



**Ledama v Narok County Government (Civil Appeal (Application)
E921 of 2024) [2025] KECA 875 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 875 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E921 OF 2024
FA OCHIENG, WK KORIR & JM NGUGI, JJA
MAY 23, 2025**

BETWEEN

OLE KINA LEDAMA APPELLANT

AND

NAROK COUNTY GOVERNMENT RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(E.C. Mwita, J.) dated 27th September 2024 in HC. Petition No. E512 OF 2023)*

RULING

1. Before us is a notice of motion dated 21st November 2024, in which the applicant, Honourable Ledama Ole Kina, seeks an order for stay of the procurement process in respect of Tender No. NCG/OT/31/2023-2024, pending the hearing and determination of appeal No. E921 of 2024, arising from the decision of Honourable E. C Mwita delivered on 27th September 2024.
2. The genesis of this matter was High Court Constitutional Petition No. E512 of 2023, filed in the public interest, where the applicant challenged the procurement process of the said tender on the grounds of actual violations of the *Constitution*, specifically, Articles 3 and 258.
3. The High Court, in its judgment, dismissed the petition. The dismissal was on the ground that the petition did not meet the threshold for a constitutional petition. The court held that the alleged financial and procurement issues fell within the jurisdiction of other competent bodies, and the applicant ought to have utilized the specified bodies instead of invoking a constitutional petition.
4. Aggrieved by this decision, the applicant filed a notice of appeal on 27th September 2024 and subsequently lodged Appeal No. E921 of 2024, within which the current application is brought.



5. The applicant submitted that unless the stay is granted, if the appeal were to succeed, it would be rendered nugatory, as the procurement process may proceed and culminate in an irreversible outcome, as the respondent could enter into an unlawful contract.
6. The applicant further stated that public resources may be misapplied if the respondent proceeds with the procurement, in light of the fact that there are existing contracts with KAPS, the Mara Conservancy, and Webtribe (JamboPay), potentially resulting in duplication and wastage.
7. The applicant relied on the established principles for the grant of stay pending appeal, including demonstrating an arguable appeal; the appeal being rendered nugatory without the stay; the application being in the public interest; and the application having been brought without undue delay.
8. The applicant submitted that he had an arguable appeal raising substantial issues. He made reference to the memorandum of appeal dated 21st November 2024. He submitted that the interpretation of Article 201(d) (responsible use of public funds) and Article 227(1) (public procurement principles) was a weighty and substantial issue.
9. The applicant also pointed out the judge's alleged error in dismissing the petition despite the respondent's admission of existing contracts with KAPS, The Mara Conservancy, and Webtribe (JamboPay). The applicant was of the view that the procurement of another contract, whilst those three contracts subsisted, would constitute constitutional and statutory violations.
10. It was the applicant's position that the violation of the principles of public procurement, as enshrined in Articles 201, 227, and 232(1), constituted the violation of the Constitution, thus giving the High Court the mandate to handle the case.
11. The applicant further faulted the court for failing to consider evidence of existing contracts, providing similar services, and the potential revenue loss.
12. The applicant submitted that the application was brought without undue delay, noting that the notice of appeal was filed promptly on 27th September 2024, immediately after judgment was delivered. Thereafter, the application was filed on 29th November 2024.
13. The application was said to be in the public interest, to protect against the misuse of public funds. The applicant also stated that the application and appeal were in good faith, evidenced by the payment of a security deposit for the appeal.
14. In opposition, the respondent relied on the High Court's finding that there was no constitutional violation or threat, and that the impugned tender was not duplicative, as it pertained to distinctive revenue streams not covered under the existing contracts.
15. The respondent pointed out that the new system was intended to provide the respondent with its own internal module for revenue collection, focusing on streams outside those handled by the existing contractors.
16. The respondent submitted that the existence of these contracts did not prevent them from proceeding with the new tender, as it promotes efficiency and is in the public interest. They stated that they were aware of their obligations under the existing contracts, and they had no intention of prematurely terminating them. They believed that the applicant's arguments were speculative.
17. The respondent further submitted that they were not in violation of specific constitutional provisions, and that the application is frivolous, vexatious, and an abuse of court process, and was filed with the



intention of denying the respondent the benefits of the High Court judgment. They urged that the application be dismissed with costs.

18. When the application came up for hearing on 29th January 2025, the court raised a pivotal issue suo moto, whether it is legally permissible to award a tender designated for the financial year 2023-2024, during the 2025 calendar year.
19. In response, Ms. Lyonah, counsel for the respondent, conceded, albeit tentatively, that such an award may not be legally permissible, considering statutory and regulatory requirements under Sections 53 (procurement to be planned and budgeted for) and 54 (procurement to be conducted within the approved procurement plan and fiscal year) of the *Public Procurement and Asset Disposal Act* (PPADA).
20. On the other hand, Mr. Ongoya, counsel for the applicant, reiterated that the tender remained “alive” because the invitations had not been recalled, but conceded that any award would require an active budget and procurement plan, as envisaged under Section 53(2) of the PPADA.
21. We have carefully considered the application, affidavits, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the application has met the threshold for the grant of a stay of execution under Rule 5(2)(b) of the Court of Appeal Rules.
22. The crux of this application turns on whether there exists a live procurement process in respect of Tender No. NCG/OT/31/2023-2024.
23. In the case of Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR, this Court held thus:
 - “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.”
24. While we acknowledge that the appeal raises significant constitutional questions, the nugatory aspect has been weakened by the emerging factual and legal context.
 25. When this Court asked counsel if a tender for the period 2023-2024 could be awarded in 2025, the respondent’s counsel expressed doubts. To our minds, the said doubts align with our prima facie opinion, that a time-bound tender may not be awarded after the lapse of the applicable financial year.
 26. While the applicant’s counsel maintained that the tender was still “alive” as the invitations had not been recalled, he acknowledged that its conclusion would be subject to the existence of a budget and subsequent procurement plans. The critical point is not merely whether the invitations were recalled, but whether the tender for the year 2023-2024 could still be awarded in 2025.
 27. If, as suggested by the court and tentatively confirmed by the respondent’s counsel, a tender for the 2023-2024 financial year cannot legally be awarded in 2025, then the core threat that the applicant seeks to avert by way of a stay order may no longer exist. The procurement process for Tender No. NCG/OT/31/2023-2024 would, in effect, have lapsed or become incapable of completion through the award stage due to statutory or regulatory constraints related to financial year budgeting and procurement timelines.
 28. In such circumstances, the applicant’s fear that the respondent “will proceed to complete the impugned procurement process” of this specific tender is likely unfounded as a matter of law.
 29. The court’s concern regarding the 2023/2024 tender and whether it could be awarded in the current year goes to the substratum of this application. The designation of the tender tied it to a specific year, and awarding it outside that year would likely violate Section 54(1) of the PPADA.
 30. In the circumstances, we find that the threat of the impugned procurement process being completed no longer exists, or at the very least, has become speculative and legally doubtful.
 31. In *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others* [2017] KECA 436 (KLR), this Court quoted with approval the *William Ole Ntimama & 2 Others vs. Governor, Narok County & 2 Others* [2014] eKLR case as follows:
 - 63. It would stagnate and hinder the orderly implementation of such laws and policies if citizen participation extended to the routine execution of a County Government’s laws and policies such as procurement of services of a revenue



collection agent. Besides, in light of the strict timelines on matters of public procurement, there is real danger of defeating such timelines if the County Executive were hamstrung by citizen participation as they are not bound by such timelines.” Emphasis ours.

32. Accordingly, the apprehension that the appeal would be rendered nugatory due to the progression of the procurement process is not supported by current legal or factual realities.
33. In view of the above, and taking into account the guiding jurisprudence, we find that while the applicant’s appeal raises arguable grounds challenging the High Court’s decision on constitutional interpretation and the legality of the process “when it was initiated”, the procedural reality regarding the likely lapse of the specific tender NCG/OT/31/2023-2024 due to the passage of the financial year undermines the necessity and efficacy of a stay order at this stage.
34. For the foregoing reasons, the applicant’s application dated 21st November 2024 is hereby dismissed.
35. Costs of the application shall be borne by the applicant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025.

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

