



**Kenya Bureau of Standards v Osho Chemicals Industries Limited & 2 others; Mitchell Cotts Limited & 3 others (Interested Parties) (Civil Application E068 of 2025) [2025] KECA 1191 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1191 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E068 OF 2025  
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA  
JULY 4, 2025**

**BETWEEN**

**KENYA BUREAU OF STANDARDS ..... APPLICANT**

**AND**

**OSHO CHEMICALS INDUSTRIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MITCHELL COTTS LIMITED ..... INTERESTED PARTY**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**KENYA ASSOCIATION OF MANUFACTURERS ..... INTERESTED PARTY**

*(An application for stay of execution pending the determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Lawrence Mugambi, J.) dated 22nd January 2025 in Constitutional Petition No. E202 of 2022)*

**RULING**

1. The application before us is dated 3<sup>rd</sup> February 2025, and it was lodged by the Kenya Bureau of Standards, in its quest to obtain orders for the stay of execution of the judgement and orders dated 22<sup>nd</sup> January 2025.
2. In his judgment, the learned trial judge made the following orders:



- a. A declaration that the decisions and actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in failing to authorize the timely clearance and release of the petitioner's products, namely NPK Water Soluble Fertilizer and Karisma Organic Fertilizer, were unlawful, capricious and a breach of Article 47(1) and 40(3) of the Constitution.
  - b. A declaration that it was unreasonable, and therefore unlawful, to detain the goods of an importer for more than 21 days, thus causing the importer to unjustly be exposed to warehouse rent, taxes and other attendant costs, yet the importer was not at fault for any of the delays in the carrying out of tests by government agencies.
  - c. An Order of *Mandamus*, directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to pay all the outstanding warehouse rent and the taxes due to the 1<sup>st</sup> and 3<sup>rd</sup> interested parties, on account of the fertilizer in issue.
  - d. An order directing the 3<sup>rd</sup> interested party to destroy the expired NPK Water Soluble Fertilizer and the Karisma Organic Fertilizer; and that the said destruction shall be at the cost of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, who would also release all the containers to the custody of the petitioner.
  - e. The petitioner was to be paid compensation in the sum of Kshs. 593,639 and USD 119,036.20 in relation to the NPK fertilizer; and a further sum of Kshs. 402,865.36 and USD 33,548.20, in relation to the Karisma organic fertilizer.
  - f. The petitioner was awarded the costs of the petition.
3. The applicant was aggrieved by the whole judgment and decided to challenge it through an appeal to this Court.
  4. The first basis upon which the appeal was lodged was that the learned judge had applied a subjective test of reasonableness in determining the time within which the conformity assessment tests ought to have been carried out. Yet, such an assessment was of a scientific nature, which is influenced by multiple factors beyond the trial court's expertise.
  5. The applicant faulted the trial court for failing to take into account the explanation for the delays at the applicant's test laboratories, which had an impact on when the tests were conducted, before the products of the 1<sup>st</sup> respondent could be released.
  6. The applicant was convinced that the trial court had erred by ordering compensation for all the fertilizer, yet two consignments had been released on 21<sup>st</sup> December 2018 and on 11<sup>th</sup> January 2019, respectively.
  7. The said information concerning the release of the two said consignments was said to have been acknowledged by the learned trial judge, in his express findings which are embodied in the judgment.
  8. The applicant noted that the trial court held that there had been a delay of 58 days, whilst a proper computation (which ought to exclude weekends and public holidays) would show that the delay lasted 42 days.
  9. It was also the hope of the applicant that it would, in the appeal, demonstrate to this Court that there was no justification for ordering it to pay the costs, whereas the applicant had no statutory authority to have control over the fertilizer in issue.
  10. In a nutshell, the applicant believes that it has a strong appeal, with a probability of success.



11. Secondly, the applicant submitted that if the execution of the judgment was not stayed, the appeal would be rendered nugatory. When expounding on that aspect of the case, the applicant pointed out that it had been condemned to pay the 1<sup>st</sup> respondent's costs for the consignment of the NPK fertilizer, and also of the Karisma organic fertilizer. The said costs would be in respect of money paid to import the fertilizer, the customs duty, demurrage charges, and warehouse rent.
12. Considering that the applicant had not only released the goods between 21<sup>st</sup> December 2018 and 11<sup>th</sup> January 2019, but also that the applicant had never had authority over the said goods, the applicant expressed the view that there was no basis for condemning them to pay the costs.
13. In the circumstances, if the 1<sup>st</sup> respondent proceeded to carry out execution, the applicant would be compelled to satisfy the decree whilst the appeal was still pending.
14. This Court was asked to bear in mind the fact that the applicant is a public body, which is financed by public resources, which have to be strictly budgeted for.
15. As the costs of the suit had not been budgeted for, the applicant told the court that it would have to divert funds which had been set aside for public services, so as to use the same to pay off the decretal amount, to avoid execution.
16. The applicant invited this Court to hold that when funds that have been budgeted for consumer protection were diverted for use in settling a decree which might ultimately be set aside, that would cause a great loss to the people of Kenya. Therefore, the applicant submitted that it was in the public interest to order that execution be stayed until the appeal was heard and determined.
17. Nevertheless, the applicant was not averse to the destruction of the fertilizer, which had expired. The only request that the applicant made, with regard to the destruction of the expired fertilizer, was that the costs for the destruction ought to be held in abeyance until the appeal was determined.
18. On its part, the 1<sup>st</sup> respondent put up a spirited opposition to the applicant.
19. In the first instance, the 1<sup>st</sup> respondent pointed out that pursuant to Section 14A of the *Standards Act*, it is the applicant that has the mandate to destroy goods which fail to meet the relevant Kenya standard. Therefore, the 1<sup>st</sup> respondent was of the view that the request (by the applicant) to hold in abeyance the issue of costs was an attempt by the applicant to evade its legal obligations.
20. Our attention was drawn to the fact that the expired goods were also explosive. In the circumstances, any delay in the destruction of the expired fertilizers was deemed to be detrimental.
21. On the question of the compensation which the applicant was ordered to pay, the 1<sup>st</sup> respondent reasoned that the applicant had the option to pay the same by way of instalments. In the alternative, the 1<sup>st</sup> respondent was ready to accept the applicant's undertaking that the compensation would be paid in the next budget cycle. In other words, the 1<sup>st</sup> respondent was convinced that the parties could mutually agree on a procedure which would not expose Kenyans to the danger alluded to by the applicant.
22. In any event, the 1<sup>st</sup> respondent stated, unequivocally, that it has the capability of repaying the decretal sum, if the appeal succeeds after the decree had been executed.
23. To demonstrate its capabilities to repay the decretal amounts, the 1<sup>st</sup> respondent exhibited its audited accounts.
24. The 1<sup>st</sup> respondent further submitted that an order for stay of execution would result in an astronomical increase in the warehouse and storage charges, to the detriment of all the parties involved.



25. More significantly, the 1<sup>st</sup> respondent submitted that the continued storage of the fertilizer, which is of a potentially explosive nature, militates against the grant of an order for stay of execution. If anything, the 1<sup>st</sup> respondent believes that it is in the public interest to destroy the expired fertilizer, forthwith, in order to avoid any potential calamitous explosion.
26. The application came up for hearing on 28<sup>th</sup> April 2025. On that day, the applicant was represented by Miss Gachagua, advocate; the 1<sup>st</sup> respondent was represented by Mr. Allen Gichuhi, senior counsel; the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Miss Chibole, advocate; while the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were represented by Miss Kithinji, advocate. The 1<sup>st</sup> interested party and the 4<sup>th</sup> interested party were unrepresented.
27. As there was no proof of service upon the 1<sup>st</sup> and the 4<sup>th</sup> interested parties, the court was inclined to adjourn the application, as it would have been prejudicial to proceed against parties who had not been accorded an opportunity to be heard.
28. At that stage, Miss Gachagua made a decision to withdraw the application against the 1<sup>st</sup> and the 4<sup>th</sup> interested parties.
29. In the result, the application dated 24<sup>th</sup> February 2025 stands withdrawn against the 1<sup>st</sup> and the 4<sup>th</sup> interested parties.
30. On her part, Miss Chibole informed the court that her clients (the 2<sup>nd</sup> and 3<sup>rd</sup> respondents) supported the application.
31. Miss Kithinji informed the court that the 3<sup>rd</sup> interested party required the guidance of the court, with regard to the party who would meet the costs for the destruction of the expired fertilizer, as well as the storage charges which would have accrued before the goods were destroyed.
32. In *Stanley Kang'ethe Kinyanjui v 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.”
33. When highlighting the written submissions of the 1<sup>st</sup> respondent, Mr. Gichuhi said that there was no threat that execution would be carried out. He explained that the 1<sup>st</sup> respondent had filed an application at the trial court, seeking clarification of the judgment.
  34. The applicant confirmed that the 1<sup>st</sup> respondent had lodged the application seeking a clarification of the judgment. It is common ground that the said application for clarification is still pending before the trial court.
  35. It is further common ground that no steps have been taken by any of the parties to extract the formal decree from the judgment.
  36. In sum total, we find that the conduct of the parties is symptomatic of the lack of a desire to execute the decree. Our said finding is fortified by the fact that the applicant and the 1<sup>st</sup> respondent were both driven by the desire to withhold execution, if only the hearing of the appeal could be fast-tracked. The only hurdle to finding consensus was the costs of destruction of the expired fertilizers, and more significantly, the huge amounts of money payable with respect to the warehousing and storage of the fertilizer.
  37. Destruction of the fertilizers is to be carried out by a multi-agency team, under the guidance of the National Environmental Management Authority (NEMA).
  38. Matters such as the venue at which destruction is to be carried out; the appropriate mode of destruction (such as incineration); the need to ensure that public safety is adhered to (considering the possibility of explosions); and the appropriate mode of carriage of the product from the warehouse, to the place designated for destruction; the warehousing and the storage, all require money to be paid to various persons and entities, many of whom are not parties to the case. As it is clear that the parties to the application are unable to agree on who should meet the various aspects of the costs, that is yet another reason why we are persuaded that there was no real threat that execution may be carried out soon.
  39. Furthermore, although the appeal raises arguable issues which require consideration by this Court, we find that the appeal would not be rendered nugatory if it were to succeed, after execution was



carried out. On a prima facie basis, we find that the 1<sup>st</sup> respondent has more than adequate financial muscle, which could be flexed to compensate the applicant, if that became necessary. In *International Laboratory for Research on Animal Diseases v 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.”

40. And because the decision on the pending application, which the applicant filed before the trial court, has the potential of changing some aspects of the impugned judgement, it would be premature for us to make a decision on the basis of a situation which could well change prior to the hearing of the appeal.

41. In the result, the application is rejected. However, we order that the costs of the application shall abide by the determination of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> 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**

