



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE, & OTIENO-ODEK JJA)

CIVIL APPLICATION NO. NAL. 307 OF 2018

BETWEEN

JAMES NDUNGU GETHENJI.....1st APPLICANT

ERIC GOVANI.....2nd APPLICANT

CHACHA MABANGA.....3rd APPLICANT

KIHINGO VILLAGE (WARIDI GARDENS).....4th APPLICANT

AND

GITAHU GETHENJI.....1st RESPONDENT

AMEE CHALISHAZAR.....2nd RESPONDENT

SHEETAL KHANNA..... 3rd RESPONDENT

NARESH MEHTA.....4th RESPONDENT

(An application for stay of the Ruling and Orders of the High Court of Kenya

at Nairobi (Makau J.) dated 25th October 2018

in

HC Petition No. E105 of 2018)

RULING OF THE COURT

1. By Notice of Motion dated 3rd October 2018, the respondents moved the court *inter alia* for orders restraining the applicants, their servants or agents from in any way interfering with the intended Annual General Meeting of the 4th applicant scheduled for 27th October 2018. An order was also sought to the effect that pending the general meeting of 27th October 2018 and the appointment of new directors, the Nominal Respondent's Account with NIC Bank Limited Account No. 1000158287 be frozen.

2. Upon hearing the parties, the learned judge in a Ruling dated 25th October 2018 issued an interlocutory injunction restraining the applicants and or their servants or agents from in any way interfering with the intended general meeting on 27th October 2018. In the body of the Ruling, the judge expressed himself thus:

“The petitioners have demonstrated good cause for freezing the account of the Nominal Respondent as of now. I find no

good reasons for discharging the order freezing the Nominal Respondent Account with NIC Bank Limited Account No. 1000158287.”

3. Aggrieved, the applicant has filed the instant application under **Rule 5 (2) (b)** of the Rules of this Court seeking an order to stay the ruling delivered on 25th October 2018.

4. At the hearing of the instant application, while learned counsel **Mr. John Katiku** appeared for the 1st and 2nd applicants, learned counsel **Mr. Willis Otieno** appeared for the 3rd applicant. Learned counsel **Mr. Kigata** holding brief for counsel **Mr. Allen Gichuhi** appeared for the respondents.

5. In his submission, counsel for the applicants informed this Court that prayers 3 and 4 in the Motion had been spent and overtaken by events. Prayers 3 and 4 sought a stay restraining the applicants from interfering with the intended general meeting on 27th October 2018. The general meeting was not held on October 27th 2018. Prayers 3 and 4 have accordingly been spent.

6. Counsel submitted the remaining prayer sought in the instant application is prayer No. 2 of the Motion. The prayer is to stay the order freezing the Nominal Respondent’s Bank Account with NIC Bank Limited Account No. 1000158287. The applicants urged that their grievance relates to the order by the learned judge expressing *“I find no good reasons for discharging the order freezing the Nominal Respondent Account with NIC Bank Limited Account No. 1000158287.”*

7. On the face of the application, it is stated that the intended appeal has good prospect of success and the appeal will be rendered nugatory if stay is not granted.

8. Counsel for the respondent in opposing the application conceded prayers 3 and 4 had been overtaken by events; that the prayers having been overtaken by events, the intended appeal was neither arguable nor could it be rendered nugatory. On the issue of staying the order freezing the Nominal Respondents NIC Bank Account, counsel submitted that the order by the learned judge was a negative order; no appeal has been made against the Order of 17th October that froze the Bank account; the Notice of Appeal upon which the instant application is founded is against the Ruling of 25th October 2018; there being no Notice of Appeal against the Ruling of 17th October 2018 that froze the NIC Bank Account, counsel submitted there was no competent application for stay before this Court. Counsel urged there were allegations of misappropriation of funds and the learned judge having duly considered the allegations made a finding declining to discharge the freezing order.

9. In response to the allegations of misappropriation, counsel for the applicant urged that there was no finding of embezzlement or misappropriation of funds; that the freezing order will lead to collapse of respondent company as it will not be able to pay its employee salaries and pay for other services rendered.

10. Counsel for the 3rd respondent submitted that the intended appeal is arguable and would be rendered nugatory if the order freezing the Bank Account is not stayed. It was urged the freezing order is threatening the existence of the company as service provision will collapse.

11. We have considered the grounds in support of the instant application as well as submission by counsel. This is an interlocutory appeal and we must consider only issues that do not compromise or prejudice the hearing and determination of the suit now pending before the High Court and the intended appeal. The threshold for granting an interlocutory injunction is stated in **Giella vs. Cassman Brown & Co. Limited** [1973] E.A. 358. First, an applicant must show a *prima facie* case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and third, if the court is in doubt, it will decide an application on the balance of convenience.

12. These three principles were further considered by this Court in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others**, [2014]eKLR as follows:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA

86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-

frogging” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. “

13. In the instant matter, the applicant conceded that prayers 3 and 4 in the Notice of Motion dated 25th October 2018 have been overtaken by events. We make no order in relation to these prayers.

14. On the order declining to discharge the freezing of the Bank Account with NIC Bank, the respondents counsel submitted the judge did not make any positive order; the judge in the Order of 25th October 2018 did not order anyone to do anything. Conversely, the applicant submitted that the learned judge made a positive order in that by declining to discharge the freezing order, the judge positively extended the order freezing the NIC Bank account.

15. We have examined the Ruling dated 25th October 2018 where the learned stated judge as follows:

“I find no good reasons for discharging the order freezing the Nominal Respondent Account with NIC Bank Limited Account No. 1000158287.”

16. The judge gave reasons for declining to discharge the freezing order and expressed himself as follows:

“30. The respondent contend the orders of 17th October 2018 be discharged as it has been demonstrated that the interim orders may have been issued through deliberate non- disclosure of material facts, thus of existing suit relating to the current suit. The petitioner objected to discharging of the interim orders on grounds that no formal application has been filed to enable them respond. I agree with the petitioners. By allowing the application without the respondents having filed a formal application would be prejudicial to the petitioners who will have been denied an opportunity to file a response. The interim orders were not granted ex-parte but interpartes. I therefore find no justification to interfere with the interim orders. They shall remain in force”.

17. It is not in dispute the order freezing the NIC Bank Account was made on 17th October 2018. In the ruling delivered on 25th October 2018, the learned judge simply stated it was premature for the applicant to seek discharge of the freezing order without a formal application that will enable the respondents to reply. Rather than make a formal application before the High Court to discharge the freezing order, the applicant has moved to this Court to stay the freezing order made on 17th October 2018.

18. We remind ourselves that this is an interlocutory application and the only issue now pending before the trial court relates to the freezing order as all other issues having been overtaken by events. Being an interlocutory application, we must consider only issues that do not compromise or prejudice the hearing and determination of the suit pending before the High Court. This Court in **Pattni vs. Ali & 2 Others CA No. 354 OF 2004 (UR183/04)**, stated that in interlocutory applications, the orders that are sought should not decide the rights and obligations of the parties but are merely meant to keep matters in status quo pending such determination.

19. In this matter, the learned judge in the Ruling dated 25th October 2018 urged the applicant to file a formal application seeking discharge of the freezing order. Such an application, if instituted may well determine all issues now pending before the trial court. It is thus premature on our part to consider and determine issues relating to discharge of the freezing order.

20. In addition, the applicant has not filed a Notice of Appeal challenging the freezing the order made on 17th October 2018. In **John N. Liboyi vs. The Board of Governors of St. John College Civil Application No. Nai. 13 of 2009 (UR 92/2009)** where it was expressed:

“The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the Jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule.”

21. In **Equity Bank Limited vs. West Link Mbo Ltd, Civil Application No. 78 of 2011** this Court re-stated its jurisdiction to grant any order under ***rule 5 (2) (b)*** flows from an appeal or notice of appeal in respect of which the specific relief is sought. In **Ruben & 9 Others vs. Nderitu & Another [1989] KLR 459**, this Court held that if there is no notice of appeal lodged, one cannot get an order under ***rule 5 (2)(b)***.

22. In this matter, the Notice of Appeal upon which the applicants have moved this Court specifically challenges the Ruling and Order of 25th October 2018.

There is no Notice of Appeal against the order of 17th October. A prayer to stay an order made on 17th October 2018 cannot be challenged through a Notice of Appeal impugning the Ruling delivered on 25th October 2018.

23. The upshot is that the applicants Notice of Motion dated 25th October 2018 has no merit as it has not only been overtaken by events but seek to stay a freezing order made on 17th October 2018 yet no Notice of Appeal has been filed against the order. We hereby dismiss the Notice of Motion dated 25th October 2018 and order each party to bear its/his/her own costs.

Dated and delivered at Nairobi this 20th day of December, 2018

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR