



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: G.B.B. KARIUKI, KIAGE, & J. MOHAMMED**

**JJ.A**

**CIVIL APPLICATION NO.NAI 321 OF 2014 ( UR 243/2014)**

**BETWEEN**

**ELEGANCE INVESTMENT LIMITED.....1<sup>ST</sup> APPLICANT**

**JOYCE AKINYI OCHIEN.....2<sup>ND</sup> APPLICANT**

**AND**

**AND ANTHONY CHINEDU IFEDIGBO.....RESPONDENT**

**(Application for stay of execution pending the hearing and determination of an intended appeal from the judgment & decree of the High Court of Kenya at Nairobi (Ogola, J) delivered on 19<sup>th</sup> May, 2014 in H.C. WINDING UP CAUSE NO. 19 OF 2009)**

**RULING OF THE COURT**

**Background**

Before us is a Notice of Motion application by **ELEGANCE INVESTMENT LIMITED**, hereinafter referred to as the 1<sup>st</sup> applicant and **JOYCE AKINYI OCHIENG**, hereinafter the 2<sup>nd</sup> applicant dated 16<sup>th</sup> December, 2014, expressed to be brought under **Rules 5(2)(b) of the Court of Appeal Rules**, seeking the following order:

*That there be a stay of execution of the decree issued in the Winding Up Cause Number 19 of 2009 on 19<sup>th</sup> May 2014 by the Honourable Justice E.K. Ogola pending the hearing and determination of the intended Appeal.*

The application is premised on the grounds on the face of the application and supported by the affidavit of the 2<sup>nd</sup> applicant, a Director and a shareholder of the 1<sup>st</sup> applicant, sworn on 16<sup>th</sup> December, 2014, which makes the following averments:

1. *The 1<sup>st</sup> applicant has been wound up pursuant to a judgment delivered by Justice E.K. Ogola on 19<sup>th</sup> May 2014 and the respondent intends to execute the decree issued to wind up the 1<sup>st</sup>*

*applicant.*

2. *That if the execution is effected and the assets of the 1<sup>st</sup> applicants are distributed in accordance with each members shareholding, they will not be recovered as the Respondent was declared a persona non grata by the Government of Kenya and deported to Nigeria.*
3. *That the applicant will suffer substantial and irreparable loss and damages if the orders of stay of execution of the decree to wind up the 1<sup>st</sup> applicant are not granted since the applicant solely depends on the business run at the Deep West Resort, a business established by the 1<sup>st</sup> applicant herein for survival.*

The respondent opposed the motion vide the Grounds of Opposition dated 22<sup>nd</sup> January, 2014, drawn and filed by Havi & Company Advocates for the Respondent, in which they argue that the 2<sup>nd</sup> applicant has not demonstrated the existence of an arguable appeal and that a successful appeal will not be rendered nugatory as the assets of the 1<sup>st</sup> applicant shall be distributed *in specie* between the 2<sup>nd</sup> applicant and the respondent.

The relevant antecedent facts giving rise to this application can be extracted from the impugned judgment. The respondent successfully moved the High Court by way of Petition in *Winding Up Cause No. 19 of 2009* seeking among others the following orders:

- a. *That Elegance Investment Limited be wound up by the court under the provisions of the Companies Act, Cap. 486 of the Laws of Kenya and the assets be distributed in specie, that is, in accordance with the members' respective shareholding.*
- b. *That an interim liquidator be appointed and be given the full custody of the Company's property, management and running of the business of the Company known as Deep West Resort on property L.R. No. No. 209/9339 without any interference from the Petitioner and the 2<sup>nd</sup> Respondent pending the hearing and determination of the Petition.*

The 1<sup>st</sup> applicant was incorporated in Kenya with the nominal share capital of KShs.100,000/= divided into 1,000 shares of KShs.100/= with the amount of capital paid up as KShs.200/= . The objectives of the 1<sup>st</sup> applicant were, *inter alia*, to carry on business of real estate developers and management property development, debt collectors, as per the 1<sup>st</sup> applicant's Memorandum and Articles of Association. The 2<sup>nd</sup> applicant and the respondent who at one time were husband and wife are the only shareholders and directors of the 1<sup>st</sup> applicant, each holding one share. It emerged during the trial of the suit that the respondent had been declared by the Kenyan Government as *a persona non grata* and deported to his home country of Nigeria and also that the 1<sup>st</sup> applicant's annual returns for the years 2012 and 2013 had not been filed.

The learned Judge invoked the jurisdictional provisions of **Sections 218 and 219 of the Companies Act, Cap 486** and granted the orders sought and more specifically made a finding that with the deportation of the respondent from Kenya, the number of members of the 1<sup>st</sup> applicant has been reduced to below two, which makes it impossible for the company to transact its business. Secondly, that the 1<sup>st</sup> applicant had not filed the statutory annual returns for the years 2012 and 2013 and that there was no likelihood that it would be done in the year 2014. In the circumstances, the learned Judge found that it was just and equitable to wind up the company.

Aggrieved by the said decision, the applicants have filed a notice of appeal declaring their intention of appealing against that decision. Pending the lodging and determination of that appeal they have brought this motion before us for interlocutory relief.

#### **Submissions by counsel**

When the application came up for hearing before us, learned counsel Mr F G Thuita appeared for the applicants, while Ms Melissa Ng'ania appeared for the Respondent.

On the arguability of the appeal, counsel for the applicants submitted that there are other remedies which should have been considered by the learned Judge besides winding up of the 1<sup>st</sup> applicant under **Sections 218 and**

**219 of the Companies Act, Cap 486.** Counsel argued that the fact that a husband and a wife, as in this case the 2<sup>nd</sup> applicant and the respondent, are estranged does not lead to the death of a Company which is a separate legal entity. In any event, he argued, the respondent who opted to exit can sell his shares to another buyer. Counsel further submitted that the respondent had not resigned from the company with the effect of lowering the statutory requirement for a minimum number of shareholding in the 1<sup>st</sup> applicant. Counsel also faulted the learned judge for dispensing with oral testimony due to the deportation of the respondent from Kenya. Counsel argued that the physical absence of the respondent could have been mitigated by reception of the respondent's testimony via video conferencing or Skype. Lastly, counsel lambasted the learned Judge for having proceeded with the winding up of the 1<sup>st</sup> applicant while there were several other suits involving the 1<sup>st</sup> applicant which had neither been stayed nor concluded.

On the nugatory aspect, counsel argued that the decree issued calls for the winding up of the 1<sup>st</sup> applicant and that once the 1<sup>st</sup> applicant is wound up, the appeal if successful will be an academic exercise. Finally, he lamented that if the Company is wound up and the appeal succeeds, it would be very difficult to recover the money from the respondent who has been declared **persona non grata** and deported by the Kenyan government. In support of the twin preconditions, reliance was placed on this Court's recent decisions in **KENYA AIRPORTS AUTHORITY V MITU-BELL WELFARE SOCIETY & ANOTHER, [2014] e-KLR, ENGINEERS REGISTRATION BOARD V JESSEE WAWERU WAHOME & OTHERS, [2013] e-KLR, WARDPA HOLDINGS LIMITED & 3 OTHERS V EMMANUEL WAWERU LIMA MATHAI & ANOTHER, [2012] e-KLR, CONSOLIDATED BANK OF KENYA LTD V FLORENCE WAIRUMU MBUGUA & ANOTHER, [2014] e-KLR.**

On the other hand, Ms Ng'ania for the respondent, opposed the application arguing that the applicants have not demonstrated an arguable appeal; that the principle enunciated in the English case of **SALMON V SALMON** dictates that every shareholder in a company is entitled to the shares as per their shareholding; that the statutory minimum requirement for the incorporation of the 1<sup>st</sup> applicant company have not been met due to the absence of the respondent and the failure of the 1<sup>st</sup> applicant to file its annual returns; that the 1<sup>st</sup> applicant is a family-owned business and that the 2<sup>nd</sup> applicant cannot on her own make resolutions in the absence of the respondent.

Counsel further argued that money from the operations of the 1<sup>st</sup> applicant is being collected by the 2<sup>nd</sup> applicant to the detriment of the respondent; that this was tantamount to placing the 2<sup>nd</sup> applicant at an advantaged position during the pendency of the appeal. Finally, while urging us to dismiss the application, counsel submitted that the winding up cause was commenced before the respondent was deported from Kenya and, therefore, the applicants have not demonstrated that they will suffer irreparable loss. Reliance was placed on **MADHUPAPER INTERNATIONAL LIMITED V KERR, [1985] e-KLR, KILELESHA SERVICE STATION LIMITED V KENYA SHELL LIMITED, [2008] e-KLR** and **MAUREEN WAITHERA MWENJE & ANOR V DAVID KINYANJUI NJENGA & 2 OTHERS, [2014] e-KLR.**

### **Determination**

The law is settled regarding applications brought under **Rule 5 (2) (b)**, that an applicant must satisfy the court that he has an arguable appeal and that his intended appeal, if successful, will be rendered nugatory if the orders sought are not granted.

This Court in **ISHMAEL KAGUNYI THANDE V HFCK, CIVIL APPLN NAI NO. 157 OF 2006**

determined:

***“The jurisdiction of the court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show 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 the appeal will be rendered nugatory.”***

Githinji JA in ***EQUITY BANK LIMITED V WEST LINK MBO LIMITED, CIVIL***

***APPLN NO. NAI 78 OF 2011***, stated:

***“It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance... It is clear that 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”***

In considering the application, we bear in mind that an arguable appeal is not one that must necessarily succeed, but one which a court should consider; that whether or not an appeal will be rendered nugatory is a question of fact which will depend on the peculiar circumstances of each case; whether or not what is sought to be stayed, if allowed to happen, is reversible or not and whether an award of damages will be sufficient compensation for the purpose of the application.

On the question of whether the appeal, if successful, will be rendered nugatory if stay is not granted, the court ought to weigh the claims of both parties in the dispute.

On the question whether, on the material before us, the applicants have made out an arguable appeal, the applicants have both in the draft memorandum of appeal and in the affidavit in support of their application, stipulated the grounds on which they seek to appeal against the judgment of the High Court. The applicants, ***inter alia***, raise the following grounds of appeal:

2. *The learned judge failed to take into account that the dispute involving the 1<sup>st</sup> appellant involved a fraudulent sub-lease of a business established under the 1<sup>st</sup> appellant called Deep West Resort which had been issued by the respondent to one Joseph Muchina and the issue was pending before court for determination in HCCC 172 of 2009 Joseph Muchina versus Joyce AKinyi.*
3. *The learned judge failed to take into account that allowing the winding up petition prior to the determination of the validity of the sub-lease of the Deep West Resort, a business established by the 1<sup>st</sup> appellant would be an abuse of the court process and an action intended to delay the course of justice.*
4. *The learned judge erred in law and fact in failing to appreciate that the winding up petition was actuated by ulterior motives which included; the attempt to frustrate the 2<sup>nd</sup> appellant due to sour matrimonial issues; an attempt to circumvent numerous court cases between the appellants and the respondent; and an endeavor by the respondent to assist a 3<sup>rd</sup> party who had procured an illegal sub lease.*

We are of the view that the above grounds are arguable and not frivolous. We are, therefore, satisfied that the applicants have satisfied the first limb of the requirements in an application under ***Rule 5 (2) (b)***.

Turning to the question whether the appeal, if successful, will be rendered nugatory if the orders sought are not granted, we are similarly satisfied that it will. The 2<sup>nd</sup> applicant's averments in the affidavit supporting the application dated 16<sup>th</sup> December, 2014, contend that if the order to wind up the 1<sup>st</sup> applicant is executed, the 2<sup>nd</sup> applicant will suffer loss as the 1<sup>st</sup> applicant's assets will be distributed in

accordance with each member's shareholding and will not be recovered if the intended appeal is successful as the respondent was declared *persona non grata* by the Government of Kenya and deported to Nigeria.

As this Court stated in *RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD, (2003) 1EA 232*, what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.

We have come to the conclusion that in the circumstances, this is a deserving case for exercise of our discretion under *Rule 5 (2) (b) of the Rules of this Court*. Accordingly, we allow the application. Costs of the application shall abide by the outcome of the appeal.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of March, 2015.**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**