



REPUBLIC OF KENYA



**Nyagah v AKM Investment Limited & 3 others (Civil Application E252 of 2023) [2023] KECA 1507 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1507 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E252 OF 2023  
K M'INOTI, M NGUGI & F TUIYOTI, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**EVANS NYAGAH ..... APPLICANT**

**AND**

**TRIAD NETWORKS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**AKM INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**STENNY INVESTMENTS PTY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**SUREINVEST COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution pending lodging, hearing, and determination of an intended appeal from the ruling and order of the High Court of Kenya at Milimani (Majanja, J.) dated 26th May 2023 in HC Commercial Suit No. E247 of 2022))*

**RULING**

1. Mr. Ogembo learned counsel for Evans Nyagah (the applicant) submitted, correctly we think, that the dispute that gave rise to the proceedings sought to be stayed reveals a boardroom tussle between shareholders of Directline Assurance Company Limited (Directline) over the control of the company.
2. Directline is a limited liability company carrying on the business of insurance under the provisions of The *Insurance Act* (Chapter) 487 Laws of Kenya). By a plaint dated 4<sup>th</sup> July 2022, it commenced proceedings against the respondents who are its shareholders, in fact, holding the majority shares. The suit was ill-fated because the respondents successfully sought its striking out. The respondents persuaded the High Court (Majanja, J.) that the suit was mounted to re-litigate a controversy in shareholding which had been determined by an arbitration award published on 11<sup>th</sup> May, 2022 and was, therefore, an abuse of court process. The learned Judge further found that the majority shareholders did not authorize the suit and invited the applicant who is the Chief Executive Officer of



- Directline to show cause why he should not be ordered to pay costs of the suit personally. After hearing the applicant, the learned judge on 26<sup>th</sup> May 2023, found that the applicant had not shown cause and ordered that he meets the costs of the suit personally.
3. Aggrieved by that decision, the applicant lodged a notice of appeal signifying his intention to challenge the decision through an appeal to this Court. Before us now is a notice of motion dated 28<sup>th</sup> June, 2023 in which the applicant seeks stay of further proceedings in the superior court below and a stay of execution of the orders/ruling of the court of 26<sup>th</sup> May 2023 pending the hearing and determination of the intended appeal.
  4. At the time of filing the motion, the 2<sup>nd</sup> and 4<sup>th</sup> respondents had filed their bill of costs in which they sought a cumulative sum of about Kshs. 25,931,074.00. In support of the motion was an affidavit sworn by Kelvin Mogeni on 8<sup>th</sup> June 2023. He is a director of Directline. He makes the argument that the intended appeal has prospects of success and that it will be rendered nugatory if stay is not granted. He deposes that the decision appealed against will occasion great damage to the insurance industry because it makes it very expensive for principal officers who are serving in the insurance industry to discharge their statutory duties and or implement Board decisions. In a further affidavit sworn by the applicant himself on 16<sup>th</sup> June 2023, he states that the amount in the bill of costs is colossal and should the stay not be granted, then he shall be committed to civil jail since he cannot afford to pay and so he will suffer irreparable harm. Further, that it is within his knowledge that the respondent companies are not engaged in any business and do not submit annual audited accounts, and will not be in a position to refund the monies paid to them on account of costs.
  5. The motion is opposed by all the respondents who make the arguments that they are all shareholders of Directline. They contend that the applicant is not a director or shareholder of Directline and he did not authorize the filing of the suit. That similarly, the impugned ruling of 28<sup>th</sup> September 2022, struck off his suit with costs and ordered the person who authorized the filing of the suit to meet such costs. The applicant was called upon to show cause why he should not be liable to pay the costs. It is contended that the said costs are yet to be taxed and as such there is no Certificate of Taxation issued or any execution taking place to warrant the grant of the orders sought herein. In addition, the applicant has failed to show that the respondents cannot repay the taxed costs. They affirm that since they are shareholders in Directline, they are capable of refunding any costs that may be awarded. They also contend that the appeal is not arguable as the entire subject matter of the struck out suit was settled by an arbitral award published on 11<sup>th</sup> May 2022 and its enforcement is currently pending before the High Court. That the application is therefore frivolous and ought to be dismissed.
  6. The grant of a stay order under Rule 5(2)(b) rests on the applicant demonstrating that he has an arguable appeal and the appeal will be rendered nugatory if stay is not granted. The term “nugatory” given its full meaning to include worthless, futile, invalid and trifling. See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
  7. There is undoubtedly a tussle for control of the affairs of Directline and one of the issues that the Court hearing the intended appeal may be asked to resolve is whether the filing of the suit was duly authorized by a resolution of a lawful board of directors. The Court will determine the validity or otherwise of the resolution made in the meeting of 22<sup>nd</sup> February 2022 which purported to authorise the filing of the suit. While the respondents do not think much of the intended appeal, we hold that the issue we have singled out is not a trifle and deserves the attention of the Court hearing the intended appeal even if it is eventually found to be unmerited.
  8. The second limb is more problematic for the applicant. We do not doubt that the cumulative sum of Kshs.25,931,074.00 sought from the applicant would be colossal and intimidating to many but are not



persuaded that the only fate awaiting him if he failed to pay is committal to civil jail as argued by the applicant. Civil jail is for obstinate and recalcitrant debtors not for those who are genuinely unable to pay (see the High Court decision in *Braeburn Limited vs. Gachoka & Another* [2007] 2 EA 67).

As to the fear that the respondents will not be in a position to repay the costs if the appeal goes the applicant's way, that is answered by the respondents' argument that their substantial shares in the company or any dividends declared can be attached to recover any costs paid.

9. The other argument that costs will imperil the applicant's position as the Chief Executive Officer as the respondents will use it to harass and intimate him ignores the reality that this country has robust employment and labour laws that can safeguard the applicant against any unlawful harassment and intimidation.
10. The applicant's inability to show that the appeal will be rendered nugatory if stay is not granted is dispositive of the motion before us. For that reason, it is needless to interrogate the other argument made by the respondents that the motion is bad in law as it is Directline which filed the notice of appeal and is, therefore, the rightful appellant and not the applicant. It being submitted that it is only a person who has filed a notice of appeal who has locus to move the Court for stay under Rule 5(2)(b).
11. The notice of motion dated 8<sup>th</sup> June, 2023 is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY DECEMBER, 2023.**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

