



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KIAGE, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 84 OF 2019 (UR 65/19)

BETWEEN

KENYA BUREAU OF STANDARDS.....APPLICANT

AND

KWALE INTERNATIONAL SUGAR CO LTD.....1<sup>ST</sup> RESPONDENT

MINISTRY OF TRADE.....2<sup>ND</sup> RESPONDENT

KENYA REVENUE AUTHORITY.....3<sup>RD</sup> RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

(Application for stay of proceedings and stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court at Mombasa (Ogolla, J.) dated 7th March 2019 and any other subsequent judgment *in HC Const. Pet No. 226 of 2018*)

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RULING OF THE COURT

In the Motion on Notice before us dated 16th September 2019, **the applicant, Kenya Bureau of Standards**, seeks, as far as is now relevant, orders worded as follows:

- i. That there be a stay of proceedings in High Court Petition No 226 of 2018 Kwale International Sugar Company v. Kenya Bureau of Standards & 4 Others fixed for delivery of further judgment on 30th September 2019, pending the lodging, filing, hearing and determination of an intended appeal;
- ii. That there be a stay of execution of the judgment dated and signed 7th March 2019 or any other judgment by the Honourable Justice Ogola pending the lodging, filing, hearing and determination of an intended appeal.

The application is based on the grounds that the trial court delivered a judgment on 7th March 2019; that even though it was *functus officio*, the court *suo motto* decided to visit the 1st respondent's premises and ordered the appellant to re-sample the 1st respondent's sugar; that the court subsequently heard the suit on diverse dates and scheduled a second judgment on 30th September 2019; and that the court had no jurisdiction to render a second judgment in the same suit. These grounds are expounded in a 52-paragraph supporting affidavit sworn on 16th September 2019 by **Bernard Njiraini**, the applicant's Managing Director, and in the applicant's written submissions dated 9th January 2020, which we have carefully considered.

The 1st respondent opposed the application, contending that it was fatally defective and that the Court did not have jurisdiction to deal with it. It was submitted that an order for stay of execution is contingent upon a judgment or a ruling and that on 7th March 2019 the trial court did not deliver any judgment as alleged by the applicant. On the material day, it was submitted, the trial court merely observed that in light of the conflicting results relied on by the parties regarding the quality of the sugar in dispute, it was desirable to independently re-test the sugar, and thereafter, upon further hearing of the parties, it would render its judgment. To the extent that there was no judgment delivered on 7th March 2019, the 1st respondent maintained that this Court has no jurisdiction to entertain the applicant's application for stay of execution and stay of proceedings. These arguments are further elaborated in the 1st respondent's written submissions dated 21st August 2020, which

we have also considered.

In the circumstances of this application, we do not find it necessary to delve into all the arguments put forth by the parties, because they are not necessary for the determination of the application. The notice of appeal upon which the application for stay of execution and stay of proceedings is premised is against a judgment dated 7th March 2019. That alleged judgment is really no judgment, because it does not determine any rights and liabilities of the parties and is incapable of execution. It did not grant any of the prayers that the 1st respondent prayed for in its petition. To that extent, the decision of this Court in **Kenya Airports Authority v. Mitu Bell Welfare Society & 2 Others [2016] eKLR**, which the applicant has relied upon, is easily distinguishable.

The applicant further seeks stay of execution of “any other judgment” of the trial court which, to say the least, this Court cannot grant because the prayer is pure speculation.

Satisfied, as we are, that there was no judgment, as understood in law, that was delivered on 7th March 2019, this appeal is not arguable. The same is dismissed with costs to the first respondent. It is so ordered.

**Dated and delivered at Nairobi this 4th day of December, 2020.**

**P.O. KIAGE**

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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**