



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 101 of 2009

NICHOLAS MAIHU.....APPLICANT

AND

NDIMA TEA FACTORY LTD.....1ST RESPONDENT

FRANCIS NJOGU GATHU.....2ND RESPONDENT

(Being an application for an injunction and stay of the orders of the High Court and an injunction against the Respondents pending the lodging, hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Sitati, J.) dated 3rd April 2009

in

H.C.C.C. No. 446 of 2009)

RULING OF THE COURT

This application is brought under **rule 5(2)(b)** of this Court's rules.

The factual background which gives rise to the application is that the Applicant claims to have been nominated and elected as a director of the 1st Respondent Company to represent the shareholders of the Kaguyu Electoral Area for 3 years.

It is common ground that the applicant in his capacity as a debtor presented to court a petition seeking a receiving order for the protection of his estate and a receiving order was issued on 2nd September, 2004 in High Court Bankruptcy Cause 108 of 2004 (Milimani Court Nairobi). Following the grant of the receiving order, the Company Secretary wrote to the applicant on 17th July 2008, to the effect that the position which the applicant held as a director was vacant, as a result of the grant of a receiving order against him.

On 28th August 2008 the applicant instituted suit in the Senior resident Magistrate's Court Karatina being Civil case Number 77 of 2008 where an injunction order was issued restraining the respondents from proceeding with the intended nomination and election concerning Kaguyu Electoral Area.

Despite the orders from the Magistrate's Court the 1st respondent Company conducted nominations and

elections on 22nd September, 2008 in order to fill the vacant position of director whereupon the 2nd respondent was nominated and elected as a director. The Applicant contends that the 1st Respondent Company conducted the elections in violation of existing Court orders which had been issued restraining the holding of the elections.

On 8th October 2008 the Applicant filed a suit in the **High Court Nairobi H CCC No. 446 of 2008** and sought inter alia, a temporary injunction to restrain the 2nd Respondent from assuming office and carrying out the duties and functions of the office of Director of the 1st respondent Company. The Applicant further sought a temporary injunction to restrain the 1st Respondent from barring or stopping him from participating in the affairs of the Company. The application was dismissed by the High Court on 3rd April 2009 and an appeal to this Court has been lodged by the applicant.

It is common ground that the Applicant in his capacity as a debtor, presented to court a petition seeking a receiving order for the protection of his estate and a receiving order was issued on 2nd September, 2004 in High Court Bankruptcy Cause 108 of 2004 (Milimani Court, Nairobi).

In this application before us the applicant seeks *inter alia* the following orders:-

“1. That, pending the lodging, hearing and determination of the Applicant’s intended appeal, there be stay of the ruling/orders issued by the Honourable Lady Justice R. M. Sitati on 3rd April 2007 in Nairobi High Court Civil Case Number 446 of 2008, Nicholas Mahihu Muriithi versus Ndimu Tea Factory Ltd & Francis Njogu Gathu.

2. That pending the lodging, hearing and determination of the Applicant’s intended appeal, the proceedings in Nairobi High Court Civil Case Number 446 of 2008, Nicholas Mahihu Muriithi vs Ndimu Tea Factory Ltd & Francis Njogu Gathu be stayed.

3. That pending the hearing of this application inter partes, an injunction do issue directed to the 2nd Respondent restraining him from assuming the office and carrying out the duties and functions of the office of Director of Ndimu Tea Factory Ltd and representing the Kaguyu Electoral Area.

4. That an injunction do issue directed to the 2nd Respondent restraining him from assuming the office and carrying out the duties and functions of the Office of Director of Ndimu Tea Factory Ltd and representing the Kaguyu Electoral Area pending the lodging, hearing and determination of the Applicant’s intended appeal against the orders issued by the Honourable Lady Justice R. N. Sitati on 3rd April 2009 in Nairobi High Court Civil Case No. 446 of 2008 Nicholas Mahihu Muriithi versus Ndimu Tea Factory Ltd and Francis Njogu Gathu.

5. That an injunction do issue directed to the Respondents restraining them whether by themselves, their servants, agents, officers or employees howsoever from barring or stopping or in any way from interfering with the Applicant in participating in all the business and proceedings of Ndimu Tea Factory Ltd and carrying out duties in the office of Director representing the Kaguyu Electoral Area pending the lodging, hearing and determination of the Applicant’s intended appeal against the orders issued by the Honourable Lady Justice R. N. Sitati on 3rd April 2009 in Nairobi High Court Civil Case Number 446 of 2008 Nicholas Muhihu Muriithi versus Ndimu Tea Factory Ltd and Francis Njogu Gathu.”

In the body of the application, the applicant further relies on grounds (a) to (k).

We have considered all the grounds raised but for the purpose of exercising our jurisdiction under the rule, 5(2)(b), it is sufficient for an applicant to demonstrate only one arguable ground. After taking into account submissions by Counsel for the Applicant and the Respondents, we have come to the conclusion that ground (b) is arguable.

Ground (b) states:

“The learned Judge erred in law in finding that a receiving order has the same effect as a bankruptcy order and applied the same principle in her ruling in the Superior Court.”

Even without delving into the merits of the ground, which is the responsibility of the Court which shall be mandated to hear the appeal, it is clear to us that an arguable case does arise from the provisions of Sections 5, 9, and 20 of the Bankruptcy Act Chapter 53 of the Laws of Kenya, all of which have different implications in law since the final outcome in the bankruptcy process, is an adjudication order whereas, a receiving order comes very early in the process so as to protect the estate or property of a debtor pending any further steps. The arguable point which the applicant has raised in the application and in the submission before us is whether the filing of a petition for bankruptcy in court and the making of a receiving order constitute a ground for his disqualification as a director of the 1st Respondent Company.

Turning to the second consideration on whether the appeal will be rendered nugatory if the injunction is not granted, the applicant here argues that he was elected as a Director of the 1st Respondent Company in April 2007 and was to serve for a term of three years. The applicant’s term in office was intended to end in April 2010. The applicant would therefore be denied an opportunity to serve as the duly elected Director representing Kaguyu Electoral Area. The applicant further contends that it is highly likely that the appeal will not be heard by this Court before April 2010 and therefore the determination of the matter after April 2010 would be academic, since fresh elections for a new term are due next year.

The respondents have opposed the application on both grounds upon which this Court’s jurisdiction is exercised namely that there is no arguable appeal and that the appeal would not be rendered nugatory if the orders sought were not granted. The respondents have argued that the applicant could be compensated by way of damages in the form of any lost directors allowances should their appeal succeed. The Respondents have at page 12 added another twist to the application namely that, the applicant had in a Chamber application filed in the *Chief Magistrate’s Court of Kenya, Milimani C. C. No. 5143 of 2007*, sought to discharge an order against him for committal to civil jail for a period of 30 days. In the body of his application he pleaded in ground (c) that **“he was a 75 year old man suffering from diabetes and hypertension and his life is at a high risk due to lack of adequate medication in jail.”** The respondents have contended that the thrust of ground (c), above, was that under the Companies Act, a person cannot be elected as a director if he is over 70 years, and therefore, the applicant’s nomination for election was in violation of a statutory provision and therefore null and void. The applicant’s counsel did try to wriggle out of this by saying that there was no averment by the applicant, in any affidavit, and that the disclosure on age was reflected only in the body of the application. However, this did not impress this Court at all, as the ground on age as framed, was categorical on the applicant’s age, and the applicant had himself sworn the affidavit in support of the application in question.

However, as the issue of age might affect the merits of the intended appeal, we propose not to make any finding on it so as not to bind the court hearing the appeal or any hearing in the Superior Court. For the purpose of this application, it is sufficient to state that the issue of age is capable of rendering the entire application unarguable.

However, as stated above, the distinction between a receiving order and a bankruptcy order and how this affects the status of the applicant as a director, does constitute an arguable appeal. In the case of *JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 3 OTHERS versus KILACH (2003) KQA 249* at pg 264 this Court said:

“We think this even if it were the only point, in an arguable one and the length of time counsel spent before us was itself sufficient proof that the point is worth investigating on appeal and is not frivolous one. There may or may not be any other arguable points but as we have said before, even one arguable point is sufficient for the principle of Rule 5(2); there need not be a chain of arguable points to sustain an application.”

On the second consideration on whether the intended appeal is likely to be rendered nugatory, we find

that even without speculating as to when the appeal might be fully determined, or the hearing in the Superior Court finalized, we find that the intended appeal would not be rendered nugatory as the applicant could still be compensated in damages. Thus, his loss if any, could still be quantified in terms of the lost earnings as a director of the 1st respondent company. Our finding on this is that, the Applicant has not satisfied the second principle, so as to trigger the exercise of our jurisdiction.

Although we have restated the two main principles which this Court considers in this type of application, the Court has a duty to ensure that its orders are at all times effective. In this regard, it is common ground that the 2nd respondent had already been nominated as a director before the dispute came to this court and he has also been participating in the affairs of the Company to date. This Court cannot ignore the importance of this in terms of the management of the Company. Taking into account the balance of convenience, the court is convinced that it tilts in favour of status quo so as not to disrupt the affairs of the 1st respondent Company.

In addition, the Court is not oblivious to the fact that company's elections are likely to take place next year thus paving the way for any interested party to contest. The Court has in the past walked a well trodden path. This Court's jurisdiction is original and discretionary. For an applicant to succeed, he must satisfy the two guiding principles, first, that the intended appeal is arguable and that it is not frivolous and second, that unless a stay is granted, the appeal or the intended appeal if it eventually succeeds, will be rendered nugatory – See for example, *GITHUNGURI vs JIMBA CREDIT CORPORATION LTD (NO. 2) 1985 KLR, J. K. INDUSTRIES LTD vs KCB (1982 – 88) 1 KAR 1688, RELIANCE BANK LTD (IN LIQUIDATION) vs NORLAKE INVESTMENTS LTD C.A. NO. NAI. 98 OF 2002 (unreported)*.

The upshot is that the applicant has only satisfied the first principle and failed to satisfy the second principle. In the result, the application is dismissed with costs to the Respondents.

Dated 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