



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, GATEMBU & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. NAL. E 001 OF 2020

BETWEEN

KENYA REVENUE AUTHORITY..... APPLICANT

AND

AKABA INVESTMENTS LIMITED.....RESPONDENT

(Being an application for stay of execution of part of the judgment and order of the High Court of Kenya at Mombasa (P.J. Otieno, J) dated 5th June, 2020 pending the hearing and determination of an intended appeal

in

MSA H.C.C.S. No. 47 of 2009)

RULING OF THE COURT

[1] As the heading of this Ruling suggests, this is an application seeking stay of execution of the judgement and consequential orders issued on 5th June, 2020 in **Mombasa High Court Civil Suit No 47 of 2009** pending the hearing and determination of an intended appeal. In the said Judgment, ***Akaba Investments Limited*** (respondent) filed suit against ***Kenya Revenue Authority*** (applicant) seeking special and exemplary damages to the tune of USD 1,132,460.45 and Kshs. 405,108,353.30 together with interest thereon at the market rates and costs.

[2] Upon hearing the suit which was defended by the applicant, the learned trial Judge (Otieno, J.) entered judgment for the respondent in the following terms:-

“The Upshot is judgment is entered for the plaintiff against the defendant for the sum of USD 1,132,460.45 and Ksh. 405,108,353.30 as special damages with interest thereon at court rates from the date of filing suit until payment in full. The plaintiff shall also have costs of the suit”

This judgment appears to have aggrieved the applicant and a Notice of Appeal was filed and served on counsel for the respondent on 16th June, 2020. This was followed hot on its heels by the instant application that was filed on 1st July, 2020.

[3] The applicant is seeking an order of stay of execution of the said judgment pending the hearing and determination of the intended appeal. The Motion is supported by the grounds stated therein which are amplified by the supporting affidavit sworn by ***James Ndege*** of 30th June, 2020. The deponent is an officer with the applicant at the Customs and Border Control Department. In brief, the deponent gives the background information that gave rise to the suit the subject matter of the intended appeal. The dispute arose from a **Gazette Notice No. 12** of March 2004 issued by the Minister of Finance, domesticating the arrangements made between Kenya and COMESA in 2003. The legal Notice provided for duty free importation of sugar to a maximum of 111,000 MT of white refined sugar per annum and 89,000 MT of other forms of sugars per annum.

[4] The Kenya Sugar Board published **Gazette Notice No. 296 of 2007** informing registered importers of sugar who wished to import sugar that the importation period was between 1st February, 2007 to 28th February, 2008. The applicant also published notices in the daily newspapers indicating the effective date of importation of sugar quota to be imported duty free from COMESA was 1st March, 2007 and not 1st February, 2008 as published earlier by the Kenya Sugar Board. The Kenya Gazette Notice by the Kenya Sugar Board and the public notices issued in the local dailies by the applicant generated litigation from various sugar importers.

[5] As regards the case for the respondent, on 27th February, 2007, it imported 1000 MT of sugar from COMESA which landed but the Customs Services Department of the applicant declined to process the release of the sugar under the COMESA mutual tariff concessions insisting that the import was not within the declared period which was 1st March 2007. Further, on 27th March, 2007 the respondent imported another consignment of 3000MT of sugar from COMESA but the same could not be cleared because the applicant contended the allocated COMESA quota of 89,000MTS of other sugar for the period had been exhausted.

[6] This refusal by the applicant is what precipitated the filing by the respondent of High Court Being **Misc. Appl. No 258 of 2007** where they sought judicial review orders to quash the applicant's decision of refusing to process the release of the sugar under the COMESA terms and an order compelling the applicant to release both consignments of sugar, duty free and also free of other charges. That suit was dismissed with costs by Nyamu, J. (as he then was). The respondent appealed against that decision in **Civil Appeal No. 231 of 2007**. It would appear that there were similar other appeals regarding the same dispute which were heard in the Court of Appeal in **Civil Appeal No 89 of 2007**. This Court held that the sugar consignment be released duty free on 30th May, 2008. Although the respondent's appeal was not consolidated with the later appeals, it is indicated that via a consent order dated 17th November, 2008 the decision of the Court of Appeal in **Civil Appeal No. 89 of 2007** was deemed to be applicable to the respondent's **Civil Appeal No 231 of 2007**. Consequently, the sugar consignments for the respondent was released on 19th December, 2008 pursuant to the consent aforementioned.

[7] The respondent filed suit seeking damages that gave rise to the impugned judgement. According to the applicant, it has an arguable appeal, maintaining that the Judge erred in law and fact in that; their actions did not cause injury to the respondent; that the Judge proceeded on the wrong principles of law with regard to the award of special damages which were not specifically pleaded and proved; that the Judge misapprehended the evidence tendered thus arriving at a figure which was inordinately high and failed to correctly address the law regarding mitigation of losses by the respondent. On the nugatory aspect, the applicant stated that this being a money decree of colossal sums of money, unless an order of stay is granted, there is imminent danger that the intended appeal if successful will be rendered nugatory and occasion not only to the applicant but the government and people of Kenya irreparable harm.

[8] The application was opposed by the respondent vide a replying affidavit sworn by **Abdulbasit Swaleh**, written submissions and list of authorities. It was argued that the applicant had no arguable appeal because the applicant illegally and unreasonably withheld the respondent's consignment of sugar. That the delay/refusal to release the consignment was condemned by the Court of Appeal in **Civil Appeal No. 89 and 92 of 2007** delivered on 30th May, 20008 which confirmed the applicant had acted unreasonably. That judgment of the Court of Appeal notwithstanding, the applicant released the said consignment in December 2008 thereby causing a delay of 1 year 8 months. It was further argued that the applicant blatantly breached the law and violated the respondent's rights which led to the protracted litigation and denial of the consignment that led to the colossal losses.

[9] It was the respondent's case that it was able to prove to the required standard the quantum of the sums awarded which were also pleaded. Counsel for the respondent entreated us to find the applicant as a litigant like any other who should be denied stay. Moreover, the Court should balance the interests of all the parties and should it be inclined to grant an order of stay, order that the entire decretal sum be deposited either in court or in a joint interest earning account in the names of both counsel. To bolster those arguments, counsel cited several cases among them **Housing Finance of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR** where this Court ordered the entire decretal sum be deposited in a joint account. Also the case of **George Otieno Gache & Another vs. Judith Akinyi Bonyo & 5 Others [2017] eKLR** where this Court affirmed the case **Hashmukhlal Virchand Shah & 2 others vs. Investment & Mortgages Bank Limited [2014] eKLR**, in the following terms: -

“As for the second requirement, we have to ensure that the word “nugatory” has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (Reliance Bank Ltd versus Nor Lake Investment Ltd [2002] IEA

227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

[10] This matter came for hearing under the prevailing extreme circumstances brought about by the COVID 19 Pandemic. Accordingly, it was determined on the basis of documents filed and written submissions. It is trite that in an application such as this, two principles must be satisfied by an applicant who applies for stay of execution under **Rule 5 (2) (b)** firstly, establish that there is an arguable appeal which is to say that the intended appeal is not frivolous, and secondly, that the intended appeal, would be rendered nugatory if stay of execution applied for was not granted - see **Ishmael Kagunyi Thande vs. Housing Finance Company Limited Civil Application No. 156 of 2006 (UR)** where these principles were restated thus:-

“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show 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 the appeal will be rendered nugatory.”

[9] We also need to throw a caution that an arguable appeal is not one that must necessarily succeed but one which merits to be argued fully before Court. Looking at the summary of the material that was presented before us, rival submissions and several authorities that were cited, we are satisfied that there are some arguable points that have been demonstrated for determination in the intended appeal. The ground whether the respondent’s entire claim for special, and exemplary damages was pleaded and proved; whether the quota allocated under the COMESA Tariff was available to the respondent; whether the respondent’s actions were unlawful, unreasonable to warrant the awards made and whether the Judge failed to consider mitigating circumstances are some of the arguable points we are able to glean from the material before us.

[10] Turning to the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, we note that this is a money decree. The two sums awarded; USD 1,132,460.45 and Ksh. 405,108,353.30 are colossal sums. The respondent did not indicate its willingness and/or ability to repay the decretal amount in the event the appeal is successful. Counsel for the respondent urged that the interest of both parties be balanced by urging us to order the entire sum be deposited in court or in the joint names of both counsel. We have given this request consideration but are of the view that the applicant being a government body, charged with the responsibility of collecting and accounting for all revenue due to the government, is unlikely to lack money to settle a decree if the appeal is unsuccessful.

[11] Accordingly, we are satisfied that the applicant has satisfied the principles upon which an application of this nature is granted and we therefore grant a stay of execution of the judgment delivered at Mombasa on the 5th June, 2020 **in Civil Suit No. 47 of 2009** and any consequential orders pending the hearing and determination of the applicant’s intended appeal. Costs of the application shall abide the outcome of the appeal.

Dated and Delivered at Nairobi this 4th day of September, 2020.

M. K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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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