



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 32 OF 2008 (UR 20/2008)**

**PANKAJ VRAJLALA SOMAIA .....APPLICANT**

**AND**

**BILL KIPSAND ROTICH .....1<sup>ST</sup> RESPONDENT**

**FLORENCE ROTICH .....2<sup>ND</sup> RESPONDENT**

**METRO PETROLEUM LIMITED .....3<sup>RD</sup> RESPONDENT**

*(Application for stay under rule 5(2)(b) of the Court of Appeal Pending  
the filing and determination of an intended appeal from the Ruling of the High  
Court of Kenya at Nairobi (Okwengu, J.) dated 7<sup>th</sup> March, 2008 discharging  
he injunction order of (Azangalala, J.) made on 4<sup>th</sup> December, 2007*

**in**

**H.C.C.C. NO. 542 OF 2007)**

**\*\*\*\*\***

**RULING OF GITHINJI, JA**

I have had the advantage of reading the Ruling of O’Kubasu JA in draft and I agree that the application should be allowed on terms proposed by him.

I have nothing useful to add.

***Dated and delivered at Nairobi this 18<sup>th</sup> day of April, .2008***

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 32 OF 2008 (UR 20/2008)**

**PANKAJ VRAJLAL SOMAIA ..... APPLICANT**

**AND**

**BILL KIPSANG ROTICH ..... 1<sup>ST</sup> RESPONDENT**

**FLORENCE ROTICH ..... 2<sup>ND</sup> RESPONDENT**

**METRO PETROLEUM LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Application for stay under rule 5(2)(b) of the Court of Appeal pending the filing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (Okwengu, J.) dated 7<sup>th</sup> March, 2008 discharging the injunction order of (Azangalala, J.) made on 4<sup>th</sup> December, 2007*

*in*

*H.C.C.C. NO. 542 OF 2007)*

\*\*\*\*\*

**RULING OF O’KUBASU, J.A.**

This is an application by way of notice of motion expressed to have been brought under **Rules 5(2)(b)** and **47** of the Court of Appeal Rules seeking one main relief:-

***“THAT the order given by the Hon. Justice Okwengu on 7<sup>th</sup> March, 2008 discharging the injunction order made on 4<sup>th</sup> December, 2007 by Hon. Justice Azangalala be stayed pending the hearing and determination of the Applicant’s appeal.”***

The application was based on the following grounds:-

***“a) The superior court on 7<sup>th</sup> March, 2008 (Hon. Lady Justice Okwengu) discharged an earlier order made on 4<sup>th</sup> December, 2007 without considering that the injunction orders made by Honourable Justice Azangalala were made on the merits of the case and that discharging them would amount to a miscarriage of justice.***

***b) By reason of the said order discharging the injunction granted on 4<sup>th</sup> December, 2007, the respondents are now free to run the affairs of the 3<sup>rd</sup> respondent company to the exclusion of the applicant which situation perpetuates the unlawful actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in illegally ousting the applicant from the directorship and management of the 3<sup>rd</sup> defendant Company. The injunction orders of 4<sup>th</sup> December, 2007 were given to stop these illegal actions and in discharging the orders, the court has now sanctioned these illegalities which situation is a gross miscarriage of justice and gravely prejudicial to the applicant.***

- c) ***The effect of the said order made on 7<sup>th</sup> March, 2008 is to allow the respondents to continue misappropriating the 3<sup>rd</sup> respondent's assets which assets the injunction orders given on 4<sup>th</sup> December, 2007 sought to protect and which misappropriation will cause grave loss to the applicant who is a 50% shareholder and director of the 3<sup>rd</sup> respondent company.***
- d) ***The injunction orders given on 4<sup>th</sup> December, 2007 were meant to protect the assets of the 3<sup>rd</sup> defendant company and its products worth over KShs.100,000,000/= (one hundred million) for the benefit of all interested parties including the 3<sup>rd</sup> defendant's creditors and in discharging the injunction orders, the said products are going to go to waste and/or will be sold by the respondents and the money siphoned to bank accounts unknown to the applicant with the result that recovery of the said assets will thereafter be impossible.***
- e) ***That the order given on 7<sup>th</sup> March, 2008 discharging the injunction order given on 4<sup>th</sup> December, 2007 renders all the matters pending before the superior court particularly High Court Civil Case Number 542 of 2007 nugatory.***
- f) ***That in discharging the injunction orders given on 4<sup>th</sup> December, 2007, the learned judge failed to consider that the injunction orders were given after the court had considered the matter on its merits and made the following findings:***
- i) ***That it is now well settled that an interlocutory injunction will issue where one's legal or equitable rights have been violated or are threatened with violation by the unlawful acts of another.***
- ii) ***That the plaintiff had on a prima facie basis shown that the 1<sup>st</sup> and 2<sup>nd</sup> defendants may be acting in contravention of the Memorandum and Articles of Association of the 3<sup>rd</sup> defendant.***
- iii) ***The defendants may also have irregularly changed the management of the 3<sup>rd</sup> defendant using documents that the Registrar of Companies has disowned.***
- iv) ***This is a case where temporary mandatory injunction will serve the ends of justice.***
- By discharging the orders the court indeed made a ruling that flies in the face of justice.
- g) ***That even before the injunction orders were discharged, the 1<sup>st</sup> respondent had already disobeyed the orders and sold off the 3<sup>rd</sup> defendant's products worth KShs.29,925,370/= and the court in giving an order declining to commit the said 1<sup>st</sup> respondent to civil jail for contempt of court or attaching his assets to recover the said sum in effect sanctioned flagrant disobedience of court orders and set a very dangerous precedent that one can disobey a court order and get away with it.***
- h) ***The applicants intend to appeal against the decision of the superior court and have already filed a Notice of Appeal in this respect.***
- i) ***The applicants have an arguable appeal with great chances of success as shown on the annexed draft Memorandum of Appeal.***
- j) ***That further the superior court in declining to give a stay of its ruling for 30 days to allow the applicant lodge an appeal effectively left the applicant with no option but to file the matter under a certificate of urgency in the Court of Appeal.***
- k) ***Unless the said order is stayed the respondents will have succeeded in getting the superior court to sanction their unlawful actions and the applicant will be left with no redress thereby defeating the course of justice.***
- l) ***Unless the said order is stayed the applicant will suffer irreparable loss and damage as the***

**products and assets of the 3<sup>rd</sup> defendant company worth over KShs.100,000,000 (one hundred million) in which he is a 50% share-holder and director will be sold off and/or misappropriated and further the intended appeal and High Court Civil Case Number 542 of 2007 will be rendered nugatory.”**

The foregoing sets out the applicant’s main complaint in this application. There was in addition to the foregoing grounds a supporting affidavit sworn by the applicant, **PANKAJ VRAJLAL SOMAIA**.

The brief background to this application is as follows:-

The applicant herein is a director and **50% shareholder** of the **METRO PETROLEUM LIMITED** (3<sup>rd</sup> respondent). It was alleged that **Bill Kipsang Rotich** (1<sup>st</sup> Respondent) and his wife **Florence Rotich** (2<sup>nd</sup> Respondent) illegally removed the applicant from the company (3<sup>rd</sup> respondent). However, the removal of the applicant from the company was reversed by the Registrar of Companies. It is this dispute that led the applicant to file **High Court Civil Case No. 542 of 2007** at the Commercial and Tax Division in which the applicant, (as the plaintiff), sought declaratory orders, temporary prohibitory injunctions and temporary mandatory injunctions, among other reliefs. Simultaneously with the plaint the applicant filed a Chamber Summons seeking the following main orders:-

**“3. That pending the hearing and determination of this suit:**

**(a) The defendants be restrained from issuing any loading orders for the 3<sup>rd</sup> defendant’s products wherever stored and an order be made to the effect that only the plaintiff and the 1<sup>st</sup> defendant can make a loading order for the 3<sup>rd</sup> defendant’s said products.**

**(b) The defendants be restrained from operating the accounts opened at Oriental Commercial Bank and Consolidated Bank Limited in the name of the 3<sup>rd</sup> defendant or from opening or operating any other account in the name of the 3<sup>rd</sup> defendant apart from the accounts at Giro Bank Limited and Imperial Bank Limited and any other accounts where the plaintiff and the 1<sup>st</sup> defendant are the signatories of the accounts.**

**(c) The accounts opened by the defendants at Oriental Commercial Bank and Consolidated Bank Limited in the name of the 3<sup>rd</sup> Defendant be frozen.**

**(d) The 2<sup>nd</sup> defendant be restrained from holding herself out as a director of the company and be restrained further from interfering in any way with the running of the 3<sup>rd</sup> defendant’s company’s business.**

**(e) The defendants be restrained from excluding the plaintiff from directorship and management of the 3<sup>rd</sup> defendant company.**

**(f) The 1<sup>st</sup> and 2<sup>nd</sup> defendants be restrained from dealing with or removing the assets and products of the company from its business premises and/or from wherever the same are stored.”**

That Chamber Summons application was placed before Azangalala, J. for determination. The learned Judge considered what was placed before him by way of submission and granted the orders sought. In concluding his ruling delivered on 4<sup>th</sup> December, 2007, the learned Judge stated:-

**“The plaintiff has also on prima facie basis shown that the 1<sup>st</sup> and 2<sup>nd</sup> defendants may be acting in contravention of the Articles of Association of the 3<sup>rd</sup> defendant. They may also have irregularly changed the management of the 3<sup>rd</sup> defendant using documents that the Registrar of Companies has disowned. In the premises this is a case where a temporary mandatory injunction will serve the ends of justice.**

***In conclusion therefore I will allow prayers No. 3 (a), (b), (c), (d), (e) and (f).***

***The above orders are granted upon the condition that the plaintiff files by 1:00 p.m. on 7<sup>th</sup> December, 2007 an appropriate undertaking under oath as to damages. The defendants have liberty to apply.***

***Costs shall be in the cause.”***

It is to be observed that the learned Judge ordered that appropriate undertaking be filed by **1:00 p.m.** on **7<sup>th</sup> December, 2007**. The applicant who had filed an undertaking as to damages on **24<sup>th</sup> October, 2007** was of the view that the earlier undertaking was sufficient and hence filed no fresh undertaking. That was the beginning of the problems in this matter. It was actually discovered that the undertaking filed on **24<sup>th</sup> October, 2007** was missing from the court file. This prompted the applicant to file another undertaking. But on **10<sup>th</sup> January, 2008**, the applicant learnt that the **1<sup>st</sup>** respondent was issuing loading orders and within one week orders worth **30 million shillings** had been sold to third parties. The applicant then moved to the superior court seeking orders that the property of **1<sup>st</sup>** respondent be attached and sold to recover a sum of **Shs. 29,925,370/=** and that the **1<sup>st</sup>** respondent be committed to civil jail for a period six **(6) months**.

The respondents on their part filed an application under **Order XXXIX Rule 4** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act* asking the superior court to deem it as discharged the order of injunction issued by that court (Azangalala, J.) on **13<sup>th</sup> December, 2007**. The respondents also sought an order for an inquiry to be made as to damages resulting from the order of injunction made by the court on **4<sup>th</sup> December, 2007**.

The two applications were both dated **22<sup>nd</sup> January, 2008** and for that reason the superior court, very properly in my view, decided to hear both applications together. The two applications were placed before Okwengu, J. for determination.

The learned Judge gave a careful consideration of the two applications and in the end came to the conclusion that the applicant's application lacked merits and hence dismissed it. As regards the application by the respondents it was the view of the learned Judge that it was for allowing and hence allowed it by discharging the temporary injunction which had been granted on **4<sup>th</sup> December, 2007**. In the ruling delivered on **7<sup>th</sup> March, 2008** the learned Judge concluded thus:-

***“In the above premises, I find that the plaintiff having failed to comply with the condition upon which the order of temporary injunction given on the 4<sup>th</sup> December, 2007 was predicated, the orders of temporary injunction must be discharged. With regard to the issue of damages, arising from the temporary injunction, the defendant is at liberty to bring an appropriate application. The defendant's application dated 22<sup>nd</sup> January, 2008, therefore succeeds and is granted to that extent. As regards the plaintiff's notice of motion dated 22<sup>nd</sup> January, 2008, for the reasons already given, the same fails and is dismissed.”***

Being aggrieved by that order of Okwengu, J. discharging the temporary injunction, the applicant filed a Notice of Appeal on **10<sup>th</sup> March, 2008** indicating intention to appeal against that ruling. And before that appeal is heard and determined the applicant seeks an order of stay. This is the application that was placed before this Court for determination on **20<sup>th</sup> March, 2008** when Mr. R.M. Kariuki and Ms. A. Bugo appeared for the applicant, while Mr. Mutula Kilonzo Junior appeared for the respondents.

Mr. Kariuki took issue with the fact that Okwengu, J. discharged an injunction which had been granted by another Judge of the superior court of similar jurisdiction. Mr. Kariuki submitted that failure to file a fresh undertaking was excusable and that it was the **1<sup>st</sup>** respondent who was in contempt of the court order.

On the nugatory aspect of the intended appeal, Mr. Kariuki submitted that if the order of stay is not granted, the assets of the company worth over **100 million shillings** would be sold without consent of the applicant and hence rendering the intended appeal nugatory.

Mr. Kilonzo Junior on his part submitted that Okwengu, J. had discretion to discharge the injunction and that as the applicant did not fulfill the condition upon which the injunction was given he should have gone back to the superior court to show that the breach or failure to comply with the condition was excusable. It was Mr. Kilonzo Junior's view that the intended appeal raised no arguable point. Finally Mr. Kilonzo Junior contended that where ensuing damages can be compensated, a stay ought not to be granted and that in the present case the applicant would be adequately compensated by way of damages should he be successful in the intended appeal.

This application as already stated, was brought under **rule 5(2)(b)** of this Court's Rules. The jurisdiction exercisable by this Court under **rule 5(2)(b)** of the Rules is now well settled. It is original and discretionary. For an applicant to succeed, he must satisfy the twin guiding principles, first that the intended appeal is arguable, that is that it is not frivolous and second that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory – see **J.K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD (1982-88) 1 KAR 1688, GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (NO. 2) (1988) KLR 838, RELIANCE BANK LTD V. NORLAKE INVESTMENT LTD. [2002] 1 E.A. 218 and EXCLUSIVE ESTATES V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION AND ANOTHER (2005) 1 EA 53.** These are well known authorities of this Court which were cited and relied upon by both sides to this application.

The issue now is whether the applicant has satisfied the twin principles governing an application of this nature. The facts as already demonstrated are not seriously disputed. The issue now is what would happen if the stay is refused. Of course, everything will be left at the mercy of the respondents and who as it has been indicated are likely to go back to the position as prior to the filing of the suit in the superior court and the application for temporary injunction in that court which application was granted by Azangalala, J. but discharged by Okwengu, J. This applicant who has 50% share holding in the 3<sup>rd</sup> respondent will lose control of the operations of the 3<sup>rd</sup> respondent and even if he eventually succeeded in his intended appeal there might be nothing left by way of assets of the 3<sup>rd</sup> respondent by the time the intended appeal is finally heard and determined. The application which was allowed by Azangalala, J. had been brought pursuant to **Order XXXIX rule 1** of the **Civil Procedure Rules** which rule provides:-

***“Where in any suit it is proved by affidavit or otherwise:-***

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”***

It can be said that the rule was intended to protect the property in dispute from being wasted, damaged or alienated by any party to the suit. The learned Judge of the superior court (Azangalala, J.) was satisfied that the applicant had shown a prima facie case with the probability of success and for that reason the property in dispute needed protection from being alienated. Hence, the temporary injunction. But the injunction was given upon certain conditions, viz, the applicant had to file an undertaking as to damages. But the applicant having filed an earlier undertaking to damages was of the view that the earlier undertaking was sufficient. It was rather interesting that things started moving again once that earlier undertaking went missing from the court file!

In view of the foregoing, I would grant a stay in this matter but on the following terms:-

- 1) ***That any loading order from 20<sup>th</sup> March, 2008 for the 3<sup>rd</sup> respondent's products be signed jointly by the applicant herein and the 1<sup>st</sup> respondent.***
- 2) ***That the proceeds of such products of the 3<sup>rd</sup> respondent be deposited in a new bank account to be opened in the name of the 3<sup>rd</sup> respondent by the applicant and the 1<sup>st</sup> respondent.***
- 3) ***That the applicant and the 1<sup>st</sup> respondent be the sole signatories to the new account.***
- 4) ***That the costs of this application shall be in the intended appeal.***

As ***Githinji, JA*** agrees those shall be the orders of the Court.

***Dated and delivered at NAIROBI this 18<sup>th</sup> day of April, 2008.***

***E.O. O'KUBASU***

.....

***JUDGE OF APPEAL***