



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Winding Up Cause 29 OF 2006**

**IN THE MATTER OF UMOJA SERVICE STATIONS LIMITED**

**AND**

**IN THE MATTER OF A PETITION BY MINORITY SHAREHOLDERS**

**RULING**

On 28<sup>th</sup> November, 2007, Azangalala J dismissed the petitioners' application for injunction in which the Petitioners sought to restrain the board of directors of Umoja Service Station Limited (*hereinafter referred to as the company*) from convening or conducting any meeting, either annual or special pending the hearing and determination of the winding up cause. The Learned Judge dismissed the petitioners' application for injunction basically on two grounds. He ruled that the petitioners' application was *res judicata* since the matters in dispute in the winding up cause were substantially similar to the matters in dispute in a previous case which was filed before the High Court at Nyeri. He further ruled that since part of the dispute relating to legality in office of the current directors of the company was pending determination before the Court of Appeal, he would not make a decision that would prejudice the determination of the said appeal.

At page 5 of his ruling, Azangalala J stated as follows:

*"It is plain from what I have read above that in this petition just like in the Nyeri suit the primary dispute is over who the proper directors should be. The underlying dispute between the parties is the same despite the fact that the Nyeri matter is by way of a plaint and this matter is by way of a Petition. What complicates the matter is that the dispute is now at a different level i.e. the Court of Appeal. It is not proper for the same parties or substantially the same parties to be litigating over the same subject matter or substantially the same subject at different levels of our courts at the same time and using different forums... I agree with counsel for the Respondents that the parties in Nyeri HCCC No.79 of 2005 should prosecute their suit and appeal instead of coming before this court. If they have reliefs which are not covered in the Nyeri case, the Law allows them to amend their claim. If there are other parties who are of the view that their interests should also be adjudicated upon by the court, they are at liberty to be added as parties to the Nyeri suit."*

The Petitioners were aggrieved by the decision of Azangalala J and duly filed notice of their intention to appeal against the said decision to the Court of Appeal. I was informed by Mr. King'ara, counsel for the petitioners, that the petitioners filed an application under **Rule 5(2)(b)** of the **Court of Appeal Rules** seeking an injunction pending the hearing and determination of the intended appeal to be filed against the decision of Azangalala J. The said application was however not certified urgent by the Court of Appeal

hence the petitioners' decision to file the present application before this court. The petitioners have applied under **Section 3** and **3A** of the **Civil Procedure Act** and **Order XLI Rules 4(1), (2) and (6)** of the **Civil Procedure Rules** seeking orders of this court to grant an injunction pending the hearing and determination of the intended appeal. The petitioners specifically sought orders to restrain the respondents from convening or conducting any meeting of the company, or transacting any business involving the issuance, transfer and allotment of further shares or declaring dividends until the pending appeal is heard and determined.

The petitioners sought the said order of injunction pending the hearing of the appeal on the grounds that they are apprehensive that should the board of directors of the company be allowed to convene and conduct any meeting of the company, resolutions would be passed which would result in the dilution of the shares of the petitioners. They are further apprehensive that the said meeting would pass unlawful resolutions since, it is the petitioners' contention, that persons who are not members or who acquired shares illegally would be allowed to participate and pass resolutions in the said meetings. Mr. King'ara for the petitioners maintained that the present winding up cause was not similar to the suit which was filed before the Nyeri High court. He submitted that Azangalala J erred when he failed to consider the merits of the application but instead ruled that the application was *res judicata*. It was his contention that the petitioners should be allowed to ventilate their appeal on merits by this court granting injunction to preserve the *status quo* pending the hearing and determination of the said appeal. He urged the court to grant the injunction to prevent the intended appeal from being rendered nugatory. He submitted that this court has jurisdiction to grant the injunction sought pending the hearing and determination of appeal.

The respondents opposed the application. They filed notice of preliminary objection. Hezekiah Gichohi, the chairman of the board of directors of the company swore a replying affidavit in opposition to the application. He gave the litigation history of cases involving the petitioners and the respondents. Dr. Kamau Kuria, counsel for the respondent submitted that the present application was filed in abuse of due process of the court. He submitted that the issues which the petitioners were litigating in this application were issues which had been heard and decisions rendered by several courts of competent jurisdiction. He submitted that in the present suit Azangalala J correctly ruled that the application was *res judicata*. He urged the court to consider the various orders made by various courts, including the Court of Appeal in respect of the company and reach an appropriate decision dismissing the petitioners' application with costs.

I have carefully read the pleadings filed by the parties to this application in support of their respective positions. I have also considered the submission made by Mr. King'ara on behalf of the petitioners and by Dr. Kamau Kuria on behalf of the respondents. The issue for determination by this court is whether the petitioners established a case to enable this court grant them injunction pending the hearing and determination of intended appeal. That this court has jurisdiction to grant injunction pending the hearing and determination of the intended appeal is not in doubt. In **Madhupaper International Limited –vs- Kerr [1985] KAR 840** the Court of Appeal held that the High Court had jurisdiction to grant an injunction pending the hearing of an appeal even after dismissing such an application for injunction in the suit. At page 846, the court had this to say:

*“Megarry, J granted the intended injunction pending appeal which the applicant sought on the principle that-*

*“When a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.”*

*Which was what Cotton, LJ enunciated in the leading judgment in Wilson Vs. Church (No. 2) [1879], 12 Ch D 454 and 458 dealing with an appeal from the Court of Appeal to the House of Lords and Pennycuik, J applied in Orion Property Trust Ltd vs. Ducane Court Ltd, [1962] 3 All ER 466 even though the action in the High Court had wholly failed and the appeal was to the Court of Appeal from it. It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned Judges of the High Court*

should take note of this concurrent jurisdiction which the two courts have and exercise theirs.”

In the above case, the Court of Appeal approved the English decision of **Erinford Properties Ltd vs. Cheshire County Council, [1974] 2 All ER 443**. Waki J (*as he was then*) applied the same principle when he considered a similar application to the present one in **Erick Kiplangat Ngetich –vs- Co-operative Bank of Kenya Ltd & 2 others Nairobi HCCC No. 98 of 2003 (Milimani) (unreported)**.

It was the contention of the petitioners that if the injunction pending the hearing of the appeal is not granted, they will be prejudiced because the respondents would deal with the shares of the company in such a manner as would be adverse to the interests of the petitioners. They contend that they would suffer as minority shareholders of the company if the property of the company is dealt with by the directors of the company to their detriment. They further contend that persons who are not legitimate shareholders of the company would be allowed to make decisions affecting other shareholders of the company which is a development not contemplated by the law. On the other hand, the respondents contend that the present application is one of the many instances where the petitioners have sought to challenge the election of some of the respondents as directors and further frustrate them in the discharge of their duties as directors of the company.

In their submission, the petitioners criticized the decision by Azangalala J. It is evident that the petitioners were seriously aggrieved by his decision. I have put in mind that I am not being called upon at this stage of the proceedings to determine the legality or otherwise of the decision of my brother, Azangalala J. What I am being asked to do is to preserve the *status quo* by granting injunction pending the hearing and determination of the intended appeal. I am however not oblivious of the fact that Azangalala J considered the merits of the application for injunction which was before him before dismissing it. What is the *status quo* that the petitioners intend to preserve pending the hearing and determination of the appeal? It is clear to me that the petitioners intend to prevent the respondents from convening or conducting any meeting that would address issues involving the management of the company.

As conceded by the petitioners, the issue as to who has the mandate to manage the company was settled when the court of Appeal declined to overturn the decision of Okwengu J when she dismissed the petitioners’ application which sought to restrain the respondents from taking office as directors of the company. The petitioners now want this court to restrain the directors of the company from discharging their mandate pending the hearing and determination of the intended appeal. My evaluation of the facts of this case leads me to no other conclusion other than that the petitioners appear intent on challenging the decision of the Court of Appeal through the backdoor. The petitioners have failed to establish that they would suffer substantial loss if the current *status quo* continues i.e. if the respondents hold the meeting scheduled for the 19<sup>th</sup> April, 2008 in the discharge of their mandate in managing the affairs of the company. I am also of the view that since the petitioners exercised the option of making an application for injunction pending the hearing of the appeal before the **Court of Appeal** under **Rule 5(2)(b)** of the **Court of Appeal Rules**, it is not open for them to again come to the court of first instance to seek the same orders that the court of appeal already has been seized jurisdiction to determine.

The upshot of the above reasons is that petitioners have placed no materials before me that would incline me to exercise my discretion and grant the order of injunction pending the hearing of the appeal. The application lacks merit. It is hereby dismissed with costs.

**DATED at NAIROBI this 17<sup>th</sup> day of APRIL, 2008.**

**L. KIMARU**

**JUDGE**