



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 343 OF 2009

SAMMU MUTUA MAKOVE

(COMMISSIONER OF INSURANCE) .....APPLICANT

AND

STATUTORY MANAGER UNITED INSURANCE COMPANY

LIMITED & 198 OTHERS ..... RESPONDENTS

(Application for stay of proceedings pending the hearing and determination of the appeal from the ruling and order of the High Court of Kenya at Milimani Commercial Court, Nairobi (Kimaru, J.) dated 2<sup>nd</sup> day of October, 2009

in

WINDING UP CAUSE NUMBER 22 OF 2006)

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RULING OF THE COURT

This is an application by the **Commissioner of Insurance** under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order that there be stay of any further proceedings in the *High Court Winding Up Cause No. 22 of 2006* pending the determination of an appeal against the ruling of the superior court.

The applicant has filed the *Winding Petition Cause No. 22 of 2006* in the superior court seeking a winding up order against **United Insurance Company Ltd.** The winding up petition is apparently opposed by contributories, shareholders and creditors, amongst others.

On 21<sup>st</sup> October, 2008 the Winding Up Court (Kimaru, J.) upon application for directions by contributories and shareholders that the petition be heard by *viva voce* evidence directed that the petition do proceed by way of submissions, stating in part:

**“Winding up proceedings are technical by nature and therefore (sic) does not require evidence to be adduced viva voce to enable the court reach a just determination. In the premises therefore I**

**direct that the hearing of the winding up petition shall proceed by way of submissions”.**

Thereafter, the hearing of the petition proceeded by way of submissions and all parties presented their arguments. When it came to the counsel for the petitioner to reply to the submissions, the counsel, Lucy Kambuni stated that a copy of the petition had not, inadvertently, been annexed as an exhibit to the affidavit verifying the petition and applied for adjournment to file an appropriate application. The hearing of the petition was thus adjourned. On 31<sup>st</sup> March, 2009, the petitioner filed an application seeking leave to file a supplementary affidavit in terms of the draft supplementary affidavit annexed to the application. Regrettably, the copy of the application to the court has not been included in the record of the application. We cannot thus, fully appreciate its tenor and we have to rely on what the winding up court says about it in its ruling. Apparently, the application was opposed but similarly the replying affidavit or the formal grounds of opposition are not part of the record of the application. Again, we have to rely on what the court says about them. According to the ruling, the application was opposed mainly on the grounds, that the application was an abuse of the process of the court as it was filed after the petition had been fully heard; that the court had no jurisdiction to grant the amendments sought as the defect sought to be rectified went to the jurisdiction and validity of the petition; that failure to annex the petition to the verifying affidavit and to mark it as an exhibit was a fatal defect touching on the validity and foundation of the petition, and, that, the defect cannot be rectified by a supplementary affidavit.

The winding up court referred to **Rules 25, 28 (1) and 31** of the *Companies (Winding Up) Rules* and stated:

**“It is therefore evident from above cited rules that in winding up proceedings, affidavits constitute prima facie evidence upon which the winding up petition is heard by the court. Being prima facie evidence such affidavits cannot be amended nor supplementary affidavits filed after the petition has substantially be heard”.**

**Rule 25** of the *Companies (Winding Up)* cited Rules in particular provides:

**“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by one of the petitioners, if more than one, or, where the petition is presented by a corporation, by a director, secretary or other principal officer thereof and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be prima facie evidence of the contents of the petition”.**

Before the court considered the application, it stated apparently as prelude to the ruling, thus:

**“I applaud Mrs. Kambuni for her valiant effort and the research she undertook in a bid to salvage what appears to be a doomed cause”.**

The court thereafter, considered the application and ultimately on 1<sup>st</sup> October, 2009 ruled, among other things, that the presentation of the petitioner’s case was based on non existent documents as the copy of the petition was not annexed to the verifying affidavit; that a supplementary affidavit cannot be filed to bring on record evidence which was not there when the case was heard by the court, and, that the court lacked jurisdiction to allow the application. The application was dismissed.

The applicant being aggrieved by the ruling filed a notice of appeal and ultimately on 27<sup>th</sup> November, 2009 filed *Civil Appeal No. 279 of 2009*.

The application is supported by the affidavit of Sammy Mutua Makove, the Commissioner of Insurance and the Chief Executive Officer of The Insurance Regulatory Authority (Commissioner). He deposes that the appeal is arguable and has set out numerous grounds of appeal in essence faulting the exercise of discretion by the trial Judge and accusing the judge of exhibiting bias in an interlocutory application. On the question of bias the Commissioner deposes in paragraph 3, that:

**“..... the learned judge made express statements in the subject interlocutory proceedings that**

**betray the mind of the judge and indicate what ultimate decision ..... shall be and that he shall in all probability dismiss the amended petition all (sic) for which constitute bias and prejudice against the applicant”.**

He refers to the comment of the trial judge to the effect that the petition ‘*appears to be a doomed cause*’.

The Commissioner further, deposes that, if stay is not granted, the appeal would be rendered nugatory for the reasons that the hearing of the petition will be concluded and in all probability dismissed in view of the biased expressions of the trial judge; that the winding up petition is of great public importance and interest as it affects policy holders of public service vehicles and decree holders in personal injury claims all of whom will be greatly prejudiced if adverse final orders are made without interrogating the substance and merits of the petition; that, if adverse orders are granted without hearing the petition on merit, the moratorium declared by the Statutory Manager with regard to all payments to all classes of policy holders and creditors shall lapse thereby occasioning a rapid run on the company’s fragile assets to the total prejudice of the insured and creditors.

The application is opposed on the grounds, *inter alia*, that the appeal is not arguable and that imminent fear of losing the case does not render the appeal, if successful, nugatory. It was contended for the respondents that the petition should be allowed to proceed to conclusion and that, if the applicant is aggrieved by the final decision of the court; he can appeal against the entire decision.

The principles applicable to **Rule 5 (2) (b)** applications are well settled. Before the court can exercise its discretion in favour of the applicant, the applicant should demonstrate that the appeal is arguable and that unless the winding up proceedings are stayed the appeal, if it ultimately succeeds, would be rendered nugatory.

It is apparent from the decision of this Court in **Silverstein vs. Chesoni** [2002] 1 KLR 867 that as a general principle, the Court is reluctant to stay proceedings in the superior court as a matter of course but the Court will do so, if it is demonstrated that the appeal would indeed be rendered nugatory, if stay is not granted. The court in that case while allowing an application for stay of proceedings stated:

**“The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the courts own rules ..... each case must depend on its own facts .....”.**

The appeal has already been filed. The numerous grounds of appeal have been set out on the body of the application and in the supporting affidavit. Mr. Nowrojee, learned counsel for the applicants has adumbrated on them. Having scrutinized the grounds of appeal, we are satisfied that the appeal already lodged is, indeed, arguable.

On the question whether the appeal would be rendered nugatory, if stay of proceedings is not granted, we recognize that the grounds of appeal include grounds based on bias and prejudice. The applicant apprehends that, if the trial continues, there will be no fair trial as the trial judge had made expressions which betray his mind and indicate that the said judge would ultimately dismiss the petition. The learned judge has already stated that the petitioner’s cause appears to be doomed. He has also said that since the petitioner did not annex a copy of the petition to the verifying affidavit, the presentation of the petitioner’s case was made on non existent documentary evidence. Lastly, the learned judge has said that the petitioner did not annex a copy of the petition as required by law to the verifying affidavit. Although Mrs. Lucy Kambuni did not at the hearing of the application in the superior court refer to the law which according to her require that a copy of the petition (already filed) be annexed to the verifying affidavit, and, although we cannot readily find any rule providing so, nevertheless, the learned judge has already formed an opinion that such is the law. The trial judge may or may not be correct.

By **Section 77 (9)** of the Constitution, the petitioner who is seeking a civil right is, among other things, entitled to a fair hearing before an impartial court.

In this case, the trial judge, quite unwittingly, in our respectful view, has made pre-emptory remarks in an interlocutory application which according to the applicant show the judges inclination that he will ultimately dismiss the petition. The apprehension of the applicant is not unfounded.

Bias or impartiality vitiates a trial and where as in this case, the applicant has demonstrated that he is not likely to get a fair trial of the civil right or that the trial court is not impartial, the court should stop the proceedings by granting a stay of proceedings pending appeal.

There are also other compelling reasons stated by the Commissioner in his supporting affidavit which we have already recorded justifying a stay, to wit, the great public interest in the petition and the devastating effect a dismissal of the petition without hearing it on merits would have on the company's assets.

In the result, we are satisfied that this is an appropriate case for granting a stay of proceedings.

Accordingly, we allow the application and order that the proceedings in the *High Court Winding Up Cause No. 22 of 2006* be stayed pending the hearing and determination of *Civil Appeal No. 279 of 2009*. The costs of this application shall be costs in the aforesaid appeal.

Dated and delivered at Nairobi this 26<sup>th</sup> day of March, 2010.

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**