

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & MUCHELULE,
JJ.A.) CIVIL APPLICATION NO. E020 OF 2025**

BETWEEN

**HON. AYUB BUNDI SOLOMON.....1ST
APPLICANT**

**JACOB KIRARI.....2ND
APPLICANT HON. ZIPPORAH KINYA.....
.....3RD APPLICANT**

AND

**HON. KAWIRA MWANGAZA.....1ST
RESPONDENT COUNTY ASSEMBLY OF
MERU.....2ND RESPONDENT**

CONSOLIDATED WITH

CIVIL APPLICATION NO. E021 OF 2025

BETWEEN

THE COUNTY ASSEMBLY OF MERU.....APPLICANT

AND

HON. KAWIRA MWANGAZA.....RESPONDENT

(Being an application for stay of execution of the Ruling of the High Court of Kenya at Meru (Muriithi, J.) delivered on 13th February, 2025

in

***Petition No. E013 of
2024.)***

RULING OF THE COURT

1. These two consolidated applications arise from the ruling of Muriithi, J. in the High Court Petition No. E013 of 2024 delivered on the 13th February, 2025. The applications have

been brought under **rules 5 (2)(b), 44 (1) & (2)** and **45** of this Court's Rules, 2022. The same were consolidated on 5th

March, 2025 at the hearing, on application by **Mr. Mbaya** learned counsel for the applicants in Civil Application No. E020 of 2025, with that file being the lead file. **Mr. Muriuki** learned counsel for the 2nd respondent, **Mr. Mutuma** learned counsel for the 1st respondent and learned counsel **Mr. Muriuki** and **Mr. Mwerere** for the 2nd respondent did not oppose the consolidation.

2. The background to the applications before us is that the respondent Hon. Kawira filed a Petition before the High Court seeking to halt the impeachment process against her before the County Assembly of Meru. The respondent in that Petition was the County Assembly of Meru. Kassan, J. heard the Petition then in his rulings of 24th and 29th July, 2024, gave interim orders to the effect that the status quo be maintained meaning that the process of impeachment be halted pending the substantive ruling on the application set for 20th August, 2024. Hon. Kawira filed another application on 1st August, 2024, in which she sought *inter alia*, to cite Hon. Ayub, the Speaker of the County Assembly of Meru; Jacob, the Clerk of the County Assembly of Meru and Hon. Zipporah, a nominated member of County Assembly of Meru, for contempt of court orders that had been issued by P. Kassan, J. That application was heard by Muriithi, J. In his ruling, Muriithi, J. issued the following orders:

- 1. The respondents were guilty of contempt of court and the appropriate relief within the**

meaning of Article 23(3) of the Constitution in this case against the named members of County Assembly of Meru is a declaration that the respondent is in contempt of court, which this court hereby grants.

- 2. In addition, the court makes an order for the payment of fine of Kshs.100,000/- each against the Speaker of the County Assembly of Meru, Ayub Bundi Solomon, the Clerk of Meru County Assembly Jacob Kirari and Zipporah Kinya, a nominated member of the County Assembly and Deputy Leader of the majority for contempt of Court in disobeying the order of the court made on 24th July 2024 by Justice P. Kassan.**
 - 3. In default of payment of the fines, each of the contemnors named above will serve imprisonment for period of six (6) months to be executed by the official bailiff of the court.**
 - 4. There shall be liberty to apply for either party.”**
3. Aggrieved and dissatisfied with the impugned ruling the applicants and the County Assembly of Meru filed the two applications which have now been consolidated to be heard and determined together.
 4. The first application is by **Hon. Ayub Bundi Solomon** (hereinafter Hon. Ayub), **Jacob Kirari** (hereinafter Jacob) and **Hon. Zipporah Kinya** (hereinafter Hon. Zipporah) against **Hon. Kawira Mwangaza** then Governor of Meru County and the **County Government of Meru**, the 1st and 2nd respondents respectively. The applicants are seeking for orders of stay of execution of the impugned ruling of the High Court pending the hearing and determination of the intended appeal and any

other order the Court deems fit to issue. The application is supported by the grounds on the face of the motion and in the affidavit and supplementary affidavit sworn on his behalf and that of the 2nd and 3rd applicants in support of the applications.

5. In summary, Hon. Ayub in his affidavit contends that the orders made by Muriithi, J. were made in error for reason: the orders were made against the applicants who were not parties to the suit in which the order was made; the applicants were condemned unheard which was a grave violation of their fundamental right to natural justice; they were sentenced to a fine each of Kshs.100,000/- in default of payment of fine to serve an imprisonment term of six months each; and, the sentence was imposed without giving the applicants an opportunity to mitigate, which was a great procedural error. The applicants contend that the Judge acted *ultra vires* to Article 23(3) of the Constitution by issuing a declaratory order in the nature of a final order.
6. In response, the respondent, Hon. Kawira challenged the grounds upon which the application was premised, arguing that the issues raised therein were premature as they are reserved for hearing and determination in the main appeal. The respondent sought to controvert the applicants' denial that they were not aware of the application for contempt, arguing that the 2nd applicant filed a replying affidavit in the main Petition and therefore that the applicants were aware of

the matter all along. Hon. Kawira argues that their draft memorandum of appeal does not raise any appealable or arguable issues and is therefore untenable and vexatious with no chance of success. In conclusion, she argues that the applicants' application fails to meet the threshold for the issuance of the orders under rule 5 (2)(b) of the Court of Appeal Rules and urges the Court to dismiss the same.

7. The second application is by the County Government of Meru against Hon. Kawira. It also seeks stay of the order of Muriithi, J. pending the hearing and the determination of the intended appeal. The grounds upon which the application is premised are similar, word for word, to those cited by the applicants in Civil Application No. 21 of 2025. We need not repeat them here except to state that the applicant is the County Government of Meru, which was the respondent in the Petition No. E013 of 2024. The respondent's response to this application is similar to that in Civil Application No. E020 of 2024. We need not rehash them.
8. At the hearing thereof learned counsel **Mr. Mbaya** appeared for the applicants, counsel **Mr. Muriuki** alongside **Mr. Mwereru** appeared for the County Assembly, while counsel **Mr. Mutuma** appeared for the respondent.
9. Mr. Mbaya made brief oral submissions on the applicants' written submissions dated 27th February, 2025. He maintained that the applicants have an arguable appeal.

Citing the case of **Makokha vs. County Government of Bungoma & 4 Others [2024] KECA 211 (KLR)** he argued that the trial court granted a declaratory order that had not been pleaded or sought by the petitioner (Hon. Kawira). He urged that the applicants were denied the right to be heard before they were condemned and were also denied an opportunity to mitigate before being sentenced.

10. Counsel relied on the written submissions in which he urges that the intended appeal is not only arguable but also meritorious with overwhelming chances of success. He contends that their draft memorandum of appeal dated 17th February, 2025 sets out a compelling and arguable case, raising substantial questions of law. In the said draft memorandum of appeal, they fault the learned Judge for *inter alia* issuing an order which was manifestly ambiguous and legally flawed as it improperly referred to 'respondents' despite there being only one single respondent in the suit and notably; that the application dated 1st August, 2024 filed by Hon. Kawira did not seek any declaratory orders; issuing orders that each applicant pays a fine of Kshs.100,000/ which punitive imposition which was unjustified especially considering that the applicants were not parties to the proceedings; and imposing punishment for contempt without giving the applicants an opportunity for mitigation, which was procedurally flawed.

11. On nugatory aspect, Mr. Mbaya emphasized that unless stay was granted, the applicants ran the risk of being jailed for six (6) months thereby rendering their appeal hopeless. He relied on the case of ***Jackson Kipkemboi & 7 Others vs. Samuel Muriithi Njogu & 4 Others*** [2007] KECA 440 (KLR) and argued that if the appellants are committed to jail it is obvious that by the time their appeal will be heard and determined, they would have served their sentence and hence the appeal, even if it were to succeed, will be rendered nugatory. Mr. Mbaya clarified that although a fine was imposed in the alternative, the applicants were not in a position to pay the fine ordered right away, and that that will cause the applicants to suffer significant and irreversible prejudice.
12. Mr. Mwereru for the County Assembly made brief oral submissions adopting their written submissions dated 27th February, 2025. He reiterated that the intended appeal was arguable.
13. On the nugatory aspect, Mr. Mwereru argued that imprisonment of the Hon. Ayub the Speaker of the County Assembly and Mr. Kirari, the County Clerk would paralyze the Assembly's functions, damage reputations, and curtail liberty. Citing the Supreme Court's decision in ***Mate & Another vs. Wambora & Another*** [2017] KESC 1 (KLR) he submitted that the Supreme Court recognized the place of mitigation in contempt of court proceedings, and it also

recognized the place of these immunities and privileges that are enjoyed by the

officers of the Assembly. He also cited this Court's decision in **Justus Kariuki Mate & Jim G. Kauma vs. Martin Nyaga Wambora & Jim G. Kauma** [2014] KECA 590 (KLR) and noted that this Court found that, indeed where there was a threat to loss of liberty, stay was indeed justified pending the hearing of the intended appeal in order to allow the applicants to state their case in the appeal. Mr. Mwereru urged this Court to grant stay pending the hearing of their intended appeal.

14. Mr. Mutuma for the respondent gave brief oral submissions, adopting the respondent's written submissions dated 3rd March, 2025 in opposition to the consolidated applications. He argued that the Assembly's application did not meet the threshold under rule 5 (2)(b) of the rules. Citing the case of **Nairobi City Council vs. Tom Ojienda & Associates** [2022] KECA 1326, he argued that the applicant have no arguable appeal in its Civil Application No. E021 of 2025. Counsel urged that the last two orders made by the court were specific to the contemnors, the applicants in the first application E020 of 2025, and thus, the application by the County Assembly was for striking out. With respect, there was no application for striking out of any application before us.
15. With regards to application No. E020 of 2024, Mr. Mutuma contended that the applicants failed to demonstrate the nugatory aspect noting that the main order required payment of Kshs.100,000/ fine with imprisonment only in

default. He urged that none of the applicants had shown inability to pay

the fine. Further, citing the case of **Gupta & 2 Others vs. Gupta & 3 Others [2023] KECA 487 (KLR)** he contended that the fine would be refunded if the applicants' appeal succeeds. He sought to distinguish the instant case and the case of ***Gupta & 2 Others***, (supra), from the case of ***Jackson Kipkemboi & 7 Others***, (supra), relied on by the applicants. Mr. Mutuma submitted that there was no real risk of the applicants being arrested as no evidence of imminent arrest had been established and that the applicants had, in fact, participated in the contempt proceedings through affidavits and thus could not claim denial of a hearing. He maintained that the issues raised were matters for appeal and not for the interim application and contended that the applicants have not even demonstrated that they have taken any steps to have their appeal expedited.

16. In rejoinder, Mr. Mbaya submitted that the trial court directed the bailiff of the court to execute the orders. It follows therefore that there was a high risk that the orders would be executed at any time to the detriment of the applicants. He maintained that they had an arguable appeal and emphasized that knowledge of an application for contempt does not amount to being given an opportunity to be heard as those are two distinct issues. On the issue of expediting their appeal, he submitted that they actually filed their letter in court requesting for copies of proceedings to enable them file an appeal and further they had also filed a notice of appeal.

17. We have carefully considered the Motions, the grounds in support cited on the face of the Motion and in the supporting and supplementary affidavits sworn on behalf of the applicants; and, the replying affidavits in opposition to both Motions. We have also considered both oral and written submissions by counsel to the parties, the authorities cited and the applicable law.
18. The principles that guide this Court in considering applications of this nature are now well settled. In order to succeed in an application brought under rule 5 (2)(b) of this Court's rules, the applicant must satisfy the Court first, that the appeal or intended appeal is an arguable one, that, it is not frivolous. Second, that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. See. **Reliance Bank Ltd (in liquidation) vs. Norlake Investments Ltd [2002] 1 EA 227; Republic vs. Kenya Anti- Corruption Commission & 2 Others [2009] KECA 387 (KLR)**. We need not emphasize that the twin principles must all be met to warrant the grant of the orders for stay of execution.
19. Regarding the issue whether the intended appeal is arguable and not frivolous, the applicants have raised several issues both of law and fact. They contend that they were declared contemnors of court orders in a matter where they were not parties, had not been served and so were condemned unheard and sentenced without being given an opportunity to mitigate.

What we hear the respondent say is that the applicants were aware of the Petition, that Kirari, the 2nd applicant in E020 of 2025 even swore an affidavit in the Petition. We think that the issue whether they were parties in the Petition is easy to tell, as nowhere are they mentioned in the case citation. As to whether they were served with the application for citing them for contempt before it was heard is a matter of fact which can only be resolved through evidence. Whether they were heard through affidavit evidence as Hon. Kawira, the respondent urged, is also an arguable point deserving of determination by this Court. As to whether their fundamental rights to natural justice to be heard before being condemned and before being sentenced is an arguable ground of appeal.

20. We have also perused the draft memorandum of appeal attached to the Motions. In addition to the issues raised in regards to being condemned and sentenced unheard, and making adverse findings against persons who were not parties to the proceedings, the applicants challenge the making of a declaratory order that was not sought by the respondent, and which was in effect an order in the nature of a final order. We find that these are serious issues, they are not frivolous or idle. They are also serious issues touching on fundamental rights of an individual, right not to be deprived of liberty without due process, as well as the right to natural justice. Any allegation of violation of the nature raised in this applications deserve consideration by this Court. We are

satisfied that the applicants have raised arguable grounds of appeal, thus satisfying the first limb.

21. On nugatory aspect of the intended appeal, we are guided by the decision in **Stanley Kangethe Kinyanjui vs. Tonny Keter & Others [2013] eKLR** where the Court summarized what should guide the court as follows:

“xii. The term ‘nugatory’ has to be given its full meaning. It does only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

22. We have considered the arguments of counsel to the parties for and against the finding whether there is anything presented before us that would justify a finding that the applicants appeal will be rendered nugatory if the stay sought is not granted. Considering the applicants arguments on this limb; they contend that an order was issued for their arrest and incarceration if they were unable to meet the fine. They contend that they did not have money to pay the fine ordered, and that if they were sent to six months jail term in default, then they will have suffered irreparably including damage to their reputation, and that their appeal would be rendered an exercise in futility. The respondent argued that there was no proof that the applicants could not post the fine, thus their application should be dismissed.

23. In **Stanley Kangethe Kinyanjui** case, (supra), the test to apply to determine whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. This Court differently constituted in the case of **Justus Kariuki Mate & Jim G. Kauma vs. Martin Nyaga Wambora & Jim G. Kauma** (supra) when faced with a situation as the one pertaining in this case observed:

“[9] The power of guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case.”

24. Faced with the need to uphold the sanctity of court orders and the prospect of the applicant being subjected to loss of liberty, the Court should strike a balance. That balance is kept by giving the applicants an opportunity to be heard before subjecting them to imprisonment, which in this case is imminent as an order of arrest has been issued against the applicants. Once one is imprisoned, their character and reputation is damaged. We are not convinced that loss of liberty is reversible, neither can it be compensated by an award of damages. We find that this second limb has been satisfied.

25. We have come to the conclusion that the applicants are deserving of the orders sought. Accordingly we order:

1. **Pending the hearing and determination of the Applicants' intended appeal, there shall be stay of execution of the Ruling delivered on 13th February, 2025 at Meru, by Muriithi, J. in *High Court Petition No. E013 of 2024 between Hon Kawira Mwangaza and County Assembly of Meru.***
2. **It is also directed that the applicants do file their appeal within 30 days of the date hereof and serve the same within 7 days from the date of filing.**
3. **The parties to appear before the Deputy Registrar of this Court to take directions as to the hearing of the appeal within 21 days from the date of service of the appeal upon the respondent.**
4. **In default of filing the appeal as directed, the stay granted herein will stand vacated.**

Dated and delivered at Nyeri this 27th day of February, 2026.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

A.O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is
a True copy of the
original
Signed*

DEPUTY REGISTRAR