



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 008 OF 2020**

**(FORMERLY NAIROBI ELC NO. 1132 OF 2015)**

**BETWEEN**

**DAVID NJIHIA MBUGUA ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL KIANIA MBUGUA..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MONICAH WANJIRU MBUGUA .....1<sup>ST</sup> DEFENDANT**

**JANE WAMBUI MBUGUA..... 2<sup>ND</sup> DEFENDANT**

**RULING NO. 2**

1. The Plaintiffs have moved the court by a Notice of Motion dated 7<sup>th</sup> September 2020 made, inter alia, under **Order 42 rule 6** of the **Civil Procedure Rules** seeking the following order:

*[3] THAT a stay of execution of the order issued on 3<sup>rd</sup> August, 2020 do issue pending the hearing and determination of this appeal.*

2. The application is grounded on the supporting and supplementary affidavit of Paul Kiania Mbugua sworn on 7<sup>th</sup> September 2020 and 30<sup>th</sup> September 2020 respectively. The application is opposed through the replying affidavit of Jane Wambui Mbugua sworn on 24<sup>th</sup> September 2020.

3. Since the applicant seeks to stay the orders made on 3<sup>rd</sup> August 2020, a brief background of the matter leading up to the order is necessary. The Plaintiffs are the sons of Johnson Mbugua Mugo (“Mugo”) through his deceased wife Mary Wanjiru Mbugua while the 1<sup>st</sup> and 2<sup>nd</sup> defendants are his wives. The dispute between the parties revolves around a company, J.M. Mugo Investments Company Limited (“the Company”) incorporated as a family company. Although the plaintiffs’ shareholding in the Company is contested by the defendants, the plaintiffs, in their plaint, admit that, “*The Defendants are the majority shareholders of the company while the Plaintiffs were the minority shareholders in the said family company.*”

4. The gravamen of the plaintiffs’ case as set out in the plaint dated 4<sup>th</sup> November 2015 concerns a property known as LR No. 1/543 (Original No. 1/148/3) (“the suit property”) which was originally owned by the Company. By a conveyance dated 14<sup>th</sup> August 2015, the Company transferred the suit property to the defendants as proprietors in common in equal shares.

5. The plaintiffs contended that the conveyance of the property was fraudulent and to the detriment of the Company as Mugo was mentally indisposed. In order to challenge the conveyance while admitting that they could not act on behalf of the Company as minority shareholders, the Plaintiffs filed **Nairobi ELC Misc. No. 290 of 2015 (David Njihia Mbugua and Paul Kiania Mbugua v Monicah Wanjiru Mbugua and Jane Wambui Mbugua)** seeking an order that, “*the applicants be granted leave to institute a derivative suit.*” The Defendants

also filed an application dated 18<sup>th</sup> April 2019 seeking to strike out the suit and **Nairobi ELC Misc. Application No. 290 of 2015** on grounds, inter alia, that the plaintiffs had not obtained leave to institute a derivative action.

6. I heard both applications together and by the ruling dated 3<sup>rd</sup> August 2020, I held as follows:

*[38] Since this matter is to be resolved by reference to sections 238, 239 and 341 of the Companies Act, I am not convinced that the Plaintiffs have made out a case for grant of permission to proceed with this suit as a representative suit. The suit property belonged to the Company, the acts complained were within the power of the Company and even if the suit proceeded and was successful, the same acts would be ratified by the Company.*

*[39] Since I have declined to grant permission for the plaintiffs to continue with this suit as a derivative suit, I dismiss the application in Nairobi ELC Misc. Application No. 290 of 2015. Consequently, this suit is hereby struck out with costs to the defendants.*

7. It is the above order that the Plaintiffs now seek to stay. It is not disputed that the Plaintiffs have now evinced their intention to appeal as they have lodged a Notice of Appeal dated 6<sup>th</sup> August 2020 and a Memorandum of Appeal being **Civil Appeal No. E288 of 2020**. The gravamen of the application is that the plaintiffs are apprehensive that the Defendants will sell the suit property and have indeed started sending prospective buyers to view the premises. They contend that they and the Company will suffer substantial loss if the suit property is sold and if an order of stay of execution is not granted pending the hearing of the appeal, the property will be sold and the Company will not have any asset in the future. The Plaintiffs are also ready and willing to abide by any reasonable conditions that this court may impose for the grant of the order of stay.

8. The Defendants have opposed the application on the ground that I have already dismissed the oral application for stay when the ruling was delivered on the ground that there was nothing to stay hence the application is *res judicata*. In addition, Jane Wambui Mbugua further deponed that the Plaintiffs have filed this application in order to unjustly deny them the use and benefit of the suit property. She complained that the Plaintiffs' registered a caveat against the suit property which was subsequently removed. Further, that the Plaintiffs instigated criminal proceedings against them and caused the Director of Criminal Investigations to place a restriction on the suit property which is still in force. The Defendants contend that since the restriction is still in force they cannot deal with the suit property; a fact the Plaintiffs have failed to disclose. The Defendants also state that the Plaintiffs have control over the suit property and continue to enjoy its rental income.

9. Both parties filed written submissions in support of their respective positions. The preliminary and substantial point for determination is whether this court can grant an order of stay in light of the fact that the order of 3<sup>rd</sup> August 2020 resulted in dismissal of the Plaintiffs' application for permission to continue the suit as a derivative action and for striking out of the suit.

10. The principles governing the grant of an order for stay pending appeal are set out in **Order 42 Rule 1 and 2** of the **Civil Procedure Rules** which provides as follows:

*42(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order...*

*(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 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.*

11. A reading of the aforesaid provision contemplates that the order sought to be stayed is capable of execution. In this case the order appealed from is the order dismissing the application for permission to lodge a derivative suit and striking out the suit. Both orders are negative in nature and do not give rise to any positive action which can be stayed. In short, there is nothing to be stayed. In **Western College of Arts and Applied Sciences v Oranga and Others [1976] 1 KLR 63**, the Court of Appeal observed as follows:

*But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for stay, it is so ordered.*

12. The same position was taken by the Court of Appeal in **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) Civil Application No. NAI 133 of 2015 [2015] eKLR** where Kantai JA., observed that:

*An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:*

*‘..... an order for stay of execution must be intended to serve a purpose .....’*

13. As there is no order to stay, the Notice of Motion dated 7<sup>th</sup> September 2020 is now dismissed with costs.

**DATED and DELIVERED at NAIROBI this 13<sup>TH</sup> day of NOVEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Chigiti, SC., instructed by Chigiti and Chigiti Advocates for the plaintiffs.

Ms Mutua instructed by Miyare and Company for the defendants.