REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E080 OF 2021

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....APPLICANT

VERSUS

SAMPER TOURS TRAVEL.....RESPONDENT

RULING

1. The events leading to the present appeal are as follows. **Samper Tour Travels** (the Respondent herein) filed a suit in the lower court, namely, **Nairobi CMCC No. 1361 of 2020** against the **National Transport and Safety Authority** (the Applicant herein), the **Inspector General of Police**, the **Traffic Commandant** and **the Hon. Attorney General** as the 1st to 4th Defendants respectively. The Respondent simultaneously also filed a motion seeking injunctive orders pending the hearing and determination of the suit. Orders were granted in that regard against the Applicant on 5th March 2020 and the Respondent's motion set down for hearing on at least three occasions but was adjourned due to the onset of the COVID-19 pandemic.

2. Eventually, the motion was listed before **Mmasi, SPM** on 12th June 2020. The Applicants being absent, the injunctive orders were confirmed. Prompting the Applicant's application seeking to set aside the ex parte orders. The application was dismissed by a ruling delivered on 8th February 2021. The Applicants then proceeded to file the instant appeal and the motion dated 22nd February, 2021, the latter seeking an order to stay the ruling delivered on 8th February 2021. The motion is expressed to be brought under Section 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 22 Rules 25, 51 & 52, and Order 51 Rule 1 of the Civil Procedure Rules, *inter alia*.

3. The grounds on the face of the motion are amplified in the supporting affidavit sworn by **Judith Opili-Sirai** who describes herself as the Principal Legal Officer of the Applicant. To the effect that being dissatisfied with the ruling of the lower court delivered on 8th February 2021 the Applicant has preferred an appeal which raises serious issues of law that require adjudication and determination by this court; and the deponent expresses apprehension that the Applicants stands to suffer irreparable damage and prejudice if the orders sought herein are not granted pending hearing and determination of this appeal.

4. The motion is opposed through the replying affidavit of **Sammy Mwenda Mberia** who describes himself as a director of the Respondent. He views the motion as intended to delay the hearing and determination of the suit before the lower court whereas the orders sought to be stayed were issued on an interim basis pending full hearing. He urged the court to dismiss the instant motion to enable parties dispense with the suit before the lower court.

5. The motion was canvassed by way of written submissions. Counsel for the Applicant submitting on the question of substantial loss argued that the motor vehicles operated by the Respondent qualify as private car hire category under the Traffic Act and National Transport and Safety Authority Act (hereafter NTSA Act) and hence the Applicant is not legally mandated to licence such vehicles as public service vehicles under section 30 of the NTSA Act and NTSA Act (Operation of Public Service Vehicles Regulation 2014).

6. That the existence of the order issued on 12th June, 2020 has caused uncertainty in the transport sector as the continuous operation of unlicensed motor vehicles by the Respondent is being viewed in the transport sector as evidence favoritism of the Respondent, a situation that may result in other companies unlawfully operating private car hire vehicles as public service vehicles, to the disadvantage of licensed public service vehicle operators. In conclusion it was submitted that the motion was filed without unreasonable delay and is deserving.

7. For his part, counsel for the Respondent based his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the decision in **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**. Concerning substantial loss, counsel relied on the decision in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** and asserted that the Applicant has failed to demonstrate the substantial loss instead resorting to argue the merits of the suit before the subordinate court at this stage. Counsel concluded by relying on the provisions of Section 27(1) of the Civil Procedure Act and calling to aid the decisions including **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR**, to assert that no security has been offered by the Applicant, and as such the

motion ought to be dismissed with costs.

8. The court has considered the material canvassed in respect of the motion. First, it is pertinent to state that at this stage, the Court is not concerned with the merits of the appeal. It is trite that the power of the court to stay the execution of a decree pending appeal is discretionary, however the discretion should be exercised judicially. See **Butt V Rent Restriction Tribunal [1982] KLR 417.**

9. The Applicant's motion is expressed to be brought under the provisions of Order 22 Rules 25, 51 & 52 of the Civil Procedure Rules. The jurisdiction of the High Court to grant orders to stay execution pending appeal is donated by Order 42 Rule 6 of the Civil Procedure Rules which provides that:

> **"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **(2) No order for stay of execution shall be made under subrule (1) unless—**
>
> **(a) the court is satisfied that substantial loss may result to the Applicants unless the order is made, and that the application has been made without unreasonable delay; and**
>
> **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicants".**

10. In **Halai & Another v Thornton & Turpin (1963) Ltd [1990] eKLR** the Court of Appeal held concerning an application for stay of execution pending appeal under the old Order XLI rule 4 (the equivalent of the above provision) that:

> **"The application before the superior court was made under Order XLI rule 4. In sub-rule (1) the order provides that the court appealed from <u>may for sufficient cause</u> (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause. Subrule (2) of the same rule reads:**
>
> **"(2) No order for stay of execution shall be made under sub-rule 1 unless:**
>
> **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;**
>
> **and**
>
> **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**
>
> **Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."**

11. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] e KLR 410**. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the **Shell** case are especially pertinent. These are that:

> **"1. …..**
>
> **2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.**
>
> **3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.**
>
> **4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."**

12. The decision of Platt **Ag JA**, in the **Shell** case, in my humble view sets out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The **Ag JA** (as he then was) stated inter alia that:

> **"The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim**

damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…"

13. The learned Judge continued to observe that: -

"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicants, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added)

14. Earlier on, **Hancox JA** in his ruling observed that:

"It is true to say that in consideration [sic] **an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-**

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."

15. The subject of appeal and the instant motion is a ruling delivered on 8th February 2021 in **Nairobi Milimani CMCC No. 1361 of 2020** dismissing the Applicant's motion seeking to set aside orders issued exparte on 12th June, 2020 when the Appellants failed to attend the hearing of the motion by the Respondent. A copy of the extracted order of 12th June 2020 is attached to the replying affidavit as annexure **"SMM 4".** The relevant part thereof reads**:**

"1. THAT pending the hearing and determination of this suit the Defendant's/ Respondents whether by themselves, servants or agents or jointly are hereby permanently restrained from harassing, arresting, impounding and interfering with the smooth running of the Plaintiff's motor vehicles pending compliance by the Applicant with NTSA guideline rules". (sic).

16. The live prayer in the motion before the court is prayer 3 which is seeking to stay the ruling of 8th February 2021 pending appeal. Prayer 2 which sought to stay the above order is spent, because it was sought pending the hearing and determination of the instant application. Evidently, prayer 3 is to no avail. The lower court in its ruling of 8th February 2021 dismissed the Applicant's motion seeking to set aside the above order of the lower court. The dismissal order is in the nature of a negative order and is incapable of execution. The Court of Appeal in **Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021) [2021] KECA 363 (KLR)** stated as follows; -

"We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in Western College of Arts and Applied Sciences vs Oranga & Others (1976-80) 1 KLR, where the Court stated in respect of stay of execution as follows:

"But what is there to be executed under the judgment, the subject of the intended appeal". The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered."

Further, in the more recent case of Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

"16. In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others__ [1976] KLR 63 at page 66 paragraph C)."

17. Thus, prayer 3 cannot be granted. The Applicant's motion may be replete with drafting blunders, but a court of law ought to aim at doing substantive justice. Due to some apparent irregularities that will be outlined shortly, the Court will, invoking its inherent power under section 3A of the Civil Procedure Act deem prayer 2 of the motion as one for stay of the order of 12th June 2020 pending appeal.

18. Though equally poorly presented, the material in the Applicant's motion and submissions to my mind surfaces several points of concern. The first is that on the face of it, the resultant orders of 12th June 2020 have far-reaching ramifications for the statutory mandate of the Applicant and other defendants in the lower court suit, the transport sector, and the public at large. And while this Court will at the appropriate time determine the key issue raised in the appeal, namely the service of notice upon the Applicant of the hearing date for the motion in the lower Court, it can be observed that the orders issued ex parte on 12th June 2020 appear rather drastic. The second and related concern is that the orders issued on 12th June 2020 appear to have taken the form of a permanent injunction against all the Defendants in the matter and yet the suit in the lower court is yet to be heard. Equally, the order does not specify particulars of the Respondent's vehicles envisaged therein.

19. The third troubling issue concerns the jurisdiction of the subordinate Court. While this Court has not had the advantage of perusing the pleadings in the lower court, it seems from material before it and especially the Respondent's annexure "**SMM 2"** being a copy of the certificate of urgency dated 5th March 2020 accompanying their motion in the lower Court, that the Respondent by his action in the lower Court was primarily challenging the Applicant's denial of the Respondent's applications for licences described therein as TLB and RSL (Road Service Licence) which are apparently mandatory legal requirements for the operation of the Respondent's fleet of motor vehicles as public service vehicles. Rightly or wrongly, it appears that by its denial, the Appellant was exercising its statutory mandate under the Traffic Act.

20. In an ideal case, a challenge to such an exercise of statutory power by a public body ought to be brought by way of judicial review or a constitutional petition before the High Court. If it is eventually found that the subordinate Court was not clothed with the necessary jurisdiction, the orders granted on 12th June 2020 would be a nullity.

21. In my considered view, and without determining the issues raised above, there is sufficient cause here as envisaged in Order 42 Rule 6(1) for granting stay of the orders of 12th June 2020. I daresay that the effect of the orders appears to be to grant permission to the Respondents to operate public service vehicles before complying with legal requirements and without let or hindrance by traffic police and the NTSA. The Court can readily appreciate the Applicant's difficulty in attempting to craft a scenario in the present case that fits the conventional definition of substantial loss. The order of the lower Court did not involve a monetary decree, but it is evident that the appeal could well be rendered nugatory if the orders of 12th June 2020 are allowed to stay in place.

22. Specifically, because, the impugned orders entail an overarching public interest issue as the NTSA is the body legally mandated to regulate and licence public service vehicles upon compliance with stipulated conditions. Would it be in the public interest to allow that, until the appeal is heard, the Respondent continues to operate public service vehicles when the said vehicles are apparently not licensed or compliant with licensing conditions? And to *"permanently"* restrain law enforcement agencies such as the traffic police from carrying out their related duties under the law? I doubt it.

23. Similarly, the nature of the matter before the court is such that the requirement for security may not be strictly applied but suffice to say that, on the material before the court, there is sufficient cause to justify intervention by way of stay and further, there is a likelihood that the appeal herein may be rendered nugatory if the orders of 12th June 2020 are not stayed. Accordingly, the Court hereby grants prayer 2 of the Applicants motion, save that the same is granted pending the determination of the appeal. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF APRIL 2022.

C.MEOLI

JUDGE

In the presence of:

Applicant: N/A

Respondent: Ms. Makassy h/b for Mr. Njau

C/A: Carol