



Republic v Public Procurement Administrative Review Board & another; Utmost Insurance Brokers Limited & another (Ex parte) (Judicial Review Application E001 & E002 of 2026 (Consolidated)) [2026] KEHC 2792 (KLR) (Judicial Review) (4 March 2026) (Ruling)

Neutral citation: [2026] KEHC 2792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E001 & E002 OF 2026 (CONSOLIDATED)
RE ABURILI, J
MARCH 4, 2026**

BETWEEN

REPUBLIC APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

COUNTY GOVERNMENT OF NYERI INTERESTED PARTY

AND

UTMOST INSURANCE BROKERS LIMITED EX PARTE

GOLDFIELD INSURANCE BROKERS LIMITED EX PARTE

RULING

Background

1. On 16th February, 2026, this Court delivered judgment in the consolidated judicial review applications JR E001 and E002 of 2026. In the said judgment, the Court quashed the decision of the Public Procurement Administrative Review Board made on 22nd December, 2025 in respect of a request for review No. 111 of 2025 regarding Tender No. CGN/CS/INS/01/2025-2026 for provision of comprehensive medical insurance cover for Executive and staff of the Nyeri County Government.
2. The decision of the Review Board affected two of the bidders being the exparte applicant in JRE001 of 2026 who was evaluated as the most responsive and lowest evaluated bidder and the 2nd Interested party



- applicant in JRE002 of 2026. In the decision of the said request for review application, the Review Board set aside the notification of intention to award the tender to the exparte applicant in JRE001 of 2026 and nullified the entire procurement process, directing the procuring entity to restart afresh the procurement process by readvertising the said tender on account of illegalities in the manner that the procuring entity's Tender Opening Committee handled what it considered to be a curable oversight error of misreading the tender security document.
3. The exparte applicant in JRE001 of 2026 had raised a preliminary objection to the jurisdiction of the Review Board on account that the Request for review was filed outside the statutory period of 14 days from the date when the alleged breach by the tender opening Committee arose. The Review Board overruled that challenge to jurisdiction and proceeded to determine the Request for Review on merit, nullifying the entire procurement process.
 4. The 2nd interested party who was one of the bidders who was nonetheless not declared a successful bidder, was equally aggrieved by the decision of the Review Board's nullification of the entire procurement process, claiming that the Review Board should have declared it as the lowest evaluated bidder and should have directed the procuring entity to issue to it a notification of intention to award the tender because, according to the 2nd interested party, the exparte applicant was a non-responsive bidder for want of a tender security, a mandatory requirement.
 5. From the onset, the 2nd interested party was not the lowest evaluated bidder and secondly, the Review Board did not direct that it be awarded the tender.
 6. This court in its judgment which has been appealed against, after consolidating the two judicial review matters, quashed the decision of the review Board on two fronts one, is that the request for review was filed outside the 14 days statutory period, in that, the applicant therein, being the 2nd interested party herein did not have to wait until the award of the tender to the successful bidder in order to challenge what it considered to be breach by the procuring entity. I therefore found that the Review Board had no jurisdiction to entertain the request for review filed by the 2nd interested party applicant in the present stay application.
 7. The second front was that this court having found that there was no jurisdiction on the part of the Review Board, in the event that I was to be found to have erred, I further found that the misreading of the tender security document was curable and capable of rectification and therefore the review Board ought not to have nullified the notification of intention to award the tender to the successful bidder. I therefore directed that the procuring entity proceeds to complete the procurement process as stipulated in section 86 of the PPADA. This was no doubt a consequential order upon quashing the decision of the review Board.
 8. On the side of the 2nd interested party/ applicant herein, I found that there was no justification for the Review Board to award it the tender, having established that the exparte applicant herein was the lowest evaluated bidder. I therefore dismissed its judicial review application JR E002 of 2026.
 9. In other words, having quashed the decision of the review Board, what remained was the notification of intention to award, now that the 2nd interested party's challenge was also dismissed.
 10. The big jurisdictional question in this application for stay pending appeal is whether there is anything capable of being stayed or whether the orders issued were negative orders incapable of being stayed. There are other questions that this court will resolve as it addresses what the parties have raised in their respective pleadings and oral submissions.



The respective parties' cases

11. The applicant/ 2nd interested party seeks stay and or injunction to prohibit the procuring entity from entering into any contract with the exparte applicant until the filed appeal, which already has a hearing date, is heard and determined on its merits.
12. The exparte applicant filed a replying affidavit sworn by Stephen Gikandi on 24th February 2026 while the procuring entity filed grounds of opposition dated the same day. The contents of the responses by the respondents in the application were canvassed orally yesterday and I have endeavored to render this decision expeditiously in the spirit of fair administrative action.
13. According to the applicant's counsel, in submissions, this court in its impugned judgment gave a positive order for compliance with section 86 of the PPADA and that status quo ought to be maintained in order not to render the appeal nugatory, which appeal was filed on 20/2/2026 vide CA E137 of 2026 together with the record of appeal and is scheduled for hearing on 13/3/2026, ten days from now.
14. Counsel conceded that he had filed a parallel application before the Court of Appeal seeking stay because this Court and the Court of Appeal have parallel jurisdiction in matters stay pending appeal. That the stay application in the appellate court was filed on 19/2/2026 after the applicant failed to secure stay I the High Court in the first instance hence the apprehension. He gave an undertaking to withdraw that application once this court grants stay. It was submitted that this application is not subjudice the Court of Appeal application nor is it an abuse of court process.
15. Further submission was that this is not a money decree hence the court should consider proportionality so that the substratum of the Court of Appeal is not lost. It was submitted that once a contract is signed and implemented, the appeal as filed will be rendered an academic exercise which will be to the detriment of the public as funds will be consumed and deny the applicant its constitutionally guaranteed right of appeal besides loss of profits.
16. It was also submitted that this court is not functus officio as contended by the respondents because this court has residual jurisdiction to grant stay. Counsel urged this court to exercise unfettered discretion and grant stay.
17. On behalf of the exparte applicant, it was submitted relying on the replying affidavit sworn by Mr. Stanley Gikandi to the effect that this court's jurisdiction ended on 16th February 2026 upon delivery of judgment within 45 days this being a public procurement matter as stipulated in section 175 of the PPADA. secondly, that the nature of the orders given are Negative orders which cannot be stayed as established by jurisprudence.
18. Thirdly, that the applicant having filed another application for stay before the Court of Appeal vide Civil Appl E097 of 2026, this Court's jurisdiction was ousted and that the applicant is guilty of material non-disclosure that it filed that application which may lead to conflicting decisions, a situation avoided by section 175 of the PPADA.
19. It was submitted that the applicant had not demonstrated that it is deserving of stay, that loss of profit alleged can be compensated by damages, that there is no evidence of the appeal being rendered nugatory and no security for due performance of decree has been offered.
20. Further submission was that this court should weigh public interest of exposing staff of the procuring entity to health risk due to delay in the provision of medical insurance.



21. On behalf of the procuring entity which is the 1st interested party, it was submitted, concurring with the ex parte applicant's submissions adding that no substantial loss had been demonstrated and that the tripartite test for stay pending appeal had not been demonstrated.
22. Further, that what was suffering was the right to health and the successful party hence the balance of convenience tilts in favour of the respondents. that the applicant not having been the lowest evaluated bidder cannot suffer any irreparable harm and is merely relying on an anticipatory contract.
23. In a rejoinder, the applicant's counsel submitted order d in the impugned judgment directed the procuring entity to proceed in accordance with section 86 of the PPADA.
24. On alleged parallel applications, it was submitted that Order 42 Rule 6 and Rule 5(2) (b) of the Court of Appeal Rules require different tests on stay and their jurisdiction is also different.
25. On material non-disclosure, a submission was made that the applicant could not disclose what it had not yet filed as at the time the application herein was filed which application was filed earlier than that before the Court of Appeal hence non-disclosure does not arise.
26. On substantial loss, counsel maintained that they had pleaded loss of the right of appeal and public interest. On security for due performance of decree, it was submitted that they had pleaded at paragraph 11 of the supporting affidavit that they would abide by any conditions that this court may impose.

Analysis and determination

27. Having considered the respective parties' positions, the main issue for determination is whether the stay sought is merited. As stated earlier, there are questions raised which this court will endeavour to resolve.
28. I will first resolve the question of whether the judgment of this court was a negative order and therefore whether it is capable of being stayed.
29. It is legally correct to say that the order dismissing the 2nd interested party's judicial review application produced a negative order incapable of being stayed. On the other hand, it is arguable as to whether the order quashing the decision of the review order and the consequential orders restoring the notification of intention to award the tender to the ex parte applicant by the procuring entity was a negative order.
30. That said, in its judicial review application, the 2nd interested party had expected that this court would quash the decision of the review Board so far as nullification of the entire procurement process was concerned and order that the procuring entity issues the letter of notification of award to the 2nd interested party. Instead, this Court quashed the decision of the review Board and consequently, the procuring entity was to proceed and conclude the procurement process with the successful bidder.
31. It is now settled that courts will not stay negative orders. A "negative order" is one that does not command any party to do anything; does not restrain any party from doing anything; does not require payment or performance; and merely dismisses or declines relief. Such an order is incapable of execution and therefore incapable of being stayed.
32. This Court in *Hassan & another v Abdullahi & 2 others; Cargo & Clearing Limited (Interested Party)* (Judicial Review Application E284 of 2024) [2025] KEHC 8677 (KLR) (Judicial Review) (19 June



2025) (Ruling) Neutral citation: [2025] KEHC 8677 (KLR), citing the Court of Appeal decisions had this to say concerning stay of negative orders of dismissal of suit:

- “ 30. So, do the applicants merit the order of stay of execution or enforcement of the judgment of this Court rendered on 7th April 2025 dismissing the judicial review application to prohibit the DCI and DPP from investigating into a complaint filed by the interested party against the applicants of crimes allegedly committed by the applicants against the interested party?
31. In the context of judicial review, as is in the instant case, where the reliefs sought are often prohibitory, declaratory, or quashing in nature, stay of execution may only be granted where the decision being appealed is positive and capable of execution.
32. A negative order, such as a dismissal, is not capable of being stayed, as confirmed by Muchemi J in *Githau v Kagiri & Another* (Civil Appeal 314 of 2023) [2024] KEHC 6320 (KLR) that: “ I have further perused the court record and noted that the judgment dated 17th May 2023 dismissed the applicant’s suit and the respondent’s counterclaim. Notably, the court cannot grant stay of the impugned judgment dated 17th May 2023 as it dismissed the entire suit which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.” Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating: “ In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: “The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs



and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise.... 37. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order. A dismissal of a suit is a negative order incapable of execution. The court cannot stay what does not exist to be enforced.”

33. In *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] KECA 418 (KLR) the Court of Appeal emphasized that: “We have revisited those grounds and considered them in light of the above principles. We are satisfied that the applicants intend to present an arguable appeal. This is nonetheless with the usual caution that it may not ultimately succeed as in law an arguable appeal need not be one that will ultimately succeed. The above finding notwithstanding, we cannot lose sight of the fact that the order that the applicants seek to stay is the order of the High Court issued on 24th June 2020 dismissing their application. This is a negative order. We are guided by the decision in the case of *Western College Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated *inter alia* as follows: “But what is thereto be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.” We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above thresholds we have no mandate to grant a stay order in the manner prayed for by applicants. As regards the nugatory test, we are not satisfied that the appeal will be rendered a mere paper victory if it succeeds. As the Court reiterated in *Stanley Kangethe Kinyanjui vs. Tony Keter & 5 Others* (*supra*) and which we fully adopt: “Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.” [emphasis added]

33. In this case, however, this Court did not merely dismiss the judicial review application filed by the 2nd interested party applicant herein. Rather, this court in the consolidated matter issued an order of



certiorari quashing the decision of the Review Board and directed implementation of the award in accordance with Section 86 of the PPADA.

34. The effect of those orders is to restore the procuring entity's original decision made, to award the tender to the successful bidder, being the *ex parte* applicant herein and to pave the way for contract execution. That being the case, an order directing implementation is a positive and enforceable directive, not a passive dismissal. Thus, the order made directing action under section 86 of the PPADA is not the same as an order which merely dismisses judicial review application and makes no further order for implementation.
35. Accordingly, this Court is not satisfied that all the orders given in its impugned judgment rendered on 16th February, 2026 are negative orders incapable of implementation and therefore stay.
36. Onto the question of whether this court has jurisdiction to stay execution or grant an injunction to prohibit the procuring entity from entering into any contract with the *ex parte* applicant successful bidder, the procuring entity and the *ex parte* applicant argued that this court is *functus officio* in public procurement matters, after rendering its decision within 45 days of the filing of the judicial review, as stipulated in section 175(1) of the PPADA.
37. On this point, from the onset, I beg to disagree. In my humble view, where there is a right of appeal guaranteed, the law contemplates that a stay can issue as long as the applicant satisfies the conditions for stay. More importantly, it is not correct to say that this court's jurisdiction is ousted after delivering judgment to the extent that it cannot make any other order. This Court retains residual jurisdiction to determine any other applications and if that were not to be the case, then where costs are awarded, then this court would have no jurisdiction to enforce payment of those costs because it would be *functus officio*.
38. The doctrine of *functus officio* dictates that once a court has performed its function by rendering a final decision, it cannot reopen or revisit the merits of that decision, save as provided by law, say, through review to correct apparent errors or mistakes on the face thereof. However, this application for stay pending an appeal which is already filed does not invite this Court to reconsider, review, vary or set aside its judgment on its merits. Rather, it seeks preservation of the subject matter which is the procurement process pending the exercise of its right to challenge this Court's decision on appeal.
39. It is true that Section 175(1) requires that the judicial review once filed in this Court from the decision of the Review Board must be determined within 45 days and this Court did comply with that requirement by rendering the judgment in the consolidated matters within that statutory period of 45 days of the date of filing of judicial review. However, the section does not state that the Court's jurisdiction is extinguished immediately upon delivery of judgment, nor does it expressly bar this Court from issuing consequential or preservative orders incidental to its decision.
40. Furthermore, jurisdiction to grant stay of execution pending appeal is a well-recognized incidental power of a superior court. Such jurisdiction is exercised not to re-determine the dispute, but to safeguard the integrity of the already initiated appellate process. It is not lost to this Court that election petitions have timelines within which they must be determined and after such determination, a party who is aggrieved can appeal and seek for stay to preserve the status quo, pending the hearing and determination of the appeal.
41. Therefore, for the applicant to invite this Court to hold that the Court becomes entirely devoid of jurisdiction immediately upon pronouncement of judgment in proceedings which are time bound would in my opinion, produce impractical consequences and set a dangerous precedent, with the party aggrieved by the decision being rendered incapable of seeking interim protection pending appeal, even



where the appeal, if successful, may otherwise be rendered nugatory. This is fortified by section 168 of the PPADA which allows an automatic stay the moment an aggrieved bidder files a request for review to the Review Board. The section provides:

168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

42. Accordingly, I find that the 45-day period under Section 175(1) of the PPADA governs the determination of the judicial review application and not the incidental exercise of jurisdiction necessary to facilitate the appellate process.
43. On alleged non-disclosure of the pendency of the application for stay before the Court of Appeal, it is not disputed that the Applicant, after filing the present application for stay, upon filing a Notice of Appeal dated 17th February, 2026, subsequently filed an application for stay before the Court of Appeal. However, from the explanation offered by counsel for the Applicant, the sequence of events is as follows: The application under certificate of urgency was placed before the Duty Judge Hon Justice Chigiti SC on 18th February 2026. The Duty Judge directed that the application be placed before this Court, being the trial Court Judge, five days later. In view of the stringent procurement timelines and the risk of contract execution between the exparte applicant and the 1st interested party procuring entity, the Applicant, out of an abundance of caution, filed a parallel application before the Court of Appeal. The question is whether failure to disclose in the application that the applicant had another similar application before the Court of Appeal and such conduct of filing a parallel application for stay before the Court of Appeal disentitles the Applicant to relief for stay before this Court.
44. It is not a secret that a litigant seeking equitable relief must make full and frank disclosure of material facts. However, non-disclosure must be examined in context. In this case, the Applicant did not obtain any order from the Court of Appeal, nor is there evidence that the two courts have issued conflicting directions or orders. The filing of an application seeking protective orders before the Court of Appeal, particularly where urgency was critical and interim stay was not immediately granted at the High Court by the duty Judge, does not ipso facto amount to abuse of process. I have already stated above that the application herein was filed first but no conservatory orders were issued to protect the substratum of the appeal, noting that without any stay, the procuring entity and the exparte applicant were free to proceed under section 86 of the PPADA.
45. What would be unacceptable is concurrent pursuit of identical substantive relief in two courts with the intention of forum shopping that may eventually lead to obtaining of conflicting orders.
46. Accordingly, I find that the applicant is not guilty of non-disclosure of material facts of the filing of a stay application before the Court of Appeal. Neither can the applicant's application before this Court be fatally incompetent by virtue of another application for stay being at the Court of Appeal as that can be withdrawn should this Court decline the stay sought. It is worth noting that the Court of Appeal in entertaining the application for stay exercises original jurisdiction under Rule 5(2) (b) of the Court of Appeal Rules. In Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR), the Court of Appeal stated:

“Starting with this prayer, we note that such an application is everyday fare in this Court and the principles on which the Court acts if invited to exercise that jurisdiction, is old hat. This Court, in accordance with precedent, has to decide first, whether the applicant has



presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2) (b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii.”

47. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR), Platt Ag JA. Stated as follows:

“This is an application for a stay of execution of a decree of the High Court. The latter refusal a stay pending an appeal from that court’s judgment. The application is brought directly under this court’s original jurisdiction to be found in rule 5 (2) (b) of the Court of Appeal Rules.”

48. Therefore, on whether this Court can grant stay, as earlier stated, I find that this Court retains residual jurisdiction to grant consequential or preservatory relief after judgment is rendered within the statutory timelines stipulated in Section 175(1) of the PPADA. Furthermore, the Court of Appeal ordinarily exercises such jurisdiction to grant stay where the High Court has declined such application for stay.

49. The mere fact that an application has been filed before the Court of Appeal does not automatically divest this Court of jurisdiction. Until this Court has pronounced itself on the stay application, its jurisdiction remains intact.

50. Having said that, and owing to the strict timelines under Section 175 of the *Public Procurement and Asset Disposal Act*, this Court cannot decline jurisdiction merely because another competent court, which in this case is the Court of Appeal is seized of a similar application.

51. Under Order 42 Rule 6 of the Civil procedure Rules, this Court having rendered the impugned judgment, is best placed in the first instance to determine whether its decision should be stayed pending appeal. However, once this Court renders its determination one way or the other, on the stay application, any aggrieved party is at liberty to move the Court of Appeal which has jurisdiction to determine whether a stay should be granted or not and in doing so, the Court of Appeal invokes Rule 5(2) (b) of its Rules.

52. Onto the principles for granting stay of execution and whether the applicant for stay has satisfied the conditions precedent, Order 42 Rule 6 (1) of the Civil Procedure Rules governs applications for stay pending appeal as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon



as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

53. Under Order 42, Rule 6 (2) of the Civil Procedure Rules:

“No order for stay of execution shall be made under sub-rule (1) unless: -

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

54. In *Pauline Yebei & Another v estate of Kiprotich Letting represented by Andrew Kipkoech Kiprono* [2017] eKLR the Court of Appeal affirmed its decision in *Ishmael Kagunyi Thande v Housing Finance Kenya Ltd., Civil Appln No. Nai 157 Of 2006 (Unreported)* where the court held as follows on the principles for stay of execution: -

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

55. In *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR it was held:

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

56. For money decrees, stay of execution is only considered in special circumstances

57. Based on the foregoing, an application for stay will be successful if the following conditions are met and the question is whether in this case, the applicant has fulfilled the said conditions for stay: a) It is brought without unreasonable delay. In this case, the application was timeously brought by the applicant. Judgment was delivered on 16th February 2026 and the application was filed on 18th February, 2026. b) Substantial loss will occur if the orders are not given. Here, the applicant claims that it will suffer substantial loss in terms of loss of profit and that it is in the public interest that stay is granted to safeguard its right of appeal so that the appeal if successful should not be rendered nugatory. The respondents in the application contend that no evidence of any loss was provided and that as no tender was awarded to the applicant, the loss claimed is anticipatory not real. Further, that public interest is in favour of denial of stay since the staff of the procuring entity are exposed for not having medical insurance which hinders their right to health. I have considered this ground and I find no evidence of anticipated loss to be suffered by the applicant which cannot be compensated by an award of damages



or costs c) The applicant gives security for due performance of the decree sought to be stayed. The applicant deposed and submitted that it is willing to abide by any conditions that the court may impose. Under this condition, it is true to say that the applicant need not offer security as the court is empowered to order for depositing any security for due performance of decree.

58. The respondents also contended that the balance of convenience tilts in favour of the respondents in view of the exposure by the Executive and staff of the procuring not having in place a medical insurance cover.
59. It is important to note that the discretion to grant or deny stay is in the discretion of the trial court. In *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court of Appeal stated as follows concerning stay, in a brief but succinct manner:

...The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.

Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory, I would grant the stay asked for pending determination of the appeal by this court against the decision dated January 9, 1979 but upon terms, as authorised by the provisions of Order XLI rule 4(2)(b), that the applicant will deposit in court within thirty days the sum of Kshs 60,000 as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay shall lapse without a further order of this court being necessary. I would order the costs of this application to be costs in the appeal.

60. In this case, and for this Court, unlike the Court of Appeal, whether an appeal as filed is arguable or has likelihood of success is not a factor. For that reason, I would proceed, as did the Court of Appeal in the above *Butt v Rent Tribunal*, on a narrow basis. I find that the timelines for the hearing and determination of an appeal to the Court of Appeal takes only 45 days from date of filing the appeal



and that the Court of Appeal has already set a date for hearing which is set for 13/3/2026, less than ten days away. In my humble view, the procuring entity must have had a running medical cover for staff which they are expected to extend pending hearing and determination of this litigation which is time bound with very short timelines. I am not persuaded that the staff will suffer exposure as there are legal mechanisms for handling such eventualities and the procuring entity cannot plead exemption or ignorance.

61. In the circumstances, and so as not to oust the applicant from the seat of justice to ventilate its grievance on appeal, and so that its appeal is not rendered a mere academic exercise where a contract will already have been entered into, should the appeal be successful, and if not successful, as the appeal before the Court of Appeal is final, the procuring entity will be given a go ahead to conclude the already commenced procurement process, I exercise discretion and grant a stay of the procurement process commenced and restored by this Court on 16th February, 2026 until the appeal as filed in the Court of Appeal is heard and determined in the next less than 45 days.

1. I make no orders as to costs.
2. This file remains closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2026

R.E. ABURILI

JUDGE

