



Macharia & 6 others v Directline Assurance Co. Ltd & 5 others (Civil Application E624 of 2024) [2025] KECA 697 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 697 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E624 OF 2024
M NGUGI, F TUIYOT & GV ODUNGA, JJA
APRIL 11, 2025**

BETWEEN

- SAMUEL KAMAU MACHARIA 1ST APPLICANT**
- BASHIR MBURU 2ND APPLICANT**
- JULIUS ORENGE 3RD APPLICANT**
- KELVIN MOGENI 4TH APPLICANT**
- SALOME GITHOHO 5TH APPLICANT**
- SUNA HOLDINGS LTD 6TH APPLICANT**
- ATANAS MAINA 7TH APPLICANT**

AND

- DIRECTLINE ASSURANCE CO. LTD 1ST RESPONDENT**
- FAMILY BANK LTD 2ND RESPONDENT**
- I & M BANK LTD 3RD RESPONDENT**
- DIAMOND TRUST BANK 4TH RESPONDENT**
- INSURANCE REGULATORY AUTHORITY 5TH RESPONDENT**
- EQUITY BANK LTD 6TH RESPONDENT**

(Being an application for stay of execution of orders or appointment of a receiver manager pending lodging, hearing and determination of an intended appeal from the ruling and order of the High Court at Nairobi (Mabeya, J) delivered on 4th October 2024 in HCCC No. E328 of 2024)



RULING

1. On 4th October 2024, the High Court (Mabeya, J) in High Court (Commercial and Tax Division) Case No E328 of 2024 delivered a ruling in respect of two applications dated 16th June 2024 (by the 1st respondent) and 18th July 2024 (indicated to have been made by the 1st respondent). The application dated 18th July 2024 sought a declaration that the firm of Andrew M'mbogori & Co. Advocates was not appointed by the 1st respondent and that the suit, filed through that firm, ought to be struck out. The learned Judge found that the said application had already been heard and determined and was therefore spent. Accordingly, the learned Judge proceeded to deal with the application dated 16th June 2024 which sought orders, inter alia, prohibiting the 1st to 10th respondents, in that application, from making any withdrawals, transfers or other transactions that could encumber the funds or lead to their removal from the specified bank accounts. The said accounts were indicated to be with the 2nd, 3rd, 4th and 5th respondents in this application and any other bank account in the name of or on behalf of the 1st respondent. The application further sought an order that “the 1st to 7th and 12th defendant/respondent be prohibited from withdrawing, transferring or conducting any transactions regarding the Kshs 400,000,000 (the said amount) held in the 6th defendant/respondent’s account” and further an order “to restrain the 1st to 6th respondent from physically accessing the plaintiff/applicant’s premises at Hazina Towers or any other location”. It was further sought that “a temporary joint board be established consisting of three nominees from the plaintiff/applicant’s shareholders and three from the 1st respondent”. The application was strenuously opposed.
2. In his impugned ruling, the learned Judge found the application merited and granted some thirteen orders which, for the purposes of this application we need not rehash.
3. The applicants, being dissatisfied with the said decision, filed a Notice of Appeal dated 7th October 2024, through the firm of Kamau Kuria & Company Advocates evincing their intention to appeal against the decision. By a Notice of Motion application dated 20th November 2024, the applicants now seek:
 1. That this Honourable court be pleased to stay execution of the following orders made by the High Court on 4th October, 2024:
 - a. That pending the hearing and determination of the Suit herein, the 1st to 10th and 12th Defendants/Respondents whether by themselves, their servants, agents or anyone else acting on their behalf be and are hereby restrained from making or allowing or suffering the making of any withdrawals, transfers or any other transactions whatsoever that would result in funds being encumbered in any manner whatsoever or funds being removed or assigned from the Plaintiff’s following bank accounts:
 - a. Diamond Trust Bank Limited Account No. 08xxxxx001
 - b. Equity Bank Limited Account No. 088xxxxxX0915
 - c. Family Bank Limited Account No. 300xxxxx21
 - d. I & M Bank Limited Account No. 0010xxxxx1810
 - e. Any other bank accounts held in the name of or for or on behalf of the Plaintiff by the foresaid banks or any other banks as may be directed by this



Honourable Court. Except with leave of the Court or as authorised by the Majority Shareholders of the Plaintiff Company.

- b. That pending the hearing and determination of the Suit herein, the 1st to 7th and 12th Defendants/Respondents be and are hereby restrained whether by themselves, their servants, agents or anyone else acting on their behalf from withdrawing, transferring or carrying out allowing or suffering the withdrawal, transferring or carrying out any transaction whatsoever with respect to the fund held in the 6th Defendants/Respondent's Bank Account no. 003xxxxxx in the sum of Kshs 400,000,000/- plus all accrued and accruing interest held at the 7th Defendant/Respondent Bank (Diamond Trust Bank Limited) unless so authorised by the Majority Shareholders of the Plaintiff Company and/or the Plaintiff/Applicant's Board of Directors (as duly appointed/elected by the Plaintiff/Applicant's majority shareholders).
- c. That pending the hearing and determination of the Suit herein, the 1st to 6th and 12th Defendants/Respondents be and are hereby restrained whether by themselves, their servants, agents or anyone else acting on their behalf from transactions relating to all and any of the funds held in the name of or for or on behalf of the Plaintiff/Applicant in the subject or any other bank accounts of the Plaintiff including instructions to close accounts and/or instructions lifting any injunctive order granted herein except with the leave of the Court or as authorised by the Majority Shareholders of the Plaintiff/Applicant Company and/or the Plaintiff/Applicant's Board of Directors (as duly appointed/elected by the Plaintiff/Applicant's majority shareholders).
- d. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th and 12th Defendants/Respondents whether by themselves, their servants, agents or any of them from purporting to terminate or hire new employees or any other manner whatsoever interfering with the contracts of employment of the Plaintiff/Applicant's employees and from issuing any orders, directives or instructions to or regarding any independent contractor working for or with the Plaintiff/Applicant.
- e. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th Defendants/Respondents whether by themselves, their servants, agents or any of them from purporting to act for or on behalf of the Plaintiff/Applicant in any capacity whatsoever.
- f. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th Defendants/Respondents whether by themselves, their servants, agents or any of them from physically accessing the Plaintiff's/Applicant's offices at Hazina Towers or elsewhere and/or any other premises or property of the Plaintiff/Applicant.
- g. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th Defendants/Respondents whether by themselves, their servants, agents or any of them from signing any cheques or effecting any money transfers or otherwise issuing any directives, instructions or any orders whatsoever to any of the Plaintiff's/Applicant's Banks or any other bodies, persons or corporations holding any monies, bonds, properties or other investments on behalf of the Plaintiff/Applicant unless expressly authorised by Resolutions from



the Plaintiff/Applicant's shareholders and/or Board of Directors (as approved/elected by the Plaintiff/Applicant's Shareholders) or by Order of the Court.

- h. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th and 12th Defendants/Respondents whether by themselves, their servants, agents or any of them from purporting to terminate or hire any new employees or in any other manner whatsoever interfering with the contracts of employment of the Plaintiff/Applicant's employees and from issuing any orders, directives or instructions to or regarding any independent contractor working for or with the Plaintiff/Applicant.
 - i. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th Respondents whether by themselves, their servants, agents or any of them from purporting to act for or on behalf of the Plaintiff/Applicant in any capacity whatsoever unless expressly authorised by Resolutions from the Plaintiff/Applicant's Shareholders and/or Board of Directors (as may be approved/elected by the Plaintiff/Applicant's Shareholders) or by Order of the Court.
 - j. That pending the hearing and determination of the Suit herein a temporary injunction be and is hereby issued restraining the 1st to 6th Respondents whether by themselves, their servants, agents or any of them from physically accessing the Plaintiff's/Applicant's offices at Hazina Towers or elsewhere and/or any other premises or property of the Plaintiff/Applicant unless expressly authorised by Resolutions from the Plaintiff/Applicant's Shareholders and/or Board of Directors (as may be approved/elected by the Plaintiff/Applicant's Shareholders) or by Order of the Court.
 - k. That an order be and is hereby issued requiring the 11th Defendant/Respondent to forthwith determine either by approving or disapproving the Plaintiff's/Applicant's request for approval of Lisa Anyango Ameyia, Jackson Kionga Kamau, Tom Otieno Odongo and Kimamo Kuria as the Plaintiff's/Applicant's Directors having been duly elected by the Plaintiff/Applicant's Shareholders at the general meeting held on 2nd December 2022 and as contained in the current Business Registration Service (BRS) form CR-12.
 - l. That a temporary joint board be and is hereby constituted forthwith consisting of two nominees of each of AKM Investment Ltd, Janus Ltd and Royal Media Services Ltd.
 - m. That an order do and is hereby issued directed at the 7th Respondent to forthwith re-transfer the sum of Kshs 400,000,000/- from Ac No. 003xxxx02 back to the plaintiff's account no. 08xxxxx001 held with itself.
 - n. That an order be and is hereby issued that a forensic audit of the Plaintiff's books of accounts be undertaken. This is to be complied with by the interim board of directors and is to be undertaken within 90 days of the date hereof.
 - o. That an order do and is hereby issued that the bank signatories be appointed by the interim board of directors.
2. That this Court be pleased to appoint Ms Stella Kinoti, Mr Julius Orange, Mr Kelvin Mogeni receiver managers of the 1st Respondent pending the lodging, hearing and determination of the applicant's intended appeal from the ruling of the superior court delivered.



3. That the costs of the application be provided for.
4. The application was based on the grounds: that under rule 5(2)(b) of this Court's Rules and section 63 of the *Civil Procedure Act*, the Court has jurisdiction to preserve the subject matter of the intended appeal through either injunctions or a stay of execution or appointment of a receiver manager; that the intended appeal is of great public interest in the nation's commerce; that the High Court ignored the fact that in regulated companies such as banks and insurances, it is the regulator who is the custodian of all records and not the Registrar of Companies hence the trial court erred in declining to act on shareholding as determined by the 6th respondent, which confirmed the 1st applicant, his wife, Purity Macharia and their company Royal Credit Ltd (Royal Credit), as the shareholders; that the trial court ignored the principle that there is no estoppel against statute and once the regulator establishes shareholding it has to be given effect to unless it is shown that its records are wrong; that a memorandum and articles of association constitute a contract and the courts will not enforce an illegal one once the illegality comes to the court's attention; and that the trial court ought not to have ignored the information from the regulator and the law.
5. It was further contended: that the trial court ignored section 166 of the *Insurance Act* which forbids the transfer of more than ten percent of the paid up share capital or voting rights of an insurer without prior approval of the Commissioner of Insurance; that in the order being challenged the trial court entrusted the management of the 1st Defendant's business to AKM Investment Ltd (AKM) and Janus Ltd (Janus); that the learned Judge ignored the evidence that AKM and Janus in 2005 committed illegality by purporting to acquire shares in the 1st respondent in contravention of section 166 of the *Insurance Act*; that the learned Judge ignored the fact that section 23(4) of the *Insurance Act* forbids any single shareholder, participating in the management of an insurer, from holding more than 25% shares; that the learned Judge misconstrued the expression prima facie evidence and that CR-12 cannot override the actual evidence of the true shareholding in the possession of the regulator; that the High Court contravened the constitutionally protected freedom of enterprise in Article 19(3)(b) of *the Constitution* by allowing non-shareholders namely AKM and Janus to manage the applicant's enterprise and treating the two as majority shareholders of the 1st respondent; that the learned Judge erred in making an order whose effect was to exclude the lessee from his property; that the learned Judge's decision has introduced uncertainty in the law by failing to be bound by the decisions of the Court of Appeal; and that the purpose of the application is to preserve the subject matter on the basis that this Court might arrive at a different conclusion from the High Court, upon hearing the intended appeal.
6. The application was supported by an affidavit sworn by Samuel Kamau Macharia in which he reiterated the grounds aforesaid and added: that the applicants are aggrieved by the decision declining to strike out the suit; that, in his knowledge, this was the first time that a court of law was imposing the shareholders on the 1st respondent, a company incorporated by the 1st applicant, his wife and their company Royal Credit and the late Dan Karobia in 1998; that in 2005 the 1st respondent was licenced to carry out insurance business and they entrusted the management of the 1st respondent to the 1st applicant's late son, John Gichia Macharia who, together with Terry Wanjiku Kiarie Wijenje, without the knowledge of the shareholders purportedly acquired shares in the 1st respondent through their companies, AKM Investments Ltd and Janus Ltd; that after the death of the 1st applicant's son, a forensic audit revealed gross mismanagement of the 1st respondent, including the unsecured borrowing by AKM and Janus from the 1st respondent of nearly Kshs 7 billion; that AKM and Janus restructured the 1st respondent without the knowledge of the 1st applicant, his wife and Royal Credit and purported to become the majority shareholders of the 1st respondent; and that when the Insurance Act was amended in 2009,



- to restrict shareholding of an individual to 25%, the late John and the said Terry devised and executed a plan whereby the purported shareholding would remain with them through the institution of a declaration of trust and as a result procured a fraudulent CR-12 through which favourable rulings were obtained.
7. It was deposed: that upon resuming control and management of the 1st respondent in 2019, in April 2024, the true shareholders applied for the issuance of a correct CR-12 on the basis of the shareholding as established by the Insurance Regulatory Authority but the same was not issued; that in June 2024, the 6th respondent conducted an audit which was aimed at removing the management of the 1st respondent and vesting it in AKM and Janus on the false ground that the genuine shareholders were involved in a fraudulent transfer of Kshs 400,000,000 to Toy and Suna Holdings, a subsidiary of the 1st respondent; that on 16th June 2024, AKM and Janus filed HCCC E328 of 2024 from which the intended appeal arises; that on 22nd October 2024, the High Court gave the parties 7 days within which to constitute a temporary joint board with non-shareholders; that on 8th November 2024, the 1st respondent as constituted by AKM and Janus applied for review of the order requiring Royal Credit Ltd to supply two nominees to the temporary joint board so that the 1st respondent is run only by the nominees of AKM and Janus to the exclusion of the nominees of Royal Credit Ltd; that the said application was allowed on 20th November 2024.
 8. The 1st applicant's apprehension is that unless the orders of stay sought are granted, the genuine shareholders of the 1st respondent stand to lose their investment.
 9. In response to the application, Terry Wanjiku Kiarie Wijenje, also known as Janice Theresa Wanjiku Kiarie, set out her version of the background of the dispute, and deposed: that she is one of the shareholders of the 1st respondent through Janus Limited having 20% shares; that by a decision made on 21st October 2022, the Registrar of Companies voided the 1st applicant's appointed directors, Francis Maina Njakwe, Hezekiah Wangombe Gichohi, Dr Macharia, Julius Oenge, Bashir Mburu Salome Gitoho and Kelvin Mogeni and expunged their names from the 1st respondent's CR-12; that subsequently fresh directors were appointed by the 1st respondent's shareholders whereupon resolutions were passed to change the company's bank mandates which information was communicated to the 1st respondent's bankers; that the 6th respondent still insisted that the struck off directors were still the directors of the 1st respondent; that as a result, the 1st respondent's duly appointed directors were shut out of and excluded from the 1st respondent's operations; that consequently, the 1st applicant and some of the 2nd to 7th applicants perpetrated numerous fraudulent, illegal, irregular, irrational and unprocedural financial transactions and other acts in breach of and/or contrary to proper corporate governance and Company Law and practice, particulars whereof were set out; that as a result, the 1st respondent's shareholders held an extra-ordinary general meeting on 1st September 2023 where they reserved the right to appoint the Company's Principal Officer, terminate the appointment of the Company's Principal Officer, appoint and remove bank mandates and appoint and remove advocates acting on behalf of the Company; and that the 6th respondent muddied the waters by his letter dated 5th March 2024 in which he sought to irregularly and un-procedurally review the shareholding tabulations of the 1st respondent company to its 2005 position, a decision that was stayed by the Insurance Appeals Tribunal on 29th April 2024.
 10. It was deposed: that there is an ever-growing likelihood of conflicting decisions from Judges of various courts over the issue regarding the 1st respondent's management and shareholding; that the 1st applicant is engaging in the impropriety of forum shopping in a gamble to secure a favourable ruling in his bid to overturn the 1st respondent's shareholding; that it was against that backdrop that HCCC No. E328 of 2024 was filed by the 1st respondent; that as a result of the application filed in the suit, the 1st



respondent's bank accounts were all frozen resulting in its inability to service its policy holders, pay its bills or meet financial obligations necessary to keep the 1st respondent running; that based on the foregoing, on 3rd July 2024, a joint meeting was held at the offices of the 6th respondent with a view to unlocking the 1st respondent's accounts and ensuring a return of Kshs 400,000,000 diverted from the 1st respondent's accounts; that at the meeting, the 1st and 6th respondents agreed that Kshs 400,000,000 irregularly taken out of the 1st respondent's accounts be returned, that an interim Board of Directors of the Company be appointed from the nominees of Janus, AKM, Royal Credit and the 6th respondent, that bank signatories be appointed from the 1st respondent's management and that the said signatories be allowed to transact the 1st respondent's accounts to meet specified expenses; that although invited to the said negotiations, the 1st applicant refused to meaningfully cooperate in the negotiations and ultimately refused to instruct his advocates to execute the consent; that as a result the consent was only partially adopted; that being in the minority the 1st applicant and his associated companies have no locus to object to the consensus; that on 4th October 2024 the learned Judge ordered, inter alia, that a joint board be constituted consisting of two nominees each of AKM, Janus and Royal Credit, the 7th respondent to forthwith retransfer the sum of Kshs 400,000,00 back to the plaintiff's account, that the bank signatories be appointed by the interim board of directors and that forensic audit of the plaintiff's books of accounts be undertaken within 90 days; that the 1st respondent's accounts were once again frozen pending the formation of the interim board; that although Janus and AKM complied by having Tom Otieno Odongo, Titus Muthua Karanja, Robinson Maina Mwangi and Kenneth Maina Ndura vetted and approved to sit on the interim board, the 1st respondent failed to have its directors nominated or approved and instead sought substitution of Royal Credit Ltd with Royal Media Ltd as the party to nominate 2 directors; and that as result, the 1st respondent was forced to file an application dated 8th November 2024 seeking an order that the board consisting of Tom Otieno Odongo, Titus Muthua Karanja, Robinson Maina Mwangi and Kenneth Maina Ndura be deemed as having been fully constituted, and by a ruling delivered on 20th November 2024, the said application was allowed as prayed.

11. According to the deponent, the application does not meet the threshold for granting stay; that contrary to the 1st applicant's position, the 1st respondent's business will be best served by maintaining the orders of 4th October 2024 and refusing the stay, based on the actions taken by the applicants which the deponent set out; that the historical conduct of the applicants, if left unchecked, will result in the imminent collapse of the 1st respondent; that the grant of the orders sought will lead to the resumption of the applicants' wanton abuse of the 1st respondent to the ultimate prejudice of its policy holders; that this Court has the duty to protect not only the 1st respondent but the public in the form of policy holders who will ultimately suffer prejudice if sanity is not maintained in the 1st respondent's operations; that it is unclear what prejudice the applicants will suffer if the orders of 4th October 2024 are maintained; that it has not been shown that refusing stay will render the applicant's appeal nugatory; and that the applicants have widely exceeded the scope of the matters that should be properly considered in an application for stay pending appeal and the issues raised herein amount to an attempt to re-litigate various grievances between the 1st respondent's shareholders which disputes are already the subject matter of other forums.
12. There was an affidavit sworn by Salome Gitoho, the 5th applicant herein, on 17th December 2024, in which she deposed: that she resigned as director of the 1st respondent by a letter dated 13th May 2024; that she did not give instructions for the application for stay to be made on her behalf; and that she has no interest in the subject matter of the dispute.



13. There was a further affidavit sworn by the 1st applicant on 11th December 2024 responding to the matters raised in the replying affidavit.
14. This matter came up before us for plenary hearing on 18th February 2025 on the Court's virtual platform when learned senior counsel, Dr Gibson Kamau Kuria, appeared for the applicants, while learned counsel, Mr Nelson Havi, appeared for the 6th respondent. The other parties, although duly served, were not represented. Nevertheless, the 1st respondent had filed submissions. While Dr Kuria relied on the written submissions filed on behalf of the applicants, Mr Havi informed the Court that since the orders sought to be stayed had already been executed, the applicants should concentrate on the intended appeal.
15. On behalf of the applicant, it was submitted, while reiterating the contents of the supporting affidavit: that for the applicants to succeed in the application they must prove that they have filed a notice of appeal, that they have an arguable appeal and that their intended appeal will be rendered nugatory; that the learned Judge determined the suit at interlocutory stage by removing the lawful shareholders from the management of the 1st respondent and vesting it in non-shareholders; that unless the orders sought are granted the applicants' right of appeal will be rendered nugatory as non-shareholders have no interest in managing the 1st respondent for commercial purposes but stripping its assets; and that this exercise will have been accomplished by the time the appeal is heard and determined.
16. On behalf of the 1st respondent, it was submitted: that the applicants have neither filed a memorandum of appeal, a draft memorandum of appeal or proposed grounds from which the basis of their appeal can be gleaned; that on the basis of the issues deposed to in the replying affidavit, the applicants cannot be said to have an arguable appeal since their entire appeal centres on shareholding disputes which are the subject of other proceedings not before the Court; that the applicants have neither argued nor shown how the refusal to grant the stay sought would render their appeal nugatory; that it is likely that granting the stay sought will severely prejudice the 1st respondent; and that the other prayers are substantive in nature and cannot be granted in an application seeking stay of execution.
17. We have considered the application and the affidavit in support thereof as well as the submissions filed. This Court, in numerous decisions, has crystallised the basis for the exercise of its jurisdiction under rule 5(2)(b) of the Court of Appeal Rules, under which this application is premised. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2) (1988) KLR 838*). It is a procedural innovation designed to empower the Court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited [2013] eKLR*). It only arises where the applicant has lodged a notice of appeal or the appeal itself (see *Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009 UR*).
18. The decision of this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] KECA 378 KLR* sets out the principles for grant of stay of execution as follows:

“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. 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.”

19. Before we embark on the consideration of the merit of the application, an issue was raised by the respondents on the propriety of prayer (2) of the application. According to the respondents, this prayer being substantive in nature, cannot be granted in an application seeking stay of execution. The Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers*, Sup. Ct. Appl.



No. 16 of 2015 considered the nature and scope of the jurisdiction of this Court under rule 5(2)(b) of the Rules as follows:

“It is clear to us that Rule 5(2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from Article 164(3) of *the Constitution*. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”

20. This Court in *Consolidated Marine v Nampijja & Another Civil Application No. Nai. 93 of 1989*, similarly held the view that the purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant, who is exercising his undoubted right of appeal, are safeguarded and the appeal, if successful, is not rendered nugatory. This Court therefore expressed itself in *Kileleshwa Service Station Ltd. v Kenya Shell [2008] KLR 55* that:

“It seems that by the stay application the applicant is in effect seeking a restoration of the order for payment of the compensation pending appeal which cannot be done at this stage. A “stay” does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.”

21. In other words, the purpose of granting a stay order is to preserve the subject matter of the appeal or intended appeal so that in the event that the decision sought to be appealed against is reversed, the Court does not find itself in a situation of hopelessness resulting from the inability to return to the status quo. In prayer (2) of the Motion the applicants seek the appointment of Ms Stella Kinoti, Mr Julius Orege and Mr Kelvin Mogeni as receiver managers of the 1st respondent pending the lodging, hearing and determination of the applicant’s intended appeal. That prayer is clearly not intended for the purposes of preserving the subject matter of the intended appeal since it does not arise from the ruling intended to be appealed against. We therefore agree with the respondents that the prayer does not fall within the purview of rule 5(2)(b) of the Rules and we decline to grant it.
22. Dealing with the merits of the application, and as regards the arguability of the intended appeal, at this stage of proceedings, we are not expected to, and it is highly undesirable, that we make a conclusive view on the merits of the intended appeal. To do so may have the effect of embarrassing the bench that will ultimately hear the appeal, should it eventually be filed. Our jurisdiction is restricted to forming a prima facie view on the arguability of the intended appeal. In arriving at our decision, we ought not to make a finding in a manner to suggest that we are tying the hands of the bench that will ultimately hear and determine the intended appeal, since our findings on arguability are not necessarily binding on that bench. That is the reason why, at this stage, we only need to be satisfied that the intended appeal is not frivolous and is worthy of consideration by the bench that will hear the appeal. To be arguable, the applicant should connect the intended grounds of appeal to the decision sought to be appealed against.
23. According to the applicants, the learned Judge, in his decision, made a final determination on the shareholding of the 1st respondent. The respondents, on the other hand, are of the view that the issue of shareholding, while it is the subject of other suits, was not the subject of the suit from which the applicants intend to appeal. It is clear to us, from the arguments made by the parties, that whether in these proceedings or in other related proceedings, the shareholding of the 1st respondent is central. We



are not required to make a finding whether that issue will succeed. We are however satisfied that the issue is not frivolous. It is arguable.

24. Having found in favour of the applicants in respect of the first condition, we proceed to the next condition, whether the intended appeal, if successful, will be rendered nugatory, absent stay. The applicants are apprehensive that unless the stay is granted, the 1st applicant, his wife and Royal Credit Ltd are likely to lose their investments in the 1st respondent if those they believe are non-shareholders are permitted to continue managing the affairs of the 1st respondent. We have considered the rival arguments made before us. We are not satisfied that the applicants' fears are imminent. What was appointed was an interim board during the pendency of the suit. A further order was issued that there be a forensic audit. Without making any definite finding, we do not understand the order to mean that the applicants were barred from making any necessary application before the trial court in the event that they have reasons to believe that the 1st respondent's affairs are being mismanaged, or are being managed in a manner detrimental to the interests of the shareholders.
25. In this application we are alive to the fact that the issues do not just concern the management of a private company. The 1st respondent is an insurance company and it is in the public domain that it covers, inter alia, third party liability, a mandatory requirement for motor vehicle owners in this country. The manner in which the 1st respondent is managed should not only concern the litigants but, as appreciated by the applicants, the public as well. The inconsistent issuance of orders and the incessant changes in the management of the 1st respondent, even before the real issue in controversy is determined, does not augur well for the insuring public.
26. The position, as was held in *Kenafric Matches Ltd v Match Masters Limited & Another Civil Application No. E902 of 2021 (UR)*, is that, in deciding whether an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties, and that each case has to be considered on its own merits. This is in line with the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality ought to be taken into account. This position was restated in the case of *African Safari Club Limited v Safe Rentals Limited [2010] eKLR* where this Court held that:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”
27. Proportionality, in our view, requires that we take into account the interests of the public which may not be directly represented in the litigation, but which is likely to be prejudiced by the orders that the Court may make. It is in that light that we understand the opinion of the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, that the Court must consider whether or not it is in the public interest that the order of stay be granted.
28. We have considered the material placed before us and, in the circumstances of this case, we are not satisfied that the applicants have met the threshold for grant of an order of stay or injunction pending the intended appeal. No sufficient material has been placed before us to persuade us that unless we grant the orders sought, the intended appeal, were it to succeed, will be rendered nugatory. We also find that it is not in the public interest that the orders be stayed. In our view, this is a matter in which the parties ought to proceed and expedite the filing and hearing of the intended appeal as soon as practicably possible.



29. The Notice of Motion dated 20th November 2024 fails and is dismissed. The costs will be in the intended appeal.

30. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

