



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO 170 OF 2018

BETWEEN

KENYA REVENUE AUTHORITY.....APPLICANT

AND

DR. ROBERT ANYISI.....RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT....INTERESTED PARTY

(Being an application for stay of execution of the judgment and order of the High Court at Nairobi (Odunga, J.) dated 16<sup>th</sup> May, 2018 in PET. No. 412 of 2016)

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RULING OF THE COURT

1. Kenya Revenue Authority (applicant) sought an order by way of a notice of motion dated 8<sup>th</sup> June, 2018 staying the entire judgment and orders of the High Court rendered on 16<sup>th</sup> May, 2018 by Odunga J., pending the hearing and determination of an intended appeal. The orders that aggrieved the applicant prompting it to file a Notice of Appeal on 18<sup>th</sup> May, 2018 followed by the instant application are in the following terms:-

**“I declare that sections 44(1) and (2), 60(1) and (3) and 59(4) of the Tax Procedures Act, 2015 are unconstitutional and are invalid and are accordingly null and void.**

**1. The Petitioner is entitled to damages for violation of his right to dignity and I assess the same in the sum of Kshs.2,000,000.00.**

**2. I also award the costs of this Petition to the Petitioner to be borne by the Respondent.**

**3. The Deputy Registrar of this Court is directed to serve a copy of this judgement on the office of the Attorney General for the necessary action”.**

2. The grounds supporting the motion state that the intended appeal is arguable because the learned Judge misapprehended the purpose of Sections 44, 59 and 60 of the Tax Procedures Act, 2015 The Act which are meant to facilitate the enforcement of tax collection. That the applicant had used the said provisions pursuant to its mandate of ensuring that information in the custody of the 1<sup>st</sup> respondent who was a public officer working as the Secretary to the Nairobi County Government was released to the applicant who was investigating issues of tax related fraud. That the said orders have thrown the country’s revenue collection in a quagmire such that the applicant cannot successfully implement tax compliance under several heads and cannot combat tax fraud and evasion. Further, by the High Court nullifying the said sections of the law, it effectively stopped the enforcement of tax collection in its entirety including rendering the projected revenue targets for the succeeding financial years uncollectable. That unless an order of stay is granted the intended appeal will be rendered nugatory and colossal amounts in revenue due for collection will be lost.

3. The motion was supported by the affidavit of David Ontweka that was sworn on 8<sup>th</sup> June, 2018 and Cyrell Wagunda, the chief manager in charge of investigations and compliance sworn on the same day. The averments in the said affidavits give a detailed chronology of how the applicant received information that: -

**“a) The Nairobi City County Government had procured legal services from the firm of Professor Tom Ojienda & Associates and he had billed them for a sum of Ksh 92.8 million;**

**b) That the said firm of Professor Tom Ojienda & Associates had sued Nairobi County Government in 2015 for non-payment of legal fees amounting to Ksh 724, 197, 078.**

**c) That Ksh.280 million was wired into Professor Tom Ojienda’s personal account and further investigations established that Professor Ojienda had under declared taxes in his self-assessment tax returns.”**

This is what prompted the tax officers to write letters to Nairobi County Government through the 1<sup>st</sup> respondent who was the county secretary requesting him to avail copies of fee notes, details of bank accounts operated by the Nairobi County Government so as to ascertain transactions in respect of the said public funds and taxes payable by **Prof Tom Ojienda & Associates**.

4. The respondent refused to co-operate and that is when the applicant invoked the provisions of **Section 99 1(a)** of the **Tax Procedures Act** which provides that it is an offence not to provide information or produce any document for examination as required by the Commissioner of Kenya Revenue Authority (KRA) under **Section 59 (1) (a)** or **(b)** of the Act. Due to the respondent’s refusal to cooperate, the applicant was left with no option but have him arrested on 4<sup>th</sup> October, 2016 but he was released upon intervention by his lawyer and an undertaking he made that that he would provide the documents required within 10 days after being released. Although the respondent was never charged, he also did not provide the documents but he instead filed the petition before the High court challenging the aforesaid request for documents. It is the applicant’s case that it operated within the law after the respondent was warned several times that action would be taken against him under **Section 99** of the **Tax Procedure Act** and several letters were written to him but he failed to comply. The respondent filed the petition before the High Court challenging the aforesaid provisions of the **Tax Procedure Act** with the sole purpose of frustrating the applicant’s efforts to collect tax owed by **Professor Tom Ojienda & Associates**. The applicant also made reference to the several grounds stated in the draft memorandum of appeal which they contend are arguable.

5. The application was opposed by the respondent’s replying affidavit sworn on 29<sup>th</sup> July, 2019. The respondent contends that the prayers sought by the applicant are invalid as **Rule 5 (2) (b)** of the **Court of Appeal Rules** makes provisions for reliefs such as an order of stay of execution; stay of proceedings or an injunction. According to counsel for the respondent, the instant application sought stay of judgment and orders which is a new concept not provided in the rules. Moreover, the judgment cannot be stayed as it is not capable of being executed save for the award of Ksh. 2 million and costs which the respondent is not averse to its being stayed. The respondent also faulted the Notice of Appeal dated 17<sup>th</sup> May, 2018 on the grounds that an appeal ought to have been filed on 17<sup>th</sup> July, 2018 that is within sixty (60) days but instead the record of appeal was filed on 16<sup>th</sup> August, 2018 and no explanation was given for filing it out of time. The respondent seemed to argue that the notice of appeal is defective and therefore ought to be deemed withdrawn.

6. On the merit of the appeal, counsel for the respondent argued that apart from the damages awarded and costs, the other orders are declarations that did not require any party to do anything or abstain from doing anything as the orders simply made a finding of unconstitutionality of certain provisions of the **Tax Procedures Act, 2015**. According to the respondent, it is inappropriate for this Court to stay a finding of unconstitutionality of a statute that was made by the High Court in exercise of the Judge’s discretion before the appeal is heard. Counsel urged that an order maintaining the status quo would be an appropriate one without reversing / suspending the finding by the learned Judge. Further, in the event that the order is stayed, the respondent is likely to be arrested and charged as per the charge sheet that was exhibited by the applicant. That even though the applicant laments or attributes the shortfall in tax collection to the orders made herein, there were no documents attached to show the said shortfall was as a result of the annulment of **Sections 60 (1), (2) & (3)** of the **Tax Procedures Act, 2015** and the applicant failed to discharge the burden of proof that the impugned provisions met the limitation test provided under **Article 24** of the Constitution.

7. During the plenary hearing, **Mr. Nyaga**, learned counsel held brief for **Mr. Ontweka** for the applicant while **Mr. Makhokha** learned counsel appeared for the respondent. Urging the motion, **Mr. Nyaga** relied on the written submission and list of authorities and made some brief highlights.

8. Counsel for the applicant was emphatic that the application meets the threshold of granting an order of stay under **Rule 5 (2) (b)** of the **Court of Appeal Rules** as the sections of the **Tax Procedures Act** that were nullified were critical for enforcement of collection of taxes. With **Section 60** nullified, the applicant is stopped from seeking information/calling for documents relating to a tax payer. The respondent was the Chief Officer of the Nairobi City County Government a public entity that had used public funds to pay for legal fees out of which it was necessary for the firm of **Professor Tom Ojienda** to pay taxes which in the estimation of the applicant were understated and it was imperative to verify the fee notes settled against the bank accounts. Nullifying the statute tied the hands of the applicant to an extent that it cannot carry out any in depth audit. According to counsel, the power given to the applicant to request for documents and to enforce the tax law cuts across many jurisdictions and authorities to that effect were furnished to the trial Judge but he went ahead to make orders that crippled the mandate of the applicant. Counsel cited authorities to support the argument that a judgment can be stayed; among them the case of **Sicpa Securities Sol Sa vs. Okiya Omtatah Okoiti & 2 Others [2018] eKLR**.

9. Submitting in opposition to the application, **Mr. Makhokha** reiterated the matters contained in the replying affidavit of the respondent by emphasizing that the motion was fundamentally defective; that there is no appeal that is pending under **Rule 82** of the **Court of Appeal Rules** and that there are no positive orders capable of being stayed. Counsel submitted that the orders being sought to be stayed were merely declarations of the Judge’s finding that the impugned sections of the **Tax Procedures Act** were unconstitutional and invalid and staying that finding is rendering the whole judgment *otiose*. According to counsel for the respondent, the impugned sections of the statute were draconian as they allowed the applicant to seize documents arbitrarily which is excessive use of power contrary to the rights enshrined in the Constitution; that once a court declares a section of the law unconstitutional in rem, it is applicable to all persons. The orders curtailed the kind of police powers vested on the applicant by the said enactments that allowed them to harass tax payers with arrests. Counsel urged us to decline to grant any order of stay except for the payment of damages and costs which the respondent had no intention of executing.

10. We have considered the application, the replying affidavit and deliberated on the submissions and the list of authorities. This being an application under **Rule 5 (2) (b)**, the applicant is supposed to demonstrate that the appeal is arguable and unless the order of stay is granted, the intended appeal shall be rendered nugatory. See the case of Ismael Kagunji Thande vs. Housing Finance Kenya Ltd - Civil Application No. Nai 157 of 2006 (unreported) where the principles to bring to bear on whether or not to grant an order of stay of execution were set out as follows:-

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [1988] KLR 838.)”**

Also in a recent ruling by the Supreme Court while dealing with an application seeking stay of execution and/enforcement or implementation of orders made by this Court in the case of Ethics and Anti-Corruption Commission vs. Prof Tom Ojienda & Associates & 2 Others CA No 21 of 2019; the Court re-stated the principles that guide the Court to include the two stated above as well as a further consideration of whether a matter is in the public interest that an order of stay be granted. This is what their Lordships stated in their own words at Paragraph 14 of the said Ruling: -

**“In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014]eKLR, this Court enunciated three principles for consideration in determining applications for stay of execution. They are: “whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted. Has the applicant met these criteria”**

11. That said, the competency of the motion before us was challenged, counsel for the respondent submitted that the Record of Appeal was not filed within sixty (60) days since the notice of appeal was filed. We hold that this is not the forum to address this issue of the competency of the appeal. Under **Rule 84** of this Court Rules, the respondent is supposed to file a separate application under **Rule 84** seeking to strike out the notice of appeal or the appeal as the case should be. This should have been done within thirty (30) days of the filing of the notice of appeal or the appeal.

12. On the merit of the application, it is predicated on the grounds that the intended appeal is arguable. The intended appeal seeks an opinion of this Court on whether the declaration by the learned Judge that **Sections 44(1) and (2), 60(1) and (3) and 59(4) of the Tax Procedures Act, 2015** are unconstitutional, invalid and are accordingly null and void is correct and sound in law. It was generally agreed even by counsel for the respondent that this was an arguable point to be submitted to the Court of Appeal. This was nonetheless with a rider that the only order capable of execution was the award of damages and costs but as regards the declaration nullifying the provisions of the law as invalid, counsel for the respondent was emphatic that those declarations cannot be stayed because to do so, would be tantamount to staying a negative order that did not direct any party to do or refrain from doing anything.

13. To this end counsel for the applicant responded by citing this Court’s decision in Sicpa Securities (supra) where this Court was determining whether to grant a stay order after the High Court had nullified a **Legal Notice No 53 of 30<sup>th</sup> March, 2017** on the grounds that there was lack of public participation before its enactment. In allowing an order staying the judgment and decree of the High Court, the Judges stated in a pertinent portion of their ruling as follows;

**“In an application under Rule 5(2)(b) of the Rules of this Court, the Court has discretion to make orders on such terms as are just in the peculiar circumstances of the case. In his response to the applications, Okiya has not denied or controverted the deposition in the application that in the event the appeal succeeds, then he would not be in a position to reimburse the parties the loss occasioned. Of course, given the huge sums of money involved, that would be unlikely. Even though as seen above that the orders of declaration and certiorari issued by the High Court are not amenable to stay of execution, the fact that the SICPA, the CS and KRA stand to lose substantial amounts is a factor for consideration. In Peter Njuguna Njoroge v Zipporah Wangui Njuguna [2013] eKLR, this Court observed as follows;**

**“Turning to whether the intended appeal, if ultimately successful, will be rendered nugatory, in Reliance Bank Ltd vs. Norlake Investments Ltd, (2002) 1 EA, 227, this Court stated that what may render a successful appeal nugatory must be considered within the circumstances of each particular case. Considerations such as the expense and length of time it may take to reverse or recover what has changed hands pending the appeal are relevant considerations. In The Standard Bank Limited Vs G. N. Kagiati/A Kagia & Company Advocates, Civil Application No. Nai 193 OF2003, it was stated:**

**“If the applicant’s appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”**

14. Bearing in mind that this is an interlocutory application, our mandate is circumscribed such that we should not delve deep into the merit which will ultimately be determined. It is apparent to us that the issue of whether the statutory provisions that were declared unconstitutional is an arguable one. We are persuaded by the arguments by counsel for the applicant that the orders issued have far reaching implications and that they have crippled the applicant in execution of its mandate to enforce tax collection. That this is a matter of public interest as the

mandate of the applicant is to ensure that every citizen pays their fair share of taxes as envisaged in the Constitution. More importantly was the submission that some of the nullified sections of the law left some subsections in operation, on the procedures of seizure thereby creating some absurdities in law enforcement. To us these are arguable points.

15. As against that background, we have also considered the issue raised by the respondent to the effect that this Court cannot stay a judgment or a negative order. Whereas it appears to us that this is not a purely negative order as the applicant claims that the orders have crippled their operations and that the impugned provisions were actively in use, and other subsections have been rendered absurd, we are also persuaded that under this Court’s original and inherent jurisdiction under **Rule 5 (2) (b)** nothing stops us from granting a stay order of an implementation of a judgment in the interest of justice. See this Court’s decision in the case of **Njuguna S. Ndungu vs. Ethics & Anti-Corruption Commission & 3 Others (2015) eKLR** where this Court pronounced itself as follows;

**“It is worth noting that in *Dhiman v Shah* (supra), whereas the Court conceded the absence of any provisions in the Rules by which it could stop an eviction order in an application under Rule 5(2) (b), it resorted to the inherent jurisdiction with a view to making such orders as would meet the ends of justice. It allowed the applicant to remain in possession of the premise in question, thereby maintaining the status quo pending appeal. That, for purposes of this case, addresses the argument about negative orders being incapable of being stayed. In appropriate cases they can, in as much the same way as a judge who reject an application for injunction may, nevertheless, in appreciation of the fact that he could be wrong, grant an injunction pending appeal against his refusal to grant the injunction.” (Emphasis provided)**

16. Having disposed the issue that the appeal is arguable and we have the requisite jurisdiction to order stay, we have to address the nugatory aspect. Counsel for the applicant argued that if the impugned orders remain in force, the applicant’s mandate in tax collection will be greatly hampered. That the applicant will fail to collect colossal sums of money that is budgeted for the coming financial years; that it cannot undertake any audit or investigate cases of tax evasion but merely rely on self-assessment of tax due. That finally refusal to grant a stay would cause hardship that may reflect in the overall national economy and in the event that the appeal succeeds, the loss will be irreversible. We are convinced that these arguments have some merit. From our own analysis of the matter, and as demonstrated above, this is a unique case that has a public interest bearing on the mandate of the applicant as a tax collection agency on behalf of the people of Kenya. Also, in the interest of justice it is imperative that the provisions of the law that were nullified by the impugned orders should be subjected to a second opinion of this Court before the laws are amended. We note that even the learned Judge had issued a temporary stay order of the same order pending the filing of the appeal while perhaps being mindful of the same considerations.

17. In the upshot, the order that best commends to us is to stay the entire judgment and orders of the High Court delivered on 16<sup>th</sup> May, 2018 pending the hearing and determination of the appeal. We however direct that the applicant should not arrest the respondent until the hearing and determination of the appeal. Costs of the application to abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April, 2020.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**Signed**

**DEPUTY REGISTRAR**