sum of approximately USD6 million is erroneous as there is no such decree following the nullification of Waweru, J's. judgment. He admits having filed a bill of costs claiming Kshs.501,295,720 as party and party costs but states that he has taken no steps to enforce it by execution as the costs are yet to be taxed by the Taxing Officer, whose determination can even then be challenged by reference to a Judge and ultimately by and appeal to this Court. At any rate, an order to pay costs cannot be a sole reason for a stay of execution. He concludes by stating that the applicant has not shown that the

respondent will not have the means to pay the

costs of any retrial as compensation and prays that the motion be dismissed.

Both parties filed submissions which reinforced their foregoing positions with legal arguments backed by lists of authorities. At the hearing of the motion the same were argued by the learned **Mr. Singh** who appeared with **Mr. Malakwen** for the applicant and **Mr. Ahmednassir** learned Senior Counsel for the respondent.

Going first, Mr. Singh first made it clear that the applicant has not sought a stay of proceedings. He asserted that unless the learned Judge's judgment is attended to, it would have serious ramifications on finality of judgments. The respondent had filed an appeal against the judgment of Waweru, J. which was dismissed by this Court which found that whether payment was made to the respondent by the Government of Tanzania was immaterial. He took issue with the learned Judge's setting aside of the judgment of Waweru, J. on a fresh suit by the respondent following the dismissal of his certification application by the Supreme Court. The proper course to challenge a judgment has to by review or appeal. He faulted the learned Judge for making no reference at all

to the judgments of the two superior courts above her, which she could not escape from.

Mr. Singh took the view that the applicant's intended appeal was arguable mainly because the learned Judge was debarred by the doctrine of *res judicata* from entertaining the applicant's fresh suit and the judgment of this Court remains in force and binding. He asserted that this Court does have jurisdiction to grant stay even though what were issued by the learned Judge were declarations, as declarations can be either positive or negative. The injunction granted to stop execution of the judgment and decree of Waweru, J. was a positive order capable of being stayed. The intended appeal would be rendered nugatory due to dissipation of the estate, for which the respondent has applied for letters of administration. Counsel cited several authorities for his various contentions including ***STANLEY KANGETHE KINYANJUI Vs. TONY KETTER & 5 OTHERS*** ***[2013[KECA*** on arguability; ***NATIONAL INDUSTRIAL CREDIT BANK LTD Vs. AQUINAI FRANCIS WASIKE & ANOR*** ***[2006] KECA 333*** on the evidentiary burden on a respondent to show financial capacity to repay the decretal sum once challenged; ***SCOPE TELEMATICS***

INTERNATIONAL SALES LTD Vs. STOIC COMPANY LTD & ANOR

[2017] KECA 545 on irreparable harm being a compelling reason for granting an application; and the case of ***AIC LTD Vs. FEDERAL AIRPORTS AUTHORITY OF NIGERIA [2022] UKSC16*** on the

principle of finality being of fundamental public importance so that "the successful party should not have to worry that something will subsequently come along to deprive him of the fruits of victory."

On his part Mr. Ahmednassir started by conceding that this Court dismissed the respondent's appeal against the judgment of Waweru, J., but went on to say that the motion before us is not grantable in that the orders of the learned Judge were declarations which are neither positive nor negative and are therefore incapable of execution which entails a coercive or positive action of seizing assets, garnishee, or the like. What the learned Judge issued were "passive orders that we cannot execute" and this Court's power under rule 5 (2) (b) is to stay *execution of orders*, not to stay orders. Senior counsel next asserted that as the applicant has not asked for a stay of proceedings in HCCC No. 51 of 2005, the retrial of which the learned Judge ordered, there is nothing for this Court to exercise

its rule 5 (2) (b) jurisdiction over as it cannot grant what is not sought. He cited ***NAIROBI CITY COUNCIL Vs. THABITI ENTERPRISES LTD[1997] KECA 59 (KRL)***. He went on to say that

beyond there being nothing for the respondent to execute, he was giving his undertaking not to be executing anything. The only aspect of the learned Judge's orders capable of execution is the costs but it was governed by a different regime involving taxation with the opportunity for reference to the High Court which would have the power to issue appropriate orders if moved, with appeal to this Court with leave to set out in the Advocates Remuneration Order. ***LUDWICK MUSINDI Vs. NANCY NDUTA [2021] KEELRC 1610 KLR*** was called in aid. This Court would not issue an order to stay of execution of costs merely, for which he cited ***SANDE INVESTMENTS LTD t/a WESTLAND COLLEGE HOSPITAL Vs. KENYA COMMERCIAL FINANCE & OTHERS CORPORATION & OTHERS[2007] 2 EA 450*** and ***MANDAVIA Vs. THE COMMISSIONER OF INCOME TAX [1957] EA 2.***

Mr. Ahmednasir then attacked prayer 5 of the motion as indicative of absurdity "in that the applicant prays that the respondent deposits the equivalent of Kshs.1.2 Billion being the sum awarded in a judgement procured by fraud." He pointed out that nowhere in his application, affidavit or submissions does the applicant address the fact that the said judgment was obtained

through his “fraudulent criminal conduct.” He asserted that there

are “expansive pronouncements worldwide” that fraudulent judgments acquire a new cause of action and thus a justifying a new suit to nullify them. He cited, *inter alia*; ***DUNBAR (ADMINISTRATOR OF THE ESTATE OF DUNBAR (DECEASED) Vs. PLANT [1997] 4 ALL ER 289; TINSLEY Vs. MILLIGAN [1993] ALL ER 65; CHARLES BRIGHT & CO. LTD Vs. SELLAR [1904] 1 KB 6*** and ***TAKHAR Vs. GRACEFIELD DEVELOPMENTS LTD [2019] UKSC 13; ALL ER 283.***

He also referred to our own Supreme Court’s decision in

OUTA Vs. OKELLO & 3 OTHERS [PETITION 6 of 2014] (2017)

KESC 25 (KLR) for the proposition that judgments obtained by fraud cannot stand and the proper way to uproot them is by filing suit. He urged that where a fraud is committed on the court which is deceived into giving judgment, one files suit to set aside the judgment so obtained. To senior counsel, given the state of the authorities, there is no arguable appeal, there would be nothing to be rendered nugatory and so the motion should be dismissed with costs.

Making reply to those submissions, Mr. Singh reiterated his position that there is such a thing as a positive declaration and

urged us to read the declarations issued by the learned Judge in

context to appreciate the point. He also urged that the order of retrial given did, in fact, take away the benefits of the prior judgement and all these aspects are capable of being stayed by this Court.

We have given due and careful consideration to the application, the rival affidavits and the contending submissions made before us. We have to observe from the onset that the parties in their passionate urging of their respective cases seemed to lose sight of the fact that what is before us is by character and definition an application for interim relief pending the hearing of the intended appeal. That the intended appeal raises interesting questions given the rarity of what the judgment of the learned Judge wrought does not alter the nature of the motion before us and we on our part will not honour the invitation, attractive as it may be, to delve into the merits of the appeal. That must await another day when the appeal proper shall be heard before the bench seized of it.

The principles governing an application for stay of execution pending appeal brought under Rule 5 (2) (b) of the Rules of this Court are notorious. They received full treatment by the Court in the oft-cited ***STANLEY KANGETHE KINYANJUI Vs.***

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KETTER case (supra) and we need not rehash them beyond stating that to succeed, an applicant must satisfy the twin principles of, first; the appeal or intended appeal being arguable and, second; that the said appeal would, in the absence of the orders sought, be rendered nugatory.

It is against these principles that we shall consider and determine this application as we consider them sufficient for the purpose. We chose for now to eschew the path, urged by learned senior counsel, of denying the applicant audience for the reason that he has been adjudged a dishonest litigant who obtained judgment from Waweru, J. on the basis of fraud and stands tainted when he who comes to equity must do so with clean hands.

In doing so we do not fail to appreciate the persuasive force of the English authorities cited by the respondent on the point. Nor do we scantily regard the gravity of a party obtaining judgment by fraud for we are persuaded that it strikes at the very heart of the administration of justice. We are not to be understood to condone such conduct. To the contrary we are fully aware of our duty as a Court to protect our process from abuse and agree in principle with the sentiments and conclusion

of Lord Reid in his memorably

titled lecture ***"Lies Damn Lies: Abuse of Process and the Dishonest Litigant"*** delivered at the University of Edinburgh on 26th October 2012. He was of the view that "Judges should not be unduly reluctant to dismiss cases where it appears that a litigant is determined to subvert the adjudicative process by fraudulent means ... [and] should ... be slow to make decisions favouring those who set out to use the court process as an instrument of fraud." Considering that in the present case the applicant has initiated the process of exercising his undoubted right of appeal against the adverse findings made by the learned Judge, we think that it is fundamental to the right to fair hearing by appellate review that he should not be denied the right to seek the reliefs he prays for. It is at the hearing of the appeal that the correctness or otherwise of the learned Judge's findings about his having obtained judgment by fraud shall be interrogated and pronounced on with finality.

Is the intended appeal arguable? We think there is no difficulty arriving at the conclusion that it is. While we appreciate that the Supreme Court in ***OUTA*** (supra) did acknowledge exceptional circumstances where the principle of finality can be departed from to meet the ends of justice to include "where

the

judgment, ruling or order was obtained by fraud or deceit," among other reasons, and do also bear in mind Lord Denning's famous dicta on the legal effect of null and void acts in ***MACFOY Vs. UNITED AFRICA CO. LTD [1061] 3 ALL ER 1169***, we cannot say

that the applicants draft memorandum of appeal is entirely devoid of plausible argument. We apprehend that the threshold for arguability is deliberately low as an arguable point is not one that must necessarily succeed. We hear the applicant to say that it was not open for the learned Judge to be seen to sit on appeal against the judgment Waweru, J., to offend the principle of finality, and to make the judgment of this Court of no effect contrary to hierarchy. We have seen the many authorities cited and the robust arguments made by the respondent to counter those assertions. It is not for us to decide which party is right on the point but the undeniable fact is that there is something to be urged and answered on appeal, and on which the Court will be called upon to make a determination. Thus, arguability is satisfied.

To succeed, the applicant must in addition show that his appeal would be rendered nugatory absent the stay of execution

he seeks. This aspect is, to our mind, intimately linked to the reversibility or otherwise of the apprehended harm which in turn

brings into play the various principles, developed by the Court over time, regarding the circumstances under which stay of execution may or may not issue. It is common ground, for instance that an order of stay cannot issue against a negative order, so that a dismissal of a suit or an application by the court appealed from cannot attract intervention of this Court by way of stay of execution. The Court cannot grant a stay where the effect is to reverse at interlocutory stage that which was decided by the High Court before the appeal itself is heard. Our approach as we have stated it, accords with that of O'Kubasu, Githinji & Aluoch, JJ.A in ***KILELESWHA SERVICE STATION LIMITED Vs. KENYA SHALL LIMITED [2008] KECA 342 (KLR)*** who, immediately after finding the intended appeal therein to be arguable, delivered themselves thus;

> *"The order of the superior court that the applicant intends to appeal against merely set aside the order requiring the company to compensate the applicant in the sum of Shs.13,088,000/= for improvements done in the petrol station. It was not a positive order capable of execution by enforcement. It seems that by the stay application the applicant is in effect seeking a restoration of the order for payment of the compensation pending appeal which cannot be done at this stage.*
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> *As the authors of BLACKS LAW DICTIONARY, sixth Edition, explain at page 1413:*

"A 'stay' does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal".

The words of Law, V.P. in Western College of Arts and Applied Sciences v Oranga [1976] KLR 63 at page 66 L – D) are apt:

"In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or to restrain by injunction".

Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extend misconceived.

In the present case, while the learned Mr. Singh posits that declarations on the positive or negative and that the order of injunction granted by the learned Judge was a positive order, we are unable to agree with him. The declaratory orders merely stated answers and resolved questions that had been raised for determination. They did not require the applicant to do anything, pay any money under the decree or take any step. Nor did they permit the respondent to take any enforcement measures in execution, such as by seizing and selling the applicant's property

or demolishing or even entering upon such property. The injunction that was issued restrained the applicant from executing or acquiring any benefit from the judgment adjudged to have been procured by fraud. It was a restraining injunction, not a mandatory one that would have required the doing of any act. In short, the orders given by the learned Judge were not positive orders, are unexecutable and are, therefore, not capable of being stayed by this Court under Rule 5 (2) (b). This was our holding in ***OPONDI Vs. ONYANGO (ADMINISTRATOR OF THE ESTATE OF CHARLES ONYANGO GUCHA [2023] KECA 1076***, cited by Mr. Singh himself.

That then leaves the question of execution of costs. With respect, this Court has stated time without number that an order for the payment of costs, alone without a substantive order requiring stay, is not one capable of being stayed, for the self-evident reason that costs are not part of the judgment or decree, and stand alone and are grantable to the party who succeeds in a claim or in resisting a claim. We reiterate the holding, half a century ago in ***MANDAVIA Vs. COMMISSIONER OF INCOME TAX***

(supra) that a direction to pay costs is not of itself sufficient to bring the order appealed from within the definition of “a judgment

which requires the appellant to pay money or do any act." A stay of execution thus cannot issue in the circumstances of this case.

We think we need not trouble ourselves in this application with a consideration of the effect of the judgment of the learned Judge on the decretal sum arising from the judgment of Waweru, J. It is not the applicant who was to pay the sum so as to attract our stay jurisdiction. The judgment that gave rise to it was nullified for fraud but, were the applicant to succeed on the appeal and the same be restored, he would proceed with execution for it in the usual manner.

Since the applicant did not seek a stay of proceedings with regard the ordered retrial, we will not consider the same as the Court has no jurisdiction to grant to a party prayers not sought by that party. That would be a case of gratuitous overreach on the part of the Court, and it would be acting devoid of jurisdiction. See ***NAIROBI CITY COUNCIL Vs. THABITI ENTERPRISES LTD*** (supra).

The upshot of our consideration of this application is that it is devoid of merit and fails. The same is dismissed with costs to the respondent.

We think that in it in the interest of justice and certainty that the intended appeal once filed be accorded priority.

So ordered.

Dated and delivered at Nairobi this 5th day of December, 2025.

P. O. KIAGE

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR