

**IN THE COURT OF
APPEAL AT NAIROBI**

CORAM: M'INOTI, J. MOHAMMED & JOEL NGUGI,

JJA. CIVIL APPLICATION NO. NAI E207 OF 2025

BETWEEN

NATIONAL BANK OF KENYA LTD.....APPLICANT

AND

HARIOM CONSTRUCTION LTD.....1ST RESPONDENT

VERUS PRAEDIUM REALTORS LTD.....2ND RESPONDENT

SHALOM G. NJAGI 3RD

RESPONDENT BENJAMIN G. NJAGI.....4TH

RESPONDENT

*(Application for stay of execution and further proceedings
pending the hearing and determination of an appeal from the
ruling and order of the High Court of Kenya at Nairobi
(Mong'are, J.) dated 17th January 2025*

in

HC.COM.C No. E170 of 2024.)

**** RULING OF THE**

COURT

1. The applicant, the National Bank of Kenya, has moved the Court vide a Notice of Motion dated 28th March 2025 for an order of stay of execution pending appeal, of the ruling and order of the High Court of Kenya at Nairobi (Monga're J.),

dated 17th January 2025. By the impugned ruling the High Court

found the applicant's Chief Executive Officer/Managing Director, Mr. George Odhiambo (Mr. Odhiambo), guilty of contempt of court and set 3rd March 2025, which was later changed to 28th April 2025, for the said officer to show cause why he should not be punished for the contempt.

2. We heard the applicant and the respondents on 23rd April 2025 and issued an order of temporary stay of execution pending delivery of this ruling.

3. The relevant background to the application is that on 30th April 2024, the 1st respondent, Hariom Construction Ltd., the 2nd respondent, Verus Praeduum Realtors Ltd., the 3rd respondent, Sharom G. Njagi and the 4th respondent, Benjamin G. Njagi, recorded a consent order in High Court Civil Suit No. E170 of 2024. The order was worded as follows:

- i. "That the interim orders issued by this court for freezing the defendant's account at NBK Account No. 0106065130400 and Co-operative Bank Number 00119278435660 be and are hereby lifted;***
- ii. That a sum of Kshs. 23 million shall be held in a joint interest account in the joint names of the advocates for both parties at NBK bank pending***

the hearing and disposal of this suit;

iii. That this application be and is hereby marked spent; and

iv. That the matter be mentioned on 27th may 2024 before the Deputy Registrar.”

4. On 25th June 2024, the 1st respondent applied to the High Court to find Mr. Odhiambo guilty of contempt of court for disobeying the orders issued on 30th April 2024, and to commit him to civil jail until the applicant complied with the said order, and paid a fine of Kshs 2,000,000.00.
5. The applicant contended that the applicant partially complied with the court order by unfreezing the 1st respondent's account and opening a joint interest earning account in the name of the parties' advocates, but, in breach of the court order, failed to transfer Kshs 23,000,000.00 into the joint account.
6. The applicant opposed the application on the grounds that the court order did not require it to deposit the stated amount in the joint account; that at the time the 1st respondent's advocates asked the Bank to deposit 23,000,000 into the joint account, the 2nd respondent's account had Kshs 19,285.95; and that it had not deliberately refused to comply with the court order and was

willing to effect the deposit once the 2nd respondent's account had adequate funds.

7. The 3rd respondent and the 4th respondent who together with the 2nd respondent were defendants in the High Court suit, opposed the application contending that the 1st respondent had misrepresented that the 2nd respondent's account had Kshs 300,000,000.00, which was not true and that in any event, the account was for a construction project and the 2nd respondent had no access thereto.
8. The High Court found that on 20th June 2024 the 2nd respondent's account was debited with Kshs 32,587,070.30 and that the applicant failed to deposit therefrom Kshs 23,000,000.00 in compliance with the court order. The court concluded that the applicant had the opportunity to comply with the court order, but failed to do so. It accordingly set 3rd March 2025 for Mr Odhiambo to show cause why punishment should not be meted for contempt of court.
9. The applicant was aggrieved and lodged a notice of appeal on 29th January 2025, followed by the present application. In support of the application Mr. Gatonye, SC, leading Mr. Kaburu and Mr. Muiruri, relied on the supporting and supplementary affidavits of Mr. Odhiambo sworn on 28th March 2025 and 10th April 2025, respectively; a draft

memorandum of appeal dated 27th March 2025; and written submissions dated 7th April 2025.

10. The substance of the applicant's argument is that its intended appeal is arguable because the High Court erred by failing to take into account the fact that the applicant was not a party to the consent order; that in so far as the consent order required it to take action, namely to unfreeze the 2nd respondent's account and to facilitate the opening of a joint account, the applicant had complied; that the consent order did not require the applicant to deposit money in the joint account and did not even indicate the source of the moneys to be deposited in the said account; that in any event, at the time the 2nd respondent's account was unfrozen, it had only a credit balance of Kshs. 19,285.95; and that in the circumstance it was erroneous for the High Court to hold that the applicant had deliberately and willingly failed to comply with the consent order.
11. The applicant contended that the decision of the High Court was contrary to consistent decisions holding that to justify a conviction for contempt of court, the alleged

contemnor must not only be shown to have deliberately
and willingly

disobeyed an order of the Court, but the order itself must be clear and unambiguous.

12. Turning to whether the intended appeal risked being rendered nugatory, the applicant submitted that what was at stake was Mr. Odhiambo's liberty and that he ought not to be denied his liberty even for a day without just cause. The applicant relied on the ruling of this Court in **Commissioner of Mines & Geology & 2 Others v. Steam Alloys Enterprises Ltd.** [2015] eKLR for the proposition that deprivation or threat of deprivation of personal liberty is a serious constitutional issue and that once liberty is lost, it cannot be fully restored. Also relied on to the same effect were the decisions of this Court in **Pioneer International Schools Ltd. v. Delmonte Kenya Ltd & 4 Others** [2018] eKLR and **Kenya Airports Authority v. Mitu-Bell Welfare Society & Another** [2012] eKLR.
13. The 1st respondent, represented by Mr. Kibet, learned counsel, opposed the application vide a relying affidavit and a supplementary affidavit sworn by Mr. Vipesh Bhimji Bhuva on 4th April 2025 and 5th April 2025, respectively

and written submissions dated 11th April 2025.

14. Counsel submitted that the intended appeal is not arguable because it was the 2nd, 3rd and 4th respondents who represented to the court that the 2nd respondent's account had a credit balance of Kshs 300,000,000.00. It was further contended that the court order was not vague or ambiguous and that is why the applicant found no problem complying with parts of the order it wanted to comply with.
15. It was counsel's further argument that the failure to deposit the Kshs 23,000,000 in the joint account was deliberate and in contempt of court because on 20th June 2024 the applicant debited the 2nd respondent's account with Kshs. 32,587,070.30 instead of first depositing the Kshs 23,000,000.00. It was also contended that if the applicant found the court order to be vague or ambiguous, it ought to have applied for review or clarification by the High Court.
16. On whether the intended appeal would be rendered nugatory, the 1st respondent submitted it would not, because the applicant had the option of purging the contempt. It was also contended that having been found in

contempt of court, the applicant does not deserve the order of state of execution. The 1st respondent relied on **Chengo v. Odida** [2022] KECA 1320

(KLR) in support of the submission that a party who has not purged his or her contempt is not entitled to the remedy of stay of execution.

17. The 2nd, 3rd, and 4th respondents filed a replying affidavit sworn by Benjamin M. Njagi on 7th April 2025 and submissions dated 14th April 2025. These respondents associated themselves with the applicant's submissions and supported the application.
18. All the parties to this application agree on the principles that guide the Court in determining whether or not to grant an application for stay of execution pending appeal. Briefly, the applicant must satisfy the Court that the appeal or intended appeal is arguable and that unless the order of stay of execution is granted, the appeal risks being rendered nugatory if it succeeds. The applicant must satisfy both those considerations and not only one. At this stage the Court is not called upon to make definitive findings on the merit of the appeal. That is for the bench which will ultimately hear the appeal. Nevertheless, the Court is not precluded from calling out a frivolous appeal when it sees one.

19. Two other points are worthy emphasising as regards an arguable appeal. An applicant is not obliged to present a multiplicity of arguable issues before the appeal can be deemed arguable. Even one *bona fide* issue deserving of determination by the Court will suffice. Secondly, to constitute an arguable appeal, the appeal must not necessarily succeed when it is ultimately heard. All that the applicant has to satisfy the Court is that the appeal is not frivolous.
20. As regards whether the appeal will be rendered nugatory, the concern of the Court is to ensure that should it succeed, it will not end up as a mere pyrrhic victory or a paper judgment because of intervening circumstances which cannot be undone or are only capable of reversal at considerable cost or inconvenience. Whether or not an appeal will be rendered nugatory depends on the peculiar circumstances of each case. For all these principles, see **Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others** [2013]eKLR).
21. Turning to the merits of this application, we are satisfied that the intended appeal is arguable. Whether the consent

order was sufficiently clear on all the obligations of the applicant,

is an issue worthy the consideration and determination of this Court. Similarly, worthy of consideration is whether the applicant deliberately and willingly disobeyed the court order.

22. As regards whether the appeal risks being rendered nugatory if it succeeds absent an order of stay of execution, it is no consolation to the applicant if its CEO has already served a sentence in jail, to be told that the consent order did not obligate it to deposit any money, that it was not in contempt of court, and that the time in jail was unnecessary. A subject's liberty is at stake and whether or not he should serve time in jail ought to await the determination of the appeal.

23. Accordingly, we are satisfied that the applicant has satisfied both considerations under rule 5(2)(b) of the Court of Appeal Rules and is entitled to an order of stay of execution pending the hearing and determination of the intended appeal. The notice of motion dated 28th March 2025 is hereby allowed, with a further order that costs shall abide the outcome of the intended appeal.

24. However, taking into account the circumstances of this

application and in particular the need to expeditiously
hear

and determine allegations of deliberate undermining of the authority of the courts, the applicant shall file and serve its intended appeal within sixty (60) days from the date of this ruling, failing which the order of stay of execution shall automatically lapse. It is so ordered.

Dated and delivered at Nairobi this 13th day February 2026.

K. M'INOTI

.....
JUDGE OF APPEAL

JAMILA

MOHAMMED

.....
JUDGE OF

APPEAL JOEL

NGUGI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.