



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & O'KUBASU, J.J.A.

CIVIL APPLICATION NO. NAI. 41 OF 2002

BETWEEN

GEORGE KIHARA MBIYUAPPLICANT

AND

SIFA INTERNATIONAL LTD1ST RESPONDENT

KOINANGE INVESTMENT AND DEVELOPMENT LTD2ND RESPONDENT

RITH DAMARIS WAMBUI MBIYU3RD RESPONDENT

DAVID NJUNU MBIYU4TH RESPONDENT

MARGARET NJERI MBIYU5TH RESPONDENT

EDDAH WANJIRU MBIYU6TH RESPONDENT

(An application for injunction in an intended appeal

from the ruling and order of the High Court of Kenya

at Nairobi (Mr. Justice Rimita) dated 26th February,

2002

in

H.C.C.C. NO. 215 OF 2002)

RULING OF THE COURT

George Kihara Mbiyu (the applicant) brings this application under **rule 5(2)(b)** of the Court of Appeal Rules asking for a stay of the ruling and orders of Rimita J given on 26th February, 2002, and an injunction restraining the named respondents, their servants and agents, from entering the Car Park on Plot L.R. No. 209/9099 City Hall Way, Nairobi (the Car Park) or interfering with the applicant's management of the facility.

In his affidavit in support of the application dated 27th February, 2002 the applicant claims to be the court appointed manager of the urban properties of the estate of Mbiyu Koinange (the deceased) vide an order made by the superior court on 22nd March, 1999 in ***H.C. Succession Cause No. 527 of 1981***. By that order he says he was appointed as agent of the administrators to manage the urban properties and in paragraphs 3 and 4 he deponed:-

"(3) That the Car Park on L.R. No. 209/9099 City Hall Way has always been regarded as a prime asset of the estate of Koinange and indeed the High Court has made several orders relating to its management and sale.

(4) That to prove further that my family regards the Car Park as its asset the family appointed M/s Eberplan Consultants as manager before I took over the management thereof in 1999."

The Car Park is owned by a limited liability company called Koinange Investment and Development Company Limited in which the deceased was a majority shareholder (75%), the rest of the shares being held by a Mr Madatally Manji.

Koinange Investment and Development Company Limited, the second respondent, filed a suit against the applicant on 6th February, 2002 (H.C.C.C. No.215 of 2002). It is averred in the plaint that the second respondent is the proprietor and owner of the Car Park; that the applicant was running the business of motor vehicle parking on the second respondent's property on the basis that he is an agent for the administrators of the estate of the late Mbiyu Koinange. The plaint also states, that the plot does not belong to the estate of Mbiyu Koinange as it is owned by a limited liability company, that is to say, the second respondent, which is entitled to receive the income from the business. It is also alleged that the applicant has misappropriated the income from the business and converted it to his own use, and that the facility was in imminent danger of being sold to defray accumulated rates demanded by the Nairobi City Council which the applicant has failed under/or neglected to pay. The second respondent sought a permanent injunction restraining the applicant, his servants and agents from entering the Car Park or interfering with its management, and an order requiring the applicant to give an account of the money he had collected from the Car Park.

So the second respondent also took out a Chamber Summons under ***Order XXXIX*** of the Civil Procedure Rules for temporary relief pending the hearing and determination of the suit. It was these two applications that were consolidated and heard together by Rimita J culminating in his ruling and order dated 26th February, 2002. The learned Judge rejected the claim by the applicant that the Car Park formed part of the assets of the estate of the late Mbiyu Koinange. He said:-

"I was told that the late Mbiyu Koinange was a major shareholder of Koinange Investments and Development Company Limited. I was not told how the shares which belonged to the late Mbiyu Koinange were dealt with but I notice that certain Koinanges are on the Company's Board of Directors. However, it is enough to state at this stage that since the car park belongs to the company it is not part of the estate of the late Mbiyu Koinange."

The learned Judge held that the applicant's claim was misplaced and dismissed his application. He upheld the claim by the second respondent and allowed its application. It is against that ruling that the applicant intends to appeal and in relation to which he has brought this application. For the applicant to obtain the orders he seeks in this application, he must, first, show that he has an arguable appeal and, secondly, that his appeal, if successful, would be rendered nugatory, unless he is granted a stay.

There is incontrovertible evidence that the Car Park is owned by the second respondent which, as we have already pointed out, is a limited liability company. The applicant does not dispute this but he says that since he was put there by an order of the superior court as the agent of the executors of the estate of the late Mbiyu Koinange, he is entitled to occupy and run the Car Park and keep the true owner out of it. This is the point which the applicant intends to canvass in the appeal and which his counsel, Mr Njiru, says is a substantial point. With respect, we cannot agree with him. Our considered opinion is that there is no arguable appeal and having arrived at that conclusion we do not have to consider the second limb of

the application.

In the result this application fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of July, 2002.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR