



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 19 OF 2009

IN THE MATTER OF ELEGANCE INVESTMENT LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF
THE LAWS OF KENYA

BETWEEN

ANTONY CHINEDU

IFEDIGBO:.....PETITIONER

VERSUS

**ELEGANCE INVESTMENT LIMITED:.....1ST
RESPONDENT**

**JOYCE AKINYI OCHIENG:.....2ND
RESPONDENT**

RULING

1. The Notice of Motion application before the court is dated 17th June 2014 and is filed under Section 223 of the Companies Act and the inherent jurisdiction of the court. The application seeks the following orders:-
 - a. *That the application be certified as urgent and be heard ex-parte in the first instance.*
 - b. *That there be a stay of execution of the decree issued herein on the 19th May 2014 by the Honourable (Mr.) Justice E.K.O. Ogola pending the hearing and determination of this application.*

- c. ***That there be a stay of execution of the decree issued herein on the 19th May 2014 by the Honourable (Mr.) Justice E.K.O. Ogola pending the hearing and determination of the intended appeal.***
- d. ***That costs incidental to this application abide by the result of the intended appeal.***

2. The application is premised on several grounds set out therein and is supported by affidavit of **Joyce Akinyi Ochieng** dated 17th June 2013.
3. The brief history of the application is that this court on 19th May 2014 delivered a Judgement and decree herein in favour of the Petitioner which Judgement and decree in effect wound up the 1st Respondent's Company herein. It was further declared that the assets of the 1st Respondent shall be distributed in specie and an Official Receiver in Bankruptcy was appointed to be the Official Receiver for Winding Up purposes.
4. The Applicant, being aggrieved by the said Judgement has since allegedly filed a Notice of Appeal against the same. It is now submitted by the Applicants that they will suffer substantial and irreparable loss and damage if a stay is not granted since the Applicant solely depends on the business run at the Deep West, established by the 1st Respondent herein for survival. It is also submitted that unless the stay of execution is granted, the 1st Respondent which is the subject of these proceedings shall be wound up and dissolved prior to the hearing of the appeal thus rendering the intended appeal nugatory and in futility. Further, it was submitted that there exists alternative remedies to Winding Up the company, and if the stay is not granted, such remedies will no longer be available as the Company will be no more after the winding up, and that there will be no prejudice to be suffered by the Respondent if the stay is granted.
5. The application is opposed. The Respondent filed Statement of Grounds of Opposition in court on 18th July 2014, and submitting on the same, stated that there is no order or decree that is capable of being executed from the Judgement of this court delivered on 19th May 2014. It was further submitted that the Applicant has not met the conditions for grant of stay of execution, and that the orders are not available under Section 223 of the Companies Act Cap 486 of the Laws of Kenya. It was further submitted that there is no appeal as no notice of the same was attached to the application, and lastly that the application is an abuse of the process of the court.
6. I have considered the application and the opposing submissions. the issues which arise are as follows: -

- ***Whether under Section 223 of the Companies Act the orders sought can be allowed.***
- ***Whether there is evidence of an intended appeal or a Notice of Appeal.***
- ***Whether there is a decree capable of being executed.***

7. To address issue number one above, Section 223 of the Companies Act states as follows:-

“At any time after the presentation of the winding up petition, and BEFORE a winding up order has been made, the Company, or any creditors or contributory, may –

- a. ***where any suit or proceeding against the Company is pending in the High Court or the Court of Appeal, apply to the court in which the suit or proceeding is pending for a stay of proceedings therein.***

and the court . . . may stay or restrain further proceedings in the suit.

8. My understanding of this Section is that it refers to stay of proceedings after a presentation of a Petition has been filed. The court can allow such an application any time before a winding up order has been given. This position must be differentiated from that of stay for the purposes of appeal. A winding up order or decree can be appealed as any order of the court is appealed. Therefore, a stay for the purposes of appeal does not come under Section 223 of the Companies Act. The Applicant cited and relied on the wrong provisions of the law. The proper provisions of

the law is Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 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. . .”***
9. The Applicant has not urged her application under Order 42 Rule 6. But even if she had, it is not evident what substantial loss the Applicant would suffer in the circumstances. The order winding up the Company is for the benefit of the Company, its contributors and creditors. The Official Receiver’s work is to receive and manage the assets of the Company for the benefit of all concerned. So, the Respondent cannot claim to suffer any loss, leave alone irreparable loss. While Section 223 of the Companies Act is not applicable, the Applicant has also not satisfied the demands of Order 42 Rule 6 of the Civil Procedure Rules for an order of stay pending appeal.
10. To address the second issue, I have not seen any copy of a Notice of Appeal. If it was there, it was not attached to the application. This court cannot ascertain whether indeed there is intention to appeal. A stay for the purposes of appeal is presumed on the existence of an appeal or intention to appeal. The evidence of such intention is a Notice of appeal which is missing in this application.
11. As to the last issue, that is, whether the decree is capable to being executed, the answer is in the affirmative. The court has already appointed Official Receiver of the Company, and they will execute their mandate and dissolve the Company. This is an action that can be stayed by this court if proper grounds exist for the same.
12. The upshot of the foregoing is that this application is denied.
13. The Applicant shall pay costs of the application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Ngania for the Petitioner

M/s Oyagi for the 2nd Respondent

Irene – Court Clerk