



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 28 OF 2012

IN THE MATTER OF: NUCLEAR INVESTMENTS LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT

(CAP. 486 LAWS OF KENYA)

AND

**IN THE MATTER OF: A PETITION BY MINORITY SHAREHOLDERS UNDER THE
PROVISIONS OF SECTION 135, 211, 212, 218 AND 219 OF THE COMPANIES ACT**

BETWEEN

MARTIN NJUGUNA KURIA 1ST PETITIONER
SAMUEL MWAURA GICHUMBU 2ND PETITIONER
STEPHEN MAGI KARITU3RD PETITIONER
JOHN GITHARI NDUNGU4TH PETITIONER
PETER NDUNGU NJUGUNA5TH PETITIONER
STEPHEN MWANGI GICHUHI 7TH PETITIONER
JOHN NJOROGE CHEGE8TH PETITIONER
DOMINIC MBUGUA GATHEA9TH PETITIONER
MARY KARANJA11TH PETITIONER
RACHAEL KARANJA 12TH PETITIONER

PETER NDEANI13TH PETITIONER

TARZAN IKAMA MBUGUA14TH PETITIONER

PETER MWANIKI MBUGUA 16TH PETITIONER

VERSUS

NUCLEAR INVESTMENTS LIMITED 1ST RESPONDENT

NAFTALI GICHOBI MUTUGI 2ND RESPONDENT

MOSES NOTTINGHAM MWANGI 3RD RESPONDENT

JOHN MAINA KIGUNDU4TH RESPONDENT

STEPHEN NJOROGE KIBOI5TH RESPONDENT

RUEL NDUNGU KINYANJUI6TH RESPONDENT

JOHNSON MUNENE MURIUKI 7TH RESPONDENT

FRANCIS MWANGI MWENDIA 8TH RESPONDENT

R U L I N G

1. The Respondents herein filed a Notice of Motion dated 3rd February 2014 seeking a stay of execution pending appeal of this Court's Orders given on 28th January 2014 which had arisen out of the Petitioners' Notice of Motion dated 10th September 2013. The Respondents' said Application was brought under the provisions of **Order 42 rule 6 (1)** of the *Civil Procedure Rules, 2010* and, further, was brought under Certificate of Urgency. The said Application was predicated on the following grounds:

“a) The respondents/applicant has appealed against part of the ruling/orders delivered on 28.1.2014 by the Honourable Mr. Justice J. B. Havelock.

b) The applicant has filed an appeal in the Court of Appeal at Nairobi, of the same parties and has a good and arguable appeal from the ruling/Order of this court given on 28th January 2014 which appeal raises substantial issues of law and facts and has very high chances of success.

c) The petitioners/respondents will move swiftly and expeditiously any time from now to effect the orders and attach the applicants property.

d) Effectively, the order calls upon the respondents/ applicants to reinstate and acknowledge the petitioners as members of the 1st respondent/ applicant and grant them privileges and rights appertinent to members, while the said persons voluntarily relinquished their membership in the 1st respondent/applicant. The court order will immensely interfere with the internal management of the company.

e) The order is oppressive and the court equally will have difficulty in supervising

it, which will prejudice the 1st applicant's business. To enforce the order as it stands will also inflict injury to other members who are not enjoined in the suit.

f) That if execution were to proceed while the respondents/applicants are pursuing an appeal, it will greatly prejudice the applicant, destroy the substratum of the appeal and render the applicants/appellants appeal if successful nugatory.

g) The applicants are ready to comply with all conditions (if any) that may be laid down by the court including order for security for the due performance of any order/decreed that may ultimately become binding on them.

h) This application is brought without undue delay.

i) The applicants stand to suffer substantial and hefty loss unless an order for stay of execution is granted.

j) The petitioners definitely will not be in a position to refund the money and should it be paid out to the petitioners it will remove the said money from the reach and control of the applicants.

k) An award for payment of dividend at an interlocutory juncture, amount to awarding special damages, which has not been pleaded, and strictly proved by the claimant as statutorily required.

l) By the court declaring the petitioners as members of the 1st respondent as well as for payment of dividends at an interlocutory stage, there will be nothing to go to trial which is prejudicial to the respondents' case".

2. In an initial response to the Respondents' said Application, the Petitioners filed a Notice of Preliminary Objection dated 12th February 2014. That Preliminary Objection was predicated on the following grounds:

“1. The Defendants application is misconceived, unprocedural, lacks merit and is an abuse of the Court process as it is bad in law and incurably defective as it is trying to delay justice.

2. That the applicants application seeking the stay of the order issued by this honourable court offends Order 6 Rule 2 in the sense that:-

i. The Applicants have not proved to the courts satisfaction that they will suffer substantial loss.

ii. There is no evidence by the applicant of serious threat of execution.

3. That there is a risk of prejudice and increase of continuous loss if the stay is granted against the respondents and that the applicants right to appeal will not be rendered nugatory by a refusal of stay by this honourable court.

4. That the Applicants have no intention of respecting the orders of this court, their main intention is to get rid of the petitioners from the company, the question whether the petitioners are shareholders or not is still pending before this court, appealing the same will render the matter sub judice and the balance of convenience favours refusal of stay by this honourable court.

5. That the application ought to be dismissed “in limine” as it is a clear misrepresentation of Order 42 Rule 6 (1) of the Civil Procedure Rules 2010”.

3. When counsel for the parties appeared before Court on 13th February 2014, Mr. Kiarie the learned counsel for the Petitioners pointed to the Preliminary Objection and maintained that the Respondents' Application before Court was a misrepresentation of **Order 42 Rule 6 (1)**. The application was seeking a stay of execution pending appeal but the Respondents had not detailed as to how they would suffer substantial loss. At the present stage, the Petitioners had not sought to execute any Decree herein. In fact the whole question of whether the Petitioners were still shareholders in the first Respondent company was awaiting determination at the substantive hearing of the suit in due course. As a result, counsel maintained that such matters were *sub judice*. Mr. Kiarie expressed surprise at the Application and submitted, from the bar, that the Petitioners had organised a delegation of their number to discuss the arrears of dividends, bonus etc. which they had not been paid, with the officials of the first Respondent company. Counsel noted that the Respondents' Application envisaged the establishment of a joint account into which the arrears that the Petitioners felt that they were owed, could be paid.
4. Mr. Mahinda, learned counsel for the Respondents, submitted that there was no point of law which had been raised before Court in relation to the Preliminary Objection. All the issues that counsel for the Petitioners had raised were of fraud and could only be remitted to Court through Affidavit in response to the Supporting Affidavit of the Application. As regards the matter being *sub judice*, counsel noted that the Respondents were aggrieved at part of the Court's said Ruling and they have a right of appeal. A Notice of Appeal has been filed as well as this Application for stay of execution of this Court's Orders in relation to the Petitioners being given access to the first Respondent's car parks along with stay as regards the payment of arrears of dividends and bonuses to the Petitioners. The latter had rendered a bill to the Respondents for Shs. 3.6 million as to which they had no knowledge as to what it related to. The Respondents were having difficulty as a result of this Court's Orders and consequently were seeking to go to appeal with a stay in place. Counsel emphasised that the Respondents were not looking for a stay of proceedings. There is no bar to the Petition herein proceeding to hearing. In Mr. Mahinda's view the Petitioners could only respond to the issue of substantial loss by Affidavit, not by way of Preliminary Objection. It seemed that the Petitioners were only interested in getting paid. The position as to whether the Petitioners were executing the Decree was again a matter of fact, not of law. In this regard, the Court was unable to understand counsel's submission, as the Petition herein has yet to be heard and until the same has been determined, no Decree can arise.
5. In a short reply, Mr. Kiarie for the Petitioners noted that Mr. Mahinda had complained that the Preliminary Objection was based on matters of fact not of law. To this end, counsel referred the Court to **Order 42 rule 6 (2)** of the *Civil Procedure Rules, 2010*. That reads as follows:

“42. 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appeal 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, and whether the application for such stay shall have been granted or refused by the court appeal 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.

(2) 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.**

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit

a stay of execution pending the hearing of a formal application.

(4) 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.

Mr. Kiarie went on to say that the Respondents had provoked the Petitioners by serving the present Application, as they had thought that the Court had left the parties to sort out the issues as between them and was not prepared to interfere in the internal workings of the first Respondent company. As far as the Application was concerned, the Respondents had failed to show any substantial loss as required by the above rule.

6. A Preliminary Objection is raised purely on a point of law or procedure. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696 Law, J.A. (as he then was) held at page 700 *inter alia*;

“...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”. (Underlining mine).

It seems from the Petitioners’ Preliminary Objection that they maintain that there are 2 points of law raised by the same firstly, that the Application of the Respondents is *sub judice* and secondly that, as required by Order 42 rule 6, the Petitioners have failed to show that they will incur substantial loss as a result of the Application being refused. Further, but outside a point of law, the Petitioners had detailed that there is no evidence before the Court brought by the Respondents as to a serious threat of execution.

7. There is no question that what is *sub judice* before Court is whether the Petitioners are still shareholders of the first Respondent company or otherwise. That fact is to be determined at the hearing of the Petition herein in due course which the Respondents maintain may proceed as all they are looking for at this stage is a stay of execution of this Court’s Orders as contained in its Ruling delivered on 28th January 2014. The Respondents are not looking for a stay of proceedings. To this Court’s way of thinking, the Respondents’ Application before Court for stay of execution is not *sub judice* and I hold so. With regard to the question of whether the Respondents will suffer substantial loss, I have carefully perused the Affidavit in support of the stay Application sworn by **Naftali Gichuki Mutugi** on 3rd February 2014. I cannot see the difficulty therefrom, from the Respondents’ point of view, as to the amount of payment of dividends and bonuses to the Petitioners as continuing shareholders of the first Respondent. The Respondents must be fully aware as to amounts paid to other shareholders apart from the Petitioners. To my mind, it only amounts to a simple calculation to be made based on what has already been paid to others. What is of greater concern is the privileges accorded to shareholders in terms of the use of the first Respondent’s facilities including bus terminals, car parks and petrol station. The Affidavit in support of the Application details that there have been differences of opinion in this regard which may turn physical. To my mind, such would amount to substantial loss possibly not to all the Respondents but almost certainly to the first Respondent Company.
8. As a result, I am of the opinion that the Respondents’ Application before Court dated 3rd February

2014 merits airing and almost certainly requires opposition, if considered necessary by the Petitioners, by the filing of a Replying Affidavit. Accordingly, I dismiss the Petitioners' Preliminary Objection with costs to the Respondents.

DATED and delivered at Nairobi this 19th day of February, 2014.

J. B. HAVELOCK

JUDGE