



**Jomo Kenyatta University of Agriculture And Technology v ICEA  
Lion Life Assurance Company Limited & another (Civil Application  
E619 of 2024) [2025] KECA 1462 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1462 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E619 OF 2024  
W KARANJA, K M'INOTI & LA ACHODE, JJA  
JULY 31, 2025**

**BETWEEN**

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND  
TECHNOLOGY ..... APPLICANT**

**AND**

**ICEA LION LIFE ASSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for Stay of Execution of Judgment of the High  
Court Commercial and Admiralty Division in Nairobi (Peter Mulwa J)  
dated 4th October 2024 in Milimani HCCom. Suit No. E881 of 2021)*

**RULING**

1. The applicant moved this Court by a Notice of Motion dated 15<sup>th</sup> November 2024 brought under rules 1(2), 5(2) (b), 44 (2) and 49 of the Court of Appeal Rules, 2022, Sections 3A and 3B of the *Appellate Jurisdiction Act*, Section 3 of the Court of Appeal Organization and Administration Act and Articles 50(1) and 159 (2) (d) of *the Constitution*.
2. The applicant sought orders of stay of execution of the judgment issued in the High Court at Nairobi, by P. Mulwa J, in HCCom. Suit No. E881 of 2021 between ICEA Life Assurance Company Limited, (ICEA) vs Jomo Kenyatta University of Agriculture and Technology, (JKUAT), on 4<sup>th</sup> October 2024, pending hearing and determination of this application inter partes, and the intended appeal. In the alternative, an ex parte order maintaining status quo be granted pending hearing and determination of this application inter partes and the intended appeal and the costs of this application be provided for.
3. In the judgment, the High Court ordered the applicant to pay the 1<sup>st</sup> respondent a sum of Ksh. 296,000,000.00, being Value Added Tax (VAT), on the sale of L.R. No. 209/8287, (the suit property),



- as per the terms of the Settlement Agreement dated 30<sup>th</sup> September 2019, interest thereon from the date of the Settlement Agreement until payment in full, and costs of the suit.
4. The application is based on the grounds on the face thereof and the supporting affidavit sworn by Richard Wokabi Kariuki on 15<sup>th</sup> November 2024. In the supporting affidavit it was deposed that being dissatisfied with the impugned judgment, the applicant filed a Notice of Appeal in compliance with rule 77 manifesting its intention to challenge the decision of the High Court.
  5. It was deposed that the applicant stands to suffer a substantial loss of Ksh. 296,000,000.00, for which the respondents are now at liberty to execute, if a stay of execution is not granted. It was further deposed that the appeal is arguable and it is in the interest of justice that this application be granted.
  6. The 1<sup>st</sup> respondent filed a replying affidavit sworn by Kennedy Ontinti, its Group Company Secretary, on 4<sup>th</sup> February 2025. He deposed that the applicant has not demonstrated the loss that it claims it will suffer, and having purchased the suit property, this money had to be paid to KRA. That in any event, at the time of purchasing the said property, the applicant was aware of the tax implication and that this was money due to KRA.
  7. It was averred that the applicant executed a deed of indemnity in favor of the 1<sup>st</sup> respondent and was well aware that the amount was due to the 1<sup>st</sup> respondent. Further, that the 1<sup>st</sup> respondent is one of the largest providers of insurance and financial services in East Africa, with well established operations in Kenya, Uganda and Tanzania. Therefore, the applicant's allegations that the 1<sup>st</sup> respondent has no capacity to repay the decretal sum in the event the intended appeal succeeds, is incorrect and misleading.
  8. The Chief Legal Officer of the applicant swore a further affidavit on 17<sup>th</sup> February 2025 in response to the replying affidavit and reiterated that the appeal is arguable and that in the event the respondent proceeds to execute the judgment, the applicant will be greatly prejudiced as it will not be compensated.
  9. In the submissions dated 17<sup>th</sup> February 2025, and filed by the firm of Ashitiva Advocates LLP, the applicant submitted that the two limbs which require to be satisfied for the grant of an order of stay of execution under rule 5(2)(b) are well settled. Firstly, the applicant must show that it has an arguable appeal and it need not be shown that the appeal will succeed, but merely that it raises a reasonable question of law for the Court's determination. Secondly, the applicant must show that the appeal, if successful, would be rendered nugatory if an order of stay of execution is refused.
  10. The applicant urged that the judgment is appealed on several grounds as shown in the draft Memorandum of Appeal annexed to the supporting affidavit. The judgment is challenged inter alia, on the ground that the trial Judge erred in law and fact by failing to find that the applicant acquired the suit property from the 1<sup>st</sup> respondent vide the Agreement of Sale dated 14<sup>th</sup> July, 2015, in its capacity as a public institution offering educational services. That in line with provisions of the Value Added Tax Act 2013, the applicant was not liable to pay VAT on the transaction.
  11. On the second limb, it was argued that it is necessary for the Court to consider the material placed before it and carry out a balancing exercise to determine the fairest course of action for two reasons. First, that the applicant is a public entity and the settlement of the decretal funds will therefore come from public funds, which are allocated to the applicant to be used primarily to provide higher education.
  12. Secondly, that the 1<sup>st</sup> respondent failed to show that in the event the appeal is successful it is able to repay the amounts paid to it. That the 1<sup>st</sup> respondent produced audited accounts for the year 2023. These do not provide an up-to-date reflection of its current financial standing in 2024. That financial circumstances can change significantly within a short period, and without more recent financial



- records, such as audited accounts for 2024, bank statements, or other verifiable evidence, the Court cannot assume that the 1<sup>st</sup> respondent remains in a position to refund the decretal amount.
13. The applicant argued that the 1<sup>st</sup> respondent's financial position is a matter solely within its knowledge, and it was under an obligation to provide comprehensive and current proof of its ability to repay. Its failure to do so creates a risk that, should the appeal succeed, the applicant may face undue hardship in recovering the amount paid. Accordingly, the Court should grant the orders sought to preserve the subject matter of the appeal and prevent potential prejudice to the applicant.
  14. The applicant relied on the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1EA 2274 for the proposition that the issue of the balance of convenience or the claims of both sides, is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory, if a stay of execution is not granted.
  15. It also referred to the case of *Kenya Hotel Properties Ltd v Willesden Investments Ltd* [2007] eKLR, to urge that the success of an appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.
  16. The applicant urged that the balance of convenience tilts in favour of the applicant as no prejudice will be suffered by the 1<sup>st</sup> respondent that cannot be compensated by an award of costs if the appeal is dismissed. Further, that the 2<sup>nd</sup> respondent's private ruling dated 4th September, 2017 exempting the applicant from paying VAT on the transaction is binding and any VAT paid by the 1<sup>st</sup> respondent on account of the sale of the property is refundable under Section 47B of the [Tax Procedures Act](#).
  17. Lastly, the applicant urged the Court to take a broader view of justice stating that the two principles can no longer be regarded as exhaustive. That rule 5 (2)(b) is subject to the overriding objectives provided under the [Appellate Jurisdiction Act](#).
  18. In the submissions dated 17<sup>th</sup> February 2025, filed by the firm of Messrs. LJA Associates LLP for the 1<sup>st</sup> respondent, it was submitted that the respondent paid Ksh. 296,000,000 as the VAT payable in the Settlement Agreement. Thereafter, the 1<sup>st</sup> respondent made several demands for refund and indemnification of the VAT amount plus interest thereon. Despite the demands and notices of intention to sue, the applicant refused and/or neglected to make good the refund for VAT. The 1<sup>st</sup> respondent asserted that the applicant issued an unequivocal deed of indemnity, undertaking to indemnify the 1<sup>st</sup> respondent should KRA demand the VAT that was due, and there were no conditions in the terms of the indemnity that required the 1<sup>st</sup> respondent to involve the applicant in the negotiations towards a settlement.
  19. The 1<sup>st</sup> respondent cited the case of *Patrick Mukiri Kabundu versus Miliki Limited* (2016) eKLR, for the proposition that stay orders are by their very nature discretionary and equitable. That the applicant's conduct herein is prejudicial to the 1<sup>st</sup> respondent and renders it undeserving of the orders sought. It also relied on the case of *Manchar Singh Sagoo & Another versus Caroline Njeri Mwiagi* (2018) eKLR, to urge that the applicants having not satisfied the first limb of the test under rule 5 (2) (b) by showing that the appeal is arguable, it was not necessary for the 1<sup>st</sup> respondent to delve into the 2<sup>nd</sup> limb.



20. It was averred that the 1<sup>st</sup> respondent annexed its audited financial statements to show that its annual turnover as at 31<sup>st</sup> December 2023 was Kshs. 3,466,721,000.00 and its assets are valued at Kshs. 148,387,242,000.00. It was urged that the appeal will not be rendered nugatory and in the unlikely event that the 1<sup>st</sup> respondent is required to repay the monies, it is able to do so.
21. The 1<sup>st</sup> respondent urged that the applicant has not tendered any evidence to show that the 1<sup>st</sup> respondent is facing harsh economic times as it claims. That the applicant has failed to establish an arguable appeal, or to show what harm it will suffer if the application is dismissed, or to prove that the appeal will be rendered nugatory if it pays the sums due. In short that the application should be dismissed with costs to the 1<sup>st</sup> respondent.
22. The 2<sup>nd</sup> respondent did not file a response to the motion or submissions. When the application came up for hearing on 8<sup>th</sup> April 2025, Mr. Mugo learned counsel appeared for the applicant and Mr. Singh and Ms Gave were present for the 1<sup>st</sup> respondent. Both parties elected to rely on their written submissions entirely.
23. We have considered the grounds of the application, the affidavits in support and in reply and the rival submissions on record. Our jurisdiction as provided rule 5(2) (b) prescribes two requirements that must be satisfied for the instant application to succeed. The Court must first be satisfied that the intended appeal is arguable, or that it is not frivolous and second, that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
24. The principles for granting a stay of execution, under rule rule 5(2) (b) are well settled. In *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR, the Court set out the jurisdiction of the Court in such an application thus:

“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...”
25. On the first limb, it is trite that 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. In considering the application we do not make definitive, or final findings of either fact or the law at this stage, as doing so may embarrass the ultimate hearing of the main appeal. (See the case of *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
26. The undisputed facts of the application are that the applicant issued an unequivocal deed of indemnity, undertaking to indemnify ICEA should KRA demand the VAT that was due. KRA did demand payment of VAT on the conveyance of the suit property from ICEA and ICEA paid Ksh. 296,000,000 as the VAT payable in the Settlement Agreement. ICEA then demanded a refund from JKUAT on the basis of a Deed of Indemnity that is not disputed. This, in our view renders the appeal inarguable. We say no more lest we embarrass the bench that will be seized of the substantive appeal.
27. In determining whether the success of this appeal will be rendered nugatory if a stay of execution is not granted, we considered the balance of convenience in the conflicting claims of the parties, bearing in



mind that each case is to be considered on its merits. This Court rendered itself on the nugatory aspect in Stanley Kang'ethe Kinyanjui as follows:

- “(ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- (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.”

- 28. The decree herein being a money decree it has not been demonstrated to the Court’s satisfaction that the 1<sup>st</sup> respondent is financially impecunious. The applicant did not provide evidence of imminent financial hardship on the part of ICEA, or that it would be unable to refund the money in the event the appeal succeeds so that the appeal would be rendered nugatory. This limb therefore fails.
- 29. Consequently, the applicant having failed to establish that the appeal is arguable and that it will be rendered nugatory if the orders sought are not granted, the application dated 15<sup>th</sup> November 2024 brought under rule 5(2)(b) cannot succeed and is hereby dismissed. Costs are awarded to the 1<sup>st</sup> respondent only, since the 2<sup>nd</sup> respondent did not file a response to the Motion.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**K. ACHODE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

