



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 29 OF 2019

IN THE MATTER OF: TAITA TAVETA COUNTY FINANCE ACT, 2018

BETWEEN

SAMRUDDHA RESOURCES (KENYA) LTD.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF TAITA TAVETA.....RESPONDENT

JUDGMENT

The Application

1. The application before court is dated 4/6/2020 and it prays for the following orders:

(a) **THAT** this Application be certified as urgent.

(b) **THAT** the Respondent be restrained by way of an injunction pending appeal from collecting from the Applicant/Petitioner Kshs. 19,883,301.00 on account of the claim made by it from the Petitioner on account of amounts claimed allegedly for “transportation cess” or any further sums on account thereof until determination of the Applicant’s intended appeal against the judgment delivered herein on 4th May, 2020 pending hearing and determination of this application inter partes.

(c) **THAT** the Respondent be restrained by way of an interim injunction pending appeal from collecting from the Applicant Kshs. 19,883,301.00 on account of the amount claimed allegedly for “transportation cess” or any further sums on account thereof until determination of the Applicant’s intended appeal against the judgment delivered herein on 4th May, 2020 pending hearing and determination of the Applicant’s intended appeal.

(d) **THAT** the costs of this application be awarded to the Applicant/Petitioner

2. The application is supported by Affidavit sworn on 4/6/2020 by Upendra Patel.

3. It is the Applicant’s case that on 4/5/2020 this court delivered a decision and allowed the petition by nullifying the Respondent’s inclusion of a charge of Mineral Tax to Kshs. 1,000.00 per ton on iron ore but that in the process the court erred in stating that a charge of Kshs. 150.00 could still be levied for transportation cess despite there being no provision in the Taita Taveta County Finance Act 2018 and as such the Petitioner has filed an appeal against the whole decision. The Applicant further states to have requested for copy of proceedings on 14/5/2020 to facilitate the lodging of the appeal and that they believe that the intended appeal is meritorious and has good prospects of success.

4. Further, the Applicant states that under the guise of COVID-19 pandemic the Respondent stopped and ordered ceasure of operations at the Applicant’s/Petitioner’s mine in a bid to wrongfully and unlawfully enforce collection of the sum of Kshs. 19,883,301.00 yet Taita Taveta Finance Act 2018 does not authorize such collection and in this regard Respondent is acting in excess and in abuse of its powers in attempt to coerce payment of the said sum. The Petitioner avers that they may be compelled to either terminate its employees’ employment or have them take unpaid leave as it is not possible to economically sustain the operations in such circumstances and that there will be no prejudice occasioned to the Respondent given that the Petitioner’s mining operations are located in Taita Taveta County with substantial investments and assets which the Respondent shall always retain and have recourse to against the Applicant if the present appeal is not successful.

The Response

5. The Respondent filed a Grounds of Opposition dated 9/6/2020 and states that the application is an afterthought and is filed inordinately and inexcusably too late and that this court does not sit as an appellate court as it does not have jurisdiction under Order 42 Rule 6 (6) of the Civil Procedure Rules, 2010 to hear and determine applications of this nature. The Respondent further states that the Applicant is not entitled to orders of injunction pending disposal of the intended appeal and that no evidence has been adduced to prove that the Respondent demanded Kshs. 19,883,301.00 nor ordered cessation of the Applicant's operations and in particular prohibiting mining of iron ore as alleged.

6. The Respondent also filed Replying Affidavit to the application sworn on 10/6/2020 by Edwin Chahilu Ayiro who depones that the import of the orders of the court was that the cess of Kshs. 1,000.00 per ton payable under the 2018/19 Finance Act was suspended and that the Petitioner was to continue paying a sum of Kshs. 150.00 per ton which was undertaken to be complied with by counsel for the Petitioner but the same has not been complied with since issuance of the court order on 2/5/2019 and that as at 20/11/2019 a sum of Kshs. 15,610,212.00 was outstanding. The Respondent then filed a Certificate of Urgency on 21/11/2019 to have the Applicant compelled to pay 150.00 per ton but the application was compromised for faster hearing of the petition but still the outstanding sum is yet to be settled.

7. The Respondent states that the Petitioner is not ready to pay cess at all which position was not pleaded in the Petition and that what was pleaded was suspension of the imposition of cess of Kshs. 1000 under the Finance Act 2018 from the Kshs. 150.00 previously charged. The Respondent states that if an injunction is granted the Respondent will be denied opportunity to levy cess and subsequently deny the larger public including the Petitioner critical services including good roads, healthcare and other essential services. The Respondent states that a Replying Affidavit filed on 3/7/2019 confirms that a search was done on the Directors and shareholders of the Petitioner and it was established that they are foreigners and have no attachable assets and therefore if an injunction is allowed the Respondent may not be able to recover the cess and that the Petitioner should be ordered to deposit to Court the entire sum of Kshs. 19,883, 301.00 and any other cess that will accrue during the pendency of the intended appeal.

Submissions

Petitioner's Submissions

8. The Petitioner filed their submissions on 15/7/2020 and relied on the authorities **Msa Misc Civil Application No. 59 of 2013 (JR-Krish Commodities Limited v Kenya Revenue Authority [2017] eKLR** and **Msa Misc Civil Application No. 85 of 2012 (JR) – Corrugated Sheets Ltd v Kenya Revenue Authority**. The Petitioner submitted through its counsel Mr. Khagram, that this Court ought to address issue of injunction pending appeal, and that failure to grant the same will not only render the appeal nugatory, but the Petitioner also stands to suffer substantial loss in the intervening period including family cash flow leading to adverse effect on its business. Counsel submitted that justice demands that the status quo prevailing be maintained through issuance of injunction pending appeal and that in any event the Respondent shall continue to be secured given that the Petitioner's mining operations are located within the same locality, with substantial investments and assets having been made which shall all be at the disposal of the Respondent in the event the Appeal is not successful.

Respondent's Submissions

9. Mr. Bwire, counsel for the Respondent submitted that the Applicant has no arguable chances of appeal and that the intended appeal will not in any way be rendered nugatory if the injunction is not granted and that the Applicant shall not suffer any harm or substantial loss and that to the contrary, if injunction is allowed the Respondent will be denied the opportunity to levy cess and subsequently deny the larger public including the Petitioner critical services.

10. Counsel submitted that the matter before Court is a constitutional Petition and as such Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 apply which rules do not contemplate a scenario where this court may issue any injunctive order pending appeal and that Rule 32 only provides for stay pending appeal which is not the same as injunction. Counsel cited Supreme Court Case of **Samuel Kamau Macharia & Another v KCB Limited & 2 Others [2012] eKLR** and submitted that court cannot expand its jurisdiction through judicial craft and innovation and therefore this court does not have jurisdiction to issue such orders.

11. It was further submitted that the Applicant has failed to demonstrate: that the appeal has chances of success; that the intended appeal will be rendered nugatory if the orders sought are not granted and that it is likely to suffer substantial harm on denial of the injunctive reliefs sought herein; that the order of injunction would not inflict greater hardship than it would avoid.

12. In the alternative, the Respondent submitted that if this court were to grant any orders sought herein, then the same should be on condition that the Applicant deposits the entire Ksh. 19,883,301.00 to this court or in a joint interest earning account in the name of respective counsel for the parties pending the determination of the envisaged appeal.

Determination

13. Having considered the Application before court, two issues arise for determination:

- a) Whether this Court has jurisdiction to determine the Application?
- b) Whether the Applicant has established pre-requisites to grant order of injunction pending appeal.

14. On whether this Court has jurisdiction to determine the Application, the Respondents submit that the matter before Court is a constitutional Petition and as such Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure Rules

2013 apply which rules do not contemplate a scenario where this court may issue any injunctive order pending appeal and that Rule 32 only provides for stay pending appeal which is not the same as injunction. In **Nairobi Metropolitan PSV SACCOS Union and 25 others v County Government of Nairobi & 3 others (supra)** the Court of Appeal stated:

*“In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction...”*The court proceeded to cite the case of *Equity Bank Limited vs. West Link MBO Limited CA No. Nai 78 of 2011* wherein Githinji JA stated:

“It is trite law in dealing with 5 (2) (b) applications the court exercises discretion as a court of first instance. It is clear that rule 5 (2) (b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

15. Although the above section refers to powers of the Court of Appeal when faced with such matters, this court is equally faced with a similar situation and may benefit from the wisdom of the Court of Appeal regarding rule 5 (2) (b) of the Court of Appeal Rules.

16. On the second issue of whether the Applicant has established pre-requisites to grant order of injunction pending appeal, **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** empowers this court to stay execution, either of its judgment or that of a court whose decision is being appealed, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2). The decision by the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise its discretion. It held that:

“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.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

17. The court however must be careful in dealing with the application so as to uphold the best interest of both parties. After weighing all the relevant matters, considering the interest and welfare of both the Applicant and the Respondent in this case, I am persuaded, that the Applicant is entitled to a conditional order of injunction. I am also satisfied that the condition imposed is reasonable and that the Applicant will not be placed in a difficult situation with compliance thereof.

18. The upshot is that the motion herein is allowed on the condition that the Petitioner/Applicant shall within 14 days from the date hereof deposit Kshs. 19,883,301/= in an interest earning joint account in the names of the respective advocates for the Petitioner and the Respondent.

Costs shall be in the cause.

That is the Ruling of the Court.

Dated, Signed and Delivered at Mombasa this 6th day of October, 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Ondego for Petitioner

Mr. Ondeng holding brief Bwire for Respondent

Ms. Peris Court Assistant