REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO 30 OF 2010

IN THE WINDING UP OF KOFINAF COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

1. The background of the dispute between the Petitioners/Applicants and the Company was set out extensively in the ruling) of 18th January 2013 by Musinga J (as he then was). The same will therefore not be reproduced in this ruling. Suffice it to point out that the Petitioners filed Winding Up Cause No 29 of 2010 seeking to wind up Kofinaf Company Limited. Before he could deliver the said ruling, the learned judge was appointed as a judge of the Court of Appeal as a result of which this court read the said ruling on his behalf. It is on that basis that this court subsequently became seized of this matter.
2. In his said ruling, the learned judge declined to wind up the said company. He stated as follows:-

   "**The petitioners are acting unreasonably by seeking to have the companies wound up so as to force a buy out on their terms, even where the court has no jurisdiction to make such orders regarding foreign registered companies. The petitioners should pursue the alternative remedy, both here in Kenya and at the London Court of International Arbitration. The value of the petitioners' shares in the companies shall be determined by a reputable firm of Accountants to be agreed upon by the parties, failing which the firm shall be appointed by the Chairman of the Certified Public Accountants of Kenya…"**

3. 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:-

i. **Spent**
ii. **Spent**
iii. **Spent**
iv. **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.

v. **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:-**

a. **L.R. No 28078 formerly L.R. No 91;**
b. **L.R No 28079 formerly L.R. No 11538/2;**
c. **L.R. No 28080 formerly L.R. No 8182;**
d. **L.R. No 28081 formerly L.R. No 104**
e. **L.R. No 28091 formerly L.R. No 10901/22**

pending the hearing and determination of this application.

vi. **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:-**
   a. **L.R. No 28078 formerly L.R. No 91;**
   b. **L.R No 28079 formerly L.R. No 11538/2;**
   c. **L.R. No 28080 formerly L.R. No 8182;**
   d. **L.R. No 28081 formerly L.R. No 104**
   e. **L.R. No 28091**

pending the hearing and determination of the appeal.

vii. **THAT the costs of this application be provided for.**

4. In broad and general terms, the grounds in support of the Petitioners' application were that:-
   a. **On 18th January 2013, Musinga J lacked jurisdiction when he granted them a relief they never sought which was as follows:-**

i. **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;**

ii. That the Petitioners do pursue the alternative remedy both here in

Kenya and at the London Court of International Arbitration;

iii. That the value of the Petitioners' shares in the companies was to be

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.

b. **The Petitioners had exercised their right under Section 270 of the Companies Act to appeal against the said judgment.**
c. **This court had jurisdiction to preserve the subject matter pending their intended appeal.**
d. **Section 224 of the Companies Act forbade a company like the Company herein from disposing of any property, transferring shares or altering the status of its members once the Winding Up case commenced on 8th October 2010.**
e. **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.**
f. **Cedar IV, an offshore company that was incorporated in the Republic of Mauritius held 1,574,993 shares in the Company while seven (7) other shareholders and the Petitioners held one (1) share each in the Company.**
g. **Although the Petitioners held 15.8% 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.

h. **The learned judge had acknowledged that the relationship between the Petitioner and the Company was so bad that the deadlock could only be unlocked by winding up the company if there was no other alternative remedy.**

i. **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.**

j. **The majority shareholders were likely to set in motion the arbitration order and remove them from the company and do what they would want with the Petitioners' investment.**

k. **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.**

e. On 28th January 2013, Stephen Mbugua Mwagiru, the 1st Petitioner herein swore the Supporting Affidavit on his own behalf and that of his mother, who is the 2nd Petitioner herein.

f. 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.

g. Josphat Kibogo Kinyua swore the Replying Affidavit on behalf of the Company on 1st February 2013. It was his evidence that the present application was an improper use of the court process and the Company was not certain that the Petitioners had indeed filed the Notice of Appeal as the Company had not been served with the same. He deposed that the Petitioners had no interest in the properties and assets of the Company but rather, their interest was in their shareholding which the learned judge had determined in his said ruling. The deponent contended that there was no suit in existence to underpin the grant of injunctive orders as had been sought by the Petitioners.

h. 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.

i. It was the Company's case that there was nothing to be executed and at the very least, the Petitioners had not demonstrated to the court that it had threatened to execute against them. All it had done, was to invite the Petitioners to agree on the firm of accountants who would value the shares they held and which shares were to be bought by the Company. The deponent contended that the Petitioners' assertion for the sum of Kshs 11 billion could only be ascertained by the valuation of the shares held by the Petitioners. The Company annexed a copy of its advocates' letter dated 21st January 2013 in its affidavit evidencing its overtures to the Petitioners to agree on the firm of accountants.

j. 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.

k. On 5th February 2013, the Company also filed Grounds of Opposition of even date. The grounds were generally as follows:-

    a. **The application was misconceived, bad in law, an abuse of the court process, unmerited, without legal foundation and that there was no judgment capable of**

execution or upon which the court could grant injunctive orders. It was the Petitioners' intention to cripple the business of the Company.

b. **The Petitioners' assertions that the learned judge granted orders that they had not sought had no foundation as Section 222 (1) of the Companies Act provided that the court could grant any other order that it deemed fit to grant. The Section had no further application after delivery of the ruling by the learned judge.**
c. **The Petitioners had sought an alternative order to the winding up of the Company and this court had no jurisdiction to re-open the factual or legal arguments dealt with in that ruling.**
d. **The said ruling did not order any arbitration between the Petitioners and the Company and their reference to a liquidator was misplaced as none had been appointed.**

l. 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.

m. In their written submissions dated 12th February 2013 and filed on 13th February 2013, the Petitioners submitted that they would suffer substantial loss and that Section 224 of the Companies Act turned the assets of the Company into assets of the shareholders to be shared amongst the shareholders according to their respective shareholding by the liquidator to be appointed under Sections 236 and 237 of the Companies Act. This would lead to them not getting benefit from their investment.

n. 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

o. In this regard, they relied on the case of **African Safari Club vs Safe Rentals Court of Appeal at Nairobi Civil Application No 53 of 2010** and **Lake Turners Ltd & 2 others vs Oriental Commercial Bank Ltd, Court of Appeal Nairobi Civil Application No 64 of 2010** where it was held in both cases that the policy of law during the pendency of an appeal was to focus on substantial justice and preserve the subject matter of the intended appeal so as not to defeat a party's right to appeal. In granting the orders, the court would be acting fairly and justly and balance the relative hardships of the parties.

p. In **Re: African Safari Club** case, the court observed thus:-

"**…however, after the enactment of the overriding objective, we believe that the court is now required to take a much broader view of justice and therefore the two requirements can no longer be regarded as exhaustive… one of the principle aims of the overriding objective of treating both parties with equality or in other words putting them on equal footing as far as practicable pending the determination of the intended appeal on merit… We believe that the rules of procedure including Rule 5(2)(b) have considerable value in terms of administration of justice but the new challenge brought about by the enactment of the overriding objective principal brings into focus the fundamental purpose of civil procedure which is to enable the courts to deal with cases justly and fairly…"**

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

"In Butt vs Rent Restriction Tribunal (1982) KLR 417, this Court held among other things that in exercising its discretion whether to grant or refuse an application for stay of execution the court would consider the special circumstances of the case and its unique requirements…In Mukuna vs Abwoga (1988) KLR, it was recognised inter alia that the issue of substantial loss is the cornerstone of jurisdiction under Rule 5 (2) (b) and what is to be prevented is the substantial loss because such loss would render the appeal nugatory."

18. 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:-

"**Where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful party an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of an appellate court from being nugatory should the appeal succeed. (Obiter) It is preferable for the High Court to deal with an application for injunction pending appeal from its decision not so much as to protect the Court of Appeal from inconvenience but more because the Court of Appeal would have the advantage of seeing what the High Court judge made of the application. The judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs."**

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

"…On the other hand, where the application is for injunction pending an appeal, the question is whether the judgment that has been given is one in which the successful party ought to be free to act despite the pendency of the appeal…Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong…I cannot see a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction or that by refusing an injunction pending appeal, the trial judge becomes functus officio granting any injunction at all."

20. 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:-

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. " When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard?... Those who take this view do not, I think, do themselves justice"

21. 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.
22. It was the Company's submission that in so far as the application sought a stay of execution, the same was incompetent for the simple reason that there was nothing to execute. It stated that Order 42 Rule 6 of the Civil Procedure Rules, 2010 stipulated as follows:-

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

23. To support its case, the Company relied on the case of **Kileleshwa Service Station Ltd vs Kenya**

Shell Limited [2008] KLR 55 where the Court of Appeal held as follows:-

" **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."**

24. It also relied on the case of **Milcah Jeruto Tallam t/Milcah Faith Enterprises vs Fina Bank & Another [2013] eKLR**, where this court found that a negative order could not be stayed.
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:-

(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 as has been given by the applicant.**

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).
27. The Company further submitted that the Petitioners had relied on the likelihood of them suffering substantial loss as the only ground in their application for a stay of execution or for injunction. It conceded that the Petitioners had brought the present application without unreasonable delay.
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.
29. In respect of the prayer for injunctive orders, the Company argued that the subrule under which the Petitioners sought an injunction related to detention, preservation and inspection of property during the pendency of the suit which had no relevance in this matter. The court will not attach a lot of weight to this argument as Order 51 Rule 10 of the Civil Procedure Rules, 2010 provides that an application shall not be deemed to be incompetent merely for citing the wrong provision of the law to be relied upon.
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. In this regard, the Company relied on the case of **Vadag Establishment vs Yashvin & Numised AG & Others [2001] 2 EA 587** at **588** where the Court of Appeal held that:-

"…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. It was therefore the Company's case that the jurisdiction of Order 40 of the Civil Procedure Rules, 2010 was no longer available to the Petitioners and that in any event the special jurisdiction of this

court to grant an injunction pending appeal would only be available if the learned judge had dismissed an application for temporary or interlocutory injunction. The Company was emphatic that in this case, there was no such application for temporary or interlocutory application for an injunction and that the circumstances of this case were clearly distinguishable from **Re: Madhupaper** and **Re: Erinford** cases. They relied on the case of **Re: Kileleshwa** where the Court of Appeal held that:-

" The application was extraneous to the orders of the superior court and was to that extent misconceived."

33. The Company further submitted that the learned judge clearly exercised jurisdiction that he was clothed with as he expounded in his ruling of 18th January 2013. It dismissed the Amended Notice of Appeal as it purported to appeal against the whole ruling when in fact it had listed narrow grounds taken from the said ruling. It averred that the Petitioners had not complied with the provisions of Rules 75 and 77 of the Court of Appeal Rules, 2010 as regards lodging and service of Notices of Appeal upon a Respondent. It persuaded this court to disregard the said Amended Notice of Appeal as it had no foundation on the Court of Appeal Rules, 2010.
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. It therefore argued that, through this application, the Petitioners were abusing the court process and which the Court of Appeal had identified as one of the categories of an action in furtherance of improper purposes. The Company cited the case of **Matic General Contractors Ltd vs Kenya Power and Lighting Company Limited [2001] 2 EA 440** where at page **441** the Court of Appeal held as follows:-

" 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…"

36. To advance its argument on the abuse of process, the Company also relied upon **Muchanga Investments Limited vs Safaris Unlimited (Africa) Limited & 2 others [2009] KLR 229**, **Beinosi vs Wiyley 1973 SA 721 (SCA)**, **Attahiro vs Bagudo 1997 3 NWLL, Sarak vs Kotoye (1992-9 NWLR 9pt 264)** which dealt at length with different forms of abuse of process.
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.
38. In response to the Company's submissions, the Petitioners filed submissions dated 18th March 2013 and filed on 19th March 2013. They submitted that in **Re: Butt**, the general principle was that if there was no overwhelming hindrance, a stay ought to be granted so as not to render an appeal nugatory. They contended that the leave of the court was required prior to the company sharing its assets amongst the shareholders. They argued that this was a possibility that could occur and it could not be ignored in this case. Hence, it reiterated the importance and relevance of Section 224 of the Companies Act in this matter.
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.

40. On the issue of security, the Petitioners argued that it was not necessary to furnish the same for the following reasons:-
    a. **Bearing in mind that they had 10% shareholding in the Company, the majority shareholders had sufficient security to recover whatever loss they would suffer from their investment;**
    b. **Since the land appreciates with passage of time, no loss would be suffered; and**
    c. **The Company was in control of all assets.**
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.
42. The court has carefully considered the pleadings herein, the oral and written submissions of the parties and wishes to point out right at the outset that this court is not sitting on appeal as the ruling delivered on 18th January 2013 was delivered by a court of equal jurisdiction. Rather the role of this court is to establish whether or not the Petitioners have made a good case for it to grant to the Petitioners, of a stay of execution or injunction pending appeal of the said ruling.
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. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

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 (emphasise mine)**
b. **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."**

as. It is clear that the three (3) prerequisite conditions for a stay pending appeal cannot be severed. The key word is **"and"** . It connotes that all three (3) conditions must be met at the same time before such an order can be granted. The issue of these three (3) conditions being inseparable was dealt with in the case of **Mukuma vs Abuoga [1988] KLR 645 and Re: Kenya Shell Limited vs Kibiru & Another [1986] KLR** in which Platt Ag JA observed as follows:-

"**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.."**

46. The Petitioners are required to demonstrate to the court that:-
    a. **Substantial loss may result to the applicant unless the order was made; and**
    b. **The application was made without unreasonable delay; and**
    c. **Such security as the court orders for the due performance of such decree or order as may ultimately binding on them has been given by the applicant.**

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. To establish whether the Petitioners were likely to suffer substantial loss, the court has had due regard to the case of **James Wangalwa & Another vs Agnes Naliaka (2012) eKLR**, in which the court observed as follows:-

> "**…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."**

49. A case of substantial loss likely to be suffered would have arisen if it could be shown that the Company would have been entitled to proceed with execution because the ruling was in its favour. From the above holding, since the process of execution would have been lawful, it would not have been deemed to amount to substantial loss. In the circumstances, it would have been incumbent on the Petitioners therefore to show the court that if execution was effected, if at all, what substantial loss they were likely to suffer.
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 15.8% 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.
51. The Petitioners did not furnish this court with any proof that that they would not be able to recover the monies from the Company in the event they were successful in the appeal. According to the ruling delivered by the learned judge, the Company's assets were shown to be over Kshs 78bn. This is a sufficient guide for this court to determine whether or not the Company one of straw or one from which the Petitioners would be unable to recover any monies if the same were found to be due and owing to them by the Company if they were to succeed on appeal.
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:-

> "**I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay should be properly given. Parallel with that is the equally important proposition that of a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause…The first Company is a person of substance, with a good position and prospects…there is no evidence … that the first Respondent will not remain in his job until pensionable age."**

53. 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.
54. The provision of security in an application for stay of execution is couched in mandatory terms. It is not correct as the Petitioners stated that the Company could recover their monies as they were in possession of the properties. The court finds that failure by the Petitioner to furnish any security prior to obtaining a stay order would have caused their application to fail for failing to satisfy the third ingredient 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.

56. The court recognises that there has been new and emerging jurisprudence in view of the principles espoused in the overriding objectives in the Civil Procedure Rules, 2010 and the Appellate Jurisdiction Act, 2009. It is also alive to the fact that these overriding principles must be applied within the context of the already established and existing laws. It therefore follows that a party who applies for a stay of execution or injunction pending appeal must then operate within the parameters provided in such laws.
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:-

No appeal or second appeal shall operate as a <u>stay of execution or proceedings under a decree or order</u>…

58. 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.
59. It is evident from the learned judge's ruling that once he delivered his ruling on 18th June 2013, there was no further action that was required from the High Court. The next step was for the parties to proceed as he had ordered or for any party who felt aggrieved by his ruling to proceed to the Court of Appeal for determination of its appeal.
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.
61. Evidently, the order issued by the learned judge was negative in its very nature. Its fate would be similar to the case of **Re: Milcah Jeruto** where this found that a negative order could not be stayed for the reason that it was not capable of being executed and/or enforced against a party in the proceedings.
62. In view of the 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.
63. The above notwithstanding, the Petitioners also sought prayers under Order 40 of the Civil Procedure Rules, 2010. It appears to this court to have been a precautionary measure taken by the Petitioners so that in the event they failed to obtain a stay of execution of the judgment under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010, they could have a fair chance under Order 40 of the Civil Procedure Rules, 2010. For the reason that this court found that it would not deem the Petitioners' application incompetent for having cited the wrong provisions of the Rules, the court will therefore proceed to consider the merits of the said application under the said order.
64. The Petitioners relied heavily on the **Re: Madhupaper** and **Re: Erinford** cases to advance their argument that they were entitled to injunctive orders.
65. It is trite law that parties must be and are bound by their pleadings. A prayer in an application must mirror the prayers in the Plaint, Petition or Originating Summons. The Petitioners have sought injunctive orders when none appear in its Petition. In the said Petition, the Petitioners prayed for the following orders:-
    a. **The Kofinaf Company Limited be wound up under provisions of the Companies Act Cap 486 of the Laws of Kenya.**

b. **That as an alternative to winding up of the company, the court order that the company purchase the Petitioners' shares as stated in paragraph 18 hereinabove on such terms as the court deems fit.**
c. **That such further or alternative orders be made in the premises as the court shall fit deem fair and just**
d. **That the cost of the Petitioners be provided out of the assets of the company on priority basis.**

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.
67. The court has carefully considered the facts of this case and finds that this case does not fall within the circumstances under which the Superior Court can grant an injunction to give an aggrieved party an opportunity to approach the Court of Appeal. This court does not have jurisdiction or power to grant an interlocutory injunction in the first instance when such a prayer had not been sought in the Petition. The court finds that the cases of **Re: Madhupaper** and **Re: Erinford** are clearly distinguishable from the facts of this case as interlocutory judgment had been sought and denied in the first instance. Consequently, the court is not persuaded that it has the mandate to decide, as Mabeya J and Okwengu J did in the respective, by applying the principles in the said cases. For the said reason, the Petitioners' prayer for injunctive orders accordingly fails.
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:-

> **"In a winding up by the court, any disposition of the company, including things action and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall unless otherwise orders, be void."**

69. 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.
70. The court is, however, in agreement with the Petitioners that this court cannot look at the technicalities of the lodging or of service Amended Notice of Appeal. It has no jurisdiction to do so. While the court has noted the submissions on this issue by both parties, it will not be necessary for it to analyse the same as the issue of appeal is purely within the purview and ambit of the Court of Appeal.
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.
72. The analogy used by the Company about a shareholder restraining aircrafts for Kenya Airways because there is a dispute on its shareholding may appear far- fetched but the court think that the same demonstrates the scenario that is likely to play out in the event the court was to grant the Petitioners they had sought. There would be great hindrance if the orders sought by the Petitioners were granted. Most importantly, there is nothing that has been provided to persuade this court that

if the Petitioners application is not granted, it would render the appeal in the Court of Appeal nugatory.

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.

74. For the reason that this court has lacked substantive jurisdiction after the learned judge delivered his ruling or that even if it was to be assumed the court had jurisdiction the Petitioners did not in event make out a good case why this court should grant them a stay of execution or injunction pending appeal, the court hereby finds that the Petitioners' Notice of Motion application dated 28th January 2013 and filed on 29th January 2013 is not merited and it is hereby dismissed with costs to the Company. The interim injunctive orders issued by the court on 29th January 2013 are accordingly hereby discharged.

75. Orders accordingly.

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

J. KAMAU

JUDGE