



Kenya Aids NGOs Consortim v Arthur Ingutya & Co Advocates (Civil Appeal (Application) E513 of 2024) [2025] KECA 589 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KECA 589 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E513 OF 2024
DK MUSINGA, M NGUGI & F TUIYOTT, JJA
MARCH 28, 2025**

BETWEEN

KENYA AIDS NGOS CONSORTIM APPELLANT

AND

ARTHUR INGUTYA & CO ADVOCATES RESPONDENT

(Appeal from the partial judgment of the Environment and Land Court of Kenya at Nairobi (A. Omollo, J.) delivered on 11th April 2024 in ELC Misc. (Reference) No. E060 of 2023)

RULING

1. There is a fallout between an advocate and his client in respect to fees. The dispute was presented to a taxing officer for resolution and escalated by way of reference to the superior court below. Kenya Aids NGO's consortium, the applicant, is aggrieved by the decision of A. Omollo, J. dated 11th April 2024 in which she upheld the decision of the taxing officer delivered on 19th September, 2023 regarding item 2 of the Advocate/Client Bill of Costs that was before her. There is already lodged before this Court an appeal against that decision.
2. The applicant is now before us in an application dated 29th October, 2024 brought pursuant to rule 5(2)(b) of the Court of Appeal Rules seeking stay of execution of that ruling and decree, in addition to stay of Garnishee proceedings and decree nisi issued on 22nd October 2024. The ruling on the garnishee proceedings was reserved for 6th March 2025, a date now past.
3. Mr. Allan Ragi, the CEO to the applicant, swore an affidavit on 29th October 2024 in support of the motion. In it, he deposes that: the decision of the superior Court below contained numerous instances of misinterpretation of the law and is legally flawed and unjustified; the garnishee proceedings, if effected, will affect the running of its day -to- day activities; and these activities include payment of salaries and supply of HIV AIDS medication to the vulnerable. He deposes, further, that at the



moment, there is no institution supplying HIV AIDS medication across the country. The applicant is willing to deposit security as a condition for grant of the stay order.

4. In response, Mr. Arthur Ingutya ,who is an advocate of the High Court, and who is on record for the respondent states that: the application before us is an abuse of court process as an exactly similar one is before the superior court below filed by the applicant; there is no appeal against the judgment and decree of the court below from which the garnishee proceedings flow; the applicant has not demonstrated that it will suffer substantial loss if orders sought are not granted; and even then, mere allegation that the applicant stands to suffer substantial loss does not suffice.
5. The advocate alludes to the fact that the payment of the amount sought to be stayed is legal fees, properly earned and subjected to due process; that his firm is a stable legal practice founded in mid- 1995 with offices on 2nd floor Old Mutual Building where they have been paying rent of Kshs.110,385.80 without fail. The advocate states that the firm is blessed with a steady flow of legal work which turns in a reasonable income, but while he sought to display copies of fee notes, proof of funds and invoices as proof, they were not attached to his affidavit. He asserts that the firm is able to meet any financial obligation resulting from the appeal, including refund of any amount found to be excessive.
6. We have considered the notice of motion, the replying affidavit, the submissions by the rival sides as highlighted by respective counsel, Mr. Wamalwa for the applicant and Mr. Ingutya for the respondent.
7. The principles for grant of stay under rule 5(2)(b) of this Court’s Rules are well settled. See Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR where this Court stated:

“ The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
8. Regarding stay of a money decree, this Court has previously held that the success of the appeal would not be rendered nugatory, so long as the Court ascertains that the respondent, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. See Kenya Hotel Properties Limited v Willesden Investments Limited (Civil Application 322 of 2006) [2007] KECA 401 (KLR).
9. Even if we were to find the applicant’s appeal arguable, we would still not grant the order. Central to the plea for stay is that if the applicant’s accounts were to be frozen, then it would suffer reputational loss and donors will stop funding its activities. The effect will be to condemn the persons dependent on the applicant for medication and treatment to suffering and death. This, it is urged, will lead to substantial loss. We do not doubt that apprehension and would in fact be sympathetic, but that is not a consideration that will determine the matter before us.
10. In a stay application before this Court, the Court is concerned about whether or not an appeal will be rendered nugatory if stay is not granted. It is not about whether the applicant will suffer substantial loss. Regarding the former, it has not been demonstrated that payment of the contested sum of Kshs.11,854,439.57 imperils the very existence of the applicant. Yes, it may be inconvenient or even likely to inflict substantial loss to the applicant, but as long as it is not existential, then we cannot say that it will render the appeal nugatory.



11. In making this holding, we bear in mind that the applicant has not raised a doubt as to the ability of the respondent to repay the sum should it be found to be undeserving upon the hearing and determination of the appeal.

12. In the end, the notice of motion date 29th October, 2024 is without merit. We dismiss it with costs.

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

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

Deputy Registrar.

