



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. NAI. 8 OF 2012 (UR 6/2012)

BETWEEN

TITUS MUSYOKI NZIOKA.....APPLICANT

AND

JOHN KIMATHI MAINGI.....1ST RESPONDENT

KINGS CARGO AGENCIES LIMITED.....2ND RESPONDENT

(An application for an injunction and stay of execution of the order of the High Court of Kenya at Nairobi (Mutava, J.) made on the 22nd day of November, 2011

in

HCCC NO. 478 OF 2010)

RULING OF THE COURT

Titus Musyoki Nzioka, the applicant is the plaintiff in **Nairobi HCCC No. 478 of 2010**. The respondents herein are the defendants. It is important to note that the applicant and 1st respondent herein hold equal shares in the 2nd respondent which is a limited liability company. The two are the only directors of the respondent and are both signatories to the 2nd respondent's bank accounts.

Although a copy of the plaint is not part of this record, it is easy to decipher the orders sought in that plaint from the prayers in the application for injunction dated 12th July, 2010 which was filed simultaneously with the plaint. In the said application, the applicant sought the following two principal prayers *inter alia*:-

1. ***That the Honourable Court be pleased to restrain the 1st defendant from acting as either a director or managing director of the 2nd defendant company and in particular to restrain the***

defendant from signing, drawing, cashing or encashing cheques drawn by or purporting to be drawn by, the 2nd defendant, pending the hearing and determination of this suit.

- 2. That the Honourable Court be pleased to grant to the plaintiff leave to continue with this derivative suit against the 1st defendant for the benefit of the 2nd defendant.*

The said application was heard ex-parte following an affidavit of service filed by one *Bjorn Munywa Peter* who deposed that he had served the application on the defendants/respondents. The application was allowed and orders granted as prayed.

According to the 1st respondent, it was after the extracted order was served on him that he became aware of the said application. He therefore, promptly moved the court vide the chamber summons dated 21st October, 2010 asking the court to set aside the ex-parte orders in question. That is the application that gave rise to the impugned ruling of J. M. Mutava J dated 22nd day of November 2011, in which the learned Judge made the following orders:-

- 1. That the defendant/applicant's application dated 21st October, 2010 is hereby allowed with costs and the ex-parte injunction orders granted by this court on 26th July, 2010 discharged forthwith.*
- 2. That the 1st defendant be restored to his previous position in the 2nd defendant with immediate effect and that a meeting of the shareholders of the company be held within 14 days from today for purposes of taking accounts and to discuss possible resolution of the dispute herein.*
- 3. That in consequence of the dispute herein being incapable of amicable resolution within 30 days from today, either of the parties do take steps to fix the suit for hearing on a priority basis.*

Being dissatisfied with those orders, the applicant filed a Notice of Appeal the same day and later filed the application at Bar.

This application is brought under **Rules 5(2)b** and **47** of the **Court of Appeal Rules** and seeks the orders enumerated earlier on in this ruling. The application is premised on eight grounds on its face and supported by the affidavit of the applicant sworn on 24th January, 2012.

The same is opposed by the 1st respondent vide the replying affidavit sworn on 21st March, 2012. The gravamen of these grounds and rival affidavits is that the applicant claims that the 1st respondent has withdrawn and converted company funds to his own use, an allegation that the 1st respondent vehemently denies and this appears to have triggered bad blood between them and they cannot work together at all. Instead of working at a reconciliation or any other amicable resolution, they want the Court to determine which one of the two is better suited to run the affairs of the 2nd respondent - yet the applicant herein has not even endeavored to fix the application for leave for hearing before the High Court.

The jurisdiction of this Court at this point is to determine whether the appellant's appeal is arguable and whether if the orders sought are not granted, in the event the appeal is allowed, the same will have been rendered nugatory. These are the twin principles which the appellant needs to establish before this Court can give him the orders sought.

Is this appeal arguable? On this limb, *Mrs. Muindi*, learned counsel for the appellant submitted that they have an arguable appeal. Her contention was that the learned Judge was wrong in his finding that the application had not been served on the 1st respondent. She further urged that the learned Judge did not give the orders based on the application before him.

On the nugatory aspect, her contention was that unless the orders sought are granted, the company, i.e 2nd

respondent, would suffer irreparable loss.

On his part, *Mr. Simiyu*, learned counsel for the 1st respondent urged us to find that the applicant has no arguable appeal as the suit before the trial court is not a derivative suit and is therefore, bound to fail. He urged that the applicant is not a minority shareholder and he therefore, lacks the *locus standi* to file a derivative suit.

On the nugatory aspect, he submitted that the applicant has not in any way demonstrated how he or the company stands to suffer irreparable loss if the orders sought are not allowed.

The law enjoins the applicant to prove not one but both of these principles. This point was succinctly expressed by this Court in the case of **IL NWESI COMPANY & TWO OTHERS – VS – WENDY MARTIN [2011] eKLR** where the Court expressed itself as hereunder:-

“There are well established guiding principles in the exercise of this Court’s discretion under Rule 5(2)(b). The applicant ought to show, firstly, that the intended appeal is arguable even on a solitary issue, and it will be arguable if it is not frivolous. Secondly, and in addition, the applicant ought to show that unless the order sought is granted, the success of the intended appeal would be rendered nugatory.”

The issue at hand is whether or not the applicant can be said to have satisfied these two principles.

As far as the first limb is concerned, we are cognizant of the fact that we must avoid making determinate findings on matters that are the subject of the intended appeal. The issue was nonetheless raised as to whether the suit before the trial court is a derivative suit or not. In our view, we need to say something about that issue and more so because learned counsel for the applicant decided not to respond to it. If the suit in question is not a derivative action, then the appellant will not have the necessary *locus standi* to proceed with the same. A derivative suit, simply put, is a suit filed by a minority shareholder of a limited liability company to seek remedy for wrongs done to the company by the majority shareholders or directors. In this case, it is not disputed that the applicant and the 1st respondent hold equal shares in the 2nd respondent. Indeed, they are both directors of the company. Neither of them can in law purport to file a suit on behalf of the company to seek redress against the co-director. We are not persuaded that the suit before the High court is a derivative suit. It was also conceded by the applicant that the chamber summons dated 12th July, 2010 in which he seeks leave to continue with the “derivative suit” against the 1st defendant on behalf of the 2nd defendant has not even been fixed for hearing. It would be presumptuous for this Court to assume that such leave will be granted as a matter of course. Where then does that leave the suit before trial court? There is also the issue as to whether the prayers sought in this application particularly prayer No. 3 are efficacious at all. If this Court were to grant the injunctive orders sought against one director, it would definitely not be possible for business of the company to be conducted by one director. This would be contrary to the law and particularly to Article 1.3 of the Second Respondent’s Articles of Association which clearly stipulates that the affairs of the company cannot be run by less than two directors.

In our view, all these issues were properly addressed by the learned trial Judge in the impugned ruling and the appellant has actually not addressed us on the same. We are not persuaded that the applicant herein has an arguable appeal at all. Having so found, it is not necessary for us to deal with the nugatory aspect. We can mention however, that there is no evidence placed before us whatsoever by the applicant to convince us that the 2nd respondent will suffer any kind of irreparable loss if the orders sought are not granted.

In sum therefore, we find this application devoid of merit and dismiss the same with orders that costs abide the outcome of the appeal.

Dated and Delivered at Nairobi this 8th day of March, 2013.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR