



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 529 OF 2011

JOHN PETER KAMAU RUHANGI.....1ST PLAINTIFF

JOSEPH K GAKURE.....2ND PLAINTIFF

M.J METHU.....3RD PLAINTIFF

JOSEPH MUTHAMBURE.....4TH PLAINTIFF

JOSEPH W KIRIGWI.....5TH PLAINTIFF

LAZARUS W WAIRAGU & OTHERS.....6TH PLAINTIFF

TERESIA WAIRIMU KIRIMA.....7TH PLAINTIFF

VERSUS

KENDA INVESTMENT LIMITED.....1ST DEFENDANT

WANJAU KIRIMA.....2ND DEFENDANT

GODFREY KIBUTHU.....3RD DEFENDANT

RULING

1. This ruling relates to an application by the 1st, 2nd and 3rd defendant dated 25th April 2019. The application is expressed to have been brought under order 42 rule 6(1) of the Civil Procedure Rules. It seeks the following orders:

a) Spent

b) That pending the hearing of this application inter parties the plaintiffs by themselves, their servants or their agents be restrained by an order of injunction from holding the special general meeting of Kenda investments limited on the 11th May 2019 or any other date at the Kenda house hall Kenyenyaini shopping center Kangema district of Muranga county

c) That the defendants by themselves or their servants or agents be restrained by an order of injunction for holding the special general meeting of Kenda investments limited convened for the 11th may 2019 at the Kenda house hall Kenyenyaini shopping centre Kangema district of Muranga county

d) That the decision and orders of this honourable court given in the ruling dated 7th march, 2019 and delivered on the 27th March, 2019 be stayed pending the hearing and determination of an appeal to the Court of Appeal.

e) The costs of this application be provided for

2. The application is premised on the grounds that a ruling by Lady Justice Sewe dated 7th March 2019 and delivered on 27th March 2019 has prejudiced the lawful members of Kenda Investments Limited by denying the said members their right to attend, to vote and to make

resolutions in respect to the company during the special meeting. That the decision in the ruling infracts upon and offends the provisions of sections 112 to 120 of the Companies Act Chapter 486 Laws of Kenya (repealed). That if the ruling is not stayed and the Special General Meeting slated for the 11th May, 2019 is allowed to proceed, Kenda Investments limited and the third defendant herein shall suffer substantial loss. That if the ruling is not stayed the consent orders dated 12th March 2015 entered by the parties will be disregarded and rendered otiose.

3. The application is supported by the affidavit of **Wanjau Kirima** who is the director of Kenda Investments Limited and sworn on 25th April 2019.

4. The 1st plaintiff, **John Peter Kamau Ruhangi**, filed a replying affidavit dated 25th April 2019 in which he opposed the notice of motion while terming it as being misconceived and an abuse of the court process for reasons that; there is no sufficient cause established to warrant a stay in the ruling; The applicants have not established the loss they are likely to suffer in the event the Special General Meeting is held as ordered by the court and that the instant application appears to suggest that this court is an appellate court. It is further deponed that the decision by Justice Sewe merely directed that a Special General Meeting be convened pursuant to the consent order dated 12th March 2015 and that no prejudice will be visited upon the applicants by convening such a meeting. He urged the court to take judicial notice of the fact that an appeal at the court of appeal is likely take a long time before being determined in which case, the majority shareholders in the company would suffer irreparable loss and damage. He further avers that the applicants have not advanced any legal or lawful basis to support the orders sought and that the application ought to be dismissed with costs.

5. **Susan Wangari Kirima** also filed a replying affidavit dated 3rd May 2019 wherein she avers that there was a mix up in the pages referred to by the court which have the contested Gateru list being used as opposed to the list approved by the court at paragraph nine of the impugned ruling by Justice Sewe. She avers that the mix up is prejudicial and ought to be corrected.

6. **Teresiah Wairimu Kirima**, filed a replying affidavit in support of the notice of motion on the 6th May 2019 in which she states that she supports the defendants because both the estate of her husband and herself were deprived of their shares without due process of the law. She avers that she has lodged an application to appeal against the entire ruling and that the same is pending at the Court of Appeal. She states that the reason for the appeal is that the honourable trial judge in her ruling adopted a list of members that excluded her name as a shareholder and reduced the shares of the estate of the late G.K Kirima. She further states that as a result of that action her appeal will be rendered nugatory and her rights will be violated.

7. I have considered the instant application and the submissions by the parties' respective counsel. The main issue that falls for determination is whether this court should grant an order of Stay of Execution pending appeal.

8. The gist of the applicant's case is that in the ruling of Justice Olga Sewe dated 7th March 2019 that has given rise to this application for stay of execution pending appeal, directions were issued to the effect that the list to be used at the SGM is the one that the company used in the general meeting of 2009 and on which the dividends paid in 2008 was based (hereinafter the "**Gateru list**"). The applicant's contention, on the other hand, was that the list that ought to be used in the Special General Meeting should be the one agreed upon in the consent order of 12th March 2015.

9. This court has been invited to examine the facts before it and ascertain whether they are sufficient to warrant an order of stay. The applicant invoked the provisions of **Order 42 Rule 6(1) of the Civil Procedure Rules** which provides for the conditions for granting orders of stay of execution pending appeal as follows:

No appeal or a 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 appealed from 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.

10. Further **Order 42, Rule 6(2)** states:

No order for 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.

11. The applicant therefore needed to satisfy the Court on the following conditions before they can be granted the stay orders:

a. Substantial loss may result to the applicant unless the order is made.

b. The application has been made without unreasonable delay, and

c. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

12. On the aspect of substantial loss, the applicant argued that substantial loss will be visited upon Kenda Investments limited and the 3rd defendant if the Special General Meeting is held in terms of the impugned ruling that is the subject of the appeal before the Court of Appeal. It is also the position of one Theresiah Wairimu Kirima that adoption of the list of shareholders as ordered by the trial judge in the impugned ruling excluded her name as a shareholder and reduced the shares of the estate of the late Kirima.

13. Gikonyo J. discussed the issue of substantial loss in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and held thus:-

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.*”**

14. On the issue of whether or not the instant application has been filed without undue delay, I find that it was not contested that the instant application was filed timeously. The last condition for stay, which is the provision of security for costs, was not canvassed by the parties and I will therefore not belabor it in this ruling.

15. The instant application invokes the discretionary powers of the court which powers must be exercised judiciously. In the case of Butt Vs Rent restriction Tribunal [1982] KLR 417 Madan, Miller and Porter JJA, had this to say while considering an application and the subject of discretion:

***“i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*”**

***ii. the general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.*”**

***iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*”**

***iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.”*”**

16. The dictum in the above cited case is that the decision on whether or not to grant an order of stay of execution pending appeal is at the discretion of the court. It is also worthy to note that each case must be determined on its own merit while taking into account the fact that while the decree holder is entitled to the fruits of his judgment, the court ought not to rule in a manner that will render the appeal nugatory. (See Samuel Kiprono Sang vs Rosemary Chebet Korir & 2 Others [2018] eKLR)

17. In Tabro Transporters Ltd V Absalom Dova Lubasi [2012] eKLR the court held that;

***“the discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage, but administers the justice that the case deserves.”*”**

18. In the instant case, I find that at the heart of the dispute in both the application and the appeal pending before the Court of Appeal is the issue of the list of shareholders that will be used in the 1st defendant’s Special General Meeting (SGM) that is slated for 11th May 2019. While the applicant contends that the applicable list is the one that was agreed upon in the consent order of 12th March 2015, the respondents are of the view that the applicable list is the Gateru list. Needless to say, participation or attendance at the SGM will only be open to those shareholders whose names are on the list referred to in the impugned ruling which the applicant contends, excludes a large number of shareholders. My take is that participation at the SGM is a right accruing to every shareholder. I therefore find that the possibility that *bona fide* shareholders of the company may be excluded from the said meeting, as is alleged in this application, should the list of shareholders used in the said meeting not contain their names, constitutes a loss that falls in the category of substantial loss that cannot be remedied through damages as decisions may be made in such a meeting that could have irreversible consequences on the company in question.

19. In a nutshell, I find that in the interest of justice, the orders sought in the application are merited so as not to render the appeal nugatory. Consequently, I allow the application in the following terms:

***a) That the plaintiffs/respondents herein, by themselves or their servants or agent be restrained by an order of an injunction from holding the Special General Meeting of Kenda Investments Limited slated for the 11th May, 2019 at the Kenda House Hall, Kenyenyaini Shopping Centre, Kangema District, Murang’a County.*”**

***b) That the decision and orders of this Honourable court given in the ruling dated 7th March, 2019 and delivered on the 27th March, 2019 be stayed pending the hearing and determination of an appeal to the Court of Appeal.*”**

***c) The costs of this application will abide the outcome of the appeal.*”**

Dated, signed and delivered in open court at Nairobi this 8th day of May 2019

W. A. OKWANY

JUDGE

In the presence of:

Mr Njengo for the 1st- 5th plaintiff

Mr Njengo for the 6th plaintiff

Mr Kyalo for 7th plaintiff

Mr Amollo for the defendants

Court Clerk - Ali