



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 361 OF 2002

MUNGAI MUCHIRI

TITUS GATITU NJAU

WITHANJE GITHAIGA

JAMES MUNGAI THINDIU..... APPLICANTS

AND

THELUJI DRY CLEANERS LIMITED..... RESPONDENT

(Application for stay from a Ruling of the High Court of Kenya Eldoret (Etyang J.)

dated 3rd December, 2002 In H.C.C.C. NO. 169 OF 2002)

RULING OF THE COURT

This application by way of notice of motion dated 11th December, 2002 is seeking five orders which are that:-

1. The order of 3rd December 2002 by Mr. Justice A.G.A. Etyang in Eldoret H.C.C.C. No. 169 of 2002 be stayed pending the hearing and determination of the intended appeal.
2. That Isaac Karugu Njenga, Joseph Mburu Mwangi, Christopher Komu Mungai, Nganga Kinuthia Mirie, James Wangewa, James Gitau Githinji and Willie Ndungu Muiru (hereinafter referred as "New Directors of the Respondent") be restrained from managing, running and or acting as directors of the Respondent pending the hearing and determination of the intended appeal.
3. That the Applicants do continue acting as directors of the Respondent pending the determination of the intended appeal.
4. That there be an order of stay of further or other proceedings in Eldoret H.C.C.C. No. 169 of 2002 pending the determination of the intended appeal."

The application is brought under Rule 5(2) (b) of the Court of Appeal rules which states as follows:-

"The Court may 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 a stay of any further proceedings on such terms as the court may think just."

The facts of this case which have given rise to this application are lengthy but as we are of the view that the same facts are necessary for the fair and proper decision of this application, we feel it necessary to give brief aspects of the same in this ruling.

The Respondent, Theluji Dry Cleaners Limited, is a duly registered limited liability company. From the pleadings and what we can gather from the affidavits, it operates mainly in Eldoret area. The Applicants in this application were, prior to 26th September, 2002, the Directors of the respondent company. Vide a letter dated 4th September 2002 addressed to the Directors of the respondent company, by Senior Assistant Registrar General, the Registrar General, reacting on a complaint received from some of the shareholders of the respondent company, and noticing from his records that no annual returns had been filed by the company since 1997, gave the respondent company a notice under section 131 of the Companies Act to hold its annual general meeting within 42 days of the date of that letter i.e. 4th September, 2002 failing which the Registrar General would institute legal proceedings against the respondent company. Acting on that letter, one Willie Ndungu Muiru the secretary to the Respondent issued notice of the annual general meeting which was to take place on 26th September 2002 at 10.00 a.m. Upon receipt of the same notice, a suit was filed in the superior court being H.C.C.C. No. 159 of 2002 in the name of the company as the plaintiff and the same Willie Ndungu Muiru as the defendant. Together with the plaint in that suit, there was also filed an affidavit under certificate of urgency in which the plaintiff sought injunction orders to restrain the shareholders from holding the annual general meeting which was then scheduled for 26th September, 2002. That application was placed before the superior court for its orders as to whether it would be certified as urgent or not. The superior court declined to certify it urgent and gave reasons for the same decision. That ruling was dated 24th September, 2002. That plaint, it must be observed, was filed by Theluji Dry Cleaners Limited of which the directors were at that time the present applicants. On the same day 24th September 2002, the plaintiff in that case H.C.C.C. No. 159 of 2002 Theluji Dry Cleaners Limited, apparently prepared a notice of withdrawal of the suit in which it was stated that that suit was withdrawn in its entirety. From the record of the application, it appears that that notice was filed on 1st October, 2002 as is evidenced by the court's stamp in the same notice of withdrawal. On the same day 24th September 2002, Theluji Dry Cleaners Limited then filed Civil Suit No.980 of 2002 at the Chief Magistrate's Court at Eldoret. In that suit it stated that there was no suit pending and that there had been no previous proceedings in any court between the plaintiff and the defendant over the same cause of action. That was clearly not true as the High Court suit No. 159 of 2002 we have referred to hereinabove was between the same parties as the one in the Chief Magistrate's Court and the suits were on the same subject matter. Be that as it may, that suit was also accompanied with chamber summons under certificate of urgency which sought, *inter alia*, interim injunction orders before inter-partes hearing. The application was granted and interim injunction orders were granted and inter-partes hearing was fixed for 8th October, 2002. The respondent in this application before us appeared before the Principal Magistrate on 26th September 2002 seeking to set aside the same ex-parte orders but the Magistrate rejected that application and ordered that it be heard inter partes on 30th September, 2002. That in effect meant that the Magistrate's orders of interim injunction were still alive as on 26th September, 2002, the date earlier on scheduled for the meeting of the company's shareholders. Whether the learned Magistrate had jurisdiction to hear and determine the matter or not in view of the definition of the word "court" in section 2 of the Companies Act Chapter 486 Laws of Kenya is as yet not for us to decide. It is equally not as yet for us to decide whether ignoring the same order would be proper in law or not. It is enough for purposes of this application to observe that as on 26th September 2002 there was an order by a court of law restraining the attendance of the meeting which was convened by Willie Ndungu Muiru to be held on the same day. It is not easy to tell what happened on the same day as there is conflicting evidence with the applicants stating that no meeting took place at the venue advertised that day whereas the respondents maintain that a meeting for the company's shareholders was held and the new directors namely Isaac Karugu Njenga, Christopher Komu Mungai, Ng'ang'a Kinuthia Mirie, James Wangewa, Joseph Gitau Githinji and Willie Ndungu Muiru were elected at that meeting. Whatever happened, the new directors as named hereinabove took over the management of the company. The

present applicants who were ousted from the leadership of the company through that alleged election, and being aggrieved by the new directors taking over the offices of the company filed another suit, Civil suit No. 1236 of 2002 dated 5th March, 2002 in which they sought permanent injunction against the new directors; a declaration that the same new directors' acts were illegal, null and void and they were not the lawful directors of the company, Theluji Dry Cleaners Limited, which was named as the first plaintiff in the suit. Together with that, a chamber summons seeking injunction was also filed. The same injunction was granted by the Principal Magistrate. On 6th November, 2002, the company, now having new directors namely Karugu Njenga, Christopher Komu Mungai, Nganga Kinuthia Mirie, James Wangewa, Joseph Gitau Githinji and Willie Ndungu Muiro (to whom we shall refer to as New Directors) filed H.C.C.C. No. 169 of 2002 at Eldoret against the applicants. Together with that suit, chambers summons was also filed under certificate of urgency. That application came up for hearing before Etyang J. on the 14th November 2002 and on 15th November 2002.

The ruling was reserved to be delivered on 3rd December, 2002. He further ordered that the management of the company was to be in the hands of the new directors pending the delivery of the ruling on 3rd December 2002. He also stayed the restraining orders issued in Chief Magistrate's Civil case No. 1236 of 2002 till 3rd December 2002. On 3rd December, 2002, the Judge delivered his ruling in which he made orders striking out CMCC 980 of 2002, and CMCC 1236 of 2002. He also granted prayer 2 of the chamber summons dated 6th November, 2002. That was the prayer which sought temporary injunction restraining the applicants from interfering with the day to day running of the affairs of the company by new directors pending the hearing and determination of the suit. He further ordered the company to pay costs and the firm of Nyairo & Co. Advocates to pay costs of the two cases filed in the Chief Magistrates Court. He ordered the ruling to be typed and served upon the Principal Magistrate personally. These are the orders that the applicants are by this notice of motion before us seeking to stay and as is stated above they also want to restrain the new directors from managing, running and/or acting as directors of the company Theluji Dry Cleaners Limited. They also seek other orders as appear hereinabove. However, during the hearing of the notice of motion, a new fact was revealed. This was that on 27th November 2003, one year from the time the new directors now being challenged were elected, the company, in compliance with its Articles of Association held a meeting in which directors were elected. Some of the directors elected on 26th September, 2002 offered themselves for election and were duly elected whereas others were new faces. Those directors elected on 27th November 2003 are the ones now running the company and not the ones elected at the controversial elections on 26th September, 2002. Even those elected on 26th September, 2002 who were re-elected on 27th November 2003 are now running the company on their new status gained from the election of 27th November 2003. This statement was not disputed by any party to the matter before us.

The brief facts narrated above do demonstrate, in our minds, that the appeal against the decision of the superior court, in so far as it is challenging the basis on which the superior court did strike out the two suits filed in the sub-ordinate courts (even though these courts may very well have had no jurisdiction over the matters that were brought before them) cannot be said to be frivolous. Further, though the learned Judge of the superior court may have felt that the applicants who were the respondents before him did not go to the subordinate court in respect of the two suits in that court with clean hands and that the learned Judge may have felt the applicants did not deserve to retain what they obtained from the subordinate court, through what he felt was close to dishonesty in failing to disclose in those complaints that HCCC No. 159 had been filed in the High Court, nonetheless, we feel that it is an arguable point as to whether the learned Judge did consider all the principles for granting prohibitory temporary injunction. Thus in our view, the appeal is arguable. We are stopped by a court order. When reminded that after that election, another election took place on 27.11.2003 which has not been challenged and the present directors running the company are not the new directors he is complaining about, his reaction was that as the present directors took over from new directors who were illegally in office, they too are illegally in the office and do not deserve to be there. In our mind Mr. Katwa may have had in mind what Bosire J., as he then was, said in the case of Belle Maison Ltd. vs Yaya Towers Ltd. HCCC No.2225 of 1992 where the learned Judge held that an unlawful eviction does not create a basis of any claim of right to a lessor and that should a lesser in such a position purport to install a new tenant in place of the one evicted, such

new tenant cannot benefit from illegality. Other than these arguments, we were not addressed on any other aspects that would show that the results of appeal would be rendered nugatory.

We have anxiously considered these arguments. In our view the situation before us in this case is clearly distinguishable from the two situations in the two cases we have referred to hereinabove. In this case, the position is clearly that the new directors whom the applicants want restrained and removed from their positions are no longer enjoying the same positions of directors on the basis of the alleged offending elections of 26th September, 2002. Those of them who are still there as directors are there on account of their new status conferred upon them by the elections of 27th November 2003 which elections have not been challenged and are thus valid. Those who allegedly enjoyed positions of directors through the disputed election of 26th September 2002 are not directors any more. To grant the orders prayed for in this application, people who were elected on 27th November 2003 are the ones who will be affected. Some of them are not before us in this case and so it would in effect mean condemning them unheard. That would have been possible under the authority of the case of Belle Maison Ltd. vs Yaya Towers Ltd. (supra) (which is only of persuasive effect on us) if it was demonstrated that the present directors elected on 27th November 2003 were put in their positions as directors by the new directors elected on 26th September 2002. That is not the case here as the present directors were elected by the shareholders who might have included the new directors elected on 26th September 2002, but were by no means elected only by the same new directors. In short, it has not been demonstrated that they were beneficiaries of the wrong doing, if there was any wrong doing by the new directors allegedly elected on 26th September 2002. The case here is that the present directors were elected by the shareholders.

In our humble opinion, we cannot see how the results of the appeal, if favourable to the applicants would be rendered nugatory as what we have stated above will show that the application has been overtaken by events as the present directors were elected later and their election has not been challenged. Further they are not before us as parties and it has not been demonstrated that they are beneficiaries of any wrong doing.

The upshot of this entire claim is that we decline to grant this application. It is dismissed with costs to the respondents.

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

R.S.C. OMOLO

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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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AG. JUDGE OF APPEAL