



REPUBLIC OF KENYA



KENYA LAW
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**Kay Construction Company Limited v Consultants (Civil Application
E569 of 2023) [2024] KECA 1 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KECA 1 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E569 OF 2023
MA WARSAME, SG KAIRU & JW LESSIT, JJA
JANUARY 19, 2024**

BETWEEN

KAY CONSTRUCTION COMPANY LIMITED APPLICANT

AND

PATRICK SAGWA T/A STEG CONSULTANTS RESPONDENT

(An application for stay of execution from the ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 31st October, 2023 in Nairobi Civil Suit No. 60 of 2016)

RULING

1. In its application dated November 30, 2023 made under rule 5(2)(b) of the [Court of Appeal Rules](#), the applicant, Kay Construction Company Limited, seeks two main orders. First, that pending the hearing and determination of the intended appeal, this court be pleased to stay execution of a ruling delivered by the High Court at Nairobi (Majanja, J.) in HCCC No. 60 of 2016 on October 31, 2023. Secondly, that the court be pleased to stay execution of the judgment delivered by the High Court in the said suit on March 25, 2022.
2. The background in brief is that the respondent, Patrick Sagwa t/a Steg Consultants was apparently the applicant's consultant in arbitration proceedings between it and the Office of the President with the Department of Defence. The respondent then filed suit against the applicant before the High Court, being the said HCCC No. 60 of 2016, seeking judgement for Kes 142,234,965.60 together with interest. In a judgment delivered on March 25, 2022, the High Court ordered the applicant to pay to the respondent the amount of Kes 142, 234, 965.60, being 15% of the sum of Kes 335,605,244.69 awarded by the arbitrator.
3. After commencement of execution of the judgment by the respondent, the applicant moved the court by an application dated May 17, 2023 to stay execution on the basis that it was premature as payment was subject to the applicant receiving payment from the Ministry of Defence. On August 24, 2023,



the respondent applied for review of the judgment seeking award of interest at commercial rates. On September 7, 2023, the applicant applied for review of the judgment to indicate, that as per the judgment, the respondent was entitled to 15% of the difference between Kshs. 335,605,244.69 and Kshs. 70,000,000 which is the equivalent of Kshs. 39, 840,786.70 and not the decretal amount as awarded.

4. In its ruling delivered on October 31, 2023, the High Court dismissed, with costs, the applicant's applications for stay of execution and for review dated May 17, 2023 and September 7, 2023 respectively. Aggrieved, the applicant filed a notice of appeal dated November 3, 2023 on which the present application is hinged.
5. We heard the application on January 17, 2024 when learned counsel Dr. Arwa appeared for the applicant. Despite having been served with the application, there was no response to the same and neither was the respondent represented at the hearing despite service of notice of hearing.
6. Counsel for the applicant submitted in support of the application that the main appeal has already been filed; that execution of the judgment of the High Court would be premature; that the decretal amount would only be payable after receipt of payment from the Government and further that that the respondent's application for review is still pending before the High Court; that the amount sought to be recovered in execution far surpasses what is properly due; and that the appeal is arguable. It was urged that unless the orders sought are granted, the appeal will be rendered nugatory.
7. We have considered the application against the applicable legal principles, namely that, to succeed, the applicant must demonstrate that the appeal or intended is arguable and secondly that the appeal, if successful, should not be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.
8. As already indicated, the ruling delivered on October 31, 2023 that is sought to be stayed, dismissed the applicants two applications. Except in its award for costs, the High Court did not in that ruling order any of the parties to do anything, or to refrain from doing anything. It is a negative order incapable of stay except as regards the award of costs. See *Mbaruk vs. Mwasi & 6 others* (Civil Application E006 of 2020) [2022] KECA 520 (KLR).
9. Counsel for the applicant conceded that there is no appeal, no notice of appeal, in relation to the judgment delivered on March 25, 2022. Without that, this Court has no jurisdiction to entertain the application to stay execution thereof. See *Attorney General v Kazungu* (Civil Appeal (Application) E078 of 2022) [2023] KECA 498 (KLR).
10. In the result, we are not persuaded that the threshold for granting the orders sought has been met. The applicant's application dated November 30, 2023 is devoid of merit and is hereby dismissed. We make no orders as to costs as the respondent did not participate in the application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2024.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

