



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 313 OF 2007**

NAFTALI WACHIRA NJOROGE .....1<sup>ST</sup> APPLICANT

EMANUEL NDERITU THEURI .....2<sup>ND</sup> APPLICANT

PETER GAKONYO NDERITU ..... 3<sup>RD</sup> APPLICANT

JOYCE M. GAKUGI ..... 4<sup>TH</sup> APPLICANT

GITUKU KAMAITHA ..... 5<sup>TH</sup> APPLICANT

PETER NDERITU MUTHOGA ..... 6<sup>TH</sup> APPLICANT

PHOEBE NJOKI WAMBUGU ..... 7<sup>TH</sup> APPLICANT

ADAM WERU MWANIKI ..... 8<sup>TH</sup> APPLICANT

**AND**

UMOJA SERVICE STATION LIMITED ..... 1<sup>ST</sup> RESPONDENT

HEZY JOHN LIMITED ..... 2<sup>ND</sup> RESPONDENT

ANTHONY WAGURA IKIKI ..... 3<sup>RD</sup> RESPONDENT

SAMUEL GACHOKI KINGORI ..... 4<sup>TH</sup> RESPONDENT

DOUGLAS KINGORI MUTHUA ..... 5<sup>TH</sup> RESPONDENT

PETER GICHOHI GITAU ..... 6<sup>TH</sup> RESPONDENT

**RULING OF THE COURT**

This is an application by way of notice of motion brought under **rule 5(2)(b)** of the Court of Appeal Rules (the Rules) in which the applicants herein seek the following orders:-

**“1. THAT this honourable court be pleased to issue an injunction restraining the Board of Directors**

of Umoja Service station Limited from convening and conducting the annual or special General Meeting scheduled for 22<sup>nd</sup> December, 2007 or any other subsequent special or General Meeting pending the filing, hearing and determination of the intended appeal against the ruling and orders of Honourable Justice F. Azangalala delivered on 28<sup>th</sup> November, 2007.

2. **THAT** this honourable court be pleased to issue an injunction restraining the Board of Directors of Umoja Service Station Limited from issuance, transfer and allotment of further shares and/or declaration of dividend pending the filing, hearing and determination of the intended appeal against the ruling and orders of honourable Justice F. Azangalala delivered on 28<sup>th</sup> November, 2007.

3. **THAT** the applicants be at liberty to apply for further orders and/or directions as the court may deem just and expedient to grant.

4. **THAT** the costs of this and incidental to this application do abide the outcome of the appeal.”

The application is made on the following grounds:-

“(a) **THAT** the applicants are minority shareholders of the 1<sup>st</sup> respondent Company who are dissatisfied with the manner that the same is being run by the Board of Directors.

(b) **THAT** by application dated 24<sup>th</sup> November, 2006 the petitioners sought various restraining orders against the Board of Directors restraining them from conducting the Annual or Special General Meeting scheduled for 9<sup>th</sup> December, 2006 and or any further special or General Meeting pending hearing and determination of the petition herein.

(c) **THAT** the petitioners are dissatisfied with the entire ruling of 28<sup>th</sup> November, 2007 and have preferred an appeal thereto.

(d) **THAT** this honourable court by its ruling of 28<sup>th</sup> November, 2007 declined to grant the said orders not on their merit but allegedly due to the same orders being extensively res judicata in light of Nyeri HCCC NO. 79 of 2005 that is currently pending at Nyeri Law Courts.

(e) **THAT** the petitioners have also requested for copies of the entire proceedings for purposes of appeal and served copies of both the Notice of Appeal and letter requesting proceedings to the respondents.

(f) **THAT** the appeal and this application have both been instituted without inordinate delay in light of the substantial loss and damage that the petitioners are bound to suffer was (sic) the scheduled annual or special meeting be held prior to conclusive determination of the appeal.

(g) **THAT** any other issuance, transfer and/or allotment of further dividend prior to determination of the appeal is very prejudicial to the petitioner as the same is ordinarily based on the complained illegal and ultra vires allotment and transfer of the shareholding irrespective of the companies status of a Private Company Limited by shares and thus any new members preferring to join would have to be ratified at the Annual or Special General meeting by all the shareholders.

(h) **THAT** voting at any of the Annual or Special General Meetings would still be on the basis of the disputed shareholding thus further prejudicing the oppressed minority shareholders whose rights have been contravened.

(i) **THAT** the petitioners are prepared to comply with any conditions that this Honourable Court will impose as conditions for the grant of the orders pending appeal but urges the court to be lenient in any such imposition of conditions to prevent the said conditions becoming an obstacle to prosecution of the intended appeal.

**(j) THAT as a demonstration of their goodwill and fact that this petition and HCCC No. 79 of 2005 pending at Nyeri Law Courts are clearly distinguishable, the petitioners have simultaneously with institution of this application made a formal application to Nyeri High Court for the transfer and consolidation of that suit together with this for hearing and disposal of the same at the Milimani Commercial and Tax Division of the High Court at Nyeri and the need for interim orders being issued.**

**(k) THAT the respondents have in the meantime, issued out notices inviting all the shareholders of Umoja service Station Meeting on the 22<sup>nd</sup> December, 2007 thus the apprehension that the entire Petition and intended appeal may be rendered nugatory was the scheduled meeting to proceed.**

**(l) THAT it is in the interest of justice to issue the orders sought.”**

There was then a supporting affidavit sworn by Joyce M. Gakugi the 4<sup>th</sup> applicant in this motion.

The background to this application is necessary in order to appreciate the nature of the dispute. The applicants herein filed a Petitioners application at the High Court of Kenya at Nairobi (Milimani Commercial Courts) being **Companies Petition No. W.C. 29 of 2006** expressed as being brought under the provisions of **Sections 3 and 3A** of the **Civil Procedure Act, Order 39 Rules 1, 2, 3 and 9** of the Civil Procedure Rules, **Section 211** of the Companies Act and **Rules 3 and 203** of the Companies (*Winding Up*) Rules. In that application the petitioners (applicants herein) were seeking the following orders:-

**“1. An injunction restraining the current board of Directors of Umoja Service Station Limited from convening and conducting the annual general meeting scheduled for 9<sup>th</sup> December, 2006 and or any other Special or General Meeting pending the hearing and determination of this suit.**

**2. An injunction restraining the current Board of Directors of Umoja Service Station Limited from issuance, transfer and allotment of further shares and declaration of dividends until hearing and determination of this suit.**

**3. An order to stay or halt all development activities being undertaken by the Company pending hearing and determination of this suit and/or auditing of the accounts from 1<sup>st</sup> January, 2006 to date the fresh and transparent elections be held.**

**4. An injunction restraining the current Company’s Board of Directors from surcharging the petitioners for amounts paid out by them in their capacity as directors and from further holding the petitioners’ shares as lien to the alleged debts pending hearing and determination of this suit.**

**5. In the alternative, the court be pleased to appoint an interim receiver of all the company assets with powers to run the day to day affairs of the company but without powers to transfer any property or shares of the company without the leave of the court pending hearing and determination of this suit.”**

That application was placed before Azangalala, J. who considered the rival arguments presented before him and in the end dismissed the application with costs in his ruling delivered in Nairobi on 28<sup>th</sup> of November, 2007. Being dissatisfied with the said ruling the applicants, through their advocates Gichuki King’ara & Co., Advocates, filed a Notice of Appeal in the superior court on 29<sup>th</sup> November, 2007. In the course of his ruling, Azangalala, J. made the following observations:-

**“It is plain from what I have read above that in this petition just like in the Nyeri suit the primary dispute is over who the proper directors should be. The underlying dispute between the parties is the same despite the fact that the Nyeri matter is by way of a plaint and this matter is by way of a petition. What complicates the matter is that the dispute is now at a different level i.e. the Court of Appeal. It is not proper for the same parties or substantially the same parties to be litigating over the same subject matter or substantially the same subject at different levels of our courts at the same time and using different forums.**

***The practice is gaining ground in this country where a party who is unsuccessful in one forum presents the same dispute disguised as a fresh dispute in a different forum. The consequence of course is clogging our court system with the same disputes in various courts.”***

The learned Judge made reference to *Nyeri High Court Civil Case No. 79 of 2005* and concluded his ruling thus:-

***“In the premises, I find and hold that the plaintiffs have not satisfied the conditions for the grant of an interlocutory injunction. Strictly speaking, I need not consider the other conditions for the grant of an injunction.***

***Before penning off however, I must state that the 3<sup>rd</sup> and 6<sup>th</sup> petitioners’ locus to join this petition is doubtful as they are not Personal Representatives of their deceased fathers. That incapacity compounds their position even if the conditions for the grant of an injunction were established.***

***In the end, the petitioners’ application is dismissed with costs.”***

The applicants intend to appeal against that order of dismissal but before that appeal is heard and finally determined they now seek the orders set out in the notice of motion (as set out at the commencement of this ruling). As it will be obvious ***prayer 1*** of that application has been overtaken by events and hence we are only concerned with ***prayer 2*** of the notice of motion. When the application came up for hearing, Mr. P.G. King’ara appeared for all the applicants while Dr. G.K. Kuria appeared for all the respondents. In his submissions, Mr. King’ara contended that the learned Judge did not consider the matter on merit as he merely dismissed it as being *res judicata* and yet the parties in the petition were not the same as the parties in the Nyeri Suit. Mr. King’ara went on to argue that the petition in the Commercial Court Milimani was concerned with the activities of the directors. He also pointed out that eighteen (**18**) of the original shareholders had died. Finally, Mr. King’ara told us that if the application were to be refused the applicants, some of whom were very old, would suffer.

In opposing this application, Dr. Kuria relied on the replying affidavit of one, ***Hezekiel Wang’ombe Gichohi*** and went on to submit that in his view this application was an abuse of the court process. He referred to the ruling of this court arising from the ***Nyeri High Court Civil Case No. 79 of 2005 (the Nyeri Case)***. It was Dr. Kuria’s contention that there was no arguable appeal because the issue has been resolved by this Court in *Civil Appeal No. 39 of 2006*. He submitted that the applicants herein should have filed an appeal rather than filing the petition seeking an injunction. Dr. Kuria reminded us that Okwengu, J. had refused to grant injunction to the applicants in the Nyeri case which decision was confirmed by this Court.

On the nugatory aspect of the intended appeal, Dr. Kuria contended that its results, if it succeeds would not be rendered nugatory since the applicants have not been prevented from buying shares of the company. Dr. Kuria did not only ask us to dismiss this application but also sought an order directed at the applicants to stop making any further applications.

The 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, or applicants as in this case, to succeed, they 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 LIMITED V. NORLAKE INVESTMENT LIMITED [2002] 1 E.A. 128 and EXCLUVISE ESTATES V. KENYA POSTS & TELECOMMUNICATIONS CORPORATION AND ANOTHER [2005] 1 E.A. 53.***

The issue now is whether the applicants have satisfied the twin principles governing an application of this nature. At the commencement of this ruling, we set out the prayers sought in the notice of motion

and we deliberately included the first prayer which clearly has been overtaken by events as the annual or special General Meeting was scheduled for 22<sup>nd</sup> December, 2007. So that this application really concerned itself with the second prayer which in our view was indeed the main relief sought in this application. We have now considered the history of this matter and the submissions by counsel appearing for the parties and as the intended appeal is yet to be determined, we must be careful not to encroach into the area which will be the domain of the bench that will eventually hear the intended appeal.

Having considered the rival submissions canvassed before us by counsel and assuming for a moment that the intended appeal is arguable, can it be said that our refusal of this application would render the intended appeal nugatory? We do not think so since the applicants have not been prevented from buying shares of the company. If we granted the relief sought the operations of the company would be severely curtailed. We have been told that eighteen (**18**) of the original shareholders have died and a number of the shareholders are very old. Clearly we do not see how an application for stay or injunction would benefit those who have died and/or very old.

In view of the foregoing, we have come to the conclusion that even if the intended appeal were to succeed any consequent losses upon the applicants are capable of being quantified and are assessable. Accordingly, we reject and dismiss this application. We order the costs of this application to be in the intended appeal. We however decline to grant the draconian order requested by *Dr. Kuria* that the applicants be stopped from making any further applications.

***Dated and delivered at NAIROBI this 13<sup>th</sup> day of June, 2008.***

***E.O. O’KUBASU***

.....

***JUDGE OF APPEAL***

***J.W. ONYANGO OTIENO***

.....

***JUDGE OF APPEAL***

***D.K.S. AGANYANYA***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**