



**Kaylift Services Limited v Thuo (Suing as the personal representative and administrator of the Estate of the Deceased - Joram Thuo Wairegi) & 2 others (Civil Appeal (Application) 182 of 2019) [2024] KECA 1547 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1547 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 182 OF 2019  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**KAYLIFT SERVICES LIMITED ..... APPLICANT**

**AND**

**MICHAEL THUO (SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED - JORAM THUO WAIREGI) ..... 1<sup>ST</sup> RESPONDENT**

**JANE NJERI MUIKIA (SUBSTITUTED FOR SAMUEL MBUGUA) ..... 2<sup>ND</sup> RESPONDENT**

**SHELITH WAITHERA KAMUNYA (SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED - PETER KAMUNYA KIBOI) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of this appeal from the Judgment and Decree of the High Court of Kenya at Nyeri (Matheka J.) dated 18th October, 2017 in H.C.C.C. No. 39 of 2002 Consolidated with H.C.C.C. No. 121 of 2001)*

**RULING**

1. The applicant, Kaylift Services Limited, by a notice of motion dated 11<sup>th</sup> July 2024, moved this Court pursuant to Rule 5 (2) (b) of the *Court of Appeal Rules*, 2022 seeking orders of stay of execution of the judgment and decree of the High Court delivered on 18<sup>th</sup> October 2017 and which the 1<sup>st</sup> respondent had sought to execute pursuant to an Order and Ruling of the High Court (Kizito, J.) issued on 8<sup>th</sup> July, 2024. The applicant craves to invoke the exercise of this Court's discretion to stay the execution of the said judgment and decree pending the hearing and determination of the present appeal i.e. Civil Appeal No. 182 of 2019.



2. The application is supported by the annexed affidavit of Paul Kihoro Thuo, a director of the applicant and the grounds stated on the face of the application. In essence, the applicant states that it was aggrieved by the judgment of the High Court delivered on 18<sup>th</sup> October 2017, and has appealed against the said decision to this Court. The appeal is pending hearing and determination by this Court. The applicant states that the 1<sup>st</sup> respondent had, pursuant to an order issued by the High Court on 8<sup>th</sup> July, 2024, which allowed the execution of the said judgment and decree, proclaimed the applicant's properties.
3. The applicant laments that it would suffer "immense and irreparable loss and prejudice occasioned thereby and the appeal before this Court would be rendered nugatory...". The applicant, therefore, craves for this Court to grant the order staying execution of the said judgment and decree pending the hearing and determination of this appeal. The applicant reiterates that it has a good appeal which is arguable. The application should, therefore, be allowed as prayed.
4. The 1<sup>st</sup> respondent opposed the application. He filed grounds in opposition to the application. The 1<sup>st</sup> respondent stated that the applicant was guilty of laches in that he had filed the present application after an inordinate delay. The applicant had not given any explanation for the delay. The 1<sup>st</sup> respondent was of the view that the application had been filed in abuse of the due process of the court due to the fact that a similar application had been heard, considered and determined by the High Court. The 1<sup>st</sup> respondent pointed out that the applicant is insured – the insurer had separately moved the High Court in its own name. In the circumstances therefore, the appeal would not be rendered nugatory if stay is denied. He urged the Court to disallow the application.
5. Both the applicant and the 1<sup>st</sup> respondent filed written submissions in support of their respective opposing positions. During plenary hearing, this Court heard the highlights of the 1<sup>st</sup> respondent's submissions made by learned counsel, Mr. Omoiti. There was no appearance on behalf of the applicant.
6. We have carefully considered the said submissions, both written and oral. Both parties appreciate the principles that guide this Court in determining applications such as the present one. In [\*Kenya Industrial Estate Ltd & Another v Matilda Tonge Mwachi\* \[2021\] eKLR](#). This Court held thus:

“ 12. It is old hat that for this Court to grant an order of stay of execution, the applicants must satisfy this Court that their appeal is arguable and that if stay is not granted, the same would be rendered nugatory in the event that the appeal succeeds. Both limbs must be satisfied and demonstrating only one limbs will not suffice. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.”
7. In the present application, the applicant is supposed to demonstrate that it has at least one arguable ground of appeal for this Court to be satisfied. As has been stated time and time again by this Court, an arguable appeal is not one which must succeed but one which persuades the court that it is an issue capable of consideration by this Court.
8. Having examined the grounds of appeal put forward by the appellant, it was clear to this Court that the applicant's appeal is arguable. One of the issues that the applicant has raised in its memorandum of appeal that is arguable is whether the 1<sup>st</sup> respondent established to the required standard of proof that the applicant was the owner of the motor vehicle that was involved in the accident that resulted in the cause of action that was the subject of the verdict by the High Court. The 1<sup>st</sup> respondent has not seriously challenged the fact of the applicant having an arguable appeal.



9. As regards the second issue which is whether the appeal would be rendered nugatory if stay of execution is not granted, we hold that the applicant established such a case. It was instructive that the 1<sup>st</sup> respondent failed to swear any affidavit to the effect that it would be in a position to refund the decretal sum if the appeal lodged by the applicant succeeds. We are persuaded that since the thrust of the applicant's appeal is whether it is liable at all in tort to the 1<sup>st</sup> respondent, the applicant established to our satisfaction that if stay of execution sought is not granted, the appeal may well be rendered nugatory.
10. We are, however, of the considered view that a conditional stay of execution will serve the interest of justice in the circumstances of this case.
11. In the premises, therefore, the applicant's application has merit and is hereby allowed on the following terms:
  1. Stay of execution is granted pending the hearing and determination of the appeal.
  2. The applicant shall deposit in a joint interest earning account, in a reputable bank, in the names of the advocates on record for the applicant and the 1<sup>st</sup> respondent, the sum of Kshs.5,000,000.
  3. The said sum shall be deposited within thirty (30) days of the date of delivery of this ruling in default, the stay granted shall automatically stand vacated.
  4. The costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NYERI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

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

signed

**DEPUTY REGISTRAR.**

