



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Odando & another (Civil Application
E381 of 2021) [2021] KECA 325 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 325 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E381 OF 2021
MSA MAKHANDIA, J MOHAMMED & KI LAIBUTA, JJA
DECEMBER 17, 2021**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

ISAIAH LUYARA ODANDO 1ST RESPONDENT

WILSON YATTA 2ND RESPONDENT

(Being an application for stay of execution and further proceedings pending an intended appeal from the Ruling and Order of the High Court at Nairobi (Makau, J.) delivered on the 27th day of September 2021 in High Court Petition No. E. 374 of 2021)

RULING

1. By a petition dated 20th September 2021 filed in Nairobi High Court Petition No. E374 of 2021, the respondents herein prayed that the court be pleased to–
 - a. issue permanent conservatory orders quashing the decision by the Commissioner General of the applicant to adjust excise duty rates for petroleum products effective 1st October 2021, subject to approval by the Cabinet Secretary Treasury and National Planning;
 - b. issue declaratory orders that Parliament has failed to exercise its mandate to cushion Kenyans against the spiraling effect of fuel tax by deliberately sanctioning taxes on petroleum products, which currently constitute more than half of the price;
 - c. issue orders directing the respondents in the petition aforesaid (who include the applicant herein) to come up with clear regulations on the management



- and application of moneys received by the Petroleum Subsidy Fund from the Petroleum Development Levy;
- d. issue orders directing the respondents to the petition to account for moneys received from the Petroleum Development Levy in favour of the Petroleum Subsidy Fund; and
 - e. award costs of the petition.
2. The respondents' petition was supported by the annexed affidavit of the 1st respondent, Isaiah Luyara Odando, sworn on 20th September 2021. The petition was also accompanied by the respondents' Notice of Motion of the same date seeking, among others, temporary conservatory orders quashing the decision referred to in paragraph 1 (a) above. In addition to the temporary orders aforesaid, the petitioners sought certification of their petition as urgent and directions that the same be mentioned on a priority basis.
 3. When the petition came for directions on 27th September 2021, the learned Judge ordered that –
 - a. pending the hearing inter partes and determination of the Motion aforesaid, “conservatory orders in the interim quashing the decision of the Commissioner General of the Kenya Revenue Authority to adjust excise duty rates for petroleum products effective 1st October 2021 subject to approval by the Cabinet Secretary Treasury and National Planning do issue;
 - b. that the respondents therein, who were yet to file responses in the application as well as submissions in response be granted 14 days to do so;
 - c. the matter be mentioned on 12th October 2021 to confirm compliance and further directions; and
 - d. costs to abide the outcome of the application.
 4. The Applicant, the Kenya Revenue Authority, was aggrieved by the interim orders of Makau J and intends to file an appeal. Indeed it has already filed a notice of appeal evidencing that intention.
 5. When the respondents' interlocutory application in the petition came up for hearing inter partes on 12th October 2021, it could not proceed as scheduled in view of the pendency of the applicant's Notice of Motion herein dated 29th September 2021 seeking stay of execution pending lodging, hearing and determination of an intended appeal from the Ruling of the High Court at Nairobi (Makau, J) delivered on the 27th day of September 2021.
 6. Pursuant to the notice of appeal aforesaid the applicant filed the instant application under consideration in the main seeking stay of execution of the interim order by Makau J. The application is brought under Rule 5 (2) (b) of the *Court of Appeal Rules*. In its pleadings and written submissions in support of the application, Ms. Chelagat and Mr. Nyaga learned counsel for the applicant, were in attendance while learned counsel told the Court that the applicant was seeking stay of the said interim orders made on 27th September 2021 and further proceedings in the High Court pending their intended appeal against those orders. They contended that, in their view, the intended appeal is arguable in that the learned Judge's mind was already made up to the applicant's prejudice, and that the pending hearing inter partes of the respondents' Motion and Petition would not be in the applicant's interest. On the nugatory aspect it was submitted that the applicant was losing colossal sums of money in the consumable tax that it may not recover from the respondents should the intended appeal succeed.



7. In response, the respondents filed a replying affidavit as well as written submissions. In essence, Mr. Amondi, learned counsel for the respondents decried the delay in the hearing and determination of the respondents' Motion and petition in the High Court on account of the applicant's Motion before us. Further that the applicant had not met the threshold for the grant of the orders sought.
8. Having considered the applicant's Motion and the affidavit in support thereof, the affidavit filed in reply thereto by the respondent, and having considered the corresponding submissions made in writing and orally by learned counsel for the applicant and learned counsel for the respondents, we form the view that the Applicant's Motion stands or falls on two main grounds:
 - a. whether the intended appeal is arguable, which is to say, it is not frivolous; and
 - b. whether the appeal, if successful, would be rendered nugatory if stay of the interim orders in issue were not granted.
9. The principles that apply in applications pursuant to Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal, or intended appeal, have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties.
10. On the first limb of this twin principle, we call to mind the Court's decision in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR where the Court held that, for stay orders to issue, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
11. In our considered view, the applicant's Motion is premature and unprocedural. The orders sought, and the reasons advanced by learned counsel for the applicant are precisely the matters that await determination at the *inter partes* hearing of the respondents' Motion and petition in the High Court. We agree with learned counsel for the respondents that the proceedings herein can only serve to delay the proceedings in the High Court. The intended appeal is not arguable. The impugned interim orders of the learned Judge are yet to be confirmed so as to be the subject of challenge on appeal. Accordingly, denial of the stay sought would be inconsequential and there is nothing to be rendered nugatory if the applicant's motion is not granted.
12. The term "nugatory" was defined in *Reliance Bank Ltd V Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: it does not only mean worthless, futile or invalid. It also means trifling." The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
13. We are persuaded that the circumstances of the application before us does not call for stay of further proceedings in the High Court. The intended appeal from the interim orders in issue is frivolous and in vain and can only serve to stand in the way of *inter partes* hearing and determination, on the merits, of the respondents' Motion in the High Court. In conclusion, the applicant's Notice of Motion dated 29th September 2021 is hereby dismissed. This being a matter of public interest litigation, we make no orders as to costs

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

ASIKE-MAKHANDIA



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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

