



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 10 of 2007

NYAKIO INVESTMENTS LTD.PLAINTIFF

VERSUS

JOHN MWANGI WAGAKODEFENDANT

R U L I N G

Notice of motion dated 17/11/2008 was filed by the applicant under Section 3 A of Civil Procedure Act, Order XLI Rule 4 of Civil Procedure Code and Rules 7 and 203 of the Companies (WU) Rules, Cap.486 Laws of Kenya.

The applicant seeks orders namely that there be a stay of proceedings and all interlocutory applications in this suit until the appeal on the ruling of 29th September 2008 to the Court of Appeal is heard and determined. And that costs be in the cause. The application is grounded on 6 grounds and a supporting affidavit sworn by Stephen Karanja Wagako. The affidavit shows that a notice of appeal has been filed. The applicant is on the way to file record of appeal in the Court of Appeal and the applicant wishes to obtain stay of proceedings pending appeal.

Replying affidavit was sworn by John Mwangi Wagako on 24/11/2008 who is the petitioner in this Winding Up Cause. He objects to the application as it is an after-thought, long after the respondent filed an appeal and that the objectives of the applicant are: to prevent or delay hearing of the application dated 19/6/2007 which was filed under certificate of urgency to continue abusing their trustees' obligations by paying themselves millions of shillings under the guise of directors remunerations whilst leaving a small sum of money as the revenue of the company available for distribution to the beneficiaries of the trust namely, the estate of Wagako Ndibaru and to perpetuate oppression as a minority shareholder and to enable their houses to in under control of deceased's wealth, which is comprised of the assets of the respondent's company. There are further affidavits filed, with leave of the court.

On 26/2/2009 applicant was allowed to file a further affidavit and also the petitioner was granted leave to respond. The parties agreed to file written submissions and looking at the plaintiff's submissions, the application is supported by affidavit sworn on 17/11/08 by Stephen Karanja Wagako and his supporting affidavit sworn on 11/12/08. The applicant submits that he has satisfied the requirements set out under Order XLI (1) (4) Civil Procedure Code.

The appeal shall be rendered nugatory if order is not granted. The court has granted the applicant leave to appeal and notice of appeal to the Court of Appeal has already been filed and lodged in the registry of the court. The applicant relies on the decision in George Roine Titus vs. Daniel Ndichu & another, Court of Appeal Nai. 82 of 1997. Further, it is submitted that the appeal has overwhelming chances of success or is an arguable appeal.

The application and supporting affidavit sworn on 11/12/08 the issues or grounds to be taken to court shall be around 8. The petition herein is a nullity in law and it shall save time and costs if the Court of Appeal resolves these issues. Furthermore, the appeal is not frivolous. The applicant relies on the case of Ibis Aviation Ltd. vs. Equitorial Commercial Bank & another in Case No. 257 of 1999 EALR page 141-145.

It is further submitted that this court was unable to differentiate between proceedings and pleadings which is explained in Mitra Legal and Commercial Dictionary. The other judges always dismissed petitions which is correct procedure. The applicant filed further submissions on 26/3/2009 stating that petitioner's further affidavit has nothing to do with the application dated 17/11/08 and emphasizes that "personal representative" is the only mandate given under Cap. 486 to Law of Succession Act, Cap.160.

The succession court can only deal with the shares of the deceased (20 shares) and in this case, the company was not a party to the succession case. The applicant relies on Butt vs. Rent Restriction KLR 1982 and Bob Morgan Systems KLR [2004], both of which decisions state that the discretionary powers of court in an application for stay must be exercised in such a way so as not to prevent appeal or render an appeal nugatory and that where an appeal has weighty issues for consideration but the result if successful, would not necessarily be rendered nugatory unless a stay was granted.

The petitioner submits that the applicant's (company) notice of motion dated 17/11/08 is opposed through petitioner's affidavits. He submits that the plaintiff's application should be dismissed. He relied on the decision of Court of Appeal in the case of KANU vs. Attorney General – Civil Appeal No. Nairobi 7 of 2007. It was held that where stay of proceedings was refused, the right of appeal is not rendered nugatory.

Further submission is that the application for stay of proceedings do delay the hearing of suits and is contradictory to the court policy that the litigation must not be delayed. The courts do invariably reject stay applications.

In the present application, the applicant is using the process to oppress the petitioner and members of his house, the directors who control the company hold shares upon trust for the estate of their father. The application is founded on the wrongdoing of the breach of fiduciary duty.

The controlling directors, Karanja and Muturi, sons of the two widows of deceased are running the company for their own benefit instead of as trustees of their father's estate. The applicants are not deserving of exercising of court discretion. The law as cited by the applicant does not speak much of the powers of court in granting stay. Rule 4 (1) states:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far the court appealed from may order, but the court appealed from may, for sufficient cause, order stay of execution of such decree or order.”

It will be noted that the Rule 41 (1) mentions stay of proceedings only once in that rule. And thereafter, Rule 4 (2) sets down under which circumstances an order of stay may be granted. The petitioner relies on the case of Republic vs. A.G. & others in Misc. Civil Application No. 128 of 2003, where Justice Nyamu, Mohamed Ibrahim and Emukule, stated (Judicial Review) the court stated the law on the stay of proceedings thus:-

“Where an applicant seeks to stop others from being heard, a higher standard of test is required if the proceedings are to be stopped.”

The court relied on a persuasive statement of law in Halsbury's Laws of England at page 99:-

“The stay of proceedings is a serious, grave and fraudulent interpretation in the right that a party has to conduct its litigation on the basis of substantive merits of his case and that therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond all reasonable doubt, ought not to be allowed to continue.”

The application in this Winding Up ought to be rejected. In the case of Mohammed Ahmed Gaidi vs. Amosheriff Mohamed, decision by Hon. Azangalala, J. in HCC No. 84 of 2003, the same principles were followed. Again, in the decision of Hon. Justice Kimaru, Nakuru HCC No. 108 of 2008, it was stated:-

“Having carefully considered the reasons advanced by the defendant in support of his application and in the light of the requirements of provisions of Order XLI 4 (2), Civil Procedure Code, that requires a party seeking to have the proceedings stayed must establish that it would suffer substantial loss if stay was not granted.

I am of the opinion that the defendant has not made a case for granting such orders. This court wonders what prejudice the defendant would suffer if the hearing of this case without a deposit ...

From the nature of the case filed by the plaintiffs, it would take a long time to be terminated. ... the appeal would have been finalized.”

It is submitted that the onus is on the applicant to prove that stay of proceedings is necessary.

I have heard the submissions of both parties. It is clear that the real applicants are the self-styled directors of the

company. It appears they have been controlling the company affairs for many years. The enterprise is owned by the company which was established by the patriarch of the family and who is now deceased, leaving 3 widows. The survivors in control are from the two houses, the house of the third widow, from where the petitioner comes from are kept out of the control of the enterprise (affairs of the company). The petitioner says that the two houses controlling the company's affairs are oppressing the 3rd house and the directors are enjoying large sums of money by way of directors' remunerations, while leaving only a small part of revenue for distribution among beneficiaries.

It is quite clear that if the stay of proceedings order is not granted, the appeal cannot be rendered nugatory. It is also clear that the applicant has not satisfied the provisions of Rule 4 (2). They have not produced evidence as to what substantial loss would be occasioned if order is not made. In fact, it is evident that no loss would be suffered for not granting order. The company is running and in the control of the managers who continue to enjoy all benefits of managers of the company.

On the issue of arguable appeal, it is correct to state that leave to appeal was given. The deponent in support swears that:-

Our appeal is based on numerous grounds, on accounts of procedure and rules of filing the petition, the court amended the petition when there was no application pending in court to amend and without giving us a hearing on merit. The petition is defective. When does the principle of Obiter dicta apply? Deciding issues not before the court amongst other grounds.”

These, as is admitted, are matters of procedure and not heavy and weighty matters to be heard by the court. I would agree in the proposal that for an applicant to seek to stop a litigant from proceeding with his case it is a serious and grave matter and the standard applicable is high. The applicant has not exhibited any standard except that of balance of probability.

Furthermore, the provisions of Order XLI Rule 4 (2) is not complied with not evidence has been adduces to demonstrate that substantial loss would be suffered. I find that there is no basis laid down to warrant granting stay orders as prayed. The petitioner is entitled to proceed with his petition without having to wait indefinitely for the termination of the proposed appeal. In the Case No. 128/2003 – KANU vs. President Mwai Kibaki & 6 others at page 21, the 3 judges sitting in Judicial Review stated:-

“We, as a court have a serious responsibility to ensure that a matter is determined within a reasonable time from its inception and a decision of court made known within a reasonable time. A stay of proceedings would clearly defeat the object of speed and effective determination of the main application and speed in the administration of justice.”

Upon consideration of the above, I am persuaded that this application must be refused with costs to the respondent.

It is so ordered.

DATED and DELIVERED at Nairobi this 20th day of May 2009.

JOYCE N. KHAMINWA

JUDGE