



**Attorney General & 2 others v Mohammed & 4 others (Civil Appeal
(Application) E940 of 2024) [2025] KECA 1197 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1197 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E940 OF 2024
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA
JULY 4, 2025**

BETWEEN

**THE HON ATTORNEY GENERAL 1ST APPLICANT
CABINET SECRETARY, MINISTRY OF DEFENCE 2ND APPLICANT
THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD APPLICANT**

AND

**ADAN MOHAMMED 1ST RESPONDENT
DUBANE SAMOW 2ND RESPONDENT
ABDULLE SAHARA MAOW 3RD RESPONDENT
SALAN HASHIM 4TH RESPONDENT
MOHAMMED SHEIKH MOHAMMED 5TH RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at
Garissa (Abida Ali-Aroni, J.) delivered on the 30th day of June
2022 in Constitutional and Human Rights Petition No. 1 of 2017)*

RULING

1. The application before us is dated 3rd February 2025. It is premised on the provisions of Rules 5(2) (b), 43 and 47 of the Court of Appeal Rules, 2022, as read together with Article 159 of *the Constitution* of Kenya, 2010.
2. The applicants are seeking an order for the stay of execution of the judgment delivered by the High Court on 30th June 2022, pending the hearing and determination of their appeal.



3. The judgment in question arose from a petition which had been lodged by the respondents herein on the grounds that their constitutional rights had been infringed upon.
4. This Court has discretionary power to order a stay of execution, an injunction, or a stay of any further proceedings when a Notice of Appeal has been lodged. However, this discretion must be exercised judiciously and in the interests of justice. The Court must also avoid making definitive findings that could prejudice the main appeal when considering the application.
5. In the case of *Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others* [2013] eKLR this Court held that:

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- “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.”

6. It was the assertion of the respondents that whilst they were lawfully undertaking repairs to their stalled vehicle, some officers of the Kenya Army approached the scene, aboard three Land Cruisers. The said officers are said to have shot indiscriminately, towards the respondents, resulting in two fatalities and injuries to the other respondents.
7. Notwithstanding a thorough search of the respondents' vehicle, police officers, including some from the Anti-Terrorist Police Unit, found nothing incriminating.
8. In the circumstances, the respondents deemed the Government of Kenya, the Kenya State Organs and the Kenyan State Officers culpable for the violation of the respondents' rights.
9. The army officers had, allegedly, indicated that the reason for shooting at the vehicle in which, or around which, the respondents were, was that the vehicle had explosives in it.
10. Therefore, when the search yielded no explosives, the respondents submitted that the appellants had failed to prove that there was any justification for the shootings.
11. But the army officers denied any involvement in the shootings. Indeed, the applicants were convinced that the petition did not meet the standards of a constitutional petition, as the facts upon which it was founded, were not proved.
12. As an example of the insufficiency of the basic facts, the appellants pointed out that there was no evidence linking to the army, any of the vehicles allegedly used during the shooting. They told the trial court that none of the respondents provided the registration particulars of any of the vehicles.
13. Furthermore, the applicants stressed the fact that the respondents did not produce any post-mortem evidence or other medical reports or ballistics evidence, that could have connected the army to either the injuries or to the deaths in question.
14. The petition proceeded to trial through viva voce evidence. Thereafter, the learned trial Judge found the applicants liable for the attack on the respondents. The said finding was attributed to the alleged admission, which was made by the applicants' witness.
15. The trial court also held that the applicants had admitted the fact that the injuries to the victims were inflicted by unjustified shooting, which was carried out by the Kenya Defence Forces.
16. The applicants feel aggrieved with those findings, and have lodged an appeal to challenge the judgement.
17. Meanwhile, the respondents have given written notice to the applicants, of their intention to push for the payment of the decretal amounts.
18. The applicants submitted that their appeal was not frivolous. In their considered opinion, the appeal was arguable.
19. Secondly, the applicants pointed out that the respondents, who are private citizens may be unable to pay back the decretal amount of Kshs. 7,900,000, if the appeal were to succeed, after execution had taken place. In a nutshell, the applicants urged us to find that the appeal would be rendered nugatory



if execution was not stayed until the appeal was heard and determined. In *International Laboratory for Research on Animal Diseases vs. Kinyua* (supra), this Court held that:

“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.”

20. When the application came up for hearing on 2nd April 2025, the applicants were represented by Ms. Mjomba, learned state counsel. On the other hand, the respondents did not attend court, although the court records show that they were duly served with both the application and the hearing notice.
21. Ms. Mjomba pointed out that the decretal amounts would have to be paid from public coffers. Therefore, in the event that the money could not be recovered, in the event that the appeal was successful, the applicants submitted that the appeal would have been rendered nugatory.
22. We have given due consideration to the application, the affidavit in support, and the applicant’s submissions.
23. As the respondents did not file either affidavits or submissions, they are deemed to have chosen not to challenge the application. In effect they have not countered the assertions relating to their perceived inability to reimburse the decretal amount. They have also not challenged the contention that the applicants’ appeal was arguable.
24. In our considered opinion, the issues raised in the applicants’ appeal are arguable. The said matters are not frivolous.
25. On the second limb of the application, we find that the appeal might be rendered nugatory, if the respondents were allowed to execute the decree before the appeal was heard and determined.
26. Accordingly, there is merit in the application; and we therefore make the following orders:
 - a. The execution of the decree is stayed until the appeal is heard and determined.
 - b. The applicants shall deposit the decretal amount in court, within the next 90 days; failing which the order for stay of execution shall automatically lapse.
 - c. Costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

