



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

Civil Suit Misc. Application No. 495 Of 2012

IN THE MATTER OF PHILIP AGENCIES LIMITED

AND

IN THE MATTER OF WINES & SPIRIT (KENYA) LIMITED

AND

IN THE MATTER OF WAIGANJO INVESTMENT LIMITED

AND

IN THE MATTER OF COMPANIES ACT (CAP 486) LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF INSPECTORS

AND AN INVESTIGATION UNDER SECTIONS 165 (1) (A) AND 166 (b) (i) and

(iii) OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

BETWEEN

LUCY WAITHERA KIMANGA1ST APPLICANT

DAMARIS WANJIKU WAIGANJO.....2ND APPLICANT

MARGARET WAMBUI CHUCHU.....3RD APPLICANT

VERSUS

JOHN WAIGANJO GICHURI.....RESPONDENT

RULING

Stay of proceedings

[1] I have before me a Motion dated 19th May 2014. The Application has been made by the Respondent in the main cause and he seeks an order of stay of further proceedings in this matter pending the hearing and determination of an appeal against the decision of **25th February, 2014**. The Application is expressed to be brought under Order 42, Rule 6 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act, CAP 21 Laws of Kenya and all other enabling provisions of the Law. It is supported by the affidavit of **JOHN WAIGANJO GICHURI**, the Respondent, sworn on **19th May, 2014**.

The threshold of law

[2] The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, ***Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR***. The guiding legal principles gathered from these cases may be summarized as follows:-

- a. *The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.*
- b. *The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.*
- c. *In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.*
- d. *In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.*

[3] Does the grounds set out by the Application fit the above legal threshold?

What the Applicant says

[4] The Applicant says that he has filed an appeal against the decision of the court made on 25.2.104 dismissing his preliminary objection to dismiss the suit herein. The appeal in the court of appeal has not been heard hence the necessity of filing this application. He stated that, other than this matter the parties in this suit are engaged in a similar dispute in HCC MISC case 66 of 2012. The applicants therein intend to take over control of the Kshs. 14 billion estate of the father of the applicant who is a shareholder in the companies mentioned in this motion. He went further to submit that he is a brother in law to the 1st and 2nd applicant in the main motion and allegedly a step son of the 3rd applicant. The 1st and 2nd applicants have filed the motion on behalf of the estates of their deceased husbands who were shareholders of some of the companies. It is not clear under what capacity the 3rd applicant has filed the motion other than to further the cause of HCC Misc cause no. 66/2012. Pending the hearing of this motion, the parties arrived at a compromise over a sale of properties owned by Philip Agencies Limited and the consent was executed. It is therefore safe to state that all parties are related through marriage and are fighting over the control of properties owned by companies in which only the respondent is a director.

[5] The Applicant cited the law governing stay of proceedings to be as enunciated in the case of **Silvestein vs. Cheson (2002) eKLR** and repeated in later cases like **KCB vs. Hon. Nicholas Ombija and Donholm Rahisi Stores –Vs- Barclays Bank of Kenya Ltd & Anor (2006) eKLR**. These principles according to the Applicant are:

1. The intended appeal is arguable;
2. That unless stay is granted, the successful appeal will be rendered nugatory;
3. The application is intended to save on judicial time and costs to the parties;

[6] The Applicant stated that the appeal has high chances of success because the applicants in the main motion have deposed that they are not directors of the companies in issue. The four companies are private and not public entities. Their operations can only be limited to the directors and shareholders of those entities. Strangers have no business in their private affairs. The court at page 17 and 18 of its ruling made certain findings of fact on shareholding of the companies and shareholding is one of the issues to be determined in the proposed appeal. According to the Applicant, *Locus standi* is a pure matter of law that can be established at a preliminary level. These are arguable points of appeal. The Applicant took issue with the ruling of the court that matters which formed part of the objection were to be tried at the hearing yet all issues raised ought to have been in a plaint where documents will be produced and witnesses examined. The suit herein was commenced by way of Notice of Motion and there is no procedure that hearing of motions will be by way of oral evidence. This is an arguable point on appeal.

[7] They preferred that a third arguable point is that there is disconnect between the provisions of the companies rules and the civil procedure rules on how appointment of inspectors should be done. The companies act talks of a motion presuming the existence of a main suit in place at the time of filing whereas the civil procedure contemplates a plaint. Fourthly the four companies sought to be the subject matter are not parties to the suit. The parties to the suits are the applicants and the respondent. The companies are mentioned as a matter of course and in the heading of the suit. This is a matter of law and can be determined at a preliminary level. This is arguable and substantive matter for determination by the appellate court.

[8] Other arguable points are that the applicants have failed to use the machinery set out in the Companies Act before going to court; and membership of a company vis-à-vis the provisions of the law of succession act is yet to be resolved. The Applicant urged the court to find that unless stay is granted the appeal will be rendered nugatory. If this matter is heard on merit when the current appeal is subsisting, the appeal will be rendered nugatory and will be a waste of time and resources of the applicant. So that precious judicial time and costs are saved, these proceedings should be stayed. The eventuality of setting aside the judgment which may be entered as well as the possibility of embarrassing the court by having two divergent decisions will be avoided. Allow the application. Prejudice to him will also occur unless stay is granted.

The Respondent opposed stay of proceedings

[9] They filed a Replying Affidavit sworn on **19th June, 2014**. They submitted that there is an appeal in the Court of Appeal at Nairobi. But it is not true that the appeal will be rendered nugatory or he will suffer any prejudice unless stay is granted. The reasons given are that; the Application is an abuse of the Court process filed only to frustrate this matter from proceeding to full hearing. The Applicant is already running down the companies' subject of this matter as clearly evidenced by his **Supplementary Affidavit filed in Misc. 567 of 2012**, which annexure is marked **LWK1** in the Replying Affidavit. The taxman is rightfully owed and the longer it takes to solve this matter, the more the tax arrears will accrue. It is imperative for all parties concerned and for the sake of Mzee Philip Waiganjo Gichuri's dependants that the companies subject of these proceedings are placed in the hands of a neutral manager because it is evident the Respondent/Applicant has been mismanaging the same. The Applicant is bent at disintitling the rest of Mzee's family from his estate.

[10] Despite averments by the Applicant in his Supplementary Affidavit dated 1st July, 2014 alleges that he has been reducing the debts of the companies, including KRA, he has not availed any documentary evidence to prove this. He is at the helm of these companies and it is clear that he is mismanaging them all alone. If he really cared about these companies, he wouldn't have filed an unmerited appeal. The estate will suffer by any order of stay of proceedings. The

Respondents as shareholders have interest in the companies. There is no sufficient cause to order stay of proceedings. The *locus classicus* authority is the finding of **Madan JA** (as he then was) in the case of **Butt v The Rent Restriction Tribunal (supra)** stay of execution. The Applicant for stay of proceedings pending appeal must provide specific details and particulars of the loss he is likely to suffer if the stay is not granted. It is not enough to merely state that substantial loss will result, or that justice would be put into disrepute, like the Applicant in the instant case. The Respondent/Applicant has not shown how he is likely to suffer if his application is dismissed. His appeal is unmerited. It is the shareholders who will suffer out of the mismanagement of the companies. See decision by Havelock. J. in **Bai Lin (K) Ltd & 2 others v Zingo Investments Limited & another [2014] eKLR** where he relied on the holding in **Machira v. East African Standard (No. 2) (2002) 2 KLR 63**, where Kuloba J. found;

“In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage.....In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result...In this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars...Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

[11] See also decision by Odunga J on substantial loss in **Republic v. The Commissioner For Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR**, where he relied on the case of **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63**, where Kuloba J. also held that;

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

[12] No damage is shown will occur to the Applicant unless stay is granted. The companies will collapse instead as a result of further delay in prosecution of this suit. The suit should proceed to hearing. See **Halsbury's Law of England, 4th Edn. Vo. 37** page 330 and 332. See also Lesiit J., in **Chesilyot Enterprises Ltd vs. Co-Operative Bank (K) Ltd [2008] eKLR**, where she relied on the above text, and further on **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another C. A. Misc. Appl. No. Nai 50 of 2001**.

[12] The facts of this case favour the dismissal of the application for stay of proceedings. The companies herein are at the verge of collapse with the Respondent at their helm. He is a litigant without clean hands. There is a far greater interest to be protected here, the companies and the dependants of Mzee Philip Waiganjo Gichuri.

THE DETERMINATION

[13] The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in

law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the Constitution which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with *the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.*

[14] Further illumination on this approach is found in the passage *Halsbury's Law of England, 4th Edn. Vo. 37* page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

[16] Are the reasons given sufficient for this court to impose a stay of proceedings? As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed. That is only one of the factors which the court should consider. There are other equally important factors to consider namely;

i) ***The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;***

ii) ***The interest of justice in the case; the pros and cons of granting or not granting the order;***

iii) ***The prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,***

IV) The scarcity and optimum utilization of judicial time and

V) Whether the application has been brought expeditiously.

[17] The Applicant put much effort in showing that he has arguable appeal with high probability of success. The points he has raised may be arguable but he has failed to show how continuing of these proceedings will cause him prejudice. He has stated in most generalized manner that the appeal will be rendered nugatory because it has high chances of success. But he has not shown how an appeal arising out of an interlocutory application would be prejudiced by hearing this case.

The nature of stay of further proceedings is founded on the fact that the suit is still pending and only that it is being sought on the basis of an interlocutory appeal. Havelock J stated clearly that the objections on membership of the companies, locus standi, disconnect among the Companies Act, the Succession Act and the Civil Procedure Rules as well as the procedural objections which were raised by the Applicant were capable of being tried and determined in the trial. I agree. The decision by Havelock J represents the school of thought which posits that matters of locus standi should be determined in the trial and not as a preliminary point. There will be no prejudice that the Applicant will suffer if the suit is heard and determined before the appeal. There is absolutely no reason why these proceedings should not be heard the appeal notwithstanding. I buy one argument by the Respondents, that expeditious disposal of this suit will benefit all the parties. Any delay should be excused. Accordingly, I dismiss the request to stay these proceedings and direct the main motion to be fast tracked and concluded without any delay. The Application dated 19th May 2014 is dismissed with costs to the Respondents. It is so ordered.

Dated, signed and delivered in court at Nairobi this 11th day of March 2015

F. GIKONYO

JUDGE