





223(a), above, for an order staying that suit, and on 15<sup>th</sup> October, 2003 Mwera, J. granted the stay. The respondents did not challenge that order on appeal. Later however, the 3<sup>rd</sup> respondent felt that the winding up cause was a “friendly” one meant to help the applicant. It, therefore, moved the superior court, under **section 3A** of the Civil Procedure Act, and **O.50 rule 1** of the Civil Procedure Rules, for an order vacating Mwera J’s order.

Azangalala J. heard that application, and on 27<sup>th</sup> May 2005, made orders, inter alia, as follows:

**“1. The plaintiff is given 60 days within which it should set in motion proceedings to conclude the winding up cause No.6/2002 at Nyeri High Court.**

**2. In default of (1) above the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to move the court in this case as they deem fit.”**

The 60 days period, above, expired but the winding up cause had not been determined and no motion had been taken out to have the winding up order vacated. The 3<sup>rd</sup> respondent renewed its application for the order of stay of proceedings to be varied or set aside. The application bore the date 7<sup>th</sup> December, 2005. In response to that application the applicant apparently caused one Nahashon Mwititi Mpuko, advocate, to swear an affidavit on 20<sup>th</sup> January, 2006, to the effect that he, as advocate for the petitioner in **Nyeri Winding-Up Cause No.6 of 2002**, had taken steps to set down the cause for hearing. In support thereof, he annexed some letters and copies of hearing notices purportedly issued and served for the hearing of the winding up cause; but these were challenged by the respondents as not being genuine.

Azangalala, J. heard the application and allowed it on 16<sup>th</sup> February, 2006, vacated Mwera, J’s order and that provoked this application and the intended appeal. As we stated earlier, Mwera J’s order was made on 15<sup>th</sup> October, 2003. The argument raised by the applicant before us is that Azangalala J. lacked the jurisdiction to vacate it, as the winding up order in **Nyeri High Court Winding Up Cause No. 6 of 2002**, is still in force. Whether or not that order is still in force is not in dispute. Mwera J’s order was vacated on the ground that the applicant was indolent in taking any action to vacate it. The respondents argue that because it was in a way beneficial to the applicant, there is no hurry in taking steps to have it vacated.

The power exercisable in an application under **section 223(a)** of the Companies Act, is discretionary. Mwera J. exercised his discretion under that section and granted the applicant an order staying **Nairobi High Court Civil Case No.1475 of 2000**. But suppose it were to be shown either that the applicant is not acting with reasonable dispatch to have the winding up order vacated or to settle whatever debt it was owing which led to the making of the order, is the court helpless with regard to the order staying a suit merely because the winding up order is still in place? Azangalala J. held that the court in exercise of its inherent powers has jurisdiction to order, and he ordered, that the order be vacated. The delay in dealing with the winding up order, is, prima facie, long, and considering the facts and circumstances of this matter we see no arguable point raised by the applicant in support of its intended appeal. We eschew any attempt to say more as the intended appeal is yet to be filed.

Having come to that conclusion regarding the first principle, and in view of what we stated earlier that an applicant must satisfy the two principles for the grant of an order under **rule 5(2)(b)**, of the Rules, we find no necessity of dealing with the second principle, namely the nugatory aspect. Accordingly, we dismiss the application **dated 6<sup>th</sup> July, 2006** with costs.

**Dated and delivered this 27th day of October, 2006.**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**