IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, AZANGALALA & SICHALE, JJ.A.

CIVIL APPLICATION NO. NAI 189 OF 2013 (UR 135/2013)

STEPHEN MBUGUA MWAGIRU.....1ST APPLICANT

ROSEMARY WANJA MWAGIRU……..……..…..2ND APPLICANT

AND

TATU CITY LIMITED..... RESPONDENT

(Being an Application for stay of execution and also of injunction pending the hearing and determination of an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Musinga, J.) dated 18th January, 2013 in H. C. Winding Up Cause No. 29 of 2010)

RULING OF THE COURT

The parties herein are embroiled in a multiplicity of suits both before this court and in the High Court. Two such matters were **Winding Up Causes Nos. 29** and **30 of 2010** before the High Court, filed by **Stephen Mbugua Mwagiru** and **Rosemary Wanja Mwagiru** (the applicants).

Both petitions were seeking winding up orders in respect of two companies in which the applicants are minority shareholders. These are **Tatu City** (the respondent), and **Kofinaf Company Limited,** a sister company.

Both suits were consolidated and heard together culminating into the "Ruling" of Musinga, J (as he then was) dated 18th January, 2013. Following delivery of the said "Ruling", the applicants filed two separate notices of appeal, one in winding up cause No. 29 of 2010 and the other in winding up cause No. 30 of 2010.

Shortly thereafter, the applicants filed before this Court, Civil Application No. 189 of 2013 and Civil Application No. 190 of 2013 which were basically seeking similar orders. Since these applications arise from the same ruling, the Court, by consent of both parties (Dr. Kamau Kuria SC for the applicants and Mr. Ohaga for the respondent), consolidated both applications on 11th March, 2015 and further gave directions that the matter proceeds by way of written submissions pursuant to Rule

100 of this Court's Rules.

The submissions and lists of authorities were duly filed and the parties appeared before us for highlighting of the submissions on 11th May, 2015.

By way of short background, the appellants moved the High Court in two winding up petitions as stated earlier in which they sought the following reliefs:-

> ***"(1) that it is just and equitable that the company should be wound up.***
>
> 2. ***In the alternative a prayer that,***
>
> ***if this Court finds that it would be just and equitable that the company be wound up, but that to do so would prejudice the petitioners and that part of the members, then, in that event, the petitioners' equity or proprietary interest in the company should be sold to other members of the company at such price, either in cash or kind, or partly in cash and partly in kind, as may be agreed by the parties or as the court may deem fit."***

After the hearing of both petitions, the learned judge in the judgment being impugned made the following observations and gave relief as hereunder:-

> ***"Having considered all the affidavits and submissions by counsel, I have come to the conclusion that the petitioners have established some of the grounds in their petitions and are entitled to some relief. I will however, not make a winding up order since there is an alternative remedy available and that is acquisition of their shares by majority shareholders at fair value. The petitioners are acting unreasonably by seeking to have the companies wound up so as to force a buy out on their terms, even where the court has no jurisdiction to make such orders regarding foreign registered companies. The petitioners should pursue the alternative remedy both here in Kenya and at the London Court of International Arbitration."***

The Court did not therefore grant the main prayer but gave the alternative prayer, and even prescribed the course to be followed in realisation of the alternative order sought. The appellants were nonetheless aggrieved by some aspects of the said judgment and filed notices of appeal in both petitions, and shortly thereafter the notices of motion at bar under certificate of urgency, under **Sections 3A** and **3B of the Appellate Jurisdiction Act** and **Rules 5(2) (b)** and **43 of the Court of Appeal Rules** seeking the following orders:-

> ***"(1) That this honourable court be pleased to stay the execution of the judgment delivered herein on 18th January 2013 in High Court Winding Up Case No. 29 pending the hearing and determination of the intended appeal;***
>
> 2. ***That the respondent be restrained from selling, subdividing, charging, mortgaging, letting or subletting without the leave of this honourable court the following properties:-***
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> a. ***LR No. 28078 formerly L.R No. 91;***
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> b. ***LR No. 28079 formerly LR No. 11538/2;***
>
> c. ***LR No. 28080 formerly L.R No. 8182;***
>
> d. ***LR No. 28081 formerly L.R No. 104;***
>
> e. ***LR No. 28091 formerly L.R. 10901/22;***
>
> ***pending the hearing and determination of the intended appeal;***
>
> 3. ***That the costs of and incidental to this application abide the result of the said appeal."***

We shall for purposes of this ruling deal with Civil Application No. 189 of 2013, and apply the final order *mutatis mutandis* to Civil Application No. 190 of 2013.

The application is predicated on some thirty grounds on its face and supported by the lengthy affidavit of the 1st applicant, Stephen Mbugua Mwagiru, on his behalf and that of the 2nd applicant, sworn on 24th July, 2013 and an even longer supplementary affidavit sworn on 6th December, 2013.

The application is opposed by the respondent through the replying affidavit and further replying affidavit of Alexey Perelman sworn on 7th October, 2013 and 23rd

May, 2014 respectively. The deponent of these two affidavits describes himself as a director of Tatu City Limited and Kofinaf Company Limited (the respondents in both applications).

Each affidavit is accompanied by several annexures. Each party also filed comprehensive and detailed submissions and list of authorities. We also heard both counsel in their highlight of the submissions.

This being an application under **Rule 5(2) (b) of this Court's Rules**, we shall eschew getting into the depth of the issues that are the subject of the intended appeal. All we need to do at this stage, is to consider and determine whether the applicants have an arguable appeal before this Court, and secondly, whether if the prayers sought are declined, the applicants' appeal, were it to succeed would be rendered nugatory.

As stated consistently by this Court, these two principles are conjunctive and not disjunctive. The appellants must therefore prove both, as proving only one of them will not suffice. We shall now consider those twin principles against all the material placed before us by way of the record of appeal, rival affidavits along with the annexures thereto, the case law cited and also the written and oral submissions of both counsel.

Before we discuss these principles, it's incumbent upon us to resolve a very pertinent issue raised by learned counsel for the respondents as to whether there is indeed an appeal before this Court on which this application can be pegged.

The reason for this submission was that, although the applicants filed a notice of appeal on 22nd January, 2013 they proceeded to file an amended notice of appeal on 28th, January 2013 without the leave of the Court. It was the respondent's submission that the said amended notice has never been served on them and pursuant to **Rule 83 of the Rules of this Court**, the appeal should be deemed to have been withdrawn. If the Court were to uphold this submission, then the logical finding would be that this application is hanging in the air and it would therefore be a non starter.

In response to this submission, Dr. Kamau Kuria SC for the appellant submitted that the said submission would only hold sway if it was urged in an application to strike out the notice of appeal – which this one is not.We do not for purposes of this ruling want to delve into issues as to whether or not a notice of appeal is amenable to amendment. We do not either want to go into the issues as to whether the notice of appeal should be struck out or not; or even why almost three years down the line, the memorandum of appeal has not been filed and served.

Those are issues, in our considered view which would be better ventilated in a motion to strike out the notice of appeal made under either **Rules 83 or 84 of this Court's Rules**. We also note that as severally held by this Court, our jurisdiction to entertain applications under **Rule 5(2) (b) of this Court's Rules** stems from the filing of a notice of appeal. The court is not enjoined to scrutinise the said notice for purposes of confirming if it is compliant with the Rules or not.

This Court recently in the case of **Kaushumu Wambui vs Hamisi Omari and another (Civil application No. Nai 173 of 2014)**, reaffirmed its pronouncement in **National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike and Another (Civil Application No. Nai 238 of 2005)** as follows;

> ***"in making a determination under Rule 5(2) (b), the Court's function is not to determine whether or not there is a valid notice of appeal. We are aware that deficiencies in the***

notice of appeal can be corrected, and that the Rules of this Court provide parties with remedies that can be exercised to their advantage."

The point raised by Mr. Oduol, learned counsel for the respondent is indeed not frivolous or otiose. It is a valid one and would definitely have elicited much more serious consideration had it been raised and canvassed in a proper motion to strike out the notice of appeal. For now, we are prepared to assume that there is a valid notice of appeal on record and consider the application before us on its merits.

Do the appellants have an arguable appeal or not? In determining these issues, it is instructive to note that the applicants did actually get the alternative relief they had sought from the Court. The Court declined to wind up the company but allowed the alternative prayer to the effect that the applicants equity or proprietary interest in the company should be sold to the company ***"at a price, either in cash or in kind, or partly in cash and partly in kind, as may be agreed by the parties as the court may deem fit". (Emphasis supplied)***

The applicants therefore gave the Court some leeway to decide on how the said proprietary interest of the applicants could be crystallised and liquidated. The Court of course seeing how acrimonious the relationship between the parties was, ordered that the shares be valued by a reputable firm of accountants either to be agreed upon by the parties or to be identified by the Certified Public Accountants of Kenya.

Apparently, according to the respondents the valuation was done, but the values given per share has no comparison whatsoever with the billions given by the applicants in their submissions. Though not expressly, that could be one of the grievances the applicants have with the alternative relief granted by the High Court.

This has nonetheless not been proffered as a ground of appeal. According to Dr. Kuria, the arguable points to be determined on appeal are the interpretation of **sections 224** and **270 of the Companies Act**. Learned counsel urged that the learned

Judge fell into error when he applied **section 211 of the Companies Act** instead of **section 224.** Is that an arguable point? We have looked at these two provisions of the Companies Act.

Section 224 of the Company's Act is about avoidance of dispositions of property after commencement of winding up in a winding up by Court. It forbids the disposition of property, including transfer of shares or alteration of status of members of the company once the winding up process of a company has started.

In this case, as rightly submitted by Mr. Oduol, the learned Judge declined to grant winding up orders as prayed by the appellants. This therefore meant that provisions of **section 204 of the Company Act** could not apply once judgment was rendered.

Having declined to allow the winding up order, then the provisions of **section 211 of the Companies Act** came into play. The learned Judge gave his directions on the disposal of the applicants' shares strictly within the parameters of **section 211(2)**

(b). Section 270 of the Companies Act only gives an aggrieved party a right of appeal to this Court. It does not in any way extend the operation of **section 224 of the Companies Act** where the winding up petition has been dismissed, or the winding up order itself declined and the alternative granted.

That in our view cannot be an arguable point. We note however, from the judgment and the submissions before us that there is a big discrepancy between the amount and attendant value of the shares as claimed by the appellants and as awarded by the Court. Since the entire dispute is about proprietary rights of the appellants and the value of their shares in the two companies, that would be an arguable issue on appeal. On that basis only, we are convinced that the appeal is not frivolous. This is so because the applicant is not obliged to establish a multiplicity of arguable grounds, as even a single one will suffice. **(See Transmouth Conveyors Ltd vs Kenya RevenueAuthority & Another, Civil Application No. 37 of 2007 (unreported).**

We would however wish to reiterate that an arguable appeal is not one that will necessarily succeed, but one that is deserving of the Court's consideration. This brings us to the second limb of the twin principle. As stated earlier, it is incumbent upon the applicants to establish that if the order of injunction sought is not granted, then , the intended appeal were it to succeed would be rendered nugatory. (See **Reliance Bank Ltd (In Liquidation) vs Norlake Investment Ltd [2002]1EA 227**).

The applicants worry as we understand it is that if the respondent is not restrained from selling the properties in question, then in the event their appeal succeeds, there will be no money available for the respondent to purchase the said shares. In our view, the applicants own a very small percentage of the shares in the respondent companies. There is no evidence placed before us to even remotely suggest that the Respondent is insolvent. Indeed its financial net worthiness, which is admitted by the applicants, is demonstrative of the fact that the respondents would be in a position to buy out the applicants' shares as ordered by the court in the event their appeal succeeds. The nugatory aspect has therefore not been proved.

For the foregoing reasons, and after balancing both sides of the scale, we find that there will be no injustice whatsoever occasioned to the applicants if the injunctive orders sought are not granted.

On the other hand, the applicants, who are still shareholders of the respondents, would suffer if any impediments continue to be placed in the way of the respondents, and thus preventing them from going on with their projects. We find that the applicants have failed to satisfy the requirements necessary for an application under **Rule 5(2) b of the Rules of this Court** to succeed.

We find this application devoid of merit and dismiss it accordingly with costs to the respondents.

This Ruling applies *mutatis mutandis* to Civil Application No. 190 of 2013.

Dated and delivered at Nairobi this 3rd day of July, 2015.

W.**KARANJA**

…….……..

JUDGE OF APPEAL

F. **AZANGALALA**

…….……..

JUDGE OF APPEAL

F. **SICHALE**

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR