Speaker of the National Assembly & another v Orange Democratic Movement Party & 8 others (Civil Appeal (Application) E907 of 2024) [2025] KECA 681 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KECA 681 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E907 OF 2024

FA OCHIENG, WK KORIR & JM NGUGI, JJA

APRIL 11, 2025

BETWEEN

SPEAKER OF THE NATIONAL ASSEMBLY ..... 1ST APPLICANT

NATIONAL ASSEMBLY OF KENYA ..... 2ND APPLICANT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY ..... 1ST RESPONDENT

GITAHI NGUNYI ..... 2ND RESPONDENT

KATIBA INSTITUTE ..... 3RD RESPONDENT

AFRICAN CENTRE FOR OPEN ACCOUNTABILITY ..... 4TH RESPONDENT

INSTITUTE OF SOCIAL ACCOUNTABILITY ..... 5TH RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

AUDITOR GENERAL ..... 8TH RESPONDENT

SENATE ..... 9TH RESPONDENT

(Being an application for conservatory orders and/or stay of execution pending the hearing and determination of the appeal against the judgment and decree of the High Court at Nairobi (Mwita, J.) dated 24th September, 2024 in HIGH COURT PETITION NO. E491 OF 2023)

RULING

1. The application before the Court is dated 21st November, 2024, and is expressed to be predicated on Section 3(1) of the Court of Appeal Act, 2015, Sections 3A and 3B of the *Appellate Jurisdiction Act* and Rules 1(2), 5(2)(b) and 44 of the *Court of Appeal Rules*, 2022. It seeks orders that:

1. This application be certified urgent and be heard ex-parte in the first instance.

2. Pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders and/or stay of execution of the entire judgment and decree of the High Court of Kenya at Nairobi (Hon. E.C. Mwita) delivered at Nairobi on 24th September 2024 in Nairobi High Court Petition Number E491 of 2023 consolidated with Petitions E010 and E025 of 2024.

3. Pending the hearing and determination of the appeal, this Honourable Court be pleased to issue conservatory orders and/or stay of execution of the entire judgment and decree of the High Court of Kenya at Nairobi (Hon. E.C. Mwita) delivered at Nairobi on 24th September 2024 in Nairobi High Court Petition Number E491 of 2023 consolidated with Petitions E010 and E025 of 2024.

4. Costs be provided for.

2. The application is supported by grounds on its body and a supporting affidavit of Samuel Njoroge, C.B.S., the Clerk of the National Assembly, sworn on 26th November, 2024, together with annexures thereto. He narrates that the applicants herein were dissatisfied with the judgment and decree of the High Court which declared the Privatisation Act, 2023 unconstitutional primarily for lack of meaningful public participation. The judgment by the High Court was delivered on 24th September, 2024 in Nairobi High Court Constitutional Petition No. E491 of 2023 consolidated with Nairobi High Court Constitution Petitions No. E010 of 2024 and E025 of 2024.

3. The High Court made the following orders:

   a. A declaration is hereby issued that the National Assembly did not conduct reasonable, meaningful, adequate and/or effective public participation before passing the Privatisation Act, 2023. The entire Privatisation Act, 2023 is, therefore, unconstitutional, null and void.

   b. A declaration is hereby issued that section 22(5) of the Privatisation Act, 2023 is inconsistent with *the Constitution* and is unconstitutional, null and void.

   c. A declaration is hereby issued that the decision to privatise Kenyatta International Conference Centre, (Kenyatta International Convention Centre), a national monument, contravenes Article 11(2) of *the Constitution* as read with the provisions of the Monuments and Heritage Act and is, therefore, unconstitutional, unlawful, null and void.

   d. This being a public interest litigation, each party will bear own costs.

4. The applicants are aggrieved by the High Court judgment and have timeously lodged a Notice of Appeal. Additionally, the present application hopes to prevent the High Court orders from becoming effective, that is to say, the applicants desire that the *Privatization Act*, 2023 continue in implementation during the pendency of the intended appeal.

5. The application is opposed through the 1st respondent's grounds of opposition dated 24th January, 2025 (a creature unknown to our Rules); the 2nd respondent's Replying Affidavit dated 23rd January, 2025; and the 3rd, 4th and 5th respondent's Replying Affidavit sworn by Emily Kinama (the Litigation Manager of the 3rd respondent) dated 18th December, 2024.

6. The application was canvassed by way of written submissions followed by oral highlighting. The applicants' submissions are dated 16th December, 2024. Those of the 2nd respondent are dated 23rd January, 2025 while those for the 3rd, 4th and 5th respondents are dated 23rd December, 2024. The

submissions for the 6th and 7th respondents are dated 3rd December, 2024. The other parties did not file any responses to the application even though they were duly served with both the application and the hearing notice.

7. During the virtual hearing of the application, learned counsel, Mr. Kiilu, appeared for the applicants; learned counsel, Mr. Kuria appeared for the Attorney General (for the 6th and 7th respondents); learned counsel, Mr. Awele appeared for the 1st respondent; learned counsel, Mr. Oriri, appeared for the 2nd respondent; and learned counsel, Mr. Odanga and Mr. Nyawa appeared for the 3rd, 4th, and 5th respondents.

8. The parties are agreed that the governing legal provision is Rule 5(2)(b) of the *Court of Appeal Rules*, 2022. The rule provides as follows:

> " 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 -
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just."

9. This Rule grants this Court unfettered discretion to order a stay of execution of a judgment or order pending appeal. The only qualification to the exercise of that wide discretion is that it must be exercised judicially and not capriciously. The Court's jurisdiction to grant stay pending appeal is original. (See *Co- operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya)* [2015] eKLR).

10. To guide the Court in its judicial exercise of the discretion donated by Rule 5(2)(b), this Court has developed principles which are now well settled. This Court in *Chris Mungga N. Bichage vs. Richard Nyagaka Tongi & 2 Other*s [2013] eKLR succinctly set out the principles as follows: -

> " The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only
>
> one is demonstrated."

11. The Supreme Court, in Ethics and Anti-Corruption Commission vs. Prof Tom Ojienda & Associates & 2 Others *CA No 21 of 2019*, restated these twin principles and added a third element: whether it is in the public interest that an order of stay should be granted. The apex Court stated as follows:

> " In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, this Court enunciated three principles for consideration in determining applications for stay of execution. They are: "whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted."

12. The applicants argue that the High Court erred in ruling that the public participation conducted during the enactment of the Privatisation Act, 2023, was insufficient. They claim that the court incorrectly applied a new standard by requiring Bills and Notices to be published in Kiswahili, a

requirement not established by the Supreme Court in cases such as British American Tobacco Kenya, *PLC formerly British American Tobacco Kenya Limited vs. Cabinet Secretary for the Ministry of Health & 2 Others*; *Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment).

13. The applicants contend that retrospectively applying these new requirements violated their right to a fair trial. They also argue that the judgment misinterpreted the doctrine of public participation, ignored existing mechanisms available to the National Assembly, and undermined the Assembly's discretion in choosing the appropriate method of public participation.

14. Furthermore, the applicants claim that the judgment has far- reaching implications, as it imposes new burdens on the National Assembly to publish legislation in Kiswahili.

15. Regarding the second limb of the test for grant of stay of execution under Rule 5(2)(b), the applicants argue that invalidating the Privatisation Act would put immense pressure on limited public resources, forcing the government to finance and maintain public assets that offer no tangible public benefit. If stay is not granted, the applicants insist, the main and urgent benefit of the Privatisation Act, which is to provide for a mechanism in which publicly-owned enterprises are to be managed and commercialized in an economically sound way for the benefit of the public, would be lost. They also stress that public interest favors allowing the Act to remain in force to ensure the continued operation of essential services and agencies. The applicants assert that their application for a stay was filed on time and met all procedural requirements.

16. On the other hand, the 1st respondent argues that the application does not meet the legal standards for granting a stay of execution, as it seeks to stay negative orders. They claim that the grounds of

appeal lack arguable points and that public interest does not favor granting the orders.

17. The 2nd respondent also opposes the application, stating that the applicants failed to prove that their appeal is arguable or that it would be rendered nugatory if the stay is not granted. They highlight procedural flaws in the applicants' submissions, including failure to attach a draft memorandum of appeal and inconsistencies in the supporting affidavit. They also argue that the applicants have not demonstrated how public resources are strained or how public assets do not benefit the public.

18. The 3rd, 4th, and 5th respondents concede that the appeal may raise arguable issues but insist that negative orders cannot be stayed, as doing so would effectively reverse the High Court's judgment. They argue that granting a stay would violate constitutional principles, as it would allow the privatisation of strategic public assets without adequate public participation. Moreover, they assert that granting conservatory orders would harm public interest by facilitating unconstitutional actions and potentially irreversible changes, such as transferring government assets to private entities.

19. Finally, the respondents argue that maintaining the status quo (i.e., non-enforcement of the unconstitutional Act) is essential, as the applicants have failed to demonstrate any direct prejudice or irreparable harm that would justify staying the judgment. They urge the court to uphold the status quo while the appeal proceeds.

20. We have given anxious consideration to the singular question presented which is whether to grant a stay of execution or conservatory orders against the judgment and orders of the High Court dated 24th September, 2024 in light of the application, the supporting affidavit, the replying affidavits, the written submissions by the parties and the oral submissions made before us.

21. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single bona fide arguable point noting, as the Court defined it in the *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others* [2013] KECA

    378 (KLR), that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court because it is not idle or trifling.

22. The applicants have listed ten (10) grounds of appeal. One of the grounds that the applicants hope to take up on appeal is the question whether the High Court ignored the Supreme Court's binding authorities in setting down the outer limits of the requirement of public participation under our Constitution by finding, for the first time, that the National Assembly was required to publish the Privitisation Bill and Notice in Kiswahili and conduct public sensitization before the publication of the Bill.

23. We are fully satisfied that this point, along with the other grounds of appeal, undeniably merits thoughtful judicial scrutiny on appeal. We, therefore, find that the applicants easily satisfy the

    first limb for the grant of stay of execution or conservatory orders under Rule 5(2)(b).

24. Turning to the second limb, have the Applicants succeeded in demonstrating that the appeal will be rendered nugatory if stay is not granted? As this Court held in Stanley Kang'ethe Kinyanjui Case (supra), the term ""nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

25. In the present case, the applicants have proffered a singular argument to support their position that the appeal will be rendered worthless if the orders sought are not granted. They make the claim that it is imperative that the impugned Act be operationalized so as to save public resources from the drain of loss-making parastatals. These loss-making institutions are subjecting immense pressure on limited public resources, forcing the government to finance and maintain public assets that offer no tangible public benefit.

26. During the plenary hearing of the application, we pointed out to Mr. Kiilu, learned counsel for the applicants, that this argument was supported by nary an evidential statement let alone substantiation in the supporting affidavit. Mr. Kiilu conceded as much, as he had to but still insisted that this Court should deliver a ruling on his application.

27. An applicant under Rule 5(2)(b) bears the onus of demonstrating how the intended or pending appeal would be rendered nugatory if

    the sought stay orders are not granted. Such demonstration must arise either from evidence properly placed before the Court or from inescapable logical deductions drawn from admitted facts or facts of which the Court may take judicial notice. The Court cannot make a finding that an appeal would be rendered nugatory based solely on conjecture or speculative reasoning, as is the case here.

28. On his part, in supporting the application, Mr. Kuria, for the Honourable Attorney General, submitted that the nugatory aspect of the application is satisfied by the fact that given the declaration of unconstitutionality of the Privitisation Act, 2023, there is no statutory framework for privatisation of parastals in Kenya. This is because, he argued, the existing statute had been repealed vide the enactment of the Privitisation Act, 2023.

29. This argument is fallacious. The legal effect of the declaration of unconstitionality of the Privatisation Act, 2023 is to render inoperative all the provisions thereof – including the provisions that repealed the existing statute to pave way for the new one. It cannot, therefore, be true that the effect of the High

Court judgment is to create a vacuum in this area. The effect of the High Court judgment is to return the statutory landscape to the status quo ante.

30. The applicants fare no better regarding the third element – consideration of public interest. The subject matter of the litigation is a constitutional matter. The High Court judgment declared the Privatisation Act, 2023 unconstitutional. Therefore, granting conservatory orders and/or stay of execution of the judgment would mean that a statute that has been found to be constitutionally infirm, will continue being in operation pending the hearing of the appeal. Our jurisprudence on this question is that this should only happen in truly exceptional cases where uniquely compelling circumstances are demonstrated. This Court in *National Assembly & 47 Others v Okoiti Omtatah & 169 Others* [2024] KECA 39 (KLR)(26 January 2024) held thus:

> " 88. The presumption of constitutional validity in respect of the impugned sections was extinguished the moment the trial court issued the declaration. The question that begs an answer is whether in the circumstances of this case it would be in public interest to grant a stay whose effect is to allow a statute that has been found to be constitutionally infirm to continue being in the law books pending the hearing of an appeal. We do not think so. This is because should the court hearing the appeal affirm the constitutional invalidity of the impugned laws, then all actions that will have been undertaken under the impugned sections of the law during the intervening period will be legally frail..."

31. In the present case, as we have already pointed out, no evidence whatsoever was placed before the Court to demonstrate the compelling public interest which would warrant a suspension of the declaration of unconstitutionality of the statute by the High Court. Indeed, as the 1st – 5th respondents have credibly argued, public interest considerations run in the opposite direction: in the intervening period, should stay or conservatory orders be issued, the government may proceed to sell parastatals that are either

> " "natural" or inherent monopolies or are of strategic importance or national interest. Should this happen, both the transfer of functions and costs are likely to be irreversible. Therefore, it is our view that public interest lies in awaiting the determination of the appeal.

32. In the result, we find that the applicants have failed to satisfy the requirements for the grant of stay of execution or conservatory orders under Rule 5(2)(b) of the Court of Appeal Rules, 2022. The upshot is that the application is not merited and it is hereby dismissed. Costs shall abide the outcome of the appeal.

33. Orders accordingly.

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

F. A. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.