



IN THE COURT OF APPEAL

AT NAIROBI

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

Civil Application No. Nai. 185 Of 2013 (Ur 131/20130)

BETWEEN

JOHN B. MUYA 1ST APPLICANT

MRS R. W. KUNYIHA 2ND APPLICANT

SAFINA PROPERTIES LIMITED 3RD APPLICANT

AND

ELKANA MUKUNDI GATIMU 1ST RESPONDENT

KENYUA NGUNJIRI 2ND RESPONDENT

(Being an application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi delivered on the 29th January, 2013 (Kimondo, J) pending the hearing and determination of the intended appeal In CIVIL CASE NO. 611 OF 2004)

RULING OF THE COURT

The applicants, **JOHN B. M. MUYA, R.W. KUNYIHA** and **SAFINA PROPERTIES LIMITED**, filed a Notice of Motion dated 19th July, 2013 under **Rule 5(2) (b)** of this Court's Rules. In the main, the applicants sought an order to the effect that

“..... pending the hearing and determination of the intended appeal and appeal herein filed or to be filed, there be and is a stay of execution of the judgment and decree delivered on the 29th January, 2013 in NBI HCCC No. 611 of 2004.”

The application was supported by the affidavit of JOHN B. M. MUYA sworn on 19th July, 2013 on his own behalf and on behalf of the other two applicants. He deponed that the impugned judgment had the effect of grounding the company and the undesirable position of nominating a Third Party, to wit the Registrar of Companies to run the affairs of the company; that the company was faced with substantial loss as the court had decreed that all the resolutions and declarations made on 25th May, 2004 and thereafter were invalid; that the company had been rendered impotent and cannot function; that the company cannot file its returns with Kenya Revenue Authority and this would attract penalties and finally

that the impugned judgment did not resolve the issue of quorum.

As would we expected, the respondents opposed the Motion. On 11th February, 2014 Elkana Mukundi Gatimu, the 1st respondent, swore a replying affidavit on behalf of himself and on behalf of the 2nd respondent, **KENYUA NGUNJIRI**. He deponed that the applicants were intend on continuing to mismanage the affairs of the company to the detriment of the respondents and further that the application was spent as the Registrar of Companies had already convened a meeting of the Shareholders.

The background to the motion was that the respondents herein filed a further re-amended plaint dated 7th July, 2010. In the plaint they averred that the meetings called by **JOHN B. M. MUYA**, the then 1st defendant (the 1st applicant herein) in which several resolutions were purportedly made, were illegal as the meetings were convened contrary to the provisions of the Companies Act and the Articles of Association of the Company.

The applicants (the then defendants) refuted the averments in the plaint in their amended defence dated 14th July, 2010. They averred that the meetings held were in accordance with the law. They further reiterated that the resolutions made during the meetings were not invalid.

The hearing proceeded before Kimondo, J who, in a judgment delivered on 29th January, 2013, made several orders including:

- “ (a) THAT a declaration is made that the extra-ordinary general meeting and board of directors meeting of Safina Properties Limited held on 25th May 2004 contravened the articles of the Company and the Companies Act. Accordingly, all resolutions made affecting the constitution of the board, shareholding of the company or bank account mandates were null and void.**
- b. THAT the allotment of 13,000 shares to the 1st defendant and 3,290 shares to the 2nd defendant is declared null and void and is hereby cancelled.**
- c. THAT all the returns made and documents and declarations filed in the register of the company by the Registrar of Companies pursuant to the meetings held on 25th May 2004 and any subsequent meeting including the one held on 5th July 2010 are cancelled and shall be expunged from the register.**
- d. THAT in the interests of Justice, suo moto, and in view of the gridlock in the board of directors, the Registrar of Companies shall cause to be convened, upon issuing the requisite notices, a meeting of all the shareholders of Safina Properties Limited for the purpose of appointing new directors of the company and to transact any other business to ensure full compliance by the company with the Companies Act. The costs of holding the meeting shall be borne by the 1st and 2nd plaintiff and the 1st defendant.”**

The applicants were aggrieved by the judgment of Kimondo, J and filed a Notice of Appeal dated 30th January, 2013. It was on the basis of the Notice of Appeal that the applicants filed the motion herein.

On 11th March, 2014 the Court and with the concurrence of the parties directed that the motion be disposed of by way of written submissions. The applicants were to file and serve their written submissions within 14 days. However, this did not happen as the applicants filed and served their submissions on the eve of the hearing i.e on 16th June 2015. As a result, the respondents had not filed their submissions come the hearing date on 17th June, 2015. When counsel appeared before us on 17th June, 2015 it was agreed that the written submissions be dispensed with and the motion to proceed by way of oral submissions.

Mr. Ombwayo learned counsel for the appellant sought leave to amend the motion to the extent that the stay sought was in respect of three orders in the judgment. Mr. Mungai learned counsel for the respondent was not opposed to the application for amendment. Accordingly, the motion was amended by consent and limited to:

- “(a) THAT a declaration is made that the extra-ordinary general meeting and board of directors meeting of Safina Properties Limited held on 25th May 2004 contravened the articles of the company and the Companies Act. Accordingly, all resolutions made affecting the constitution of the board, shareholding of the company or bank account mandates were null and void.***
- b. THAT the allotment of 13,000 shares to the 1st defendant and 3,290 shares to the 2nd defendant is declared null and void and is hereby cancelled.***
- c. THAT all the returns made and documents and declarations filed in the register of the company by the Registrar of Companies pursuant to the meetings held on 25th May 2004 and any subsequent meeting including the one held on 5th July 2010 are cancelled and shall be expunged from the register”***

Relying on the grounds appearing on the face of the application and the supporting affidavit sworn by John B. Muya, Mr. Ombwayo urged us to find that the appeal was arguable. It was counsel’s position that the meeting of 25th May, 2004 had the requisite quorum as the 2nd applicant, being the administrator of her deceased’s husband, had been appointed a director and was thus a member.

He submitted that the appeal would be rendered nugatory unless we granted an order for stay. In opposing the appeal, Mr. Mungai argued that the 2nd applicant did not participate in the High Court proceedings and did not tender proof of being an administrator of the estate of her late husband, the late G. K. Kunyihya, who was a shareholder. He further argued that the orders granted by Kimondo J., are declaratory and hence there was nothing to stay.

We have carefully considered the application, the affidavits, the oral rival submissions and the law. The principles applicable in the determination of applications under Rule 5(2)(b) of this Court’s Rules are now well settled In **Ishmael Kagunyi Thande V Housing Finance of Kenya Ltd.** [Civil Application No. Nai 157 of 2006] (unreported) the court stated as follows:

“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 that 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 that appeal will be rendered nugatory.” (See Githunguri vs Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982- 1988).)

On the question of the competency of the application, the applicants sought a stay of the orders made by the High Court. These orders were declaratory in nature. The High Court declared the meeting of Safina Properties held on 25th May, 2004 illegal; it declared the allotment of 13,000 shares to the 1st defendant and 3,290 shares to the 2nd defendant null and void and further decreed that all the returns made, documents and declarations filed by the Registrar of Companies pursuant to the meetings of 25th May, 2004 and 5th July, 2010 be cancelled and expunged from the record. By these orders the High Court did not order any of the parties to do anything or refrain from doing anything. It merely made declarations to the effect that all actions arising from the meetings of 25th May, 2004 and 5th July, 2010 were invalid. As to whether orders were merited is a matter that will be determined in the appeal. At this juncture we have not been called upon to set aside the orders of Kimondo, J but to grant an order to stay them. The question that we must ask ourselves is, what is there to stay in a judgment that has made declaratory orders? Suffice to state that we have no power to reverse the orders at this stage. They can only be set aside after

hearing the appeal. We agree with counsel for the respondents that there is indeed nothing to stay at this stage. It would have been otherwise if the applicant sought stay of execution of specific acts towards enforcement of the judgment such as stay of cancellation of returns and stay of cancellation of allotment of the shares pending appeal.

We therefore find that we have no power at this stage to grant an order for stay of execution in the terms sought.

Having come to the above conclusion, we do not deem it fit to consider whether there is an arguable appeal or whether it would be rendered nugatory.

The upshot of the above is that the motion is dismissed with costs.

Dated and Delivered at Nairobi this 25th day of September, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

F. AZANGALALA

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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