



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 24 OF 2019

BETWEEN

DUNCAN CHENGO BANDARI.....APPLICANT

AND

PHILOMENA GERTRUDE BANDARI..... RESPONDENT

*(An application for stay of execution pending the hearing and determination of an intended appeal from the Ruling and order of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 18<sup>th</sup> January 2019*

in

**Winding Up Cause No. 5 of 2006)**

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RULING OF THE COURT

In this Notice of Motion dated 11<sup>th</sup> January 2019 made under *sections 3A and 3B* of the *Appellate Jurisdiction Act* and *rules 31, 41, 42 (1), 43 (1) and 47 (1) and (2)* of the *Court of Appeal Rules*, the applicant, *Duncan Chengo Bandari* seeks orders of stay of execution of the ruling and orders of the High Court at Mombasa delivered on 18<sup>th</sup> January 2019 pending the hearing and determination of the intended appeal.

The application was brought on the grounds that following a judgment of the High Court (Njoki Mwangi, J), the court ordered the attachment and sale of the sole asset of Zaini Holdings Limited (*the Company*), that is Plot No. 6308/I/MN (*the property*), before costs incurred in the suit are ascertained by way of taxation; that the applicant has filed a Notice of Appeal, and was awaiting the certified typed proceedings; that further, the respondent had filed a Bill of Costs for taxation with a view to obtaining a Certificate of Costs which taxation was fixed for 26<sup>th</sup> March 2019. The applicant contended that he had every intention of buying the respondent's shares in the Company as ordered and that he did not intend to dispose of the company's only asset. His apprehension was that if the company's property was sold, and the appeal was successful it would be rendered nugatory. It was finally contended that the appeal had a high chance of success.

The motion was supported by an affidavit of Duncan Bandari sworn on 22<sup>nd</sup> March 2019 reiterating the contents of the ground of the motion.

From a replying affidavit sworn by *the respondent, Philomena Gertrude Bandari* the background to the application was that, both the applicant and herself are shareholders and directors of the Company which was the registered owner of the property, the sole asset of the Company. For 25 years the applicant had excluded her from the Company's operations as a result of which in 2006, she petitioned the court to wind up the company in *Winding Up Cause No. 5 of 2006*. One of the orders she sought was for the shares of the Company to be valued and the applicant ordered to purchase her shares at market value. Invoking the remedy specified by *section 211* of the *Companies Act*, the High Court (Sergon,J.) issued an order to the effect that the applicant purchase

the respondent's shares, at a value to be determined by an independent valuer which value would exclude the value of the structure existing thereon. This decision was not appealed by the applicant and following the applicant's refusal to obey the High Court order, the respondent in a Notice of Motion of 19th December 2016, moved to court for an order for the attachment and sale of the property, which order was granted by the court on 7th April 2017; and that in the meantime, she applied for a certificate of taxation.

The respondent opposed the applicant's motion averring that the applicant had variously devised improper and devious schemes to deprive her of the shares value by, attempting to unlawfully dispose of the property in 1995 to a third party without her knowledge and consent; by attempting to defeat her interest in the company's property, by instituting a false claim for adverse possession of the property vide *ELC Cause No. 331 of 2015 (OS)*, and deceiving the court to enter a default judgment for adverse possession; by attempting to steal the original certificate of title from the court's custody; by fraudulently obtaining a provisional title by misrepresenting to the Land Registrar that the original title was lost and frustrating the valuer from accessing the financial records of the Company in an effort to defeat the court's various orders; that the devious actions employed, were all aimed at ensuring that her claim was defeated or overtaken by the disposal of the property, and that this application was yet another ploy to buy time.

In the submissions before us, learned counsel for the applicant **Ms. D. Ndirangu** stated that the orders sought were for stay of execution of the orders of attachment and sale of the company's property. Arguing that the appeal had a high chance of success, counsel asserted that the learned judge did not have jurisdiction to make the orders made on 17<sup>th</sup> January 2019 as on 26<sup>th</sup> February 2009, Sergon, J. had determined that the applicant purchase the respondent's shares, and that contrary to this order, Njoki Mwangi, J had ordered that the asset be sold and the proceeds distributed between the parties, which ruling was tantamount to a review of the decision of Sergon, J, from which an appeal had not so far been preferred.

Counsel further asserted that the appeal would be rendered nugatory if the company was wound up, as the applicant was not ready or in a position to immediately wind up the company.

**Mr. S. Karina** counsel for the respondent opposed the application and relying on the replying affidavit and the grounds of objection filed stated that, the application that led to the ruling was for the asset to be sold before taxation was completed; that this was specified in the ruling of Njoki, Mwangi, J. Counsel explained that the judgment of Khaminwa, J (as she then was) of 19th January 2005 addressed the shareholding issue and therefore the issue was *res judicata*; that the applicant had on various occasions improperly sought to dispose of the company's property.

It was further contended that the appeal would not be rendered nugatory since the order for sale had already been made in the ruling of 7<sup>th</sup> April 2017 and the court order specified that the company's property should be valued and sold, and the applicant paid 50% of the proceeds of sale; so that, there would be no prejudice to the applicant's rights if the property was sold. Enumerating the applicant's unlawful actions to dispose of the property, counsel concluded that the court orders sought were not justified as they effectively removed him from accessing the equitable remedies of this Court. Counsel implored us to decline to grant the orders sought as a delay in selling the property would only result in deprivation of the respondent of her rightful shares value.

We have considered the pleadings and the submissions of the parties. In the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012***, this Court stated *inter alia*:

***"That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."***

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not capricious or frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under **rule 5 (2) (b) of the Court Rules**, the court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court.

See ***Ruben & Others vs Nderitu & Another (1989) KLR 459***.

Concerning the question of whether the appeal is arguable, we will begin by observing that the applicant did not attach a memorandum of appeal outlining the issues intended to be appealed against. After a thorough examination of the motion, we were able to discern that his main grievance against the ruling of the High Court is that the court ordered the "...attachment and sale of the Respondent's company asset plot No 6308/I/MN, before the amount of costs incurred in the suit can be ascertained by taxation." The applicant also asserted that the court had no jurisdiction to revise the content of the judgment rendered by Sergon, J., as it was *functus officio*. As to whether or not the lower court revised Sergon, J.'s order by specifying that the property be attached and sold, whereas Sergon, J ordered that the applicant buy the respondent's shares at the value of the company, would, in our view, be a matter for ventilation before this Court. As stated above, the ground of appeal need not necessarily be one that will

succeed.

But that said, to fulfill the second principle, that is, whether the appeal would be rendered nugatory if it were to succeed, the applicant requires to convince us that if the property were attached and sold by the respondent the appeal would be rendered nugatory. In considering this issue, the applicant has not demonstrated to us what loss he would suffer from the sale of the property, as it would appear that, in the past he has himself sought to dispose of it through various schemes and maneuvers without the respondent's knowledge or consent. It is not lost on us that any transaction resulting in the alienation of the property from the Company would effectively diminish the value of the company, and with it, the value of the shares, and more particularly the respondent's shares.

Stay of execution orders are discretionary and therefore are equitable in nature. It is trite that those who approach a court of equity must do so with clean hands. In the case of *John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR*, this Court of Appeal emphasized;

***“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.” The applicant has not done so and is underserving of the orders he seeks.”***

In devising the schemes aimed at improperly alienating the company's sole asset, and intended to deny the respondent her rightful shares value in the Company, we do not consider the applicant worthy of the exercise of our discretion in his favour.

In so concluding, we find that the application is unmerited. We decline to grant the orders sought. The application is dismissed with costs to the respondent.

***It is so ordered.***

***Dated and delivered at Mombasa this 25<sup>th</sup> day of July, 2019.***

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**