



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 72 of 2006**

EAST AFRICAN SAFARI AIR LIMITED APPLICANT

AND

ANTHONY AMBAKA KEGODE1ST RESPONDENT

ELIZABETH ANNE KEGODE2ND RESPONDENT

(An application for an injunction and stay of proceedings pending the filing, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Mr. Justice Anyara Emukule) dated 2nd March, 2006

in

H.C.C.C. NO. 345 OF 2004)

RULING OF THE COURT

This is an application by *East African Safari Air Ltd. (EASA)* by Notice of Motion dated 14th March 2006 under **rule 5(2)(b)** of the Court of Appeal Rules (the Rules) seeking an order restraining **Anthony Ambaka Kegode** (the first respondent) and his wife **Elizabeth Anne Kegode** (the second respondent) from withdrawing or disposing of any of the sum of monies deposited in their accounts at Charterhouse Bank Limited (Longonot Branch) and Standard Chartered Bank Ltd (Langata and Karen Branches) pending the filing and determination of the intended appeal against the ruling and orders of Emukule J delivered on 2nd March 2006 (the Emukule J. Ruling).

EASA also sought an order staying any further proceedings in the superior court in Milimani HCCC No. 345 pending the filing and determination of the intended appeal against the Emukule J. Ruling.

HCCC No 345 was a suit brought by EASA as plaintiff against the first and second respondents herein as defendants. It was commenced by way of a plaint dated 28th June 2004 in which EASA sought orders for declarations and permanent injunctions against the two respondents herein, declaring *inter alia* that the defendants, held certain monies which they had withdrawn from the EASA's account, and banked into their respective accounts and seeking permanently to restrain the defendants from utilizing or otherwise withdrawing those monies. Simultaneously with the suit, EASA also filed under a certificate of urgency a Chamber Summons dated 28th June 2004 in which it sought, and the superior court granted, temporary orders of injunction restraining the defendants and each of them from withdrawing or disposing of any of the same monies so deposited.

The first respondent herein, faced with the said Chamber Summons dated 28th June 2004, applied by a Notice of Motion filed on 12th July 2004 to strike out both the 28th June 2004 Chamber Summons and the whole suit HCCC No 345.

The ruling by Emukule J. dated 2nd March 2006, which is the subject of the intended appeal, was a ruling in which he allowed with costs the first respondent's said application by Notice of Motion dated 12th July 2004.

Emukule J.'s reasons for this decision were in brief: -

- (a) The appointment of new directors of the EASA could not be done by a Board meeting—only the shareholders in general meeting could do so under the Articles of the Company.**
- (b) The only exception to this was that provided by Article 28 of the articles enabling casual vacancies to be filled by the directors under Article 28.**
- (c) In the learned Judge's view the need for appointment of directors did not fall into the category of filling a casual vacancy.**
- (d) The new directors were therefore invalidly appointed with the result that there was no properly constituted Board of EASA in being at the time to authorise the filing by EASA of either the suit or the Chamber Summons.**
- (e) Even if there had been a quorate EASA board meeting there was no formal board resolution giving that authority.**
- (f) Therefore there was no power in the EASA directors to instruct counsel to act on its behalf.**
- (g) The learned Judge also noted that there was a dispute as to who were the Company Secretaries at the time the debenture dated 5th December 2003 was signed which cast doubt on both the validity of that debenture under which the Receivers and Managers were appointed and on their subsequent purported ratification of the suit and the appointment of the plaintiff's Advocates. The Judge made no findings on these points which in his view would be more properly dealt with in other suits which were pending.**
- (h) With regard to costs of the suit and of the application to strike it out, the learned Judge ordered that the firm of Walker Kontos Advocates should be responsible for the payment of those costs but that Walker Kontos should be indemnified by Adam Craig Ogden, Kiran Chandbhai Patel and Captain Elly Alivale, jointly and severally as they were the authors of the instructions to the said advocates to file suit in the name of EASA.**

At this stage in the litigation, our task is to decide, firstly, whether the intended appeal is arguable or in other words not frivolous and secondly, whether if the stay and injunction sought is not granted and the appeal is ultimately successful the appeal will be likely to have been rendered nugatory. We consider that it is highly probable that if the stay and injunction now sought is not granted, the money that is now frozen in the accounts at Charterhouse Bank Limited (Longonot Branch), Standard Chartered Bank Ltd (Langata & Karen Branches) may well be removed from those accounts and taken out of the jurisdiction of the court. If this happened any success in the appeal against the Emukule J. Ruling will be rendered nugatory.

What is more difficult to decide is whether or not the intended appeal is arguable. After careful consideration of the reasons, summarised above, given by the learned Judge for his refusal to grant the interim injunction and stay sought, we have come to the conclusion that there are issues raised by the applicant, which are arguable and not frivolous. We do not consider we should say more at this stage as to our reasons for this conclusion as we do not wish to influence the bench that will hear the substantive

appeal in due course.

Having come to the above conclusions we allow the application and hereby make the following orders: -

1. ***An injunction is hereby issued restraining Anthony Ambaka Kegode and Elizabeth Ann Kegode, the respondents herein, and each of them whether by themselves or by their servants, agents or otherwise howsoever, from withdrawing or disposing of any of the sums of money deposited in their accounts at Charterhouse Bank Limited (Longonot Branch), Standard Chartered Bank Limited (Langata and Karen Branches) pending the final determination of the intended appeal against the ruling and orders of the Honourable Mr. Justice Anyara Emukule delivered on 2nd March, 2006 Milimani H. C. C. C. No. 345 of 2004.***
2. ***It is hereby ordered that there be a stay of any further proceedings in the superior court in Milimani H. C. C. C. No.345 of 2004 pending the determination of the intended appeal against the ruling and orders of the Honourable Mr. Justice Anyara Emukule delivered on 2nd March, 2006.***
3. ***The costs of and incidental to this application shall be in the intended appeal.***

Dated and delivered at Nairobi this 5th day of May, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR