



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 14 OF 2019

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE CONTRACENTION OF ARTICLES 19 20, 21, 40 AND 47 OF CONSTITUTION OF KENYA 2010

BETWEEN

MAYA ENTERPRISES LIMITED.....PETITIONER

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

BANK OF BARODA (K) LTD....1ST INTERESTED PARTY

JKADS COMPANY LTD.....2ND INTERESTED PARTY

RULING

Introduction

1. On 19/2/2019, the Petitioner filed a Notice of Motion seeking to restrain the Respondent from attaching, physical removal and/or selling by public auction or otherwise in any manner disposing of or interfering with the Petitioner's use of the suit properties. After considering the Application, this Court was satisfied that the Petitioner was not entitled to the temporary reliefs sought since it had not established a *prima facie* case for the grant of the orders sought at the preliminary stage.

2. The Petitioner has now filed Application dated 2/3/2020 seeking the following orders:

a. Spent

b. That the honourable Court be pleased to extend the stay of execution order issued on the 13/2/2020 pending the hearing and determination of the instant Application.

c. That the honourable Court be pleased to extend stay orders/restraining orders against the Respondent's and Interested Party jointly and severally by themselves, agents (Leakeys' Auctioneers) from proclaiming, attaching, auctioning, removing and/or interfering in any other manner with the subject property pending hearing and determination of the instant Application.

d. That the honourable Court be pleased to extend the stay orders against the Respondent's and the Interested Party jointly and severally by themselves, agents (Leakeys' Auctioneers) from proclaiming, attaching, auctioning, removing and/or interfering in any other manner with the subject property pending hearing and determination of the intended Appeal.

e. That costs of the Application be provided for.

3. The Notice of Motion is premised upon seven (7) grounds appearing on the face of it and supported by the Affidavit sworn on 2/3/2020 by **RAKESH KISHOR BHUNDIA** who is the Applicant's manager. He avers that the Petitioner being dissatisfied by the ruling delivered on 13/2/2020 has filed a Notice of Appeal. Therefore, it is just and fair for the stay of execution orders issued on the 13/2/2020 be extended hearing of the instant Application and the Intended Appeal at the Court of Appeal.

4. The deponent further avers that the Petitioner is an innocent purchaser for value without notice of the 2nd Interested Party's motor vehicles. Therefore, it is not true that the Petitioner took over the 2nd Interested Party's business and/or its premises. Consequently, the proclamation and attachment of the subject motor vehicles is malicious, in bad faith since the Petitioner is tax compliant and was even issued with a tax compliance certificate that is valid until an infringement of the Right to private property and economic right.

5. In response to the application, the Respondent filed a Replying Affidavit sworn on 17/03/2020 by **Wilson Mwangi** who is the Respondent's officer. He avers that the instant Application is frivolous, vexatious and an abuse of the Court process and is a ploy by the Petitioner to delay collection of taxes that are due and owing. Further, it is apparent that the Petitioner runs a transport business similar to that carried on by the 1st Interested Party, using the same motor vehicles previously owned by the 1st Interested Party. Therefore, the Petitioner must not be allowed to continue enjoying fruits of unjust enrichment through fraudulent misrepresentation to the detriment of tax payers.

6. The deponent further avers that an intended Appeal is not a bar to the collecting of the taxes due. The Petitioner ought to furnish security for the taxes due pending hearing and determination of the Appeal as provided under Section 36 of the Tax Procedure Act No. 29 of 2015.

Analysis and Determination

7. This Court has carefully perused and considered grounds for the application herein, submissions by the Petitioner and the annexures to the Affidavit filed. This Court notes that the Respondent did not file its written submission.

8. The Applicant has indicated dissatisfaction with this Court's ruling. On substantial loss, the Applicant argues that it relies on its eleven (11) Lorries, which have been proclaimed and risk being auctioned. Therefore, its business will be paralyzed if stay is not granted and the intended appeal will be rendered nugatory. The Applicant also submits that it is willing to abide as per any order for security as may be reasonable to fulfil in due compliance with the conditions set by this Court.

9. This Court made a finding on the issue that the Petitioner was not entitled to the temporary reliefs sought since it had not established a *prima facie* case for the grant of the orders sought and would not want to go into the merits of the intended appeal. While this Court is not being asked whether it could have been wrong in its appreciation of the facts pleaded and the application of the law to those facts, it is well aware that even where it is overly confident of its findings, those findings are subject to the decision by the appellate Court. Therefore, this Court's duty would be to safeguard and preserve the subject of the Appeal. See ***Siegfried Busch v MCSK [2013] eKLR:***

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

10. Having found that it would best in the circumstances to preserve the status quo as not to render the Appeal nugatory, this Court is of the view that stay of execution pending appeal is a matter within the court's discretion, such discretion to be exercised subject to the conditions set out in **Order 42 Rule 6 of the Civil Procedure Rules**, which provides:

“6.(1) 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 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 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.”

11. Similarly, In the case of ***Feissal Amin Janmohammed t/a Dunvia Fowarders v Shami Trading Co Ltd, [2014] eKLR***, Kasango J stated as follows:

“It is trite law therefore that a stay of execution is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made; that the application was made without unreasonable delay and that the applicant has offered proper security”.

12. Considering all the circumstances of this case, I note that Applicant has demonstrated that it will suffer substantial loss if the stay is not.

Balancing the prejudice to the parties, it appears to me that there is a greater risk of harm to the Respondent if the stay is granted pending the determination of the Appeal, since the distrained eleven (11) Lorries are still in the custody of the Applicant and in active use. Therefore, this Court takes judicial notice that Lorries in the transport business are subject to depreciation of value each day that they remain in the Applicant's use. Therefore, by the time the intended Appeal is heard and determined there might be no proper security for the performance of execution by the Respondent. Consequently, the proposal by the Applicant to have restriction on the transfer of the Lorries does not hold water in this Court's view.

13. This Court finds and holds that the scales of justice need to be balanced. The Applicant's interest is to protect its business from grinding to a halt. However, it is Respondent statutory duty to ensure that the taxes due and demanded is paid. Consequently, it would be in the interest of justice to stay the ruling delivered on 13/2/2020 pending hearing and determination of the intended appeal. This court proceeds to stay the said ruling on condition that half of **Kenya Shilling Ten Million Three Hundred and Sixty Three Thousand, five hundred and fifty four hundred. (Kshs. 10,363,554/=)** is deposited in Court within 21 days from the date of delivery of this ruling.

14. Further, all log books for all motor vehicles the subject matter of this application viz -

- a. **KBY 623U and Trailer ZF 4285**
- b. **KBV 448Z and Trailer ZF 4286**
- c. **KBV449Z and Trailer ZF 2104**
- d. **KBY 624U and Trailer ZF 2105**
- e. **KCJ 281X and Trailer ZF 2105**
- f. **KBN 891Z and Trailer ZF 2107**
- g. **Trailers:ZD 3399 and ZD 6587**

shall be deposited in court. Where the same are with the bank – 1st Interested Party or another bank – a written undertaking by the said banks that they shall not dispose off the same pending hearing and determination of intended appeal.

15. Costs shall be in the cause.

Dated, Signed and Delivered at Mombasa this 13th day of October, 2020.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Wairire for Respondent

Ms. Nduku for Petitioner

Ms. Peris Court Assistant