



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO.333 OF 2003**

HARRISON GICHARU

NG'ANG'A & 4 OTHERS ..... PLAINTIFFS

VERSUS

SIMON MWANGI NGERU .....DEFENDANT

**RULING**

In this acrimonious matter, which started off as a judicial review matter but is increasingly turning out to be a contest for leadership to the company, a multi-billion undertaking, the interested parties, now applicants by their application dated 16th April 2003 as later amended by application dated 29th April 2003, seek orders that the ex parte orders of 8th April 2003 be discharged under the provisions of Section 3A and 63 of the Civil Procedure Act. O.39 of Rule 4 and 50 and 53 of the Civil Procedure Rules as they are prejudicial to the running of the company. The respondents/original ex parte applicants contend otherwise.

On account of the acrimony which this matter has so far generated, a short background would in my view assist in crystallising the issues at stake in this application. As already stated, the company is a multi-billion undertaking and has been the subject of a number of leadership cases which has taken up a lot of this court's precious time. Presently on 22nd April 2003, the company and 2 directors notified the court of an intention to bring a judicial review application for leave on the following day. On the following day it duly filed the application for leave to seek orders of certiorari to quash the order of the Registrar of Companies made on 21st March 2003 registering the interested parties as directors of the company and deregistering the applicants from the company leadership. It also sought the order of mandamus to compel the respondent, to reregister the applicants and to prohibit the registrar and the interested parties from interfering with the management of the company. The application also sought an order that the leave do operate as a stay of the respondents' orders. When the matter came before the court for hearing ex parte, although the leave was granted, the order for it to operate as a stay was specifically refused. However when the notice of motion for the substantive orders was filed on 7th April 2003, a prayer for restraining the interested parties pending the hearing of the motion was included therein and taken before the Duty Judge as it was under a certificate of urgency, Counsel for the applicant then submitted that the interested parties who were in court would cause irreparable loss to the assets of the company. The court then directed that the leave granted on 3rd April 2003 do operate as a stay and also restrained the applicants from acting as directors of the company. The billion dollar question is whether the court was entitled to order the leave to operate as a stay long after the leave was granted.

Mr. Njogu for the applicants submitted that as the stay had been refused at the leave stage, it was not open to the court to do so long after the stay and motion had been filed. He also stated that the order if maintained would create a vacuum in the management of the company and disrupt its activities. Consequently they should be vacated.

Mr. Machira, the learned counsel for the respondents submitted that the court had powers to do so and that there would be no disruption of the company's activities. In his view the court should not entertain the current application as it was tantamount to sitting on appeal over own orders.

O.53 Rule 1(4) of the Civil Procedure Rules, which is a reproduction of the Law Reform Act reads as follows:-

**“(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari, shall if the Judge so directs, operate as a stay of the proceedings in question until determination of the application, or until the Judge rules otherwise”.**

As can be seen, the jurisdiction of the court to require leave to operate as a stay only arises at the time it is granting the leave. It is also entitled to bring the stay, if granted, to an end otherwise after grant at the time of granting the leave. The court is not entitled to give it at any other time. Consequently, the restraining orders could have only been granted on specific application under O.39 of the Civil Procedure Rules.

Mr. Machira as stated submitted that the court would be sitting on appeal against itself if it entertained this application. With due respect to the learned Senior Counsel, I do not agree. The rules themselves specifically provide that such a stay, if granted, would last until the Judge orders otherwise. If such an order were to be made on the basis of this application it would be within the rule. In any case under O.39 rule 4 of the Civil Procedure Rules, the court can vary its orders on application at any time before they are spent. In such cases, it would not be sitting on appeal on its own orders. It would hereby be excusing powers divided to it by the rules.

In view of the above, I hold that this court in granting or directing the leave to operate as a stay long after it had granted the leave had erred. It also erred in granting the ex parte restraining orders as the application for same were not properly before the court and in any case as the orders sought to be quashed were already in force they would have disrupted the running of the company. I therefore grant prayer 5 of this application and discharge and set aside the orders of this court issued on 8th April 2003. I have no order as to costs. Orders accordingly.

Dated and delivered this 6th day of August, 2003.

G.P MBITO

JUDGE

6.8.2003

Coram : Mbito, J

Kariuki for applicants/interested parties

Nil for respondent

ORDER

Read and signed.

G.P MBITO

JUDGE