

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA (P), GATEMBU, & NYAMWEYA,

JJ.A.) CIVIL APPLICATION NO. NAI E247 OF 2025

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES.....APPLICANT

AND

HALL EQUATORIAL LIMITED.....RESPONDENT

*(Being an application for stay of ruling and further proceedings pending the determination of the intended appeal from the Ruling and the Directions of the High Court of Kenya at Nairobi (**Cherere, J.**) delivered on 27th March 2025*

in

HCCC No. E115 of 2024)

RULING OF THE COURT

1. Before this Court is an application dated 15th April 2025 that seeks stay of the ruling delivered on **27th March 2025** and any consequential orders as well as stay of further proceedings in **Milimani HCCC No. E115 of 2024, Hall Equatorial Limited vs Titus Makhanu & Associates Advocates**, pending hearing and determination of an intended appeal.
2. The background to this application is that the respondent

filed an Originating Summons dated 4th June 2024 seeking an order

compelling the applicant to release a sum of Kshs. 2,300,000/= and the original title to land parcel L.R. No. 15400/119. The respondent contended that in 2018 it instructed the applicant to file a debt recovery suit against Amboseli Court Limited which resulted in judgment for Kshs. 3,480,992.78 plus costs. A consent was later recorded on 25th July 2019 where Amboseli Court Limited agreed to pay the decretal amount in instalments and deposited the original title as security. The respondent stated that Amboseli Court Limited subsequently paid Kshs. 2,300,000/= to the applicant, who acknowledged receipt but failed to remit the money or release the title, despite demand.

3. In response, the applicant, through an affidavit sworn on 24th January 2025, admitted being in possession of both the funds and the title, but claimed they were being held under a lien for unpaid legal fees. It relied on three certificates of costs taxed against the respondent, *to wit*, **Nairobi ELRC Misc. App. No. 280 of 2023** for Kshs. 61,042.80, **Nairobi ELRC Misc. App. No. E281 of 2023** for Kshs. 69,959.40 and **Naivasha Misc. Civil Case No. E185 of 2023** for Kshs. 882,865.64, making a total of Kshs. 1,013,867.84.

The applicant also referred to a
pending certificate in **Nairobi HCCOMM Misc. E075 of
2024**

for Kshs. 164,383.00. The applicant further contended that Southern Shield Holdings Ltd and Alicate Holdings Ltd, which it claimed were associated with the respondent, also owed outstanding fees and therefore the property and the said sum could not be released to the respondent. It was also asserted that the matter could not be resolved under Order 52 and should instead proceed as a full suit.

4. In addition, the applicant also filed an application dated 17th March 2025 seeking stay of proceedings in the High Court matter. Vide orders made on 17th March 2025, the court (***Cherere, J.***) declined to certify the application as urgent and directed that it be served upon the respondent for directions on 18th March 2025. In addition, the applicant also filed a Notice of Preliminary Objection dated 25th March 2025 stating that the claim for Kshs. 2,300,000/= and the release of the original title was directly and substantially in issue in **Milimani MCCC/8548/2018**, which was pending before court awaiting determination, and therefore, on account of the *sub judice* rule, the court had no jurisdiction to entertain the matter by the respondent, **High Court Civil Case No. E115 of 2024.**

5. Vide a ruling delivered on 27th March 2025, the High Court acknowledged the existence of three valid certificates of costs in favour of the applicant, but held that an advocate's lien over costs is passive and does not entitle an advocate an automatic right to deduct the fees from funds received on behalf of a client, unless expressly agreed or ordered by the court. Since the Kshs. 2,300,000/= originated from a court-supervised settlement and was held in trust, the applicant had a fiduciary duty to account and release the funds to the respondent.
6. Regarding release of the title deed, the Court held that it was deposited solely as security by the judgment debtor, Amboseli Court Limited, and not as collateral for unpaid fees. The lien, if any, was extinguished once the advocate-client relationship ended, and the applicant had no continuing legal entitlement to hold it.
7. On whether the applicant's rival claims necessitate a separate suit for adjudication, the Court held that disputes between advocates and clients fall squarely under Order 52 and should not be delayed by additional litigation where the record is clear. It was thus held that a separate suit was

unnecessary.

8. The court also held that the applicant breached fiduciary obligations by withholding both the funds and the title without lawful justification. It allowed the application and ordered the applicant to pay the respondent Kshs. 2,300,000/= with interest from the date of receipt, and release the title to L.R. No. 15400/119.
9. Being aggrieved and dissatisfied with that ruling, the applicant intends to lodge an appeal, as evinced by the Notice of Appeal dated 28th March 2025.
10. In this application, which is supported by an affidavit sworn by Titus Makhanu, Advocate, the applicant contends that its intended appeal is arguable and raises serious constitutional issues which deserve to be heard and determined on their merits. Although the applicant did not annex a draft memorandum of appeal to the affidavit sworn in support of the application, the grounds in support of arguability as can be gleaned from the affidavit in support are that the High Court erred in law and in fact by: refusing to determine the applicant's application dated 17th March 2025 challenging the proceedings leading to the impugned ruling and hence violated

the applicant's right to be heard; refusing to determine the

applicant's preliminary objection dated 25th March 2024 first challenging its jurisdiction to hear and determine the Originating Summons dated 4th June 2024, hence violated the applicant's rights to be heard; proceeding to issue directions on the disposal of the applicant's application dated 17th March 2025 while knowing very well that by the delivery of the impugned ruling, the said application had been rendered nugatory and the court had become *functus officio*; and by refusing to grant the applicant audience on 27th March 2025 to first address it on the Preliminary Objection and the need to determine the applicant's application before transacting any other business.

11. On the nugatory aspect, it is contended that unless stay is granted, the appeal will be rendered nugatory because the respondent may proceed with execution of the ruling requiring release of funds and the title deed. In addition, that the High Court is scheduled to issue another ruling on 5th May 2025 (now past), and is unlikely to issue stay of further proceedings, especially in light of the respondent's arguments that the court is now *functus officio*. That would alter the substratum of the

intended appeal and result in irreversible consequences. The

applicant asserts that no prejudice will be suffered by the respondent if stay is granted, whereas refusal would subject it to ongoing violation of fair hearing rights and defeat the appellate process altogether.

12. In response, the respondent, through a replying affidavit sworn by its director, Abdulali Kurji, contends that the application is misconceived, lacks merit and ought to be dismissed. The respondent maintains that the applicant admitted receiving the sum of Kshs. 2,300,000/= on its behalf, yet failed to disclose that fact in the earlier application before the High Court. It is further averred that on 18th February 2025 the High Court directed that the matter be canvassed by way of written submissions and issued timelines within which the applicant was to file its response, but the applicant allegedly failed to comply. Instead of adhering to those directions, the respondent asserts that the applicant opted to file other applications, including a taxation reference, rather than a response as ordered by the High Court.

13. The respondent further avers that the ruling delivered on 27th March 2025 was regularly issued after both parties

were

accorded an opportunity to be heard and therefore the applicant

cannot validly claim that its rights to a fair hearing were infringed. The respondent disputes the applicant's contention that the preliminary objection ought to have been determined first, arguing that it did not raise a pure point of law and was instead introduced belatedly as a tactic to delay the matter. It is also the respondent's position that the High Court, having already pronounced itself on the issues before it, is now *functus officio* and there are no ongoing proceedings capable of being stayed.

14. On arguability, it is averred that the intended appeal is not arguable at all, and in any case, the applicant has not annexed a draft memorandum of appeal to enable the Court decipher the grounds intended to be raised on appeal. On the nugatory aspect, it is averred that contrary to the averments by the applicant, the intended appeal, if successful, will not be rendered nugatory because the respondent is able to refund the decretal sum.
15. Through a supplementary affidavit, the applicant contends, *inter alia*, that there is no reasonable evidence that the respondent will be able to refund or satisfy any decretal amount

should the appeal succeed; that the respondent ceased

operating from its last known office in 2018 and now operates from an undisclosed location; that in 2019 the respondent charged all its assets to secure a loan of over Kshs. 80 million and therefore its known assets are encumbered.

- 16.** At the hearing of this application, learned counsel **Mr. Makhanu** appeared for the applicant, while learned counsel **Mr. Wainaina** was present for the respondent. Both counsel made brief oral highlights of their respective client's written submissions, which we have considered.
- 17.** It is trite law that in applications of this nature the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.**
- 18.** As regards arguability, the law is settled that an arguable appeal is not one that must ultimately succeed, but one that raises at least a single *bona fide* issue that deserves full consideration on appeal. The applicant contends that the High Court erred when it declined to first determine the

application dated 17th March 2025 which challenged the continuation of the proceedings and in doing so violated the applicant's right to be heard. The

applicant also faults the High Court for failing to first consider and determine the preliminary objection dated 25th March 2024 which questioned the court's jurisdiction to entertain the originating summons. Taken together, these grounds are, in our view, not idle. They require interrogation on appeal. On that basis, the applicant has demonstrated that the intended appeal is arguable.

19. Turning to the nugatory aspect, this Court stated in **Stanley**

Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra)

that whether or not an appeal will be rendered nugatory depends on whether 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.

20. The High Court in the impugned ruling ordered the applicant to pay the respondent the sum of Kshs. 2,300,000/= together with interest at court rates from the date of receipt by the applicant. The applicant was also directed to release to the respondent the original title to land parcel L.R. No. 15400/119. Other than the order for return of the title, the decree is a monetary one. In **Safaricom PLC v Laiser**

Communications Limited & 4

Others [2022] KECA 800 (KLR) this Court stated thus:

“On the nugatory aspect, it was not disputed that the decree is a monetary decree. In Kenya Shell Limited vs Benjamin Karuga Kibiru & Anor (supra), this Court held that a monetary decree would not be rendered nugatory by the mere execution of the decree. However, this position has since shifted. In Kenya Hotel Properties Limited vs. Willesden Properties Limited (supra), this Court had this to say regarding monetary decree.

“The decree is a monetary decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a monetary decree so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on the grounds that the decree is a monetary decree. The court however was emphatic that in considering such matters as hardship, a third principle in law was not being established at all. Hence the cases such as Oraro & Rachier Advocates vs Cooperative Bank of Kenya Limited - Civil Application No. NAI 358 of 1999 (unreported) where it was held by this Court that if an applicant is compelled to pay the decretal amount in a money decree, the hardship that the applicant may undergo may be unbearable.

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It does appear to us that in considering the question as to whether the success of the intended appeal will be rendered nugatory

were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the Court with the background of ensuring justice in mind.”

21. In the circumstances herein, while the amount in issue is not colossal, the applicant has placed in issue the respondent's ability to refund the decretal sum should the intended appeal ultimately succeed. Other than the bare assertion that it is financially capable of doing so, the respondent has not furnished any documentary or credible proof to demonstrate its capacity to refund the amount if called upon. In **Safaricom PLC v Laiser Communications Limited & 4 Others (supra)**, this Court went on to hold thus:

“...The applicant is apprehensive that it may not be able to recover these monies from the respondents because the respondents' capability to repay the decretal sum in the event that the intended appeal is successful, is doubtful as their means of income is presently unknown. This was disputed by the respondents without any substantive facts or information. As held by this Court in International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403, the onus was on the respondents to rebut the claim regarding their financial capacity to refund the decretal sum if the appeal succeeds.”

22. The burden rested with the respondent to demonstrate, through evidence, that it has financial capacity to refund the decretal sum if required to do so. Having failed to discharge that obligation, the applicant is justifiably apprehensive that the

respondent will not be able to refund the decretal sum, which would render a successful appeal nugatory.

23. As regards the prayer for stay of proceedings, nothing was placed before this Court to demonstrate that the continuation of the proceedings would occasion prejudice to the applicant or render the intended appeal nugatory. Besides, in **Meta Platforms, Inc & Another v Samasource Kenya EPZ Limited t/a Sama & Another; Kenya National Humans Rights Equality Commission & 9 Others (Interested Parties) [2023] KECA 996 (KLR)**, this Court held that stay of proceedings constitutes a grave curtailment of a party's right to prosecute or defend their case, and will not be granted unless it is clearly shown that the proceedings ought not to be permitted to continue, or there are special circumstances to warrant it. In the present case, no such threshold has been met. Accordingly, the prayer for stay of proceedings fails.

24. In the end, we are satisfied that the applicant has demonstrated that the intended appeal is arguable and that, absent stay, if the appeal succeeds it will be rendered nugatory. Accordingly, the notice of motion dated 15th April

2025 is allowed to the

extent that there shall be an order staying the ruling delivered

on **27th March 2025** in **Milimani HCCC No. E115 of 2024:**
Hall Equatorial Limited v Titus Makhanu & Associates
Advocates, pending hearing and determination of the
intended appeal. The costs of the application shall abide the
outcome of the appeal.

Dated and delivered at Nairobi this 19th day of December,
2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb, C.Arb

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.