



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI, AZANGALALA, JJ.A)

CIVIL APPLICATION NO. 152 OF 2015 (UR 124/2015)

BETWEEN

STAHITO COMMUTER SERVICE COMPANY LIMITED.....APPLICANT

AND

GEORGE GITHINJI KANYI 1ST RESPONDENT

GEOFFREY KIMANI WANJIE 2ND RESPONDENT

JACKSON NJANGA MAINGI 3RD RESPONDENT

ZIPPORAH WANGOI NGUGI.....4TH RESPONDENT

(Being an application for stay of Ruling and Orders of the High Court of Kenya at Nairobi (F. Gikonyo J.) made on 21st April, 2015 with respect to the Respondents Notice of Motion dated 18th July 2014 pending hearing of the intended Appeal

in

HIGH COURT CIVIL SUIT

NO. 316 OF 2014)

RULING OF THE COURT

[1] This is an application by, Stahito Commuter Services Company Limited, (applicant) under the provisions of Rules 5(2) (b) and 41(1) of the Court of Appeal Rules and Section 3A and 3B of the Appellate Jurisdiction Act. The applicant is seeking orders to stay execution of the ruling and orders of the High Court in HCCC No.316 of 2014 by Gikonyo J, delivered on the 21st April, 2015 pending the lodging, hearing and determination of its intended appeal in the Court of Appeal.

[2] The brief facts discernable from the record that is before us are as follows;-By a motion dated 18th

July 2014, the respondents, applied before the High Court for injunctive reliefs against several persons; John Ndungu Kungu, George Njau, Francis Njoroge Chege, Stahito Commuter Services Company Limited (applicant herein), David Murigi Kimani, Ishmael Mwai Mwangi and Paul Wanjohi Maina. The orders sought were for the aforesaid persons with their employees, agents and/servants to unconditionally allow the respondents' motor vehicles registration numbers, namely, KAU 419K, KAU 123S, KAT 517Z, KAX 519R, KAL 445V, KAV 532N, KAQ 033D and KAR 533D and/or any other of the respondents' motor vehicle (s) registered with the applicant, access to designated stand at City Stadium bus terminus. They also sought an interlocutory injunction restraining the said persons from receiving monies from motor vehicle owners until a general meeting of the company was conducted under the supervision of the Registrar of Companies or other officers appointed by court.

[3] It is undisputed that the respondents, are the registered owners of varying fleets of public service commuter motor vehicles (**Matatus**) operating at the Muthurwa/Industrial area route from the City Stadium terminus which are branded with Stahito Commuter logo as required by transport regulations. In 2008, over 30 owners of matatus plying the said route came together for ease of management of operations of their matatus and formed a self help organization which they called Stahito Commuter Services. Stahito Commuter Services became the manager of their fleet of matatus and of the designated terminus. The respondents agreed to charge each member a daily contribution of Kshs 200/= for each matatu licensed under Stahito Commuter Services which was the management vehicle for their investment venture. The said charge was to cover daily running costs of the management of the fleet as well as the terminus and the surplus was to be shared among the members. The said money was to be deposited in a bank account that was in the names of selected members of Stahito Commuter Services who were to act as trustees of the matatu owners.

[4] On or about 2010, transport regulations were enacted that required all proprietors of public commuter service vehicles to belong either to a limited liability company or a Sacco and to have a stated minimum number of motor vehicles registered under their membership. The applicant was thus converted to a private limited liability company. John Ndungu Kungu, George Njau and Francis Njoroge Chege became the founder directors and shareholders of the company. In January, 2011 the applicant was registered as a private limited company. A management committee comprising of David Murigi Kimani, Ishmael Mwai Mwangi and Paul Wanjohi Maina was appointed by the members in 2010 to oversee the day to day management of the members' fleet alongside the directors of the company. A bank account No 01134218755400 was opened at the Enterprise Road Branch, Co-operative Bank of Kenya in the names of John Ndungu Kungu, Francis Njoroge, David Murigi Kimani and Jackson Njanga Maingi. David Murigi Kimani was tasked with the responsibility of collecting and banking the daily collections from members who were the matatu owners and to bank the money accordingly.

[5] At a meeting held on the 28th August, 2012, it was resolved that the management committee would convene quarterly meetings to receive an update and/or account to the members on the monies received and other affairs of the applicant including the operations of their matatus. The management committee failed to convene any quarterly meetings from December 2010 and on the 28th September, 2013 members who were dissatisfied with the state of affairs of the applicant agreed to pressurize the management committee to convene a meeting so as to give an account to members of monies received on their behalf by withholding the levy of Ksh 200/=. The members accused the management committee and the active directors of failing to account and other financial improprieties. Due to the respondents' persistent demand for accountability, the management committee and some directors decided to victimize them as the leaders of the group and denied their matatus access to the terminus and from plying from the licenced route. As a result, the respondents filed a suit before the High Court seeking several injunctive reliefs.

[6] The application was heard by Gikonyo J. and by a ruling dated 21st April, 2015, the learned judge ordered the applicant to hold a general meeting within the next 45 days from the said date to discuss all the issues raised by parties; should they fail, members were at liberty to requisition a meeting in accordance with section 132 of the Companies Act. A temporary order of injunction restraining the applicant from interfering with the respondents' vehicles from continuing to operate under the umbrella of the applicant until the resolution of the company in the meeting to be held in accordance with the ruling was also issued.

[7] Aggrieved by the said orders, the applicant filed a Notice of Appeal, and pending the filing and determination of the appeal, the instant application seeking orders of stay of execution. According to the applicant, it is apprehensive that unless the aforesaid order calling for a general meeting is stayed, its appeal shall be rendered nugatory. Mr. Karanja Kiare, learned counsel for the applicant emphasized that the respondents wanted to continue operating their matatus under the applicants' banner without being charged the daily levy. The learned judge ordered for a general meeting to be held by the applicant which was not prayed for in the application; the issue of whether the respondents were members of the applicant was contested. If the general meeting were to be held as ordered, before the members or shareholders of the applicant are determined, that could lead to mayhem as there is a likelihood that the meeting will be invaded by non-members and might degenerate into chaos. The court should have ascertained the membership of the applicant. Counsel urged us to allow the application.

[8] On the part of the respondents, the application was opposed. Mr. Gachuna, learned counsel for the respondents relied on the replying affidavit sworn by the 3rd respondent. He argued that the applicant does not own the fleet of 30 matatus that qualified it to be registered as the manager of the route. For reasons that his clients brought evidence to show how the applicant was registered, and the evidence of ownership of the matatus that are part of the fleet that is managed by the applicant, they established a prima facie case with a probability of success. It follows that the owners of the matatus who sustain the company are its members and shareholders. The balance of convenience lies in the application being dismissed; the accounts and directorship of the company can only be sorted out during the general meeting of the company as ordered by the trial judge.

[9] We have considered the present application, the grounds in support thereof, the replying affidavit filed on behalf of the respondents, the able submissions by counsel and the law. In the case of; - **Ismael Kagunji Thande V. Housing Finance Kenya Ltd** [Civil Application No. Nai 157 of 2006] (unreported), the principle to bring to bear on whether or not to grant an order of stay of execution were set out as thus;-

“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are 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 also Githunguri V. Jimba Credit Corporation Ltd. No. 2 {1988} KLR 838.”

[10] The key issue and the only one in this application in our view is whether the applicant has demonstrated that its intended appeal is arguable and if this is answered in the affirmative, the next issue is whether its intended appeal will be rendered nugatory unless an order of stay of execution of orders dated 21st April, 2015 is issued. On whether the intended appeal is arguable, we are alive to the fact that an arguable appeal is described as one which is not frivolous and even one arguable point of law in an appeal is sufficient and the appeal does not have to be one which must necessarily succeed. (See **Joseph Gitahi & Another versus**

Pioneer Holdings Limited and 2 others Civil Appeal No. 124 of 2008).

[11] The arguable aspect in the intended appeal according to the applicant is whether the respondents are members of the applicant and whether they are entitled to participate at the general meeting. This is what the learned judge had to say about this issue;-

“The defendants have submitted that the plaintiffs have not shown that they are members of the 4th defendant. I expected the directors of the company to present form CR12 to court as a way of showing who the members of the 4th defendant are, instead of making a general statement that the plaintiffs have not proved they are members of the 4th defendant, I am not shifting the burden of proof here. The material placed before the court clearly shows the manner in which the 4th defendant was incorporated, the objects and membership thereof and the meetings of the company ...it will be pretentious for the defendant directors who

speak for the company not to provide necessary information on membership and meetings of the company which should ordinarily be provided by them. The directors are not being entirely honest with the matters in issue.”

[12] From the above excerpt of the ruling, it is evident that the learned judge considered the issue of membership and found the applicant was not candid for failing to present form CR12. It is the applicant who is the custodian of the company documents and not the respondents who claim membership. Under the provisions of section 108 of the Evidence Act, the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all was given on either side; Section 112 also provides that in civil proceedings the burden of proving or disproving a fact within the special knowledge of a party is upon that party. We are in agreement with the learned judge that the evidence of membership of the respondents could only be disproved by the applicant who withheld that evidence from court just to turn around and claim the respondents were not its members.

[13] How about the contention that the High Court granted orders that were not prayed for by the respondents? The dispute involves membership and management of a company. It is trite that such issues are only sorted out within the mechanisms that are set out in the company’s memorandum and articles of association and through meetings of members or shareholders. Although the respondent did not seek a specific prayer for a general meeting be ordered, it was a consequential prayer that the daily levies be frozen until the applicants conducts a meeting with members. In our view the judge was seized with the entire dispute that involved the management of the applicant which can only be sorted out in a general meeting. We are also alive to the provisions of Order **15 rule 2** of the Civil Procedure Rules, that a court has power to frame issues it considers pertinent for the determination of a dispute between the parties. In this case the aforementioned issues were relevant and arose from both the pleadings, submissions and sworn depositions. See also the case of **ODD JOBS V MUBIA, 1970 EA Page 476**, where it was held:

“(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

(ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it.”

[14] The other aspect to consider is whether the appeal will be rendered nugatory if the order of stay is not granted. As stated above, the applicant is the custodian of the company records including the register of members. A general meeting is a normal function, nay a statutory requirement of a company. Holding a general meeting or members requisitioning for a general meeting which is in any event is within their rights, which they could have exercised even without going to court, cannot render an appeal nugatory. For the aforesaid reasons we are not persuaded that the applicant has demonstrated the twin principles upon which we exercise our jurisdiction under rule 5 (2) (b) of this Court’s Rules. The upshot is that we find no merit in this application which we hereby dismiss with costs to the respondents.

Dated and delivered at Nairobi this 20th day of November, 2015.

M. K. KOOME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.