



Muiya & 11 others v Kwetu Savings & Credit Co-operative Society Limited (Civil Application 12 of 2020) [2023] KECA 50 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 50 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 12 OF 2020
RN NAMBUYE, MSA MAKHANDIA & S OLE KANTAI, JJA
FEBRUARY 3, 2023**

BETWEEN

JAMES MUIYA & 11 OTHERS APPLICANT

AND

**KWETU SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

(An application brought under Rules 5(2) (b), of the Court of Appeal Rules, 2010 seeking stay of execution of the ruling of the High Court of Kenya (Kemei .J.) dated 26th February 2018 in Machakos HC. Misc. App. No. 35 of 2015)

RULING

1. The motion before us was taken out on 10th January, 2020 under Rule 5 (2)(b) of the [Court of Appeal Rules](#), “COA” seeking key prayer that: -
 3. That this Honorable court be pleased to grant an order of stay of execution of a ruling issued on 26/2/2018 and all consequential orders pending the hearing and the determination of the appeal.
2. The same is premised on the grounds that the appeal is arguable and that it may be rendered nugatory if the prayer sought is not granted. On arguability, it is stated in the memorandum of appeal dated 10th January, 2020 that the question of changing a public to a private company had not been addressed by the trial court.

Similarly, the question of obtaining shareholding fraudulently and privatization of a public company without the input of the shareholders was not addressed as well.
3. On nugatory aspect, the applicants allege that if the changes are made at the company registry as ordered by the trial court, it will have the effect of removing the applicants from the register as subscribers,



shareholders and /or members of the company thereby interfering with their shareholding and the substrata of the appeal will have been spent. That there is imminent danger of execution of the ruling and order as the respondents have since forwarded a draft order for approval by their advocates which if approved will be forwarded to the Registrar of Companies for appropriate action.

4. The background to this dispute is that the respondents approached the court seeking the Company Registrar to rectify the register in respect of the 12th applicant by removing and or expunging therefrom the names of the applicants; the register of the 12th applicant be rectified by entering the respondent as holding 19,999 shares while that of the 12th applicant retains one share; an order for damages and costs. The learned Judge after considering the application allowed the same with costs on 26th February 2018. Aggrieved, the applicants sought unsuccessfully for stay of execution of the ruling and order in the trial court. That refusal led to the filing of the notice of appeal consequently upon the applicants filing the instant application.
5. The respondents did not reply to the application even after the applicants' law firm, Messrs. Andrew Makundi Advocates wrote to court and copied to their counsel a letter dated 1st March, 2021 indicating that he had not received any response to the application from the respondents. As it is therefore, the application was unopposed.
6. The applicants filed written submissions and list of authorities all dated 1st March 2021 to buttress their point that they deserved the orders sought. It was their assertion that the appeal is one that is not only arguable but one with a high probability of success as could be seen from the memorandum of appeal. They cited *Trust Bank Limited and Another vs. Investech Bank Limited & 3 Others*(2000) eKLR; *Freight in time Ltd vs. Image Apparels Limited* [2009]eKLR, *Caltex Oil (Kenya Ltd) vs. Evanson Njiiri Nanjibia* [2009] eKLR and *Wanjiri Kiboro vs. Konabauthi Limited* [2009] eKLR in support of their proposition.
7. On the nugatory aspect already pointed out elsewhere in this ruling, they relied on the case of *Republic vs. Kenyatta University Exparte Ochieng Dominic & 7 Others* [2018] eKLR.
8. We have considered the application, the supporting affidavits, the submissions by the applicants, the cited authorities and the law. This Court's jurisdiction under Rule 5 (2) (b) as has been stated time and again is discretionary and original. In *Trust Bank Ltd & Anor vs. Investech Bank Ltd & 3 Others* (supra), this Court stated inter-alia:

“The jurisdiction of the court under Rule 5 (2) (b), is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put in another way, it is not frivolous and secondly, that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case”
9. As already stated, the respondents did not deem it fit to file any response to the application despite being served. As such, the issues raised by the applicant were not rebutted and or controverted in any way. However, that notwithstanding we must interrogate the application to determine whether the twin limbs have been satisfied so that we may grant or refuse the order sought.
10. On whether the appeal is arguable, the applicants have raised the issue of the trial court failing to note that a public company was involved in the dispute and by dint of the ruling it was turned into a private company without following the due process of law and that there were shares that were unaccounted for that the trial court did not address. These are issues among others that will be the



subject of interrogation during the hearing of the appeal and are sufficient to demonstrate that the appeal is not frivolous.

11. As to whether the appeal is likely to be rendered nugatory should stay sought not be granted, it is not disputed that there is an order for change of shareholders issued by the trial court which is directed at the Registrar of Companies to cause changes in the registry to reflect the change in the shareholding. If and when these changes are made the substrata of the appeal will have dissipated and or changed completely thereby creating another dimension in the dispute that may not be easily reversible
12. For these reasons, we are satisfied that the application has met the threshold for granting of the order prayed for. Accordingly, there shall be stay of execution of the ruling and order issued on 26th February, 2018 and all the consequential orders pending the hearing and determination of the appeal. Costs of the application shall abide the outcome of the appeal.
13. This ruling is delivered under Rule 34(4) of the [Court of Appeal Rules](#), 2022 as Nambuye, J.A (as she then was) has ceased to hold office.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

