

**IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: MUSINGA, (P), MUMBI NGUGI & ODUNGA,
JJA.) CIVIL APPLICATION NO. E778 OF 2025**

BETWEEN

**KENYA ELECTRICITY TRANSMISSION CO. LIMITED
(KETRACO).....APPLICANT**

AND

INSTALACIONES INABENSA S.A.....1ST

RESPONDENT NCBA BANK KENYA (PLC).....

....2ND RESPONDENT KENYA COMMERCIAL BANK 3RD

RESPONDENT

STANDARD CHARTERED BANK4TH

RESPONDENT CO-OPERATIVE BANK OF KENYA.....

....5TH RESPONDENT

**CITI BANK.....6TH
RESPONDENT**

(Being an application for stay of execution of the ruling & order of the High Court of Kenya, at Nairobi (P. Mulwa J.) dated 11th December 2025

in

Misc. Application No. E445 of 2019)

RULING OF THE COURT

1. Before us is the Notice of Motion dated 23rd December 2025, brought by the applicant, **Kenya Electricity Transmission Co. Limited (KETRACO)**, seeking orders that pending the

hearing and determination of its intended appeal against the ruling and order of the High Court at Nairobi, (**P. Mulwa J.**) dated and

delivered on 11th December 2025 in Miscellaneous Application No. E445 of 2019, this Court should stay the execution of the said decision and any orders consequential thereto.

2. The brief background to the present application is that the applicant, a State corporation incorporated under the **Companies Act** (now repealed), entered into two contracts with the 1st respondent for construction of an electricity transmission line and extension of an existing sub-station in April 2013. In April 2016, disputes arose between the parties and were referred to arbitration. The arbitral tribunal found in favour of the 1st respondent and ordered the applicant to pay to the 1st respondent Euro 30,887,820.39; interest of Euro 6,477,870.77; legal costs, arbitrators costs and administrative costs of Kshs.102,165,144.20, 83,520,000 and 2,000,000.00 respectively. On 12th February 2021, pursuant to an application by the 1st respondent, judgement was entered in terms of the award. It is important to note that several attempts by the applicant to set aside the said award have so far been unsuccessful, and that the main decree remains unchallenged.

3. On 23rd February 2024, the 1st respondent filed an application seeking garnishee orders against bank accounts held in the applicant's name with the 2nd to 6th respondents in a bid to execute the arbitral award. Although in garnishee proceedings, applications for an order nisi are ordinarily made *ex parte*, pursuant to Order 23 rule 1 of the **Civil Procedure Rules**, in this case, the application was heard *inter partes*, together with the applicant's application seeking to stay proceedings. In his ruling delivered on 11th December 2025, the learned Judge dismissed the applicant's application but granted the 1st respondent's application and issued a garnishee order nisi attaching all the monies in the applicant's bank accounts with the 2nd to 6th respondents and directed that the matter be mentioned on 20th January 2026 for further directions, and for consideration of whether or not to make the garnishee order nisi absolute.
4. The application was grounded on the contentions that the applicant's intended appeal is arguable and: that it has been disabled from accessing, utilizing, or deploying funds necessary for the discharge of its mandate; that the 1st respondent, which is in liquidation, is not a going concern

capable of refunding the

funds, hence the intended appeal will have been rendered nugatory should it succeed; that freezing of the accounts has already caused serious operational paralysis and has effectively halted ongoing projects and threatens stable power transmission nationwide with severe consequences for public safety, the economy, essential services and energy security; that the applicant being a critical state corporation, it is in the public interest to grant the orders sought; and that the applicant is ready and willing to abide by such conditions as may be imposed by the Court for issuance of orders of stay, including tendering security.

5. In the supporting affidavit sworn by the applicant's Company Secretary and General Manager, **Florence Mitey**, it is averred: that the applicant is a State Corporation mandated with planning, construction, operation and maintenance of the national electricity transmission grid; that the legal and practical effect of the order nisi is that the applicant is unable to access its funds and, unless stayed, the order is "liable to be made absolute", compelling the garnishees to release the funds to the 1st respondent; that the freezing of the applicant's accounts

immediately cripples its ability to operate and maintain electricity transmission infrastructure, pay staff, meet contractual obligations and sustain ongoing projects, thereby disrupting electricity transmission country wide; and that the magnitude of the award and the accruing interests far outstrips the applicant's financial capacity and asset base, hence its immediate enforcement will bring the applicant's activities to an abrupt halt, contrary to public policy and the interests of justice.

6. The applicant, according to the said affidavit, believes that the High Court erred by: failing to sequester/separate project/donor funds in the listed accounts, from other funds owned by the applicant; failing to sequester/separate moneys held in trust by the applicant, for the benefit of third parties, such as the project- affected persons to whom compensation was due; failing to consider the impact of the deed of assignment/subrogation of the debt between Instalaciones Inabensa S.A and Infraestructuras T&I SLU by which terms the debt was assigned to Infraestructuras T&I SLU; and ignoring the impropriety of the garnishee proceedings commenced by

the 1st respondent. These

grounds, according to the applicant, constitute arguable grounds with probability of success.

7. It was disclosed that the applicant and the 1st respondent were engaged in good faith, Government-led negotiations aimed at an orderly settlement of the award, hence a stay is necessary to preserve the substratum of those negotiations. In addition, on a without prejudice basis, that the applicant is ready and willing to file an affidavit of means and a structured payment plan to secure the 1st respondent's interests while safeguarding public service delivery. In the applicant's view, no prejudice will be occasioned to the 1st respondent by the grant of stay, whereas a refusal to grant the same will occasion irreparable harm to the applicant and the Kenyan public at large.

8. In opposition, the 1st respondent's advocate, **James K. Muthui**, filed a replying affidavit sworn on 2nd January 2026 wherein he avers that the stay application is incompetent and an abuse of the Court process since: the dispute arises from arbitral proceedings and, by dint of the provisions of section 10 of the **Arbitration Act**, the Applicant does not have an

automatic right

of appeal against the ruling and orders of 11th December 2025; even if the dispute arose from ordinary civil proceedings, by dint of section 75 of the **Civil Procedure Act** and Order 43 of the **Civil Procedure Rules**, the applicant does not have an automatic right of appeal; the applicant has a similar application for stay before the High Court dated 17th December 2025 whose existence and material facts the applicant has concealed; the appeal is not arguable since the dispute has been litigated before the High Court, this Court and the Supreme Court and the decree itself is not under any pending legal challenge; the issues raised in the Draft Memorandum of Appeal are matters that the applicant should raise before the High Court at the determination of the issue whether the garnishee order nisi should be made absolute; the appeal will not be rendered nugatory if stay is not granted since the decree is a money decree; and that should the Court be amenable to granting the stay, it should be conditional on the deposit of the entire decretal sum, interest and costs in a joint account in the names of the parties' advocate, with a reputable bank or on provision of a bank guarantee.

9. It was further averred: that prejudice will be occasioned to the 1st respondent as the applicant will simply withdraw the funds in the accounts, thus rendering the garnishee order nisi and the entire garnishee application futile and nugatory; that the decree in this matter arose from a voluntary commercial transaction freely entered into by both parties and not a matter of public funds; and that CA Infraestructuras T & I, SLU having acquired the interest and rights in the decree by subrogation, it is the decree holder and it being a reputable company, would be able and willing to refund the decretal sum, in the unlikely event that the applicant's intended appeal succeeds.
10. We heard the application on the Court's virtual platform on 13th January 2026 when learned counsel, Mr Mosota, appeared with Mr Mumia, Mr Kisigwa and Mr Wanderi for the applicant; learned counsel, Mr James Muthui, appeared with Ms Nyangweso for the 1st respondent; learned counsel, Mr Gichangi, appeared for the 2nd respondent; and learned counsel, Mr Gichana held brief for Mr Ndirangu for the 3rd respondent. For the 4th and 6th respondents, learned counsel, Mr Lawson Ondieki, was present while learned counsel, Ms

Andenyi, held brief for Mr Muchiri for

the 5th respondent. During the plenary hearing, Mr Gichangi, Mr Gichana, Mr Ondieki and Ms Andenyi informed us that they would abide by the Court's decision. Mr Mosota, together with Mumia, and Mr Muthui briefly highlighted their written submissions.

11. It was submitted on behalf of the applicant: that on the authority of the case of **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**, the applicant had satisfied the two conditions precedent for granting an order for stay pending an intended appeal. The applicants indicated that in the intended appeal, it will challenge the propriety of the proceedings commenced by the 1st respondent in view of the 'assignment' of its debt to a 3rd party, Infraestructuras T&I SLU, and also challenge the 1st respondent's capacity to institute the proceedings in view of its liquidation in Spain. In the absence of stay, the applicant submitted that its intended appeal will be rendered nugatory, because, firstly, the garnished funds may be carted away pending the hearing and determination of the appeal, and secondly, following the assignment of the decretal proceeds to a 3rd Party (Infraestructuras T&I SLU), paying the

proceeds to the 1st respondent could result in further legal proceedings being instituted against the applicant by the assignee- Infraestructuras T&I SLU. According to the applicant, and referencing the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**, since the 1st respondent is under liquidation, it cannot be said to be a credit-worthy 'going concern' capable of refunding the garnished sums should the appeal be successful. The applicant lamented that the subsisting garnishee orders threaten to hamstring its critical operations in electricity transmission countrywide, thus it is important for the Court to weigh the hardship that will be occasioned to the applicant (a state corporation) and the general public, as against the hardship (if any) that will be occasioned to the 1st respondent. The deponent reiterated the applicant's amenability to providing an acceptable security as directed by the Court.

12. On behalf of the respondent, it was submitted: that this Court lacks jurisdiction since a dispute arising from arbitral proceedings and an appeal to this Court can only be preferred

with leave, in exceptional circumstances as held by the
Supreme

Court in **Nyutu Agrovat Limited vs Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch(Interested Party) [2019] eKLR**; that under section 75 of the **Civil Procedure Act** as read with Order 43 of the **Civil Procedure Rules**, there is no right of appeal in respect of a garnishee application made under Order 23 rules 1 and 2; and that pursuant to rule 39(b) of this Court's Rules, and referencing the case of **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR**, leave may only be granted where an application for leave to appeal has been made to the High Court and refused, and the application made to this Court within fourteen days of such refusal.

13. In addition, it was submitted: that the applicant failed to disclose that an application for stay of the impugned ruling is already pending before the High Court and scheduled for hearing on 20th January 2026, thus, as held in **Linet Kemunto Nyakeriga & Another v Ben Njoroge & 3 Others [2013] eKLR**, this application is an abuse of the court process; that the intended appeal is premature as the trial court has not made final orders on the garnishee application as the ruling only addresses the

preservation of monies in the affected accounts by a garnishee order nisi; that at the hearing of the application to make that order absolute, the applicant and the garnishees will have the opportunity to make their arguments to the court on what monies are attachable or not attachable before the garnishee order nisi is made absolute; that this being a money decree, on the authority of the cases of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] eKLR** and **Kenya Hotel Properties Ltd v Willesden Investments Ltd [2007] eKLR**, the appeal cannot be rendered nugatory if stay is not granted; that the applicant has not provided evidence or demonstrated that the 1st respondent is in liquidation and is unable to repay the money should the appeal eventually succeed; that on the authority of the cases of **National Transport and Safety Authority v Elisha Z. Ongoya & 2 Others [2020] eKLR** and **Broadway Enterprises Ltd v Ministry of Housing & Urban Development & 3 Others [2018] eKLR**, it is not enough for one to claim that it is the custodian of public funds and thus ought to be shielded from any form of execution; that should the Court be persuaded to grant stay orders, it should, on

the authority of **Caltex Oil**

(Kenya) Ltd v Wanjihia [2009] 2 EA 105 and **Kenya Hotel Properties Ltd v Willesden Investments Ltd,**

(supra) balance the interests of the parties and in this case, condition the order on the applicant securing the decretal sum by depositing the entire decretal sum in the joint names of the parties' advocates and providing either a bank guarantee or insurance guarantee within 30 days.

14. We have considered the foregoing. The principles guiding the grant of stay of execution pending appeal or intended appeal are settled. As crystallised and summarized by this Court in **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others** (supra) they are: that the Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal, if successful, would be nugatory if the interim orders sought were denied; 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; that the term "nugatory" has to be given its full meaning and does not only mean worthless, futile, or invalid but also means trifling; that 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; and that in considering whether an appeal will be rendered nugatory, each case must depend on its facts and peculiar circumstances.

15. In this application, the 1st respondent contends that the intended appeal is not arguable on the grounds that there is no automatic right of appeal against the decision intended to be appealed against to this Court; and that the intended appeal is premature as the final decision in the matter is yet to be made. On those grounds, it is contended that the intended appeal is not arguable. The applicant, in response states that leave is not required to appeal against the decision in question since what is being challenged is not the arbitral award, or an order arising from arbitration proceedings, but one from execution proceedings.
16. In this ruling, we do not wish to determine, with finality, the issue of whether or not the intended appeal arises from arbitral proceedings or execution proceedings, so as not to prejudice any applications that may be made challenging

the validity of the

intended appeal. Nevertheless, it is clear, and the applicant concedes, that the application that was before the trial court was brought pursuant to Order 23 rules 1 and 2 of the **Civil Procedure Rules**. Section 75 of the **Civil Procedure Act** sets out the decisions from which appeals lie as of right. Garnishee proceedings, under Order 23 of the **Civil Procedure Rules** are not expressly identified in section 75(1) as those proceedings from which an appeal lies. Section 75(1)(h) of the aforesaid Act however states that an appeal lies from any order made under the rules if expressly allowed by rules. Pursuant to the said section, Order 43 provides for Orders and rules from which appeals lie as of right. Our reading of rule 1 subrule (1) of that Order does not reveal that an order made under Order 23 rules 1 and 2 is appealable as of right. It follows that orders made under those provisions require leave. The applicant has not told us that such leave was sought and granted.

17. Apart from that it is clear, and this was admitted by Mr Mosota, that the intended appeal is against the grant of the garnishee order nisi. A garnishee order nisi, as its name

connotes, is not an absolute order. It is meant to preserve the funds as the court

interrogates their ownership and their availability to settle the decree in question. We have perused the grounds of the intended appeal and we agree with Mr Muthui that nothing bars the applicant from raising those objections during the hearing of the application for the garnishee order nisi to be made absolute.

18. Having considered the foregoing, and while we appreciate that our decision, in the exercise of our jurisdiction under rule 5(2)(b) of the Rules of this Court, does not necessarily bind the bench that will ultimately hear the appeal, (see ***Musiara Ltd v. Ntimama [2004] 2 KLR 172; [2005] 1 EA 317***), our *prima facie* view, based on the material placed before us, is that the intended appeal is not arguable. As was held in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others*** (supra) for the applicant to succeed, the Court must be satisfied on both conditions of arguability of the intended appeal and the nugatory aspect of the appeal, should it succeed. If the Court is not satisfied in either of them, the application must fail.

19. In this case, the applicant has not satisfied us that it has an

arguable appeal. In the premises, we do not need to consider

whether or not the intended appeal, should it succeed, will be rendered nugatory. Consequentially, this application fails and is dismissed with costs to the 1st respondent.

It is so ordered.

Dated and delivered at Nairobi this 25th day of March, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.