



Ethics and Anti-Corruption Commission v Kanani & 5 others (Civil Application E616 of 2024) [2025] KECA 605 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 605 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E616 OF 2024
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA
MARCH 28, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

NASHON WILSON KANANI 1ST RESPONDENT

WALLA INTERNATIONAL LIMITED 2ND RESPONDENT

WILCOREG LIMITED 3RD RESPONDENT

BRIDGE SIDE FARM 4TH RESPONDENT

REGINA MUNYIVA MUTINDA 5TH RESPONDENT

REGINEEZ ENTERPRISES LIMITED 6TH RESPONDENT

(An application for injunction against the judgment and decree of the High Court of Kenya at Nairobi (N. Sifuna, J.) dated 7th November 2024 in ACEC No. E022 of 2023)

RULING

1. Before us is a notice of motion dated 15th November 2024. The applicant seeks orders, which we have summarized as follows:
 - a. An order prohibiting the respondents from withdrawing or dealing with funds in various bank accounts (listed in detail in prayers 2, 3, & 8 of the application) pending the appeal.
 - b. Orders to prevent the respondents from transferring, disposing, or dealing with motor vehicles listed in prayers 4 & 10 of the application, and land titles listed in prayers 5 & 9 of the application, pending the appeal.



- c. An injunction to stop the respondents from dealing with Kshs.898,000 recovered from the 1st respondent's house.
 - d. Any other orders the court deems fit, in order to preserve the assets during the appeal process.
 - e. Costs of the application be provided for.
2. The application was premised on the grounds that:
 - a. The impugned judgment dismissed the applicant's case for the forfeiture of unexplained assets (totaling Kshs.643,213,688.12), which included land, vehicles, and cash.
 - b. The respondents had started disposing of these assets, risking rendering the appeal nugatory.
 - c. The assets were suspected to be the result of corrupt practices, involving public funds.
 - d. If the respondents were allowed to deal with the assets, it would be difficult to recover them, if the appeal was successful.
3. The application was supported by an affidavit from Abdulhamid Farooq Low, a Deputy Director of the Ethics and Anti-Corruption Commission (EACC), who outlined the ongoing investigations into the respondents' acquisition of unexplained wealth. He stated that the assets under suspicion included significant sums in bank accounts and various properties. The affidavit pointed out that there had been the issuance, and thereafter, the extension of preservation orders, during earlier legal proceedings related to these assets.
4. In response to the application, the 1st respondent, in his replying affidavit sworn on 25th November 2024, stated that he was authorized by the respondents to swear the affidavit on their behalf due to their 'association'. He stated that:
 - a. The applicant's conduct had been unfair and had harmed his reputation.
 - b. The investigations conducted by the applicant were flawed and had caused him significant economic hardship.
 - c. The applicant had failed to prove its case in the trial court and the appeal had little chance of success.
 - d. The assets under investigation had legitimate sources, and the applicant's suspicions were based on flawed reasoning and outdated evidence.
5. In a supplementary affidavit sworn by Abdulhamid Farooq Low on 28th November 2024, the applicant responded to the respondents' replying affidavit by reiterating that the assets were suspected to have been acquired through corruption and that preserving these assets was necessary for the tangible success of the appeal. The applicant emphasized the urgency of the injunction to prevent further dissipation of the assets, which could render the appeal nugatory.
6. When the application came up for hearing on 10th February 2025, Ms. Murugi, learned counsel, appeared for the applicant. Mr. Okore Jayalo, learned counsel holding brief for Professor Tom Ojienda, SC, appeared for the respondents. Counsel relied on their respective written submissions, which they orally highlighted.
7. Ms. Murugi submitted that the appeal would be rendered nugatory if the injunction was not granted because the assets the applicant was pursuing were currently held by the respondents. She noted that



- approximately 40 million shillings held in bank accounts had already been removed by the respondents, between the date of the High Court judgment and the date of filing of this application.
8. Counsel submitted that the applicant sought protection to ensure these assets were available when the appeal was heard and concluded. She further argued that the case involved unexplained assets and substantial sums of money, and without these, the pending appeal would be rendered academic.
 9. Counsel submitted that the draft memorandum of appeal raised arguable and non-frivolous grounds. She was convinced they had demonstrated corrupt dealings by the respondents, as detailed on page three of their submissions.
 10. Counsel contended that public interest would suffer if an injunction was not granted to preserve the respondents' assets, which the applicant believed had been acquired through corrupt conduct. Noting that the value of the unexplained wealth was in excess of Kshs.220 million, counsel urged the Court to grant the injunction.
 11. Counsel confirmed that Kshs.40 million represented all the money in the listed accounts. However, it was conceded that granting orders concerning those accounts, would likely serve no purpose as the money had moved.
 12. Counsel further submitted that a Notice of Appeal dated 8th November 2024 was in place, which was sufficient for seeking an injunction pending appeal.
 13. The applicant filed written submissions in which they outlined several key arguments as to why the injunction should be granted. On the aspect of arguability, the applicant contended that their draft memorandum of appeal annexed as 'AFL 15' raised several grounds of appeal that are arguable, and should be fully argued before the court. They believe the applicant is likely to succeed in the appeal.
 14. The submissions point to alleged erroneous findings by the trial court, stating that the court failed to analyze the explanations provided by the respondents regarding the sources of their assets and incorrectly made definitive or final findings of fact or law at the interlocutory stage. The applicant relied on the decision in *Ogato v Nyaguthii & Another* [2024] KECA 733 (KLR), to buttress the submission that the appeal was not frivolous, as it would raise pertinent points of law.
 15. The applicant submitted that the appeal would be rendered nugatory if the injunction was not granted. This was so because the total value of the assets, which were the subject matter of the appeal was substantial, amounting to Kshs.643,213,688.12. However, it was noted that only Kshs.48,003,527.47 remains preserved in the bank accounts.
 16. The applicant was apprehensive that if the injunction was not granted, the respondents might dissipate these assets, making it impossible to recover them, even if the appeal was successful. The applicant further submitted that if the injunction is denied and the appeal succeeds, the applicant and the public would suffer irreparable prejudice due to the potential loss of the assets acquired through suspected corrupt conduct.
 17. The applicant submitted that conversely, if the injunction was granted and the appeal fails, the respondents would only be temporarily prevented from dealing with the assets.
 18. The applicant submitted that granting the injunction was in the public interest, as the applicant was empowered by law to investigate and conduct the prosecution of corruption or economic crimes. They emphasized that recovery of property against those who are suspected of having corruptly acquired it is a matter of public importance.



19. The applicant submitted that the balance of convenience tilted in their favor, and maintaining the status quo pending the appeal would serve the public interest by preventing the potential dissipation of assets that were suspected to be proceeds of corruption.
20. The applicant pointed out that they had not been served with a draft decree for approval following the High Court's decision. They submitted that enforcing any orders from the dismissed suit would be difficult, further necessitating the preservation of the subject matter pending appeal.
21. Opposing the application, Mr. Okore submitted that the kind of issues raised in the draft memorandum of appeal were previously before the Court of Appeal in Pamela Abo v EACC, (supra), and that the trial court had followed the well-reasoned judgment in that case. Therefore, he submitted that the current appeal did not raise new arguable points. He also asserted that the respondents had satisfactorily explained the legitimate sources of their assets at the trial court, complying with Section 55 of the ACECA Act, which extinguished any reasonable suspicion.
22. Counsel submitted that the appeal would not be rendered nugatory if the injunction was denied. He emphasized that the law provided for well-established recovery procedures, in the event the applicant succeeded in the appeal. He also pointed out that the Court's powers were not limited in recovery. He contrasted this with the burden of having the assets quarantined for the past two years since 13th December 2022 through freeze orders.
23. Counsel submitted that the applicant had ample opportunity to prove their case while the assets were frozen until the High Court's judgment on 7th November 2024. He further submitted that the principles for granting stay orders under Rule 5(2)(b) of this Court's Rules, were the same as for injunctive orders, and since stay cannot be granted on a negative order (dismissal of the suit), an injunction should also not be granted, as it would amount to resuscitating a dead case.
24. Counsel contended that it was not in the public interest to sustain freeze orders pending an appeal that had not yet been filed despite the expiry of timelines. He submitted that restricting the respondents' businesses, which had been the case for two years while their assets were quarantined, was also not in the public interest, especially since the applicant had had two years to prove their case. He concluded that the injunction was sought in bad faith and should not be granted.
25. Counsel clarified that while not synonymous, stay of execution and injunction orders, derive from the same legal provisions, Rule 5(2)(b), and share the same principles of proof. However, counsel conceded that he had not come across any authority in support of that assertion.
26. Counsel submitted that should an injunction be granted, the respondents' immovable property and other non-monetary assets, would be put on ice.
27. On the relevance of the Pamela Abo judgment in determining the current injunction application, counsel pointed out that the applicant had attempted to appeal the Pamela Abo decision to the Supreme Court.
28. Counsel acknowledged the logic of the applicant's argument that the public stands to lose improperly acquired property if the injunction was not granted, but pointed out that the properties in question had not been transferred since the High Court's judgment, mitigating the immediate risk. He also reiterated that recovery proceedings were available to the applicant if they succeeded in the appeal.
29. The respondents submitted that the application was devoid of merit, and it aimed to deny them the benefits of the judgment they obtained. They submitted that the applicant had not raised any cogent grounds that constitute an arguable appeal with a likelihood of success.



30. The respondents submitted that the applicant was attempting to re-litigate matters already decided by the trial court, by introducing new facts and investigations, as grounds of appeal, rather than focusing on the court's findings.
31. The respondents reiterated that the trial court's decision was consistent with the principles established in *Pamela Aboo v Assets Recovery Agency and the Ethics and Anti-Corruption Commission*, (supra). They submitted that while this case was granted certification for appeal to the Supreme Court, this did not mean the principles were overturned. They further submitted that the applicant's intended appeal raised similar issues that were already considered and dismissed by the trial court.
32. The respondents pointed out that the applicant's initial suspicion was based on a conviction that was later overturned by the High Court in *Criminal Appeal No. 381 of 2010 Wilson Nashon Kanani vs Republic*, a fact they claimed the applicant overlooked. They characterized the applicant's claim as lacking a basis for proving corrupt conduct and being a form of "blackmail".
33. The respondents submitted that the applicant had failed to demonstrate that the appeal would be rendered nugatory if the injunction was not granted. They were of the view that the applicant had not proven the impossibility of recovering the assets if the appeal was successful at a later stage.
34. According to the respondents, merely listing the assets the applicant sought to recover, did not demonstrate the irreparable damage the applicant would suffer if the injunction was denied. They contended that the burden was on the applicant to prove that the respondents would be unable to repay the claimed amounts, which the applicant had allegedly failed to do.
35. They submitted that the balance of convenience favored them, as they had already won the case in the High Court and should not be denied the fruits of their judgment based on a weak appeal.
36. The respondents emphasized that the applicant had already enjoyed injunctive orders for two years and still failed to prove their case in the trial court. They were of the view that granting another injunction would unfairly subject the respondents to continued hardship.
37. The respondents submitted that the trial court, after considering the evidence, did not find a basis for the applicant's claim of unexplained assets. They pointed out that overturning this with an interlocutory injunction would be inappropriate.
38. In conclusion, the respondents prayed for the dismissal of the applicant's application with costs, arguing that the applicant has not met the threshold for granting an injunction pending appeal under Rule 5(2)(b) of the Court of Appeal Rules. They believe that it would be in the interest of justice that they be allowed to enjoy the judgment rendered in their favor.
39. In her rejoinder, Ms. Murugi submitted that the explanation of asset sources should be determined at the main appeal, not at this stage. Regarding the Pamela Abo case, she noted that the applicant had filed an appeal to the Supreme Court, which was still pending. Accordingly, we agree with the applicant, that until it is finally determined, it is not clear what the final legal position is, as the Supreme Court is yet to render itself on the issue.
40. Counsel pointed out that recovery procedures would be limited if no assets were available, due to the lack of a court order preserving them. She countered the argument that two years was sufficient for investigations and the suit, stating that it was actually a short timeframe. She disagreed with Mr. Okore's assertion that the conditions for stay and injunction were similar. She stated that stay relates to a previous order, while an injunction is a newly sought order.



41. Finally, counsel confirmed that the applicant had filed a notice of appeal and was within the timeframe to file the record of appeal.
42. We have carefully considered the application, the affidavits by the parties, the submissions counsel, the cited authorities, as well as the relevant legal principles governing the grant of injunctions pending appeal. The issue for determination is whether the application has met the threshold for grant of an injunction, under Rule 5(2) (b) of the Court of Appeal Rules.
43. Before we proceed to the substance of the application, it is worth noting that a stay order prevents the enforcement of a judgment or order of the lower court while an appeal is pending before the Court of Appeal, while an injunction is ordinarily granted where the Court appealed from, had issued a negative order. A stay order can only be granted in respect of an impugned positive order, whereas an injunction can be granted when the impugned decision is a negative order. In the case of *Patel (As the Administrator of the Estate of Kanji Naran Patel) v Kiptoo & 8 Others* [2025] KECA 446 (KLR), this Court addressed itself on the issue as follows:

In the present application, the applicant is not seeking stay of injunction but an injunction. Such an order is capable of being granted notwithstanding the fact that the order in question was a negative order. That was the position of this Court in *Joyce Mutethya Kimanthi v Timothy Kimanzi Kiiva and others*, Nai Civil Application No. E321 of 2021 where a distinction was made between a stay pending an appeal and an injunction pending appeal. The Court delivered itself thus: “Applying the above principles to the rival positions herein, it is our position that considering the nature of the circumstances surrounding the litigation giving rise to the intended appeal, it is not only fair and just that the applicant be accorded an opportunity to be heard on her intended appeal but also that the suit properties be preserved pending hearing of the intended appeal. The above conclusion now leads us to determine which of the two substantive prayers, that is, stay and injunction, is the appropriate relief for us to grant herein. As correctly contended by the respondents, what the High Court issued as the final order is a negative order. It is now settled that a negative order is incapable of being stayed. See *Nairobi Metropolitan PSV Saccos Union Limited and Twenty- Five others v County of Nairobi Government and three others* [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) (b) of this Courts Rules where the High Court’s order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained. The above being the correct position in law, it is our position that it is only the injunction relief that can issue herein as an appropriate relief.”

44. Rule 5(2)(b) of the Court of Appeal Rules provides that:
 - “(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - a.
 - b. in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
45. To succeed in an application of this nature, the applicant must satisfy the Court that it has an arguable appeal which is not frivolous, that it would suffer irreparable loss if the injunction is not granted, and



that the balance of convenience favours the granting of the order. In the case of Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR, the Court held that:

- 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. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin [1963] Ltd. [1990] KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
- vii. 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. Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra).
- ix. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.
- x. 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.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

46. On the issue of whether the applicant has an arguable appeal, this Court notes the grounds raised in the applicant's submissions, particularly concerning the trial court's analysis of the evidence and findings at an interlocutory stage. The reliance on the Ogato v Nyaguthii case suggests that the applicant intends to argue points of law regarding the principles applicable at such a stage. While the respondents argued that the applicant was merely re-litigating decided matters and that their appeal was weak, we find



that the applicant has identified points that warrant further consideration by the appellate court, and cannot be dismissed as frivolous at this stage. Therefore, the Applicant has demonstrated that they have an arguable appeal.

47. Regarding the nugatory aspect, the applicant highlighted the substantial value of the assets involved, and the risk of their dissipation if the injunction was not granted, with a significantly smaller amount currently preserved. In the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E.A. 227, this Court stated that:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant’s appeal to be heard and determined.”

48. The potential for these assets to be moved or otherwise dealt with before the appeal is heard and determined presents a real risk that any success in the appeal would be rendered meaningless. The respondents’ assertion that the applicant had not proven the impossibility of recovery does not entirely negate this risk, especially considering the nature and value of the assets involved. We are satisfied that the applicant has demonstrated a risk of suffering irreparable loss.

49. Furthermore, the public interest in preserving assets suspected of being acquired through corruption was a significant factor that weighed in favour of granting the injunction.

50. In light of the foregoing, we are persuaded that the applicant has met the threshold for the grant of an injunction pending appeal. The application herein is allowed. We grant orders as follows:

- a. An order prohibiting the respondents from withdrawing or dealing with funds in various bank accounts as listed in prayers 2, 3, & 8 of the application, pending the appeal.
- b. An order to prevent the respondents from transferring, disposing, or dealing with motor vehicles listed in prayers 4 & 10 of the application, and land titles listed in prayers 5 & 9 of the application, pending the appeal.
- c. An injunction to stop the respondents from dealing with the Kshs.898,000 recovered from the 1st respondent’s house, pending the appeal.
- d. That the costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

