



**Republic v Bwanamaka & 4 others (Criminal Miscellaneous Application E005 of 2023) [2024] KECA 825 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KECA 825 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2023  
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA**

**JULY 12, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MAUR ABDALLA BWANAMAKA ..... 1<sup>ST</sup> RESPONDENT**

**FEDERAL INVESTMENTS COMMERCIAL LTD ..... 2<sup>ND</sup> RESPONDENT**

**ALI MOHAMED AHMED ..... 3<sup>RD</sup> RESPONDENT**

**CAPTAIN SHIPPING AGENCY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**ABDULA HUSEIN MER ..... 5<sup>TH</sup> RESPONDENT**

*(Application for stay of execution pending lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Mombasa (A. Ong'injo, J.) delivered on 30th October 2023 in Mombasa High Court Criminal Appeal No. E043 of 2023)*

**RULING**

1. By Notice of Motion dated 9<sup>th</sup> November 2023 brought pursuant to Article 164(3) (a) of the Constitution, section 3A and 3B of the Appellate Jurisdiction Act, and rule 43 of the Court of Appeal Rules, 2022 the applicant, the State, seeks an order of stay of execution of the ruling delivered on 30<sup>th</sup> October 2023 and its consequential orders in Mombasa High Court Criminal Appeal No. E43 of 2021 pending hearing and determination of the intended appeal together with costs.
2. The applicant's motion is brought on several grounds on its face and supported by the affidavit sworn on 9<sup>th</sup> November 2023 by Evanson Mairura, a Kenya Revenue Authority officer, where it is contended that, in the judgment of 30<sup>th</sup> October 2023, the High Court allowed the respondents' appeal by quashing and setting aside the trial Magistrate's judgment, thereby acquitting them and further



- ordering the release of 10,500 bags of rice for reshipment and the refund of fines paid; and that, the applicant being dissatisfied with the whole of the said Judgment, intends to lodge an appeal and filed a Notice of appeal on 6<sup>th</sup> November 2023.
3. As a brief background to the motion, the respondents were charged in Mombasa Chief Magistrate's Court with 2 Counts to wit: Count I, the offence of making a false report contrary to section 24(6) (b) as read with section 209 of the *East African Community Customs Management Act*, 2004, the particulars of which were that on 28<sup>th</sup> October 2019 at Old Port and Kilindini ship boarding office within Mombasa County, being Directors of Limited Companies, unlawfully made a false report namely Transire, in relation to cargo aboard MV ALFAZAL registration number Z 1438 to wit 1000 bags of 25 kgs of rice and 10 tonnes of scrap metal instead of 15,045 bags of 25kgs of rice and 16 tonnes of scrap metal, all valued at Kshs. 22,532,619 with tax implication of Kshs. 13,142,066; and Count II against the 4<sup>th</sup> respondent for conveying imported goods contrary to section 199(b) (i) of the East Africa Community Customs Management Act, 2004 the particulars of which were that, on 28<sup>th</sup> October 2019 at Kilindini ship boarding office within Mombasa County, being the master of a Marine Motor vessel namely MV AL FAZAL registration number Z 1438, was found to be conveying rice and scrap metal which had been under declared vide Transire No. OCV KLD xxx 2019 in contravention of the East African Community Customs Management Act to wit 1000 bags of 25 kgs rice and 10 tonnes of scrap metal, all valued at Kshs. 22,532,119 with tax implication of Kshs. 13,142,066.
  4. The trial magistrate found the respondents guilty of the offence in Counts I and II. The 1<sup>st</sup> respondent was found guilty in Count II. And in Count I, he was fined 5000 dollars. The 3<sup>rd</sup> and 5<sup>th</sup> respondents were fined 5000 dollars each in Count I and, in default of payment, to serve 12 months' jail terms each. The 5<sup>th</sup> respondent was fined 10,000 USD in respect of Count II and, in default, to serve 12 months' jail term. The trial magistrate also ordered the 1<sup>st</sup> respondent to pay outstanding taxes amounting to Kshs. 9,654,163 and, in default, to serve 2 years imprisonment. The rice was ordered to be destroyed as it was unfit for human consumption.
  5. Aggrieved by the Judgment, the respondents appealed to the High Court. The learned Judge, upon considering the matter, held that the applicant had not established its case to the required standard and proceeded to acquit the respondents. Hence the intention to appeal to this Court and this application.
  6. In the motion and the affidavit in support, it was contended that the intended appeal had a high probability of success and that, unless an order of stay is granted, the appeal will be rendered nugatory; that the High Court was in error in law in acquitting the respondents and subsequently ordering reshipment of the 10,500 bags of rice declared unfit for human consumption solely on grounds that the prosecution had not proved that the duty on the consignment was not going to be paid upon assessment, whereas the trial magistrate sentence was with respect to offences preferred against the respondents, which offences did not include non-payment of duties; and that the Judge failed to consider the ingredients for the offences with which the respondents had been charged, and whether they had been proven to the required standards.
  7. It was further contended that the respondents are likely to reshipe the 10,500 bags of rice out of the Court's jurisdiction, which exhibits are the substance of the applicant's appeal; that, further, the court ordered refund of the fines paid by the respondents, who are seafarers of Indian nationality, and who pose a flight risks; that, furthermore, the Judgment has the effect of curtailing the enforcement of tax laws in the administration of tax, which are intended to deter the crime of tax evasion; and that the Judge was wrong to conclude that Kenya Revenue Authority should have disregarded that offences were committed and instead sought to collect the taxes.



8. Both the applicant and the respondent filed written submissions. When the motion came up for hearing on a virtual platform, learned counsel for the State, Mr. Simbi appeared together with Mr. Kiogora. Highlighting their submissions, Mr. Simbi reiterated the contents of the application, urging that if the stay of execution is not granted, the applicant will be compelled to release the bags of rice declared unfit for human consumption for reshipping out of the jurisdiction of the Court, refund the fines paid by the respondents and release the 5<sup>th</sup> respondent; that were the condemned rice and the 5<sup>th</sup> respondent to leave the jurisdiction of the Court, then the appeal will be rendered nugatory.
9. On their part, learned counsel for the respondents, Mr. Shimaka, submitting orally, stated that the applicant has not demonstrated that they have an arguable appeal, or that the appeal will be rendered nugatory; that the application is baseless as the respondents have already been acquitted, and that the orders cannot be stayed; and that this would amount to detaining the respondents without charges. Counsel went on to submit that the claim for taxes can always be recovered by way of fines. From the bar, counsel informed the Court that the current state of affairs was that the 5<sup>th</sup> respondent is due to be escorted back to his country of origin, and that the fines paid into court have since been refunded and the other respondents released.
10. In reply, Mr. Simbi confirmed that the fines had been refunded, and that some of the respondents are already outside the jurisdiction of the Court. He also informed us that the taxes were yet to be paid.
11. We begin by observing that this application has been brought under rule 43, which bears no relation to the principles that the applicant seeks to advance. We would however surmise that it was intended to be brought under rule 5(2) (b) and, as such, we will determine the application on this basis.
12. In the case of *Manilal Jamnandas Ramji Gobil v Director of Public Prosecution* [2014] eKLR, this Court observed that:

“ 16. This Court may grant stay orders in criminal proceedings pending before the subordinate court only on appeal arising from the decision of the High Court...”

The Court continued thus:

“ 17. To benefit from the discretion of the Court the applicant must satisfy the Court that first, his appeal is an arguable one, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory. These principles are now well settled in a host of the decisions of this Court including *Trust Bank Limited and Another v Investech Bank Limited & 3 Others* (Civil Application No. Nai 258 and 315 of 1999 (unreported))...”

13. The jurisdiction of this Court under rule 5(2) (b) of this *Court's Rules* is discretionary. In the exercise of this discretion, the Court must be satisfied that the twin principles, which are, firstly, that the appeal is arguable; and, secondly, that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory. These principles were stated in the case of *Trust Bank Limited and Another v Investech Bank Limited and 3 Others* [2000] eKLR where this Court held:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding



principles but these principles must be considered against facts and circumstances of each case...”

14. On the first principle, in order to discern whether the appeal is arguable, this Court need only consider whether there is at least a single bona fide arguable ground that has been raised by the applicant. See *Damji Premji Mandavia v Sara Lee Household & Body Care (K) Limited* Civil Application No. Nai.345 of 2005 (UR ); *Kenya Railways v Ederman Properties Ltd*, Civil Appeal No. Nai 176 of 2012; and *Ahmed Musa Isamel v Kumba ole Ntamorua & 4 others*, Civil Appeal No. Nai 256 of 2013.
15. We have considered the grounds of appeal set out in the motion. The applicant is dissatisfied with the High Court decision for the reason that the court was wrong in law in failing to consider the ingredients of the offences with which the respondents were charged, and in failing to reach a determination on whether the offences were proved to the required standards. We find this to be an arguable ground worthy of ventilation before this Court.
16. On the nugatory aspect, the first appellate court held that the applicant had not established their case to the required standard and, on this basis, proceeded to acquit the respondents, order refund of the fines paid and the condemned rice be reshipped to the country of origin.
17. With respect to the respondents’ acquittal, and whether or not an appellate court has jurisdiction to stay execution of such orders, the Supreme Court in the case of *Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR held that:

“In the circumstances and in light of the above persuasive authorities we have referred to, we find that it would throw out of the window the objective of a fair trial under Article 50(1) of our *Constitution* if we were to concur with the Appellate Court that courts in this country have no jurisdiction to stay an order of acquittal and remand in custody a respondent whose acquittal is being challenged on appeal.
45. We would, however, wish to point out that an application for stay of an acquittal and remand of an acquitted person, whose innocence has been declared by a court of competent jurisdiction, is a very serious matter as it seeks to restrict such acquitted person’s constitutional right to freedom of movement. It is therefore a matter that requires to be considered with great circumspection. Orders of stay and remand of an accused-respondent should be sparingly granted. The prosecution must demonstrate to the court the risk of flight likely to render the appeal or intended appeal an academic exercise if the respondent is not remanded  
.....

The upshot is that an appellate court is not totally handicapped. It may where satisfied grant an order staying an acquittal pending the hearing and determination of the appeal by the State.”
18. When the afore cited decision is considered against the parties’ averments, we are not persuaded that the applicant has satisfied the laid down prerequisites. We say this because, save for stating that the 5<sup>th</sup> respondent is a flight risk, nothing was presented before us to show that he is indeed a flight risk. We also bear in mind both counsel’s concurrence that some of the respondents have already left the jurisdiction of the Court. As a consequence, the basis for a stay of the acquittal of the respondents has therefore not been met.
19. In so far as the refund of fines is concerned, both counsel for the applicant and for the respondent agree that the fines have already been paid out. It therefore becomes evident that a stay on refund of fines has been overtaken by events, and that there is nothing for us to stay.



20. Finally, regarding the condemned rice, the learned judge ordered that, the rice having been declared unfit for human consumption, it should be reshipped back to the country of origin. In seeking stay orders in this regard, we were not told how declining a stay in respect of the shipping of rice declared unfit for human consumption would render the intended appeal nugatory.
21. In effect, the applicant has failed to satisfy the nugatory aspect in respect of a rule 5 (2) (b) application with the result that the Notice of Motion dated 9<sup>th</sup> November 2023 is without merit and is hereby dismissed. Costs in the appeal.

It is so ordered

**DATED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JULY, 2024**

**S. GATEMBU KAIRU, FCIARB**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA C.Arb, FCIARB.**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

