



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI 23 OF 2016

BETWEEN

PARAG BHAGWA NJIBHAI SAVANI APPLICANT

VERSUS

JITU TRIBHOVANBHAI SAVANI 1ST RESPONDENT

PVRV RAO 2ND RESPONDENT

SHIV J SAVANI 3RD RESPONDENT

(Being an application for stay of execution and proceedings pending the hearing and determination of an Intended Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (C. Kariuki, J.) delivered on 29th January, 2016 in MISC. Cause No. 197 of 2015)

RULING OF THE COURT

The Motion dated 5th February, 2016 is brought under Rule 5 (2) (b) of this Court's Rules and we are asked to stay execution of Order No. 1 of the ruling of the High Court of Kenya sitting at Nairobi (C. Kariuki, J.) dated 29th January, 2016 granting prayer Nos. 3, 4 and 5 of the 1st respondent's application dated 30th April, 2015 pending the hearing and determination of the applicant's intended appeal against the ruling. We are further asked to stay all further proceedings in that court pending the intended appeal. In the grounds in support of the Motion it is stated inter alia that the learned judge of the High Court allowed an application by the 1st respondent seeking the investigation of the affairs of three companies namely Key Investments Limited, Plastic Products Limited and Multi Packaging Limited (hereinafter "the three companies") and that parties were to agree within 7 days on the identity of the inspector otherwise the court would do so. It is also said that the applicant has lodged a Notice of Appeal against the said decision; that the intended appeal is arguable with good prospects of success; that the impugned inspection would proceed and be concluded before the intended appeal is heard and determined rendering the same nugatory; that the High Court has delegated the determination of issues pending before another court and that it is just and equitable to grant relief to the applicant.

The applicant swore an affidavit on 5th February, 2016 with various annexures which recapitulates the grounds already adverted to where it is further stated that the 1st respondent with the applicant's uncle instituted a suit at the High Court against the applicant's parents challenging shareholding as well as directorships of the three companies; that a Notice of Motion was then filed stated to be brought under

Sections 165, 166 and 396 of the Companies Act seeking injunctive relief as well as an order for appointment of an inspector to inspect the affairs of the 3 companies; that the 1st respondent then instituted another suit in respect of directorship and transfer of shares in the three companies stating that he had been shut out of the affairs of the same; that during pendency of the proceedings before the High Court the 1st and 3rd respondent's held a Board of Directors meeting where other directors were excluded and resolutions made; that money belonging to a company had then been transferred; that the Motion was heard and the learned judge granted the order for inspection of the affairs of the three companies by an inspector to be appointed by the parties or in default by the court; that the intended appeal was arguable and would be rendered nugatory if relief was not granted.

A brief history or background facts will suffice.

In a plaint presented at the Commercial and Admiralty Division of the High Court of Kenya at Nairobi Jitu Tribhovanbhai Savani (1st respondent here) and his brother Rajendra Tribhovan Hansraj Savani ("the plaintiffs) sued Bhagwanji Tribhovanbhai Patel, Manjula Bhagwanji Tribhovan Patel and Parag Bhagavanjibhai Savani (the applicant here) ("the defendants") for various reliefs. All the said parties are related by blood. We do not find it necessary to repeat the various averments and the history set out in the plaint. By a Notice of Motion said to be brought under Section 165, 166, 396 of the Companies Act and Rules 3 and 8(c) of the Companies (High Court) Rules and various provisions of the Civil Procedure Act and articles of the Constitution of Kenya, 2010, it was prayed in the main that injunctive relief be granted to the plaintiffs against the defendants restraining the defendants from changing, altering or interfering with the shareholding and directorship of the three companies pending hearing and determination of that application. It was also prayed that Abdulahid Aboo, a certified public accountant or such other competent person be appointed as inspector of the three companies to inspect their affairs and make a report to court. The application was heard by C. Kariuki, J. who granted orders as prayed making further orders that the parties agree on the inspector, amount for investigation and duration of investigation. Those orders did not please the applicant who filed a Notice of Appeal and moved us in the present application.

Mr. W.A. Amoko, learned counsel for the applicant submitted before us that it was wrong for the learned judge to make orders against the three companies without affording those companies a hearing and where the three companies were not parties to the litigation before the Court at all. According to counsel the orders were a breach of the three companies' natural justice rights to be heard and this was an arguable point. In addition, learned counsel faulted the learned judge for granting orders by virtue of provisions of the Companies Act which, counsel submitted, were not applicable or available to the plaintiffs.

On the nugatory aspect of the matter Mr. Amoko submitted that orders contested required inspection of companies' affairs, appointment of an inspector and payment of money and that if all these took place and the intended appeal thereafter succeeded the same would have been rendered nugatory.

Miss Wangari Kamau, learned counsel for the 2nd respondent supported the application and urged that the same be allowed.

Mr. Munene, learned counsel for the 1st and 3rd respondents in opposing the application submitted that the application before the High Court ruling whereof was the subject of the intended appeal was presented under provisions of the Companies Act where an appeal to this Court was not permitted at all. Counsel submitted further that the order of inspection granted by the High Court did not stop the applicant from appealing, as, thought learned counsel, the report of the inspector could always be challenged or contested. What prejudice could the applicant suffer if inspection proceeded as ordered – wondered learned counsel Mr. Munene.

The principles that we apply on a consideration of applications under Rule 5(2) (b) of this Court's Rules are now fairly well settled. This Court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of the Judge. The court has to be satisfied that the intended-appeal, or appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must, in addition, be satisfied that should the appeal, or intended appeal, as

the case may be, succeed, the success would be rendered nugatory should the court refuse to grant the application – see, for instance, an enunciation of these principles in the case of Republic v Kenya Anti-Corruption Commission and 2 Others [2009] KLR 31 where the following passage appears:

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [See also this Court’s decisions in the case of RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI v JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL

NO. 72 OF 2011 [unreported].”

In the lead Ruling in Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others [2013] eKLR Onyango Otieno, JA stated on arguability of an appeal or intended appeal:

“I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one

So an applicant who establishes a single arguable point and who also satisfies the nugatory aspect of the application before the court is entitled to the protection accorded by Rule 5(2) (b) of this Court’s Rules.

We have perused draft Memorandum of Appeal attached to the Motion. The applicant intends to raise as a ground of appeal whether the 1st respondent was entitled to invoke provisions of the Companies Act which prima facie appear to donate a right to the Honourable Attorney-General or the Registrar of Companies to approach the court. That, to us, is an arguable point. Also taken as a ground of appeal is the question whether substantive orders could be made against the three companies when they were not parties to the suit and without hearing those parties at all. Again an arguable point and as we have stated a single arguable point satisfies the first limb of the principles which we apply in an application for stay of execution such as this one. What about the nugatory aspect which a successful applicant must also satisfy? Learned counsel for the applicant says that if the orders of inspection are carried out and a report presented to court there would be nothing left if the intended appeal which we have already found to be arguable would be rendered nugatory. We agree and accept this submission. The learned judge made substantive orders against the three companies without hearing them on the matter at all and it is true that if the orders are executed there would be nothing left if the intended appeal succeeded as it would be a worthless mere academic exercise.

The applicant has satisfied both limbs of the principles which we apply in applications brought under Rule 5(2) (b) of this Court’s Rules and in the event we grant the prayers set out in the Motion dated 5th February, 2016. Costs of the Motion shall abide the hearing and determination of the intended appeal.

Dated and Delivered at Nairobi this 14th day of October, 2016.

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

E.M. GITHINJI

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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

DEPUTY REGISTRAR