



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO. E009 OF 2021**

***(CORAM: F.M. GIKONYO J.)***

*(Being an appeal from the Ruling of Hon G.N. Wakahu (C.M) Delivered*

*on 3<sup>rd</sup> May 2021 and 26<sup>th</sup> May 2021 in Narok CMCC No. E069 of 2021)*

**CARNAVALE VINCENT MICHAEL.....1<sup>ST</sup> APPELLANT/APPLICANT**

**JACKLINE RENOI SAIROWUA.....2<sup>ND</sup> APPELLANT/APPLICANT**

**ATOK LIMITED.....3<sup>RD</sup> APPELLANT/APPLICANT**

**VERSUS**

**MOHAMED HANIF MAJOTHI (SUING THROUGH HIS PROXY)**

**ABDUL AZIM ANWARALI KASSAM ISMAIL.....RESPONDENT**

**RULING**

**Stay of Proceedings, Enlargement of Time and variation of orders**

[1] The Notice of Motion dated 3<sup>rd</sup> July, 2021, seeks the following orders.

***i. Spent.***

***ii. THAT leave be granted ex parte to the applicants herein to file the intended appeal against the ruling by Hon. G.N. Wakahu (C.M.) on CMC E069 of 2021 delivered on the 26<sup>th</sup> day of May 2021.***

***iii. THAT pending the hearing and determination of the intended appeal, this honourable court be pleased to call for purposes of staying proceedings of the Chief Magistrate Court in Narok, CMC NO. E069 of 2021.***

***iv. THAT the ex parte interlocutory order of injunction emanating therefrom dated the 3<sup>rd</sup> May 2021 against the applicants/appellants be vacated or varied accordingly as the same is unfounded both at law and equity.***

***v. THAT this honourable court be pleased to grant leave to the applicants herein to file the intended appeal out of time against the ruling by Hon. G.N. Wakahu (C.M.) on CMC E069 delivered on the 26<sup>th</sup> day of May 2021,***

***vi. THAT cost of this application be provided for.***

[2] The application is premised upon the grounds set out in the application and supporting affidavit sworn by Michael Vincent Carnevale.

[3] The applicant's major complaint is that their preliminary objection dated 12<sup>th</sup> May 2021 challenging the jurisdiction of the chief magistrate court to hear and determine the suit was dismissed in a ruling delivered on 26<sup>th</sup> May 2021. They now fear that the suit may be set down for hearing anytime to the detriment of this appeal. Therefore, they apply for stay of that suit pending determination of this appeal.

[4] The Respondent opposed the application via a Replying Affidavit Replying affidavit dated 28th July 2021 sworn by Abdul Azim Anwarali Kassam Ismail.

### **THE APPELLANT/APPLICANTS' CASE**

[5] The applicants contends that the ruling dated 26th May 2021 subjects them to the process that is fundamentally flawed at law. The applicants pointed out that the substratum of the suit that was filed by the respondent is purely within the purview of the Companies Act 2015 laws of Kenya and exclusively reserved for the high court by Section 3 of the Companies Act 2015.

[6] The applicants submitted that the respondent's suit is within the scope part IX more particularly Sections 238 & 239 of the Companies Act 2015 'derivative claim' requiring leave of court before instituting the claim. The same was nonetheless not sought at the instance thereby making the suit incompetent before the chief magistrate court in the first instance. See **Birch Vs Sullivan & Another [1958] 1 ALL ER 56 and Wallersteiner Vs Moir (no. 2) [1975] ALL ER 849 as cited in Ghelani Metals Limited & 3 Others Vs Elesh Ghelani Natwarl & Another [2017] eKLR**

[7] The applicants submitted that disputes of director ought to be addressed within the scope and the meaning and the import of part XI of the Companies Act 2015 which eventually translates to such disputes being heard and determined by the high court within the meaning and interpretation of section 3 of the companies act 2015 laws of Kenya.

[8] The Applicants are seeking for stay of proceedings in Narok, CMC NO. E069 of 2021 for the reason that the trial court lacks jurisdiction to hear and determine this matter.

[9] The applicants urges this court to exercise its supervisory power and proceed to call for the proceedings of the CMC E069 of 2021 for purposes of staying them to curtail the imminent abuse of the court process.

[10] The applicants submitted that the high court has supervisory jurisdiction under Article 165(6) and (7) of the Kenyan Constitution 2010 over the subordinate courts. Stay of proceedings of the court is a fundamental interruption of the right that a party has to conduct his litigation and should only be exercised cautiously and to preserve the ends of justice. They relied in the case of **Global Tours Vs Travels Limited; Nairobi Hc winding Up Cause No. 43 Of 2000 As Cited In Kenya Wildlife Service Vs James Mutembei [2019] eKLR And Halsbury's Laws Of England , 4th Edition Vol.37 Pages 330 And 332.**

[11] Further, the Applicants seek leave of this court to file the intended appeal out of time. This follows the lapse of the statutory time lapse within which they should have filed the appeal. The applicants averred that the delay was purely logistical not inordinate in the circumstance as the applicants have not shown any indolence or lethargy towards the process.

[12] The applicants submitted that that the documents were obtained within the record time and the lapse of the window period is inadvertent and not calculative or malicious to derail the due process or waste the courts judicious time. That the applicants were able to obtain certified proceedings of the magistrate's court on the 24th June 2021 which time was within the 30 day period as the ruling was delivered on 26th May 2021.

[13] The applicants did proceed to file the application for leave on the 3rd July 2021 a period of less than 10 days which was purely logical in the instance to compile and set the application ready for filing including obtaining the such other supporting documentation from the applicants to further buttress the intended appeal in the event leave is granted as annexed and attached in the said application for leave supported by the draft memorandum of appeal.

[14] The applicants submitted that there is no prejudice that will be occasioned to the respondent should the time to file the intended appeal be granted by this honourable court. They cited the case of **Leo Sila Mutiso Vs Hellen Wangare Mwangi CA NO.255 Of 1997** as cited in **Happy Jumwa Kazungu Vs Victor Kahindi Kazungu [2020] eKLR And Martin Vs Chao [1985] 34 WLR 379**

[15] The applicants argued that they acted in good faith and pursued the necessary documents to lodge the intended record of appeal and lapse of period of less than ten days therefrom is not inordinate in the circumstance.

[16] The applicants argued that the intended appeal raises a prima facie case as the grounds have been well laid out in the draft memorandum of appeal. They relied in the case of **Niazons (Kenya) Limited Vs China Road & Bridge Corporation (Kenya) Limited Nairobi (Milimani) Hccc No. 126 Of 1999 (As Cited In Ezekiel Mule Musembi Vs Young & Company (E.A) Limited [2019] eKLR., David Morton Silverstein Vs Atsango Chesoni Civil Application No. Nairobi 189 of 2001 [2002] 1KLR EA 296.**

[17] The applicants' further contest the *ex parte* orders of injunction issued against them for want of threshold. They stated that the said orders are punitive and abrogates the interest of justice to which the respondent also stands to suffer irreparably if sustained.

[18] The applicants submitted that the grounds for granting injunction order laid out in the locus classicus case of **Giella Vs Cassman Brown [1973] E.A 358** cited in **East Africa Development Bank Vs Hyundai Motor Kenya Limited [2006] eKLR** were never met by the respondent and therefore the honourable court ought not to have granted the *ex parte* order of injunction in the first instance. They cited the case of **Llyods Bowmaker Ltd Vs Britania Arrow Holdings P/C (Larens, Third Party [1988] 3 ALL ER 178 At 183 As Cited In Owners Of Motor Vessel 'Lilian 'S' V Caltex Oil Kenya Limited [1989] eKLR, R Vs Kensington Income Tax Commissioner E.P. Princess Edmond De Ploignac [1917] 1KB486**

[19] The applicants submitted that the *ex parte* order ought not to have issued in the instance as the proper material was not placed before court at the preliminary stage. They relied in the case of **Andria (Vasso), [1984] 1qb 477 At Page 491**

[20] The applicants submitted that it follows that in the absence of the proper procedure being adhered demonstrably by the respondent, it therefore leaves no room for doubt that the applicants intended appeal is not only meritorious in the instance but also has *prima facie* chance of success. They relied in the case of *Rai & Others Vs Rai & Others*[2002] 2 EA Pages 537 as cited in *Damson Muketu Mutuku Vs David Kioko Musau* [2020] eKLR

[21] The applicants prayed that this court calls for the proceedings of the chief magistrate's court CMC E069 of 2021 for purpose of staying the same.

[22] The applicants state that they have established an arguable Appeal with a *prima facie* chance of success. It is further stated that the Appeal will be rendered nugatory if stay of proceedings herein is not issued. They urged this court to vacate and /or set aside the *ex parte* order of injunction dated 3<sup>rd</sup> May 2021 and enlarge time to allow the applicants to file their intended record of appeal.

### **RESPONDENT'S CASE**

[23] The respondent submitted that the application is misplaced. He cited Article 162(2) of the Constitution 2010 and Section 3 of the Companies Act 2015 and Section 7(3) of the Magistrate's Court 2015.

[24] The respondent submitted that the issue of Section 238 and 239 of the Companies Act as to derivative suits was not pleaded earlier. He however stated that the said section clearly stipulates only suits by members and not directors hence the application is merely a fishing expedition which ought not to be allowed to see the light of the day.

[25] The respondent submitted that it is established by law that for stay of proceedings, the appeal has to be allowed and therefore the same be heard hence the same is premature at this stage.

[26] The respondent submitted that the applicants have not given a reason for the delay.

[27] The respondent submitted that the applicants are still operating business in the subject premises and in the name of Kobe Mara Camp/Kobe House Mara in total contravention of the court's orders as to status quo out of which they have filed contempt proceedings. He urged the court to deny the applicants extension of time for appeal on account of being contemnors hence have come to court with unclean hands.

[28] The respondent submitted that the applicants have not made any efforts to complying with the law while operating the business to the detriment of the respondent who is a majority shareholder. He therefore urged this court to dismiss the applicants' application dated 3rd July 2021.

[29] The respondent submitted that the business of the 3<sup>rd</sup> applicant's account is run through ATM withdrawals. That the issues as raised as to safeguard of the business has not been put in place as a matter of law.

[30] The respondent submitted that on 30<sup>th</sup> April 2021 he filed an application under certificate of urgency seeking injunctive orders therein which was granted and subsequently served upon the appellants. Among the issues raised to warrant granting the said order is operating the business of the companies investment on hospitality majoring on tourism while the applicants have failed to get relevant licences, insurance as well as account for the income as received and again which might lead to issues on KRA returns.

[31] The respondent submitted that beside this appeal the applicants have never even filed their defense as required in law almost three months down the line as provided for under Order 7 Rule 1 of the Civil Procedure Code cap 21 laws of Kenya. The applicants have not adhered to the issues raised in the respondent's application. It is clear indication that the applicants are out to use this appeal to sanitize an illegality.

[32] The respondent submitted that despite the colossal amount injected into the company by the respondent the 1<sup>st</sup> and 2<sup>nd</sup> appellant have not only failed to show value for that capital to the extent of failing to show returns for the same beside costs therein are exaggerated.

[33] The respondent urges that for the interest of justice this honourable court does decline to grant the orders sought to safeguard his interest since the actions by the 1<sup>st</sup> and 2<sup>nd</sup> appellants may subject him to irreparable loss which will emanate from law suits.

[34] The respondent Prays that the application for leave to appeal out of time be dismissed with costs.

### **ANALYSIS AND DETERMINATION**

[35] Pursuant to the request by the applicant, and the nature of the claims being made in these proceedings, the court called for the trial court's file. The court has perused the said file. Worthy to note is that the major issue in controversy is whether the suit filed in the trial court is a derivative suit or not. The question of jurisdiction is invariable in issue thereto. I do not wish to determine it at this stage. Nonetheless, I will state just what is enough for purposes of this riling.

### **Important Hints**

[36] Two important hints arising from the perusal of file. One, from the annexures filed, the records relating to ATOK LIMITED held by the companies Registry as at 28<sup>th</sup> January, 2021, show that the 1<sup>st</sup> and 2<sup>nd</sup> applicants, and the respondent are director/shareholder of the

company; with 25%, 25% and 50% shareholding, respectively. Accordingly, in the absence of change of the said particulars and details, the three, are members and directors of the company.

[37] Two, I note squabbles amongst members of the company; grievances against the company; but also, matters to do with how the company is being managed is at the center of the controversy herein.

[38] These important hints will shape the direction the court will take on the requests herein. I have considered the rival arguments made by parties.

### **Significant orders sought**

[39] The significant orders sought by the applicants are: -

- i) Leave to file appeal out of time;***
- ii) Stay of proceedings; and***
- iii) Discharge or variation of injunction order issued herein.***

### **Leave to file appeal out of time**

[40] Whereas the court has wide discretion to extend time, the applicant should explain the reasons for the delay to the satisfaction of the court. See **Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR:-**

*“..... It is clear that the discretion to extend time is indeed unfettered.*

*It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

[41] Under Section 79G of the Civil Procedure Act, which section provides that: -

*“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”*

[42] As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). The explanation if any for the delay; (ii). The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

[43] What then is the explanation for the default in this matter? The applicants' legal counsel termed the delay in not filing appeal in time as inadvertence. However, the nature of the inadvertence is not explained. In **Itute Ngui & Anor vs. Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997, Omolo, JA** held that whereas advocate's *bona fide* error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. Nevertheless, the delay herein is for ten days which is really not beyond unacceptable limits.

[44] In light of the important hints I passed on earlier, points in the proposed appeal are arguable and worth court's determination. This statement is made generally and is not to be seen as a determination of the merits of the intended appeal. See **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court stated as follows:

*“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”*

[45] What of the degree of prejudice to the respondent? It bears repeating that the parties herein are members of the respondent company. Intense evaluation of the appeal is in the best interest of the company as well as its members. There is not really any prejudice that the respondents will suffer by an extension of time to file appeal.

[46] In the upshot, I find the delay of about 10 days not to be inordinate or inexcusable. In the circumstances, denying the applicants an opportunity to be heard on appeal is a denial of right to appeal and access to justice, and therefore, prejudicial to the applicants. Consequently, I grant the applicants leave to file appeal in 30 days.

### **Stay of proceedings**

[47] I have allowed the applicants leave to file appeal out of time. Is stay of proceedings a feasible option?

[48] Stay proceedings is a serious interruption of a party's right to litigate the case. It should therefore, be ordered in clear cases where the proceeding is an abuse of the court process, or its oppressive or is mere demurer or must be stopped in the interest of justice.

[49] In the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2015) eKLR* the court observed that: -

*“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”*

[50] From the observations above, it is safer the proceedings filed in the trial court are transferred to this court for hearing and disposal. This way, any further proceedings shall be heard in this court. I so order. The court may on its own motion order a matter before a lower court to be withdrawn and or transferred to this court for hearing and disposal if the interest of justice so demands. I so order.

[51] The application for stay of proceedings is therefore overtaken by events.

### **Discharge or variation of the injunctive orders issued.**

[52] The applicants stated that the injunction issued is so disruptive yet it was not deserved and was issued without jurisdiction. The respondent states that the injunction is deserved as he is entitled to share the profits of the company- something the applicants have denied him. He claims that he had been denied access to the Camp.

[53] A *bona fide* concern of any member of a company is for the company to run in accordance with the law and the memorandum and articles of association, and in the best interest of the company and its members. First and foremost, appointment of the Board of Directors is done by the shareholders in an AGM. I have stated that the record annexed show the three parties herein are director/shareholder. From the record, the applicants are in control of the management and business of the company to the exclusion of the respondent who holds 50% shareholding of the company. Neither majority nor minority dictatorship in the affairs of a company is good.

[54] The respondent has stated that the applicants are still operating business in the subject premises and in the name of Kobe Mara Camp/Kobe House Mara in total contravention of the court's orders as to status quo out of which they have filed contempt proceedings. He has cited them as contemnors, thus, they have come to court with unclean hands.

[55] The respondent lamented that the applicants have not made any efforts to comply with the law while operating the business to the detriment of the respondent who is a majority shareholder.

[56] The respondent submitted that the business of the 3<sup>rd</sup> applicant's account is run through ATM withdrawals. In addition, the applicants have failed to get relevant licences, insurance as well as account for the income as received and which might lead to issues on KRA returns. To him, the issues raised are to safeguard of the business, yet, nothing has not been put in place as a matter of law. The respondent's anguish is that injunctive orders herein were served upon the appellants.

[57] It seems the parties have resulted into dealing with the affairs of the company in methods other than in accordance with memo and articles of association, and the law. The scenario created by the averments of the parties portends a stale mate as two directors holding 50% shareholding are on one side whilst the other director holding a shareholding of 50% is on the other side; this is injurious to the company.

[58] As a matter of law, accountability by the directors in the management of the company to the law and members is peremptory. And failure to account or running the company in contravention of the law and the tools of incorporation makes the directors liability in law. Pertinent issues of accountability and possible violation of the law and the tools of registration have been raised by the respondent.

[59] On the basis of the foregoing, it is imprudent to discharge or vary the injunction before intense interrogation of the true status of the affairs of the company. Accordingly, I deny the request to discharge or vary the injunction issued herein.

### **Conclusions and orders**

[60] Ultimately, I issue the following orders:

**i. Leave to file appeal out of time is granted. The Appeal and record of appeal to be filed within 30 days.**

**ii. The trial court's file is transferred to this court for hearing and disposal. As a consequence, the order for stay of proceedings appealed against is overtaken by events.**

iii. The appellants request for a discharge or variation of the injunction issued herein is denied for now. This order may, however, be reviewed after interrogation of status of the affairs of the company.

iv. Given the nature of these proceedings, I order each party to bear own costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 4TH DAY OF OCTOBER, 2021 -

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**F. GIKONYO M.**

**JUDGE**

**In the Presence of:-**

1. Court Assistant – Kasaso
2. Ombati Counsel for Respondent - Present
3. Ms tuyu Counsel for Applicant - Present