

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

**(CORAM: MUSINGA (P), JOEL NGUGI & ODUNGA,  
JJ.A) CIVIL APPLICATION NO. NAI E540 OF 2025**

**BETWEEN**

**I & M BANK LIMITED.....APPLICANT**

**AND**

**KAGWIMI KANG'ETHE & CO ADVOCATES.....RESPONDENT**

*(Being an application for stay of execution of the  
Judgment of the High Court of Kenya at Nairobi,  
Commercial & Tax Division (Njoroge, J.) dated 7<sup>th</sup> August,  
2025*

*in*

***HCCC No. E220 of 2020)***

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**RULING OF THE COURT**

1. This is a Notice of Motion dated 8<sup>th</sup> September, 2025 brought under rule 5(2)(b) of the Court of Appeal Rules, 2022. The applicant, I & M Bank Limited, seeks an order staying execution of the judgment of the High Court (*Benjamin Njoroge K., J.*) delivered on 7<sup>th</sup> August, 2025 in ***HCC Suit No. E220 of 2020*** pending the hearing and determination of its intended appeal.
2. The impugned judgment arose from a suit in which the High Court found that the applicant had unlawfully frozen several bank accounts belonging to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents without lawful justification and without notifying them, notwithstanding that the relevant court orders and investigations related only to an escrow account. The High

Court awarded general damages of Kshs. 5,000,000/= to each of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, together with costs.

3. Aggrieved by that decision, the applicant lodged a Notice of Appeal and subsequently moved this Court, seeking a stay of execution of the decree on the ground that the intended appeal is arguable and that, unless a stay is granted, the appeal would be rendered nugatory.
4. The application came before us for plenary hearing on 16<sup>th</sup> December, 2025. Mr. Wawire, learned counsel, appeared for the applicant while Mr. Kivuva, learned counsel, appeared for the respondents. Both counsel confirmed that they had filed written submissions and briefly highlighted them orally.
5. It is common ground that the application invokes the original and discretionary jurisdiction of this Court under rule 5(2)(b) of the Court of Appeal Rules. The governing principles are settled. An applicant must satisfy the twin requirements: that the intended appeal is arguable, meaning that it is not frivolous, and that unless the orders sought are granted, the intended appeal, if successful, would be rendered nugatory. These principles were restated by this Court in ***Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR***, and have been consistently applied in a long line of authorities.
6. It is against this settled jurisprudential backdrop that the parties framed their respective arguments before us, the applicant urging that it had satisfied both limbs of the rule, while the respondents contended that it had satisfied neither.
7. The applicant's case is that the intended appeal raises arguable issues, including whether the bank was justified, under its contractual terms and in the context of court orders

and fraud investigations, in freezing accounts not expressly named in those

orders, and whether the learned Judge erred in law by imposing a duty of notification not expressly provided for in the contract between the parties. The applicant further challenges the award of general damages as excessive and unsupported by evidence.

8. On the nugatory limb, the applicant contends that the decretal sum of Kshs. 15,000,000/= is substantial and that there is a real risk it may not be recoverable from the respondents if paid out before the appeal is heard, thereby rendering the appeal academic.
9. In response, the respondents oppose the application and rely on their replying affidavit and submissions. They argue that the intended appeal is frivolous because the applicant expressly admitted at trial that it froze the relevant accounts without any court order and failed to notify the account holders, despite clear evidence and even a letter from the Directorate of Criminal Investigations clarifying that its interest was limited to the escrow account. They contend that the High Court's findings were firmly grounded on the evidence and law.
10. On the nugatory aspect, the respondents submit that the decree is purely a money decree and that they have demonstrated, through bank statements and affidavits, that they are not impecunious and are fully capable of refunding the decretal sum should the appeal succeed. They rely on long-standing authorities of this Court to the effect that execution of a money decree does not, without more, render an appeal nugatory.

11. We have carefully considered the application, the affidavits, the submissions by counsel, and the applicable law. As this Court

has repeatedly stated, the two limbs under rule 5(2)(b) are conjunctive, and failure to satisfy either is fatal to an application.

12. On the first limb, and without expressing any concluded view on the merits of the intended appeal, we are satisfied that the applicant has demonstrated at least one arguable issue. In particular, whether a bank, acting under general contractual terms and in the context of fraud investigations, may lawfully freeze accounts not expressly named in court orders, and whether a legal duty to notify customers arises in such circumstances, are issues that are not idle or frivolous and merit interrogation on appeal.
13. The application, however, founders on the second limb. The question whether an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, is reversible, or if not reversible, whether damages would reasonably compensate the aggrieved party. This principle was articulated in ***Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] KLR 410***, where this Court emphasised that the mere fact that a decree is for a large sum of money is not, by itself, a ground for granting stay.
14. The same principle was reiterated in ***Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another, Civil Appeal No. 74 of 2015 (UR 63/2015)***, where this Court held that an applicant must demonstrate, by evidence, that the respondent would be unable to refund the decretal sum if the appeal were to succeed.

15. In ***Trust Bank Limited & Another v Investech Bank Ltd & 4 Others [2000] eKLR***, the Court further underscored that where

the respondent is shown to be financially capable, the nugatory limb is not satisfied merely because execution may proceed.

16. Applying these principles to the present case, the decree sought to be stayed is a straightforward money decree for general damages and costs. The evidential burden lay on the applicant to demonstrate that the respondents would be unable to repay the decretal sum if the appeal were to succeed.
17. The respondents placed before the Court evidence demonstrating that they are financially capable and not impecunious. The 2<sup>nd</sup> respondent, a senior advocate of long standing and the proprietor of the 1<sup>st</sup> respondent, exhibited bank statements showing substantial credit balances. The 3<sup>rd</sup> and 4<sup>th</sup> respondents likewise demonstrated that they maintain active accounts with appreciable balances. This evidence was not displaced by the applicant.
18. In these circumstances, we are not persuaded that payment of the decretal sum would irreversibly destroy the substratum of the intended appeal. Any success on appeal would not be rendered hollow, as restitution would remain a viable and realistic remedy.
19. We also bear in mind the well-established principle that a successful litigant should not lightly be deprived of the fruits of a judgment regularly obtained. Rule 5(2)(b) is not intended to operate as an automatic suspension of execution pending appeal, particularly where no exceptional circumstances are shown.

20. Finally, we see no basis, on the material before us, for invoking broader considerations to convert this matter into something other than an ordinary money decree. This is not a case involving

unique subject matter, perishable rights, or public interest considerations of such a nature as to justify departure from settled principles.

21. The upshot is that while the intended appeal may be arguable, the applicant has failed to demonstrate that it would be rendered nugatory if a stay is not granted. The application, therefore, does not meet the conjunctive threshold required under rule 5(2)(b) of the Court of Appeal Rules.

22. Accordingly, the Notice of Motion dated 8<sup>th</sup> September, 2025 is dismissed with costs to the respondents.

23. It is so ordered.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of January, 2026.**

**D. K. MUSINGA, (PRESIDENT)**

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**.... JUDGE OF  
APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

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