



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 62 OF 2010

BETWEEN

JOHN KIPKEMBOI KILEI APPLICANT

AND

WILFRED RUTHO NJERU as

INTERIM LIQUIDATOR OF LAKESTAR

INSURANCE COMPANY LIMITED RESPONDENT

(An application for an order of stay of execution and proceedings pending the lodging and hearing of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Milimani) (Khaminwa, J) dated 21st October, 2009

in

H. C. C. No. 363 of 2008)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules for an injunction and stay of proceedings pending the hearing and determination of an intended appeal.

On 27th June, 2003 the superior court (Mutungi, J) issued an order winding up Lakestar Insurance Company Ltd (the Company) following the hearing of a Petition in Winding Up Cause No. 21 of 2003, and appointed Wilfred Ritho Njeru, the respondent herein, as the interim liquidator with effect from 30th June, 2003. Pursuant to the aforesaid order, the respondent assumed all legal responsibilities of the Company, including management, settlement of debts and liquidation of assets.

The applicant, who calls himself a “contributor and shareholder” of the Company sought from the interim liquidator certain accounts and liquidation reports especially in connection with the sale of the Company’s two properties, namely L. R. No. 209/13453 and L. R. No. 1899/3, which he claimed had

been sold at an undervalued price. When these accounts and reports were not forthcoming, the applicant filed an action in the superior court being H. C. C. C. No. 336 of 2008 seeking, among other things, that the respondent render true and accurate accounts of the liquidation of the company's assets; that the liquidator be restrained from accessing certain bank accounts; and that the court appoint another interim liquidator. Contemporaneously with the filing of the above suit, the applicant filed an application in the superior court under a certificate of urgency seeking interim orders along the same lines as those sought in the Plant. He was granted *ex parte* interim orders, and the main application was set down for hearing inter-partes before Khaminwa, J. After hearing both the parties, the learned Judge of the superior court dismissed the applicant's application, vacated the interim orders, and ordered as follows:

1. ***The application dated 1/7/2008 is to be dismissed as it is based on misleading information and non-disclosure of material facts;***
2. ***The application dated the 29/7/08 is allowed with costs to the liquidator;***
3. ***The liquidator is hereby ordered to file final accounts within the next 3 months from the date of this order."***

It is the above ruling that is the subject of an intended appeal, and in the meantime the applicant has filed this application dated 25th March, 2010 seeking in the main the following four orders:

“2. THAT, the Honourable Court be pleased to Order a Stay of Execution of the ruling/order of Lady Joyce Khaminwa given on 21st October, 2009 in the Superior Court pending hearing and determination of the Appeal.

3. THAT, the Honourable Court be pleased to order a stay of proceedings in HCCC NO. 363 OF 2008 NAIROBI (MILIMANI) pending hearing and determination of the Appeal.

4. THAT, this Honourable Court be pleased to appoint Waithaka Kiarie of Buyer & Co. Auditing firm to do auditing of Lakestar Insurance Co. under liquidation pending hearing and determination of the Appeal

5. THAT, Waithaka Kiarie of Buyer & Co. Auditing be allowed to have access to accounts 0112061694500 and TB A/C 0118561694500 with Co-operative Bank Limited."

In his submissions before us, Mr. S. Oyugi, learned counsel for the appellant, argued that the interim liquidator had liquidated the assets of the company at an undervalued price, that he had failed to call meetings of contributors and shareholders, and had failed to render true and accurate accounts, and had thus contravened the law. He called for his removal, and the appointment of a Mr. Waithaka Kiarie, as the new interim liquidator. Finally, he urged this Court to stay the superior court's order requiring the interim liquidator to render final accounts within three months of its order made 21st October, 2009. He argued that unless the last order is stayed, the interim liquidator will render final accounts without complying with the statutory requirements of calling a meeting of the contributors and shareholders.

Mr. Ligunya, learned counsel for the respondent, on the other hand, relied on the replying affidavit of the respondent sworn the 22nd April, 2010 and submitted that the order of injunction (being a negative order) made by the superior court is not capable of being stayed; that a new interim liquidator cannot be appointed through an application under **rule 5 (2) (b)** and finally that if the order of the superior court to render final accounts was stayed, that would further cripple the efforts of the interim liquidator to bring an end to this old Winding Up case. Mr. Ligunya submitted further that the appellant was heavily indebted to the company, to the tune of Kshs.47.6 million, that he had neglected and refused to repay the same, and that he had not come to this Court with clean hands.

The principles applicable to the determination of applications under **rule 5 (2) (b)** of the Rules are well settled, as was observed by this Court in **Civil Application No. Nai. 157 of 2006** in ***Ishmael***

Kagunyi Thande vs Housing Finance of Kenya Ltd (unreported) in these terms:

“The Jurisdiction of the Court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.” {See Githunguri vs Jimba Credit Corporation Ltd, No 2 (1988) KLR 838, J. K. Industries Ltd vs Kenya Commercial Bank Ltd (1982-88)}.”

Is this appeal arguable? Although it would not be appropriate for us at this interim stage to make any definitive statements as to the merits of this appeal, we are highly skeptical about its success. First, we note that the prayer to stay the “execution” of the injunction order issued by the superior court cannot be granted because the order is a negative order, incapable of execution, and therefore incapable of stay. Secondly, a new interim liquidator cannot possibly be appointed through an application under **rule 5 (2) (b)** of this Court’s Rules. Hence, the only order capable of being stayed is the one requiring the interim liquidator to file final accounts within three months of the orders issued by the superior court. However, it is strange that the applicant should ask for such a prayer given that the whole basis of his suit in the superior court is to require the interim liquidator to render accounts. Why would he now want to stop the very thing that brought him to the superior court? That reinforces our doubts about the arguability of this appeal.

Having found that the intended appeal is not arguable, we do not find it necessary to go into the second limb of the principles set out for determining this application, namely, that the appeal will be rendered nugatory in the event an injunction is not granted.

In the result, we dismiss the motion dated 25th March, 2010 with costs to the respondent.

Dated and delivered at Nairobi this 16th day of July, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR