



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAL, J.J.A.)

CIVIL APPLICATION NO. NAI. 54 OF 2019

BETWEEN

SPACE AND STYLE LIMITED.....1ST APPLICANT

WINFRIDA WANJIKU NGUMI.....2ND APPLICANT

AND

NJAMA WAMBUGU.....1ST RESPONDENT

CECILIA NJOKI MUHOHO (sued as proxy for

DECAMIS LIMITED).....2ND RESPONDENT

LUCY MUMBI KIMANI.....3RD RESPONDENT

EDWARD MULEWA MWACHINGWA.....4TH RESPONDENT

DAVID OYIENO OPIYO.....5TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPLICATION NO. 64 OF 2019

NJAMA WAMBUGU.....1ST APPLICANT

AND

SPACE AND STYLE LIMITED.....1ST RESPONDENT

WINFRIDA WANJIKU NGUMI.....2ND RESPONDENT

CECILIA NJOKI MUHOHO

(sued as proxy for DECAMIS LIMITED).....3RD RESPONDENT

LUCY MUMBI KIMANI.....4TH RESPONDENT

EDWARD MULEWA MWACHINGWA.....5TH RESPONDENT

DAVID OTIENO OPIYO.....6TH RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (A. Makau, J.) dated 31st January, 2019 and an application to strike out notices of appeal arising from the said ruling

in

H.C.C.C. NO. 194 of 2018)

RULING OF THE COURT

There are two Notices of Motion before us. In the motion dated 18th February, 2019 the applicants are **Space and Style Limited** and **Winfrida Wanjiku Ngumi**. It is an application for stay of execution of the ruling and orders of the High Court at Nairobi in H.C.C.C. No. 194 of 2018 where it is prayed that we stay the ruling of that court until the applicant's intended appeal is lodged, heard and determined.

In the grounds in support of the motion and in a supporting affidavit of **Winfrida Wanjiku Ngumi** (the 2nd applicant) the history of the dispute between the applicants and the respondents – **Njama Wambugu, Cecilia Njoki Muhoho (sued as proxy for Decamis Ltd), Lucy Mumbi Kimani, Edward Mulewa Mwachingwa and David Otieno Opiyo** is given.

This can be summed up as follows as discerned also from the plaint filed at the High Court: the 2nd applicant, **Winfrida Wanjiku Ngumi**, the 1st respondent, **Njama Wambugu** and a company **Decamis Limited** are shareholders of the 1st applicant **Space and Style Limited**. A disagreement arose between the 2nd applicant and the 1st respondent on management of the 1st applicant leading to an agreement that the 1st respondent would exit the 1st applicant by transferring his shares in the same company to the 2nd applicant. An agreement was drawn and the 1st respondent appointed the 2nd applicant as his attorney through a Power of Attorney signed by both parties on the 9th of February, 2018.

In the agreement between the 1st applicant and 2nd respondent it was agreed amongst other things that valuation of the shares of the 1st applicant would be undertaken by a named valuer and upon payment of the valuation price for the 1st respondent's shares he would exit the company. Valuation of the 1st applicant was done and part payment of the share value of the 1st respondent's shares was paid to him by the 2nd applicant but thereafter the 1st respondent filed suit at the High Court being H.C.C.C. No. 194 of 2018. It was prayed in that suit that the 2nd applicant be restrained from holding herself out as the majority shareholder of the 1st applicant on the basis of ordinary shares transferred to her by the 1st respondent pursuant to the Power of Attorney we have referred to. It was further prayed that the 4th, 5th and 6th respondents be restrained from holding themselves out and acting as directors of the 1st applicant. Further, that the 2nd applicant and the 3rd respondent be restrained from changing the bank operations mandates of the 1st applicant in various banks set out in the plaint. On the same day that the plaint was filed the 1st respondent by Chamber Summons said to be brought under **section 7 of the Arbitration Act, Rule 1 and 2 of the Arbitration Rules, 1997, section 1(a) 1(b), 3, 3A of the Civil Procedure Act** prayed in the main that the 2nd applicant be restrained from holding herself out as the majority shareholder of the 1st applicant on the basis of the ordinary shares that had been transferred to her by the 1st respondent pursuant to the said Power of Attorney. Further, that the 4th to 6th respondents be restrained from holding themselves out and acting as directors of the 1st applicant; that the 2nd applicant and the 3rd respondent be restrained from changing the bank operations mandates of the 1st applicant in named bank accounts and further that there be restraining orders pending determination of a dispute in arbitration.

In the second motion before us said to be brought under **section 10 of the Arbitration Act, section 3, 3A and 3B of the Appellate Jurisdiction Act and rule 42 and 84 of the Court of Appeal Rules, 2010** it is prayed in the main that the notice of appeal filed on behalf of the 1st, 2nd, 5th and 6th respondents and the notice of appeal filed by the 3rd and 4th respondents in the said suit be struck out. In the grounds in support of the motion and in an affidavit of the 1st respondent it is stated *inter alia* that a dispute between the 2nd applicant and the 1st respondent had been referred to arbitration and that the arbitral reference process had commenced; that the High Court had issued an interim measure in terms of **section 7 of the Arbitration Act** restraining the 2nd applicant (in the first application) from holding herself out as majority shareholder of the 1st applicant and further restraining the 2nd applicant and the 3rd respondent (in the first application) from altering bank mandates of the 1st applicant. It is further stated that no appeal lies to this Court in respect of the decision of the High Court subject of the intended appeal; that there is no right of appeal to this Court in view of the provisions of **section 10 of the Arbitration Act**; that the application for stay did not lie as no appeal was allowed and therefore that the application and notices of appeal were incompetent and that we should allow the motion and strike out the notices of appeal.

The motions came up for hearing before us on 17th April, 2019 and we ordered that they be heard together.

In submissions before us **Mr. Kibe Mungai** for the applicants in the 1st motion summarised the facts of the case before the High Court submitting that the 1st respondent had interests in two rival companies which made his position in the 1st applicant untenable as a director and shareholder of the 1st applicant. Counsel pointed out the agreement that had been entered between the 2nd applicant and the 1st respondent; valuation that had been undertaken and the Power of Attorney made by the 1st respondent in favour of the 2nd applicant. Counsel submitted that in the agreement made between the 2nd applicant and the 1st respondent disputes arising between them were amenable to resolution by the ordinary courts. Counsel submitted that no dispute had arisen and that if a dispute arose the parties could approach the court for orders of specific performance if the sale was not completed. Counsel faulted the High Court for invoking an arbitration clause which in his view was not applicable to the matter before the High Court. Counsel also pointed out that there was no prayer for reference to arbitration in the plaint. Counsel faulted the learned judge of the High Court for making what amounted to final orders in an interlocutory application. **Mr. Kibe Mungai** submitted that all those were arguable points on appeal. On the nugatory aspect, counsel submitted that the 3rd to 5th respondents had been lawfully appointed as directors of the 1st applicant yet the High Court orders stopped them from acting as such which, in counsel's view, was contrary to the Companies Act. Also that the banks were stopped from changing bank mandates when in company law it is the company that decides the mandates to be held by a bank. Counsel asked us to allow the motion and dismiss the other motion.

Mr. Waweru Gatonye learned counsel for the 2nd and 3rd respondents supported the motion for stay of execution submitting that there was an arguable appeal because in his view there was no basis for ordering the parties to go for arbitration. According to counsel the High Court

could not grant orders not sought or prayed for. Counsel submitted further that the company had been paralysed by the orders of the High Court which was injurious to its operations. In opposing the 2nd motion it was Mr. Gatonye's submission that **section 7** of the **Arbitration Act** presupposes the existence of arbitral proceedings. Without a consent of parties to go to arbitration, it was counsel's view that there was no legal contractual or constitutional basis for ordering parties to go to arbitration.

Mr. Nelson Havi for the 1st respondent in the first motion and for the applicant in the second motion pointed out to us various articles of the Memorandum and Articles of Association of the 1st applicant; **articles 9 and 10** provide for how shares were to be transmitted while **article 32** contains an arbitration clause. Counsel submitted that the 1st respondent had transferred his shares to the 1st applicant but that a dispute had arisen and arbitration proceedings automatically kicked in. He referred to the notice to appoint an arbitrator and pointed out provisions of the **Arbitration Act** which provide that proceedings shall commence when notice is received. Counsel admitted that the Term Sheet Agreement made between the 2nd applicant and 1st respondent did not contain an arbitration clause. According to counsel, the company operations were not affected as the 1st respondent continues to be a director and shareholder of the 1st applicant. Further, that strangers (meaning the other respondents) were being brought into the company without the 1st respondent's agreement. Counsel pointed out the case of **Nyutu Agrovet v Airtel Networks Limited [2015] eKLR** whose effect is that there is no right of appeal to this Court from arbitral proceedings. According to counsel the order of the High Court having been made under **section 7** of the **Arbitration Act** there was no right of appeal to this Court. In view of all that counsel submitted that we had no jurisdiction to grant stay of execution.

In a brief reply Mr. Kibe Mungai submitted that **section 32** of the **Arbitration Act** did not have universal application as it identified who disputants in an arbitration are.

We have considered the motions before us and submissions made. On the motion for stay of execution pending appeal it is trite that for such an application to succeed an applicant must, firstly, establish that there is an arguable appeal and, secondly, that the appeal, or intended appeal, would be rendered nugatory absent stay – see, for an exposition of these principles, the case of **STANLEY KANGETHE KINYANJUI v TONY KETTER & OTHERS [2013] eKLR** where the following summary is given:

- “i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court***
- ii) The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
- iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
- v) An applicant must satisfy the court on both of the twin principles.***
- vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***
- vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.***
- viii) In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
- ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.***

The suit at the High Court has not been heard.

The agreement between the 2nd applicant and the 1st respondent was reduced into writing through a document titled **“THE DETAILED TERM SHEET”**. It identifies the parties to the agreement, the person to carry out valuation, the tax advisor and the purpose of the agreement is stated to be:

“The ultimate aim of the commercial terms contained in this TS is to enable the transfer of all Shares owned by NW in S & S to WN or to any Party that WN may in her sole discretion nominate”.

From a reading of the whole agreement TS refers to term sheet agreement, NW is Njama Wambugu the 1st respondent, S & S is Space and Style Limited the 1st applicant while WN is Winfrida Wanjiku Ngumi the 2nd applicant. It is stated in the agreement that the 1st respondent owns 47,500 ordinary shares of Shs.100 each and 1560000 redeemable preference shares of Shs.100 each (total value Shs.156 million). The agreement identifies the applicable law as the Laws of Kenya.

There is also a loan agreement made between the 2nd applicant and the 1st respondent which was made according to the term sheet agreement. In that agreement the 2nd applicant advanced a sum of Shs.25 million to the 1st respondent as part performance of the term sheet agreement and at the clause on the governing law it is stated:

“This Loan Agreement shall be governed by and construed in accordance with the Laws of the Republic of Kenya and is subject to the jurisdiction of the Kenyan courts.”

In the ruling sought to be appealed which was delivered on 31st December, 2019 J.A. Makau, J. considered the application filed by the 1st respondent and considered **article 32** of the 1st applicant's Articles of Association and by virtue of that provision the judge referred the matter to arbitration and issued various other orders restraining the 2nd applicant from holding herself out as majority shareholder of the 1st applicant on the basis of the shares transferred by the 1st respondent to her; restrained the 4th to 6th respondents from holding themselves out and acting as directors of the 1st applicant and, pending arbitration, the 2nd applicant and the 3rd respondent were ordered to maintain status quo as a measure of interim protection and not to change the bank operations mandate of the applicant. What the applicants are asking in the motion before us is to stay those orders pending appeal.

We have perused clause 32 of the 1st applicant's Articles of Association. It states as follows:

“Whenever any differences arise between the company on the one hand and any of the members, the executors, administrators, or assigns on the other hand, touching the true intent or construction, or the incidents, or consequences of these Articles, or of the statutes, or touching anything then or there after, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, or whom one shall be appointed by each of the parties in difference.”

In the plaint filed by the 1st respondent it was averred that the said **Article 32** of the **Articles of Association** of the 1st applicant requires that every dispute affecting the 1st applicant and its shareholders or directors would be referred to arbitration. The judge of the High Court found that the clause mandated the 1st applicant and shareholder in dispute or shareholders and directors in dispute to go to arbitration.

We have read that clause and it is arguable whether that interpretation is correct. From the material which was before the judge and which is the record before us the dispute that arose was between the 2nd applicant and the 1st respondent when a possible conflict of interest was identified from the fact that the 1st respondent, apart from being a shareholder and director of the 1st applicant had interests in a rival company. The 2nd applicant and the 1st respondent mutually agreed that the 1st respondent transfer his shares and interests in the 1st applicant to the 2nd applicant. They executed an agreement which provided that disputes between them be sorted by Kenyan courts. The dispute that arose was between the 2 shareholders in that capacity and it is an arguable point in the intended appeal whether the arbitration clause in the 1st applicant's Memorandum and Articles of Association could apply to the dispute between 2 shareholders.

The learned judge of the High Court referred the dispute to arbitration when there was no prayer in the plaint to refer the matter to arbitration. That again we find to be an arguable point in the intended appeal.

It is submitted on behalf of the applicants that the operations of the company will collapse as the relationship between the 2nd applicant and the 1st respondent had reached the point where the operations of the 1st applicant were negatively affected. We find that the intended appeal would be rendered nugatory if the operations of the company and the company itself collapsed. The applicants have satisfied us that a stay of execution is merited.

On the motion by the 1st respondent that the notices of appeal be struck out having found that the orders to refer the dispute to arbitration was not merited on the facts before the High Court the second motion has no merit and is hereby dismissed with costs to the applicants. We grant the motion for stay of execution pending appeal and order that the applicants (Space and Style Limited and Winfrida Wanjiku Ngumi) file the intended appeal within 60 days of today. We grant costs of that motion to the applicants against the 1st respondent.

Dated and delivered at Nairobi this 19th day of July, 2019.

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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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

DEPUTY REGISTRAR