IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. NAI. 339 of 2018 (UR)

BETWEEN

THE COMMISSIONER OF CUSTOMS and EXCISE.....APPLICANT

AND

EXPORT TRADING COMPANY LIMITED.....RESPONDENT

(Being an application for stay of execution from the Judgment and Order of the High Court of Kenya at Nairobi (R. Ngetich, J.) dated 18th October 2018

in

Nairobi Customs and Excise Appeal No. 8 of 2015)

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RULING OF THE COURT

1. Before us is an application for stay of execution of judgment and orders of the High Court. At all material times, the respondent, ***Export Trading Company Limited***, was an importer of a product known as coconut coir pith. On its part, the applicant, ***The Commissioner of Customs and Excise,*** is collector of customs and excise duty for all products imported into Kenya.

2. Upon the respondent importing coconut coir pith into Kenya, for customs purposes, the applicant classified the product under Customs & Excise Heading 1404 Tariff No. 1404.900.00 thereby attracting customs duty of 10%. On its part, the respondent contended that the correct classification for the product was Tariff Code 53.05. Such classification would make the product attract zero customs duty.

3. Aggrieved by the applicant's classification of coconut coir pith under Heading 1404 Tariff No. 1404.900.00, the respondent lodged a complaint with the Customs & Excise Tax Appeals Tribunal. In a ruling dated 30th June 2015, the Tribunal upheld the applicant's classification of coconut coir pith under Heading 1404 Tariff No. 1404.900.00.

4. Further aggrieved, the respondent appealed to the High Court. By a judgment dated 18th October 2018, the court quashed the decision of the Tribunal dated 30th June 2015. The court directed and ordered coconut coir pith be classified under Heading 53.05 of the East African Community Common External Tariff Version 2012 Nomenclature.

5. Aggrieved, by Notice of Motion dated 19th November 2018, supported by the affidavit of ***Mr. Kellen Njeru*** dated 20th November 2018, the applicant is seeking stay of the judgment of the High Court pending hearing and determination of an intended appeal. The grounds in support are that the intended appeal is arguable and shall be rendered academic and nugatory if stay is not granted. It is urged that the learned judge misunderstood and misapprehended the science behind product classification in the **East African Community (EAC) Common External Tariff 2012 Nomenclature**; the judgment has thrown the country's revenue collection into disarray since the court order is at variance with the guidelines of the World Customs Organization (WCO) to which Kenya is a party; the court erred in failing to appreciate that the Harmonized Community Classification System (HS Code) is crucial for fair international trade; that by dint of **Article 2 of the Constitution**, the HS Code forms part of the Laws of Kenya; the order by the trial court has resulted into real and imminent danger of loss of government revenue where other importers of coconut coir pith will demand product classification as per the trial court's order and that unless stay is granted the intended appeal shall be rendered academic and nugatory.

6. The respondent filed a replying affidavit deposed by ***Mr. Omprakash Kayya,***. in which it is averred that the instant application is misconceived and does not meet the threshold for grant of stay under ***Rule 5 (2) (b)*** of the Rules of this Court; the intended appeal shall not

be rendered nugatory if stay is not granted; the instant application is a tactic by the applicant to deny the respondent the fruits of its judgment; the respondent has incurred a loss of Ksh. 7 million paid to the applicant as excess customs duty due to wrong classification of coconut coir pith; the intended appeal lacks appreciable chances of success and the respondent will continue to suffer prejudice if the application is allowed. The respondent submitted that if this Court is inclined to grant stay, it should be conditional on the applicant depositing a sum equivalent to the loss incurred by the respondent by way of excess customs duty.

7. At the hearing of this application, learned counsel, ***Ms. Carol Mburugu***, appeared for the applicant while learned counsel, ***Ms. Stacey Katile***, instructed by the firm of Musa Juma & Co. Advocates appeared for the respondent.

8. Counsel for the applicant recapped the grounds in support of the application as deposed in the supporting affidavit of ***Mr. Kellen Njeru***. Conversely, in opposing the application, counsel for the respondent restated the grounds in the replying affidavit.

9. We have considered the Notice of Motion dated 19th December 2018, the grounds in support and opposition thereof, submissions by counsel and authorities cited. In **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others, Civil Application No. NAI 31/2012;** this Court explicated the manner it exercises its jurisdiction in applications brought under ***Rule 5 (2)(b)*** and remarked as follows:

> **"[I]n dealing with Rule (5) (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court"**

10. In an application under ***Rule 5 (2) (b),*** we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – [2002] 1 EA**.

11. In the first instance, we must consider if the intended appeal is arguable. The existence of even one arguable point suffices in favour of the applicant. (See **Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No. NAI. 256 of 2013)**.

12. The dispute in the intended appeal relates to product classification of coconut coir pith under the East African Customs Management Act. The applicant contends that Kenya is bound by product classification as made by the World Customs Organization (WCO); that in this matter, the trial court erred in reversing the classification of coconut coir pith as made by the WCO; that the trial court has no jurisdiction to classify products under the EAC Customs Management Act.

13. On its part, the respondent conceded that the intended appeal is arguable. The respondent's recognition that the intended appeal is arguable invariably leads us to *prima facie* find the intended appeal is arguable. We have also taken into account the persuasive decision in **Enkasiti Flowers Growers Limited vs. Kenya Revenue Authority [2010] eKLR** whose facts are *in pari materia* to the dispute in this matter.

14. We now consider whether the intended appeal shall be rendered nugatory if a stay order is not granted. The judgement of the trial court is not a monetary judgment and if stay is granted, the respondent is not being denied a liquidated sum decreed in its favour. This Court in **Reliance Bank Limited vs Norlake Investments Limited [2002] 1 E.A. 227** expressed itself thus:

> **"What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning…"**

15. In **Sicpa Securities Sol. Sa vs. Okiya Omtatah Okoiti & 2 others [2018] eKLR**, this Court reaffirmed the principle that in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. (See **David Morton Silverstein vs. Atsango Chesoni, Civil Application No. Nai 189 of 2001*).*** In the persuasive case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto Bungoma Hc Misc Application No 42 of 2011** *it was held that:*

> **"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail..."**

16. In the instant application, the applicant contends that if stay is not granted, the judgment of the High Court is a judgment in rem with substantial negative implication for revenue collection in the county; that the judgment has negative implication on the Treaty obligations of Kenya in so far as product classification is concerned; the judgment if not stayed will affect product classification for other importers in respect to coconut coir pith and that the judgment if not stayed exposes the Kenya Revenue Authority to demands for refund of monies by persons who have imported coconut pith in the past; and the judgment, if not stayed will throw into disarray Kenya's revenue collection system. Based on the foregoing reasons, the applicant urged that the intended appeal shall be rendered nugatory and substantial loss and uncertainty in the legal regime for product classification will have been introduced into product classification and enforcement of the **EAC Customs Management Act**.

17. Conversely, the respondent simply urged that if stay is not granted, the intended appeal shall not be rendered nugatory.

18. We have considered the persuasive dicta of the High Court in **Republic vs. Commissioner General & Another Ex-Parte Awal Ltd [2008] eKLR,** where the court faced, with a dispute on product classification expressed itself as follows:

> **"In the end I must conclude that looking at the material placed before me and the submissions tendered by learned counsels, … the Respondents had the statutory duty to impose duty according to the tariff classification provided by law under the Customs and Excise Act and under the Harmonised Commodity Description and Coding System provided by the World Custom Organization explanatory notes in which Kenya is a signatory."**

19. In this matter, we note the emerging jurisprudence on the role of the World Customs Organization in product classification in so far as enforcement of the EAC Customs Management Act is concerned. We have also considered the persuasive decision of the High Court in **Beta Healthcare International Ltd vs. Commissioner of Customs Services [2010] eKLR** and **Republic vs. Commissioner General & Another Ex-Parte Awal Ltd [2008] eKLR**.

20. Persuaded by the foregoing decisions, we are convinced that if stay is not granted, uncertainty and disarray in product classification will be introduced in the legal framework for administration and enforcement of the Customs Management Act. Such uncertainty will render the intended appeal nugatory.

21. Confronted with an almost identical situation, this Court in **Sicpa Securities Sol. Sa vs. Okiya Omtatah Okoiti & 2 others [2018] eKLR** expressed that in situations akin to the instant matter and in the interest of justice and in the unique circumstances of this case, the order that best commends itself is to stay the judgment and decree of the trial court in its entirety pending the lodging, hearing and determination of the intended appeals.

22. For the foregoing reasons, we arrive at the conclusion that the Notice of Motion dated 19th November 2018 has merit and is hereby allowed. We hereby stay execution of the judgment and order of the High Court delivered on 18th October 2018 in **High Court Customs & Excise Appeal No. 8 of 2015**. We order the applicant to file the Record of Appeal within 60 days of the date hereof failure to which the stay order granted herein shall automatically lapse. Each party to bear its costs in this application.

Dated and delivered at Nairobi this 25th day of January, 2019

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

…….…..…

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR