REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

"(a) as against the applicant

(i) the transfer to the plaintiff, 10 shares out of each of the 20 shares held by the applicant in the 3rd, 4th and 6th respondents.

(ii) an injunction to restrain the applicant by himself his agent and/or assignees from in any way whatsoever dealing with and/or using his position as a director in the third, fourth, fifth and sixth respondents to transact any of such companies business without a Board resolution of each of the respective companies and/or in any way interfere with the running of the said company.

(b) As against the applicant and second respondent, they were requested to make payment in accordance with their shareholding as contribution to the third, fourth, fifth and sixth respondents as follows:-

To 3rd respondent Ksh.35 million

To 4th respondent Ksh.22.5 million

To 5th respondent Ksh.7.5 million

and to 6th respondent Ksh. 9 million."

It also sought interest and costs of the suit. Those prayers were made against the applicant and 2nd respondent on grounds, among others, that the applicant and 2nd respondent were in breach of the Shareholders Agreement made between the 1st respondent and the applicant together with second respondent sometimes in May and August 2005 in which the 3rd, 4th, 5th and 6th respondents were to be incorporated and contributions made to run them according to the same agreement.

Together with that plaint, the 1st respondent also filed a notice of motion dated 26th January 2009 under certificate of urgency and chamber summons dated 26th January 2009, in which it sought that the notice of motion be certified urgent and be heard during the Court vacation. In the notice of motion, the 1st respondent sought six orders which were:-

"2. That the plaintiff be granted leave to prosecute the derivative action herein for and on behalf of the 3rd, 4th, 5th and 6th defendants respectively.

3. That the plaintiff be indemnified by the 3rd, 4th, 5th and 6th defendants/respondents for all the costs and expenses reasonably incurred in prosecuting this suit.

4. Pending the hearing inter partes, the 1st defendant by himself, his agents, or assignees be restrained from in any way whatsoever using his position as a director of the 3rd, 4th 5th and 6th defendants to bind the said defendants without the board resolution of each of the said companies as the case may be.

5. Pending the hearing and determination of this suit the 1st defendant by himself, his agents or assignees be restrained from in any way whatsoever using his position as a director of the 3rd 4th, 5th and 6th defendants to bind the said defendants without the Board resolution of each of the said companies as the case may be.

6. Costs of this application be provided."

That application had grounds in support of it and an affidavit sworn by Ateet Dinesh Jetha also

in support of it. It was placed before superior court (Njagi J.) on 28th January 2009, for ex-parte hearing of the application for hearing to proceed during court vacation. That application was allowed and the notice of motion was certified urgent and could be heard during the court vacation. Thereafter, and on the same date, the notice of motion was heard ex-parte pursuant to *order 39 rule 3 (1)* of the Civil Procedure Rules. The ruling was reserved and was delivered the next day 29th January, 2009. The ruling concluded:-

"*For the above reasons, the application is certified urgent in terms of prayer 1. In order to preserve the present status quo and arrest any escalation of the matters complained of, an interim injunction is also granted in terms of prayer 4 for a period of 14 days.*

The application be served for hearing inter partes on a date to be given by the registry on priority basis. Costs in the cause."

On 30th January 2009, the notice of motion was listed for inter-parte hearing on 12th February 2009. On that day, all parties appeared before the learned Judge, represented by their various advocates. Mr. Muyaa held brief for Mr. Sheth who was for the applicant (then 1st defendant). By consent of all parties, the hearing of the notice of motion was taken out of that day's hearing list and was adjourned to a date to be taken at the registry for hearing within 21 days from 12th February 2009. Interim orders were extended by consent of all parties to the next hearing date fixed by the registry. On 3rd March 2009, the matter came up for hearing inter partes before Sergon J. Mr. Kinyua, the learned counsel for the 2nd respondent (the 2nd defendant), applied for adjournment but also sought for interim injunction order not to be extended. The grounds for that application were that Harit Sheth, the learned counsel for the applicant had not been served and Kinyua had been served on 27th February, 2009 giving him only one clear day. Mr. Obure, learned counsel who was then holding brief for Kiarie Kariuki, the learned counsel for 3rd to 6th respondents (then 3-6th defendants) also applied for adjournment on grounds that they were also served with the relevant documents late. Mr. Mogaka for Mr. Mabeya for the 1st respondent (then plaintiff) opposed the application but the record does not indicate whether he opposed the request by Kinyua that the interim orders be not extended. In a short order in response to the application for adjournment, the learned Judge stated:-

"*It is clear that the parties i.e. respondents are not ready for hearing. They have not filed any reply. I confirm the interim orders pending the hearing of the suit."*

That order is the genesis of this notice of motion before us, which is premised on *rules 5 (2) (b)* and *47* of the Court of Appeal Rules (the Rules) and which seeks mainly the order:-

"*That the ruling and order made by Hon. Justice Sergon on 3rd March 2009 restraining the 1st defendant from in any way whatsoever and howsoever using his position as a director of the 6th respondent or any of the 3rd, 4th and 5th respondents to transact any such companies' business fraudulently or in any way whatsoever bind the said companies without a proper resolution by such company and/or in any way interfere with the running of the said companies pending the hearing and determination of the suit in the superior court be stayed pending the hearing and determination of the applicants intended appeal."*

The applicant intends to appeal against that decision. The grounds of the notice of motion are that the ex-parte injunction orders could only be granted for 14 days and the learned Judge in confirming the interim orders of injunction to run for a longer period, violated the provisions of *order 39 rule 3 (2)* of the Civil Procedure Rules; that applicant was not given a chance to be heard on the application for injunction; that the injunction order was irregularly granted as such orders should only be granted after inter-parte hearing of the application seeking such orders; that the first respondent had no locus standi to sue on behalf of the 3rd to 6th respondents. Thus the applicant contends that the intended appeal is arguable. He contends further that the

success of the intended appeal would be rendered nugatory were we to refuse to grant the application. The grounds for that contention is that as a result of the superior court's orders, 3rd to 6th respondents have no board of directors capable of transacting their business and if that state of affairs continues then they may eventually be rendered insolvent; that, the applicant may risk being declared bankrupt because he has given his personal guarantees to the 3rd to 6th respondents' creditors and as the order stops him completely from interfering with the said companies, the debts may not be paid and hence he will be at risk and that the order effectively cuts off capitalization of the 3rd to 6th respondents as the applicant is the one who has been negotiating loans from financiers on behalf of the same companies.

There was affidavit sworn by the applicant in support of the application. The respondent opposed the application and filed a replying affidavit sworn by Ateet Dinesh Jetha who is a director of the 1st respondent. He stated in that affidavit that the orders sought in the superior court are for the benefit of the 3rd to 6th respondents and that the order granted and which is the subject of this application do not in any way affect the 3rd to 6th respondents as they only restrain the applicant from acting illegally and to the detriment of the 3rd to 6th respondents and that the business of those companies have since the orders were granted continued to run smoothly and will continue so as there will be no any problem with the orders in place. He concluded his affidavit by denying that there is only one director carrying out the operations of the 3rd to 6th company as alleged by the applicant.

Before us, the 2nd respondent's counsel did not appear but as he was duly served, the hearing proceeded, his absence notwithstanding. Mr. Mabeya, and Mr. Kariuki, the learned counsel for the 1st respondent and 3rd to 6th respondents respectively conceded the application in so far as that the intended appeal is arguable. That limb having been conceded, Mr. Sheth sought to and did address us only on the second limb which is whether or not the intended appeal, were it to succeed, would be rendered nugatory by our refusal to grant this application. He submitted that as the 3rd to 6th respondents had only two directors each who were the same directors, if one of them, being the applicant, is restrained from running the companies, then the companies would be rendered insolvent and their respective businesses would collapse. Mr. Mabeya, while conceding that the intended appeal, is arguable, submitted however, that on point of law, the orders sought were not available because the application is brought under *rule 5 (2) (b)* which only allows stay to be granted if the execution of the orders are threatened or could be carried out. He was of the view that an order which does not seek positive action cannot be stayed in law. In the matter before us, the orders were injunction orders which could not be executed and that being the case no order of stay can be granted. Further, he argued that in any event, the offending order merely stopped the applicant from carrying out illegal activities and if such illegalities are not restrained then the companies i.e. 3rd to 6th respondents will be the sufferers. Mr. Kariuki, while associating himself with what Mr. Mabeya submitted, referred us to paragraph 12 of the applicant's statement of defence dated 10th February 2009 and filed into the court on 11th February 2009 which states that the 4th and 6th respondents have already been sold to third parties and submitted that if what applicant states in that defence is true then those two companies would not suffer as a result of the offending order.

We have considered the notice of motion, the grounds in support of it, the affidavit in support of it and the replying affidavit as well as the submissions by the learned counsel for all parties except for second respondent, the record and the law. The law as to the principles that guide this Court while considering an application brought pursuant to *rule 5 (2) (b)* of the Court's Rules is now well settled. First the applicant must demonstrate that the appeal or the intended appeal is arguable, that is to say, it is not frivolous. Secondly he must also show to the satisfaction of the Court that were the appeal or the intended appeal to succeed, that success would be rendered nugatory by the refusal of the Court to grant the orders sought – see the cases of *Reliance Bank Limited vs. Norlake Investments Limited (2002 1 EALR 227*, *Ramji Hanishai Devani Ltd vs. Kenya Commercial Bank Limited Civil Application No. Nai. 128 of 2006 (Ur.)* and

Mohamed Said Ahmed vs. Grand Batian Hotels Ltd – CA No. NAI. 263 of 2004. In the matter before us the parties readily agree and with respect we are in full agreement that the intended appeal is arguable. This is a case where the records show that the learned Judge of the superior court, perhaps out of frustration caused by the advocates' apparent lack of commitment to proceed with the case, decided to ignore the fact that the application before him had not been heard inter partes and granted orders that were in effect allowing application for injunction without hearing the application. If, in any case, he merely extended the interim orders, then the record shows that prima facie the extension offended provisions of *order 39 rule 3 (2)* of the Civil Procedure Code. In our view, and without making any final decision on the matter as that is for the Court which will hear the appeal, we do fully agree that the intended appeal is arguable and is thus not frivolous.

The next matter we need to consider is the point raised by Mr. Mabeya that the orders sought are not available. We have agonised over this aspect and with respect, we do agree that we have no jurisdiction to make the orders sought on the basis of the application as presented. The relevant order that the superior court made against the appellant was as follows:-

"*2. An injunction is hereby issued restraining the 1st defendant from in any way whatsoever and howsoever using his position as a director of the 6th defendant or any of the 3rd, 4th and 5th defendant to transact any such companies' business fraudulently or in any way whatsoever bind the said companies without a proper resolution by such company and/or in any way interfere with the running of the said companies for 14 days."*

That order was clearly an injunctive order. We note also that in fact, it did not stop the applicant from continuing to be a director of the 3rd to 6th companies. All it stopped him from doing were first to use his position as a director of any of the 3rd to 6th companies to transact any such companies' business fraudulently. Secondly he was stopped from binding any of the companies without any proper resolution of such a company and thirdly he was stopped from interfering with the running of the said companies. In our mind the only order worth complaining about is the last order. We say so because we think none would fight to transact business of any company fraudulently and none would want to have a free hand to bind a company without its Board of Directors' resolution. Such a business would cease to have any direction. Be that as it may, all these orders were orders that cannot be executed. They are orders that impose upon the applicant a duty to stop doing something and not a duty to do something. In the case of *Consolidated Bank of Kenya and 2 others vs. Usafi Limited Civil Application No. 195 of 2005*, this Court, considering an application for stay of a similar order had this to say:-

"*That the defendants …. are hereby restrained by order of injunction from ….. advertising, threatening to sell, offering to sell, selling or in any way dealing ….. with the plaintiff's property known as Land Reference No. 36/V11/272 situated in Eastleigh …. Currently advertised for sale on 4th July, 2003 or at any other time whatsoever pending the hearing and determination of this suit."*

This is the order of the superior court which the applicants now before us seek to stay pursuant to the powers of this Court under rule 5 (2) (b) of the Rules. It is clear that what is now sought is the stay of an injunction ordered by the superior court. This raises the issue as to whether rule 5 (2) (b) bestows on this Court the jurisdiction to stay an injunction. During submissions this issue was raised from the bench and Mr. Majanja, learned counsel for the applicants, briefly submitted that what was being sought was the stay of execution of the injunction and therefore fell within the scope of rule 5 (2) (b) of the Rules.

The relevant wording of rule 5 (2) (b) of the Rules is:-

"*The Court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further*

proceedings."

We consider that under the rule in its present form there are only three types of orders permitted to be made under rule 5 (2) (b) namely;

(i) a stay of execution.

(ii) an injunction.

(iii) a stay of any further proceedings

"*A stay of an injunction" is not included in that provision. The omission may well have been intended by the Rules Committee since to grant a stay of an injunction would have the effect of nullifying the injunction before the appeal against its grant had been heard. We do not consider the submission of Mr. Majanja that what he is seeking falls within "a stay of execution". We are unable to appreciate how one can stay an order for an injunction and yet at the same time sustain it on record. The word "injunction" is defined in the Glossary to the White Book 2003 as:-*

"*A court order prohibiting a person from doing something or requiring a person to do something."*

We are of the view that once an injunction has been ordered it is in force and no further proceedings are required to give effect to it.

Having come to the conclusion that we have no jurisdiction under rule 5 (2)(b) to grant the order sought we need say no more than that the Notice of Motion dated 12th July 2005 is incompetent and we order that it be and is hereby struck out with no order as to the costs thereof."

The above reflects the correct legal position. It is rather unfortunate in a case such as the one before us which we feel needs urgent action one way or the other. However to deviate from the law would result into more problems than it would solve.

Before we dismiss this application as we must, we feel the parties need to approach the issue in dispute here with professionality, so as to see an early end to it. What may be necessary for an early and amicable settlement would perhaps be an action such as parties seeking to jointly set aside the offending order and proceed to hear the application for injunction inter partes or as the pleadings seem to have been filed already, proceed to hear the suit. We were shown letters exchanged on those lines and we commend that approach. We make haste to add that this is only an advice to the parties but is not by any means an order and must not be treated as an order.

The application is dismissed. We make no order as to costs.

Made and delivered at Nairobi this 29th day of May, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR