Luxury Suttles Tours & Travel Ltd & another v Njoroge & another (Civil Application E148 of 2025) [2026] KECA 206 (KLR) (6 February 2026) (Ruling)

Neutral citation: [2026] KECA 206 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E148 OF 2025

K M'INOTI, AO MUCHELULE & GV ODUNGA, JJA

FEBRUARY 6, 2026

BETWEEN

LUXURY SUTTLES TOURS & TRAVEL LTD ..... 1ST APPLICANT

CHARLES MWITI KINYUA ..... 2ND APPLICANT

AND

TABITHA WACERA NJOROGE ..... 1ST RESPONDENT

JANE WANJA KINUTHIA ..... 2ND RESPONDENT

(Application for stay of execution and further proceedings pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Kerugoya (Muriithi, J.) dated 27th February 2025 in HCCA No. E060 of 2024)

RULING

1. The applicants moved this Court under rule 5(2) (b) of the Court of Appeal Rules vide an application dated 12th February 2025 for stay of execution and stay of further proceedings pending appeal "from the ruling and order" of the High Court of Kenya at Kerugoya, (Muriithi, J.) dated 27th February 2025. As a matter of fact, the decision of the High Court dated 27th February 2025 was a judgment rather than a ruling as erroneously stated by the applicants.

2. The brief background to the application is as follows. On or about 2020, Benson Kinuthia Wanja (the deceased) was involved in a traffic accident in a motor vehicle owned by the 1st applicant, Luxury Shuttle & Travel Ltd and at the material time driven by the 2nd applicant, Charles Mwiti Kinyua. The deceased died on the spot and the respondents, in their capacity as administrators of his estate, filed a suit against the applicants for compensation in the Senior Principal Magistrate's Court at Wang'uru (the trial court). By a judgment dated 28th February 2024, the subordinate court found in favour of the

respondents and awarded them Kshs. 4,440,627.00 together with costs and interest. From the record, the applicants have never appealed against that judgment.

3. On 19th March 2024, the applicants filed a declaratory suit in the same trial court against their insurers, Invesco Assurance Co. Ltd., seeking to compel the insurers to settle the decree in favour of the respondents. The respondents were not parties to that suit. Pending the hearing and determination of the declaratory suit, the applicants applied in the trial court for stay of execution of the decree.

4. By a ruling dated 14th May 2024, the trial court stayed execution of the decree. The trial court found that section 5 of the Motor Vehicle (Third Party Party Risks) Act (the Act) capped the liability of the insurer at Kshs 3,000,000.00 and therefore the applicants were liable to pay the balance of the decree being Kshs. 1,440,627.00. The court therefore ordered the applicants to deposit half of that sum, being 720,313.50 within 30 days from the date of the ruling.

5. The respondents were aggrieved and appealed in the High Court of Kenya at Kerugoya, contending, among others that it was erroneous for the trial court to stay execution pending appeal whereas the applicants had not appealed against the decree and that section 10(1) of the Act did not provide for stay of execution of decrees against insured persons.

6. By the judgment impugned in the intended appeal, the High Court found that there was no appeal from the decree and therefore the trial court ought not to have relied on provisions of the law on stay of execution pending appeal, and that the applicants' declaratory suit did not take away their liability to the respondents. Accordingly, the High Court allowed the appeal and set aside the order of stay of execution granted by the trial court.

7. The applicants were in turn aggrieved and after lodging a notice of appeal on 12th March 2025, filed the present application for stay of execution and proceedings. In support of the application, the applicants relied on submissions dated 8th May 2025, which were highlighted by their learned counsel, Mr. Munene.

8. In a bid to demonstrate that the intended appeal is arguable, the applicants submitted that they intend to raise, among others, the questions whether a judgment debtor who holds a valid insurance cover is liable to settle the decree when the insurer is under statutory management; whether the High Court erred by failing to apply the statutory cap of Kshs 3,000,000.00 under the Act; and whether the Applicants' rights under Articles 48 and 50 of the *Constitution* were infringed. They relied on Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR on the principles that guide the Court in applications under rule 5(2) (b) of the Court's Rules.

9. As to whether the intended appeal would be rendered nugatory, the applicants submitted that the decretal amount was substantial; that they had already deposited the sums ordered by the trial court and were ready to pay the balance to make Kshs 1,440, 627.00; that requiring them to pay the full decretal amount would cripple their operations and undermine the policy objective of the Act. In support of the submissions the applicants relied on Trust Bank Ltd & Another v Investech Bank Ltd & 3 Others [2003] eKLR and National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another [2006) eKLR.

10. The respondents opposed the application on the basis of a replying affidavit sworn by the 1st respondent on 18th March 2025 and submissions dated 10th May 2025. Their learned counsel, Mr. Githu, submitted that the applicants were actively abusing the process of the Court because after filing this application in this Court, they had gone back to the trial court and obtained orders of interim stay of execution in contravention of the decision of the High Court; that the intended appeal was

not arguable because the applicants have not appealed against the decree; and that in law it was the obligation of the respondents to settle the decree.

11. The respondents further submitted that the application was defective for lack of a draft memorandum of appeal. They also challenged the validity of the notice of appeal contended that it was served upon them out of the prescribed time.

12. It was also the respondents' submission that the intended appeal would not be rendered nugatory because the decree was a money decree which the respondents could satisfy in the event the appeal succeeded. They added that the applicants had a remedy against their insurer and therefore, in the event of the appeal succeeding, it would not result in a paper judgment. In support of the submissions, they relied on the decision in Meteine ole Kilelu & 19 Others v Moses K. Nailole [2009] eKLR.

13. We have carefully considered this application and the submissions by the parties. Before we delve into the merits of the application, we will dispose of the respondents' arguments about the validity of the notice of appeal and lack of a draft memorandum of appeal.

14. The Court has stated time without number that unless admitted by the opposite party, an application under rule 5(2) (b) is not the occasion to determine the validity or otherwise of a notice of appeal. This is because a party who challenges the validity of a notice of appeal has a specific prescribed remedy under rule 86 of the Court of Appeal Rules. Such a party is required to apply to strike out the notice of appeal, which the respondents have not done. (See National industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another (supra), and Principal Secretary, Ministry of Education, Department of Vocational & Technical Training & Another v. Kepher Langi Oguwi & 2 Others, CA No. Nai E248 of 2022).

15. As regards lack of draft memorandum of appeal, this Court held as follows in DHL Worldwide Express Kenya Ltd v Andrew Mutuma, CA No. Nai E251 of 2022:

> The respondent argues that the intended appeal is not arguable because the applicant has not presented a memorandum of appeal showing the issues that make the intended appeal arguable. True, there is no draft memorandum of appeal, and it is the normal practice to demonstrate an arguable appeal by the devise of a draft memorandum of appeal. However, that is not the only way of demonstrating that the intended appeal is arguable. In the present application, there are clear and concise grounds set out in paragraphs 12 and 13 of the application detailing the issues that the applicant intends to ask the Court to determine on appeal. Lack of a draft memorandum of appeal per se is not fatal if the Court can discern from the Application the issues that the applicant wants to pursue in the appeal.

16. We reiterate those positions and find no merit in the respondents' objections.

17. Turning now to the merits of the application, as correctly submitted by both parties, for the Court to grant the remedies sought by the applicants under rule 5(2) (b), they must demonstrate that they have an arguable appeal which risks being rendered nugatory if the intended appeal succeeds absent the remedy under rule 5(2) (b).

18. As regards whether the intended appeal is arguable, we note that although the applicants' intended appeal is against the decision of the High Court that set aside the earlier order of stay of execution granted by the subordinate court, the appellants have neither challenged nor appealed against the decree. We agree with the respondents that in law the liability is primarily that of the applicants as the insured parties. We therefore are not persuaded that the applicants have demonstrated that they have an arguable appeal.

19. But even if we had found that the appeal was arguable, we still would not have granted the orders sought because the applicants have a remedy against their insurers, which is the same as saying their intended appeal will not be rendered nugatory if it succeeds. That they may have to wait a while to get compensation is not the same as rendering the intended appeal nugatory.

20. There is still a further reason why we would not, in any event, have granted this application. From the record, there is glaring evidence of abuse of the process of the court in this matter, which the applicants are trying to sanitise through this application. After the High Court set aside the order of stay of execution issued earlier by the subordinate court, the applicants approached this Court on 12th March 2005 for stay of execution of the judgment of the High Court. When they failed to obtain an ex parte order of stay of execution as they had erroneously hoped, they went back to the subordinate court on 17th March 2025 and somehow obtained a most irregular order of stay of execution in a matter already determined by the High Court. As at the time the applicants were prosecuting this application, they had an order of stay of execution from the subordinate court.

21. Conduct, like that of the applicants in this case, which is not bona fides or is oppressive, or in which a party is simultaneously pursuing the same remedies in direct legal fora, constitutes abuse of the process of the court. In The Kenya Section of the International Commission of Jurists v. Attorney General & 2 Others, Application No. 1 of 2012) the Supreme Court stated as follows regarding abuse of the process of the Court:

> " The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice ."

22. This Court will not countenance such blatant abuse of the process of the Court. An order under rule 5(2) (b) is a discretionary remedy and is not available to parties who demonstrates by their conduct that they are not deserving of such remedy.

23. We find absolutely no merit in this application and the same is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2026

K. M'INOTI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.