



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 328 OF 2009**

**CFC FINANCIAL SERVICES LIMITED ..... APPLICANT**

**AND**

**JUJA ROAD FANCY STORE LIMITED .....RESPONDENT**

*(Being an application for Stay of Execution and or any further*

*Proceedings in an intended appeal from the Ruling and Order of the High*

*Court of Kenya at Nairobi, Milimani Commercial Court (Khaminwa, J)*

*dated 6th February, 2009*

**In**

**H.C. C.C. No. 331 of 2008)**

\*\*\*\*\*

**RULING OF THE COURT:**

The motion before the Court is brought under **Rule 5 (2) (b)** of the Court's Rules and it is basically to stay the execution of an order or orders made by the superior court (Khaminwa, J) on 6th February, 2009. The motion was only filed in this Court on 16th November, 2009 but that long delay appears to have been occasioned by the fact that the applicant, CFC Financial Services Ltd. had filed an application in the superior court which had sought an order of stay of execution and an order for leave to appeal. Khaminwa, J ruled on that application on 23rd October, 2009. She granted to the applicant leave to appeal but declined to order a stay of her orders of 6th February, 2009. This motion was then filed seeking an order of stay.

The applicant says that in order to comply with the learned Judge's order, it may be compelled to breach certain provisions of the Capital Markets Authority Act; the applicant is required to nullify the allocation of certain shares which are currently registered in the names of the respondent, Juja Road Fancy Store Ltd. The applicant had purported to buy those shares on behalf of the respondent. The respondent's case has always been that it did not instruct the applicant to purchase those shares on its behalf. The position, however, is that as at present the shares are registered in the name of the respondent and the applicant says it would not be legally possible for it to compel ICDC Investments Company Ltd. to, as it were, reverse the entry in its register of shares and transfer the shares registered in the name of the respondent to another party. Even if the applicant had acted without the authority of the respondent when the shares were being bought, we think the points raised by the applicant, i.e. transferring the shares to

someone else and thus reversing various entries, is an arguable one. We note that the respondent did not, for example, ask for orders that the money used to purchase the shares purportedly on his behalf be refunded to his bank account. The order given by the Judge on 6th February, 2009 compels the applicant, either by itself, its agents, servants or whomsoever:-

“--- to reverse and cancel the entry reflecting the purchase of 10,000/- shares of ICDC Investments Company limited -----.”

As we have said the applicant has satisfied the Court that it has an arguable appeal. The Court has repeatedly pointed out that an arguable appeal does not in any way connote an appeal that will or must succeed. On whether the applicant’s intended appeal will be rendered nugatory if we do not grant an order of stay and the appeal were to succeed, we note from the record that the respondent has in fact made an application in the superior court for certain officers of the applicant to be committed to civil jail for six months for their failure to comply with the Judge’s order of 6th February, 2009. If those officers were to be committed to jail and the applicant’s appeal were to eventually succeed that success would have been rendered nugatory. The applicant has thus satisfied both requirements for an application under Rule 5 (2) (b) of the Court’s Rules.

Accordingly we allow the applicant’s notice of motion dated 13th November, 2009 and lodged in the Court on 16th November, 2009 with the result that there shall be an order of stay in the terms contained in prayers 1 and 2 of the motion. We see no reason for granting the orders sought in prayers 3 and 4, and we reject those prayers. The costs of the motion shall be in the appeal. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 5th day of February, 2010.

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**

