



Mboya v Githinji & another; Pharmacy and Poisons Board (Interested Party) (Constitutional Petition E326 of 2023) [2025] KEHC 673 (KLR) (Constitutional and Human Rights) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E326 OF 2023**

**EC MWITA, J
JANUARY 31, 2025**

BETWEEN

APOLLO MBOYA PETITIONER

AND

DR CHARLES GITHINJI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

PHARMACY AND POISONS BOARD INTERESTED PARTY

RULING

1. This is a ruling on the application dated 5th November 2024, seeking for stay of the judgment delivered on 39th October 2024 pending appeal. In that judgment, this court declared the appointment of the 1st respondent (the applicant) unconstitutional. The applicant was aggrieved and filed a notice of appeal in the Court of Appeal. He then approached this court through this application brought under Order 42 rule 6 of the Civil Procedure Rules, seeking stay of execution of that judgment pending the hearing and determination of the intended appeal. The application is supported by the applicant’s affidavit and written submissions.
2. The applicant argued that having elected to exercise his right of appeal, the court is constitutionally bound to ensure that the right of appeal is not compromised. It can only do so by allowing the application to enable him pursue that right.



3. The applicant maintained that the application meets the threshold for granting stay pending appeal, namely; it was filed without delay; he will suffer substantial loss if stay is not granted and the intended appeal will be rendered nugatory if stay is declined.
4. According to the applicant, the overriding objective in civil litigation enjoins the court to dispense proportionate and equitable justice to parties. If stay is not granted, he argued, the intended appeal will be rendered nugatory and cause irreparable and substantial loss to him. He relied on the decision in *African Safari Club v Rentals Ltd (CA No. 52 of 2010)* for the position that after introduction of the overriding objective, the court should take a broader view of justice and harmonise the requirements in Order 42 rule 6 with the overriding objective.
5. The applicant maintained that the application was filed timeously and within 5 days of delivering the judgment. On substantial loss, he asserted that he is apprehensive that he will suffer substantial loss. According to the applicant, the judgment sets a dangerous precedent so that all chairmen of parastatals are holding office unconstitutionally.
6. The applicant relied on several other decisions, including; *Edwin Wambaa Regeru & another v Joseph Kariuki Kihara & 7 others (Msa HCC No. 274 of 2009)*; *Butt v Rent Restriction Tribunal* [1982] KLR 417; *Sicpa Securities Sol. Sa. v Okiya Omtatah Okoiti & 2 others* [2018] eKLR to support his application.
7. The application was opposed through grounds of opposition, replying affidavit and written submissions. The petitioner's (respondent's) core arguments in the grounds of opposition, replying affidavit and written submissions were that the application does not satisfy the threshold for granting stay of execution; the applicant has filed another application for stay in the Court of Appeal (E597 of 2024); the application is frivolous; incompetent; bad in law, incurable, defective and a blatant abuse of the court process.
8. In the replying affidavit, the respondent stated that the applicant has not demonstrated the substantial loss that may result; his removal is reversible hence the appeal will not be rendered nugatory and the issue of nugatory should be considered in the circumstances of each case and will, in any case, be addressed in the application before the Court of Appeal.
9. According to the respondent, where the applicant's private interest is in conflict with public interest, public interest should prevail. He also argued that whether the appeal is arguable or not, will be addressed by the Court of Appeal.
10. The respondent relied on several decisions, including; *Century Trading Co. Ltd v Kenya Shell Ltd (HCCA No. 1561 of 2007)* on the meaning of substantial loss; *Stanely Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2015] eKLR on the meaning of nugatory and *Reliance Bank Ltd v Norlake Investment Ltd* [2002] 1 EA 227, that factors that would render an appeal nugatory will be considered in the circumstances of each case.
11. The respondent further cited the decision of *Samvir Trustees Ltd v Guardian Bank Ltd* [2007] eKLR, that the court should see whether there are any special circumstances which can sway it in a particular manner. He urged the court to dismiss the application.
12. I have considered the application and arguments by parties. Although the respondent was served, he did not attend court during the hearing of the application. Only counsel for the applicant attended court, moved the application and urged the court to allow it.



13. The applicant has sought stay of execution of the judgment of this court pending appeal. He has argued that he will suffer substantial loss; that the intended appeal is arguable and that the appeal will be rendered nugatory if stay is not granted.
14. The respondent on his part has argued that there is another application before the Court of Appeal; that the applicant has not demonstrated substantial loss that will be suffered and that the appeal will not be rendered nugatory.
15. Rule 32(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules) provides that an appeal or second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed. Rule 32(3) which deals with formal applications for stay, provides that a formal application may be filed within 14 days of the decision appealed from or within such time as the court may direct.
16. Rule 32 (3) confers on the court unfettered discretion to grant stay of execution. The rule does not impose any conditions on the court when considering an application for stay, except that the application be filed within 14 days from the date of the decision to be appealed against.
17. The application was filed within 5 days after the judgment thus, satisfied the condition that an application be filed within 14 days.
18. In considering application brought before it, the court has also to pay attention to rule 3(2) on overriding objective. The rule provides that the overriding objective of the rules is to facilitate access to justice for all persons as required under Article 48 of *the constitution*.
19. Rule 3(3) further requires that the rules be interpreted in accordance with Article 259(1) of *the Constitution* and be applied with a view to advancing and realising rights and fundamental freedoms enshrined in the Bill of Rights and values and principles in *the Constitution*. Rule 3(4) emphasises that when exercising its jurisdiction under the rules, the court should facilitate the just, expeditious, proportionate and affordable resolution of all disputes.
20. It is therefore plain that the overriding objective of the rules is to facilitate access to justice. It is perhaps for that reason, that rule 32 (3) confers on the court unfettered discretion to consider an application for stay, leaving the matter at the discretion of the court so that it can facilitate access to justice depending on the circumstances of each case. Unlike the Civil Procedure Rule, the Mutunga Rules do not impose conditions such as substantial loss or security, save that an application be filed without delay and, in any case, within 14 days.
21. Speaking to the overriding objective in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*, (Civil Appeal No. 161 of 1999) [2000] eKLR, the Court of Appeal stated that the overriding principle confers on the court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. The Court emphasised that the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. It is to embolden the court to be guided by a broad sense of justice and fairness.
22. The applicant has chosen to exercise his right of appeal to test the correctness of the decision of this court. This is a legal right granted to the applicant to access justice in the Court of Appeal. He filed this application timeously as required by the rules.
23. The respondent argued that the applicant has also filed an application for stay in the Court of Appeal. That notwithstanding, this court was properly moved under its rules and has an obligation to determine the application in exercise of its jurisdiction under rule 32(3). The respondent has not



argued that the application before the court of appeal has been heard and determined. That application is a matter before that Court. It does not oust the jurisdiction of this court to hear and determine the application before it.

Substantial loss

24. Even though the rule does not impose conditions on the court. The applicant has argued that he will suffer substantial loss if stay is not granted. It is appropriate for the court to address this issue. The applicant argued that he will suffer substantial loss if stay is not granted. The respondent on his part contended that the applicant had not demonstrated the substantial loss he will suffer if stay is not granted.
25. In *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331, the court stated that that “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
26. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court opined that the fact that the process of execution has been put in motion, or is likely to be put in motion, does not by itself amount to substantial loss. An applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal....“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
27. The applicant was appointed on 19th January 2023 and his term commenced on 20th January 2023 for a period of 3 years. His term will expire on 19th January 2026. There is no guarantee that the Court of Appeal will hear and determine the appeal before the expiry of his term. This leaves a real possibility that the applicant may sit out the remainder of his term as he waits for the hearing and determination of his appeal. This, in my view, is a real and foreseeable loss of the remainder of the applicant’s term that cannot in any way be remedied if stay is declined.

Public interest

28. There is also an element of public interest which the court should take into account in determining whether or not to grant stay pending appeal in the circumstances of this case. The applicant is chairperson of a public body that plays an important role in the public health sector, including formulating guidelines for regulating the manufacture, import and export, distribution, sale and use of medical products in the country.
29. That body’s mandate is critical in the country, raising an important case of public interest in this matter. Absence of the applicant exposes the country and the people to health challenges, if not hazards.
30. As to whether the appeal will be rendered nugatory, I do not think that is an issue for this court to determine following what the court has stated about substantial loss.
31. In the circumstances and for the above reasons, this court is inclined to allow the application. Consequently, the application dated 5th November 2024 is allowed. Stay of execution of the judgment dated and delivered on 30th October 2024 is hereby granted until the hearing and determination of the intended appeal to be filed before the Court of Appeal. There will be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025

E C MWITA



JUDGE

