IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 357 OF 2018

BETWEEN

COMMISSIONER OF CUSTOMS

& BORDER CONTROL..1ST APPLICANT

COMMISSIONER OF INVESTIGATIONS

ENFORCEMENT..2ND APPLICANT

AND

PERNOD RICHARD KENYA LIMITED..................................RESPONDENT

(An application for stay of execution pending lodging, hearing and determination of an intended appeal from the Ruling of the High Court at Nairobi (Hon. Lady Justice W. Okwany) delivered on the 21st day of November, 2018

in

Nairobi High Court Petition No. 232 of 2018)

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RULING OF THE COURT

This Notice of Motion dated 28th November 2018 is made under ***sections 3, 3A and 3B*** of the ***Appellate Jurisdictions Act*** and ***rules 5 (2) (b)*** and ***42*** of the ***Court of Appeal Rules,*** and has been brought pursuant to a decision of the High Court (Okwany, J.) for orders –

> ***1"….***
>
> ***2. THAT, there be a stay of execution of the Ruling delivered on 21st November 2018 in Nairobi High Court Petition No. 232 of 2018, and orders flowing there from, pending the hearing and determination of this Application.***
>
> ***3. THAT there be a stay of execution of the Ruling delivered on 21st November, 2018 in Nairobi High Court Petition No. 232 of 2018, and orders flowing there from, pending the hearing and determination of the Applicants intended appeal.***
>
> ***4. THAT there be a stay of proceedings in the Superior Court pending the hearing and determination of the Appeal.***
>
> ***5. THAT the costs incidental to this application to abide the results of the said intended Appeal".***

The application was made on the grounds that despite overwhelming arguments that there are sufficient grounds based on ***section 107*** of the ***East African Community Customs Management Act (EACCMA)*** to support the applicants' actions of applying value uplifts to the respondent's products, the court issued an injunction restraining the applicants from imposing such uplifts, which was contrary to mandatory statutory provisions; that the applicants will suffer irreparable loss of revenue if the orders sought herein are not granted, and that unless this application is allowed, the intended appeal will be rendered nugatory as duty uplifts will continue to accrue against the respondent at an exorbitant rate, and with no security guaranteeing the collection of the amounts assessed, the applicants risked being placed in a position

where it will be unable to collect the assessed amounts.

The motion was supported by an affidavit of ***Patrick Omari,*** an Assistant Manager of the 1st applicant, sworn on 28th November 2018 wherein it was deponed that, the injunction restrained the applicants from imposing value uplifts on the respondent's imported products; that the concern was that the uplifted tax continued to attract interest and penalties, which the respondent may be unable to pay; that the applicant had already demanded Kshs. 697,149,482 in uplifted tax from the respondent. It was further deponed that the respondent had not provided any security to guarantee the collection of the uplifted amounts in the event this appeal or the petition and the appeal at the Tax Appeals Tribunal did not succeed, and that as a consequence, the applicants and the Kenyan people are likely to suffer prejudice through loss of substantial revenue if the respondent's appeal in the Tribunal does not succeed.

In a replying affidavit sworn on 22nd January 2019 by ***Craig Van Der Zee***, the Finance Director of the respondent, it was deponed that the respondent is a company incorporated and registered in Kenya, and engaged in the business of marketing and distributing Pernod Ricard products including Jameson and Ballantines whiskies in Kenya. It was further deponed that the order of the High Court restrained the applicants from applying value uplifts to the respondent's products pending hearing and determination of *Constitutional Petition No. 232 of 2018*, on condition that the respondent provided an undertaking for any taxes found payable by the Tribunal.

Mr. Zee deponed that after conducting a customs post clearance audit of the respondent's operations, in a letter dated 18th January 2018 the 1st applicant demanded an amount of Kshs. 697,149,482 being value uplift on the respondent's products; the 1st applicant had rejected the customs value assessed by the respondent, and proceeded to assign higher values to the products, which values were alleged to be based on market comparisons of transaction values of supposedly identical goods.

It was further deponed that the respondent disagreed with the value uplift and the excess tax imposed by the 1st applicant and in exercise of its rights under the Tax Procedures Act, it filed a Notice of Appeal before the Tax Appeals Tribunal on 16th February 2018, but the appeal is yet to be heard as the term of the members of the Tribunal lapsed in March 2018, and the appointment of new tribunal members is still awaited; that while the appeal was pending before the Tribunal, the respondent continued to import its products, and on or about May 2018, the applicants stopped the respondent's Jameson product imported under import entries numbers "6845768", "6843982", "6843891" and "6843881" from leaving the Port of Mombasa, after indicating their intention to impose a value uplift on the products. This compelled the respondent to file the Petition herein seeking conservatory orders to restrain the applicants from applying value uplifts to the later consignment, and to also restrain them from refusing to release the respondent's products.

It was averred that on 3rd July 2018, a consent order restraining the applicants from applying the value uplifts, and ordering them to release the respondent's consignment was entered into between the parties; that the consignment was subsequently released on the basis of an undertaking given by the respondent to the applicants. It was further averred that on 5th July 2018, the respondent's consignment of 900 cases of Ballantines Scotch whisky imported under entry number 29140 was again held by the applicants on the basis that they intended to apply value uplifts to the products, but it was pointed out to the applicant that the respondent's Ballantines Whisky was one of the products that is the subject of the disputed assessment pending before Tax Appeals Tribunal in *Tax Appeal Number 25 of 2018*; that despite the explanation, the applicants refused to release the Ballantines Whisky, prompting the respondent to file a Notice of Motion on 10th August 2018 seeking an injunction to restrain the applicants from imposing further duty uplifts on similar products, the subject matter of the appeal pending before the Tribunal.

It was further averred that ***section 107 (1)*** of ***EACCMA*** empowers the 1st applicant to accept any form of security, and that in fact the 1st applicant had previously released the respondent's products on the basis of undertakings as demonstrated by an undertaking issued on 17th September 2013, and accepted by the 1st applicant; that the applicants will not suffer any prejudice whatsoever as the East African Community Customs Management Act specifically empowers the applicant to conduct a post clearance audit and uplift the value in the event that the Tax Appeals Tribunal decides against the respondent. It was finally contended that the applicants have completely failed to prove that the respondent will not be in a position to pay the tax demanded in the event that the appeal before the Tribunal was unsuccessful.

In the submissions before us, learned counsel ***Mr. Chalaba*** for the applicant submitted that the appeal was arguable as, though the ruling of the trial court ordered that the applicant be restrained from value uplifts, ***section 107 (1)*** of the ***EACCMA*** provided that security in the form of bonds, cash or any other security must be provided; that an undertaking was not a form of security specified under ***section 107 (1)***, and was therefore not acceptable.

It was further submitted that the court had taken away the statutory discretion of the Commissioner to apply value uplifts and relied on the case of ***Commissioner of Customs vs Anil Doshi, [2007] eKLR*** where this Court stated that whether in its supervisory powers a court of law can exercise control over the statutory powers donated to government authorities, and particularly the Commissioner of Customs is an arguable point.

With respect to if the intended appeal succeeds, it would be rendered nugatory should we decline to grant the orders sought, counsel's submission was that the unpaid taxes of Kshs. 697,149,482 pending before the Tax Appeals Tribunal continued to accrue, penalties and interest to the detriment of the respondent, and if the restraining order was not set aside, it would not be in a position to offset the enormous outstanding taxes.

Counsel argued that the applicants' concern here was that no security had been proffered against release of the products to the respondent which is a marketing and distribution company, and no evidence was presented to demonstrate the financial soundness of the company, or its ability to pay the outstanding duties; that on the basis of proportionality and the balance of convenience, the applicants should not be compelled to accept the undertaking, and instead the applicant should be required to provide tangible security.

Opposing the application was ***Ms. Malik,*** learned counsel for the respondent submitted that the order sought was in the nature of a prohibitory order. Counsel argued that ***section 107 (1)*** of ***EACCMA*** permitted for any other form of security that the Commissioner might

allow. Regarding the undertakings, counsel submitted that the Commissioner had accepted them in the past, and therefore it was not reasonable for it demanding a bond or cash in place of undertakings for the unpaid taxes. Counsel pointed to a letter dated 17th September 2013 to demonstrate that such undertakings had been accepted in the past, and emphasized that even during the pendency of the application; other products had also been released on the strength of an undertaking, and pointed to another undertaking provided in a letter dated 25th June 2018. As such counsel asserted, the appeal was not arguable and the learned judge was right in ordering that the applicant accept a security that had previously been accepted.

On whether the appeal would be rendered nugatory if it were to succeed, counsel argued that nothing had been placed before the court to show that the respondent was not in a position to pay the outstanding duties; that furthermore, the amount in contention is not a decretal amount, but a disputed assessment of value uplift, which amount was exorbitant and was yet to be determined by the Tribunal. Counsel argued that it was prejudicial to subject the respondent to any other form of security, given the lengthy customs clearance procedures, and the accrual of demurrage charges that the respondent would be required to pay.

We have considered the pleadings and the submissions of the parties. In the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others***, ***Civil Application No. NAI. 31/2012***, this Court stated *inter alia:*

> ***"That in 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. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."***

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not capricious or frivolous.

Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under ***rule 5 (2) (b),*** the court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See ***Ruben & Others vs Nderitu & Another*** ***(1989) KLR 459***.

The applicant has set out various grounds of appeal among them that the learned judge misdirected herself by failing to appreciate that an undertaking is not one of the forms of security for taxes prescribed by ***section 107*** of the ***EACCMA.***

Section 107 (1) of the ***EACCMA*** provides;

"Where any security is required to be given under this Act, then that security is required to be given to the satisfaction of the Commissioner either—

(a) by bond, in such sum and subject to such conditions and with such sureties as the Commissioner may reasonably require; or

(b) by cash deposit; or

(c) partly by bond and partly by cash deposit.

(2)Where any security is required to be given under this Act for any particular purpose then such security may, may with the approval of the Commissioner be given to cover any other transactions which the person giving the security may enter into within such period as the Commissioner may approve.

(b)…".

Whether an undertaking is envisage under ***section 107 (1)*** is a matter for consideration by this Court. Furthermore, there is the other question of whether or not a security should be demanded in cases where value uplifts have already been imposed. Given the need for consistency and certainty in the conduct of trade and commerce in Kenya, we consider these to be matters of a serious nature, and thus arguable.

On whether the appeal will be rendered nugatory should we decline to grant the orders sought, we do not think so. We say this because, according to the respondent, the 1st applicant released the respondent's products on the basis of undertakings. In support of this assertion, the respondent annexed undertakings dated 17th September 2013 and 25th June 2018 issued to the 1st applicant by the respondent, and which the 1st applicant had accepted. This being the case, it stands to reason that if the applicant has in the past accepted undertakings of this nature as security for release of products, nothing stops it from accepting further undertakings for products pending the resolution of the dispute before the Tax Appeals Tribunal. After all, the consequences of delay in the determination of the appeal before the Tribunal should not be visited upon the respondent. In addition, having accepted the respondent's undertaking as recently as it did, it is clear that the applicants were confident that the respondents would be in a position to pay the duties assessed, and they have not shown that the respondents financial capabilities had changed or diminished so that it was at risk of defaulting in the payment of duties if and when required to do so. We are therefore not persuaded that the success of the appeal would be rendered nugatory.

In sum, the applicants having failed to satisfy the twin requirements necessary for the granting of a ***rule 5 (2) (b)*** application, the motion

dated 28th November 2018 is dismissed. The costs to abide by the outcome of the intended Appeal.

It is so ordered.

Dated and Delivered at Nairobi this 10th day of May, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

....

JUDGE OF APPEAL

A.K. MURGOR

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR