



**Kenya Bureau of Standards v Kwale International Sugar Company Ltd & 4 others
(Civil Application E020 of 2020) [2022] KECA 526 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 526 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E020 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

KENYA BUREAU OF STANDARDS APPLICANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LTD 1ST RESPONDENT

MINISTRY OF TRADE 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

*(An application for stay of execution of the judgment and decree of the
High Court of Kenya at Mombasa (Ogola, J.) dated 7th November 2019)*

RULING

1. In its motion before us dated 18th December 2020, made under Article 159(2)(d) of the [Constitution](#) of Kenya, Section 3 and 3A of the [Appellate Jurisdiction Act](#), and Rules 5(2)(b) and 47 of the [Court of Appeal Rules](#), the applicant, Kenya Bureau of Standards, seeks an order of stay of execution of the judgment and decree of the High Court at Mombasa (Ogola, J.) delivered on November 7, 2019 pending the hearing and determination of Civil Appeal No. 2 of 2019 (sic).
2. In that judgment the High Court found, based on a constitutional petition by the 1st respondent, that: the applicant, as part of multi-agency team illegally raided and sealed off the 1st respondent's factory, warehouses and stores; impounded and sealed off lorries that had been loaded with sugar; and sampled the sugar in the warehouses. Consequently, the High Court in its said judgment: declared that the applicant and the 2nd to 5th respondents violated the 1st respondent's constitutional rights; declared



- that the seizure of the 1st respondent's factory, warehouses and stores as illegal and unconstitutional; granted a mandatory injunction compelling the applicant and the 2nd to 5th respondents to immediately lift the seizures and allow the 1st respondent access to its factory, warehouses and stores; compelled the applicant to renew the 1st respondent's standardization permit with respect to Kwale sugar; permanently restrained the applicant from purporting to seize the 1st respondent's sugar consignment stored in its warehouse; ordered payment of Kshs.10,000,000.00 compensation for loss suffered as a result of the seizure of the 1st respondent's sugar consignment and closure of its factory; ordered compensation to the 1st respondent for 8995 bags of sugar, based on market value of each bag, which the applicant refused to re-test in violation of court order; and payment of costs of the petition.
3. Urging the application before us, learned counsel Mr. Wekesa appearing with Mr. Kisaka for the applicant and supported by Mr. Ochieng learned counsel for Kenya Revenue Authority, the 3rd respondent, referred to the supporting affidavit of Bernard Njiraini, the Managing Director of the applicant, written submissions dated 8th February 2021 and authorities and submitted that the intended appeal is arguable; that it is in public interest that the orders sought be granted and that the intended appeal, if successful, will be rendered nugatory unless the orders sought are granted. In that regard the decision of the Supreme Court of Kenya in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR; the decision of this Court in *Attorney General & another vs. Phoenix Global Kenya Limited & 5 others* [2019] eKLR were cited. It was pointed out that the applicant's previous application in Civil Application 84 of 2019 seeking stay of proceedings and stay of an earlier judgment delivered on 7th March 2019 in the same case was dismissed by this Court on 4th December 2020 on the grounds that the "judgment" of 7th March 2019 was not a judgment.
 4. The 2nd, 4th and 5th respondents, though served with notice of hearing of the application did not appear during the virtual hearing of the application.
 5. Learned Senior Counsel Professor Ojienda, appearing with Ms. Awour for the 1st respondent, in opposing the application referred to a replying affidavit of Benson Nzuka, a Legal Director of the 1st respondent; the 1st respondent's written submission dated 10th February 2022 and the 1st respondent's list of authorities, and submitted that the applicant's application is not only an abuse of the process of the court but is also res judicata on account of the applicant's previous application in Civil Application 84 of 2019 over the same matter which was heard and dismissed; and that there is also pending before the lower court an application dated 6th November 2020. In that regard the case of *Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 others* [2017] eKLR was cited. Also cited is the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others*, Civil Appeal No. 25 of 2002 [2009] KLR in support of the proposition that the present application is an abuse of the process of the court.
 6. As to whether the intended appeal is arguable, counsel submitted that the sole question before the lower court was whether the 1st respondent's sugar was substandard and unfit for human consumption; that whilst according to the applicant a portion of the sugar was unfit for consumption, it was the 1st respondent's case that all its sugar was fit for human consumption; that the impugned judgment was based on a re-test and the intended appeal cannot therefore be arguable as the orders made were pursuant to the re- test results which showed that the sugar was fit for human consumption in the first instance.
 7. It was submitted that the appeal will not be rendered nugatory; that contrary to the misrepresentation by the applicant, the court did not order the remaining sugar to be released; that the sugar in question had already been destroyed as it had surpassed the expiry date; that considering that the 1st respondent's factory was already re-opened and the 1st respondent's standardization permit renewed, the application



- is moot and overtaken by events; that as regards the order for compensation, execution proceedings, which take a significant amount of time as a government agency is involved, are yet to be commenced.
8. Counsel expressed surprise that the applicant is still intent on pursuing this application as the parties embarked on out of court settlement negotiations in line with Article 159 of the *Constitution*.
 9. We have considered the application and the submissions. As to the contention that the application is an abuse of the process of the court and is *res judicata* on account of the previous application in Civil Application 84 of 2019, we observe that that application related to stay of “judgment” delivered on 7th March, 2019 and in dismissing it, the court expressed that what the High Court had delivered on the 7th March 2019 though labelled or titled as a “judgment”, was not a judgment “as understood in law”. The present application relates to the subsequent judgment of the High Court in the same matter delivered on 7th November 2019 which could not have been the subject of an earlier application of 16th September 2019 that resulted in the ruling of December 4, 2020. We are not persuaded that the present application is either *res judicata* or an abuse of the process of the court.
 10. On the merits, the principles guiding the Court in an application of this nature are well established. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & others* [2013] eKLR. As to whether the intended appeal is arguable, the complaints enumerated by the applicant in its memorandum of appeal include complaints that the learned Judge descended into the arena of the dispute; aided the 1st respondent by reframing its case and conducting two hearings to aid the 1st respondent and rendered two judgments; ignored statutory provisions under the *Standards Act* in ordering the applicant to unconditionally renew the 1st respondent’s standardization permit; ordering payment of Kshs. 10,000,000.00 “as nominal damages” without any factual or legal foundation and when no such claim was pleaded or proved. 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 *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008. We are satisfied that the appeal is not frivolous. It is arguable.
 11. As to whether the appeal will be rendered nugatory if the orders sought are not granted and the appeal ultimately succeeds, we bear in mind the pronouncement by the Court in *Stanley Kangethe Kinyanjui vs. Tony Ketter & others* above that “in considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.” As already stated, the orders made by the High Court in the impugned judgment include declarations; a mandatory injunction lifting the seizure and allowing the 1st respondent to its factory, warehouse and store; an injunction restraining the applicant from seizing the 1st respondent’s sugar consignment stored in its warehouse; payment of Kshs. 10,000,000.00 and payment of compensation for 8995 bags of sugar. There appears to be some controversy as to where matters stand in relation to seizure of the sugar consignment and access to the factory, warehouse and stores. At the close of arguments before us on 16th February 2022, when reserving this ruling, we ordered that the status quo then obtaining be maintained pending delivery of this ruling.
 12. The main appeal, being Civil Appeal No. 2 of 2020, has since been heard by this Court and judgment reserved and the order that commends itself to us, is to order, which we hereby do, that the status quo as at 16th February 2022 should continue to be maintained pending the determination of Civil Appeal No. 2 of 2020. In relation to the order for payment of nominal damages of Kshs. 10,000,000.00 and payment of compensation for 8995 bags of sugar, there is a contention that the applicant is a public body, and that the 1st respondent’s means are unknown. We order a stay of execution of the judgment in respect of the orders for payment of Kshs. 10,000,000.00 and compensation for 8995 bags of sugar pending the hearing and determination of Civil Appeal No. 2 of 2020.



13. The costs of the application shall abide by the outcome the main appeal.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY, 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

