

**IN THE COURT OF APPEAL
AT MOMBASA**

**(CORAM: MURGOR, NGENYE & JOEL NGUGI,
JJ.A) CIVIL APPLICATION NO. E037 OF 2025**

BETWEEN

**THE CLERK,
COUNTY ASSEMBLY OF TAITA TAVETA.....1ST
APPELLANT THE COUNTY ASSEMBLY OF TAITA TAVETA 2ND
APPELLANT
HON. ROSE SHINGIRA.....3RD APPELLANT
HON. ANSELM MWADIME.....4TH APPELLANT**

AND

WISDOM MWAMBURI KAZUNGU.....RESPONDENT

*(Being an Application for stay of proceedings pending the hearing
and determination of Mombasa Civil Appeal No. E070 of 2025
against the Ruling of the Employment and Labour Relations Court
at Mombasa (Kebira, J.) dated 8th April, 2025*

in

**ELRC Pet. No. E005 of
2025)**

RULING OF THE COURT

- 1.** The motion before us is dated 8th May 2025. On its face, it is expressed to be brought under Sections 3A and 3B of the Appellate Jurisdiction Act, Rules 5(2)(b), 42 and 47 of the Court of Appeal Rules, 2022, Article 159 of the Constitution and all enabling provisions of the law. The applicants seek principally an order of stay of proceedings in **Mombasa ELRC Petition No. E005 of 2025 Wisdom Mwamburi Kazungu v Clerk, County**

Assembly of Taita

Taveta & Others, pending the hearing and determination of **Civil Appeal No. E070 of 2025**.

2. The application is anchored on the supporting affidavit of Gadiel Maghanga, the present Clerk of the County Assembly of Taita Taveta, and is opposed by the respondent through a replying affidavit sworn by his advocate, Mr. Gikandi Ngibuini. Both parties filed written submissions and also highlighted them orally before us during the plenary hearing held on 2nd July, 2025. During that hearing, Mr. Nyange, learned counsel, appeared for the applicants while Mr. Gikandi Ngibuini, learned counsel, appeared for the respondent.
3. The dispute emanates from the respondent's impeachment as Speaker of the County Assembly of Taita Taveta. Since that impeachment, the respondent has moved through a maze of litigation before the High Court and the Employment and Labour Relations Court (ELRC), with each forum confronted by jurisdictional objections and conflicting rulings.
4. Initially, the respondent filed Mombasa **HC Constitutional Petition No. E035 of 2024**. The High Court declined to grant *ex parte* interim relief and transferred the matter to Voi, where it became **Voi HC Constitutional Petition No. E007 of 2024**. The High Court in Voi granted temporary relief but subsequently transferred the matter to the ELRC in Mombasa, where it was registered as **ELRC Petition No. E009 of 2024**.
5. Meanwhile, the respondent also filed **Mombasa ELRC Petition**

No. E008 of 2024. On objection by the applicants, that petition was

dismissed for want of jurisdiction. When the matter was referred back to Voi, the applicants again raised jurisdictional objections. In its judgment of 17th January, 2025, the High Court in Voi struck out the matter for want of jurisdiction, holding that it was the ELRC that was properly clothed with jurisdiction.

6. The applicants had, in the meantime, lodged an appeal, **Civil Appeal No. E174 of 2024**, but abandoned it once the High Court in Voi struck out the suit.
7. Thereafter, on 22nd January, 2025, the respondent obtained an injunction in suspending the election of a new Speaker to preserve the subject matter. The ELRC subsequently entertained yet another petition, **Mombasa ELRC Petition No. E005 of 2025**, in which the respondent sought to restrain the applicants from filling the Speaker's office and for payment of his salaries. In its ruling of 8th April, 2025, the ELRC (Kebira, J.) dismissed the applicants' objection to jurisdiction, granted conservatory orders restraining the election of a new Speaker, but declined to award salaries.
8. It is that ruling which the applicants have appealed against in **Civil Appeal No. E070 of 2025**. Pending that appeal, they now seek a stay of the proceedings before the ELRC.
9. For the applicants, Mr. Nyange argued that their appeal is arguable as it questions whether the ELRC had jurisdiction to entertain the respondent's fresh petition after a similar one had previously been dismissed. He contended that allowing the ELRC

proceedings to continue would risk reinstating the respondent to the office of

Speaker, with irreversible constitutional functions being undertaken in that capacity. In his view, such developments would render the appeal nugatory.

10. Counsel further argued that the respondent's repeated filing of petitions amounts to forum shopping and an abuse of the court process, and that the learned Judge erred in overlooking the doctrine of constitutional avoidance.
11. Opposing the application, Mr. Gikandi submitted that the threshold for stay of proceedings is extremely high, since such an order derogates from the constitutional right to a fair trial. He argued that the respondent has never had a full hearing on the merits of his impeachment and is entitled to ventilate his grievance before the ELRC.
12. Relying on ***David Morton Silverstein v Atsango Chesoni [2002] eKLR, UAP Provincial Insurance Co. Ltd v Michael John Beckett [2004] KECA 26***, and ***Katangi Developers Ltd v Pramukh Enterprises Ltd & 7 Others [2018] KECA 695***, counsel contended that an appeal is not rendered nugatory merely because proceedings in the trial court continue. Should the ELRC lack jurisdiction, its proceedings would be a nullity, and the applicants' rights would not be defeated.
13. He urged that the public interest lies in allowing the petition to proceed to conclusion, with any aggrieved party free to appeal thereafter.

14. Applications of this nature are governed by Rule 5(2)(b) of the Court of Appeal Rules, 2022. That Rule preserves for this Court a special, original and discretionary jurisdiction to issue interim relief to prevent an appeal from being rendered illusory. The jurisdiction is not appellate in character: it does not involve reviewing or correcting the discretion of the court below. Rather, it is protective, meant to safeguard the substratum of an appeal so that, should it ultimately succeed, the victory is not pyrrhic.
15. Over the years, this Court has crystallised two conditions which must both be satisfied before relief under Rule 5(2)(b) can issue. The first is that the intended appeal must be arguable; the second is that unless the relief is granted, the appeal will be rendered nugatory. This twin test is trite, having been restated time and again, including in ***Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*** where the Court explained that an arguable appeal is not one that must succeed, but one that raises at least a single *bona fide* point deserving of full judicial interrogation.
16. The second limb – the nugatory aspect – directs attention to the consequences that will follow if interim relief is denied. The Court must be satisfied that without relief, the very essence of the appeal will be lost, or the appellant will be subjected to irreversible prejudice. Where any loss or inconvenience is compensable, or where the substratum of the dispute remains intact, the appeal cannot be said to be rendered nugatory.

17. It must also be remembered that what is sought here is not a stay of execution, but a stay of proceedings. The distinction is not merely semantic; it is substantive. As was emphasised in ***Kenya Wildlife Service v James Mutembei [2019] eKLR***, stay of proceedings is a grave action because it halts the work of a constitutional court, interferes with a litigant's right to be heard without delay, and implicates the constitutional guarantee of access to justice and fair trial. For that reason, the test for stay of proceedings is "high and stringent."
18. This Court in ***David Morton Silverstein v Atsango Chesoni [2002] eKLR*** underlined that even where the question on appeal is jurisdictional, the mere continuation of proceedings does not necessarily render an appeal nugatory. In that case, the Court rejected an application for stay of proceedings, reasoning that if ultimately jurisdiction was found lacking, whatever proceedings had taken place would be a nullity and the appeal would not have been stifled. Similar reasoning was applied in ***UAP Provincial Insurance Co. Ltd v Michael John Beckett [2004] KECA 26*** and in ***Katangi Developers Ltd v Pramukh Enterprises Ltd & 7 Others [2018] KECA 695***, where the Court stressed that absent exceptional prejudice, proceedings should be allowed to take their normal course.
19. These principles remind us that while the Court is vigilant to preserve the efficacy of its appellate jurisdiction, it must also balance against the rights of litigants to access justice in the trial courts, and the imperative of ensuring that the machinery of

justice is not
unnecessarily paralysed.

20. Applying these principles to the present application, we begin with the first limb. The threshold for this limb is quite modest: The threshold for this limb is quite modest: an applicant need only show that the intended appeal is not frivolous, in the sense that it discloses at least one *bona fide* arguable ground, even if it may ultimately not succeed (**Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR**)
21. In the present case, the applicants contend that the ELRC lacked jurisdiction to entertain the respondent's fresh petition after earlier proceedings had been dismissed. They invoke doctrines such as *functus officio*, *res judicata*, and constitutional avoidance. They also argue that the respondent engaged in impermissible forum shopping by filing in multiple fora. These are serious allegations, and it cannot be said that the appeal is frivolous. We, therefore, accept that the intended appeal discloses arguable grounds.
22. The second limb is more decisive. The applicants must demonstrate that unless proceedings in the ELRC are halted, their appeal will be rendered nugatory. In this case, the applicants assert that the respondent may be reinstated as Speaker and thereby exercise constitutional functions that would be irreversible if the stay is not granted.
23. With respect, this fear is overstated. The orders presently in force are conservatory, restraining the election of a new Speaker. They do not reinstate the respondent to office, nor do they compel payment of his salaries. The substratum of the appeal is,

therefore, preserved: the

seat of Speaker remains vacant and protected pending determination.

24. Moreover, even if the ELRC proceeds to hear and determine the petition, the applicants' rights are not extinguished. Should this Court ultimately find that the ELRC lacked jurisdiction, all proceedings conducted in that forum would be void *ab initio*, as famously held in ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1***. In that sense, the appeal cannot be said to be rendered nugatory in the specific circumstances of this case.
25. On the contrary, granting a stay of proceedings would inflict palpable prejudice on the respondent, who has, thus far, been unable to secure a substantive hearing on the merits of his impeachment. For over a year, he has traversed between the High Court and the ELRC, only to be confronted with jurisdictional objections mounted by the applicants. The principle of access to justice under Article 48 of the Constitution, and the right to a fair trial under Article 50, weigh against further delay.
26. There is also a public interest dimension. The functioning of a county assembly, a vital organ of devolved governance, should not be held hostage to interlocutory contests. While we appreciate the applicants' desire to resolve jurisdictional questions definitively, that resolution lies in the appeal itself, not in paralysing the trial court. The prudent course is to fast-track the appeal so that the jurisdictional issue is

determined authoritatively, rather than allowing interlocutory objections to stall the proceedings at first instance.

27. Ultimately, we find that the applicants have not demonstrated exceptional prejudice that would justify the drastic remedy of stay of proceedings. Their arguable appeal will remain intact, and any prejudice suffered in the meantime is remediable. What is more, the continued subsistence of conservatory orders ensures that the subject matter is preserved.
28. In light of the foregoing, we are satisfied that although the appeal is arguable, the applicants have failed to show that it would be rendered nugatory absent the orders sought.
29. The Notice of Motion dated 8th May, 2025 is accordingly dismissed. Costs shall abide the outcome of the appeal.
30. It is so ordered.

Dated and delivered at Mombasa this 13th day of February, 2026.

A. K. MURGOR

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

G. W. NGENYE-MACHARIA

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

JOEL NGUGI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR