



Western Airways Limited & another v Nordic Aviation Capital (Civil Application E319 of 2024) [2025] KECA 765 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 765 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E319 OF 2024
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
MAY 9, 2025**

BETWEEN

WESTERN AIRWAYS LIMITED 1ST APPLICANT

DOUGLAS ODHIAMBO 2ND APPLICANT

AND

NORDIC AVIATION CAPITAL RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 11th May 2018 in HCCC No. 397 of 2011)

RULING

1. By their motion on notice dated 25th June 2024, the applicants, Western Airways Ltd. and Douglas Odhiambo, have moved the court principally under rule 5(2) (b) of the Court of Appeal Rules for an order of stay of execution of the judgment and decree of the High Court (Tuiyott, J., as he then was) dated 11th May 2018, pending appeal. There is on record a notice of appeal lodged by the applicants in the High Court on 13th May 2018.
2. In the impugned judgment, the High Court entered judgment for the respondent, Nordic Aviation Capital, against the applicants jointly and severally for USD. 1,034,122.47 for breach of an Aircraft Lease Agreement for a Cessna Caravan Aircraft. The respondent was also awarded interest at court rates from the date of filing suit until payment in full. The 2nd applicant, a shareholder and director of the 1st applicant, was a surety in the lease agreement and had executed a personal guarantee. To date, almost seven years since the judgment of the High Court, there is no evidence that the applicants have filed their appeal. What appears to have woken the applicants from their blissful slumber was an attempt by the respondent, on 12th February 2024, to execute the decree through a notice to show cause why the 2nd applicant should not be committed to civil jail.



3. In support of the application for stay of execution the applicants relied on written submissions dated 10th January 2025, which were highlighted by their learned counsel, Mr. Kiarie. Counsel submitted that the intended appeal is arguable and will be rendered nugatory unless an order of stay of execution is granted.
4. As regards an arguable appeal the applicants contended that the High Court erred by holding that the 2nd applicant was still liable under the personal guarantee even after the 1st appellant and the respondent amended the Aircraft Lease Agreement severally without involving him; by ignoring the 2nd applicant's separate legal personality from that of the 1st applicant when the latter was amending the Aircraft lease Agreement; by holding that the 1st applicant did not obtain any equity over the aircraft and was not entitled to set-off when the respondent repossessed the aircraft; and by failing to consider, when computing the respondent's claim, the sum of USD 80,000 paid by the applicants to the respondent.
5. On whether the appeal risked being rendered nugatory, the applicants argued that if the 2nd respondent is committed to civil jail, that eventuality cannot be undo and should the appeal succeeded, it will definitely be rendered nugatory. It is also contended that the respondent has no operations or assets in the Republic of Kenya and that should the appeal succeed, it was virtually impossible to recover the decretal amount from the respondent.
6. In support of their submissions the applicants relied on a number of decisions, among them, Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v. Kilach [2003] KLR 249; Reliance Bank Ltd. v. Norlake Investments Ltd. [2002] 1 EA 227; Dennis Mogambi Mongare v. Attorney General & 3 Others [2012] eKLR; and Hashmukhlal Virchand Shah & 2 Others v. Investment & Mortgages Bank Ltd. [2014] eKLR, which all demonstrate what is required in an application under rule 5(2)(b).
7. The respondent opposed the application vide a replying affidavit sworn on 31st July 2024 by Mr. Crispine Odhiambo. We note with great concern that the deponent is the advocate who is on record for the respondent and ought not to depose to contentious matters between the parties. (See Kamlesh Mansukhlal Damji Pattni v. Nasir Ibrahim Ali & 2 Others [2005] eKLR). In addition, the respondent did not file submissions and neither the respondent nor its counsel appeared for the hearing of the application.
8. Having carefully considered this application against the principles that guide the Court in an application for stay of execution which are adequately explained in the various authorities cited by the applicants, we are satisfied that the intended appeal is arguable, taking into account that even one bona fide issue will suffice and that an arguable appeal does not necessarily have to succeed on appeal.
9. The applicant's contention that the respondent has no operations or assets in Kenya is not controverted at all. In the circumstances, we find that the applicants have satisfied both considerations for grant of an order of stay of execution under rule 5(2) (b). However, we earlier on in this ruling referred to the inordinately long period that the applicants have taken to file the appeal. Under rule 5(2) (b), the Court is empowered to grant relief on such conditions as it deems just in the circumstances of the case.
10. Accordingly, we shall grant the applicants a conditional stay of execution to the effect that they must file and serve the record of appeal within Forty-Five (45) days from the date of this ruling, failing which the notice of motion dated 25th June 2024 shall stand dismissed. Costs of this application shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

WANJIRU KARANJA



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JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

