



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 105 of 2009 (UR 66/2009)

UNICONSULT (KENYA) LIMITED ..... APPLICANT

AND

ANASTASIA WANGECI MBAU ..... RESPONDENT

*(An application for stay of further proceedings pending the hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi, Milimani Commercial Courts, (Khaminwa, J) dated 7<sup>th</sup> November, 2008*

in

H. C. Winding Up Cause No. 18 of 2007)

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**RULING OF THE COURT**

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

The respondent, Anastacia Wangeci Mbau, is the personal representative and administrator of the estate of her late husband Engineer Paul Mbau (“the deceased”). The deceased died on 29<sup>th</sup> August, 2005. At that time he was the equal and only other shareholder of the appellant company, Uniconsult (Kenya) Limited (“the company”). He owned 75,000 fully paid shares, while his co-shareholder and director owned the other half. The company’s nominal capital was Kshs.3 million, divided into 150,000 shares of Kshs.20 each. Some three weeks before the deceased passed away, and because of his failing health, his wife, the respondent, was appointed a director of the company. Upon his death on 29<sup>th</sup> August, 2005, the respondent obtained a grant of letters of administration to his estate. She is the sole surviving beneficiary of his estate, including one-half of the shares held by the deceased in the applicant company.

The respondent claims, in a deposition filed in answer to the application before this court, that certain events had occurred in the management of the company that led her to file a petition in the superior court to wind-up the company. This is what she depones in paragraph 7 of her affidavit sworn 20<sup>th</sup> May, 2009:

***“7. That the events which have occurred in the Company since my husband died are the subject of the petition, and include, inter-alia, claims that I have since my husband’s death been mistreated by Eng. Daniel Ndungu, who in reality is the true applicant in this matter, and that I have been***

*improperly evicted by him from the board and the management of the Company; that third parties have without my concurrence unlawfully and irregularly been invited into the directorship of the Company; that the shareholding structure of the Company has been manipulated to dilute the estates' interest in the Company by the creation and illegal allocation of new shares to the surviving founder Eng. Daniel Ndungu and other third parties, and that moneys accruing to the Company are now being banked by him in secret accounts to which I am not a signatory as required, and then fraudulently siphoned off, with the effect that my late husband's lifelong investment has been or is likely to be rendered worthless. The Company has been in existence for over twenty four (24) years and was the source of income for the deceased's family. I have pleaded that the Company be wound, for reasons of equity and justice."*

That petition was filed on 21<sup>st</sup> November, 2007. When it came up for hearing before the superior court on 24<sup>th</sup> September, 2008, the applicant raised a preliminary objection based on the following two grounds, as stated on the Notice of Preliminary Objection dated 2<sup>nd</sup> July, 2008:

***"1. The late PAUL MBAU was not a contributory of the Respondent and for that reason the petitioner lacks Locus standi to present the said petition.***

***2. Further and/or in the alternative the petitioner does not satisfy any of the conditions set out in section 221 of the companies Act Cap 486 Laws of Kenya and therefore lacks capacity to present the said petition."***

Khaminwa, J heard the Preliminary Objection and in a ruling dated 10<sup>th</sup> November, 2008 dismissed the same. It is against that ruling that an appeal is intended, and for now the applicant seeks a stay of proceedings relating to the petition in the superior court.

In his submissions before us, Mr J M Mburu, learned counsel for the applicant, argued essentially that under **Section 212** of the Companies Act, a petition for winding up may be presented either by the company, or a creditor, or a contributory, and that the respondent fell in none of those categories, hence lacked *locus standi* to present the said petition. Mr Mburu submitted that the entire shares owned by the deceased in the company were fully paid, and accordingly he did not qualify to be "contributory" within the meaning of the term defined in **Section 214** of the Companies Act, and qualified by **Section 213 (3)**. He argued that in accordance with **Section 213 (3)**, in the case of a company limited by shares, a contributory is liable, in the event of a winding up, to contribute only to the extent of any sums unpaid on any shares held by him. In Mr Mburu's view, the deceased having fully paid his shares was not a "contributory". According to him if the Order sought was not granted, the appeal would be rendered nugatory if the company were wound up.

Mr Rachuonyo, learned counsel for the respondent, argued that the distinction between paid-up and unpaid shares was absurd, and defended the superior court's decision that the deceased was a contributory. He further argued that the applicant had not sought leave of the superior court to file this appeal, and was in breach of the mandatory requirement.

The discretion of the court on an application of this kind has to be exercised upon the established principles which require an applicant to satisfy the Court both that the intended appeal or appeal is arguable and that unless the order sought is granted, the appeal, if successful, would be rendered nugatory.

Clearly, the fact that there is such a wide disagreement between the counsels here on the definition and interpretation of the term "contributory", and whether the respondent had the *locus standii* to present the petition, creates an arguable point. Having considered the provisions of **Sections 213 (3) and 214** of the Companies Act, we are satisfied that this appeal is arguable. An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. The appeal is based on technical legal grounds. It would not be appropriate to say more on that for doing so would not only be pre-emptory but also might cause embarrassment to the judges who will ultimately deal with the appeal. Suffice to say at this stage that we are prepared to assume that it is arguable.

On the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that the same will **not** be rendered nugatory. We recognize the argument put forward by the applicant that there is a threat of the company being wound up by the superior court. But we are also conscious of the case put forward by the respondent that the company is so mismanaged that the value of her shares is in serious jeopardy. We are also of the view that damages would be an adequate remedy for the party that succeeds ultimately. Having considered the interests of both the parties, we have come to the conclusion that the appeal herein will **not** be rendered nugatory should the orders sought are not granted.

Accordingly, we dismiss this application with no order as to costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2009.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**