REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E004 OF 2021

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY BENJO SUPER STORE LIMITED.

AND

IN THE MATTER OF: SECTION 47,48,49,50 AND 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 17,20 AND 22(2) OF THE EAST AFRICAN COMMUNITY VEHICLE LOAD CONTROL ACT ,2016

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY....RESPONDENT

BENJO SUPER STORES LIMITED.....EXPARTE APPLICANT

RULING

1. This ruling is in respect of a Notice of Motion dated 23rd day of April, 2021 brought pursuant to Order 42 and 43 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the Civil Procedure Act 2010 and Article 40 of the Constitution seeking orders;

(a) spent;

(b) **That pending the hearing and determination of this application there be a stay of execution of the ruling delivered on 15th April, 2021 and order dated 21st March, 2021 staying the orders of certiorari quashing the respondents' decision to detain motor vehicle Reg. No KCH 386 V, an order of mandamus for the reweighing and release of the vehicle, storage expenses, luggage expenses and costs of the application.**

(c) That pending the hearing and determination of the appeal there be a stay of execution of the ruling delivered on 15th April, 2021 staying the orders of certiorari quashing the respondent's decision to detain motor vehicle Reg No KCH 368 v, an order for mandamus for the reweighing and release of the motor vehicle, storage expenses, luggage expenses and costs of the suit.

(d) that costs of this application be provided for.

2. The application is anchored on grounds set out on the face of it and averments contained in an affidavit in support sworn on 23rd April, 2021 by Michael Ngala the Assistant Director Axle Load Control of the 2nd respondent. It is the applicant's case that, the impugned ruling

contains an error on the face of record in that the court found that the substantive notice of motion was undefended. He averred that contrary to the court's holding that the respondent /applicant did not oppose the notice of motion, they have duly stamped copies of their notice of appointment, response and submissions bearing JR Division court stamp.

3. That during the pendency of the proceedings, the respondent's counsel Mr. Nathaniel Munga attended various court sessions as well as the registry. The alleged various e-mails correspondences between the court and the respondents' office were attached in attempt to prove the allegation that there was a response filed in opposition to the substantive notice of motion application.

4. It was further contented that; they have filed a notice of appeal; the intended appeal has high chances of success as it raises serious pertinent issues; the appeal will be rendered nugatory if the application for stay is not granted and that, if the exparte applicant proceeds to execute the orders, the respondent will suffer irreparable loss.

5. In response, the exparte applicant /respondent filed a replying affidavit sworn on 6th May, 2021 by Peter Karanja Kariuki its Director who averred that; the application is defective; malicious, scandalous and that it amounts to an abuse of the court process hence ought to be dismissed.

6. It was further contended that the application constitutes falsehood as the respondent /applicant's counsel only appeared in court once i.e 10th March, 2021 and not several times as alleged. That on 15th March, 2021 when parties were to appear and confirm filing submissions and fix a hearing date, neither the respondent/applicant nor their counsel was in attendance.

7. That on 29th March, 2021, the court assistant called their advocates looking for the respondent's/applicant's written submissions but the same were not available as the respondent's/applicant's counsel had served them through email an unstamped advance copy of their skeleton submissions.

8. He further contended that, as at 29th March, 2021 there was no stamped copy of the respondent's submissions in the court file. He attached an email of 29th March, 2021 marked PN-2 indicating that they had also requested for a copy of submissions from the firm of Munga which they had not been served with but in vain.

9. He went further to state that if stay of execution is granted, they will suffer immensely considering that they are in business with contractual obligations which they cannot fulfill with the motor vehicle in question being detained hence incurring losses of up to Kshs 61,200 daily. He further claimed that they have been unable to repay the loan advanced in purchasing the motor vehicle in question since it got detained.

10. Finally, he deposed that the application was filed out of spite and in bad faith and that the respondent /applicant will not suffer any substantial loss if the orders sought are not granted.

11. During the hearing, parties orally submitted with Mr. Munga for the applicant insisting that his client had filed the requisite response and submissions electronically within the required period thereof thus defending the suit. He contended that they had filed their response on 2nd March, 2021 and that that fact is confirmed in the respondent's submissions of 5th March, 2021. Counsel simply stated that they are unable to comply with the orders.

12. On the other hand, M/s Kedeki challenged the application by restating the content contained in the affidavit in reply. She contended that the response they were referring to in their submissions of 5th March,2021 was an advance copy served on them through e-mail and not an official copy as none was filed in court.

13. Counsel submitted that the applicant will not suffer any substantial loss by reweighing the luggage as directed by the court and then follow proper procedure so as to release the motor vehicle to the owner to avoid wastage through tear and wear as well as loss of income. She stated that as at 15th March, 2021 when the main application was scheduled for submissions, no response nor submissions had been filed by the respondent/applicant and that the applicant did not appear nor their counsel.

Analysis and determination

14. I have considered the application herein, response thereto and oral submission by both parties through their respective counsel. Before I endeavor to determine the application, a brief summary of the factual background will suffice.

15. Leave to file a Judicial Review substantive application was granted on 25th January,2021 and an order to file a substantive notice of motion made thereof. On 4th February,2021 the envisaged Notice of Motion of even date was filed and certified urgent on 5th March,2021 with directions that it be served upon the respondents for interpartes hearing on 11th February,2021 before me. From the record, it would appear like I din.t sit hence the file was placed before Ong'injo J who fixed it for mention before me on 16th February,2021 for further directions.

16. On 16th Febraury,2021, only M/s Kyalo holding brief for M/s Kedeki for the exparte applicant appeared. M/s Kyalo told the court that the respondent had not filed any response to the notice of motion. She further sought a hearing date.

17. The court however gave the respondent 7 more days to file their response. Parties were at liberty to file skeleton submissions. Accordingly, the court fixed the matter for interpartes hearing on 10th March, 2021 and hearing notice to issue.

18. On 10th March,201 M/s Kyalo again appeared holding brief for M/s Kedeki. She confirmed M/s Kedeki had filed her submissions and that the respondent /applicant had served them theirs. Mr. Munga indicated that their response and Skeleton submissions were filed on 1st March,2021. The court however noted that parties had not filed their submissions. M/s Kyalo sought for a date to confirm filing their submissions. The court then gave a further mention on 15th March, 2021 for parties to ensure submissions were filed and highlight on the same. Up to this time, the court was of the erroneous view that a response had been filed.

19. On 15th March,2021, there was no attendance on the respondents' side. M/s Kyalo for the exparte applicant appeared confirming that they had filed their submissions. As at 15th March,2021, there was no response nor submissions filed by the respondent/applicant. The court then fixed a ruling for 31st March, 2021 but it was not ready for delivery hence eventually delivered on 15th April,201 in the presence of M/s Nafula holding brief for M/s Kedeki but in the absence of the respondent.

20. As a court practice, parties were notified via telephone conversation by my court assistant of the rescheduled ruling date and that is how the exparte applicant got to know of the date for delivery of the ruling. The ruling date was also reflected in the cause list hence it will be improper for Mr. Munga to allege that notice of delivery of ruling was not communicated. Despite the fact that the notice was not physically served, in this era of electronic case management, it was not an excuse for non-attendance.

21. However, while writing the ruling, I noticed that there was no response nor submissions filed by the respondent /applicant and that culminated to my court assistant's effort to call all parties on 29th March, 2021 to confirm whether indeed the respondent /applicant had filed their response and submissions.

22. Having confirmed that none was filed and nothing was on the court record, I proceeded to write the ruling. It was much after I had written the ruling that the respondent submitted copies of response dated 28th March,2012 and skeleton submissions dated 1st March,2021 but filed on 17th March, 2021.

23. From the filing date indicated on the response and skeleton submissions, the two documents were filed outside time after the court had on 15th March,2021set a date for ruling. Obviously, there was no extension of time nor leave sought. They were actually brought later after 29th March, 2021, when I asked my court assistant to enquire whether they were filed or not. Even if they were filed on 17th March, 2021 and 28th March,2021, as per the court stamp, they were of no consequence as they were time barred and therefore, I had no reason to refer to them.

24. Mr Munga made reference to several correspondences by way of email marked annexures EN.3 in support of the application for stay. From the emails attached dated 29th and 30th March, 2021, Mr Munga confirmed that they had filed their pleadings via e -mail No. elcmombasa@court.co.ke. This was in response to our registry staff e-mail of 29th March, 2021 asking Mr. Munga whether he had filed the submissions.

25. It is obvious from the email correspondences filed by Mr Munga as proof of filing of his response and submissions that they were filed through the wrong email that is ELC court. Judicial Review Division has its own email. It is no wonder he had sent an advance copy to his colleague M/s Kedeki which they relied on to prepare their submission dated 5th March,2021.

26. It is also not a surprise that on 29th March, 2021 even M/s Kedeki through their email annexture PKK-2 attached to the replying affidavit asked Mr. Munga for a copy of their submissions.

27. Mr Munga should own up that it was his office or law firm's mistake in not filing his pleadings in the right court registry. Even as I was writing this ruling, I called the in- charge Judicial Review registry who confirmed that no response nor submissions were ever filed in the judicial Review Division Registry on 2nd March, 2021 whether manually or electronically.

28. Mr. Munga cannot purport to have played his role properly as he was not diligent enough to know that he had filed his pleadings in a wrong court. Had he followed and attended court as required, he would have known his mistake or omission in time. He only made one appearance throughout the entire proceedings and therefore did not treat these proceedings seriously hence cannot blame the court for his indolence. From the above background, it is clear that the court properly in my view proceeded to determine the suit on merit without making any reference to a non-existent response and submissions. The court observed that even if there was any response, it was obvious that it could not sway the position that the respondent illegally, unlawfully and irrationally detained the motor vehicle without due process.

29. Having clarified the factual part of the argument for stay, I will now turn to the legal question whether the respondent/applicant has met the threshold for grant of stay of execution orders.

30. The law governing stay orders is provided under Order 42 Rule 6 of the Civil Procedure Rules which sets out clear conditions upon which a court can exercise is discretion to grant a stay of execution order.

31. Under order 42 Rule 6 of the Civil Procedure Rules, a court can only issue an order for stay of execution if the applicant satisfies the court that; he is likely to suffer substantial loss if the orders are not granted; the application for stay has been filed timeously; security in satisfaction of the decree has been furnished and or, that there is sufficient cause shown to warrant issuance of such order. See **Vishram Ravji Halai Vs Thornton & Turpin Civil Application No Nai 15 of 1990 (1990) KLR 365** where the court of appeal stated that, whereas the court of appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41(now Order 42) Rule 6 of the Civil Procedure Rules is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, that the application must be made without un reasonable delay. Similar position was held in the of **Carter and Sons Ltd V Deposit Protection Fund Board and 2 others civil appeal No 291/1997.**

32. However, to grant or not to grant stay is a matter of discretion exercisable by the presiding Judge or trial court. See **Butt Vs Rent Restriction Tribunal (1982) KLR 417** where the court stated that the power to grant or not to grant stay of execution is a discretion which should be exercised in such a way as not to prevent an appeal.

33. In the impugned ruling, the court found that the process of imposing fine on excess weight was illegally and un-procedurally done. The court ordered the applicant to follow due process by reweighing the motor vehicle and the luggage. What loss will they suffer by doing what they are mandated to do so as to release the motor vehicle? I do not find any substantial loss likely to be suffered in the circumstances. The applicant did not even attempt to demonstrate the loss likely to be suffered by implementing the directions the court gave them. For those reasons, the first and most critical condition of proof of loss of substantial loss on a prima facie basis fails.

34. As regards filing the application in time, there is no dispute that it was filed on 26th Apri,2021 while the impugned ruling was delivered on 15th April, 20021.

35. Regarding furnishing security, the applicant has not made any offer to deposit security and being a government institution the same is not applicable in the circumstances of this case.

36. Concerning whether the appeal has high chances of success and that it is likely to be rendered nugatory if execution process takes place, it is upon the applicant to prove that they have an arguable appeal and not a frivolous one. See **Reliance Bank V Norlake Investment Ltd Civil appeal Nai 93/02 (UR)**

37. Having found that there will be no substantial loss likely to be suffered, the twin conditions of an appeal being arguable or likely to be rendered nugatory are almost spent. Substantial loss is the cornerstone in granting stay of execution orders pending appeal. To buttress this position, I am guided by the holding in the case of **Kenya Shell limited vs Kibiru (1986) KLR 410** where the court stated 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 where an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a 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"**

38. Taking into account the totality of the facts and circumstances under which the respondent /applicant detained the motor vehicle, one would on a prima facie basis find that the intended appeal is frivolous and an attempt to frustrate the exparte applicant and at the same time expose the government operations and its agencies into unnecessary litigation. Whereas courts have a duty to protect our roads from wanton destruction through overloading of motor vehicles, it has an equal duty to protect road users from harassment, abuse of office and or misuse of authority by those bestowed with the power to execute that mandate.

39. Having held as above, it is my conviction that the application herein is not merited and the same is dismissed with costs to the respondent/Exparte applicant.

DATE, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF MAY, 2021

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J.N.ONYIEGO

JUDGE