



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 126 OF 2015

**MUGUGA INVESTMENT COMPANY
LIMITED.....1ST PLAINTIFF/RESPONDENT**
DAVID NJANE RUIYI.....2ND PLAINTIFF/RESPONDENT
ESROM NGUGI MIRINGA.....3RD PLAINTIFF/RESPONDENT

VERSUS

NICHOLAS KABUCHO MURIMI.....1ST DEFENDANT/APPLICANT
JOE GATHU KIMEMIA.....2ND DEFENDANT/APPLICANT
JOSEPH KARANJA MBUGUA.....3RD DEFENDANT/APPLICANT
PAUL KINUTHIA MBURU.....4TH DEFENDANT/APPLICANT
FRANCIS KAGWE MBAYA.....5TH DEFENDANT/APPLICANT
ERASTUS GATHAGE GATU.....6TH DEFENDANT/APPLICANT
DAVID MUROKI KAGWE.....7TH DEFENDANT/APPLICANT
**NUNI GENERAL TRADING
COMPANY LIMITED.....8TH DEFENDANT/APPLICANT**

RULING

1. For consideration and determination were two applications; the 1st -7th Defendants’ application dated 12th October 2015 brought pursuant to the provisions of Order 42 of the Civil Procedure Rules and Sections 1A & 3A of the Civil Procedure Act and the 8th Defendant’s application dated 13th October 2015. In the first application, the applicants seek the following orders, *inter alia*;

1. *Spent*;

2. ***THAT upon hearing this application, the orders of this honourable court (Hon. Justice F Gikonyo) issued on 7th October 2015 be stayed pending the hearing and determination of an intended appeal against part of the said ruling and orders.***
3. ***THAT the costs of this application be provided for.***

2. The application was predicated upon the grounds that the orders issued by the Court on 7th October 2015 restrained the 8th Defendant from taking possession and reconstructing the building on the suit property, and further restraining the 1st-7th Defendants from acting as directors of the 1st Plaintiff Company. It was the Applicants contention that they were dissatisfied with the decision of the superior Court and have sought to appeal to the Court of Appeal. Further, it was reiterated that pending the hearing and determination of the intended appeal, it would be prudent and as a matter of right for the Applicant to be granted the orders as prayed for in the application, and that no prejudice would be occasioned to the Respondents if the application was allowed. The application was further supported by the affidavit of Nicholas Kabucho Murimi sworn on 12th October 2015, and in which deposition restated the grounds of the application.
3. The 8th Defendant filed its application dated 13th October 2015, which application was brought under the ambit of Order 42 Rule 6(1) & (2)(a) of the Civil Procedure Rules, as well as Sections 1A and 3A of the Civil Procedure Act. The applicant sought the following *orders inter alia*;

1. ***Spent;***
2. ***THAT this honourable Court be pleased to issue an order for stay of the orders (a)- (f) issued on 7th October 2015 by Justice F Gikonyo pending the hearing and determination of the intended appeal against the said orders.***
3. ***THAT costs of this application be provided for.***

4. The application was premised on the grounds that the 8th Defendant had entered into an agreement with the 1st Plaintiff on 26th November 2014, and by which the Court ruling on 7th October 2015 had denied it the enjoyment of the benefits accruing from the lease. The application was further supported by the affidavit of Hussein Ibrahim Nuni, a director in the 8th Defendant Company. It was deponed to therein that the deponent being aggrieved by the decision of the superior Court delivered on 7th October 2015, had filed a Notice of Appeal intending to appeal the decision. The deponent went to extensively set out the particulars of the substantial loss that it would stand to suffer should the application be dismissed, and that the matter was effectively determined before it could be heard on its merits.
5. Both applications were opposed in the replying affidavit filed by the Plaintiffs on 19th October 2015. It was deponed to that the orders issued by the Court on 7th October 2015 were ostensibly issued to maintain and preserve the status quo, that is, the preservation of the suit premises pending the hearing and determination of the suit. It was the Plaintiffs' contention that no loss would be occasioned to the Defendants, and that in any event, it was they that stood to suffer irreparable loss as the suit property was their main, if not only, source of income.
6. After considering the applications and the affidavits filed both in support of the applications, the replying affidavits as well as oral arguments by counsel for the parties, the issue that arises for determination is whether the Applicants applications have merit. Both applications are brought under the provisions of Order 42 Rule 6(2)(a) which provides as follows;

(2) 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;**
7. A closer reading of the ruling by Gikonyo, J on the application for injunctive relief by the Plaintiff, it is revealed that the underlying issue were with regards to the authority and mandate of the Board of Directors. The suit property, and to a large extent the engagement of the 8th Defendant in a lease agreement dated 26th November 2014, pitted two parties squaring off against

each other. The learned Judge in considering the arguments from both parties, allowed for the preservation of the suit property, pending the hearing and determination of the main suit. In as much as the parties had already entered into an agreement, it was for the Court to determine on certain issue with regards to the authority and mandate on the legal issues pertaining to such agreement.

8. Further, the Defendants in their affidavit stated that they stood to suffer substantial loss if the said orders as made by Gikonyo, J were not stayed. It was their contention that the matter in the main suit was determined before the same could be heard on its merits. However, in stating that they stood to suffer substantial loss, they did not unfortunately elaborate or provide evidence on how they would substantially lose should the orders by the Court preserving the suit property be enforced.
9. A key requirement for the exercise of the Court's discretion under the forementioned Order 42 Rule 6(2)(a) was for the Applicants to prove to the Court that they stood to suffer substantial loss. In determining what amounts to substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that;

'... "substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.'

In reiterating the holding of **Mukumu v Abuoga (1988) KLR 645** on substantial loss, the learned Judge further held that;

'...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

10. In the Court's exercise of its discretionary power, it should not be misled to make orders in favour of one party to the unjust, unfair and detrimental prejudice of the other. The Court has to consider the circumstances, and issue such orders that may be deemed and seen to be fair and just, and in the interest of justice. Such authority should not, as has been reiterated, be exercised capriciously, and the Court needs to caution itself from frittering away its discretion. The Defendants in their application have not been able to establish what substantial loss they stand to suffer should the orders of Gikonyo, J not be stayed pending appeal. They however, in a circumlocutious manner, seek a review of the orders, disguised as an application seeking an order for stay pending appeal. The Court will not allow any party to callously make superfluous applications that seek to deny the opposing party an opportunity to enjoy the fruits of its judgment. By simply stating that they are ready and willing to comply with providing security as provided in Order 42 Rule (6)(2)(b) does not in any way automatically mean that the Court would grant them the prayers sought.
11. In light of the foregoing, the Court finds that the application by the 1st -7th Defendants and the 8th Defendant are both unmeritorious, and the same are dismissed with costs awarded to the Plaintiffs.
12. For avoidance of doubt, the orders of Gikonyo J on appointment of directors will start to be implemented as hereunder;
 - a. The defendants no 1 to 7 to convene a special meeting within 7 days from today for shareholders to appoint directors failure to do so the shareholders to constitute a special general meeting on 25th November 2015 to appoint the 5 directors.
 - b. Order (e) of Gikonyo J. on ruling of 30/9/2015 to be complied with thereafter as decreed thereof.

Dated, signed and delivered in court at Nairobi this 3rd day of November, 2015.

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C.KARIUKI

JUDGE