



**Athi Water Works Development Agency & 3 others v Gikenyi B & 77 others; Moi Teaching & Referral Board & 60 others (Interested Parties) (Civil Appeal (Application) E067 of 2024 & Civil Application E068 of 2024 (Consolidated)) [2024] KECA 1512 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1512 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) E067 OF 2024 & CIVIL  
APPLICATION E068 OF 2024 (CONSOLIDATED)  
MA WARSAME, PM GACHOKA & WK KORIR, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**ATHI WATER WORKS DEVELOPMENT AGENCY ..... 1<sup>ST</sup> APPLICANT  
ENG JOSEPH MUNGAI KAMAU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DR. MAGARE GIKENYI B ..... 1<sup>ST</sup> RESPONDENT  
LINAH NYABATE KINGSLEY ..... 2<sup>ND</sup> RESPONDENT  
PHILEMON ABUGA NYAKUNDI ..... 3<sup>RD</sup> RESPONDENT  
SHALLUM KAKA NYAUNDI ..... 4<sup>TH</sup> RESPONDENT  
JAMLICK OTONDI ORINA ..... 5<sup>TH</sup> RESPONDENT  
AGNES WAMBUA WANZUU ..... 6<sup>TH</sup> RESPONDENT  
MOI TEACHING & REFERRAL HOSPITAL ..... 7<sup>TH</sup> RESPONDENT  
MOI TEACHING & REFERRAL HOSPITAL BOARD ..... 8<sup>TH</sup> RESPONDENT  
SITOYO LOPOKOIYOT ..... 9<sup>TH</sup> RESPONDENT  
DR PHILIP KIPTANUI KIRWA ..... 10<sup>TH</sup> RESPONDENT  
PERIS BIRICHI ..... 11<sup>TH</sup> RESPONDENT  
JUDITH JEROTICH ..... 12<sup>TH</sup> RESPONDENT  
MESHACK KOIMA ..... 13<sup>TH</sup> RESPONDENT  
JAMES MUCHIRI NDUNGU ..... 14<sup>TH</sup> RESPONDENT**



DR MICHAEL GICHANGI .....	15 <sup>TH</sup> RESPONDENT
GEORGE OMBUA .....	16 <sup>TH</sup> RESPONDENT
GEORGE OMBUA .....	17 <sup>TH</sup> RESPONDENT
PROF ROBERT TENGE KUREMU .....	18 <sup>TH</sup> RESPONDENT
MR FELIX K. KOSKEI .....	19 <sup>TH</sup> RESPONDENT
PUBLIC SERVICE COMMISSION .....	20 <sup>TH</sup> RESPONDENT
HON ATTORNEY-GENERAL .....	21 <sup>ST</sup> RESPONDENT
DR BENJAMIN KIPCHUMBA TARUS .....	22 <sup>ND</sup> RESPONDENT
DR OWEN MENACH .....	23 <sup>RD</sup> RESPONDENT
DR WILSON K. ARUASA .....	24 <sup>TH</sup> RESPONDENT
ANN CHEMORSIO .....	25 <sup>TH</sup> RESPONDENT
ENG JOSEPH MUNGAI KAMAU .....	26 <sup>TH</sup> RESPONDENT
ATHI WATER WORKS DEVELOPMENT AGENCY .....	27 <sup>TH</sup> RESPONDENT
AGNES KALEKYE NGUNA .....	28 <sup>TH</sup> RESPONDENT
KENYA BROADCASTING CORPORATION .....	29 <sup>TH</sup> RESPONDENT
ABDALLAH MOHAMMED HATIMY .....	30 <sup>TH</sup> RESPONDENT
KENYA NATIONAL SHIPPING LINE LTD .....	31 <sup>ST</sup> RESPONDENT
DR JOHN CHERUIYOT CHUMBA .....	32 <sup>ND</sup> RESPONDENT
DR EVANS RONO CHERUIYOT .....	33 <sup>RD</sup> RESPONDENT
DR SIMON KIPCHIRCHIR KIBIAS .....	34 <sup>TH</sup> RESPONDENT
TITUS TARUS .....	35 <sup>TH</sup> RESPONDENT
DR ANDALE THOMAS OKWARO .....	36 <sup>TH</sup> RESPONDENT
DR MAURICE NYONGESA WAKWABUBI .....	37 <sup>TH</sup> RESPONDENT
DR EVERLINE MUSANGI NYAMAI .....	38 <sup>TH</sup> RESPONDENT
DR ANDREW JOSEPH OJIAMBO WANDERA .....	39 <sup>TH</sup> RESPONDENT
DR RICHARD MOGENI MOGAKA .....	40 <sup>TH</sup> RESPONDENT
DR CHEPTINGA PHILIP KIPKURUI .....	41 <sup>ST</sup> RESPONDENT
PROF MICHAEL KIPTOO .....	42 <sup>ND</sup> RESPONDENT
KENNEDY ADONGO .....	43 <sup>RD</sup> RESPONDENT
ARNOLD MANGI MWABILI .....	44 <sup>TH</sup> RESPONDENT
MACDONALD SABWA .....	45 <sup>TH</sup> RESPONDENT
JOSPHAT MUTUKU .....	46 <sup>TH</sup> RESPONDENT



MARTIN ALFRED WEKESA WAFULA .....	47 <sup>TH</sup> RESPONDENT
EDWARD S. OMONDI .....	48 <sup>TH</sup> RESPONDENT
ALIO IBRAHIM ADEN .....	49 <sup>TH</sup> RESPONDENT
DR STANLEY CHERUIYOT BII .....	50 <sup>TH</sup> RESPONDENT
DR NICKSON KIPCHIRCHIR KIPKORIR .....	51 <sup>ST</sup> RESPONDENT
DR JUSTA WAWIRA KIURA MWANGI .....	52 <sup>ND</sup> RESPONDENT
ZETH OUMA OMOLLO .....	53 <sup>RD</sup> RESPONDENT
ANANGWE MUNALA SAMSON .....	54 <sup>TH</sup> RESPONDENT
DR ISSAC OBORE OMERI .....	55 <sup>TH</sup> RESPONDENT
DR ISAAH TANUI .....	56 <sup>TH</sup> RESPONDENT
WILLY MUKOMA MUNYUTHE .....	57 <sup>TH</sup> RESPONDENT
BEN SAMOEI .....	58 <sup>TH</sup> RESPONDENT
RACHEL MUSYOKI .....	59 <sup>TH</sup> RESPONDENT
JOSEPH K CHOGE .....	60 <sup>TH</sup> RESPONDENT
DR TARUS FELIX KIPLIMO .....	61 <sup>ST</sup> RESPONDENT
FRANKLYNE MISIKO OMUHOLO .....	62 <sup>ND</sup> RESPONDENT
KAUSHIK HALDER .....	63 <sup>RD</sup> RESPONDENT
BENSON BIWOTT .....	64 <sup>TH</sup> RESPONDENT
DAVID NAMU KARIUKI .....	65 <sup>TH</sup> RESPONDENT
DR ROBERT KIPLAGAT RONO .....	66 <sup>TH</sup> RESPONDENT
DR GIDEON KIBET TOROMO .....	67 <sup>TH</sup> RESPONDENT
DR EDWARD KIMUTAI SEREM .....	68 <sup>TH</sup> RESPONDENT
JULIANA SYOWEU TISNANGA .....	69 <sup>TH</sup> RESPONDENT
WEKESA CHRISTINE NAHUMINCHA .....	70 <sup>TH</sup> RESPONDENT
DR SAMSON KIPKURGAT NDEGE .....	71 <sup>ST</sup> RESPONDENT
DR.ALEXANDER IRUNGU WANJIRU .....	72 <sup>ND</sup> RESPONDENT
AKOTH OKOTH .....	73 <sup>RD</sup> RESPONDENT
DR NGOITSI HENRY NONO .....	74 <sup>TH</sup> RESPONDENT
DR WILSON KIPTOO SUGUT .....	75 <sup>TH</sup> RESPONDENT
DR VICTOR KIPYEGON MAINA .....	76 <sup>TH</sup> RESPONDENT
DR KANDIE NGÓCHOCH .....	77 <sup>TH</sup> RESPONDENT
DR PHILIP LIKKURUI TONUI .....	78 <sup>TH</sup> RESPONDENT



**AS CONSOLIDATED WITH  
CIVIL APPLICATION E068 OF 2024**

**BETWEEN**

**MOI TEACHING & REFERRAL HOSPITAL ..... 1<sup>ST</sup> APPLICANT**  
**DR PHILIP KIPTANUI KIRWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DR MAGARE GIKENYI B ..... 1<sup>ST</sup> RESPONDENT**  
**LINAH NYABATE KINGSLEY ..... 2<sup>ND</sup> RESPONDENT**  
**PHILEMON ABUGA NYAKUNDI ..... 3<sup>RD</sup> RESPONDENT**  
**SHALLUM KAKA NYAUNDI ..... 4<sup>TH</sup> RESPONDENT**  
**JAMLICK OTONDI ORINA ..... 5<sup>TH</sup> RESPONDENT**  
**AGNES WAMBUA WANZUU ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**MOI TEACHING & REFERRAL BOARD ..... INTERESTED PARTY**  
**PARTY SITOYO LOPOKOIYOT ..... INTERESTED PARTY**  
**PERIS BIRICHI ..... INTERESTED PARTY**  
**JUDITH JEROTICH ..... INTERESTED PARTY**  
**MESHACK KOIMA ..... INTERESTED PARTY**  
**JAMES MUCHIRI NDUNGU ..... INTERESTED PARTY**  
**DR MICHAEL GICHANGI ..... INTERESTED PARTY**  
**GEORGE OMBUA ..... INTERESTED PARTY**  
**DR ERNEO NYAKIBA ..... INTERESTED PARTY**  
**MR FELIX K KOSKEI ..... INTERESTED PARTY**  
**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**  
**HON ATTORNEY-GENERAL ..... INTERESTED PARTY**  
**DR BENJAMIN KIPCHUMBA TARUS ..... INTERESTED PARTY**  
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**ENG JOSEPH MUNGAI KAMAU ..... INTERESTED PARTY**  
**ATHI WATER WORKS DEVELOPMENT AGENCY ..... INTERESTED PARTY**  
**AGNES KALEKYE NGUNA ..... INTERESTED PARTY**  
**KENYA BROADCASTING CORPORATION ..... INTERESTED PARTY**  
**ABDALLAH MOHAMMED HATIMY ..... INTERESTED PARTY**



KENYA NATIONAL SHIPPING LINE LTD ..... INTERESTED PARTY  
 DR JOHN CHERUIYOT CHUMBA ..... INTERESTED PARTY  
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 KAUSHIK HALDER ..... INTERESTED PARTY  
 BENSON BIWOTT ..... INTERESTED PARTY



**DAVID NAMU KARIUKI ..... INTERESTED PARTY**  
**DR ROBERT KIPLAGAT RONO ..... INTERESTED PARTY**  
**DR GIDEON KIBET TOROMO ..... INTERESTED PARTY**  
**DR EDWARD KIMUTAI SEREM ..... INTERESTED PARTY**  
**JULIANA SYOWEU TISNANGA ..... INTERESTED PARTY**  
**WEKESA CHRISTINE NAHUMINCHA ..... INTERESTED PARTY**  
**DR SAMSON KIPKURGAT NDEGE ..... INTERESTED PARTY**  
**DR ALEXANDER IRUNGU WANJIRU ..... INTERESTED PARTY**

## **RULING**

1. Before us are two applications emanating from the ruling delivered by S. M. Muhochi, J. on 20<sup>th</sup> June 2024 in Nakuru High Court Constitutional Petition (HCCP) No. E011 of 2024 (hereinafter referred to as “impugned ruling”). When the two applications serialized E067 of 2024 and E068 of 2024 came up for hearing on 1<sup>st</sup> October 2024, we directed, and the advocates and the parties in attendance consented, that the applications be heard together. This ruling is therefore in respect to both applications.
2. A brief background will suffice. Dr. Magare Gikenyi B., Linah Nyabate Kingsley, Philemon Abuga Nyakundi, Shallum Kaka Nyaundi, Jamlick Otondi Orina and Agnes Wambua Wanzuu, the respective 1<sup>st</sup> to 6<sup>th</sup> respondents in both applications moved the High Court at Nakuru through a petition dated 20<sup>th</sup> May 2024 seeking various declaratory and judicial review orders in respect of appointment of the chief executive officers of Athi Water Works Development Agency, Moi Teaching & Referral Hospital, Kenya Broadcasting Corporation and Kenya National Shipping Line Ltd. In reference to the applications before us, the 1<sup>st</sup> to 6<sup>th</sup> respondents contemporaneously filed a notice of motion seeking conservatory orders suspending the press release, gazette notice and any other documents or authority dated 17<sup>th</sup> May 2024 or any other date appointing Dr. Philip Kiptanui Kirwa and Engineer Joseph Mungai Kamau or any other person as the chief executive officers of Moi Teaching & Referral Hospital and Athi Water Works Development Agency. On 21<sup>st</sup> May 2024, Mohochi, J. issued conservatory orders suspending the press release, gazette notice and any other documents or authority dated 17<sup>th</sup> May 2024 or any other date appointing Dr. Philip Kiptanui Kirwa or any other person as the CEO of Moi Teaching & Referral Hospital and Engineer Joseph Mungai Kamau or any other person as the CEO of Athi Water Works Development Agency pending the hearing and determination of the petition. For purposes of record, the order also affected the appointment of the Chief Executive Officers of Kenya Broadcasting Corporation and Kenya National Shipping Line Limited.
3. The parties affected by the conservatory orders went back to the learned Judge seeking stay of those orders. They also challenged the jurisdiction of the High Court through a notice of preliminary objection. The application and the notice of preliminary objection were dismissed on 20<sup>th</sup> June 2024 yielding to the intended appeal and, subsequently, the two applications that are now before us for determination.
4. The motion of Athi Water Works Development Agency and Engineer Joseph Mwangi Kamau who are the applicants in Application No. E067 of 2024 is dated 15<sup>th</sup> July 2024 whereas that of Moi Teaching and Referral Hospital and Dr. Philip Kiptanui Kirwa, the applicants in Application No. E068 of 2024



is dated 17<sup>th</sup> July 2024. The applicants in both applications seek similar orders of stay of execution or setting aside of the impugned ruling pending the hearing and determination of their intended appeals. They also seek stay of further proceedings in Nakuru HCCP No. E011 of 2024 pending the hearing and determination of the intended appeals. Specific to Application No. E068 of 2024 is a prayer that the conservatory orders made on 21<sup>st</sup> May 2024 in Nakuru HCCP No. E011 of 2024 be set aside pending the hearing and conclusion of the appeal. The grounds in support of the applications as per the averments in the supporting affidavits are that the intended appeal is arguable as it touches on the jurisdiction of the trial court; that the intended appeals will be rendered nugatory should the petition be heard and determined before the intended appeals are heard; and that the matter is of great public interest.

5. In respect to Application No. E067 of 2024, Agnes Kalekye Nguna (the 28<sup>th</sup> respondent) filed a replying affidavit sworn on 16<sup>th</sup> July 2024 supporting the application. Similarly, through an affidavit sworn on 17<sup>th</sup> July 2024 by Justus Otiso the legal officer of Moi Teaching & Referral Hospital (7<sup>th</sup> respondent), the 7<sup>th</sup> respondent, Dr. Philip Kiptanui Kirwa (10<sup>th</sup> respondent), Prof. Robert Tenge Kuremu (18<sup>th</sup> respondent), Dr. Wilson K. Aruasa (24<sup>th</sup> respondent) and Ann Chemorsio (25<sup>th</sup> respondent) all supported the application. The 8<sup>th</sup> respondent (Sitoyo Lopokoiyot) who is the Chairman of Moi Teaching and Referral Hospital Board (9<sup>th</sup> respondent) swore an affidavit on 5<sup>th</sup> August 2024 expressing his and the 9<sup>th</sup> respondent's support of the application.
6. Application No. E068 of 2024 was supported by the 4<sup>th</sup> and 5<sup>th</sup> respondents, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 24<sup>th</sup>, 47<sup>th</sup>, 50<sup>th</sup>, 64<sup>th</sup>, and 65<sup>th</sup> interested parties.
7. The 1<sup>st</sup> to 6<sup>th</sup> respondents opposed both applications.
8. For ease of reference, we shall refer to the advocates and the parties as they appeared in Application No. E067 of 2024 because that is how they appeared in Application No. E068 of 2024. Learned counsel, Ms. Kathira appeared holding brief for Dr. Kamotho for the applicants. Learned counsel, Katwa Kigen appeared for the 7<sup>th</sup>, 8<sup>th</sup>, 18<sup>th</sup>, 24<sup>th</sup> and 25<sup>th</sup> respondents. Learned counsel Mr. Mugikoyo was holding brief for Mr. Mogaka for the 28<sup>th</sup> respondent while learned counsel, Mr. Odera appeared for the 9<sup>th</sup> and 10<sup>th</sup> respondents. Learned counsel, Ms. Kashindi appeared for the 20<sup>th</sup> and 21<sup>st</sup> respondents, and Dr. Magare Gikenyi was in person. All those present had filed written submissions which they sought to rely on accompanied by brief oral highlights.
9. Learned counsel, Ms. Kathira through the submissions dated 29<sup>th</sup> July 2024 referred to the cases of Trust Bank Limited & Another vs. Investech Bank Limited and 3 Others [2000] eKLR and County Secretary County Government of Busia vs. Manwari & Co. Advocates [2021] eKLR to identify the two conditions that an applicant seeking stay of execution before this Court must satisfy. As to whether the intended appeal is arguable, counsel referred to the case of Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR to urge that a single bona fide arguable ground warranting ventilation before the Court is sufficient to satisfy the first limb for grant of stay. In submitting that the intended appeal is arguable, counsel reiterated the contents of the supporting affidavit and the memorandum of appeal and urged that the grounds therein are arguable. As to whether the appeal will be rendered nugatory if the order sought is not granted, counsel once more referred to Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others (supra) to urge that since the stay issued by the trial court had lapsed, the trial court would proceed to determine the matter thus rendering the outcome of the appeal nugatory. Counsel indicated that the trial court had indeed heard the matter and reserved it for judgment on 19<sup>th</sup> November 2024. We were therefore urged to allow the application as prayed.



10. Counsel for the 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 30<sup>th</sup>, 33<sup>rd</sup>, 56<sup>th</sup>, 59<sup>th</sup>, 73<sup>rd</sup>, and 74<sup>th</sup> respondents filed submissions dated 6<sup>th</sup> August 2024 in support of the motion. The gist of their arguments was that the intended appeal is arguable on among other grounds, that the learned Judge erred by assuming jurisdiction on matters reserved for the Employment and Labour Relations Court by dint of Article 162 (2) (a) as read with Article 165 (5) (b) of *the Constitution*. Asserting that the appeal, if successful, will be rendered nugatory, counsel pointed out that the petition has since been heard and judgment was set for delivery on 19<sup>th</sup> November 2024. According to counsel, unless stay orders are granted, the High Court will deliver judgment rendering the intended appeal worthless. In urging that we allow the application, counsel also pointed out that the intended appeal raises substantial broad-based issues of public interest that transcend the interests of the parties before the trial court.
11. Counsel for the 27<sup>th</sup> respondent also filed submissions dated 18<sup>th</sup> September 2024 supporting the application and urging that the same should be allowed. Essentially, counsel agreed with the applicants' submissions.
12. Similarly, counsel for the 8<sup>th</sup> and 9<sup>th</sup> respondents filed submissions dated 16<sup>th</sup> September 2024 to support the grant of the orders sought. They argued that the application has met the dual limbs for grant of stay and urged that we allow it. Specifically, counsel urged that the continued subsistence of the conservatory orders will negatively affect the functions of the 8<sup>th</sup> respondent which damage will not be adequately compensated by an award of damages. Counsel placed reliance on the case of *George Otieno Gache & Covenant of Peace Church vs. Judith Akinyi Bonyo, Jushua Omollo, Richard Otieno, James Otieno, Chief Lands Registrar & National Lands Commission [2017] KECA 246 (KLR)* in support of the argument.
13. Learned counsel, Mr. Katwa Kigen filed submissions dated 6<sup>th</sup> August 2024 on behalf of the 7<sup>th</sup> and 10 respondents in support of the application. Pointing to the memorandum of appeal, counsel submitted that the intended appeal is arguable because it questions the jurisdiction of the High Court to handle labour disputes. Turning to the nugatory aspect of the application, counsel urged that if the orders sought were not granted, the applicants and the 7<sup>th</sup> and 10<sup>th</sup> respondents stood to be prejudiced as they would be subjected to financial and administrative challenges not capable of being compensated by damages. He urged that the application be allowed as prayed.
14. In opposition to the application, the 1<sup>st</sup> respondent filed submissions dated 5<sup>th</sup> August 2024. He relied on the cases of *Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another [1986] eKLR*, and *David Morton Silverstein vs. Atsango Chesoni [2002] eKLR* to identify the conditions that must be satisfied by an applicant before an order staying proceedings can be granted. He submitted that where there is no pending appeal, as in the instant case, an order staying the proceedings should not be issued. Turning to the question as to whether the applicants have an arguable appeal, the 1<sup>st</sup> respondent submitted that the intended appeal is not arguable because the trial court is seized of the matter as per the jurisdiction bestowed upon it by *the Constitution*. Asserting that the appeal will not be rendered nugatory, the 1<sup>st</sup> respondent submitted that despite the existence of the conservatory orders, the parastatals named in the petition have acting chief executive officers and their operations will not be affected or prejudiced. Reliance was placed on the cases of *Hashmukhlal Virchand Shah & 2 Others vs. Investment & Mortgages Bank Limited [2014] eKLR* and *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (supra)* in support of the contention that the intended appeal will not be rendered nugatory. The 1<sup>st</sup> respondent also submitted that since the applicants can be compensated by way of damages, their claim that the appeal is likely to be rendered nugatory has not been demonstrated. He additionally argued that no exceptional circumstances have been established to warrant the issuance of an order staying the proceedings in the trial court. According to the 1<sup>st</sup> respondent, the applicants should wait



until the trial court determines the dispute on merit before approaching this Court. Reliance was placed on the Supreme Court decision in *Joseph Lendrix Waswa vs. Republic* [2020] eKLR in support of the proposition that the Court should avoid interlocutory appeals. Finally, the 1<sup>st</sup> respondent urged for the dismissal of the applications with costs, asserting that the petition before the trial court is meant to protect and uphold *the Constitution* thus upholding the public interest.

15. The advocates and the parties reiterated the same submissions in Application No. E068 of 2024 and it is not necessary to restate the submissions.
16. In order to succeed in an application under rule 5(2)(b) of the Rules of this Court, an applicant must first demonstrate that the intended appeal is arguable and not frivolous, and that the intended appeal, if it eventually succeeds, will be rendered nugatory if the stay orders are not granted. Thus, in *Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny* [2013] KECA 141 (KLR) it was held that:

“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.”
17. We have reviewed the impugned ruling and the draft memorandum of appeal lodged by the applicants. The gist of the intended appeal revolves around the question of the jurisdiction of the High Court to determine the petition and whether the impugned ruling was issued in line with the laid down principles governing the issuance of conservatory orders. As regards the issue of jurisdiction, we are left with no doubt that the intended appeal raises an arguable point deserving of this Court’s interrogation on merit. Of course, that is not to say that the appeal will succeed for whether or not the appeal has merit is a matter that lies in the hands of the bench that will eventually hear and determine the substantive appeal.
18. The next frontier is whether the intended appeal will be rendered nugatory in the absence of stay orders. The applicants in both applications have contended that the continued existence of the conservatory orders will negatively affect their operations and the effects will be irreversible. They also argue that if the proceedings are not stayed, the High Court will proceed to deliver judgment when the question of jurisdiction is not yet determined. They submit that such a state of affairs will subject the parties to unfruitful litigation and unnecessary expenses. Indeed, it was agreed by all sides that the High Court is scheduled to deliver judgment on 19<sup>th</sup> November 2024.
19. On the other hand, the 1<sup>st</sup> to 6<sup>th</sup> respondents in both applications contend that the conservatory orders were issued to prevent the occurrence of unconstitutional acts. They also submit that this Court cannot issue an order of stay against conservatory orders and that the applicants should wait for the judgment to be delivered on 19<sup>th</sup> November 2024 before they can properly move this Court through a substantive appeal, if necessary.
20. We are persuaded that this Court, can, where appropriate, vacate conservatory orders-see *Cabinet Secretary for the National Treasury and Planning & Another vs. Okoiti & 12 others* [2023] KECA 1375 (KLR) and *Cabinet Secretary Ministry of Health vs. Aura & 13 Others* [2024] KECA 2 (KLR). In the matter before us, it is important to appreciate that although the notice of appeal on record relates to the ruling of 20<sup>th</sup> June 2024 and not the orders of 21<sup>st</sup> May 2024, the applicants had in the



proceedings leading to the ruling of 20<sup>th</sup> June 2024 sought the setting aside of the conservatory orders issued on 21<sup>st</sup> May 2024.

21. Turning back to the requirement that an applicant must demonstrate that an intended appeal, were it to be eventually successful, is likely to be rendered nugatory should stay not be granted, we observe that it is not enough for an applicant to state that the appeal will be rendered nugatory. It must be demonstrated that were the intended appeal to be successful, it will be worthless to the applicant. Thus, in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* (supra), it was held that:

“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.”

22. As already pointed out, the intended appeal challenges, among other things, the jurisdiction of the High Court to hear and determine the petition. It is also clear that a judgment by the High Court has been scheduled for delivery on 19<sup>th</sup> November 2024. If the judgment is delivered thus bringing to conclusion the proceedings before the High Court, the applicants’ intended appeals would amount to an academic exercise. A court that proceeds without jurisdiction acts in futility and although the applicants can indeed be compensated by damages, they would be required to engage in another round of litigation to the detriment of the public purse. Although we cannot predict the outcome of the intended appeals, and we appreciate that the onus of determining them falls on the bench that will hear them, it remains an elementary element of law that jurisdiction is everything and without jurisdiction a court has no mandate to take one further step-see *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR.

23. Much as has been held in several decisions of this Court such as *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR and *Marriot Africa International Ltd vs. Margaret Nyakinyua Marigu & 4 Others, CA No. Nai. E152 of 2022* that an order staying proceedings should be a weapon of last resort, we are of the view that the circumstances of this case call for the deployment of that remedy. We therefore find and hold that the two motions which are the subject of this ruling satisfy the two limbs that must be established by an applicant who seeks stay of execution or proceedings. Accordingly, applications E067 of 2024 and E068 of 2024 are hereby allowed to the extent that an order is hereby issued staying the conservatory orders and further proceedings in Nakuru High Court Constitutional Petition No. E011 of 2024 pending the hearing and determination of the applicants’ intended appeals. The costs of the applications shall abide the outcome of the intended appeals. Further, we direct that the appeals be heard expeditiously.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**M. GACHOKA CIArb., FCIArb.**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

Deputy Registrar

