



IN THE COURT OF APPEAL

AT MOMBASA

**(CORAM: TUNOI, WAKI & AGANYANYA, J.J.A.)
CIVIL APPLICATION NO. NAI 230 OF 2010 (UR 165/2010)**

BETWEEN

- 1. STEPHEN KIPKATAM KENDUIYWA**
- 2. JOEL KIMUTAI SANG**
- 3. JOSEPH KIPKURUI NGETICH**
- 4. RODERICK MITEI KENDUIYWA**
- 5. JONAH KIPKEMOI KETER**
- 6. G. MUGO MUNGAI**
- 7. ASSOCIATED REGISTRAR LIMITEDAPPLICANTS**

AND

- 1. ISMAIL GULAMALI**
- 2. DAVID BETT LANGAT**
- 3. KAPCHABENET TEA FACTORY LIMITED**
- 4. REGISTRAR OF COMPANIES.....RESPONDENTS**

(Being an application for stay of proceedings and injunction pending the hearing and determination of an intended appeal from a ruling and orders of the High Court of Kenya at Mombasa (Ojwang, J.) dated 24th September, 2010

in

H.C.C.C. No. 31 of 2009)

RULING OF THE COURT

The application before us is by way of notice of motion dated 29th September, 2010 and lodged in Court on 6th October, 2010. It is brought under **rule 5(2) (b)** of the Court of Appeal Rules. It seeks amongst others that:

“1. ...

2. There be an order of stay of any further proceedings to the High Court in High Court Civil Case No. 31 of 2010 (Mombasa) between Ismail Gulamali & 2 Others vs Stephen Kipkatam Kenduiywa & 7 Others pending the hearing and determination of the appeal.

3. An order for injunction be issued in the following terms pending the hearing and determination of the appeal:

(a) The 1st and 2nd Respondents jointly and severally whether acting by themselves, their servants, agents or representatives or in any other manner howsoever be and are hereby restrained by an order of a temporary injunction from convening, holding or conducting any meeting of the 3rd respondent whether as a General Manager of the company or its Board of Directors and from passing any resolution thereat pending the hearing and determination of this appeal.

(b) The 1st and 2nd Respondents jointly and severally whether by themselves, their servants, agents, representative or in any other manner howsoever be and are hereby restrained by an order of temporary injunction from removing or purporting to remove the 1st, 2nd, 3rd and 5th applicants from their Directorships in the 3rd Respondent (Company) and/or appointing any other person as Director in their place or at all pending the hearing and determination of the appeal.

(c) The 1st and 2nd respondents jointly and severally whether by themselves, their servants, agents or in any other manner howsoever be and are hereby restrained by an order of temporary injunction from taking over the management or affairs of the 1st, 2nd, 3rd, 4th and 5th applicants and they further be restrained howsoever from interfering with the management of the affairs of the 3rd Respondent (Company) including but not limited to changing bank account signatories, dismissing or employing staff of the 3rd respondent and any document purporting to be for the 3rd Plaintiff (Respondent) pending the hearing and determination of the Appeal.

(d) The 8th respondent be and is hereby restrained by an order of this Honourable Court from registering any notice or purported notice of change of Directors of the 3rd Respondent (Company) and in particular any purported notice of removal of the 1st, 2nd, 3rd, 4th and 5th Applicants as Directors of the 3rd Respondent (Company) pending the hearing and determination of the Appeal.

(e) The 1st and 2nd Respondents whether by themselves, their servants, agents, representatives or any one of them howsoever be an (sic) are hereby restrained by an order of injunction from selling, transferring, alienating, voting by use of shares they hold or otherwise disposing of any shares in the company to a 3rd party or 3rd parties including shares owned by themselves pending the hearing and determination of the appeal.

4. Prayers 1 and 2 herein be granted on temporary basis in the first instant pending the hearing of this application”.

The application was supported by an affidavit annexed thereon and based on the following grounds as follows:

“1. The entire appeal and the activities, acts and issues raised and sought to be dealt with and addressed in the Application dated 5th May, 2010 pending in the High Court at Mombasa and the suit pending in the superior court in H.C.C.C. No. 31 of 2009 shall be overtaken by events and that the entire Appeal herein and the suit pending in the superior court shall be rendered a futile exercise.

2. The Application have an Arguable appeal, a copy whereof is annexed to the Affidavit of the 1st Applicant filed herein.

3. That the interim orders of injunction sought herein were granted by the High Court Mombasa by Hon. Justice Ibrahim, J. on 6th April, 2010 and have been extended for only 14 days by Justice J. B. Ojwang with an express order to the applicants to move the Court of Appeal within 14 days. The interim injunction Orders will automatically lapse if they are not extended.

4. That KAPCHEBET TEA FACTORY LTD (the 3rd Respondent) operation and business of manufacture and sale of Tea stands greatly threatened with imminent collapse. This will have wider ramifications to the Company, the economy and tea farmers and the 1st – 5th Applicants. The 1st and 2nd Respondents had commenced plans to interfere with the 3rd Respondent's operations.

5. The Appeal will be rendered nugatory if the injunction orders sought are refused:

(a) *The Company shall be run down by Ismail Gulamali and David Kibet Langat (1st and 2nd Respondents). They have not heavily invested in the Company. They flatly refused to mortgage their assets and personal securities to secure Kshs.290 million for the 3rd Respondent. It is the 1st – 5th Applicants who did secure a loan of Kshs.290 million for the Company from K-Rep Bank Kericho Branch and if anything happens their securities will be realized by K-Rep. They shall cause irreparable loss. The appeal will thus be rendered nugatory.*

(b) *The (1st and 2nd Respondents) Ismail Gulamali and David Kibet Langat have shown and manifestly that they have a hostile relationship to the (1st to 7th Applicants) Stephen Kipkatam Kenduiywa, Joel Kimutai Sang, Joel Kipurui (sic) Ngetich, Roderick Mitei Kenduiywa, Jonah Kipkemoi Keter, G. Mugo Mungai and Associated Registrars Ltd.*

(c) *They have already attempted to use their position of advantage to purport to replace them as Directors.*

(d) *They have attempted to change the management structures which were installed by the Board of the Company including themselves from inception.*

(e) *The interim orders of injunctions now extended for only 14 days did stop and curtail the above illegal schemes by the Respondents. The Respondents shall proceed to actualize their illegal activities and schemes if not checked by order of injunction which shall render the Appeal nugatory and the entire suit useless”.*

The application was supported by the affidavit of Stephen Kipkatam Kenduiywa, 1st applicant, which was filed together with the said application. In it the deponent refers to plans and ambitions he had in the 1980's to form a tea company and how this resulted in the incorporation of the 3rd Respondent. Then the deponent refers to injunctive orders sought from the court in Mombasa in an application dated 5th April, 2010 and which were granted by that court (*Ibrahim, J.* - as he then was) *ex parte*. The same was later fixed for inter-partes hearing on 21st May, 2010 but on that day the applicants made an application seeking the disqualification of **Hon. Justice Ojwang** from hearing the application, and that after many adjournments the learned Judge, on 16th August, 2010 informed **Mr. Opulu**, learned counsel for the applicants that the ruling would be delivered on notice and this was done on 24th September, 2010 and the application was dismissed. This is the decision giving rise to the notice of appeal filed in this Court on 6th October, 2010 intimating the intended appeal would be against the whole judgment and that there was an annexed draft memorandum of appeal showing grounds of appeal.

The brief facts of this application are that the applicants had moved the High Court in Mombasa in an application dated 5th April, 2010 seeking injunctive orders against the respondents but when it came for hearing inter-partes before *Ojwang, J.*, on 21st May, 2010, the applicants objected to his hearing the matter and formally applied for his recusal therefrom in an application of even date. The learned Judge declined to disqualify himself from hearing the application in his ruling dated 24th September, 2010. The basis of the applicants' objection was that the learned Judge had delivered another ruling in the same matter on 26th February, 2010 which the applicant believed would influence his mind in the application of 5th April, 2010.

We heard this application on 7th June, 2011, wherein **Mr. Wassuna**, learned counsel for the applicants

referred us to the dispute between the parties but that since this Court through a separate bench had issued a ruling in a similar matter on 22nd October, 2010 it was his view that the status quo should be maintained. According to him the appeal had already been filed in the matter although he did not give the appeal number; nor is there a copy on the record of this application.

Mr. Kinyua, learned counsel for the respondents replied that the matter had been dealt with by this Court before and that the orders being sought in this application are similar to those sought in the High Court. According to counsel the fact that the learned Judge declined to recuse himself from hearing the application of 5th April, 2010 cannot be a proper basis for an application for injunction.

The learned Judge's ruling of 24th September, 2010 related to his refusal to recuse himself from hearing the application for injunction pending in the High Court aforesaid. If therefore this application is in relation to that order then it should have limited itself to what the learned Judge ruled. But this is not so; it has various orders sought which relate to the substance of the dispute, namely, order of injunction to restrain the respondent from calling and holding meetings of the 3rd respondent, that they be restrained from removing the 1st, 2nd, 3rd and 5th applicants from their directorships in the 3rd Respondent, that the 1st and 2nd Respondents be restrained from taking over management of the 3rd Respondent, that the 8th Respondents be restrained from registering any change of Directors and that the 1st and 2nd Respondents be restrained from selling, transferring, alienating voting by use of shares and so on and so forth. All these prayers have no relationship with the order of the learned Judge made on 24th September, 2010 whose main import was to decline to recuse himself from hearing the application dated 5th April, 2010.

Perhaps the only prayer sought in the notice of motion which could elicit consideration by this Court is prayer 2 which seeks that:-

“2. There be a stay of further proceedings in the H.C.C.C. No. 31 of 2010 (Mombasa) between Ismail Gulamali & Others vs Stephen Kipkatam Kenduiywa & 7 Others pending the hearing and determination of the appeal.”

On this point Mr. Wassuna did not address us much but Mr. Kinyua said the fact that the learned Judge declined to recuse himself from hearing the application cannot be a proper basis for granting any orders sought in the notice of motion. We wish to add that if we are to go into this issue in detail at this stage we would be ploughing into and speculating about the mind and independence of the Judge to exercise his discretion in making orders of this nature or we may indirectly be directing that whenever an application is made for the disqualification of a Judge he has no discretion to exercise! This would be extreme on our part. The issue should be left for determination by the Court at the hearing of the appeal. At all events we are not persuaded that this is a good ground for this Court to grant an order of stay of proceedings sought herein.

We note that most of the orders sought in the notice of motion are not related to the order made by the Judge on 24th September, 2010. He may have referred to his order of 26th February, 2010 obliquely because counsel for the parties raised it during their submissions. In any event an application made by this Court dated 22nd October, 2010 involving the same parties sought orders of stay under **rule 5(2) (b)** from the order of *Judge Ojwang* dated 26th February 2010. This order was granted and it is our view that if this Court's orders as aforesaid are not misinterpreted, and subject to our earlier view that most of the orders sought are not related to the said Judge's orders of 24th September, 2010 declining to recuse himself from the case then this application is superfluous and that the status quo should be maintained in terms of that order. In the event it is not necessary to consider the conditions requisite for granting or not granting the orders sought under **rule 5(2) (b)** of the Court of Appeal Rules. This application fails but in all the circumstances each party should bear their own costs thereof. It is so ordered.

Dated and delivered at Nairobi this 18th day of November, 2011

P. K. TUNOI

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR