



**Kenya Wildlife Service v Shihua Industry Alliance Company Limited & 3 others (Civil Application E050 of 2022) [2022] KECA 1385 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1385 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E050 OF 2022  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
DECEMBER 16, 2022**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... APPLICANT**

**AND**

**SHIHUA INDUSTRY ALLIANCE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY CONSERVATOR ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GEDIRECTOR OF PUBLIC PROSECUTIONNERAL .... 3<sup>RD</sup>  
RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution and /or further proceedings pending the appeal against the Ruling of the Environment and Land Court at Mombasa (L. L. Naikuni J.) on 9th May 2022 in Mombasa ELC Appeal No 23 of 2019)*

**RULING**

1. The orders that are subject of the application for stay of execution that is before us for determination dated July 27, 2022 and brought by the Kenya Wildlife Service, the applicant herein, were made by the Environment and Land Court (L Naikuni, J) in a ruling delivered on May 9, 2022. The said ruling allowed an application made in the ELC by the 1<sup>st</sup> respondent, and granted the following orders:
  - a. An order that the appellant, the Kenya Wildlife Service (KWS) be and is hereby authorized to ensure the issuance of such permit and/or export clearance documents/certificates and / or diplomatic authorization by such authorized statutory body to the satisfaction of the CITES for purposes of transshipment of the consignment held and seized belonging to the 1<sup>st</sup> respondent within the next three (3) days from the date of this ruling without fail.



- b. An order be and is hereby made restraining and /or preventing any person, officer, agency and /or institution from causing and/or placing any objections, embargoes, restriction and/ or encumbrance onto the consignment scheduled and from the trans-shipment to the designation as had been originally intended by the 1<sup>st</sup> respondent;
  - c. There be a site visit on May 20, 2022 at the Kenya Ports Authority at Kilindini Harbour of the thirty-seven (37) containers of the consignments to be organised and led by all the following multi agencies including the Kenya Wildlife Services, Kenya Revenue Authority, Kenya Ports Authority and the Kenya Police at the Kilindini Police Station (both the DCIO & OCS);
  - d. An order be and is hereby granted tandem with the other directions issued herein there be a verification of the contents of all the said thirty seven (37) containers by the honourable court, cross stuffing to fresh containers as a designated area reserved for the same, due process including but not limited to supervision and release thereof in accordance with and in lawful compliance in the presence of the court (through the Judge or the Deputy Registrar) for the purposes of transshipment to the designated destination as duly ordered by the honourable court.
  - e. That the appellant- Kenya Wildlife Service (KWS) to bear the costs of this notice of motion application to the 1<sup>st</sup> respondent.
  - f. That failure to comply with and/or be in breach with any of the above cited directions and orders to automatically cause the Director of the Kenya Wildlife Services in person be committed to civil jail for a reasonable period for being in contempt of the court orders hereof.
2. The applicant in its application seeks a stay of order (a) in the said ruling. The facts giving rise to the said application as summarised from the affidavit in support for the application sworn on July 27, 2022 by Benta Musima, the applicant's Legal Officer, and the replying affidavits sworn on September 2, 2022 by Salama Mbauro, the 1<sup>st</sup> respondent's local representative, are that a consignment of 34 containers of Malagasy Rosewood which was on transshipment from Zanzibar through Mombasa port to Hong Kong was seized on April 29, 2014 by a multiagency team which included the applicant and the Kenya Police while at the port of Mombasa, on suspicion that it was not ordinary wood, as indicated in the bill of lading but Malagasy Rosewood which was an endangered species protected under the [Convention on International Trade in Endangered Species of Wild Fauna and Flora](#) (CITES). The consignee of the consignment was the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent then filed a suit at the Chief Magistrate's Court at Mombasa on November 14, 2017 seeking orders of forensic analysis and testing of the consignment with a view of establishing its nature and whether it contravened any provisions of CITES, and for the return of the consignment.
  3. The Chief Magistrate Court (Hon Mutunga, SRM) ordered for a forensic analysis which found that the consignment belonged to the genus Dalbergia (Rosewood). On November 29, 2019, the Magistrate Court held that the consignment was not covered under [CITES](#) at the time of the seizure and ordered for its release. The applicant being dissatisfied with the decision of the trial Court preferred an appeal to the Environment and Land Court (ELC) (Omollo, J) who, upheld the decision of the Magistrate Court and dismissed the appeal in a judgement rendered on August 14, 2019.
  4. The 1st respondent subsequently filed an application in the ELC dated December 23, 2019 seeking to cite the applicant for contempt after the order of release of the consignment was not complied, and Yano, J in a ruling rendered on July 9, 2020 found the Applicant's officer in charge of Mombasa guilty of contempt. The applicant filed a notice of appeal dated July 13, 2020 challenging the said ruling and sought stay of sentencing by an application dated August 4, 2020, which was allowed by the ELC court



in a ruling rendered on January 20, 2021. The 1<sup>st</sup> respondent then filed an application dated January 27, 2022 seeking that the court compel the applicant to issue it with export clearance under the *CITES*, so that the consignment could be transhipped, which application was the subject of the impugned ruling rendered on May 9, 2022.

5. The grounds for the application of stay are that the applicant has an arguable appeal that challenges orders which in effect compel it to act in breach of Kenya's international obligations and encourage the illegal trade in Malagasy Rosewood and the appeal will be rendered nugatory if the applicant is so compelled to act, and its director will be jailed for contempt of court orders.
6. The 1<sup>st</sup> respondent in opposition averred that the substantive judgment that found the seizure of the consignment illegal remained unchallenged, and the court has issued a raft of orders that have not been obeyed which implicated the applicant as being on a fishing expedition to further choose which orders to obey. Further, that the 1<sup>st</sup> respondent continues to incur demurrage for the consignment illegally seized by the applicant and other costs due to the non-compliance coupled with the non-ending litigation. In addition, that all the other government agencies that were pertinent to ensuring that the consignment had been transhipped had complied with the court order except the applicant, and the 1<sup>st</sup> respondent should be allowed to enjoy the fruits of its judgment. Lastly, that the applicant would not suffer any prejudice in the event that the orders sought are denied, as it had participated in the cross stuffing of the consignment to the fresh containers as ordered by the Court in the impugned ruling.
7. We heard the application virtually on September 7, 2022, and learned counsel Mr Mutua Mugambi appeared for the applicant, learned counsel Mr Egunza appeared for 1<sup>st</sup> respondent, learned counsel Ms Waswa appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and learned counsel Mr Ochieng Gaya, appeared for the 5<sup>th</sup> respondent. There was no appearance for the 4<sup>th</sup> respondent despite its advocates having been served with the hearing notice. Ms Waswa and Mr Ochieng Gaya, informed the court that they supported the application, while Mr Mugambi and Mr Egunza highlighted their written submissions dated August 24, 2022 and September 2, 2022 respectively.
8. The principles applicable in the exercise of the court's unfettered discretion under rule 5(2) (b) to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR. The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR held that the public interest is an additional element to be considered in stay applications.
9. Mr Mugambi in this respect cited the decision in *Dennis Mogambi Mongare v AG & 3 others* [2012] eKLR for the proposition that there is an arguable appeal that is not frivolous, as attested to by the draft memorandum of appeal. On the nugatory test, it was urged that should stay not be granted, then the offending cargo will be taken outside the jurisdiction of the court thereby rendering the appeal moot. It was reiterated that the 1<sup>st</sup> applicant's director will be jailed for contempt and if the appeal succeeds cannot be compensated as held by the Supreme Court of Kenya in the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR.
10. On the public interest angle to the stay, it was urged that the cargo has attracted international interest and is the subject of international monitoring to see whether Kenya will fulfil its international obligations under *CITES*, and Kenya's international reputation is at stake. The decisions in *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others* [2014] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and *Kenya Small Scale Farmers Forum*



*6 others v Republic of Kenya & 2 others* [2013] eKLR were cited in this respect. Mr Mugambi denied that it had given any permit to the 1<sup>st</sup> respondent to export the consignment, as such permit is required to be given by the country of origin of the consignment.

11. Mr Egunza's submissions on the limb of arguability of the appeal were that the subject matter of the appeal are the orders and ruling which directed the issuance of the trans-shipment permit, bearing in mind that the judgement of August 14, 2019 that concerns the applicability of *CITES* and the retrogressive application of law as relates to the subject consignment still stands and is yet to be appealed. Therefore, that the appeal is not arguable. On the nugatory aspect, the counsel submitted that the applicant has commenced the documentation as to issuance of the trans-shipment permit in partial compliance of the impugned orders, which renders the application nugatory and overtaken by events. Additionally, that the applicant had failed to show the substantial loss to be suffered.
12. In our consideration of the arguability of the appeal, we have perused the applicant's draft memorandum of appeal that was annexed to the application, which has raised the issues of whether the order to issue a permit to the 1<sup>st</sup> respondent would result in the applicant acting illegally and contradicted the earlier orders given by the ELC that the consignment is not regulated by *CITES*. The 1<sup>st</sup> respondent argues that the earlier orders on the applicability of *CITES* were not appealed, but for the purposes of the present application, what is required to be demonstrated is that a notice of appeal has been lodged with respect to the orders sought to be stayed, and the applicant exhibited a notice of appeal against the impugned ruling dated May 11, 2022 that was lodged on May 16, 2022. In addition, this court exercises original jurisdiction under rule 5(2)(b) as held in *Ruben & 9 others v Nderitu & another* [1989] KLR 459. Lastly, we only need to be satisfied that the points raised in an appeal are not frivolous, irrespective of their chances of success. We are persuaded that the grounds of appeal presented in the present application raise arguable points that merit consideration and determination one way or the other.
13. On the nugatory aspect, it was held in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [*supra*] that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. There is an obvious irreversible outcome in this application if the stay sought is not granted, as the subject consignment will be taken out of the jurisdiction of the court, rendering the appeal an academic exercise and which also discounts damages as an adequate remedy if the appeal is successful given the nature of the issues raised in the appeal. In addition, it is in the public interest that the applicant's legal obligations, if any, in the circumstances of this application are clarified.
14. The required threshold for the orders of stay of execution sought by the applicants has therefore been met by the applicant, and the notice of motion application dated July 27, 2022 is found to be merited. We accordingly stay the execution of the orders issued on May 9, 2022 by Hon Justice LL Naikuni in Mombasa Environment and Land Court Appeal No 23 of 2019 – *Kenya Wildlife Services v Shibusha Industry Alliance Co Limited & 4 others* that compel the applicant to issue the 1<sup>st</sup> respondent with such permit and/or export clearance documents/certificates and/or diplomatic authorization by such authorized statutory body to the satisfaction of the *CITES* for purposes of transshipment of its consignment, pending the hearing and determination of the intended appeal by the applicant. There shall be no order as regards the costs of the application.
15. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

**S GATEMBU KAIRU (FCI Arb)**



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**JUDGE OF APPEAL**

**P NYAMWEYA**

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**JUDGE OF APPEAL**

**J LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

