



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

WINDING UP CAUSE NO. 23 OF 2009

IN THE MATTER OF LES BELLES SAUVAGES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CHAPTER 486, LAWS OF KENYA)

R U L I N G

The Applicant in the notice of Motion dated 9th November 2010, seeks orders of this court, *inter alia* as follows:-

1. That this Honourable court be pleased to grant leave to the respondent to appeal against the judgment of Lady Justice Mugo delivered on 21st October, 2010.
2. That there be a stay of further proceedings in relation to the winding up of Les Belles Sauvages Limited until the Applicant's/Respondents appeal is heard and determined.
3. That this honourable court be pleased to grant stay of the order winding up the company, Les Belles Sauvages Limited until further orders of the court.
4. That the costs of this application be provided for.

It is premised on the grounds *inter alia* that the Applicant stands to suffer substantial loss if the stay order is not granted and that the said order is necessary to preserve the subject matter of the intended appeal, that is, the only asset of the company ordered to be wound up by the Ruling/Order appealed against. The Applicant contends further that failure to grant a stay will render the intended appeal nugatory, which, in the applicants view has high prospects of success.

The application is supported by the Applicant's affidavit of 9th November 2010, in which the applicant craves leave of the court to refer to the affidavit filed in opposition to the winding petition (erroneously

referred to as the one dated 30th November, 2010 instead of 30th November, 2009) which the Applicant reiterates. In paragraph 7 of the supporting affidavit, the applicant cites five (5) grounds of appeal to demonstrate that the intended appeal has good prospects of succeeding and repeats the same contentions as raised by him in opposing the winding up petition. He fears that the appointment of a liquidator, as ordered by the court, will lead to the sale of the only asset of the company which he claims to own exclusively of the Respondent, hence his fear of being dispossessed of the same by virtue of the winding up order. Although in the Supporting Affidavit, the Applicant states that he relies on the Court of Appeal decision in **CANVAS MANUFACTURERS LTD –VS- S. R. KARUNDITU –Civil Appeal No. 278 of 1997**, while submitting for the Applicant, at the hearing, learned counsel Miss Mwangi cited the authority of **KARUTURI NET WORKS LTD & FLOWER XPRESS FTZE –VS- DALY & FIGGS ADVOCATES**, a copy of which was furnished to the court.

The application is opposed on the strength of a Replying Affidavit sworn by the Respondent on 16th November 2010, and filed on 17th November, 2010. The Respondent contends, mainly, that the application has no merit and that the conditions for granting a stay have not been met. She argues that, since the company having been wound up on the basis of a quasi – partnership between the parties, and the court having directed that a mutually acceptable liquidator be appointed for the purpose of determining the parties’ respective shareholding and their beneficial interest in the company’s sole asset, through the taking of accounts, then the applicant’s fear that the said asset may sold is not warranted. For the same reasons the Respondent contends that no loss is likely to accrue to the Applicant since he has the opportunity to prove his entitlement as a contributory before the liquidator. She argues further that, even in the event that the asset is sold, the liquidator would account to the shareholders the proceeds of sale and give the applicant his share thereof.

Submitting on behalf of the respondent learned counsel, Mr. Hira stated that the application ought not to be allowed for all the above reasons and also because the Applicant had failed to disclose to the court that the Respondents had already written to the Applicant the letter annexed to the Replying Affidavit as “HD1” suggesting the name of a liquidator. This, counsel submitted, was material non disclosure, which automatically disentitles the Applicant from the orders sought, for reasons that he has not come to court with clean hands. Mr. Hira submitted further that no security has been given as required under **Order XL1 Rule 4 (2) (b) of the Civil Procedure Rules**. (2009 Revised Edition, now replaced by **Order 42 Rule 2(b) of the Civil Procedure Rules 2010**)

As correctly stated in ground (vii) of the application this court has power to grant a stay of a winding up order under **Section 251 of the Companies Act** which provides as follows;

“251 (1) The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

(2) On any application under this section the court may, before making an order, require the official receiver to furnish to the court a report with respect to any facts or matters which are in his opinion relevant to the application.

(3) A copy of every order made under this section shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar for registration”

With due respect to counsel for the Applicant I am of the considered view that save for the allegation the

Applicant stands to suffer substantial loss in the event that a stay is not granted, the rest of the grounds are more supportive of the intended appeal itself. It is not for this court to consider the merits of the intended appeal at this stage, save only for the purposes of satisfying itself that the same is not frivolous. In granting a stay under **Order XL1 Rule 4 (Order 42 Rule 6 2010)** the court must also satisfy itself that the Applicant has demonstrated that he stands to suffer substantial loss in the event that the stay sought is not granted and that the application was brought without undue delay. (See **NEW STANLEY HOTEL LTD -VS- ARCADE TOBACCONISTS LTD [1986] KLR 757**). The Applicant must also give security for the due performance of the decree or order appealed against.

After carefully considering the application and the arguments put forth by the opposing sides, I am not persuaded that the applicant deserves the stay sought. His claim that he is likely to suffer substantial loss is not supported by the facts of the case given the nature of the judgment sought to be appealed against and the facts upon which the decision of the court was arrived at. The Respondent too has a claim on the subject matter the extent of which can only be determined in the course of the liquidation.

The Applicant's arguments, being in the nature of a challenge to the judgment itself, I am afraid I am not well suited to grant the orders sought since the effect would be to go against my own findings in the winding up cause. That the intended appeal would be rendered nugatory if the stay is not granted is not for this court to determine but for the Court of Appeal to consider and if so persuaded to grant a stay. Apart from challenging the validity of judgment, no evidence has been placed before this court to prove that the winding up ought to be stayed as is required under **Section 251** of the **Companies Act**.

For the above reasons, and noting also that no security has been given as required under **Order XL1 Rule 4 (2) (b)** pursuant to which the application was filed, I am not inclined to grant the stay sought. In my considered view the intended appeal is calculated at delaying the winding up process to the detriment of the Respondent. A winding up order, being a final order and not an interlocutory one, the law is that an appeal against it may be made without leave as was held in the English Court of Appeal decision of **cf RE. STOCKTON IRON FURNACE CO. (1879) 10 ChD 335**, which I consider applicable in our courts. I need not therefore grant the leave sought in the circumstances and considering my opinion on the appeal itself.

Accordingly I disallow the application and hereby dismiss the same with costs to the Respondent.

DATED SIGNED and DELIVERED at NAIROBI this 17TH day of FEBRUARY, 2011

M. G. MUGO

JUDGE

In the presence of:

No Appearance

For Applicant

Mr. Were holding brief for Mr. Hira

For the Respondent