



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 368 OF 2009

BETWEEN

NYAKIO INVESTMENTS LIMITED APPLICANT

AND

IN THE MATTER OF NYAKIO INVESTMENTS COMPANY LIMITED AND IN THE
MATTER OF THE COMPANIES ACT CHAPTER 486 OF THE LAWS OF KENYA

AND

JOHN MWANGI WAGAKO RESPONDENT

*(An application for leave to appeal and Stay of Execution of the ruling and order of the High Court of
Kenya at Nairobi Milimani (Khaminwa, J) dated 15th December, 2009*

in

Winding Up Cause Number 10 of 2007)

RULING OF THE COURT

This is an application for leave to appeal and for stay of execution of the ruling and order of the superior court ***Khaminwa, J*** dated 15th December, 2009 in Winding Up Cause Number 10 of 2009. The application is dated 22nd December, 2009 and has been brought under *Rules 5(2) (b), 39(b) 42, 43 and 47* of this Court's Rules.

The applicant is a director and shareholder of the respondent company known as *Nyakio Investments Limited*.

From the record, the respondent Messrs Nyakio Investment Limited is a family business and that all went well until its founder died and left the flagship to the family members who took over the running of the company as directors and shareholders. The family set up was polygamuous and at some point in time, differences arose concerning the running of the company, among other things. The aforesaid differences triggered off the filing by the applicant of an application for the appointment of an interim liquidator and a petition for the winding up of the company. The object of the application was to preserve

the subject matter of the petition namely the rent in the sum of Kshs.500,000 per month received from the tenants who occupy the substantial properties in the City of Nairobi and which properties were registered in the name of the company. It was the applicants' contention that the majority shareholders were treating the company's property as their own and not that of the company hence the need for the court to intervene.

The applicant, *John Mwangi Wagako*, a director and shareholder of Nyakio Investments Limited by a chamber application brought under sections 231,235,237, 239 and 241 of the Companies Act and rules 7, 27 and 37 of the Companies Winding Up Rules, sought the following orders:-

"1. That, Mr George Kimeu, a certified Public Accountant be appointed interim liquidator of the company.

2. That, the powers of the said George Kimeu, as liquidator, be limited and restrained to the powers set out in section 241 of the Companies Act except section 241(2).

3. That, the said interim liquidator do take immediate possession of among others LR 209/1496 and LR 209/2211

The grounds upon which the application before us is based are numbered (a) to (i) and describe in full the nature of the dispute among the directors of the company as follows:-

a) The petitioner's co-directors have, in breach of their fiduciary duties which they owed the company, converted the company's money and premises to their personal use.

b) The petitioner's co-directors, who are in control of the company, are running (sic), as a partnership of both of them, in disregard of the Articles of association and the Companies Act; they have not called any general meetings or board meetings since November 2001.

c) The company's business has not been conducted in accordance with its Memorandum & Articles of Association.

d) The petitioner's co-directors do not recognize their late father's widows, who are executives, as shareholders who are entitled both to participate in the management and deciding what dividends are to be made and when.

e) The petitioner's co-directors have frustrated their late father's wish that the company's assets be managed for the benefit of his three houses.

f) The petitioner's co-directors excluded the petitioner from the management of the company in November 2001, to enable them to steal the revenue of the company.

g) The petitioner's co-directors have, following exclusion of the petitioner, misappropriated the company's revenue taking the form of rent fetched by the company's properties; they have used it to invest in large shops started on the company's premises in purchasing a fleet of cars for road transport business, and on luxurious lifestyle, they have purchased personal cars and let premises for personal use using the company's revenue.

h) The petitioner's co-directors do not pay rent for the premises of the company in which they carry on businesses established with the company's moneys.

i) The petitioner's co-directors have, in addition to grabbing premises used as shops, grabbed other premises which are used as offices and stores for which no rent is paid.

By a ruling dated 15th December, 2009 Khaminwa, J rendered herself as follows:-

“It is clear that the assets of the company are likely to be mixed up with the personal assets of the directors. In the circumstances, it is necessary to appoint an independent professional person to sort out and separate and safeguard the assets of the company pending the hearing of the Winding Up petition. The applicant had proposed one Kimeu to be appointed interim liquidator but the proposal has been rejected by the respondents. In the circumstances I hereby appoint the Official Receiver take over the position of Interim Liquidator of Nyakio Investment Limited forthwith”

Mr Kironji advocate for the applicant has submitted that the superior court went outside the petition and the ambit of the application in appointing the Official Receiver the interim liquidator. He has also drawn our attention to the other grounds as set out in the body of the application and the memorandum of appeal and submitted that those are all arguable grounds and that the intended appeal would be rendered nugatory because of the stigma of the company being under liquidation and that as a result, the company would suffer irreparable loss.

Dr Kuria has on his part submitted that, according to the relevant provisions of the Companies Act, the power of the court in appointing the Official Receiver as the interim liquidator in the face of the disagreement among the directors could not be in doubt or challenged because it was the right thing to do in order to safeguard the assets and to have a neutral professional safeguard the assets on an interim basis. For the same reason any intended appeal could not possibly be rendered nugatory since the interim liquidator is at the moment safeguarding the assets in the interest of all the contesting parties.

Having placed the rival positions as outlined above on the scales, we are of the view that the grounds raised by the applicants are not frivolous. However, as regards the second requirement on whether if the stay were declined and the appeal succeeded it would be rendered nugatory, we agree with Dr Kuria, the learned counsel for the respondent that the success of any such intended appeal would not be rendered nugatory because the interim liquidator is legally empowered to safeguard the assets on behalf of the company and all the contesting parties.

In the circumstances as the applicant has not satisfied the two principles for the grant of an application under rule 5(2)(b), of this Court’s Rules, viz that his intended appeal is arguable and also that unless it is granted a stay its appeal or intended appeal will be rendered nugatory, the prayer in the application for stay fails.

As regards the application for leave, Dr Kuria for the respondent having conceded that no leave to appeal is necessary, quite properly so in our view, we find no basis for ruling on the matter. The prayer was unnecessary in the circumstances.

For the foregoing reasons, we find no merit in the application and the same is dismissed with costs to the respondent.

DATED and delivered at Nairobi this 26th day of March 2010.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR