



REPUBLIC OF KENYA



Kamau & 5 others v Registrar of Companies & 10 others (Civil Application E500 of 2023) [2024] KECA 1321 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1321 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E500 OF 2023
S OLE KANTAI, JW LESSIT & PM GACHOKA, JJA
SEPTEMBER 27, 2024**

BETWEEN

**STEPHEN THIONGO KAMAU 1ST APPLICANT
AMOS KIRIA KAMUNGE 2ND APPLICANT
MWANGI MACHARIA 3RD APPLICANT
LEWIS KARIRU KIBUNGA 4TH APPLICANT
JOSEPH GACHANJA GUCHU 5TH APPLICANT
KIHURUINI INVESTMENTS LIMITED 6TH APPLICANT**

AND

**THE REGISTRAR OF COMPANIES 1ST RESPONDENT
DAVID MWANGI WAHOME 2ND RESPONDENT
PAUL WANYOIKE NGUGI 3RD RESPONDENT
GEOFFREY KIRAGU GACHANJA 4TH RESPONDENT
GEORGE MWANGI NDUNGU 5TH RESPONDENT
SIMON NJOROGE GUCHU 6TH RESPONDENT
SUSAN NYOKABI NDUNGU 7TH RESPONDENT
PHILIP W.D. KAMAU MWANGI 8TH RESPONDENT
SAMUEL KIMANI THIRU 9TH RESPONDENT
DAVID GITAU KIBIRIRI 10TH RESPONDENT
BENSON GITAU MBURU 11TH RESPONDENT**



(An application for stay of execution pending an appeal from the Ruling of the High Court of Kenya at Nairobi (A. Mshila, J.) dated 3rd June, 2023 in H.C.C.C. No. E831 of 2021)

RULING

1. The applicants Stephen Thiongo Kamau, Amos Kiria Kamunge, Mwangi Macharia, Lewis Kariru Kibunga, Joseph Gachanja Guchu and Kihuruiini Investments Limited have by Motion on notice brought under rule 5(2)(b) of the Court of Appeal Rules prayed in the main that pending the hearing and determination of an intended appeal there be a stay of execution of the order dated 23rd June, 2023 made in HCCC No. E831 of 2021 by which the High Court granted an order restraining the applicants from withdrawing monies from the 6th applicant's bank accounts. They also pray that we grant an order restraining the 2nd to 11th respondents from interfering with the management of the 6th applicant or carrying themselves out as office bearers /directors of the 6th applicant or carrying themselves out as office bearers/directors of the 6th applicant pending the hearing and determination of an appeal by the applicants from the ruling and order of the High Court given in the said suit given on 25th June, 2023. The Motion is supported by grounds on its face and by the supporting affidavit of the 1st applicant Stephen Thiongo Kamau where it is said amongst other things that the applicants are aggrieved by the ruling made on 23rd June, 2023 and have appealed; that the appeal is arguable with high chances of success; that the order appealed from has completely crippled the operations of the 6th applicant because the applicants cannot access funds of the 6th applicant to finance its day to day operations or settle its financial obligations; that the appeal will be rendered nugatory if we do not order a stay of execution and that it is in the interest of justice that the orders sought are granted. The 1st applicant says that he is a director of the 6th applicant with authority to represent the company and the other applicants; that at the material time the 1st to 5th applicants together with the 8th (Philip W.D. Kimau Mwangi), 9th (Samuel Kimani Thiru) and the 10th (David Gitau Kibiriri) respondents were and still are the duly elected office bearers/directors of the 6th applicant which is a public limited liability company with more than 550 members/shareholders; that he and the other applicants filed the said suit for orders to restrain the 2nd to 11th respondents from interfering with the management of the 6th applicant or from carrying themselves out as office bearers/directors of the 6th applicant; that he and the other applicants filed the said suit for orders to restrain the 2nd to 11th respondents from interfering with the management of the 6th applicant or from carrying themselves out as office bearers/directors of the 6th applicant; that they also prayed for a declaration that change of directors effected by the 1st respondent (The Registrar of Companies) at the instance of the 2nd to 11th respondents on 21st September, 2021 recognizing the 2nd to 11th respondent as office bearers/directors of the 6th applicant in place of the 1st to 5th applicants was irregular, unlawful, null and void. They had filed an application before that court asking for conservatory orders, an injunction was granted ex parte but when the matter came for inter parte hearing the respondents not only filed a replying affidavit but they moved the court where the 2nd to 7th respondents filed notice of preliminary objection where they contended that the suit offended the provisions of sections 238 and 239 of the *Companies Act*, 2015; that the 2nd to 11th respondents filed an application seeking orders that pending hearing and determination of their application there be a stay of further proceedings as per an order made on 30th September, 2021; that the court review, set aside or vary the orders of 30th September, 2021; that pending hearing of the applications before court the plaintiff be restrained from withdrawing and embezzling company money from bank accounts; that the court order the company's estate agent Mukara Investment Limited to deposit rental income for September, October, November and December and all future



rental income into the company's bank account pending the hearing of the application. Mshila, J. who handled the matter on 1st December, 2022 refused to certify it as urgent and made orders for hearing of the applications. According to the applicant no orders were granted ex parte and were spent by the time of the ruling of 23rd June, 2023 but that in the meantime the applicants had convened the company's annual general meeting (AGM) to be held on 11th February, 2022. When the 3rd to 11th respondents learnt of this they rushed to court to stop the said meeting and obtained an ex parte order, 3 days before the scheduled meeting, stopping it. Further, that the AGM scheduled for 11th February, 2022 was to be the first AGM for the company since 19th July, 2019 because of outbreak of Covid-19 that had led to banning of all such meetings by the government. Parties were ordered to canvass the pending applications and preliminary objection and in the ruling of 23rd June, 2023 the 1st applicant was aggrieved that the court ordered:

14. That it therefore came as a surprise to me when by the ruling delivered on 23rd June 2023, the court gave the following orders:-

“The Plaintiffs be and are hereby restrained from withdrawing monies from the company's bank accounts at Equity Bank and Amicas Microfinance.

The company estate agent Mukara Investment Limited is hereby directed to deposit all the future rental income into the company's bank account pending the hearing and determination of this suit...”

2. According to the 1st applicant those orders have completely paralyzed the operations of the company because the court ordered that rental income be deposited into the company's bank account and the applicants were restrained from withdrawing money from those accounts; that the company cannot meet its day to day operating costs, cannot pay salaries, cannot meet tax obligations or pay rates or rent, cannot meet NSSF or NHIF obligations or settle any other debts. He says that the orders granted to the respondents were not anchored on any suit or counterclaim and the High Court had no jurisdiction to grant the orders; that the appeal will be rendered nugatory as the company may be wound up by creditors. The applicants have attached a draft memorandum of appeal where 8 grounds of appeal are raised.

3. There is a replying affidavit of the 3rd respondent Paul Wanyoike Ngugi who has authority of other respondents to make the affidavit. He uses strong language to attack the application claiming that it is “... all cure (sic), omnibus, meritless, spurious, ill- fated abuse of the court process made with the intention of convoluting issues...”; that the application is intended to delay the hearing and determination of the suit at the high Court; that the 1st to 5th applicants are not directors of the 6th applicant since they were ousted from office and their place taken by the 3rd to 11th respondents and a change of particulars of directions entered in the 6th applicant's register on 21st September, 2021; that the High Court properly exercised its discretion in granting orders to the respondents; that the 6th applicant held various meeting between 19th July, 2019 and 11th February, 2022 in which the 3rd to 11th respondents were elected as directors of the 6th applicant; that the 6th applicant's affairs are being managed smoothly under the management of directors; at paragraphs 14 and 15 of replying affidavit the deponent says:

14. That since the issuance of the order of 23rd June 2023, the 6th Applicant Company has not suffered any prejudice whatsoever, and is in fact, and I attest to this, enjoying protection from financial pilferage and embezzlement by the 1st to 5th Applicants as a result of the order barring the said Applicants from withdrawing monies from the Company's bank accounts.



15. That in fact, we are shocked and frown upon, the 1st to 5th Applicants taking issue and being aggrieved by the order for the rental income to be deposited into the Company's bank account. This only points to the said applicant's malicious intent to squander and pilferage the 6th Applicant Company's income."
4. He opposes grant of any order saying that the case at High Court should be heard and the applicants make their case there.
5. There is a supplementary affidavit where the 1st applicant repeats what he had already stated adding only that he and the 2nd, 3rd, 4th and 5th applicants are still in office running the affairs of the 6th applicant.
6. The fact of who is in office and who is running the company is not agreed but is a contested issue.
7. We have seen and considered written submissions and the authorities cited in support of the rival positions taken by the parties.
8. When the motion came up for hearing before us on 30th April, 2024 the applicants were represented by learned counsel Mr. Amuga while the 2nd to 11th respondents were represented by learned counsel Mr. Ambani. We were satisfied that all parties had been served with a hearing notice for the day and allowed the motion to be urged.
9. Both counsel gave an oral highlight of written submissions which was in line with the fact we have set out in detail in this ruling.
10. The principles that apply in an application for stay of execution pending appeal are well known. For an applicant to succeed he must, firstly, demonstrate that the appeal or intended appeal, as the case may be is arguable, which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, show that the appeal will be rendered nugatory absent stay- see a summation of those principles in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR.
11. The applicants intend to argue on appeal that the Judge exceeded her jurisdiction by granting orders to the respondents who had not filed a suit or counterclaim. Whether or not a defendant who has not filed suit or counter-claim can pray for or be given orders of injunction is an arguable point. It has been held by this Court that an arguable point is not one that will succeed but it is one calling for a merit decision on appeal - see Dennis Mogambi Mong'are v Attorney General & 3 Others [2012]. So there is an arguable appeal.
12. What about the nugatory aspect which an applicant must also satisfy to be entitled to our exercise of discretion under rule 5 (2)(b) of our rules?
13. We note that the dispute at the High Court involves the 1st to 5th applicants who claim to be bona fide directors of the company (6th applicant). That factual position is hotly contested by the respondents who claim that those applicants were ousted from office in elections held in September, 2021. It is alleged by the respondents that the applicants were embezzling company funds and that they come to us in this application because they want to access those funds again. The High Court considered the rival positions taken by the parties and saw the justice of the case being served by ordering that rental income of the company be preserved in the company's bank accounts to allow the disputants to prove, at the hearing of the suit, who was to lead the company. This we find to have been a well-considered decision.
14. The applicants allege, without providing any proof, that company operations have been paralyzed. They do not say which employees have gone without salary, they do not say whether the company pays rent for premises, if any, it occupies, they have not given any particulars of statutory obligations that



the company is unable to meet, among other gaps that are left to the field of guesswork. Needless to say the applicants have not shown how the appeal will be rendered nugatory if we do not stay execution of the orders given at an interlocutory stage of the suit pending at the High Court. Having failed to do so they have not satisfied the second limb of an application of this nature. The Motion fails and is dismissed with costs to the 2nd to 11th respondents.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

S. ole KANTAI

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

.....

M. GACHOKA CIArb., FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

