



**Okoti v The Cabinet Secretary, Industry, Trade And Co-Operatives &
13 others; Kenya Bureau Of Standards & another (Interested Parties)
(Petition 19 of 2020) [2022] KEELRC 1675 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1675 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 19 OF 2020
MA ONYANGO, J
JULY 25, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**THE CABINET SECRETARY, INDUSTRY, TRADE AND CO-
OPERATIVES 1ST RESPONDENT**

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE ... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

**BERNARD M. NGOBE, CHAIRPERSON NATIONAL STANDARDS
COUNCIL 5TH RESPONDENT**

**MARY WANJA MATU, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 6TH RESPONDENT**

**HELEN KABETI NANGITHIA, INDEPENDENT MEMBER NATIONAL
STANDARDS COUNCIL 7TH RESPONDENT**

**FOUZIA A. ABDIRAHAAAN, INDEPENDENT MEMBER NATIONAL
STANDARDS COUNCIL 8TH RESPONDENT**

**PATRICK M. MUSILA, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 9TH RESPONDENT**

**EDWARD NJOROGE, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 10TH RESPONDENT**

**ERIC MUNGAI, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 11TH RESPONDENT**



GILBERT LANG'AT, INDEPENDENT MEMBER NATIONAL STANDARDS COUNCIL 12TH RESPONDENT

ROGERS OCHAKO ABISAI, INDEPENDENT MEMBER NATIONAL STANDARDS COUNCIL 13TH RESPONDENT

BERNARD NJIINU NJIRAINI, MANAGING DIRECTOR KENYA BUREAU OF STANDARDS 14TH RESPONDENT

AND

KENYA BUREAU OF STANDARDS INTERESTED PARTY

GEORGE ODHIAMBO INTERESTED PARTY

RULING

1. The application before me for termination is dated May 31, 2022. It is filed by the 5th, 13th and 14th Respondents under Section 1A, IB, 3A respectively, of the Civil Procedure Act, Cap 21, of the Laws of Kenya, Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules. The Applicants seek the following orders:
 - (i) Spent.
 - (ii) That the Honourable Court be pleased to stay the execution of the Judgement and decree delivered on May 25, 2022 in this matter pending the hearing and determination of this Application.
 - (iii) That the honourable Court be pleased to stay the execution of the Judgement and decree delivered on May 25, 2022 in this matter pending the hearing and determination of the intended Appeal to the Court of Appeal.
 - (iv) That the costs of this application be provided for.
2. The application is supported by the grounds on the face thereof and the affidavit of Eng. Bernard M. Ngore, the 5th Respondent sworn on May 31, 2022.
3. In both the grounds and the affidavit, the thread of argument is that the nullification of the appointment of the 5th to 14th Respondents had completely immobilised the operations of the Interested Party which plays a critical role in standardisation of daily products consumed by the Kenyan population. That unless the orders sought are granted there would be a monumental risk as to the safety of products consumed locally.
4. It is further stated that the Applicants shall be condemned unheard as they have a right of appeal, that the Applicants have an arguable appeal with overwhelming chances of success, and that the appeal might be rendered an academic exercise. It is further the Applicants' position that the Respondent shall not suffer any prejudice should the orders sought be granted.
5. The 1st Respondent also filed a replying affidavit of Betty Maina, the Cabinet Secretary of the Ministry of Industry, Trade and Co-operative in which she largely reiterates the grounds on the face of the application and the contents affidavit in support of the application.



6. In addition, the affiant states that it has already filed a Record of Appeal in Civil Appeal No. 397 of 2022. *The Cabinet Secretary, Industry, Trade & Co-operatives & 3 others v Okiya Omtatah Okoiti & 11 others*.
7. In the written submissions filed on behalf of the Applicants, they state that this Court has jurisdiction to hear the instant application under Order 42 Rule 6(2) of the *Civil Procedure Rules* which sets out the threshold for grant of stay of execution of a decree or order to be substantial loss, unreasonable delay and security for performance of the decree.
8. The Applicants relied on the decision in *Butt v Rent Restriction Tribunal* [1979] where the Court of Appeal stated that the decision to grant or not to grant stay of execution pending appeal is purely discretionary but the discretion should be exercised in such a way as not to prevent an appeal. Secondly that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal may not be rendered nugatory. Thirdly, that a Court should not refuse a stay if there are good grounds for granting the stay, merely because a better remedy may become available to the Applicant and lastly, that the Court will consider special circumstances of the case and its unique requirements.
9. On substantial loss the Applicants rely on the cases of *James Wangalwa & another v Naliaka Cheseto* and *Ndaiye v African Virtual University* and submit that as a result of this Court's judgment the Kenya Bureau of Standards has been immobilised.
10. It is submitted that there are no board members or members of the Council to safeguard the bureau's public mandate and role in order to carry on its daily operations therefore putting the general public at a risk of consuming and/or using substandard products. That this warrants substantial loss to the Kenya economy.
11. That in the absence of the board of directors and/or the standards' council, not only the Respondents/Applicants stand to suffer irreparably but also the members of the Public who rely on the local and imported products are at a high risk of consuming and operating with products which are sub-standard and likely to expose the public to immense health and safety risks.
12. That no prejudice and or substantial loss whatsoever shall be visited upon the Petitioner/Respondent if the orders sought herein are granted save that the correct position of the law and proper dispensation of justice shall be done once and for all.
13. That as a matter of fact, it is the Respondents/Appellants who stand to suffer irreparably as their appointment as Board members and directors of the Interested Party has since been wrongfully nullified and that in their absence, the general public is at a risk of consuming and using substandard products which have not been standardized.
14. The Applicants rely on the decision in *Attorney General v Katiba Institute & 2 others* (Civil Application E184 of 2021) [2021] KECA 38 (KLR) (23 September 2021) (Ruling), where the three Judge bench held that;

“By declaring the appointments unconstitutional the appointees can no longer conduct any business of the concerned corporations and Parastatals. The citizens of this country look upon these institutions to provide services and in the absence of board members then they shall remain inoperational and in limbo for unspecified time. Some of the parastatals are strategic whereas others impact on the economy of the country. No new appointments to the boards can be made unless and until amendments to the impugned statutes are effected



by parliament and nobody knows when this will be done. This state of affairs is obviously not in the public interest.”

15. The Applicants further rely on the decision of the Court of Appeal in *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & another* where the Court stated that it has a duty to ensure that it does not hamstring bodies like the 2nd Respondent from performing their lawful duty or duties as bestowed upon them by law as the consequences of the Court’s orders would harm the greatest number of people.
16. The Applicants also rely on the decision in *Ben Chikami & another v Peter Macitbi Muigai & 2 others* where the Board of Forestry Research Institute was found to have been in office contrary to the law and government policy and also in violation of the competitive recruitment process demanded by the *constitution*. The Court stayed execution of the decree
17. It is submitted that the competing interests in the instant case is the compliance with the *constitution*, appointing authority and the public interest, relying on the decision in *Kenya Revenue Authority v Robert Anyisi; Nairobi City County Government (Interested Party)* [2020] eKLR.
18. On the second threshold the Applicants submit that there was no unreasonable delay in filing the instant application.
19. On whether or not the appeal is arguable, the Applicants submitted that the appeal is not frivolous citing the case of *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR where the Court held that just one issue is sufficient and that the arguable issue need not succeed at the appeal. The Applicants further relied on the decision in *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR where the Court stated –

“....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.....”
20. It is submitted that the Respondents/Applicants have demonstrated that the Application raises reasonable and arguable grounds of appeal and that with the decision of the Court of May 25, 2022 which quashed and/or disbanded the Council, there is no institution to undertake the roles under Section 7, 9 and 10 of the *Standards Act* thus impeding the production, manufacturing and business community in the Country and the economic output of the Country has been brought to a screeching halt.
21. That if the proceedings and judgement of April 25, 2022 are not stayed, the same would be prejudicial to the Applicants who have a right to appeal and shall be condemned unheard against the cardinal rules of Natural Justice which stipulates that “no person shall be condemned unheard in judicial proceedings including Appeal”.
22. For the 1st to 4th Respondents, it is submitted that this Court has no jurisdiction to hear cases involving directors, citing the case of *Rift Valley Water Services Board & others v Geoffrey Asanyo & others*: Nakuru Civil Appeal No. 60 of 2015 consolidated with 61 of 2015.



23. The 1st to 4th Respondent further rely on the decision in *Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others*, Civil Application No. 24 of 2012 [2013] eKLR where this Court held as follows:

“The rule is that even where only one arguable point has been demonstrated to exist, stay should be granted. Herein we are satisfied that there are numerous arguable points capable of being raised on appeal”.

24. The 1st to 4th Respondents have also relied on the cases cited by the Applicants being *Attorney General v Katiba Institute & 2 others* (Civil Application E184 of 2021) [2021] KECA 38 (KLR) (23 September 2021) (Ruling) *East African Cables Limited v Public Procurement Complaints, Review and Appeals Board & Another* [2007] eKLR and *Ben Chikamai & another v Peter Macithi Muigai & 2 others* [2018] eKLR.

25. The 1st to 4th Respondents further rely on the decision in *Gitirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR where stay orders were granted in the public interest. The Supreme Court held at paragraph 88 thus: -

“These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.”

26. That the competing interests here are compliance with the *constitution*, appointing authority and the public interest. Complying with the judgment means that the competitive recruitment will take several months whilst the public is left exposed and therefore public interests favours the grant of the orders pending the hearing of the appeal.

27. The 1st to 4th Respondents submit that the appeal they filed is arguable and that stay of the judgment of this Court of 25th May, 2022 be allowed for the Court of Appeal to deal with all matters on the appointments of directors to boards of state corporations once and for all that the orders be granted in public interest as the Petitioner stands to suffer no irreparable harm that cannot await the hearing and determination of Nairobi Civil Appeal No. E397 of 2022: *The Cabinet Secretary, Industry, Trade & Corporative & 3 Others v Okiya Omtatah Okoiti & 11 Other* and/or cannot be compensated by an award in damages.

28. The Petitioner opposes the application. He filed a notice of preliminary objection, grounds of opposition and written submissions.

29. In the preliminary objection he raises the following grounds: –

- (1) This Honourable Court lacks jurisdiction to hear and determine the Notice of Motion application for stay of execution of the Court's Judgment and decree dated and delivered on May 25, 2022 pending appeal to the Court of Appeal.
- (2) The *Civil Procedure Act* and the *Civil Procedure Rules* do not confer upon the Employment and Labour Relations Court the jurisdiction to hear and determine an application for stay of execution of the Court's Judgement and/or decree pending appeal to the Court of Appeal.



- (3) This Honourable Court lacks jurisdiction to grant stay of declaratory orders and orders of certiorari which took effect upon delivery of Judgement and which remain in force unless set aside through appeal.
- (4) The Application for stay of execution pending appeal is fatally incompetent and bad in law as it invites this Honourable Court to usurp and exercise the powers of the Court of Appeal conferred upon the appellate court under Rule 5(2)(b) of the [Court of Appeal Rules](#).
30. In the grounds of opposition, he raises the following grounds –
- (i) The application is incompetent.
 - (ii) The application is vexatious, scandalous, and is brought malafides.
 - (iii) The application is an abuse of the process of the Honourable Court.
 - iv. The meritless application should be dismissed with costs.
31. In the submissions he urges that this Court lacks jurisdiction under the [Civil Procedure Act](#) and the [Civil Procedure Rules](#) to stay execution of judgment and decree pending appeal. He submits that without prejudice to the foregoing submissions, if the provisions of Order 42, Rule 6 of the [Civil Procedure Rules](#) were applicable to this Court, which is denied, the Applicants ought to meet the following threshold for stay under Order 42, Rule 6 (2)(a) which states:
- “No order for stay of execution shall be made under sub-rule (1) unless:-
- (a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
32. The Petitioner submits that though the first threshold is that the application be brought without unreasonable delay has been met, the Applicants have neither pleaded nor demonstrated substantial loss which they are likely to suffer unless the stay of execution is ordered.
33. That instead, the Applicants have embarked on a frolic of citing unsubstantiated loss to third parties who are not the Applicants herein as demonstrated in the following paragraphs:
- a. At paragraph 4 of the notice of motion and the corresponding averments in the supporting affidavit the Applicants cited that “in the absence of a board to standardize and regulate the quality of public products, the Kenyan population is at risk of consuming sub-standard products”.
 - b. At paragraph 8 of the Notice of Motion and the corresponding averments in the Supporting Affidavit the Applicants cited that “unless stayed, the decision of May 25, 2022 would create a monumental risk as to the safety of the products consumed locally...”
 - c. At paragraph 10 of the Notice of Motion and the corresponding averments in the Supporting Affidavit the Applicants merely stated that “if the proceedings and Judgement of April 25, 2022 are not stayed, the same would be prejudicial to the Appellants who have a right to appeal and shall be condemned unheard against the cardinal rules of Natural Justice that no



person shall be condemned unheard in judicial proceedings including Appeal.” Notably, the Applicants have made reference to a non-existent “Judgement of April 25, 2022”.

- d. At paragraph 11 and 15 of the Notice of Motion and the corresponding averments in the Supporting Affidavit the Applicants cited that “if the Judgement is not stayed it might occasion serious and irreparable injustice to the Appellants and the general Public and the administration of justice since the Court of Appeal would be sitting on a mere academic exercise and futility.”
 - e. At paragraph 12 of the Notice of Motion and the corresponding averments in the Supporting Affidavit the Applicants cited that “...The urgency is therefore dire as the decision exposes the public to immense health and safety risks.”
34. He further submits that in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court of Appeal held as follows in relation to the threshold of “substantial loss” in an application for stay of execution pending appeal:
- “It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”
35. The Petitioner submits that in the present application, the Applicants have neither pleaded that they would suffer substantial loss nor demonstrated the substantial loss which they are likely to suffer. That the Applicants have only cited various unsubstantiated risks to the public who are not the Applicants in this application.
36. The Petitioner submits that to the extent that Applicants have failed to plead and demonstrate the substantial loss which they are likely to suffer, the Petitioner submits that the Application has fatally failed to meet the threshold for granting orders of stay of execution of judgement pending appeal.
37. The Petitioner submits that the Court of Appeal is the proper forum for lodging the application for stay pending appeal considering that the provisions of the law cited by the Applicants to be granted stay pending appeal are inapplicable to this Court.
38. The Petitioner submits that there is an application before the Court of Appeal in Civil Application No. E204 of 2022 seeking stay of execution pending appeal under the provisions of rule 5(2)(b) of the *Court of Appeal Rules*, 2010.
39. He submits that Rule 5(2)(b) of the Court of Appeal Rules, 2010 provides as follows:
- (1)
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - (a)
 - (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.



40. The Petitioner submits that the Applicants have lodged a Notice of Appeal, in accordance with Rule 75 of the *Court of Appeal Rules*, against the Judgement dated and delivered on May 25, 2022 and have attached a draft Memorandum of Appeal.
41. He submits that where a Notice of Appeal has been lodged as is the case herein, the Court of Appeal is the proper forum for pursuing the application for stay pending appeal pursuant to the provisions of rule 5(2)(b) of the *Court of Appeal Rules*.
42. The Petitioner submits that declaratory orders 161(i) and (iii) cannot be stayed. He relies on the decision of Lord Denning in the *locus classicus* case of *Mcfoy v United Africa Co. Ltd* (1961) 3 All E R 1169 where he held that:
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.
43. The Petitioner submits that the appointment of members of the National Standards Council and that of the Chief Executive Officer of the Kenya Bureau of Standards was null and void *ab initio*. The appointments were found by the Court to be void and a nullity in law and declared as such through the declaratory judgement contained in the orders (i) and (iii).
44. The Petitioner refers to the definition of “declaratory judgment” in *Black’s Law Dictionary* as “A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement”.
45. He submits that the effect of a declaratory judgment is to authoritatively indicate the legal state of affairs as they exist at that time. The effect of a declaratory order is not to create or negate rights but to merely identify the existence or non-existence of rights or duties. That declarations tell it as it is. That as a result, a declaratory order is non-executory; it cannot be enforced. The logical extension, from a conceptual perspective, is that there can be no stay of declaratory relief. A stay operates to prevent the execution of an order and with declaratory relief there is no execution to stay; the declaration has already done its work. A declaration cannot be stayed.
46. He submits that the instant application is irredeemably misconceived and bad in law because declaratory orders are incapable of being stayed since by their nature they do not provide for enforcement.
47. In support of this contention the Petitioner relies on the decisions in *Chief R.A. Okoya v S. Santilli & others* and *Norman Washington Manley Bowen v Shabine Robinson & Another*.
48. In the former, the issue before the Nigerian Supreme Court was whether a defendant who has filed an appeal against purely declaratory orders made against him is entitled to apply for stay of execution of those orders pending the hearing and determination of the appeal. In its consideration, the Court stated that;
- “A defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order. This is because a declaratory judgment or Orders has no coercive effect and threatens no one.”



49. That the Jamaican Supreme Court in the *Norman Washington case* also came to the same conclusion; that a court had no powers to stay a declaratory order.
50. The Petitioner further relied on the decision in *Faith Homes of Kenya v Robert Cherukwo* where the Court cited with approval the decisions in *Johana Nyokwonyo Buti v Walter Rasugu Omariba & 2 others* [2011] eKLR, *Katiba Institute v President of Republic of Kenya & 2 others and Judicial Service Commission & 3 others (Interested Parties)* [2020] eKLR and held that there was nothing which the Court ordered the Respondent to do to effect the judgment and therefore nothing to be stayed until the Applicant decided to move the Court or other proper forum for the enforcement of his rights so declared. The Court in the same decision cited with approval the case of *Kausbik Panchamatia & 3 others v Prime Bank Limited & another* [2020] eKLR where the Court stated thus:
- “That a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”
51. The Petitioner submits that a stay of execution in respect of this Court's declaratory judgment or orders is a conceptual impossibility and any court that purports to stay execution of a declaratory judgment commits a fatal jurisdictional error.
52. The Petitioner further submits that pursuant to Section 8 and 9 of the *Law Reform Act*, the Court has no jurisdiction to grant orders of stay sought by the Applicants since under these provisions the orders are final save for appeal. That to grant the orders would amount to a reversal of the decision at this stage.
53. He submits that the orders are negative orders that are incapable of stay. He relies on the Court of Appeal decision in *Republic v Public Procurement Administrative Review Board & 3 others Ex Parte Kenya Electricity Generating Company Limited* where a three Judge Bench held that:
- “... from its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.”
54. The Court further stated in reference to an application for a stay of execution of the orders of certiorari, in *Republic v Public Procurement Administrative Review Board* (*supra*) the Court of Appeal went on to state:
- “The Court has no jurisdiction under Rule 5(2)(b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs. Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would to reverse the decision of the superior court and legalize the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.”



55. The Petitioner further relied on the decision in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others* [2015] eKLR, held that:

“The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”

56. The Petitioner submitted that even if Order 42 Rule 6 of the *Civil Procedure Rules* was applicable, the Applicants did not meet the threshold. That although the Applicants meet the threshold of filing the application without undue delay, they neither pleaded nor demonstrated substantial loss. That at paragraphs 4, 8, 10, 12, 12 and 15 of the motion the Applicants only referred to unsubstantiated risks to the public who are not the Applicants. That in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR the Court of Appeal held as follows in relation to the threshold of “substantial loss” in an application for stay of execution pending appeal:

“It is usually a good rule to see if order XLI rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

57. The Petitioner submitted that the Applicants have failed to meet the threshold for granting orders of stay of execution pending appeal as they did not plead or demonstrate the substantial loss which they are likely to suffer.

58. The Petitioner submits that in view of the fact that the Applicants have lodged a notice of appeal in accordance with Rule 75 of the *Court of Appeal Rules*, it follows that the Court of Appeal is the proper forum for pursuing the application for stay pending appeal pursuant to the provisions of Rule 5(2)(b).

59. He submits that by submitting that their appeal is arguable the Applicants are inviting this Court to usurp the powers of the Court of Appeal under the said rule. He relies on the decision in *Power Plant Engineering Limited v Business Partners International Kenya Limited* [2020] eKLR, where the Court observed that:

“Both parties have in their submissions made arguments on the chances of the intended appeal and/or lack of merit in the intended appeal. This Court as the Court appealed from cannot properly concern itself in considering the merits and/ the demerits of the intended appeal. The Court of Appeal would be the appropriate court under Rule 5 (2) (b) of its *Rules* to consider whether or not an applicant had and arguable appeal or notTo do that the court would be usurping the role of the appellate Court within whose province that jurisdiction vests.”

60. In conclusion, the Petitioner prays that the application be discussed with costs relying on the decision in the case of *Erick Okeyo v County Government of Kisumu & 2 others* [2014] eKLR where the Court held that:

“On the issue of costs, I consider that the 1st to 3rd respondents were engaged in a blatant illegal enterprise that was going to deny the County and its residents enormous resources.



It is for this reason that I order that they jointly and severally pay the costs of the petitioner who has brought this matter to the attention of the public.”

61. In response to the Petitioner’s preliminary objection and grounds of opposition, the Applicants submits that this Court is clothed with jurisdiction to grant the orders sought, relying on the decision in *Linda Ndenengo Mwakugu v Open Society Institute Company Limited* where stay was granted by this Court pending hearing and determination of an intended appeal.
62. They rely on the decisions in *Mjengo Limited v Bakery, Confectionery, Food Manufacturing & Allied Workers Union (Kenya)* [2021] eKLR and *Ismael Kagunji Thande v Housing Finance Kenya Ltd* (2006) (unreported) where the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus: -

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”
63. The Applicants submit that the same sentiments were adopted in *Githunguri’s Case* (1988), where the Court held, inter alia, as follows:

“The general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the Court should ensure that the appeal, if successful, should not be nugatory.”
64. They submit that denial of the right to have the application for stay of execution of judgement and decree heard and determined would amount to violation of Article 48 on access to Justice and it would further violate Articles 50 on fair hearing.
65. That if the current suit is not stayed, it might occasion serious and irreparable injustice to the Respondents/Applicants who play a major role within the Country through standardization of both local and imported products. That the risk is that in the absence of a board to standardize and regulate the quality of public products, the Kenyan population is at risk of consuming sub-standard products.
66. They submit that the Petitioner’s argument that this Court does not have jurisdiction to grant orders for stay are baseless and not founded on the law. They pray for orders as sought in the application, having met the threshold for grant of the said orders.

Analysis and Determination

67. Having considered the application for stay together with the grounds and affidavits sworn on behalf of the Applicants and the 1st to 4th Respondents, the Petitioner’s preliminary objection and grounds of opposition and having considered all the submissions in support of and in opposition to the application, the issues for determination are whether this Court is clothed with the jurisdiction to grant the orders sought and whether or not to grant the orders sought in the application dated 31st May 2022.
68. It is the Petitioner’s position that the instant application has been premised on the wrong provisions of the law and is therefore incompetent and for dismissal.



69. The application is premised on Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Orders 42 Rule 6(1) and 51, Rule (1) of the [Civil Procedure Rules](#).
70. The material provision is Order 42 Rule 6(1) which provides:
- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
71. Order 42 Rules 6(2) which is also material provides
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
72. From a reading of Order 42 Rules 6(1) and (2), it is evident that a Court can only order stay of execution where an order has been made for execution of a decree. This in my view means that an order of stay of execution cannot be made in respect to a decree if no order has been made for execution of a decree. This therefore means that if a decree does not require execution, then no order can be made for stay of execution.
73. I do not agree with the Petitioner’s submissions that Order 42 Rule 6 is not applicable in matters under this Court. Stay of execution orders are made in the course of execution. So if the [Employment and Labour Relations Court Act](#) and the [Rules](#) made under the Act specifically, Section 13 of the Act and Rule 32(2) of the Rules, provide that execution process shall be governed by the [Civil Procedure Act](#) and the [Civil Procedure Rules](#), it means that applications for stay of execution in this Court shall also be governed by the [Civil Procedure Act](#) and [Rules](#).
74. I however agree with the Petitioner that a declaratory order which does not require execution like in the instant case cannot be the subject to of stay of execution proceedings. As was stated in the case of [Katiba Institute v President of Republic of Kenya & 2 Others; Judicial Service Commission & 3 others \(Interested Parties\)](#) [2020] eKLR:
- “The issues raised in this petition, therefore, fall squarely within the doctrine of a fresh cause of action arising out of a declaration as was stated in the *Chief RA Okoya case*, quoted with approval in the *Okiya Omtata case*, where the court said:
- “First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g. to pay damages or refrain from interfering with the plaintiffs’ rights, such order being enforceable by execution if disobeyed.



Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement but in the meantime, there is no enforcement nor any claim to it.”

75. This was the same position taken by the Supreme Court of Nigeria in *Chief R.A. Okoya v. S. Santilli & Others*;

“A defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order. This is because a declaratory judgment or order has no coercive effect and threatens no one.”

76. It is also the position taken by the Jamaican Supreme Court in *Norman Washington Manley Bowen v Shabine Robinson & Another* decision.

77. Here at home, the Court of Appeal in *Johana Nyokwonyo Buti v Walter Rasugu Omariba & 2 Others* (*supra*) held thus:

“A declaration/declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything.”

78. The Court of Appeal again took the same position in *Republic v Public Procurement Administrative Review Board & 3 others Ex-parte Kenya Electricity Generating Company Ltd* (*supra*) where the Court stated –

“... from its nature, an order of certiorari cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.”

79. In appeals to the Court of Appeal, stay of execution is provided for under Rule 5(2)(b) as follows –

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(a) ...;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

80. There is no provision in the *Court of Appeal Rules* for stay of a decree or judgment. What is provided for in Rule 5 is stay of execution, an injunction of further proceedings.

81. Again, in *Republic v Public Procurement Administrative Review Board & 3 others Ex-parte Kenya Electricity Generating Company Ltd* (*supra*) the Court of Appeal stated that it had no jurisdiction to reverse an order of certiorari at the interlocutory stage. The Court stated:

“The Court has no jurisdiction under Rule 5 (2) (b) to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the



superior court did not order any party to do anything or refrain from doing anything or to pay any sum (of money) other than costs. Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would to reverse the decision of the superior court and legalize the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.”

82. Orders of certiorari are negative orders and cannot be stayed. A negative order was defined by the Court in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others* (*supra*) as follows –

“The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”

83. The orders made by this Court at paragraph 161 of the judgment that is the subject of these proceedings nullified the appointment of the 5th to 14th Respondents.

84. The Applicants are effectively out of office until such orders are reversed by the Court of Appeal after hearing the appeal as the orders are declaratory and do not require execution since they are negative orders.

85. The *Law Reform Act* at Section 8(3) also support the position that order an order of certiorari is not subject to stay. The Section provides: -

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

86. For the foregoing reasons, it is my finding that the application by the 5th, 13th and 14th Respondents, in so far as they seek stay of execution of the judgment delivered on 25th May 2022 is incompetent as the orders are incapable of being stayed. The application is accordingly dismissed with costs the same is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF JULY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

