



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO 29 OF 2010
IN THE WINDING UP OF TATU CITY LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT
RULING

1. In his said ruling, the learned judge declined to wind up the said company. He stated as follows:-

The Petitioners/Applicants were aggrieved by the said ruling and filed a Notice of Appeal and Notice of Motion application dated 28th January 2013 and filed on 29th January 2013. The said application was brought under the provisions of Section 1A, 1B and IC (sic) and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 40 Rule 10 and Order 51 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. When the matter came up for highlighting of the written submissions, counsel for the Petitioners made a formal application to amend their said Notice of Motion. Prayer Nos (i), (ii) and (iii) are spent and the court will therefore not deal with the same. The said application sought the remaining following orders:-

1. Spent
2. **THAT this Honourable Court be pleased to stay the execution of the Judgment delivered on 18th January 2013 pending the hearing and determination of the appeal.**
3. L.R. No 117;
4. L.R. No 247/1 and L.R. No 248/5;
5. L.R. No 11287;
6. L.R. No 11289;
7. L.R. No 11428;
8. L.R. No 113/1;
9. L.R. No 7386
10. L.R. No 111/2 (amended to read L.R. No 110/2);
11. L.R. No 10877;
12. L.R. No 7787;
13. L.R. No 295/15

THAT the Company be restrained by an order of injunction from selling, subdividing, charging, mortgaging, letting or subletting without leave of this honourable court the following properties:-

1. L.R. No 117;
2. L.R. No 11294/2;

3. L.R. No 247/1 and L.R. No 248/5;
4. L.R No 11285;
5. L.R. No 11287;
6. L.R. No 11288;
7. L.R. No 11289;
8. L.R. No 10883/2
9. L.R. No 11428;
- 10.L.R. No 11486;
- 11.L.R. No 113/1;
- 12.L.R. No 113/2;
- 13.L.R. No 7386
- 14.L.R. No 111/2 (amended to read L.R. No 111/1);
- 15.L.R. No 111/2 (amended to read L.R. No 110/2);
- 16.L.R. No 7192;
- 17.L.R. No 10877;
- 18.L.R. No 6909 (amended to read L.R. No 6906);
- 19.L.R. No 7787;
- 20.L.R. No 5815
- 21.L.R. No 295/15

THAT the costs of this application be provided for.

4. **That the court shall not make a Winding Up Order since there was an alternative remedy available and that was acquisition of shares by the majority shareholder at a fair value;**

Kenya and at the London Court of International Arbitration;

determined by a reputable firm of accountants to be agreed upon by the parties failing which the arbitrator was to be appointed by the Chairman of Certified Public Accountants of Kenya.

3. **This court had jurisdiction to preserve the subject matter pending their intended appeal.**
5. **The Petitioners filed the Notice of Appeal on 21st January 2013 and had applied for certified copies of the proceedings together with the judgment to enable them lodge an appeal.**
7. **Although the Petitioners held 14.5% of the shares allotted in the Company, the court held that only 0.0001% of their shares would be bought by Cedar IV which the Court deemed as the alternative remedy.**
9. **During the pendency of the Petition herein which ends when the appeal is determined, the Company had arranged to dispose of the aforementioned properties without obtaining leave of this court to do so as was stipulated in Section 224 of the Companies Act.**
11. **The Petitioners who had brought the application herein without delay would suffer substantial loss which was unlikely to be compensated by way of damages if the judgment was not stayed and an injunction granted as prayed.**
6. He set out *extenso* the grounds in the face of the application in his affidavit and added that together with his mother and his sister, they held 14.5 % shares allotted by the Company and that a majority of the shareholders had admitted that he and his mother held at least 10% of the 1,574,993 shares in the Company. This put their stake at over Kshs 11 billion. He contended that the aforementioned learned judge observed that the value of the Company's assets was Kshs 78.5 billion. The Petitioners annexed copies of the ruling by the learned judge, the Notice of Appeal, Amended Notice of Appeal, letter requesting for the certified copy of the ruling and proceedings, a Chamber Summons dated on 1st December 2010 and filed on 2nd December 2010, an extract of a news item from the Saturday Nation dated 19th January 2013 showing the delivery of the said ruling to support its present application.
8. He averred that the present application was made in bad faith and was an attempt by the Petitioners to cripple the Company's operations and force its majority shareholders to buy out the Petitioners on their terms as had been observed by the learned judge in his said ruling. He further stated that the 1st Petitioner could not complain about the Company selling off parcels of land as

- he had in the past been involved in identifying prospective buyers and that in fact, agreements for sale had been signed. The Company annexed copies of emails confirming the 1st Petitioner's participation in its Replying Affidavit.
10. The deponent stated that it had demonstrated through the financing of the acquisition of all the Company's properties and assets that it had the necessary financial resources and the Petitioners' contention that it should be restrained from dealing with the properties in order to secure their position was mistaken.
 12. In response to the Company's Replying Affidavit, the 1st Petitioner swore a Supplementary Affidavit on 12th January 2013. He averred that the Company's Grounds of Opposition were based on a misapprehension of the law.
 14. They contended that although the court found that they had made out a case for winding up, it declined to wind up the Company and instead granted an alternative order. They were aggrieved with the said finding and intended to appeal against the same. They argued that it was necessary to preserve the subject matter of the suit, of which the Company had admitted was 10% because the Court of Appeal could express a different opinion from that of the learned judge. They were apprehensive that during the pendency of the Petitions, the majority shareholders had tried to dispose of the properties
 16. In **Re: African Safari Club** case, the court observed thus:-

In the **Re Lake Turners Ltd** case, the Court of Appeal had this to say:-

The Petitioners argued that Okwengu J (as she then was) and Mabeya J applied the principle espoused in the two (2) cases when they decided **Emma Muthoni Wambaa & Edwin Regeru vs Joseph Kibaara Kariuki Mombasa HCCC 274 of 2009** and **S.K. Macharia & Purity Gathoni Macharia Debtors Milimani BC Nos 25 and 26 of 2009** respectively. They submitted that the two (2) learned judges heard applications under Order 42 (6) of the Civil Procedure Rules, 2010 as interpreted by the Court of Appeal in **Madhupaper International Limited vs Kerr (1985) KLR 40 where at pp 840-841** where it was held that:-

In **Erinford Properties vs Cheshire County Homes (1974) 2 All ER 448**, also relied upon by the Petitioners, Megarry J observed as follows:-

In supporting their argument that the rules of natural justice should be observed, the Petitioners relied on the case of **Oloo vs Kenya Posts and Telecommunications [1982-88] KAR 650** where Madan J restated the holding of **Megarry J in John vs Ress [1969] 2 WLR 1294** which was as follows:-

On its part, the Company relied on their written submissions dated and filed on 27th February 2013. It argued that this court should make a distinction between jurisdiction of the Court of Appeal acting under Rule 5 (2) (b) of the Court of Appeal Rules, 2010 and that of the High Court under Order 46 Rule 2 of the Civil Procedure Rules, 2010. The Company took the position that the Court of Appeal and the High Court ought to apply different principles in considering an application for a stay of execution or for injunction pending appeal.

- **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order...**

23. **“The application for stay pertained to a negative order that was not capable of execution by enforcement. The applicant sought a restoration of the order for the payment of the compensation pending appeal which could not be done at the stage. The application for stay was to that extent misconceived...A “stay” does not reverse, annul, undo or suspend what already has been done or what is specifically stayed nor pass on the merits or orders of the trial court, but merely suspends the time required for performance of the particular mandates stayed, to be preserved a status quo pending appeal.”**

25. It also argued that certain conditions had to be met under Order 42 Rule 6 of the Civil Procedure Rules, 2010 before a stay of execution could be granted. The said Section provides as follows:-

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

26. The Company stated that the conditions to be made in an application under Order 46 Rule 6 (2) were reiterated by the Court of Appeal in **Carter & Sons Limited vs Deposit Protection Fund Board & Another Civil Appeal No 291 of 1997** and **Vishram Ravji Halai & Another vs Thornton & Turpin (1963) Limited Civil Application No Nai 15 of 1990** (unreported).
28. It was the Company's submission that the Petitioners would not be in a position to satisfy the condition of furnishing security bearing in mind the terms of the ruling by the learned judge. However, in the event that the court was to be inclined to allow the application herein, then it had to order that the Petitioners furnish security as the same was mandatory. It was emphatic that the court could not waive the same. It pointed out that **in Re: S.K. Macharia** case, the court ordered the applicants therein to deposit a total of Kshs 45 million in an interest bearing account.
30. For the reason that the court will not find the present application incompetent on that ground, it will therefore delve into the merits of the Company's argument that the suit, for purposes of Order 40 of the Civil Procedure Rules, 2010, had been determined and there was nothing left to be preserved. Further, once the ruling was delivered on 18th January 2013, the Petition died and the mere filing of Notice of Appeal could not breathe new life into this matter.
31. **"...the parties having agreed that all differences between them were to be referred to arbitration, and the terms upon which the matter was to go to arbitration having been settled by the court, that petitioner was not entitled to a winding up order. The judge in casu should therefore have dismissed the petition. It was no longer alive."**
32. **"The application was extraneous to the orders of the superior court and was to that extent misconceived."**
34. It was the Company's further submission that the subject matter herein was the Petitioners' shareholding and not the properties set out in the body of their application as the Company had a separate and distinct legal existence from its shareholders as was seen in the **Salomon vs Salomon** case. It contended that the Petitioners' intention was to cause it hardship and bring it on its knees by seeking an injunction on all its assets with a view to securing less than 16% shareholding. It equated this with a shareholder holding shares in a company such as Kenya Airways or Safaricom Limited seeking an injunction to ground aircrafts or base stations respectively. It urged this court to uphold the holding in the **Re: Erinford** case to the effect that a court would not grant an injunction where it would inflict greater hardship than it would avoid.
35. **"Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure in a company, the court has inherent jurisdiction to prevent abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition and staying all proceedings upon it..."**
37. The Company submitted that the question of the Petitioners' shareholding was a matter of determination by the appellate court. It contended that the Petitioners' submissions that Section 224 of the Companies Act had no further application once the ruling of 18th January 2013 was delivered. It therefore sought the dismissal of the Petitioners' application with costs to it.
39. They were categorical that this court could not act or serve as though it was an appellate court when deciding an application under Order 42 Rule 6 of the Civil Procedure Rules, 2010. It could not look at the Notice of Appeal to determine whether or not the Petitioners had an arguable appeal. It was also their case that the jurisdiction of this court was expanded when the Civil Procedure Rules, 2010 and Appellate Jurisdiction Act, 2009 were amended as was held in **Re: Lake Turner case**. It was their contention that the Company had based its case law on old injunction/ stay of execution of judgments/ orders jurisprudence. It urged this court not to confuse the jurisdiction of the Court of Appeal and the High Court under the respective provisions of the law and reiterated that **Re: Madhupaper** case was

relevant herein.

41. In any event, they stated, there was no hard and fast rule as regards the deposit of security and cited **Southern Credit vs Atlantic Products HCCC No 922 of 2000, Re: Africa Safari Club, Okello vs K-Rep Bank** to fortify their argument. They therefore reiterated their submissions and prayed that this court grants them the prayers as sought.
43. An intended appeal does not operate as a stay and an applying party is therefore obliged to bring an application to court and obtain orders for a stay of execution pending appeal under the Order 42 Rule 6 of the Civil Procedure Rules, 2010. A superior court to which an application for stay of execution or injunction pending appeal has been made must recognise that its decision for refusal to grant a stay of execution or injunction pending appeal can be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh what the impact to the parties' rights would be as a result of its refusal or acceptance to grant such an order.
44. **No order for stay of execution shall be made under subrule (1) unless:-**
 1. **Such security as the court orders for the due performance of such decree or order as may ultimately be binding upon on him has been given by the applicant."**
45. **"The application for the stay made before the High Court failed because the first of the conditions set out in... was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Company would be unable to pay the money.."**
47. It is not in dispute that the Petitioners filed the present application without any delay which fact the Company admitted in its written submissions. The ruling was delivered on 18th July 2013 and they filed the said application on 29th January 2013. In this regard, the Petitioners met one (1) of the requisite conditions.
48. **"...the process of execution...by itself does not amount to substantial loss.... This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party."**
50. The Petitioners argued that the sale of the properties which it sought to restrain the Company from disposing of would cause them to suffer substantial loss as their 14.5% shareholding had not been paid. As was rightly submitted by the Company, the Petitioners' interest was limited to the shareholding and not to the assets of the Company. A stay of execution can only be issued where the subject matter would dissipate thus rendering an appeal nugatory. The Petitioners' interest was monetary in nature.
52. In arriving at the said finding, the court has considered the holding in the case of **Re: Kenya Shell Limited** where, in respect of a natural person, Hancox JA (as he then was) held as follows:-

Weighing the assets of the Company which were valued at over Kshs 78 bn and an individual who was found to have a

good position and prospect, this court finds no difficulty in finding that, in the absence of any proof to the contrary, the Petitioners were unlikely to suffer substantial loss as they would recover any monies from the Company, in the event they were successful on appeal. This court therefore finds that the Petitioners have failed in meeting yet another of the requisites under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.

55. Having found that the Petitioners would only have satisfied one condition, being that of bringing the present application without any delay, the court finds that their application would have failed in its entirety. The court has considered the merits and demerits of the Petitioners' application as an ideal situation and expounded the real position on the ground as shown hereinbelow.

57. A careful reading of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 shows that an application for a stay of proceedings or execution of decree or orders must be one where there are proceedings or there is in existence, an order or decree which is capable of being executed or enforced to the detriment of the unsuccessful party. Order 42 Rule 6(1) of the Civil Procedure Rules provides as follows:-

It would not have been enough for the Petitioners to satisfy the three (3) conditions in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 as the same would have been within the context of Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010. The two sub-rules are dependent on each other and must be read together.

60. This court is therefore in agreement with the Company's submissions that there was no order or decree that was capable of being enforced or executed against the Petitioners. Indeed, that decree or order must be one which is capable of enforcement through any of the modes of execution envisaged under Order 22 of the Civil Procedure Rules, 2010. Further, as at this point, save for the hearing and determination of the Petitioners' application, there are no proceedings to be stayed at the High Court. There is no provision for staying a judgment as has been sought by the Petitioners. A stay pending appeal only relates to proceedings, order or decree. The Petitioners cannot therefore purport to bring in a new aspect of the law, being a stay of the judgment, in the guise that the overriding objectives have been expanded when such a scenario is clearly not provided for under the law.

62. In view of the fact that there had to be proceedings, decree or order in existence under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, before the Petitioners could bring the application and which this court has found none were there, the court finds that the present application would have no leg to stand on under this Order and would by no means succeed.

64. The Petitioners relied heavily on the **Re: Madhupaper** and **Re: Erinford** cases to advance their argument that they were entitled to injunctive orders.

66. The Petitioners have not succeeded in persuading this court to grant them an injunction because this court does not have jurisdiction to do so. This is because they did not any injunctive orders in their

Petition. Indeed, the Petitioners had advanced as one of the grounds of their appeal that the learned judge granted them orders they had not sought. The court therefore finds no hesitation in finding that the Petitioners were at all material times aware that the court could not grant them orders they had not sought in their Petition. Their argument that the court could do so on the basis of the emerging jurisprudence of overriding principles was under a mistaken apprehension of the law.

68. It was the Petitioners' further argument that the Company could not sell the parcels of land without leave of the court because of Section 224 of the Companies Act. The said Section states that:-

It is clear from the ruling that the learned judge made he did not wind up the company but granted an alternative remedy as was provided for under the provisions of Section 222 of the Companies Act. The said Section was set out in detail in the learned judge's ruling. Section 224 cannot therefore be invoked at this stage and in any event there was had been no liquidator who had been appointed to oversee the distribution of the Company's assets. Yet again, the court finds itself more persuaded by the Company's position that that section was irrelevant and would find no place to assist the Petitioners' case.

71. On the Company's assertions that the Petitioners are abusing the court, it is this court's view that although the Petitioners may strongly believe that they were entitled to a higher percentage, which only the Court of Appeal can determine, what comes out of this application is that the actions by the Petitioners to restrain the Company from disposing of the parcels of land border on attempts to cause hardship to the Company and stifle its operations. This could very well amount to abuse of process. The Petitioners' *modus operandi* does not augur well and is open to question. It certainly does not demonstrate *bona fides* on their part.

73. The unique and special circumstances of this matter under the Companies Act leads the court to conclude that it does have not further jurisdiction to deal with the matter, once the learned judge issued the aforesaid ruling, and/or grant the orders sought by the Petitioners. It is guided by the holding in **Re: Continental Credit Finance Limited [2003] 2 EA 339**, relied upon by the Company, which basically stated that if the court had no jurisdiction over a matter, then its orders were void and had no effect.

75. Orders accordingly.

DATED and DELIVERED at NAIROBI this 12th day of July 2013

J. KAMAU

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