



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 170 of 2012

DREAM CAMP KENYA LIMITED.....APPLICANT

VERSUS

MOHAMMED ELTAFF.....1ST RESPONDENT

SAGA SAFARIS LIMITED.....2ND RESPONDENT

SAGA TRAVEL AND SAFARIS A.B.....3RD RESPONDENT

TOUR AFRICA SAFARIS LIMITED.....4TH RESPONDENT

(Being an application for stay of proceedings in the High Court pending the filing, hearing and determination of an intended

appeal from the Ruling of the High Court of Kenya at Nairobi-Milimani (Mabeya, J.) delivered on 11th November, 2011

in

Civil Appeal No. 450 of 1999)

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RULING OF THE COURT

This dispute has had a chequered and controversial history. Its genesis was a disagreement on the sale of shares, remainder of the lease, goodwill and assets. An action, H.C.C.C. No. 450 of 1999 was instituted in which Mulwa, J. in his judgment held, in relevant part as follows;

“It is quite clear that the relationship between the parties has deteriorated to the extent that it may not be possible for the plaintiff to work with the defendant again. The situation is made worse by the fact that the plaintiffs are running competing business to that of the defendant. I noted that the Agreement for Sale contains an arbitration clause. This dispute would have been best handled through arbitration rather than litigation. For some reasons litigation was preferred to arbitration. The best way out of existing situation which was made worse by this litigation is that the 1st plaintiff sells his

shareholding of 10% to the other existing shareholders of the company at a fair market value to be determined by an arbitrator to be agreed by the parties, and if not to be appointed by the court. The plaintiff would then have to relinquish his Directorship in the defendant company. The existing shareholders will by an ordinary resolution reduce the 1st plaintiff's shareholding to 10% of the issued shares."

In making that determination, **Mulwa, J.** did not define the effective date of the valuation. For this and other reasons the applicant challenged that Judgment on appeal in Civil Appeal No. 318 of 2000 which in the end was dismissed. Not relenting, the applicant went with a motion before **Kimaru, J.** in the High Court seeking to review part of Mulwa, J's judgment. The applicant suggested in that application that the value of his 10% shareholding be determined by the court upon securing the evidence from the auditor appointed by the applicant and not by an arbitrator. After observing that the applicant and the respondents could not reach a consensus, the court ordered that, within 7 days of the order, the parties to nominate one auditor each to form a panel of arbitrators to determine the value of the applicant's 10% shareholding and in the event of a stalemate, the parties would propose an umpire to resolve the stalemate.

The auditors were to determine the fair market value within 30 days of their appointment. The applicant was once more aggrieved by that order and filed another motion for a similar relief, namely the review of Kimaru J's orders to include an order that the effective date of the valuation of the applicant's shareholding be the date of judgment and not any other date. It further sought that there be a time limit within which to comply with the order of valuation and in default the court or arbitrator to proceed to determine the value of shares. The application was placed before **Mabeya, J.** who after hearing arguments held:

"In my view, the fair market value would be the one prevailing at the time of execution of the decree i.e. valuation, and not at the time of judgment. Had the judgment given the time frame within which the decree was to be effected, i.e. the sale of the shares or valuation to take place, then that date would have been the effective date. The judgment having left open the issue of appointment of arbitrators or transfer of the shares, then the effective date in my view should be the date of valuation."

The applicant intends to challenge this decision on appeal and has filed a notice of appeal in this Court. In the meantime, it has brought the instant application under **Rule 5(2)(b)** of the Court of Appeal Rules for orders that further proceedings in HCCC No. 450 of 1999 be stayed pending the determination of the intended appeal.

This application is premised on the grounds that:

- i) the learned Judge erred in holding that the effective date of valuation of the applicant's shares is the valuation and not the judgment date;
- ii) the learned Judge erred in holding that a judgment can only be "perfected" when the order giving the effect is complete;
- iii) the learned Judge failed to properly consider the merits of the applicant's application;
- iv) the 1st respondent has been guilty of prevarication and obfuscation as a result of which the conclusion of this matter has delayed for several years;
- v) the 1st respondent is using the orders of the High Court to engage in fishing expedition to vex the applicant.

The application was opposed. The learned counsel for the respondents submitted that the intended appeal is not arguable and it would not be rendered nugatory should the Court decline to grant an order to stay proceedings in the High Court.

In exercising its unfettered discretion under **Rule 5(2)(b)** aforesaid, the Court must be satisfied that the

intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay is not granted, the intended appeal would have been rendered nugatory by that refusal should it succeed.

An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the court's consideration. On the other hand, an appeal will be rendered nugatory if it will be rendered worthless, futile, invalid or if it will be of no significance or value i.e. if the victory will end up being a Pyrrhic victory.

While we entertain no doubt that the question whether or not the effective date ought to be the date of the judgment or the date of valuation is a triable issue, we are clear in our minds that the appeal will not be rendered nugatory if the proceedings before the High Court went on. What is pending before the High Court is the appointment of auditors by each party to constitute a panel of arbitrators to value the shareholding of the applicant. We do not see how this exercise will render the appeal nugatory. Should the applicant eventually succeed in his intended appeal, the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that.

We reiterate the sentiments of this Court in **Malde Transporters Limited v Bashir Arab Mohamed and Fatuma Haji Hassan (suing as the administrators of the Estate of Arab Mohamed Ahmed and John Ngandu Kinuthia)**, Civil Application No. Nai 155 of 2005 where the Court noted as follows”

“We would think that every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ip so facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept ligation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

Similarly, we find that the appeal will not be rendered nugatory if we do not stay proceedings in the High Court. In the result we dismiss this notice of motion with costs to the respondents.

DATED and DELIVERED at Nairobi this 1st day of March, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR