REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPLI 273 OF 2007 (UR.165/2007)

1. THE HON. PETER ANYANG'NYONG'O

2. THE HON. JAMES OMINGO MAGARA

3. THE HON. MWANDAWIRO MGHANGA …….. APPLICANTS

AND

1. THE MINISTER FOR FINANCE

2. SAFARICOM LTD. ……. RESPONDENTS

(An application for stay pending the hearing and determination of an intended appeal from the ruling and order of the High court of Kenya

Nairobi (Nyamu J) dated 3rd October, 2007

in

H.C. MISC. A. NO. 326 OF 1998)

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RULING OF THE COURT

This is a preliminary objection by *Safaricom Ltd.* (Safaricom), the 2nd respondent herein, to the notice of motion dated 31st October, 2007 brought by the three applicants under *Rule 5 (2) (b)* of the Court of Appeal Rules. The said notice of motion seeks a stay of the decision of the *Minister for Finance* (1st respondent), to acquire through the Permanent Secretary to the Treasury and thereafter offer to the public 25% of Safaricom Limited shares through Initial Public Offer pending the hearing and determination of the applicant's intended appeal against the ruling of Nyamu, J. dated 3rd October, 2007.

It is expedient to set out briefly the nature of the proceedings which were before the superior court and the decision of the superior court thereof before we consider the preliminary objection.

On 25th September, 2007 the three applicants who were members of Parliament filed an application for leave to apply for orders of certiorari to quash the decision of the Government of Kenya through the Ministry of Finance to offer to the public 25% of Safaricom shares through

Initial Public Offer on the Nairobi Stock Exchange; an order of mandamus requiring the Minister of Finance to forthwith appoint the date of coming to force of the Privatization Act, Act No. 2 of 2005; and two orders of prohibition, firstly to prohibit the Government from offering to the public for sale the 25% Safaricom shares at all or until the Privatization Act, Act No. 2 of 2005 had come into force, and secondly, an order of prohibition, prohibiting the Government from proceeding any further with the announced programme for divestiture of public corporations and or shares until the Privatization Act, Act No. 2 of 2005 has come into force. The applicants sought a further consequential order that:

"… ***the grant of leave do operate as a stay of the proceedings in question i.e. the continuation of the process to offer to the public 25% of Safaricom Limited shares through an initial public offer on Nairobi Stock Exchange either as announced or at all pending the hearing and determination of the judicial review proceedings herein".***

The application for leave was supported by wide ranging grounds contained in the statement and in the verifying affidavit of Hon. Peter Anyang' Nyong'o, the main grounds seemingly being the unconstitutionality and illegality of the impugned decision. Hon. Peter Anyang' Nyong'o deposes in the verifying affidavit, *inter alia*, that on 10th August, 2005, Parliament passed the Privatization Act, Act No. 2 of 2005 (Act) which received Presidential Assent on 13th October, 2005, that the commencement date of the Act was to be by a Notice; that the Minister for Finance has failed to publish the requisite commencement notice; that on 23rd August, 2007 the Speaker of the National Assembly in response to palpable public anxiety directed the Minister to operationalise the Act; that the Minister in contempt of the Speaker's directive has failed to issue the commencement notice with the result that the Privatization Commission under the Act has not been appointed; that in the 2007/2008 Budget, the Government allocated Shs.38 billion to the Ministry of Finance to buy the stake of Safaricom held by Telkom Kenya Ltd; that the Government expected to raise Shs.38 billion through floatation of Safaricom shares which would go along way in reducing the Kshs.100.9 billion budgetary deficit; that the Minister has proceeded to put in place measures towards floatation of 25% of the Safaricom shares held by Telkom through an initial public offer on the Nairobi Stock Exchange; that the sale of Safaricom shares is under the aegis of the Investment Secretary which is an office under the control of the Minister and therefore the process of divestiture is effectively under the control of the Minister of Finance as opposed to the relatively independent Privatization Commission created under the Act and that the decision of the Minister contravenes section 30 of the Constitution and therefore undermines the legislative authority and the supremacy of Parliament.

The superior court considered the application and made findings, inter alia, that although the Privatization Act was not operational, Safaricom is not a public entity but a corporate body and thus the sale of its shares are outside the Act; that a prima facie case for the grant of orders for certiorari was not established because the sale of the shares was being done lawfully under the existing law, that is, the Constitution; The Permanent Secretary to the Treasury (Incorporation) Act – Cap 101; the Companies Act; the Capital Markets Act and the Procurement of Assets Disposal Act, 2005; that a case for the grant of the orders of certiorari, mandamus and prohibition had not, prima facie, been established because Telkom Kenya Ltd, the owners of the shares and the Permanent Secretary to the Treasury – a corporate body which had power to buy and sell shares, had not been joined in the proceedings.

The superior court ultimately concluded:

"***On the basis of the above, I find no arguable points of law apparent on the face of the pleadings. I find that the court is entitled to refuse to grant leave to institute judicial review proceedings. Any leave would in my finding be of nuisance value in the face of the above even at this stage".***

On the question of leave operating as a stay of proceedings, the court ruled in effect that even if it was wrong on the issue of leave (that is to say, even if it had granted leave) it would

not have granted a stay for several reasons, including, the inordinate delay in bringing the application having regard to the fact that the Privatization Act was assented to on 13th October, 2005 – 2 years before the application was filed; and to the fact that, third parties have in the meantime acquired interest including contractual rights.

The applicants being aggrieved by the decision of the superior court filed a Notice of Appeal on 4th October, 2007 and proceeded to file the present application on 31st October, 2007. As stated before, the application is brought under ***Rule 5 (2) (b)*** of the Court of Appeal Rules and seeks an order that:

"***The decision of 1st Respondent to acquire through the Permanent Secretary Treasury and thereafter offer to the public 25% of the Safacom Limited shares out of the shareholding currently held by Telkom Kenya Limited (a 100% Government owned company); through an initial public offer on the Nairobi Stock Exchange under the on-going Privatization programme be stayed pending the hearing and determination of the applicants' intended appeal against the ruling of Justice Nyamu dated 3rd October, 2007".***

Three important events as disclosed in the replying affidavit of Esther Jepkemboi Koimett – Investment Secretary, Ministry of Finance have happened since the decision of the superior court. Firstly, on 8th November, 2007, the Government entered into an agreement with Telkom Kenya Ltd. for transfer of its shares in Safaricom in consideration of payment of specified various large sums of money (about 40 billion) most of which, according to the replying affidavit, have been paid. Secondly, by a Legal Notice No. 397 dated 4th December, 2007 the Minister for Finance appointed 1st January, 2008 as the day on which the Privatization Act shall come into operation, and, thirdly, by Gazette Notice No. 11882 of 4th December, 2007, the Minister for Finance appointed seven members of the Privatization Commission for a period of three years with effect from 2nd January, 2008.

When the application came for hearing, Prof. Githu Muigai, learned counsel for the 2nd respondent sought leave to raise a preliminary objection to the application on the grounds contained in the notice of preliminary objection served on the applicants' advocates and on the 1st respondents earlier, which leave was duly granted. There are four grounds in the notice of preliminary objection but only the 1st and 2nd grounds were argued. The two grounds are that:

"***1. The orders sought both in the application and in the intended appeal have been overtaken by events following the operationalization of the Privatization Act, 2005.***

2. The substantive order sought by the applicants in the application, namely, for an order of stay in terms of prayers 3 of the application is incapable of being granted by this Honourable Court as the same seeks the stay of a "decision", and not of any ongoing positive process or action of the respondents. The alleged decision having already been made, there can be no stay or injunction against the decision".

The 1st and 2nd respondents are relying on the new evidence contained in the replying affidavit of Esther Jepkemboi Koimett, in support of the first preliminary objection. It has been submitted by both Prof. Githu Muigai and Ms. Muthoni Kimani, learned Ag. Solicitor General for the 1st respondent, that, in view of the changed circumstances, the substratum of the intended judicial review application is gone. Mr. Katwa Kigen, learned counsel for the applicants opposed this ground of preliminary objection and submitted that the issue of transfer of shares are matters of fact which cannot be raised as a preliminary objection.

We respectfully agree with Mr. Kigen. The court is at this stage is dealing with a preliminary objection to the application for stay of the decision to offer to the public the 25% shares of

Safaricom held by Telkom Kenya Ltd. and it is not dealing with the appeal from the impugned decision of Nyamu J. In our view, the new evidence is totally irrelevant to the preliminary objection. The new evidence could however be relevant to the appeal, but even in that case the additional evidence would not be adduced without leave of the Court. Thus, the first preliminary objection is misconceived and we uphold the objection by Mr. Kigen.

In support of the second preliminary objection, Prof. Githu Muigai, submitted that the prayer for stay of the decision is totally unrelated to the order of Nyamu J; that a new case is being pleaded which is radically at variance with the suit filed in the superior court and that the superior court did not order anything to be done which can be stayed. He relied on the case of ***Ndungu Kinyanjui vs. Kibichoi Kugeria Services & Another*** – *Civil Application No. Nai. 79 of 2007* (unreported) where this Court said in part:

"***This Court has repeatedly stated in previous decisions, among them, David Thiongo T/A Welcome General Stores vs. Market Fancy Emporium, Civil Application No. Nai. 47 of 2007 …… that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum there would be nothing arising out of that decision for this Court to enforce or to restrain by injunction".***

The Ag. Solicitor General supported Prof. Githu Muigai's submission and contended that as the decision of the superior court merely dismissed the application for leave and stay there is nothing capable of execution within the purview of ***Rule 5 (2) (b)***.

Mr. Katwa Kigen on his part, submitted that this Court has original jurisdiction under ***Rule 5 (2) (b)*** and hence has jurisdiction to stay the process of the offer of the 25% shares of Safaricom and that the applicants had sought the same stay in the superior court. He distinguished ***Ndirangu Kinyanjui's*** (supra) case from this case on the ground that it related to civil proceedings and not to judicial review proceedings.

The application for stay of the decision of the Minister for Finance is made under ***Rule 5 (2) (b)*** which provides:

"***5 (2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –***

(a) ……

(b) 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 stay of any further proceedings on terms as the court may think just".

It is trite law that this Court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in civil proceedings pending appeal is circumscribed by ***Rule 5 (2) (b)***. It is apparent that under ***Rule 5 (2) (b)*** this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. This Court has consistently construed ***Rule 5 (2) (b)*** to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.

For instance, in ***Western College of Arts and Applied Sciences vs. Oranga***, [1976] KLR 63, the applicant (Weco) had sued the respondent in the superior court to recover money lying in a bank account in the respondents' name which respondents claimed belonged to Sang'alo Institute of Science and Technology. After the superior court dismissed the suit with costs, the applicant filed a Notice of Appeal and applied under ***Rule 5 (1)*** (as it existed then) for a temporary injunction to restrain the respondents from operating the bank account until the

determination of the appeal and a stay of execution. The predecessor of this Court recognized that its jurisdiction to grant an injunction pending appeal must be derived from its power under ***Rule 5 (1)*** and declined to grant an injunction or a stay of execution; Law V.P. said in that case at page 66 paragraph C, D:

"***But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs …… In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction".***

On his part, Mustafa, J.A. said in part at page 67 paragraph B:

"***The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this court has no jurisdiction to entertain it".***

The ***Weco*** case has been followed by this Court even in judicial review proceedings. In ***Mombasa Seaport Duty Free Ltd vs. Kenya Ports Authority*** *– Civil Application No. Nai. 242 of 2006* (unreported), the superior court upheld a preliminary objection to an application for judicial review and as a consequence struck out the judicial review application and discharged the order that the grant of leave do operate as a stay of decision to terminate a lease. The tenant (applicant) after filing a notice of appeal made an application in this Court under ***Rule 5 (2) (b)*** for orders, first, that the order dismissing the suit be stayed and second that an:

"***(b) …… order of stay be issued to prohibit the respondent from terminating the applicant's. lease …… forfeiting the applicant's lease and or interfering in any manner with the applicants possession of the premises".***

This Court relying on ***Weco*** case dismissed the application saying in part:

"***In this case, the superior court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs. The order striking out the application is not capable of execution against the applicant. The applicant does not seek the stay of execution in respect of the order of costs.***

Moreover, the order of stay sought in prayer (b) of the notice of motion is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5 (2) (b). We believe we have no jurisdiction to grant such an order.

The orders sought do not relate to what the superior court decided and we are of the view that we have no jurisdiction to entertain the application".

Again in ***Republic vs. Kenya Wildlife Services & 2 Others***, *Civil Application No. Nai. 12 of 2007* (unreported), the superior court granted an application for leave to apply for judicial review orders but adjourned and later dismissed the application for an order that the leave so granted do operate as stay of the signing or implementation of any contract of lease in dispute pending the hearing and determination of judicial review proceedings. The aggrieved party, Tourism Promotions Services Ltd. filed a notice of appeal and application in this court under ***Rule 5 (2) (b)*** for an order of injunction to restrain Kenya Wildlife Services from signing any lease of the disputed property pending the determination of the intended appeal from the ruling of the superior court. This Court again relying on ***Weco*** case said in part:

"***The superior court has not therefore ordered any of the parties to do anything or refrain***

from doing anything. There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court".

Lastly, in ***David Thiongo t/a Welcome General Stores vs. Market Fancy Emporium*** – Civil Application No. Nai. 47 of 2007 (unreported) this Court in effect held that the jurisdiction conferred by ***Rule 5 (2) (b)*** can only relate to the decision of the superior court appealed from and dismissed an application to stay the decision of a subordinate court which was under appeal in the superior court and which was not, and, could not, be under an appeal in this Court.

In the instant case, the decision of the Minister for Finance to acquire and offer for sale 25% of shares of Safaricom which this Court is asked to stay was not made by the superior court. Rather, as Esther Jepkemoi Koimett discloses in the replying affidavit, it was a policy decision made by the Cabinet. Whilst, we appreciate that the decision was the subject matter of the application in the superior court, that the grant of leave do operate as stay and that the decision could have been the subject matter of the judicial review application had the superior court granted leave to the applicant to apply for judicial review, nevertheless, that decision was not made by the superior court and is not the subject matter of the intended appeal. Needless to say, the subject matter of the intended appeal is the decision of the superior court dated 3rd October, 2007 dismissing the application for leave to apply for judicial review orders and rejecting the application that the grant of leave do operate as stay of the decision. The applicant does not seek any of the three interim reliefs specified in ***Rule 5 (2) (b)*** – that is to say, stay of execution, injunction or stay of further proceedings in relation to the decision of the superior court. Indeed, the order sought is a general order which the superior court in exercise of its original jurisdiction can lawfully make after granting leave to apply for judicial review. However, ***Rule 5 (2) (b)*** does not confer on this Court jurisdiction to grant such a general order.

On analysis of the authorities, it is clear that this Court has no jurisdiction to grant the orders sought for two reasons, first, that the order sought is extraneous to the decision of the superior court as the superior court did not order the acquisition and offer for sale of 25% of the shares of Safaricom by the Minister for Finance, and, secondly, the order sought is not of the species specified in ***Rule 5 (2) (b)***.

Finally, we must confess that there is another relevant matter which has troubled us and which was not raised in this application – that is, whether this Court has jurisdiction to grant any interim orders under ***Rule 5 (2) (b)*** relating to judicial review proceedings where leave to apply for judicial review proceedings has not been granted by the superior court. Judicial review proceedings for orders of certiorari, prohibition, mandamus are not like the ordinary litigation. They can only be instituted by virtue of ***section 9 (1) (b)*** of the Law Reform Act and ***order LIII Rule 1 (1)*** *Civil procedure Rules* (CPR), with the leave of the Court. By ***Order LIII Rule (1) (4)*** CPR the superior court has discretion to direct that the grant of leave shall operate as a stay of proceedings in question until the determination of the application for judicial review or until the court orders otherwise. In the present case, the superior court declined to grant leave and stay of proceedings. By the notice of appeal which is the basis of the present application, the applicant intends to appeal against the refusal to grant leave and stay.

It is apparent from ***Order LIII***. ***Rule 1 (1)*** and ***1 (4)*** CPR that the jurisdiction of the superior court to grant an order of stay of proceedings is dependent on the court having first granted leave to apply for either an order of prohibition or certiorari. Since the superior court did not grant leave the applicant is by the present application indirectly asking this Court to grant an order which the superior court could not have lawfully granted in the absence of leave. Moreover, the statutory requirement that a judicial review application cannot be made unless leave has first been granted means that before the leave is granted a judicial review application

is not maintainable in law.

We appreciate that we have not been addressed on the question we have posed and it would be presumptuous and prejudicial to the applicants to make a final finding on the legal issue without the benefit of full arguments. But having regard to the fact that leave of the Court which is a statutory prerequisite for the institution of a judicial review application has not been granted and the fact that the appeal against the refusal to grant leave is pending in this Court, we express serious doubt whether we have jurisdiction, before the appeal against refusal of leave is allowed, to grant the order sought which even the superior court has no jurisdiction to grant.

For the foregoing reasons, we uphold the preliminary objection and accordingly strike out the notice of motion dated 31st October, 2007 with costs to the respondents.

Dated and delivered at Nairobi this 20th day of December, 2007.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR