



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

PETITION NO. 6 OF 2019

IN THE MATTER OF ARTICLES 10, 23, 31(b), 40(3), 73, 165 AND 258(1)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND INFRINGEMENT OF THE RIGHTS AND FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLE 31(B) AND 40(3) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOHN MBAABU.....1ST PETITIONER

JOHN MUTEMBEI MURATHI.....2ND PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 25th June 2020 brought by Kenya Revenue Authority, the Applicant herein who has invoked the provisions of **Rule 32** of the **Constitution of Kenya** (Protection of Rights and Fundamental Freedom Practice and Procedure Rules, 2013) and all enabling provisions in seeking the following reliefs;

i) That this honourable court do stay orders issued in the judgment dated 17th June 2020 pending the hearing and determination of the intended appeal.

ii) That the court do make any other order that it may deem fit and just in the circumstances.

iii) That costs of this application be provided.

2. The Applicant has relied on the following grounds in seeking the above prayers:-

(i) That this court on 17th June 2020 rendered a Judgment in this matter and found the Excise Duty (Excisable Goods Management System) Regulation 2017 unconstitutional and further directed the Respondent to pay damages to the Petitioners and release to them the motor vehicles unless otherwise lawfully held.

(ii) That the Judgment renders the Respondent's Excise Duty Enforcement Unit, Revenue Protection Service and the inter-illicit Trade Executive Forum and Technical Working Group (commonly referred to as Multi Agency Trade Force) operations in curbing

illicit trade impossible as motor vehicle and other vessel owners play a central role in perpetrating and propelling the dealing in illicit trade.

(iii) That the dislodging of the vessel owners from illicit trade exposes the bodies mandated to curb illicit trade as the owners in most cases cannot be traced.

(iv) That the Judgment affects all the ongoing investigations, prosecutions and other detentions which have been made pursuant Excise Duty (Excisable Goods and Management System) Regulations 2017.

(v) That the Applicant intends to appeal against the Judgment of this court which in its view determined on the constitutionality of a provision when the same was not an issue.

(vi) That the Applicant was denied a chance to be heard on the constitutionality of the impugned provision.

(vii) That the mandate of the Applicant is to implement the law and not to enact and should not have been punished as such.

(viii) That the motor vehicles were held pursuant to the orders of status quo and the orders of this court amount to punishing it for complying with the said orders.

(ix) That the said Applicant intends to prefer an appeal and has lodged a Notice of Appeal dated 22nd June 2020 against the decision of this court.

(x) That the appeal is arguable and unless stay is granted, the intended appeal shall be rendered nugatory.

(xi) That the Applicant stand to suffer irreparable damage unless stay is granted.

(xii) That the personal interest of the petitioners should be subservient to the larger public interest which in its view is that the Applicant is pursuing and that the balance of convenience lies in the orders of stay.

(xiii) That this application has been brought expeditiously without delay.

4. This application is supported by an affidavit sworn on 25th June 2020 by P.C Saumu Barasa where he has largely reiterated the above grounds adding that he is an officer attached to the Applicant serving within Applicant's Revenue protection unit which deals with investigations and preparation of prosecution's file of matters falling under Kenya Revenue Authority Act, Income Tax Act, Value Added Tax Act 2013, Excise Duty Act 2015 and Tax Procedures Act 2015.

5. The deponent further adds that they have already applied for the typed copy of the proceedings for purposes of the intended appeal. He adds that the Applicant would suffer inconveniences unless stay is granted.

6. The Applicant in its written submissions made through G.O Ochieng Advocate contends that the Supreme Court pronounced itself well in the case of *Gitarau Peter Munya -vs- Dickson Kithinji & 2 Others (SC Application No.5 of 2014)* about the factors to be considered in deciding whether to grant stay of execution. The factors highlighted are as follows:-

- a) Whether the appeal or intended appeal is arguable and not frivolous.
- b) Whether the appeal would be rendered nugatory unless stay is granted.
- c) Whether it is in public interest to grant a stay.

7. The Applicant submits that its appeal is arguable as it intends to have the following issues addressed on appeal.

- i) That this court erred in law in finding a provision whose constitutionality was not an issue at the trial.

ii) *That this court suo moto picked a provision and declared it unconstitutional and denied the Applicant the right to be heard.*

iii) *That the Applicant's actions were sanctioned by law but it was punished with order of damages when it was only an implementing agency.*

iv) *That there was no malice on its part.*

8. The Applicant further submits that its intended appeal shall be rendered nugatory in the following ways:-

a) *That the Applicant's Excise Enforcement unit, Revenue protection service and the Inter-illicit Trade Executive Forum and Technical Working Group commonly known as ("Multi Agency Trade Force") will be hampered as it will need to be dissolved and hence the appeal will be of no use as the impugned provision is at the heart of their mandate.*

b) *That the Applicants will not be in a position to curb illicit trade without seizing the vessels as the two are interconnected.*

c) *That the current existing prosecutions and investigations will all need to be closed and rendered illegal.*

d) *That the Applicant will be forced to pay damages to individuals who may not be in a position to re-imburse if the appeal is successful.*

e) *That if the motor vehicles are released they risk being disposed rendering the appeal nugatory. It has relied on the case of Pauline Yabei & Another -vs- Estate of Kiprotich Arap Letting [2017]eKLR to buttress its contention.*

9. The Applicant has urged this court to grant stay to preserve the substratum of the appeal and has relied on the case of Fredrick Otieno Outa -vs- IEBC & Others. (S.C Application No. 10 of 2014.

10. The Applicant contends that this application is brought under Rule 32 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) which in its view does not require Memorandum of Appeal to be attached.

11. It further avers that the Civil Procedure Rules are not applicable herein and that their grounds of Appeal are spelt out in the Supporting Affidavit. It insists that this matter relates to a Constitutional Petition and as provision of security cannot arise.

12. The Applicant maintains that it has tried to reach out to the Respondents particularly John Mbaabu but that the two have been uncooperative to him. It maintains that it has been acting within the law in implementing the impugned regulations.

13. The Respondent has opposed this application through a Replying Affidavit sworn on 26th June 2020 by 1st Respondent, John Mbaabu. He depones that that their motor vehicles have been detained for over a year and that the award given to them in damages is not even commensurate with their sufferings.

14. The Respondents contend that the affidavit in support of this application should be expunged from record as the same in their view is abuse of court process.

15. They insist that refusal to grant stay will not render the intended appeal nugatory even if the appeal succeeds.

16. They fault the Applicant for ignoring the express law concerning stay of execution which is provided under **Order 22 Rule 22** and order **46 Rule 6** of the **Civil Procedure Rules**. The Respondents contend that this application to that extent is defective and that the same is only a ploy to delay their fruits of Judgment and lead them to a further loss of revenue. They aver that the Applicant has not offered any security to mitigate further losses in the event that the appeal is lost.

17. The Respondents submit that they have no other source of income other from the seized motor vehicles.

18. According to the Respondents, the Applicant has not demonstrated or disclosed the substantive loss it would suffer if the stay is not granted. They have relied on the decision of Amal Hauliers Ltd -vs- Abdulnasir Abubakar [2017] eKLR. They have further faulted the Applicant for failing to annex a draft memorandum of appeal to determine if it has an arguable appeal.

19. In their written submissions through Ashford Gerrald Riungu, the Respondents have submitted that Civil Procedure Rules are complementary to **Rule 32** of 'Mutunga Rules' and that the Applicant has not met the threshold for a grant of stay.

20. They submit that an Applicant under the said rules must show to the satisfaction of the court that it will suffer substantial loss. They contend that the Applicant should offer security for due performance of the decree.

21. The Respondent further submit that the seizures of their motor vehicle remain illegal as no one has been charged with any offence in relation to the goods seized.

22. They maintain that declaratory orders are incapable of being stayed and have relied on the decision in the case of Republic -vs- Retirement Benefits Appeals Tribunal Ex Parte Heritage Insurance Co. Ltd [2017] eKLR.

23. This court has considered this application and the grounds upon which the Applicant has sought the above cited reliefs. I have also considered the opposition made by the Respondent.

24. The Applicant herein seeks to stay the judgment delivered in this petition on 17th June 2020. In that decision, this court held that the seizures of Respondents' motor vehicles Reg. No.KCG 482T and KBL 804Y violated the Respondents' right under **Article 25, 31 (b), 47 and 50** of the Constitution of Kenya 2010. It also held that **Regulations 32(b) and 33** of Excise Duty (Excisable Goods Management System) Regulations 2017 were inconsistent with Fair Administrative Act 2015 and the Constitution of Kenya as it provided no chance to the aggrieved parties to be heard and to that extent, the said regulations were unconstitutional. It is quite apparent that contrary to the allegations made on first ground in this application, this court's findings did not render the whole Excise Duty (Excisable Goods Management Systems) Regulations 2017 unconstitutional. The only Regulations impugned by this court were specifically **Regulations 32(b) and 33** which regulations granted arbitrary powers to the commissioner to proceed against the rules of natural justice and contrary to **Article 25 (c)** of the Constitution of Kenya. The question as to whether the parties in this matter raised and/or deliberated on the said regulations during trial or not are matters now beyond the scope of this court because it has rendered itself on the same.

25. The issues arising from this application are;

i) Whether the application herein is defective for not citing Civil Procedure Rules.

ii) Whether the Applicant has met the threshold for a grant of stay.

(i) Whether this application is defective for want of form:

26. This application has been brought under **Rule 32** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 commonly referred to as Mutunga Rules. Rule 32(1) provide as follows:-

"An appeal or second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed." Under

Subsection (2) the Rules states;

" An application for stay of execution may be made informally immediately following the delivery of judgement or ruling and the court may issue such orders as it deems fit and just."

Under the provisions of **Order 42 Rule 6 (1)** Civil Procedure Rule the rule provides as follows:-

" No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order a stay of

execution of such decree or order....."

27. The two cited rules above in my view are complementary and there is no much or significant difference save that the Civil Procedure Rules limits the court's exercise of discretion to only where "*sufficient cause*" is shown. The latitude provide under the **Mutunga Rules (Rule 32)** is wider because the court is given discretion to issue such orders of stay "*as it deems fit and just.*" The **Civil Procedure Rules** under **Order 42 Rule 6 (2)** limits the exercise of discretion because it provides that;

" No order for stay of execution shall be madeunless the court is satisfied that substantial loss may result to the Applicant....."

The two Rules however are in tandem on the fact that an appeal shall not operate as a stay and the trial court therefore is granted discretion to grant such orders of stay if it deems fit and just.

28. In exercising this discretion a court will consider if the appeal is arguable and whether the appeal will be rendered nugatory unless stay is granted. These two tests in my view is complementary to exercise of discretion under the **Civil Procedure Rules (Order 42)** because an Applicant must show '*a good cause*' and in my view a good cause includes whether there is an arguable appeal and whether the same can be rendered nugatory or academic unless stay is granted.

29. From the above discourse this court finds that the application before me is proper and cannot be faulted for being incompetent simply because it has not invoked **Order 42 Rule 6** of the **Civil Procedure Rules**. In any event, this is a Constitutional Petition and the Applicant is within its right to invoke the "*Mutunga Rules*" to seek the relief provided for in the said rules. The big question and substantive issue is whether the application is merited or whether it has met the threshold for grant of stay.

(ii) Whether the Applicant has met the threshold for a grant of stay.

30. As I have observed above a grant of stay of execution is a discretionary matter and the trial court in exercising that discretion needs to be satisfied that the appeal or intended appeal is not frivolous and that unless stay is granted, the same may turn out to be an academic exercise if successful. The exercise of that discretion has been subject to many decisions and as a result principles have been developed to guide courts in the exercise of the discretion to grant a stay of execution. In the case of *Gatirau Peter Munya - vs- Dickson Mwenda Kithinji [2014] eKLR* the Supreme Court settled the principles for grant of stay of execution when it stated *inter alia*;

"The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted."

The Court of Appeal in *Kenya Tea Growers Association & Another -vs- Kenya Plantation & Agricultural Workers Union [2012] eKLR* reiterated that the discretionary power lies with the court and held as follows:

"The power of the Court under rule 5(2)(b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its

decision. It is also trite that the applicant need not show several issues. As stated earlier at least one issue suffices for purposes of an application under rule 5 (2)(b). Second, the applicant must in addition, show that, unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory.”

31. In the case of *Amal Hawliers Ltd -vs- Abdulnasir Abubar Hassan [2017] eKLR* the court citing the Court of Appeal in *Butt -vs- Rent Restriction Tribunal [1982] KLR 417* which gave guidance on how a court should exercise discretion held;

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.....”

32. Going by the above decisions, it is clear that that the power of a court to grant or refuse to grant a stay of execution is based on the nature of the appeal itself. The same should be arguable and secondly if the appeal is successful is likely to be rendered nugatory or an academic exercise. On the other hand it is imperative that the court in exercising the discretion has to consider the fact that a successful litigant is not unnecessarily delayed in enjoying the fruits of his/her litigation especially given that litigation in this country usually takes long to be concluded.

33. In this application, the Applicant's contention is that, if the Respondents are paid the amount awarded in damages they may not be in a position to refund the amount paid to them. That, in my view is the only plausible ground that the Applicant has advanced in stating that the appeal may be rendered nugatory. The other ground that its operations shall be hampered or that the order would affect other ongoing investigations, prosecutions and detention of other motor vehicles in my view is neither here or there because the same remains just a grievance. The Applicant has not demonstrated or shown the other investigations or other matters before courts that will be affected by the judgment of this court. It has also not shown the particulars of the motor vehicle that may have been detained pursuant to the impugned Regulations.

34. This court cannot exercise its discretion based on assumptions or on a mere fact that a party is aggrieved and has lodged an appeal or intends to appeal. The rules invoked by the Applicant clearly state that an appeal or intended appeal cannot also operate as a stay. A stay of execution is not granted automatically because a party is aggrieved by a decision of a court or on the grounds that its activities based on impugned Regulations will be hampered. I take the view that once a court has found some section(s) of a Statute or Regulations to unconstitutional and declares the same to be so then that position remains until the same is reversed by an appellate court or a revision is done.

35. The Applicant has urged this court to overlook the interests of the Respondent on grounds that the interests of many are paramount. However I am not persuaded by that contestation because just as the interests of many or the public are important, individual liberties, rights and freedoms are equally important and that is why the constitution jealously protects the rights and liberties of even the minority. Individual or minority rights cannot be sacrificed at the alter of majority unless in very exceptional circumstances and with sufficient legal backing. In this application those circumstances do not obtain and more importantly the legal basis has been found wanting by this court.

36. I have considered the Applicant's ground that its intended appeal would be rendered nugatory unless stay is granted. While this is an important ground to grant a stay of execution, I must say that the Applicant has not really persuaded me that its appeal is likely to be rendered nugatory if successful for the following reasons:-

i) The Applicant has not sworn an affidavit and expressly stated that the Respondents are unlikely to refund the amounts awarded to them in damages because they are men of straw or that owing to their impecuniosity; they are unlikely to refund the amounts paid to them in damages. Had the Applicant deposed to that fact, then it could have been incumbent upon the Respondent to demonstrate their respective abilities to refund the amount if the decision of this court is reversed. The law does not assume that one is impecunious because poverty or inability to meet financial obligations is a matter of fact. It is also important to note that under the provisions of Section 1A & 1B of the Civil Procedure Act, the overriding objective of the law is the deliver timely justice to litigants. In *Masisi Mwita -vs- Damaris Wanjiku Njeri [2016] eKLR* the court held that it was upon the Applicant to demonstrate that the Respondents would not be able to refund the money paid if the appeal is successful.

ii) Secondly the Applicant's main grievance in its intended appeal is that the impugned Regulations are good law and that position will likely be a subject of the Appellate Court. I do not see how the execution of Judgment which basically entails release of the detained motor vehicle and payment of the attendant damages would render the appeal nugatory if successful. If the Court of Appeal reverses the finding of this court in regard to the impugned provisions, the Applicant would simply go back and continue implementing the law as it is. The substratum of the appeal in my view will remain intact even with the execution of the Judgment.

iii) The Applicant has expressed fear in its written submissions that the motor vehicles are likely to be disposed if they are released and thus rendering the appeal nugatory. However though the fears are legitimate, the Applicant has again failed to swear an affidavit to that effect in order to give the Respondent a chance to Respond. This court finds that an order of deposit of the motor vehicles logbooks and prohibitory order restricting the Respondents from disposing the said motor vehicles until the determination of the intended appeal and/or further orders from this court will suffice. That way the interests of parties would not be prejudiced. The decision of the Court of Appeal in the case of *Kenya Shell Ltd -vs- Kibiru & Another (1986) KLR* is guiding in that respect. In that case the court made the following observations:-

" In an application for stay the court should balance the parallel proposition, first that the litigant if successful should not be deprived of the fruits of a judgement in his favour without just cause and secondly that execution would render the proposed appeal nugatory."

In the upshoot, this court finds no merit in the Notice of Motion dated 25th June 2020. The same is disallowed save that in the interest of justice, this court makes the following orders:-

i) The Respondents are hereby required to deposit the logbooks or any security for the motor vehicle seized pending hearing, determination and the intended appeal by the Applicant.

ii) The Respondents are further prohibited from disposing the said motor vehicle until the hearing and determination of the intended appeal which should be filed within 60 days from the date of this ruling and in default of filing the appeal within the stipulated period the conditions will stand lifted.

The costs of this Application will abide by the outcome of the intended appeal and if no appeal is filed within the specified period the Applicant will be liable to pay the costs of this application.

Dated, signed and delivered at Chuka this 22nd day of July 2020.

R.K. LIMO

JUDGE

22/7/2020

Ruling dated signed and delivered via zoom in presence of Riungu for Respondent and Ochieng for Applicant.

R.K. LIMO

JUDGE

22/7/2020



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