



REPUBLIC OF KENYA



KENYA LAW
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**Central Bank of Kenya v Bogongo & another (Civil Application
E456 of 2023) [2024] KECA 101 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 101 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E456 OF 2023
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

CENTRAL BANK OF KENYA APPLICANT

AND

BENJAMIN BOGONGO 1ST RESPONDENT

**CABINET SECRETARY NATIONAL TREASURY AND PLANNING 2ND
RESPONDENT**

*(Being an application for stay of execution of the judgment and
decree of the High Court at Nairobi (Mugure Thande J.) dated 28th
August, 2023 in Nairobi High Court Petition No. E255 of 2021)*

RULING

1. Central Bank of Kenya (CBK), the applicant, has filed the application dated 28th September, 2023 seeking two substantive orders. First, that this Court stays the execution of the judgment and decree of the High Court at Nairobi (Mugure Thande J.) dated 28th August 2023 in Nairobi High Court Petition No. E255 of 2021 pending the hearing and determination of Nairobi Civil Appeal No. E782 of 2023 which it has filed against the said decision.
2. The applicant seeks, secondly, that pending the hearing and determination of its appeal, this Court issues an order to suspend the declaration issued by the High Court that the *Banking (Credit Reference Bureau) Regulations* 2020 (hereafter CRB Regulations 2020) are null and void for non-compliance with section 11 of the *Statutory Instruments Act*, 2013.
3. The application is based on the grounds on the face of it and is supported by an affidavit sworn by Kennedy Kaunda Abuga. The applicant avers that its appeal is arguable and raises several issues of law meriting input from this Court, *inter alia*, that the trial judge erred in law and fact in failing:



to recognize and appreciate the constitutional architecture for Parliamentary scrutiny of subsidiary legislation under Article 94(4) and (5) of the Constitution.

4. It is further contended that the trial court failed to appreciate that pursuant to section 13(j) of the Statutory Instruments Act, 2013, the Committee on Delegated Legislation had the discretion to regularise any delay in transmission of any delegated legislation to the Clerk of the National Assembly for tabling before the House; and to appreciate that in exercise of its discretion under section 13(j) of the Statutory Instruments Act, 2013 the National Assembly's Committee on Delegated Legislation approved the CRB Regulations 2020, having been satisfied with the reasons for delay in transmission to the Clerk of the National Assembly.
5. The applicant contends that its appeal will be rendered nugatory as the entire credit information sharing framework has been thrown into total disarray and the applicant cannot enforce or implement the said Regulations. It contends further that there is now a lacuna in the law, particularly in respect of three areas, which necessitated the review of the CRB Regulations 2013 namely: minimum threshold for negative credit sharing information submitted to Credit Reference Bureaus ("CRBs") in Kenya; granting of CRB clearance to first time job applicants seeking employment in public and private entities; onboarding of other financial services sector players including SACCOS regulated by the Sacco Societies Regulatory Authority (SASRA) into the Credit Information Sharing framework.
6. The applicant avers that the 1st respondent has not and will not suffer any prejudice should the orders sought be granted pending the hearing of the appeal, which the applicant has already filed.
7. The 1st respondent opposes the application and has filed an affidavit which he swore on 6th October, 2023. It is his averment that the intended appeal and the present application are frivolous and lacking in merit; that the applicant does not dispute that the CRB Regulations 2020 published on 8th April, 2020 were transmitted on 5th May, 2020 while they ought to have been transmitted by 14th April 2020, and the Covid 19 pandemic is an excuse for indolence. He further contends that the applicant seeks orders against negative orders incapable of enforcement or execution; that the applicant has failed to raise a single bona fide arguable point worth considering; that the intended appeal is not arguable; and that should the intended appeal succeed, it shall not be rendered nugatory as the dispute involves a constitutional issue which can be maintained or reversed depending on the outcome of the appeal.
8. The applicant filed submissions dated 13th October, 2023 which were highlighted by learned counsel, Mr. Ouma. While reiterating the grounds and averments in support, the applicant submits that an invalidation of the CRB Regulations 2020 not only leaves a huge lacuna in the law and regulation of CRBs in Kenya but also hinders the discharge of its constitutional mandate under Article 231(1) of the Constitution as read with section 31(3)(b) of the Banking Act, which requires it to maintain a stable and efficient banking and financial system in Kenya.
9. In his oral highlights at the plenary hearing, Mr. Ouma submitted that the applicant was seeking an order of suspension of the order invalidating the CRB Regulations 2020. The said Regulations had been published on 8th April, 2020 and had been enforced from then up until 28th August, 2023 when the decision of the trial court was rendered. The basis of the nullification or invalidation, according to the applicant, was not on account of any of the issues raised in the petition, namely the alleged violation of the petitioner's right as pleaded in the petition.

Rather, the court had determined an issue which was raised in the 1st respondent's submissions regarding compliance with section 11 of the Statutory Instruments Act. Mr. Ouma asserted that this issue had not been pleaded before the High Court but was raised in submissions.



10. Mr. Ouma observed that in his replying affidavit, the 1st respondent had conceded that the issues raised by the applicant were arguable. As to whether the appeal would be rendered nugatory, learned counsel referred to the case of *George Otieno Gache & Another vs Judith Akinyi & 5 Others* [2017] eKLR for the proposition that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; if it is not reversible, whether damages will reasonably compensate the aggrieved party.
11. Mr. Ouma submitted that a court hearing and determining a petition has the discretion to suspend a declaration of invalidity for a period of time for purposes of the appeal or to ensure proper transition from the declaration. Counsel cited the decision of this Court in *National Assembly of Kenya v Kina & another* (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment) in which this Court suspended a declaration of invalidity for a period of time to enable Parliament make the necessary amendments to the impugned legislation. Ms. Wamunyu for the 2nd respondent supported the application.
12. The 1st respondent filed submissions dated 18th October 2023 which he highlighted at the hearing of the application. His submissions were essentially an expansion of the averments in his affidavit in opposition to the application. At the hearing of the application, Mr. Bogongo denied that the issue of section 11 of the *Statutory Instruments Act*, had not been pleaded in his petition, asserting that he had pleaded that the *CRB Regulations* 2020 did not meet the statutory requirement. That since the said *Regulations* had been declared null and void, there was nothing to stay. Upon inquiry from the Court, Mr. Bogongo conceded that when new regulations are enacted, the previous ones are repealed; that upon invalidation of the 2020 *Regulations*, the applicant could not go back to the 2013 Regulations, and there was therefore a vacuum in the regulatory framework.
13. We have considered the application and the grounds in support thereof, as well as the affidavits in support and opposition thereto. We have also considered the submissions of the parties and the authorities cited. Rule 5(2)(b) of this *Court's Rules* grants the Court discretion to issue injunctive or stay orders on such terms as the Court may think just. To exercise its discretion under the said rule, the Court must be satisfied on the twin principles which are now settled: that the applicant has an arguable appeal, and that absent orders of stay or injunctive orders, if the appeal succeeds, it will be rendered nugatory. Further, this Court has held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous -see *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR and *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
14. We have also addressed our minds to the grounds set out in the memorandum of appeal, which we have set out earlier in this ruling. The 1st respondent does not dispute that the applicant's appeal is arguable, his contention relating only to the nugatory aspect. On our part, we are satisfied that the applicant has met the first limb under rule 5(2)(b).
15. Will the appeal be rendered nugatory should the orders sought not be granted and the intended appeal succeeds? In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (*supra*) this Court stated:

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

 - x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”



16. In its decision, the trial court found that it was within the applicant’s mandate to formulate and publish the CRB Regulations 2020. While it found no violation of the 1st respondent’s constitutional rights as alleged in the Petition before it, the trial court nonetheless declared the CRB Regulations 2020 null and void for non-compliance with section 11 of the Statutory Instruments Act with respect to timeliness. Whether it ought to have made its decision on this basis, an argument, according to the applicant, that had not been pleaded, (though the 1st respondent asserts that he had pleaded it) is one of the matters to be considered on appeal.
17. The effect of the trial court’s decision, however, is that there are now no Regulations in force relating to CRBs. As conceded by the 1st respondent, upon the enactment of the CRB Regulations 2020, the 2013 Regulations were repealed. A declaration of invalidity of the CRB Regulations 2020 meant therefore that there was no longer a regulatory regime in place, as recourse cannot be had to the repealed statutory instrument. The decision of the trial court, as argued by the applicant, therefore threw the Credit Information Sharing Framework into total disarray; the applicant cannot perform its statutory role of regulating CRBs; and there is thus a lacuna in the law relating to credit sharing information submitted to Credit Reference Bureaus in Kenya, among other public functions. In the circumstances, we find that the applicant has satisfied the second limb under rule 5(2)(b)- its appeal would be rendered nugatory should the order declaring the CRB Regulations 2020 invalid not be suspended.
18. In *Schachter v. Canada Lamer* [1992] 2 S.C.R. 679, it was held that a court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament has had an opportunity to fill the void; and that such an approach is clearly appropriate where the striking down of a provision poses a potential danger to the public or otherwise threatens the rule of law. See also *National Assembly of Kenya v Kina & another* (*supra*).
19. Having considered the facts of this case and the respective submissions of the parties, as well as the jurisprudence on the exercise of jurisdiction under rule 5(2)(b), we are satisfied that the application dated 28th September, 2023 is merited. The applicant and the general public would suffer irreparable harm in light of the lacuna that has been left by the impugned declaration, and the applicant’s appeal, which has already been filed, would be rendered nugatory in the event that it succeeds.
20. We accordingly allow the application and grant an order that the declaration issued by the High Court that the Banking (Credit Reference Bureau) Regulations 2020 are null and void for non-compliance with section 11 of the Statutory Instruments Act 2013 be and is hereby suspended pending the hearing and determination of the applicant’s appeal, Nairobi Civil Appeal No. E782 of 2023.
21. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

MUMBI NGUGI

JUDGE OF APPEAL

.....

M. GACHOKA, CIArb, FCIArb

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

