



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

WINDING UP CAUSE NO. 18 OF 2007

IN THE MATTER OF THE COMPANIES ACT (REPEALED)

AND IN THE MATTER OF

UNICONSULT (KENYA) LIMITED

BETWEEN

ANASTACIA WANGECHI MBAU PETITIONER

AND

UNICONSULT (KENYA) LIMITED RESPONDENT

AND

EUSTACE KITHINJI MUTEA 1ST INTERESTED PARTY

JOSEPH NDIRITU KIRUMBA 2ND INTERESTED PARTY

RULING

1. The application for consideration is the Company's Notice of Motion dated 2nd March 2020 made under **Order 42 rule 6** of the **Civil Procedure Rules**. It seeks an order of stay of execution of the judgment delivered on 18th February 2020 on behalf of Sewe J., in which the court ordered winding up of the Company under the provisions of **section 219(f)** of the **Companies Act (Repealed)**. The court reserved the appointment of a Liquidator for hearing on notice.

2. The application is supported by the affidavit of Engineer Daniel Njogu Ndungu sworn on 2nd March 2020. The application is opposed by the petitioner, Anastasia Wangechi Mbau sworn on 7th May 2020. The interested parties, as directors and shareholders of the Company, also filed a Notice of Motion dated 10th August 2020 seeking orders of stay. The application was supported by the affidavit of Engineer Eustace Kithinji Mutea sworn on 11th August 2020. I directed that both applications be heard together.

3. The parties canvassed the application by oral and written submissions. Although the parties have raised many technical issues regarding the applications and affidavits. I do not intend to deal with them as I do not consider them germane to the resolution of the substance of the application for stay of execution pending appeal. The court is guided by the provisions of **Order 42 rule 6(2)** of the **Civil Procedure Rules**.

6(2) No order for 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 the application is 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.

4. The Company was incorporated by the interested parties and the petitioner's husband, who is now deceased, as shareholders. Following his death, a dispute arose as to her entitlement as the beneficiary of the deceased's estate. As a result, she filed this petition which was concluded in her favour. The Company and interested parties have now exercised their undoubted right of appeal.

5. Having heard submissions of all sides and considered the depositions, what is clear is that the Company, an engineering consulting company, is a going concern. It has substantial contracts with the Government of Kenya through its agencies including Kenya Roads Board, Kenya National Highway Authorities, Kenya Rural Roads Authority and the Northern Water Service Board. According to the deposition, it has 30 employees and an average of 40 casuals per month who work for it. It is a matter of fact that a winding up order is a death sentence for a company and if implemented, a successful appeal may not reverse its consequences for it and third parties.

6. The position of the petitioner is that she is entitled to her deceased's husband's share of the Company. Since the death of her husband, she had not been compensated for his share in the Company. This dispute has been in our court's for a period of about 13 years. Any further stay would deny her the fruits of the judgment. Even though I hold that the Company will suffer substantial loss, the petitioner's position must be secured pending the appeal as required by the law.

7. Neither the Company nor the interested parties, proffered any form of security in line with the requirements of **Order 42 rule 6** of the **Civil Procedure Rules**. At the hearing, I asked counsel for the Company the nature and extent of the security it would be willing to offer. Counsel responded that the matter was within the court's discretion. The 1st and 2nd interested parties, as shareholders of the Company, have not indicated the nature and extend of security the court should order.

8. Counsel for the Company informed the court that at some point, the petitioner had been offered Kshs. 1,500,000.00 and a vehicle but she only took the vehicle and rejected the cash. In response, Counsel for the respondent, stated that the offer was not made in good faith as it was not based on the true value of the Company. He stated that the Company had failed to disclose essential information to enable her get a true value of the Company's business undertaking.

9. At the end of the day, I have to balance the position of the Company and that of the petitioner. The Company is a going concern providing consulting engineering services. It has substantial contracts and the deceased's share must have a reasonable value. Even if I accept that that the petitioner's share was valued at Kshs. 1,500,000.00 by the Company as a starting point, inflation on the said sum, the nature of its business, the fact that the petitioner is still a shareholder and prima facie entitled to dividends, if any, and doing the best I can in the circumstances, I shall order security of Kshs. 10,000,000.00 in the form of a bank guarantee.

10. For the reasons I have set out above, I allow the Notice of Motion dated 2nd March 2020 and order as follows:

(a) A stay of execution be and I hereby issue pending the hearing and determination of the intended appeal from the judgment and decree dated 18th February 2020.

(b) That the Company shall provide a Bank Guarantee from a reputable bank in favour of the petitioner for Kshs. 10,000,000.00 within 30 days from the date hereof pending the hearing and determination of the intended appeal.

(c) That in default of (b) above, the order of stay shall lapse automatically without any further order of the court.

(d) That the order of stay shall remain in force for one year unless otherwise extended by this Court or the Court of Appeal.

(e) Costs of this application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 14th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Mburu instructed by J. M. Mburu and Company Advocates for the Company/Applicant.

Mr Odhiambo instructed by Riunga Raiji and Company Advocates for the Petitioner/Respondent.

Mr Ibrahim instructed by Nyiha Mukoma and Company Advocates for the Interested Parties.