



**Ombima v County Government of Kisumu (Petition E010 of 2025)  
[2026] KEELRC 386 (KLR) (17 February 2026) (Ruling)**

Neutral citation: [2026] KEELRC 386 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E010 OF 2025**

**JK GAKERI, J**

**FEBRUARY 17, 2026**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 27,  
28, 41, 47 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS OF THE PETITIONER**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007, THE  
FAIR ADMINISTRATIVE ACTION ACT, 2015 AND THE  
EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE CONTRACT OF SERVICE  
BETWEEN THE PETITIONER AND THE RESPONDENT**

**BETWEEN**

**JEPHRICE ODERA OMBIMA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... RESPONDENT**

**RULING**

1. Before the court for determination is the applicant’s Notice of Motion dated 25<sup>th</sup> November 2025 filed under Certificate of Urgency seeking Orders that:

1. Spent.
2. Spent.



3. Pending the hearing and determination of the respondent/Applicants intended appeal to the Court of Appeal against the Ruling delivered on 13<sup>th</sup> November 2025 there be a stay of proceedings in this Petition.
4. Costs of this application be provided for.
2. The Notice of Motion is expressed under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Section 12 of the Employment and Labour Relations Court Act and is based on the grounds set forth on its face and the Supporting Affidavit sworn by CHRP Stephen Ajode on 25<sup>th</sup> September 2025 who deposed that the applicant was desirous of appealing the court's decision on jurisdictional grounds and the appeal was arguable and the proceedings would be rendered nugatory and academic if they were not stayed.
3. The affiant further deposed that the respondent would suffer no prejudice if a stay was granted.

### **Respondent's case**

4. By a Replying Affidavit sworn on 18<sup>th</sup> December 2025, the Petitioner deposed that a stay of proceedings was a grave remedy and only available in exceptional circumstances which the applicant had not demonstrated or that continuation of proceedings would irreparably prejudice the appeal.
5. The affiant deposed that staying proceedings would occasion substantial prejudice as it would delay determination of the Petition and the issues to be canvassed on appeal were substantively evidential and the appeal was premature and speculative.
6. According to the affiant, the law provided adequate remedies if the Court of Appeal made a different finding and the balance of convenience was in favour of the Petition continuing.
7. The affiant further deposed that the applicant had not approached the court with clean hands, was intent on delaying and frustrating the hearing and the instant application was for dismissal.

### **Applicant's submissions**

8. Counsel for the applicant submitted that the court's finding that Petition herein raised no constitutional issue and was intended to outmanoeuvre the provisions of Section 90 of the Employment Act, and did not meet the threshold in Anarita case meant that the court had no jurisdiction to hear and determine the suit before it and the appeal was premised on the finding that suit ought to have been pursued as a claim as opposed to a Petition, as the Court had no jurisdiction to proceed.
9. Reliance was placed on the sentiments of the court in Re Global Tours & Camp; Travel Ltd HCWC NO. 43 of 2000.
10. Counsel submitted that the applicant had an arguable appeal on account of the court's finding that the Petition raised no constitutional issue citing the doctrine of constitutional avoidance.
11. Reliance was placed on the decision in Communications Commission of Kenya & 5 others V Royal Media Services & 5 others and Speaker of the National Assembly V James Njenga Karume [19192] eKLR as well as Gabriel Mutava & others V Managing Director Kenya Ports Authority [2016] KECA 411 (KLR), on the place of constitutional litigation.
12. According to counsel for the applicant, because the appeal raised the issue of jurisdiction there was a risk that the proceedings before this court had the potential of being rendered a nullity. Reliance was placed on the sentiments of the court in Stanley Kangethe Kinyanjui V Tony Kettters & 5 others CA No.



- 31 of 2012 on the concept of nugatory, to urge that if the intended appeal succeeded the proceedings before this court would be rendered nugatory and judicial time would have been wasted.
13. Reliance was further placed on the Court of Appeal decision in *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & Camps; 2 others* [2009] KLR 229 on management of judicial time.
  14. Finally, counsel submitted that the application was filed promptly and the respondent stood to suffer no prejudice.

### **Respondent's submissions**

15. As to whether the applicant had met the threshold for grant of the Orders sought, reliance was placed on *Kenya Wildlife Service V James Mutembei* [2019] KEHC 10478 (KLR) on the impact or effect of an Order of stay of proceedings on the right of a litigant as well as the *Halsbury's Law of England*, 4<sup>th</sup> Edition Vol. 37 for emphasis and urge that the applicant was duty bound to demonstrate exceptional circumstances to warrant a stay of proceedings and had failed to do so.
16. As to whether the appeal would be rendered nugatory, reliance was placed on *Kenya Power & Lighting Co. Ltd V Esther Wanjiru Wokabi* [2014] eKLR to urge that continuation of proceedings perse does not render an appeal nugatory to submit that the applicant had not demonstrated how proceedings would occasion irreversible harm.
17. On balance of convenience, reliance was placed on the decisions in *Raila Odinga & 5 others V I.E.B.C & 3 Others* [2013] eKLR and *Global Tours & Travels Ltd Nairobi HC winding up Cause No. 43 of 2000* on the need to consider the prejudice of the stay of proceedings against expeditious disposal of cases to submit that the balance of convenience was in favour of continuation of proceedings.
18. In response to the respondent's submissions the applicant filed supplementary submissions urging that applying the criteria enunciated in *Kenya Wildlife V James Mulembei* [2019] KEHE 10478 (KLR) cited by the respondent, the applicant had complied bearing in mind that the application was filed 12 days after the court's ruling.
19. Counsel submitted that the court had no jurisdiction in that the subject matter was a civil claim and the suit was statute barred.
20. The Petitioner's counsel cited the decision in *Kenya Wildlife V James Mutembei* (supra) which cited *Ringera J in Global Tours & Travel Ltd* (supra) on the criteria applicable to urge that the applicant had not demonstrated any exceptional circumstances to warrant a stay of proceedings.
21. On whether the appeal would be rendered nugatory, reliance was placed on the decision in *Kenya Power & Lighting Co. Ltd V Esther Wanjiru Wokabi* [2014] eKLR where the court held that an appeal was not rendered nugatory merely because proceedings have continued as they can be annulled, to urge that the applicant had not proved that irreversible harm would ensue if proceedings continued.
22. Concerning balance of convenience, reliance was placed on the decision in *Raila Odinga & 5 others V Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR to urge the right of access to justice under Article 48 of *the Constitution* of Kenya and 159(2) on the duty of courts to administer justice without undue delay.
23. Finally, counsel cited the decision in *Global Tours & Travel Ltd* (supra) on the need to balance between the prejudice likely to be suffered by each party and the need to ensure expedition in the determination of cases.



## Analysis

24. The instant application was precipitated by the court's Ruling delivered on 13<sup>th</sup> November 2025 on the applicant's Notice of Preliminary Objection dated 15<sup>th</sup> October 2025 which the court dismissed on the grounds that although the Petition did not disclose a constitutional issue under the threshold in Anarita's case, the evidence before the court was inconclusive as to whether or not the suit was statute barred bearing in mind that the Petitioner retired on 1<sup>st</sup> July 2022 and filed the instant suit on 30<sup>th</sup> June 2025.
25. As to whether the applicant had made a case for granting a stay of proceedings, counsels adopted contrasting submissions with the applicant's counsel submitting that the applicant had met the criteria relied upon by the respondent as it had an arguable appeal, utilization of judicial time and the application had been instituted expeditiously.
26. The respondent's counsel submitted that no exceptional circumstances had been proved to warrant a stay of proceedings.
27. The principles that govern stay of proceedings pending appeal are well settled.
28. In *M/s Karsan Ramji & Sons Ltd V Shaban Athumani & Alex Furaha Charo (suing for and on behalf of the Wamwanyundo clan & 6 others [2024] KECA 563 (KLR)* the Court of Appeal held:

“...For an applicant to succeed, he or she must have a pending appeal or must have expressed an intention to appeal against the decision in question by filing a Notice of Appeal in order to properly invoke this Court's jurisdiction. It should then be demonstrated that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay. The two conditions are considered conjunctively so that failure to satisfy either leads to dismissal of the application...
29. Regarding the first principle on arguability of the appeal, this Court holds the view that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another V Pioneer Holdings (A) Ltd & 2 others*, Civil Application No. 124 of 2008. It is one that is deserving of consideration by the Court and warrants a response from the opposite party. See *Kenafric Matches Ltd V Match Masters Limited & Another* Civil Application No. E902 of 2021 (UR). However, as held in *Stanley Kang'ethe V Tony Keter & 5 others [2013] eKLR*, it is not necessary that the applicant demonstrates a multiplicity of arguable issues since a single bonafide arguable ground of appeal if raised is sufficient for the purposes of the first condition...
30. As this Court held in *National Industrial Credit Bank Ltd V Aquinas Francis Wasike & another [2006] eKLR*:

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable”



31. On the nugatory aspect, which an applicant must also demonstrate, this Court in *Reliance Bank Limited V Norlake Investments Ltd* [2002] 1 EA 227 held that:

“... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

...considerations for granting stay of execution pending appeal are the same as those for stay of proceedings pending appeal, when it comes to the nugatory aspect, in the latter case a higher threshold is required to be met than in the former case. This must be so because an order staying proceedings has the effect of derailing the pending proceedings before a determination is made therein. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Articles 159(2)(d) may thereby be curtailed. In deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be considered on its own merits in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act* and the need to ensure that, when exercising discretion, the principle of proportionality is taken into account”

32. Similarly, in *Lucy Njoki Waithaka V Tribunal Appointed to Investigate the conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission Kenya Magistrates & Judges Association (Interested Party* [2020] eKLR, the Court of Appeal stated:

“... While addressing the issue of stay of proceedings in the persuasive case of *Global Tours & Travels Ltd* (supra) Ringera J. as he then was stated thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or Order appealed against is a matter of discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to Order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to Order a stay, the court should essentially weigh the pros and cons of granting or not granting the Order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

33. See also *William Odhiambo Ramogi & 2 others V Attorney General & 3 others* [2019] eKLR.

34. These decisions show that in deciding whether or to grant a stay of proceedings pending appeal, the court is enjoined to balance the appellant’s right of appeal against the other party’s right of having the suit determined expeditiously as ordained by the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution* of Kenya (See *Lucy Waithira Kamanga & 2 others V John Waiganjo Gichuri* cited by the Court of Appeal with approval in *M/s Karsan Ramji & Sons Ltd’s case* (supra).

35. In the instant case, the appellant filed a Notice of Appeal dated 25<sup>th</sup> November 2025 and sought certified copies of proceedings vide letter of even date and the same were supplied.

36. The court is satisfied that the instant application was instituted expeditiously.



37. Relatedly, since the applicant's appeal is grounded on the court's jurisdiction to hear and determine the Petitioner's case, which is the cornerstone of judicial proceedings, it is arguable that the intended appeal is arguable.
38. On the nugatory, it is discernible that if the court proceeds and determines the suit it will have the exercised power being challenged on appeal and if the appeal is successful the court's proceedings would be a nullity which implicates utilization of judicial time and costs.
39. Equally, if the application is granted delay in concluding the matter will ensue, and if the appeal is unsuccessful although the delay is irreversible, it is compensable with costs. Likewise, the resultant Judgment is capable of being stayed by the court.
40. However, the applicant has not shown why the stay of proceedings had not been sought at the Court of Appeal where the appeal is preferred, as it has the potential of delaying the suit for a long time. More importantly, the Court of Appeal enjoys a wider array of factors to consider including the arguability of the intended appeal among other parameters, and is thus better placed to determine an application for stay of proceedings.
41. Finally, the applicant has not demonstrated the requisite exceptional circumstances to warrant the grant of an Order of stay of proceedings, including why it cannot wait in order to file a single appeal after the Petition is heard on merit as the Court of Appeal found in *Wildlife Lodges Ltd V Narok County Council & 3 Others* [2011] KECA 280 (KLR).
42. Balancing the rights of the Petitioner to an expeditious determination of the instant Petition against the respondent's right of appeal, the court is not persuaded that the interest of justice is in favour of granting a stay of proceedings pending the hearing and determination of the Petition.
43. The upshot is that the applicant's Notice of Motion dated 25<sup>th</sup> November 2025 is disallowed with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17<sup>TH</sup> DAY OF FEBRUARY 2026.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

