

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. E1175 OF 2024**

**NICHOLAS NGANGA & 10**  
**OTHERS.....APPELLANTS/APPLICANTS**

**VERSUS**

**CAPITAL MARKETS**  
**AUTHORITY.....RESPONDENT**

**RULING**

1. This matter commenced as an appeal against the Judgment of the Capital Markets Tribunal delivered on 18th September 2024. The Appellants herein were dissatisfied with the said decision, by the Tribunal, and appealed to this court seeking, inter alia, orders to set aside the said decision.
2. In a judgment delivered on 30<sup>th</sup> September 2025, this court, differently constituted, dismissed the appeal but granted the Applicants a 21-day interim stay.
3. Aggrieved by this court's said judgment, the Applicants filed a Notice of Appeal dated 7th October 2025 signifying their intention to appeal before the Court of Appeal. The Applicants also filed the application dated 15th October 2025 seeking, the following orders:

***a) A declaration that there is a statutory stay of further proceedings pending hearing and determination of the intended appeal to the Court of Appeal pursuant to Section 35A(23) of the Capital Markets Act;***

***b) In the alternative, a stay of further proceedings and/or enforcement before the Respondent pending the hearing and determination of the intended appeal;***

***c) Costs of the application.***

4. The Respondent opposed the application through Grounds of Opposition dated 29th October 2025.
5. The application was canvassed by way of written submissions which the parties highlighted during the hearing after which the matter was fixed for ruling.

### **The Appellant's Submissions**

6. The Applicants submitted that the Respondent's refusal to provide particulars of the allegations of financial impropriety, to disclose complaints received from third parties and provide reasons for alleged insufficiency of documentation violated their constitutional rights under Articles 25(c), 47(1), (2) and 50(2) of the Constitution.
7. They contended that further proceedings before the Respondent would render the intended appeal nugatory.
8. The Applicants framed the issues for determination to be as follows:

- a) Whether section 35A(23) of the Capital Markets Act provides for a statutory stay pending the hearing and determination of an appeal to the Court of Appeal;**
- b) In the alternative, whether the Court should grant a stay of proceedings and/or enforcement pending appeal;**
- c) Whether the Judgment delivered on 30th September 2025 is a negative order;**
- d) Whether leave is required for an appeal from the High Court to the Court of Appeal;**
- e) Whether delay in disposal of the inquiry takes precedence over the Applicants' constitutional rights;**
- f) Whether the Court is functus officio and whether stay should be sought before the Court of Appeal.**

9. On statutory stay under Section 35A (23) of the Capital Markets Act (the Act) it was submitted that the filing of a Notice of Appeal signifies commencement of the appeal process and therefore triggers the statutory stay. The Applicants relied on section 72(1)(a) of the Civil Procedure Act, which provides for a right of appeal to the Court of Appeal from every decree passed in appeal by the High Court on grounds that the decision is contrary to law.

10. On the constitutional right of appeal, the Applicants cited the case of **Judicial Service Commission & another vs. Rawal (Civil Application 308 of 2015)**

**[2016] KECA 831 (KLR)**, where the Court of Appeal held as follows at paragraph 45:

***“That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself. The wording of Article 164(3) of the Constitution admits to no other interpretation.”***

11. They further relied on ***Thermos Hong Kong Limited vs. Doshi Ironmongers Limited (Civil Appeal (Application) E013 of 2021) [2022] KECA 544 (KLR)***, where the Court held:

***“There is no express provision in the Trade Marks Act excluding an appeal to this Court from an appellate decision made by the High Court on the grounds set out under Section 72 (1) of the Civil Procedure Rules. There is no evidence that a purposive interpretation of Section 21 (6) of the Trade Marks Act reveals a legislative intention to make the High Court the last court of resort in disputes relating to the registration of trademarks or alternatively conferring a right to a second appeal to this Court only under certain exceptional circumstances, as was established by the Supreme Court in respect of Section 35 of the***

***Arbitration Act in the Nyutu case. The upshot is that the appellants have demonstrated that their right of appeal is properly founded upon an express statutory provision.”***

12. The Applicants contended that similarly, the Capital Markets Act does not expressly bar a further appeal and therefore no leave is required.
13. The Applicants relied on ***Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 Others [2016] eKLR***, citing the exposition of a negative order:

***“16. 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 (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).’”***

14. The Applicants submitted that paragraph 20(b) of the Judgment directed that the inquiry proceed and therefore it is not a negative order.
15. On fair hearing and administrative justice, the Applicants relied on ***Kivunira vs. Capital Markets Authority (Commercial Appeal E177 of 2024) [2025] KEHC 4441 (KLR)***, where the Court stated at paragraph 20:

***“A look at the verdict of the respondent, it is clear that the respondent convicted the appellant of charges which were not the subject of the trial or investigations and if they were, it investigated the appellant on charges he had not been informed of and as such his right to defend himself effectively was compromised. It is not just a matter of procedure for the law to require that a person be informed of the charges he would face in advance. It is a constitutional requirement which goes to the core of the trial and administrative action. The respondent was carrying out a quasi-judicial function which had binding legal consequences and should have in the circumstances ensured that the appellant’s rights were respected especially noting that it was both the investigator and the judge in the same cause. In my assessment, the totality of***

***all this amounted to violation of the appellant's right to a fair trial which under Article 25(c) of the Constitution cannot be limited. This violation renders the respondent's process to have been against the rules of natural justice and breach of the appellant's right to a fair administrative action."***

16. The Applicants argued that denial of a stay would entrench similar constitutional violations.
17. On the court's discretion to grant stay, the Applicants urged the Court to exercise discretion under Order 42 rule 6(1) of the Civil Procedure Rules (CPR) and contended that Order 42 rule 6(2) does not apply as the matter does not concern execution of a liquidated sum.
18. They submitted that refusal to grant a stay would deny them their constitutional right to a fair hearing and render the intended appeal nugatory.

### **The Respondent's Submissions**

19. The Respondent, on the other hand, identified the following issues for determination: -
  - a) Whether an appeal at the third instance lies as of right or is subject to specific statutory or discretionary conditions;***
  - b) Whether Section 35A(23) of the Capital Markets Act provides for a statutory stay pending appeal to the Court of Appeal;***

- c) Whether the Applicants have satisfied the requirements for grant of stay pending appeal;**  
**d) Whether delay in disposal of the inquiry takes precedence over the Applicants' constitutional rights.**

20. On whether an appeal at the third instance lies of right, the Respondent submit that the intended appeal constitutes a third appeal and cited the decision in **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another vs. Ann Wangui Ngugi & 524 others [2018] eKLR**, where the Court of Appeal observed:

**“18. As already stated, the appeal to the Tribunal was a second appeal. The appeal to ELRC is a third appeal. For reasons of policy, that is finality of disputes, granting of right to a third appeal is rare in our jurisdiction. By Article 163(4) of the Court, appeals lie to the Supreme Court from decisions of the Court of Appeal with leave of either the Supreme Court or the Court of Appeal in the special circumstances specified therein. Therefore, as a general principle, if the Court of Appeal determines a second appeal, the Supreme Court may entertain a third appeal with leave if the conditions therein are satisfied. That is one rare case where a third appeal is allowed.”**

21. The Respondent further relied on the same decision where the Court held:

***“19. From the above analysis, we hold that the law does not provide for an appeal from the decision of the Retirements Benefits Tribunal and such right of appeal can neither be implied nor inferred to confer jurisdiction to ELRC or the High Court Jurisdiction to entertain such an appeal. It follows that the appeal filed by the respondents is incompetent.”***

22. Further reliance was placed on ***Samwel Kiplangat Mwei vs. The Hon. Attorney General & 3 others, Petition E003 of 2024***, where the Supreme Court stated:

***“We have stated severally that a court cannot entertain any proceedings without jurisdiction that conferred on it by the Constitution, statute law and/or the principles laid down in judicial precedent.”***

23. The Respondent distinguished ***Thermos Hong Kong Limited vs. Doshi Ironmongers Limited*** (supra), submitting that it dealt with a second appeal, whereas the present matter concerns a third appeal.

24. It was further contended that Section 72 of the Civil Procedure Act relates to “Second appeal from the High Court” and cannot ground a third appeal as of right.

25. On whether Section 35A(23) provides a statutory stay, the Respondent submitted that Section 35A(22) and (23) of the Capital Markets Act must be read in the proper context. According to the Respondent, the “appeal” in subsection (23) refers to the appeal to the High Court under subsection (22), not a further appeal to the Court of Appeal.
26. The Respondent argued that both the Tribunal’s and this Court’s decisions were negative orders incapable of being stayed. Reliance is placed on **Kanwal Sarjit Singh Dhiman vs. Keshavji Juvraj Shah [2008] eKLR** where it was held that: -

***“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.”***

### **Issues for Determination**

27. From the pleadings and the parties’ submissions, I find that the following issues arise for my determination:

- a) Whether an appeal to the Court of Appeal in this matter lies as of right, or whether it constitutes a third appeal requiring leave;**
- b) Whether Section 35A(23) of the Capital Markets Act provides for a statutory stay pending an appeal to the Court of Appeal;**
- c) Whether the orders made by the Tribunal and this Court are negative orders incapable of stay;**
- d) Whether the Applicants have satisfied the principles for grant of stay of proceedings pending appeal;**
- e) Whether delay in disposal of the inquiry takes precedence over the Applicants' constitutional rights;**
- f) Whether this Court is functus officio.**

28. On whether a third appeal lies as of right, it was not disputed that the Tribunal's decision was appealed to this Court. This means that the intended appeal to the Court of Appeal would therefore constitute a further appeal.

29. In **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another vs. Ann Wangui Ngugi & 524 others** (supra) the Court of Appeal observed:

**“18. As already stated, the appeal to the Tribunal was a second appeal. The appeal to ELRC is a third appeal. For reasons of policy,**

***that is finality of disputes, granting of right to a third appeal is rare in our jurisdiction... That is one rare case where a third appeal is allowed.”***

30. The same Court further held:

***“19. From the above analysis, we hold that the law does not provide for an appeal from the decision of the Retirements Benefits Tribunal and such right of appeal can neither be implied nor inferred...”***

31. In ***Samwel Kiplangat Mwei vs. The Hon. Attorney General & 3 others, Petition E003 of 2024***, the Supreme Court held: -

***“We have stated severally that a court cannot entertain any proceedings without jurisdiction that is conferred on it by the Constitution, statute law and/or the principles laid down in judicial precedent.”***

32. Section 72(1) of the Civil Procedure Act provides for a second appeal from the High Court on points of law. The marginal note reads: “Second appeal from the High Court.” My understanding of the said provision in the context of the present is that the intended appeal to the Court of Appeal would constitute a further (third) appeal beyond the High Court. I find that the statutory framework

under the said section 72(1) does not expressly confer an automatic right to a third appeal in matters arising under the Capital Markets Act.

33. It is my view that the issue of whether the present intended appeal is properly grounded as of right is a jurisdictional question that must be addressed in light of the statutory framework and precedent.

34. On whether Section 35A(22) and (23) of the Capital Markets Act provide for a statutory stay, I note that the said sections stipulate as follows:

**“(22) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.**

**(23) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced until the appeal has been determined.”**

35. The Appellants contended that subsection (23) extends to a further appeal to the Court of Appeal. The Respondent, on the other hand, submitted that the “appeal” contemplated under subsection (23) refers only to the appeal to the High Court under subsection (22).

36. A contextual reading of subsections (22) and (23) suggests that the stay mechanism attaches to the appeal to the High Court as the language used does not expressly extend the stay to a further appeal. My take is that if the intention of the law makers was to have the stay extended to an appeal to the Court of Appeal, nothing would have been easier than to include the said provision in the Act.

37. On whether the orders are negative, the Respondent submitted that both the Tribunal's decree and this Court's Judgment are negative orders incapable of stay.

38. The Tribunal's decree was as follows: -

***“IT IS HEREBY DECREED THAT this Tribunal finds no merit in the appeal and the same is hereby dismissed with costs to the Respondent.”***

39. In ***Devani and 4 Others vs. Joseph Ngindari***, cited in ***George Ole Sangui & 12 others vs. Kedong Ranch Limited [2015] KECA 480 (KLR)***, the Court stated:

***“By dismissing the judicial review application, the superior court did not thereby grant any positive order... which is capable of execution... This Court cannot undo at this stage what the superior court has done.”***

40. In ***William W. Wahome and the Registrar of Trade Unions & Others (Civil Appl. No. NAI 308 of 2005)***, the Court held:

***“The order... did not grant the respondents any relief other than costs... There is no judgment... capable of enforcement by execution save for costs.”***

41. In the instant case, I note that the Tribunal’s decree and this Court’s Judgment dismissed the appeals with costs. I therefore find that no positive executable order was issued. In light of the authorities cited, such orders are negative orders incapable of being stayed save for costs.

42. The applicable principles governing the granting of orders of stay of proceedings were set out by a five-judge bench in ***William Odhiambo Ramogi & 2 Others vs. The Honourable Attorney General & 3 Others [2019] eKLR*** as follows:-

***“20. A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court...***

***a. First, there must be an appeal pending before the higher Court;***

***b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed***

***and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court...***

***c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;***

***d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;***

***e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted...; and***

***f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”***

43. In the instant case, the Respondent contended that only a Notice of Appeal has been filed and no substantive appeal is pending.

44. On arguability of the appeal, the Respondent relied on ***Nina Mweu t/a Sassma Farm vs. Muus Kenya Ltd & another Civil Appeal 236 of 2011***, citing ***Karingo vs. R (1982) KLR 214*** where it was held that a second appellate court will not as a general rule interfere with

concurrent findings of fact of the two courts below unless it is shown that the findings are not based on evidence.

45. On substantial loss, the Respondent cited **Kenya Commercial Bank Ltd vs. Tamarind Meadows Limited & 7 others [2016] eKLR** where the Court held:

***“18. In the premises, I would be of the same view and find that there are no orders flowing from that ruling in respect of which a stay order can validly be granted... there is nothing that the Applicants have lost by virtue of the mere fact of dismissal of their application, the issue of substantial loss would not arise.”***

46. Applying the principles set in **William Odhiambo Ramogi**, case (supra) I find that the Applicants have not demonstrated that a substantive appeal is pending or that the intended appeal raises substantial questions beyond concurrent findings of fact or that the appeal would be rendered nugatory if proceedings continue. The Applicants have also not shown that there are exceptional circumstances warranting stay of proceedings.

47. It is trite that stay of proceedings is a grave judicial intervention that should not be granted lightly. In **Kuria Gathoni vs. Ethics & Anti-Corruption Commission & 2 others Civil Application E437 of 2022 [2023] KECA 222 (KLR)** the Court of Appeal stated:

***“31. To our mind, the applicant has not made a case for Stay of proceedings in the ELC We need not overemphasize the fact that such an order is a grave judicial action which will seriously interfere with the 1st respondent’s right to prosecute its case...”***

48. On whether this Court is functus officio, I find that this application concerns ancillary matters for which the court cannot be said to be functus officio. This court cannot however, sit on appeal over its own final decision.

49. The Appellants alleged violations of Articles 25, 35, 47 and 50 of the Constitution.

50. In its Judgment dated 30th September 2025, this court stated that: -

***“15. This Court, therefore, finds it a tall order to fault the ongoing process on account of procedural impropriety... The Appellants have failed to prove any infraction of their rights... The Appellants’ actions also seem to be premature. As such, the contention is for rejection.”***

51. I am not persuaded that the Applicants proved violation of any of their rights under the Constitution as the inquiry before the Respondent is yet to be undertaken.

52. In view of the foregoing, I find that the application is not merited and I therefore dismiss it with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**HON. W. A. OKWANY**

**JUDGE**

**26/02/2026**

**FOR APPELLANT .....**

**FOR THE RESPONDENT .....**

**COURT ASSISTANT Ubah**