



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 369 of 2005

ANNE WANJIRU NYAGAH.....
PLAINTIFF

VERSUS

MUBOKE HOLDINGS LTD & 3 OTHERS.....
DEFENDANT

RULING

The application before me is dated 27.10.2005. It is by the 3rd defendant. It is expressed to be brought under Section 3A of the Civil Procedure Act Order XLI Rule 4 and Order L Rule 2 of the Civil Procedure Rules. The applicant seeks one primary order that there be stay of execution of the orders issued on 12.10.2005 pending hearing and determination of an appeal against the said orders. The application is based upon the following ground that:

- (a) The 4th defendant company is a quasi partnership company with the applicant holding 50% of the shareholding.
- (b) The plaintiff also plays the multiple role of Director and Principle Officer of the Company.
- (c) There exists serious disputes between the plaintiff and the 3rd defendant with regard to the business of the company.
- (d) The disputes have spilled over to court and a part from the suit herein there are:-
 - (i) Milimani HCCC Winding Up Cause No.33 of 2005 filed by the 3rd defendant pursuant to Section 219 (f) of the Companies Act Cap.486 of the Laws of Kenya.
 - (ii) Milimani HCCC No.60 of 2005: Anne W. Nyagah –vs- Kambua Okora and Robert Okora.

The breakdown of trust and goodwill in the relationship between the 3rd defendant and the plaintiff is complete and beyond repair.

- (e) In view of the above, and the fact that the plaintiff has hindered the 3rd defendant access to the 4th defendant company premises the orders herein if executed would amount to the following:-

(i) handing over the operations of the 4th defendant company to the plaintiff.

(ii) handing over the assets of the company to the plaintiff.

All in the exclusion of the Applicant without whom the 4th defendant company cannot operate to the detriment of the company, its assets and the Applicant's investment therein.

(f) The applicant will therefore suffer substantial loss if a stay is not granted.

The application is supported by an affidavit sworn by the applicant in which the above grounds are recited.

The application is opposed and the plaintiff/respondent has filed a replying affidavit in which she states that her only reason for filing this case was to protect the assets of the 4th defendant. In the respondent's view the solution to the management problems of the 4th defendant is arbitration which is provided for in the 4th defendant's Articles and Memorandum of Association. The plaintiff/respondent maintains that the property held by Kenya Airports Police Unit should be released to the 4th defendant at its premises at the Jomo Kenyatta International Airport. She lists the following as cash held by Kenya Airports Police Unit.

(a) USD 14,360,

(b) Travellers Cheques \$1,200.

(c) 134,000 Tanzania – shillings

(d) 138,000 Uganda shillings.

In her view this cash should be banked into the 4th defendants account at Equitorial Commercial Bank Limited.

The application was canvassed before me on 17.2.06 by Mr. Sichangi Learned Counsel for the 3rd defendant/applicant and Mr. Gachoka – Learned Counsel for the plaintiff/respondent.

I have considered the application, the affidavits and the submissions of counsel. Having done so I take the following view of the matter. Order XLI Rule 4 (1) and (2) read:-

“4(1) 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 as the court may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order of 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 that the application has been 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 has been given by the applicant.”

Under the above provisions, the applicant had to show the following:-

(a) That there is sufficient cause to order stay of execution.

- (b) That substantial loss may result to her unless the order of stay of execution is made.
- (c) That the application had been made without unreasonable delay.
- (d) That she has given or offered security for the due performance of such decree or order as may ultimately be binding on her.

The order sought to be stayed was given on 12.10.2005. This application was filed on 27.10.2005 i.e two weeks thereafter. In my view the application has been made with promptitude.

This case presents interesting considerations. The suit has been instituted by the plaintiff not to protect her property but that of the 4th defendant. The 4th defendant is a limited liability company in which the plaintiff and the 3rd defendant hold equal shares and are also the only directors. The applicant 3rd defendant alleges that there are serious disputes between her and the plaintiff leading to total breakdown of trust and goodwill between them and unless stay of execution is ordered, the operations and assets of the 4th defendant will be handed over to the plaintiff. The plaintiff/respondent seems to agree that there are serious disputes between her and the applicant which arose after the respondent moved to protect the assets of the 4th defendant from alienation arising from the conspiracy between the 1st defendant and the applicant. She admits that there is now a Winding Up Cause No.23 of 2005 filed as a reaction to the suit herein. In her view the solution to the management problems of the 4th defendant is arbitration.

It appears that since my order of 12.10.2005, the 4th defendant's management problems have increased. If there is no love lost between the owners and directors of the 4th defendant, the concern of the court would be to protect the assets of the 4th defendant which I believe should also be the interest of both the applicant and the respondent. Indeed the respondent has maintained that position from inception of the suit. It is the respondent who initially involved the police to protect the 4th defendant's assets.

On the basis that the application by her seeks to protect the assets of the 4th defendant, I am persuaded that sufficient cause has been shown to stay execution of my said order in part.

The applicant owns 50% shares in the 4th defendant. She is apprehensive that if the property held by the Kenya Airports Police Unit is released as ordered she will have no control over the same as she alleges she cannot be allowed at the 4th defendant's premises at Jomo Kenyatta International Airport. If this were to happen the applicant would lose her investment in the 4th defendant. Such a loss in my view would amount to substantial loss.

With respect to security for the due performance of my said order, I am of the view that the property held by Kenya Airport Police Unit although owned by the 4th defendant is in reality property to which both the plaintiff and the 3rd defendant will ultimately lay claim to subject of course to the rights of secured creditors. The share of the applicant in the said property in my view is sufficient security for the due performance of any order that may ultimately be binding upon the applicant.

The upshot is that I am satisfied that the applicant is entitled to partial stay of execution of my order of 12.10.2005. This order relates to the 2nd limb of the said order only. The order given in terms of prayer 2 of the plaintiff's application dated 5.7.2005 remains undisturbed. In the end I make the following orders:

- (1) The cash held in various currencies by Kenya Airport Police Unit be released to the Advocates for the plaintiff and the 3rd defendant to be deposited in an interest earning joint account to be opened in a reputable financial institution in the joint names of the said Advocates pending the hearing and determination of the intended Appeal or until further orders of this court.

The rest of the 4th defendant's assets will remain with the Kenya Airport Police Unit pending the hearing and determination of the intended Appeal or until further orders of this court.

Each party has liberty to apply.

Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2006.

F. AZANGALALA

JUDGE

10/3/2006