



Kenya Revenue Authority v Transouth Conveyors Limited (Civil Application E235 of 2021) [2022] KECA 172 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 172 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E235 OF 2021
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
FEBRUARY 18, 2022**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

TRANSOUTH CONVEYORS LIMITED RESPONDENT

(Application for stay of execution from the Judgment of the High Court of Kenya at Mombasa (P.J. Otieno, J.) dated 17th May, 2021 in H.C.C.C. No. 26 of 2009)

RULING

1. In a Judgment delivered on 17th May, 2021 by the High Court of Kenya at Mombasa (Otieno, J.) the applicant (Kenya Revenue Authority) was ordered to pay to the respondent (Transouth Conveyors Limited) Ksh.504,274,887 and USD576,751.80; exemplary damages of Ksh.1,000,000 together with costs and interest, arising out of a suit lodged by the respondent against the applicant.
2. The applicant filed a Notice of Appeal against the whole of the said decision and has approached this Court under rules 1(2); 5(2) (b), 75 of the *Court of Appeal Rules* and Sections 3A and 3B of the [Appellate Jurisdiction Act](#) praying in the main that we stay execution of the said Judgment pending hearing and determination of an intended appeal.
3. In grounds in support of the Motion and in a supporting affidavit of James Ndege, the applicant's Customs and Border Control Department, it is stated in essence that there is a real danger of the said Judgment being executed; that the intended appeal is arguable with chances of success and would be rendered nugatory if the appeal succeeded.
4. Further, that the Minister of Finance had published a Gazette Notice domesticating the arrangements made between Kenya and COMESA in 2003 which provided for duty free importation of sugar; Kenya Sugar Board had also published a Gazette Notice informing registered importers of sugar of the period for importation; the applicant had published notices in the media informing of the relevant dates for



importation of duty – free sugar which notices and Gazette Notices led to various litigation relating to dates of importation.

5. With respect to the respondent, it imported 5000MT of raw white sugar from Egypt, a COMESA country but the relevant department of the applicant declined to process the same as the importation was not within the period published for duty-free importation of sugar.
6. Litigation followed between the applicant and the respondent and the High Court held in favour of the applicant but that decision was appealed and this Court ordered that the imported sugar be released duty free.
7. The respondent then filed a suit for damages where Judgment was entered as we have already seen in the opening paragraph of this ruling. The applicant contends in the intended appeal that the learned Judge in entering Judgment as stated erred in holding that the applicant's actions were injurious to the respondent; that the Judge applied wrong principles in assessing damages and that the Judge failed to correctly address the law regarding mitigation of damages.
8. When the Motion was called for hearing on a virtual platform on 19th January, 2022 learned counsel Mr. John Marigi appeared for the applicant but there was no appearance for the respondent. We were satisfied that the respondent had been served with a hearing notice on 10th January, 2022 at 12.17 p.m. where it was required that parties file written submissions within limited period. The applicant had complied by filing written submissions but the respondent had not, so we do not have the benefit of knowing the position the respondent takes in respect of the application.
9. The principles that apply in an application of this nature are old hat. For an applicant to succeed it must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* where those principles were well summarized.
10. We have perused draft Memorandum of Appeal where various grounds of appeal are taken.
11. It is proposed to be argued on appeal that the Judge proceeded on wrong principles of law for award of special damages which must be pleaded and proved. It is also proposed to be argued (amongst other grounds) that damages awarded were punitive and that the respondent did not mitigate its losses as required in law. We find these to be arguable points and as we have held before an arguable point on appeal is not one that will succeed – *Dennis Mogambi Mongare v Attorney General & 3 Others [2012] eKLR*. It has also been held in cases like *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited, Civil Application No. NAI 345 of 2004* that an applicant satisfies the principle if it raises a single arguable point as there is no requirement to raise a multiplicity of arguable points.
12. Will the intended appeal be rendered nugatory if we do not grant stay? We think it will. Firstly, the respondent has not rebutted the applicant's contention that it may not be in a position to refund the Judgment sum if the appeal succeeded. Secondly, the Judgment sum is in no sense a small sum, it is a huge amount. We follow the holding in this Court's decision in the case of *Reliance Bank Limited v Norlake Investments Limited [2002] EA 227*:

“.... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

13. The applicant is entitled to exercise of our discretion and we allow the Motion.



14. Costs of the Motion will be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

