



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 39 OF 2006

UMOJA SERVICE STATION LTD 1ST APPLICANT
PETER GAKONYO NDIRITU 2ND APPLICANT
NAFTALI W. NJOROGE 3RD APPLICANT
JOYCE M. GAKUGI 4TH APPLICANT
SAMUEL A. KAMONJO 5TH APPLICANT
PETER N. MUTHOGA 6TH APPLICANT

AND

HEZY JOHN LTD..... 1ST RESPONDENT
ANTHONY WAGURA IKIKI 2ND RESPONDENT
SAMUEL GICHUKI KINGORI 3RD RESPONDENT
DOUGLAS KINGORI MUTHUA 4TH RESPONDENT
PETER GICHOHI GITAU 5TH RESPONDENT

(An application for stay and injunction pending the hearing and determination of an intended appeal from the High Court of Kenya at Nyeri against the orders of (Okwengu, J.), dated 23rd January, 2006

in

H.C.C.C. NO.79 OF 2005)

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules. It is brought by Umoja Service Station Limited, Peter Gakonyo Ndiritu, Naftali W. Njoroge, Joyce M. Gakugi, Samuel A. Kamonjo and Peter N. Muthoga. Hezy John Limited, Anthony Wagura Ikiki, Samuel Gichuhi Kingori, Douglas

Kingori Muthua and Peter Gichohi Gitau are named the respondents in the application.

The jurisdiction of the court in an application of this nature is discretionary, which discretion should be exercised judicially. An applicant is obligated to show that his appeal or intended appeal is arguable, and that unless he is granted the orders he seeks the appeal or intended appeal, if successful, will be rendered nugatory. These principles are now well settled.

Apart from Umoja Service Station Limited, which is a Limited Liability Company, all the applicants and all the respondents are either shareholders or legal representatives of shareholders of Umoja Service Station Limited. The dispute between the two groups relates to the question as to who are the proper and lawfully elected directors of the said company.

The dispute between the parties started when a notice dated 10th June 2005 signed by Mrs. Edith Wangari Gitata, Mr. Kiiru Gachuiga, Mr. Peter Kingori Njuri and Mrs Wangechi Kingori was served on Umoja Service Station Limited requisitioning for a General Meeting of the shareholders of that company. A further notice by the same people, dated 10th August 2005, requisitioned for a special general meeting for 3rd September, 2005. The applicants aver that these notices were irregular, null and void in law and contravened the company's Articles of Association. However, that notwithstanding, the respondents aver that the applicants attended the meetings and participated in the deliberations of the same.

Among the matters which were transacted in the meeting was the voting out and replacement of the then directors of the company. The 2nd to 6th applicants aver in an affidavit in support of this motion, that they were the sitting directors and that the respondents purported, through the two meetings, to remove and replace them as directors.

By a plaint dated and filed in the High Court at Nyeri, on 20th September 2005, naming all the respondents as defendants the applicants prayed for judgment against the respondents jointly and severally for firstly, an injunction restraining the respondents from interfering with the 1st applicant's operations and, secondly, a declaration that the meeting in which a decision was made to replace the 2nd to 6th applicants as directors of the 1st applicant were null and void, ab initio. Filed with the plaint was a chamber summons of the same date as the plaint in which the applicant prayed for the same orders as in the plaint.

The applicant's case in the High Court was, firstly, that the notices requisitioning for the meetings were signed by people who did not hold at least one tenth of the shares of the 1st applicant. Secondly, that among those people who signed the notices were two individuals who did not hold shares in the company and who purported to act as legal representatives of two shareholders without being validly appointed as such. In effect the applicants' complaint on this score was that these two were mere busy bodies. But it later transpired that the two persons indeed had letters of administration appointing them as administrators of the estates of the respective shareholders they were representing. Besides, the 2nd to 6th applicants allegedly attended the requisitioned meetings and took part in deliberations therein.

The Chamber Summons dated 19th September, 2005, was heard by Hannah Okwengu J. who after hearing counsel for both sides declined to exercise her discretion in favour of the applicants and dismissed their application in a ruling delivered on 23rd January, 2006. In that ruling the learned Judge held inter alia, that orders the applicants were seeking in their application were of a final nature, that the action they wanted prevented had already taken place as the respondents had already been registered by the Registrar of Companies as directors of the first applicant, and that the applicants had not satisfied her that they stood to suffer substantial loss which could not be adequately compensated by an award of damages.

The applicants were aggrieved and intend to lodge an appeal to this Court against that decision. In the meantime they brought the present application praying, principally, for two orders:

- i. That the dismissal order against their injunction application dated 19th September, 2005 be stayed

pending the hearing and determination of their intended appeal.

ii. That an injunction issue against the respondents restraining them individually and corporately from "interfering, managing and/or assuming office as directors of the 1st applicant company, Umoja Service Station Ltd on the strength of the court order issued on 23rd January, 2006 declaring the respondent as validly elected directors or any other basis"

Mr. Mugambi Njagi, counsel for the applicants, quite properly conceded that it was futile to pursue the first prayer. Grant of the prayer would not in any way advance the applicants' cause.

As for the second prayer, on the assumption that the applicants have an arguable appeal, we do not think, that if they do not get the orders they are seeking and their appeal were eventually to succeed it would be rendered nugatory. There is no impediment to the applicants reverting to their former positions as directors. We appreciate that in the meantime they would lose directors remuneration, and that they would not be managing the 1st applicant company. However, in absence of any evidence that the respondents are mismanaging the company; even if such evidence existed, it has not demonstrated the presence of the respondents is likely to lead to such loss as will not be compensatable by an award of damages. In our view the applicants' intended appeal, if successful will not be rendered nugatory.

In the circumstances the Notice of Motion dated 9th February, 2006 fails and is dismissed with costs.

Dated and delivered at Nairobi this 24th day of March, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.