



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 156 OF 2015

1. MOHAMED BASHEIKH ALI

2. YUSUF M. ABOUBAKAR.....APPLICANTS

VERSUS

1. PETER NDINGILA

2. REGISTRAR OF COMPANIES

3. TRANSNATIONAL BANK LIMITED.....RESPONDENTS

R U L I N G

1. There is before court an application dated 17/8/2017 seeking in the main an order of stay of execution on enforcement of the ruling of this court dated and delivered on the 12/7/2017 pending the hearing and determination of an appeal to the Court of Appeal.

2. The application is grounded on the facts that unless stay is granted, the appeal will be rendered nugatory. There is an affidavit in support sworn by the Applicant/original 4th Respondent/Applicant, which only says that unless stay is granted the appeal will be rendered useless and his rights will be infringed.

3. There was additionally filed an affidavit of service sworn by on URBANUS KIOKO MUSYOKI which sufficiently prove that the application was served on the advocates for the original applicants as well as the advocate for 1st original Respondent but none of the two ever filed any responses to the application. Consequently and in terms of Order 51 Rule 14 (4) the matter proceeded *ex parte*. That order notwithstanding the duty of the court remains to give orders only pursuant to the law as applicable.

4. Order 42 Rule 6(2) provides:-

“No order for stay of execution shall be made under subrule (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”.

5. Even though I appreciate that the Applicant, CORNELL SHISANYA is a layman and acts in person, the law is blind to status and the onus of every litigant must be remain even and the same. The onus on the applicant as directed by the law is that he has to meet the thresholds of the statute for grant of stay. He must demonstrate substantial loss to be occasioned to him if stay is denied; that he has brought the application without undue delay and lastly that he has availed security for the due performance of the decree that might ultimately fall due for performance by him even after the conclusion of the appeal.

6. The affidavit in support of the application is to say the least sloven and cursory. It alleges that the appeal will be rendered useless and his rights infringed without giving an explanation of what would make the appeal useless and what rights would be infringed. As it were words have been thrown at the Court without attempt at substantiation. That is not enough to discharge the burden on the application.

7. To this court the purpose of an order for stay pending appeal is to preserve and maintain the substratum of the litigation to obviate prospects of dissipation to defeat the possible outcome should the appeal succeed. Put the others way, it is intended to avoid the ultimate decision by the court, should the appeal succeed, being rendered merely academic. It is a discretionary jurisdiction intended purposely to serve the interests of justice between the parties.

8. Even with the dearth of detail from the applicant, I have put due consideration to the interest of justice of the case between the parties and what would become of the appeal should I decline to grant stay. That must be deciphered from the ruling sought to be appealed against.

9. The long and short of the, impugned ruling is that it restored the original applicants to their positions as directors and shareholders of the company on the basis of what the court considered to have been on unlawful removal. Now, to stay that order and therefore allow the company to continue operating as if the changes have not been faulted, would be, to this court, not only unjust but would be to turn a blind eye to what the court has already found, in its own judgment, to have been unlawful and deprivation of property.

10. I as a court, will never proceed from the stand point that an order of stay should be employed to perpetuate an *ipto facto* impropriety. In any event, if the court of appeal finds for the applicant and reverses this court, the most that would have happened would be to keep the Applicant off the running of the company. Any losses that may result, if any shall have been proved, shall surely be measurable in monetary terms and thus not incapable of computation and reparation. The substratum of the appeal shall not have been changed so much so that a successful outcome is rendered nugatory.

11. It would be different, for example, if there would have been availed to court evidence that the other directors, including the original 1st Respondent, were intent and hell-bent of alienating the company, its assets and leaving jurisdiction or just winding it up.

12. For the above findings, I do not think it is worth the effort delving into the questions of expeditious filling of the application or even the question of security being offered. Those are consideration that would become due if the first test, substantial loss, would have been established.

13. The upshot is that the application lacks merit, the same is dismissed but as the same was never opposed, I make no orders as to costs.

Dated and delivered at Mombasa on this 28th day of August 2017.

P. J. O. OTIENO

JUDGE