



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & SICHALE, J.J.A.)

CIVIL APPLICATION NO. NAI 70 OF 2016 (UR 55.16)

BETWEEN

BELGO HOLDINGS LIMITED ..... APPLICANT

AND

ROBERT KOTCH OTACHI ..... 1<sup>ST</sup> RESPONDENT

WILSON BIRIR ..... 2<sup>ND</sup> RESPONDENT

*(An application to set aside or review an order made on 3<sup>rd</sup> March 2016 staying execution of any orders or Decree of the High Court of Kenya at Nairobi, (Ogola, J) dated 18<sup>th</sup> day of December, 2009*

*in*

**H.C.C.C. No.454 of 2004**

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**RULING OF THE COURT**

1. The issue for determination in this ruling is whether a party who has succeeded in a suit in the High Court by obtaining judgment against another party can competently apply for discharge of an order for stay (of such judgment) given to the unsuccessful party if such order for stay is not impugned on appeal but the judgment is. The background facts are as follows.

2. Belgo Holdings Limited (“**the applicant herein**”) instituted *qua* plaintiff in the High Court at Nairobi in the year 2004 suit No.454 of 2004 against Robert Kotch Otachi and Wilson Birir whom it named as 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. They are hereinafter referred to as **the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively**. In the suit, the applicant sought an injunction to restrain the respondents “*from claiming to be directors of the applicant company or otherwise purporting to act on behalf of the applicant or instructing any advocate to act on behalf of the applicant or in any other manner claiming to have any authority to act for the applicant.*” The applicant also sought a declaration that “*neither of the respondents is or has ever been a director of the applicant.*” Damages and costs of the suit were prayed for.

3. In a judgment dated 4<sup>th</sup> December 2015, the High Court after hearing the parties found for the applicant and granted an injunction and a declaration as prayed, plus costs on the higher scale for two

counsel to be borne by the respondents.

4. In its judgment (at paragraph 44,) the High Court expressed the following

***“On the credibility of the 1<sup>st</sup> Defendant’s evidence, during his testimony in cross-examination, he admitted that he had been charged with robbery with violence in November 1993 and was convicted to serve two years in prison on 19<sup>th</sup> December, 1994. This is despite the fact that he had earlier testified that he had never been charged with a criminal offence and that he was acquitted of the charge of robbery with violence. He also told the Court that he was released from prison on 6<sup>th</sup> July, 1995. However, at page 63 of the Plaintiff’s bundle F, there is a letter from the officer in charge, Kamiti Prison, indicating that the 1<sup>st</sup> defendant was released from prison on 4<sup>th</sup> September, 1995. He confirmed that on 5<sup>th</sup> June 1995, the 1<sup>st</sup> defendant was still in jail in Kamiti prison. This is the same date the defendants were allegedly appointed as directors of the plaintiff. At this point the 1<sup>st</sup> defendant confirmed that he was not at Corner House on the alleged date of his appointment as he had earlier testified. He stated that it was actually his father who represented him in the meeting at Corner House where he had been appointed as a director. The foregoing is a clear demonstration that the 1<sup>st</sup> defendant lied on oath. It is apparent that he was in jail on 5<sup>th</sup> June 1995 when he was allegedly appointed as a director of the plaintiff. This casts doubt as to the validity of his appointment, if at all it ever happened. It is therefore unbelievable that on 5<sup>th</sup> June 1995 he was called to the meeting appointing directors through his mobile phone as he earlier alleged yet he was in custody.”***

5. The High Court further stated in paragraph 44 of the judgment -

***“In view of the foregoing, the plaintiff has established on a balance of probabilities that the defendants were never appointed as the directors of the plaintiff company vide the resolution of 4<sup>th</sup> August, 1995 that the defendants intended to rely on or at all.”***

6. Aggrieved by the said decision, the respondents filed a notice of appeal on 18<sup>th</sup> December 2015 pursuant to rule 75 of the Rules of this Court manifesting their contention to appeal against the entire judgment.

7. On 18<sup>th</sup> January 2016, the respondents filed in suit No.454 of 2004 an application by way of a notice of motion seeking an order for “*stay of execution of the judgment*” of the High Court (by **Ogola, J**) dated 4<sup>th</sup> December 2015. After hearing the application, the High Court (Ogola, J) on 3<sup>rd</sup> March 2016 exercised his discretion in favour of the respondents and allowed the application and stayed execution and any orders “*which may arise from the judgment delivered herein on 4<sup>th</sup> December, 2015 pending the filing and determination of the intended appeal.*” Consequently, the court made the following orders –

***“(i) There shall be a stay of execution of any Orders or Decree which may arise from the judgment of this Court delivered on 4<sup>th</sup> December 2015 pending the intended appeal against that judgment in the Court of Appeal pursuant to the Notice of Appeal dated and filed at the Court of Appeal Registry on 18<sup>th</sup> December 2015.”***

***“(ii) Costs of this application shall be for the Plaintiff/Respondent.”***

8. Not surprisingly, the applicant, aggrieved by the orders, applied to this court on 23<sup>rd</sup> March 2016 by way of a notice of motion dated 22<sup>nd</sup> March 2016 seeking an order for stay of the orders of 3<sup>rd</sup> March 2016. In effect, the applicant sought for discharge of the stay orders. The precise prayer stated –

***“1. that pending the hearing and determination of this application there be an immediate stay of the orders made by Ogola J on 3<sup>rd</sup> March 2016 in HCCC No.454 of 2004 staying execution of any order or decree which may arise from the judgment of the High Court in HCCC No.454 of 2004 delivered on 18<sup>th</sup> December 2015 (correct date was 4<sup>th</sup> December 2015).”***

2. *that the said order be set aside or reviewed and*

3. *that the costs of this application be awarded to the applicant.”*

9. The application was premised on Order 42 rule 6 of the Civil Procedure Rules and Rule 42 of the Court of Appeal Rules and all other enabling provisions of the law and was supported by an affidavit sworn on 22<sup>nd</sup> March 2016 by James Ocheng Oduol, counsel for the applicant.

10. The grounds on which the application was made included the averment that the said order was made without jurisdiction; that it was made *suo moto* by the learned judge who did not give the applicant a fair hearing in breach of Article 50 of the Constitution; that no sufficient cause was shown by the respondents to entitle them to the order for stay; that the respondents did not show any ground entitling them to appeal; that Order 42 rule 6 of the Civil Procedure Rules under which the trial judge was moved only deals with stay of execution of decrees or orders and has no application to stay of judgment; that what the respondents sought in essence was an injunction pending appeal restraining the applicant from providing copy of the proposed decree to the Registrar of Companies which the learned judge had no jurisdiction to do.

11. When the application came up for hearing, learned counsel **Mr. James Ochieng Odour** appeared for the applicant while learned counsel **Mr. S. O. Oyugi** appeared for the respondents.

12. It was Mr. Oduor’s submissions that the trial judge had no jurisdiction to grant the order for stay. He termed it illegal. Criticising the grant of the order, counsel said it went to the root of administration of justice as it exemplified improper exercise of discretion and wrong application of the law. In issuing the order for stay, the learned judge, said counsel, failed to consider the relevant factors and arrived at a wrong conclusion.

13. It was Mr. Oduol’s submission that Order 42 rule 6(1) permitted the making of the application for stay and that giving of notice of appeal under rule 75 of this Court’s Rules to appeal against the order sought to be stayed was not necessary. To buttress this point, he invited our attention to the decision in **Halai & Another v. Thornton & Turpin** [1963] Ltd [1990] KLR 365 which held, inter alia, that –

***“the Court of Appeal becomes seized of the matter only after the Notice of Appeal has been filed under rule 74 (now 75). Where no appeal is filed, the court has no jurisdiction to entertain an application for stay of execution.”***

14. The applicant is an intended respondent in the intended appeal against the judgment of the High Court in HCCC No.454 of 2004 delivered on 4<sup>th</sup> December 2015 by Ogola J and, if we understood the applicant’s counsel correctly, the applicant is intent on cross-appealing in the intended appeal for affirmation of the High Court decision. The applicant did not give notice of appeal against the ruling dated 3<sup>rd</sup> March 2016 by Ogola J. Learned counsel for the applicant, Mr. Oduol, contended that his client was not obligated to file a notice of appeal as this court was seized of the matter, the respondents having filed notice of appeal on 18<sup>th</sup> December 2015 and served the same as required by this Court’s Rules. Moreover, contended counsel, the issue of the order for stay sought in the instant application is in respect of directorship of the applicant company and the suspension or stay of the order dated 3<sup>rd</sup> March 2016 made in the said suit. Ideally, the applicant should have given a notice of appeal pursuant to rule 75 of this Court’s Rules in respect of the High Court order of 3<sup>rd</sup> March 2016. But there already exists a notice of appeal by the respondents who intend to file appeal against the impugned judgment. Does that notice of appeal suffice for the purpose of the instant application? Our attention was drawn to rule 6(1) of Order 42 of the Civil Procedure Rules –

***“6(1) no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to***

which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.” (emphasis ours)

15. The order staying the judgment was given by the High Court pursuant to rule 6(1) of Order 42 of the Civil Procedure Rules. The rule also stipulates that a party aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. This seems to be what the applicant has done by coming to this court. Sub-rule (4) of rule 6, Order 42, states that for the purpose of rule 6 (supra), an appeal to this court shall be deemed to have been filed when under the Rules of this Court notice of appeal has been given. The record shows that Messrs Ochieng Onyango Kibet & Ohaga, the advocates for the applicant, filed notice of appeal on 18<sup>th</sup> December 2015 against the judgment by Ogola J delivered on 4<sup>th</sup> December 2015 in HCCC No.454 of 2004. Under rule 6(9) of Order 42 of the Civil Procedure Rules, “*the powers conferred by rules 6 and 7 shall be exercisable where an appeal may be or has been preferred (not from the decree but) from an order made in execution of such decree.*” In the instant matter, there is no decree capable of execution as the impugned final orders of the High Court were negative orders in as much as they firstly restrained the respondents by injunction from purporting to be directors of the applicant company and secondly gave a declaration that neither respondent is or has ever been a Director of the applicant company.

16. It is patent that as the impugned judgment in which the aforesaid orders were given on 4<sup>th</sup> December 2015 was stayed by the Order of 3<sup>rd</sup> March 2016, and as the respondents filed a notice of appeal on 18<sup>th</sup> December 2016, the judgment was paralysed by the order for stay and accordingly we have jurisdiction to hear and determine whether the order for stay was in the interest of justice or was merited. For starters, this court is seized of the appeal against the High Court judgment in Civil Suit No.454 of 2004 between the applicant and the respondents as a notice of appeal is in place. By virtue of the fact that the respondents as intending appellants have filed notice of appeal as aforesaid, the applicant is entitled, if it deems it fit, to file a cross-appeal without the need for a notice of appeal to do so. In the same vein, the applicant does not require a notice of appeal to seek variation, review, or discharge of the order for stay made by the High Court on 18<sup>th</sup> December 2015. In this application, the appeal is by the respondents in whose favour the stay order was made on 18<sup>th</sup> December 2015. As correctly stated in **Wilson v. Church** (No 2) [1879] 12 Ch.D. page 454 at page 459, the court has a duty where an appeal is preferred to ensure that the appeal, if successful, is not rendered nugatory by granting an order for stay. Conversely, where the appeal will not be rendered nugatory by absence of an order for stay the court ought not to grant stay especially if it is shown to the satisfaction of the Court that injustice will be caused to the other party by grant of such order for stay.

**Megarry J**, (as he then was) followed the decision in **Wilson v. Church** (supra) in **Erinford Properties Limited v. Cheshire County Council** [1972] 2 All ER 288 at Page 454 when he held that the purpose of the order for stay is to prevent the Court of Appeal’s decision from being rendered nugatory should that court reverse the judge’s decision. **Lopes LJ in Attorney General v. Emerson and Others** [1889] 24 (QB 1) 56 at page 59 held that the court will grant a stay where special circumstances of the case so require. In the instant case, it is not shown that want of a stay order would render the respondents’ appeal nugatory nor are there special circumstances warranting the grant of an order for stay. The jurisdiction we are exercising in this matter is discretionary. The applicant has demonstrated that no reasonable argument can be made in support of the stay order. Greater hardship would be suffered by maintaining the order for stay than in declining it. The overriding objective of **The Appellate Jurisdiction Act** and **The Court of Appeal Rules** is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the said Act. In furtherance of the said overriding objective, we are enjoined by dint of Section 3B (1) (a) to handle all matters presented to this Court for the purpose of attaining, inter alia, the just determination of the proceedings. We bear in mind that under rule 1(2) of the Court of Appeal Rules, “*nothing ... shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*” Article 159 of the Constitution enjoins the courts in exercising the judicial authority vested in them to do justice to all and not to pay undue regard to procedural technicalities when administering justice.

17. For these reason, we find merit in the applicant's notice of motion dated 22<sup>nd</sup> March 2016 which we allow and order that the orders of the High Court (by Ogola J) made on 3<sup>rd</sup> March 2016 staying the execution of any orders or decree in the judgment of the High Court in HCCC No. 454 of 2004 are hereby set aside and the costs of the application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of June 2016.**

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**