



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 25 OF 2017

(FORMERLY ELC NO. 97 OF 2017)

NYANDARUA PROGRESSIVE AGENCIES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS WAINAINA MUGO.....1ST DEFENDANT/APPLICANT

CHARLES MOMO MAINA2ND DEFENDANT/APPLICANT

PETER MACHARIA NJOROGE.....3RD DEFENDANT/APPLICANT

MICHAEL NJOROGE THIONG'O.....4TH DEFENDANT/APPLICANT

JOHN KAMAU KUBAL.....5TH DEFENDANT/APPLICANT

STANLEY KABACHIA.....6TH DEFENDANT/APPLICANT

DAVID MANYARA KARANJA.....7TH DEFENDANT/APPLICANT

LAWRENCE MUNGAI NG'ETHE.....8TH DEFENDANT/APPLICANT

DANIEL KIMANI KIBE.....9TH DEFENDANT/APPLICANT

REGISTRAR OF COMPANIES.....10TH DEFENDANT

RULING

RULING ON THE APPLICATION DATED 25.6.2020

1. Judgment in this case was delivered on the 27.5.2020 in favour of the plaintiff. The defendants being dissatisfied with the said judgment filed a Notice of Appeal on the 5.6.2020.

2. By a Notice of Motion application dated 25.6.2020 and filed on even date, the defendants sought ORDERS:

(a) Spent.

(b) That pending the hearing and determination of this Application, this Honourable Court be pleased to stay execution of the Judgment delivered electronically on 27.5.2020, the resultant order directing the 10th Defendant/Respondent to register purportedly elected officials as directors of the Plaintiff and/or any other orders issued therein and/or incidentals therefrom.

(c) That pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to stay execution of the Judgment delivered electronically on 27.5.2020 the resultant order directing the 10th Defendant/Respondent to register purportedly elected officials as directors of the Plaintiff and/or any other orders issued therein and/or incidentals therefrom.

(d) That the costs of this Application be awarded to the Applicant.

. It is premised under **Section 63 (e) of the Civil Procedure Act (CPA)** and **Orders 22, Rule 22, 42 Rule 6** and **Order 51** of the **Civil Procedure Rules (CPR)**, and a Supporting Affidavit sworn by one Stephen Muchoki Kirubi, one of the Interested Parties, as well as grounds stated at the face of the application.

Though brought under a certificate of urgency during the Covid -19 Pandemic, I declined to grant ex-parte orders, and on the 2.7.2020 directed that the application be served, that the Respondents file their responses; and further that the parties filed their submissions soon thereafter.

3. The Respondents filed a Replying sworn by Eliud Samuel Maina Waweru and filed on the 5.4.2019 the opposing the application.

The applicants are represented by Mr. Kahiga instructed by M/S Mirugi Kariuki & Co. Advocates. Mr. Waweru Kihara instructed by M/S Waweru Kihara & Co. Advocates represents the Respondents.

4. I have considered the parties affidavits in support and in opposition to the application as well as their submissions.

5. APPLICANTS ARGUMENTS AND SUBMISSIONS

The applicants deposit that during the court initiated election of directors of the plaintiff company on the 13.4.2018, both sides of the divide were dissatisfied with the report of the election prepared and presented to the court by the Nakuru County Commissioner, despite, citing unanswered questions whether **members were properly verified failure by the presiding officer to effectively manage the election and especially the authenticity and correctness of the OMOLO report, which the court sanctioned, by allowing the members fronted by the Respondents as duly elected officials of the Respondent. The Registrar of Companies thereafter issued CR 12 Form in respect thereof.**

This is the basis of the application seeking stay orders pending hearing and determination of the Application and the Appeal.

It is therefore urged that if stay is not granted, the intended appeal shall be rendered nugatory as the substratum of the appeal will automatically be evaded.

It is their believe that they have an arguable appeal with chances of success, and undertakes to abide by conditions that the court may impose.

6. RESPONDENT'S (PLAINTIFF) ARGUMENTS

In opposing the application, it is argued that the 13.4.2018 election was upon modalities agreed to, by a consent of the parties dated 9.3.2018 and that the proposed modalities were strictly adhered to, including use and reliance of the OMOLO Report supplied by the Registrar of Court's - Nakuru County; and filing of the report of the election on the 9.3.2018 by the Nakuru County Commissioner. They therefore urge for dismissal of the application to bring the suit to an end, as what is before the court is an afterthought.

7. ISSUES FOR DETERMINATION

(1) Whether the applicant's application meets the threshold for grant of a stay of execution order pending appeal.

(2) Which party should meet costs of the application?

8. ANALYSIS AND DETERMINATION

The grant of an order of stay of execution pending Appeal is premised under **Order 42 Rule 6 (1) (2) CPR** thus;

6 (1) – No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appended from except in so far as the court appealed from may order, but the court may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appended from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order therein as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

6 (2) – No order of stay of execution shall be made under sub-rule (1) unless

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. Further, to grant or refuse an application for a stay of execution is a discretionary power that should be exercised in a way that it would not render an appeal nugatory **Butt V. Rent Restrictions Tribunal (1982) eKLR**, and cited in **Felix Mochiemo Oindi V. Gutonya Newton Mbogo (2018) eKLR**.

The court in exercising its discretion ought to consider the special circumstances in the case (if any). I need not repeat the facts of the case here. They are well captured in the impugned judgment; but just to state a few.

10. The election disputes between the company and its shareholders started way back in 2012. Numerous elections were held during the period but one of the other parties would always dispute the election results, despite supervision by the county administration.

11. The election held on the 13.4.2018 was court mandated, but the mode of election agreed upon by the parties vide a consent dated 9.3.2018. The outcome did not please the respondents.

In the meantime, the plaintiff company continued to since 2012 to be under the leadership of the faction - the plaintiff - pending hearing and determination of the suit. In between, there are numerous rulings of the court for and/or against the rival parties.

12. By a court ruling dated 18.9.2019 with agreement of the rival parties the directors elected on the 13.4.2018 were allowed to take office and manage the affairs of the company, with a rider that **injunction orders dated 15.2.2018 and 16.5.2019 were to remain in force to the extent that the said directors were restrained from dealing in any way with the plaintiff company properties pending the hearing and determination of this suit.**

13. The judgment of this court effectively allowed the plaintiffs directors, to fully take control and management of the plaintiff company and directed the Registrar of Companies to issue a **CR12** recognizing them as the duly elected officials of the plaintiff.

14. By this application I am being urged to stay the above, meaning removing the said directors and restraining them from performing and managing the affairs of the company, pending hearing and determination of the appeal.

It is common knowledge that appeals take quite some time to be heard and determined.

15. In their submissions, the applicants, have not told or proposed to the court who would be managing the plaintiff company awaiting the outcome of the appeal.

The Respondent on its part has maintained that the said directors remain in control and management during the period.

In the case **Global Tours and Travels Ltd. WC No 43 of 2000 (UR)**, the court rendered that;

“In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one.....”

16. Under the **Companies Act, 2015, Sections 128, 129** requires that a limited liability company have at least two directors to run its affairs. It is therefore illegal for a company to transact any business when no directors (s) are in place. It was on that basis that the court by its order stated above allowed the then directors to continue in office pending the hearing of this suit. The suit is now determined.

The status as at date of the judgment is that the former directors of the plaintiff continue in the office save with some limitations as stated.

The court found these directors to have been legally and procedurally elected in the 13.4.2018 election - Prayer No. (c) in the Amended plaint.

17. If the court would find in favour of the Applicants, there would be officials/directors to run the affairs of the company until the hearing and determination of the appeal.

That in itself would be creating an illegality by the court. The parties have not told the court whether the Registrar of Companies has registered the officials and issued **CR12** Form or not.

18. I have weighed the above pros and cons – **Global Tours and Travel (Supra)**.

I also found that the appeal is arguable and has chances of success. Under **Order 42 CPR**, the applicant has to demonstrate irreparable loss if the stay order is not granted.

The only loss that the applicant has stated is that the shareholders of the company would suffer as the elected officials have already commenced operations and begun collecting money for title deeds, and grabbing land from persons aligned with the applicants.

19. As stated by Gikonyo J in **James Wangalwa & Another -Vs- Agnes Naliaka Cheseto (2012) eKLR**,

“The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very 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.....”

20. I fully concur with the above holding as the applicants would suffer if the directors are left to execute the decree, without limits, to the

extent that by the time the intended appeal is heard and determined, they may have lost their land, being the substrum of the company's existence.

There is no dispute that the application was filed without unreasonable delay.

21. As to security for the due performance of the decree, the land in issue, belonging both to the rival parties shall be sufficient security so long as it is not allowed to be destroyed by changing hands through sale charging or in any other mode or way.

I have stated the status quo as at the beginning of the hearing of this case; and at the judgment state – see paragraph 16 of this ruling.

21. Having rendered that the Applicants may suffer substantial loss should the Directors sanctioned by the court in its judgment are allowed to deal with the company assets and properties as they wish to the disadvantage of the Applicants and the company itself, I am persuaded that the application and the prayers sought are merited, but also limited in the following terms that;

(1) Pending the hearing and determination of the Appeal, and order of stay of execution of the judgment delivered electronically on 27.5.2020 is hereby granted, upon terms that;

(b) That the Registrar of Companies is hereby restrained from registering the elected officials following the election held on 13.4.2018 as the officials of the company pending hearing and determination of the Appeal.

(c) That status quo as at the date of the judgment 27.5.2020 shall be maintained which is the same status quo ordered by the court on the 18.9.2020, by consent of the rival parties to the effect that; (Paragraph12 of the judgment)

(d) That the elected directors and officials in the meeting held on the 13.4.2018 shall continue managing the affairs of the plaintiff company, with a rider that the said Directors are restrained by this court from dealing in anyway with the plaintiff company properties, meaning, they shall not sale, lease, charge, or issue title deeds to the shareholders pending hearing and determination of the appeal.

(e) The circumstances pertaining to this case demands that no orders as to costs are granted in respect of this application.

Orders accordingly.

Signed electronically.

J. N. MULWA

JUDGE

Delivered at Nakuru this 29th day of April, 2021.

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H. CHEMITEI

JUDGE