



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 23 OF 2019

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

SHIHUA INDUSTRY ALLIANCE CO. LTD.....1ST RESPONDENT

THE COUNTY CONSERVATORY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR PUBLIC PROSECUTION...4TH RESPONDENT

RULING

1. Pursuant to a ruling delivered by this court on 9th July, 2020, the court found the appellant's officer in charge of Mombasa guilty of contempt and directed the said officer to appear before the court for purposes of sentencing. The court further ordered that there be stripping of listed containers as per schedule to the court orders for purposes of verification by the 1st respondent for purposes of certainty and conformity of the court orders issued herein earlier. The court further ordered that for purposes of transshipment as ordered by the court, the 1st respondent be afforded the requisite Bills of Lading, requisite permits and authorization as is necessary to facilitate compliance of the orders issued by the court.

2. The appellant has now filed the Notice of Motion dated 4th August, 2020 and brought under Sections 3, 13, 16, 18 and 19 of the Environment and Land Court Act and Order 42 Rule 6 of the Civil Procedure Rules in which it seeks for stay of the sentencing of the appellant's officer in charge of Mombasa and execution of the orders granted by the court on 9th July, 2020.

3. The 1st respondent filed a replying affidavit sworn by Salma Mbauro on 30th September, 2020 and grounds of opposition dated 30th September, 2020 in response to the application.

4. On 7th October, 2020, this court found that it had already dealt with the issue of the release of goods and found that there was no justification for their continued holding. What was left for determination was the issue of sentencing of the appellant's officer in charge of Mombasa. The court directed for the application to be disposed of by way of written submissions. The appellant filed their submissions on 10th November, 2020 while the 1st respondent filed theirs on 11th November, 2020. On 7th October, 2020, counsel for the 2nd and 3rd respondents indicated to the court that he will not file any responses to the application since the application does not seek any orders against their clients. Despite being served with the application, the 4th and 5th respondents did not file any responses.

5. The application is premised on the grounds, inter alia, that the appellant is dissatisfied with the decision of the court and intends to file an appeal before the court of Appeal. That the appellant filed a notice of appeal on 14th July 2020 together with a request to be supplied with typed proceedings. The appellant is apprehensive that in the absence of an order staying the sentencing, the court will proceed to sentence its officer, and that the sentence may entail a loss of liberty and in the event the Court of Appeal upholds the appeal, the appeal will have been rendered nugatory. The appellant averred that it is ready and willing to abide by any order that this court may issue as a condition for staying the sentencing, and that the respondents will suffer no prejudice in the event the sentencing of the appellant's officer is stayed.

6. The application is supported by the affidavit of Jackson Muyanga, the appellant's investigating officer sworn on 4th August, 2002. It is the appellant's contention that they have an arguable appeal and that the application has been made without unreasonable delay. The appellant's counsel further submitted that judicial precedents reveal that the superior courts have held that in matters such as this one, issuance of orders of stay of mitigation and sentence pending an appeal against the order that held an applicant to be in contempt would be appropriate in the circumstance. The appellant's counsel relied on the case of **Justus Kariuki Mate & Another –v- Martin Nyaga Wambora & Another**

(2014)eKLR; National Bank of Kenya & Another –v- Geoffrey Wahome Muotia (2016) eKLR; Rev. Jackcom Kipkemboi Koskey & 7 Others –v- Rev. Samuel Njogu & 4 Others (2007)eKLR; Julius Mugo Gachagua –v- Peter Mahinda Kanyora & 2 Others (2020)eKLR; and, African Centre for Rights and Governance (ACRAG) & 3 Others –v- Naivasha Municipal Council (2018)eKLR, and urged the court to allow the application with costs.

7. The 1st respondent contended that in this matter, no appeal has been filed. That although the Notice of Appeal dated 13th July, 2020 and filed on 14th July, 2020, there was no letter requesting for typed proceedings that was made until on 2nd September, 2020 which is about two (2) months after the ruling was delivered on 9th July, 2020. That the applicant lacks the right of appeal since it joined the suit as an interested party and was not a substantive party in the suit. It is averred that the applicant filed another matter ELC Misc. Application NO. 37 of 2019 which they withdrew before serving the respondents herein. It is therefore the 1st respondent's contention that the appeal is an afterthought and the application herein is meant to frustrate the 1st respondent from collecting the merchandize from the port of Mombasa. The 1st respondent wants the applicant to write an unconditional letter to the relevant government agencies confirming that it has no claim whatsoever on the suit property.

8. The 1st respondent's submission was that the appellant's bravado, aggrandisement and approach before the court is callous and therefore not deserving of the orders sought. The 1st respondent's counsel relied on the case of **Dr. Fred Matiangi, the Cabinet Secretary, Ministry of Interior and Coordination of National Government –v- Miguna Miguna (2018)eKLR; Methodist Church in Kenya –v- Mohammed Fugicha & 3 Others (2019)eKLR** and submitted that the court should not grant the orders sought unless the applicant first purges their contempt. The 1st respondent pointed out that an appeal against the main judgment was withdrawn by the applicant herein and urged the court to dismiss the application with costs.

9. I have considered the application herein. The only issue for determination is whether the instant application raises sufficient grounds to warrant grant of stay of sentencing of the appellant's officer in charge of Mombasa pending the determination of an appeal. This court in the ruling of 9th July, 2020 found the appellant's officer in charge of Mombasa guilty of willfully and intentionally defying the order issued on 14th August 2019 which remains valid and binding. In the judgment delivered on 14th August, 2019, the court dismissed the appellant's appeal herein and upheld the decision of the subordinate court delivered on 27th November, 2018 and issued on 22nd February, 2019 which decreed the release of seized goods to the 1st respondent herein. The 1st respondent has opposed the application on the grounds that the applicant had not purged the contempt and continues to disobey the orders of the court by failing to release the seized goods as ordered by the subordinate court and upheld by this court, and therefore should not be heard. The 1st respondent has further opposed this application on the ground that the applicant has not demonstrated and/or shown that it has an arguable appeal.

10. Going by the decisions cited by the applicant, the superior courts have held that in a matter such as this one, issuance of orders of sentence pending an appeal against the order that found the applicant to be in contempt would be appropriate in the circumstances. This court is most particularly bound by the decisions of the Supreme Court and the Court of Appeal and I stand guided. No doubt the applicant in this case is underserving of stay orders for reason that there is no reason for the seized goods not to be released to the 1st respondent because there are no pending proceedings over it. I however note that the applicant has offered to abide by any order that this court may issue as a condition for staying the sentencing. The court having found the appellant's officer in charge of Mombasa in contempt, the stay of execution is herein granted on condition that the appellant fully complies with the court orders regarding the release of the suit consignment within the next fourteen (14) days from the date of this ruling, failure to which the stay order shall automatically stand discharged and the appellant's officer in charge of Mombasa shall be summoned for sentencing. The costs of this application shall abide the outcome of the appeal.

11. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 20TH day of January 2021.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE