



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GITHINJI & OKWENGU, JJ.A)

CIVIL APPLICATION NO. 281 OF 2019

BETWEEN

XPLICCO INSURANCE COMPANY LTD..... APPLICANT

AND

OBSIDITION INVESTMENTS LTD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE REGISTRAR GENERAL OF COMPANIES.....3RD RESPONDENT

ALTAF HUSSEIN BHURAWALA.....4TH RESPONDENT

PATRICK NDIRANGU.....5TH RESPONDENT

(Being an application for Stay of Execution pending the hearing and determination of an intended appeal from the Ruling of the High Court at Nairobi (F. Tuiyott, J) dated 26th July, 2019

in

Misc. Cause No.490 of 2014)

RULING OF THE COURT

In an application brought pursuant to **Rule 5(2)(b)** of this Court's Rules, the applicant has prayed that there be a stay of execution of the order made by the High Court (F. Tuiyott, J) on 26th July, 2019 in H.C Misc. Cause No. 490 of 2019 pending the hearing and determination of the intended appeal.

Briefly, the applicant was incorporated as a private limited liability company on 23rd October, 2009 pursuant to the repealed Companies Act. The applicant thereafter commenced business as an insurance underwriter and provider. It was the 1st respondent's case that by way of share allotments, transfers and transmissions, the applicant issued and paid up capital as at 30th June, 2014 stood at Kshs. 600,000,000 divided into 240,000 shares of Kshs. 2,500 each.

The 1st respondent's grievance was the decision by the 2nd and 3rd respondents in their letters dated 6th February 2014 and March, 2014, respectively and Form CR 12 referenced CPR/2009/12818 of 26th June, 2014 to alter the shareholding and directorship of the applicant. The 1st respondent asserted that the decision was neither supported or recommended by a resolution of the board of directors nor was it necessitated by a court decree or legal intervention; that the 2nd and 3rd respondent acted unlawfully and in excess of their powers, mandate and jurisdiction and have interfered with the internal management, operations and shareholding of the company.

For these reasons, the 1st respondent vide an originating notice of motion dated 13th October, 2014 moved the High Court for rectification of the register of companies in respect to the applicant. It applied that the Registrar General of Companies (3rd respondent) rectifies the register and reverts to the status ante to reflect that the applicant's shareholding and directorship did not differ from those in a list provided by the 1st respondent.

The applicant, 2nd, 3rd and 4th respondent opposed the motion arguing that following the receipt of several complaints of fraud, allegations of illegal and unprocedural alteration of directorship and shareholding of the applicant company, the Registrar acted within powers donated to her office both under the Constitution and the repealed Companies Act when she quashed subsequent changes in directorship, shareholding and company secretarial with regard to the applicant company.

The motion was canvassed before Tuiyott, J who in determining the respondent's application found that the Registrar lacked the power to rectify the register; and that she overstepped her powers. In the result, the learned Judge allowed the 1st respondent's motion but only in regard to shareholding. A stay of execution for 30 days was granted to the applicant.

The applicant has now lodged a notice of appeal dated 2nd August 2019 intending to challenge that outcome. In the meantime, it seeks through this application to stay the aforesaid order.

Mr. Cohen, learned counsel for the applicant, in his endeavour to persuade this Court that the applicant will have an arguable appeal, submitted that the learned Judge issued orders to entities not parties to the proceedings; that he denied the applicant a fair hearing as he did not consider the applicant's substantive replying affidavit dated 9th December 2015; that he allotted shares to companies that were not part of the proceedings; that he allotted shares to the 1st respondent yet there was no proof of sale or payment; that he invoked **section 118** of the Companies Act (repealed) yet the actions complained of did not fall under the said section; that he allowed third parties to own the shares in the company without payment or consideration; that he erred in his consideration of the principle of public interest; and that he erred in failing to consider the several complaints regarding the change of shareholding of the applicant.

On the nugatory limb, counsel posited that unless an order of stay of execution is granted the intended appeal will be overtaken by events and rendered academic as the Registrar General of Companies will proceed to make changes to the shareholding of the applicant as directed by the court; that the applicant is a public company that runs its affairs through shareholding thus if the orders are not stayed, the 1st respondent and other third parties will become majority shareholders with decision making powers to the applicant's detriment; and that the applicant will suffer irreparable loss and prejudice.

Counsel therefore urged that the *status quo* on the shareholding be maintained pending the hearing and determination of the main appeal which has already been filed being Civil Appeal No. 472 of 2019.

Mr. Dachi learned counsel for the 4th and 5th respondents were in support of the applicant's motion. There was no appearance for the 2nd and 3rd respondents.

Mr. Kandere, learned counsel for the 1st respondent, opposed the motion. He contended that the applicant has no arguable appeal for the reasons that there is no direct interest demonstrated by the applicant in the matter as it was merely an interested party; that the Registrar General of Companies whose decision was

impugned has opted not to appeal or have the decision reviewed, an indication that the Registrar has admitted her actions were wrong; that the applicant is relying on facts that were neither canvassed before the High Court nor proven to the required standards; and that this Court does not have the requisite jurisdiction to hear and determine the issues raised.

The 1st respondent further argued that the applicant has failed to demonstrate how the appeal would be rendered nugatory since it is a private company limited by shares, regulated by the Insurance Regulatory Authority (IRA) which has the final say in policy decisions taken by the applicant; that the applicant has failed to inform the Court what transpired prior to the decision by the registrar to dispossess the 1st respondent of its shares; that it is in fact the 1st respondent and not the applicant that stands to suffer. In view of the foregoing, it was urged that the application be dismissed.

By the application and practice under **Rule 5(2)(b)** of the Court of Appeal Rules the principles for granting a stay of execution, injunction or stay of proceedings are well settled as was observed by this Court in the case of **Ishmael Kagunyi Thande V. Housing Finance Kenya Ltd.** Civil Application No. NAI 157 of 2006 as follows;

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

In view of the foregoing, the questions of whether the 1st respondent was a member of the applicant company thus entitled to benefit from the provisions of **section 118** and **section 164** of the repealed Companies Act; who were the actual shareholders of the company and whether the 1st respondent bought shares from the applicant company are not idle thus warranting a determination by the Court on merit. There is no doubt these and other grounds enumerated by the applicant as being arguable are indeed not frivolous, hence the first limb is satisfied.

On the negatory aspect since the ruling had the effect of rectifying the register in terms of membership, the shareholding of the company was altered. This rectification in shareholding has a direct and consequential effect on the ownership of the company. If the situation subsists, the ownership of the applicant is likely to change to the detriment of the applicant before its appeal can be heard and determined. The applicant having satisfied both limbs is deserving of the orders of stay. We accordingly allow this application and direct costs to abide the outcome of the appeal.

Dated and delivered at Nairobi this 20th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR