



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR JJ.A)

CIVIL APPLICATION NO. 3 OF 2021

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

AND

GATUMA KAUMBI KIOGA.....1ST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....2ND RESPONDENT

(An application stay of execution against the judgment and orders of the High Court at Meru (Gikonyo, J.) delivered on 23rd November 2020 in Meru Constitutional Petition No. 15 of 2019)

RULING OF THE COURT

The Notice of Motion dated 8th August 2018 is brought pursuant to **sections 3A and B** of the **Appellate Jurisdiction Act** and **rule 5 (2) (b)** and **42** of the **Court of Appeal Rules 2010**, seeking orders of stay of execution against the judgment of the High Court of Kenya at Meru (*Gikonyo, J.*) delivered on 23rd November 2020. It is brought on the grounds that the High Court issued various orders including an order of *certiorari* quashing criminal proceedings against **the 1st respondent Gatuma Kaumbi Kioga** in *Nyeri CMCCRC No. 1833 of 2019*; an order of prohibition restraining the applicant from charging the 1st respondent with offences preferred in *Nyeri CMCCRC No. 1833 of 2019*; an award of general damages of Kshs 2,000,000 for injury to the 1st respondent's reputation as well as special damages of Kshs. 1,380,000 being the purchase price of the motor vehicle Reg. No KCE 385Y (the subject vehicle) and the loss of user for 1 month at the rate of Kshs 5,000 per day (equivalent to Kshs. 150,000). The applicant contends that the court erred by issuing the above orders despite finding that the motor vehicle was uncustomed and liable to forfeiture.

It was contended that the appeal was arguable with a high chance of success, and that the applicant stood to suffer immense loss of revenue because the court's orders would render it impossible to recover revenue from uncustomed goods, and prosecute customs offences under the East African Community Customs Management Act (EACCMA), particularly since it was condemned to pay damages for carrying out its lawful mandate.

The application was supported by the affidavit of **Morris Mbabu** of the applicant's Investigation and Enforcement Department together with the applicant's written submissions where it was asserted that the appeal was arguable because the learned judge, despite having found that the subject vehicle was uncustomed and that duty was not paid, he nevertheless went on to quash the criminal proceedings against the 1st respondent in *CMCCRC No. 1833 of 2019* and to award general and special damages to be paid jointly and severally by the applicant and 2nd respondent. It was argued further that the learned judge wrongly found that the 2nd respondent had inherited the Vehicle Management System from the applicant when at no time was motor vehicle registration the applicant's responsibility; that in any event the vehicle was destined for Uganda and ought not to have been registered in Kenya, and duty should not have been paid in on the subject vehicle since it was destined for Uganda. That in fact, the applicant's records in the Simba System showed that duty was not paid at all. That, it was this non-payment that had led to the seizure of the subject vehicle, and the 1st respondent being charged with possession of and interfering with uncustomed goods under the EACCMA.

In a replying affidavit sworn on the 1st March 2021, the 1st respondent deposed that the applicant and the 2nd respondent perpetuated the breach of his constitutional rights. It was the 1st respondent's case that the applicant unlawfully confiscated the subject vehicle in Meru on

19th September 2019 and to date it remained in the applicant’s custody; that subsequently the applicant preferred criminal charges against him, and thereafter publicised his case in the media; that despite the 1st respondent having produced registration documents, search certificates and other transactional documents, the applicant continued to detain the subject vehicle; that as things stand, the 1st respondent continues to suffer without the motor vehicle which was financed by a bank loan, while corrupt officers of the applicant and 2nd respondent continue to unjustly enrich themselves.

Bearing the foregoing in mind and in so far as applications filed under *rule 5 (2) (b)* of this Court’s rules are concerned, the threshold to be satisfied, as explained in the case of *Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR*, is that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

In reference to the arguability of the intended appeal, the applicant’s complaints in the main are that though the learned judge found that the vehicle was uncustomed and duty was not paid, he nevertheless quashed the criminal proceedings instituted against the 1st respondent in *CMCCRC No. 1833 of 2019* and also awarded general and special damages, where the latter damages were neither specially pleaded nor strictly proved as required by law.

Another ground is that the finding by the learned judge that the 2nd respondent inherited the Vehicle Management System from the applicant was erroneous as, at no time was the applicant responsible for the registration of motor vehicles. These matters, in our view, are indeed arguable.

On the nugatory aspect, the learned judge granted an order of certiorari quashing criminal proceedings against the 1st respondent in *Nyeri CMCCRC No. 1833 of 2019*, and an order of prohibition restraining the applicant from charging the 1st respondent with offences preferred in *Nyeri CMCCRC No. 1833 of 2019*. We do not see how the intended appeal will be rendered nugatory if we do not grant an order of stay of execution. We say so because, nothing would preclude the applicant from reinstating the charges in the event the appeal was to succeed.

On the other hand, serious issues have been raised regarding the award of general and special damages with the contention that the special damages were neither specially pleaded nor strictly proved. In the circumstances we are inclined to stay the execution as regards the various damages awarded to the 1st respondent, pending the hearing and determination of the intended appeal.

In sum, the Notice of Motion dated 8th August 2018 succeeds in part. For clarity, we order a stay of execution of the award of damages to the 1st respondent, and we decline to stay the order quashing the criminal proceedings against the 1st respondent and the order prohibiting the 1st respondent’s charging in *Nyeri CMCCRC No. 1833 of 2019*. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M.K. KOOME

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR