



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:TUNOI, O’KUBASU & GITHINJI JJ.A)

CIVIL APPLICATION NO. NAI 3 OF 2004

BETWEEN

BOB MORGAN SYSTEMS LTD & ANOTHERAPPLICANTS

AND

JONESRESPONDENT

(Application for stay of execution pending the filing and determination of an intended appeal against the ruling and order of the High Court (Ringera J) dated 30.12.2003

in

Milimani HCCC No 810 of 2003)

RULING

In the application before us the applicants have moved the Court under rule 5(2)(b) of the Court of Appeal Rules for an order that there be a stay of execution of the ruling and orders granted by the High Court of Kenya at Nairobi (Ringera, J) on 30th December, 2003 by which decision the learned judge made ten interim orders the most relevant for the determination of this application being:

1. That the 1st defendant (1st applicant) by itself, agents, servants or otherwise, be and is hereby restrained by temporary injunction from interfering with, altering, terminating, revoking or otherwise howsoever breaching or further breaching the plaintiff’s (respondent’s) position as Managing Director, Shareholder and Director of the 1st defendant (1st applicant) the powers, rights and duties conferred to him as such under the Shareholder Agreement dated 17th May, 2001 and the memorandum and articles of association of the 1st defendant, (1st applicant) including and not limited to the emoluments due to him as director pending determination of this suit and or reference of the matters in dispute to arbitration.

2. The 1st defendant, (1st applicant) by itself, its agents, its servants, or otherwise, be and is hereby restrained by temporary injunction from howsoever breaching or further breaching, altering, interfering with or otherwise contravening to the detriment of the plaintiff (respondent) the Shareholders Agreement between the 1st defendant (1st applicant), 2nd defendant (2nd applicant), Mr Ian Martyn Alderson, Bob Morgan Services Limited and the plaintiff (respondent) dated 17th May, 2001, and the Memorandum and Articles of Association of the 1st defendant (1st respondent) pending determination of this suit and or reference of the matters in dispute to arbitration.

3. That the *status quo* prior to 26th November, 2003 be maintained by all parties pending determination of this suit and or reference of the matters in dispute to arbitration.

4. That the defendants (applicants) do forthwith cause to be taken out and published a conspicuous advertisement in the Daily Nation Newspapers retracting the 1st defendant's "Public Notice" advertisement of 3rd December 2003 in the Daily Nation Newspaper concerning the plaintiff (respondent) together with an apology to the plaintiff (respondent) for the error and damage caused to him, and a categorical statement that the plaintiff (respondent) remains managing director, Shareholder and Director the 1st defendant (1st applicant) pending determination of this suit or reference of the matters in dispute to arbitration.

5. That the 1st defendant (1st applicant) acting by itself, servants, agents or otherwise do forthwith reinstate the plaintiff (respondent) as managing director of the 1st defendant (1st applicant) pending determination of this suit or reference of the matters in dispute to arbitration. Mr Ngala for the applicants has submitted before us that the mandatory injunctions issued by the learned judge were granted *ex tempore* and erroneously without going through all the pleadings, annexures and submissions made before him. Further, Mr Ngala urged that the learned judge had completely misapprehended the nature of the applicant's case, especially in not realizing that the shareholders' agreement was inoperative and that he ought to have appreciated that as a managing director, the respondent was only entitled to emoluments, which could be quantified and paid, and as such it could not have resulted into irreparable loss. Mr Ngala, therefore, concluded, the applicants' intended appeal was not frivolous, but, indeed arguable.

The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.

The record shows that the dispute between the parties, is, indeed, acrimonious and sometimes emotional and appears escalating to the point of threatening the very existence of the company itself. However, we are relieved that the learned judge of the Superior Court was quite alive to the threat the company is having and probably that is why he made the orders that he did.

No doubt, and we agree with Mr Ngala, that the orders made by the learned judge have given rise to serious issues to be canvassed in the intended appeal and we are prepared to hold, without deciding, that the intended appeal has weighty issues for consideration. However, we do not think that the result of the appeal, if successful, will necessarily be rendered nugatory unless stay is granted.

Moreover, it has been stated to us from the bar that the respondent has been reinstated as Managing Director and has been given access to the premises and offices of the applicants. We think that it is not in the best interests of the 1st applicant to have constant interruptions in its management. After all should the appeal succeed it would not be difficult to evict the respondent therefrom.

In the result, we are satisfied that there is no merit in the application which we hereby order that it be hereby dismissed with costs.

Dated and Delivered at Nairobi this 12th day of March 2004.

P.K.TUNOI

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JUDGE OF APPEAL

E.O.O'KUBASU

.....

JUDGE OF APPEAL

E.M.GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR