



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**WINDING-UP CAUSE NO. 42 OF 2015**  
**IN THE MATTER OF THE COMPANIES ACT (CAP. 486 OF THE LAWS OF KENYA**  
**IN THE MATTER OF WINDING UP OF CONSOLIDATED MARINE CONTRACTORS LTD**  
**(COMARCO LTD)**

**RULING**

1. In a Ruling delivered on 22<sup>nd</sup> April, 2016, the Court granted Leave to the Petitioner to amend her Petition to add that the Petition was also brought in her capacity as an Executor of Giani Luigi Antoni (Deceased). In that Ruling Kariuki J. dismissed the Respondent's Preliminary Objection that the Petitioner lacked locus standi to bring the Petition and that it was fatally defective for non-compliance with Rule 25 of the Companies (Winding Up) Rules.
2. Apparently aggrieved by that decision, the Respondent filed a Notice of Appeal dated 29<sup>th</sup> April 2016 of its intention to appeal against the whole of the said decision. On 20<sup>th</sup> June, 2016, the Respondent filed the Application now before Court which seeks to have the hearing of the Petition stayed pending the hearing and determination of the intended appeal. The Chamber Summons is expressed to be brought under Section 3A of The Civil Procedure Act and Rules 5(2), 25 and 203 of The Companies (winding up) Rules. That is the Application for my determination.
3. In support of that Application is an Affidavit sworn by Jorgen Horsbol Nielsen on 15<sup>th</sup> June 2016. He describes himself as a Shareholder and Director of Consolidated Marine Contractors Ltd. (Comarco Ltd) (**the Company**). The Company is the subject of these Winding Up proceedings. He reiterates the position that the Petitioner is not a Shareholder of the Applicant Company and does not have legal capacity or locus standi to present the Petition against the Company. That, this Court therefore has no jurisdiction to hear the Petition.
4. He further deposes that the issues of the Petitioner's locus standi or capacity to institute the present Winding Up Cause prior to the said amendment and Jurisdiction of Court to hear the Petition, have been determined by the Court in the impugned Ruling and the same cannot be revisited at the hearing of the Petition. He then states in paragraph 15 of his Affidavit,

*“If the Petition or Winding Up proceeds to hearing on 1<sup>st</sup> July 2016, then the Company's statutory right of appeal against the said decision will be defeated, and the appeal will be rendered nugatory, as the whole purpose and object of the appeal is to determine, first, whether the Petitioner could bring the present Petition and/or seek the relief to amend it as above, and secondly, whether the Court had jurisdiction to hear the said application for amendment”.*

5. The Application is opposed and Petitioner did so in a Replying Affidavit sworn on 29<sup>th</sup> June, 2016. She depones that the two months delay in filing the Application is inordinate and that the Company is yet to lodge an Appeal in accordance with the Court of Appeal Practice Directions. Further that Company has neither demonstrated that it stands to suffer any substantial loss should the Petition proceed nor has it offered security in respect of any orders that may be made from the Amended Petition.

6. These Winding Up proceedings were presented on 9<sup>th</sup> November 2015 before the coming into effect of The Insolvency Act 2015. And although the present application was filed after part VI (**on Liquidation of Companies**) was brought into force through Legal Notice No.1 of 15<sup>th</sup> January 2016, the provisions of the retired statute applies to this dispute by virtue of the Transitional and Saving provisions of The Insolvency Act. Section 734 (2) of The Insolvency Act Provides:-

*“Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement”*

7. On the procedure for applications of Stay under the retired Act, Judge Havelock, **In the matter of Maguta Investment Ltd** [2013] eKLR, held as follow:-

“Under Rule 203 of the Companies (Winding Up) Rules, the procedure on how to deal with application of the nature of the instant matter is provided for. The Rule reads:

**‘In all proceedings in or before the Court, of any judge or officer thereof, or over which the Court has jurisdiction under the Act or these rules, where no provision is made by the Act or these rules, the practice procedure and regulation in such proceedings, shall unless the Court otherwise directs, be in accordance with the rules and practice of the Court’.**

The Companies’ Winding Up rules do not make express provisions for stay Orders in its Rules. As a result therefore, the rules that govern civil proceedings are applicable. ie. the Civil Procedure Rules, 2010. Under those Rules, Order 42 Rule 6 covers the point”.

I agree.

8. Order 42 Rule 6(1) of The Civil Procedure Rules reads:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, and whether the application for such stay shall have been granted or refused by the court appealed 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 thereon 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”.

9. For purposes of this application, Order 42 Rule 6(4) is relevant and provides:-

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”.

10. This is because of an argument by the Respondent that there is no Appeal to the Court of Appeal. But my finding is that by filing the Notice of Appeal dated 29<sup>th</sup> April 2016, the Applicant satisfies the provisions of Rule 42 6(4) above. There is an Appeal as envisaged by the Rules of the Court of Appeal.

11. What are the Principles to be applied by Court in considering an application for Stay of Proceedings? In the case of **Global Tours & Travel Ltd (Nrb Hc Winding Up Cause No.43 of 2000)** (cited with approval by Githua J. in **Kenya Power & Lighting Company Id Vs. Esther Wanjiru Wokabi** [2014] eKLR and Ojwang J. (as he then was) **in Sidra Motor Sales & Spares Ltd vs. Onesmus Nzioki Mwinzi & another** [2010] eKLR), Ringera J. (as he then was) held,

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by...virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice or order to stay of proceedings and, if it is, on what terms it should be granted. In deciding whether or not to order stay the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, 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 the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

This Court agrees substantially with the holding of learned Judge but as the Appeal herein is from a decision of this Court, it is not in my place to consider whether or not the intended Appeal is arguable. If this Application were before the Court of Appeal then by dint of its own Jurisprudence, that Court would have to consider the arguability of the Intended Appeal. To ask me to do so in this application would be to ask me to comment on the correctness or otherwise of the Decision of this Court. An embarrassment that must be avoided!

12. Staying Proceedings is not without implications. In Halsburgs Laws of England 4<sup>th</sup> Edition, volume 27 at page 330, the Author observed:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt not to be allowed to continue”.

In considering a request for Stay of proceedings the Court keeps the above in mind and would have to consider the following:-

- a) Has the Applicant demonstrated risk of substantial loss if stay is not granted?
- b) The need for expeditious disposal of cases.
- c) The optimum use of scarce Judicial resources and time.
- d) Conditions that may attach if stay is granted.

13. The Application is supported by a 17 paragraph Affidavit of Jorgen Horsbol Nielsen. Only one paragraph seems to relate to the possible loss to be suffered by the Applicant if stay is not granted. In paragraph 15 it is deponed;

*“If the Petition or Winding Up proceeds to hearing on 1<sup>st</sup> July 2016, then the Company’s statutory right of appeal against the said decision will be defeated, and the appeal will be rendered nugatory, as the whole purpose and object of the appeal is to determine, first, whether the Petitioner could bring the present Petition and/or seek the relief to amend it as above, and secondly, whether the Court had jurisdiction to hear the said application for amendment”.*

14. What is to be made of this disposition? The Applicant has an appeal and nothing stops it from prosecuting that Appeal as it resists the Winding Up Cause. There is no knowing which proceeding will

conclude first. The Applicants apprehension, as stated, is that if stay is not granted then the Appeal will be rendered nugatory. This apprehension assumes that the Winding Up Cause will be heard and determined before the Appeal.

15. The hearing of the Winding Up Cause is yet to begin and this Court is not told the basis of that assumption. Further, this Court is not told of any imminent step in the Winding Up proceedings that may cause hardship or substantial loss to the Applicant. It cannot be that just because the Appeal is on a question of jurisdiction that Stay should automatically issue. The Court must be satisfied that there is sufficient cause to grant the order. One such cause is that substantial loss may result to the Applicant if Stay is not granted. This has not been demonstrated. And no other sufficient cause has been shown.

16. The Court may have taken a different view if the Applicant was seeking to stay the implementation of a Winding up Order. The proceedings have not reached there.

17. The Application for Stay of proceedings is without merit and is declined. The Application of 17<sup>th</sup> June, 2016 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 27<sup>th</sup> day of October, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Agwenyi h/b Ngige for Petitioner/Respondent

Ohange for Oyatsi for Company/Applicant

Alex - Court clerk