



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A)

CIVIL APPLICATION NO. 4 OF 2019

BETWEEN

ATTORNEY GENERAL

DIRECTOR OF CRIMINAL INVESTIGATIONS APPLICANTS

AND

PHOENIX GLOBAL KENYA LIMITED 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

ANTI-COUNTERFEIT AGENCY 3RD RESPONDENT

FINANCIAL REPORTING CENTRE 4TH RESPONDENT

KENYA BUREAU OF STANDARDS 5TH RESPONDENT

MITCHEL COTTS (K) LIMITED 6TH RESPONDENT

(An application for stay of proceedings and execution of the judgment of the High Court of Kenya at Mombasa (Ogola, J.) dated 24th January, 2019 in Constitutional Petition No. 205 of 2018)

RULING OF THE COURT

INTRODUCTION

1. The applicants, the Attorney General and the Director of Criminal Investigations, are aggrieved by a judgment of the High Court at Mombasa (**Ogola, J**) delivered on 24th January 2019 in High Court Petition No. 205 of 2018 by which the court ordered, among other things, that: the consignment of the 1st respondent's rice held in the warehouse of the 6th respondent be released; and that the 2nd respondent, the applicant, and 5th respondents do forthwith open the said warehouse and hand over the said consignment of rice to the 1st respondent.

2. Intending to appeal against that judgment, the applicants lodged a notice of appeal and now seek, by an application dated 20th February 2019, an order for stay of proceedings in the High Court pending the lodging, hearing and determination of the intended appeal. The application is made under Sections 3 & 3A of the Appellate Jurisdiction Act and Rules 5(2)(b) & 47 of the Court of Appeal Rules (the Rules). It is based on the ground that the applicants are apprehensive that if an order of stay is not granted, the judgment will be executed and the rice will be moved beyond the control of the applicants and sold to the general public thereby rendering the intended appeal nugatory.

Background

3. In the course of the year 2018, Phoenix Global Kenya Limited, the 1st respondent, a commodities trader, imported 10,327.80 Metric Tonnes of rice into Kenya which it stored in a warehouse of Mitchel Cotts (K) Limited, the 6th respondent.

4. On 13th July, 2018 representatives of a government multi-agency team established to carry out investigations and verification of the quality of imported commodities as a means of cracking down on the entry of illegal commodities into the country visited the 6th respondent's warehouse. That team included representatives of the 2nd- 5th respondents. Following that visit, the go downs where the 1st respondents rice was stored were sealed off by the 2nd respondent, Kenya Revenue Authority, and police officers were placed on site to guard the go downs.

5. Samples of the various varieties of rice were taken for testing after which, by a letter dated 17th September 2018, the 5th respondent identified rice samples which it found did not meet the acceptable standard of grade 1 rice despite being passed off by the 1st respondent as such. Accordingly, the 5th respondent recommended that the rice consignment from which the said samples were taken should not be released to the 1st respondent and should be condemned for destruction in line with Section 14B(5) of the Standards Act.

6. The 1st respondent protested being of the view that the action taken by 2nd - 5th respondents was illegal. It asserted that the rice had undergone Pre-Verification of Conformity (PVO) in the countries of origin by the 5th respondent's agents who issued certificates of conformity with Kenyan standards. Furthermore, the consignment was allowed into the country after the 1st respondent had met all the custom and legal requirements; and there was no indication by the applicants or the 2nd-5th respondents that the rice was unfit for human consumption.

7. According to the 1st respondent, the degree of broken rice in the samples taken could be attributed to mishandling of the same during stacking or loading or offloading of the consignments. It also took issue with what it said was non-disclosure of the test results by the 5th respondent. As far as it was concerned, the integrity of the samples taken by the 2nd applicant and 5th respondent were questionable since it was not clear how they were taken or if they related to the 1st respondent's rice.

8. Based on the foregoing, the 1st respondent filed constitutional petition No. 205 of 2018 in the High Court. That petition was hinged on Articles 10, 35, 47 and 50 of the Constitution and sought amongst other reliefs: a declaration that its fundamental rights to the protection of its property from arbitrary deprivation as well as its right to fair administrative action, access to information and to a fair hearing have been breached; a declaration that the applicants and the 2nd to 5th respondents acted inconsistently with and in breach of their powers, duties and obligations under the provisions of Articles 10, 35, 47 and 50 of the Constitution, particularly when the importation of rice as a commodity is not under investigation; a declaration that the purported Multi-Agency team comprising of the applicants and the 2nd to 5th respondents is not anchored in law; that the sealing of the 6th Respondent's warehouses where the 1st respondent's rice is stored was illegal and unlawful; an order prohibiting the applicants and the 2nd to 5th respondents from interfering with the 1st respondent's proprietary rights or its access to the rice consignment. It also sought general damages for unlawful and illegal detention of the rice.

9. The petition was opposed. After a hearing, the High Court allowed the petition having concluded that the applicants and the 2nd to 5th respondents acted in breach of the law and the 1st respondent's rights under the provisions of the Constitution of Kenya 2010. In that regard, the Judge found that the consignment of rice was permitted into the country after all relevant statutory bodies had satisfied themselves that the requirements of law had been met and all taxes and duties paid; and that an Inspector is not empowered to begin testing when there is no suspicion of an offence having been committed or when there is no complaint lodged giving rise to such suspicion. The learned Judge stated in his judgment:

“From the foregoing it is the finding of this court that the suit subject rice has met all the import required standards as well as the quality as to size and is hereby forthwith released to the Petitioner for Sale.”

10. Consequently, the Judge granted the declarations sought in the petition and an order that the entire rice quantity subject of the petition held in the 6th Respondent's warehouse be released to the 1st Respondent, forthwith. The 2nd applicant, 2nd and 5th Respondents were ordered to forthwith open the warehouse and hand over the said consignment of rice to the 1st respondent. In addition, the court awarded the 1st respondent general damages of Kshs.15,000,000.00 payable by the 5th respondent.

11. As already stated, that is the judgment the applicants intend to challenge on appeal before this Court and have in the meanwhile brought the present application to stay proceedings in the High Court.

The application

12. The application is premised on the grounds that the intended appeal is arguable and that unless the order sought is granted the appeal will be rendered nugatory. In support of the application, Joseph Ng'ang'a, the Regional Criminal Investigation Officer, Coast Region, deposed that the effect of the orders issued by the High Court directing the release of the rice consignment is to impede on the 5th respondent's ability to carry out its statutory mandate of promoting standardization in industry and commerce; that in effect, the High Court allowed the release of substandard rice into the Kenyan market in contravention of Article 46 of the Constitution and the prescribed standards.

13. He deposed further that following the judgment, the 6th respondent filed an application dated 6th February, 2019 before the High Court seeking an order for the removal of the seals from the go downs where the substandard rice was stored; that unless the order of stay sought is granted there is an imminent risk that the substandard rice consignment would be moved from the Court's jurisdiction and/or be sold to the unsuspecting Kenyan public whose right to consumer protection would be infringed; and that it is in the interest of justice and fairness for the orders sought to be granted.

14. The 5th respondent supported the application through a replying affidavit sworn by its Regional Manager, Coast Region, Charles Musee on similar grounds. Mr. Musee further deposed that after delivery of the impugned judgment the High Court became *functus officio*; that

consequently, the trial court lacked the jurisdiction to allow the amendment of the 6th respondent's cross petition and to set down the cross petition for hearing.

15. Further, it was urged that the Judge had condemned the 5th respondent to pay damages of Kshs.15,000,000.00 without proof of fault on its part and in contravention of Section 17 of the Standards Act. It was therefore necessary for the proceedings in the High Court to be stayed otherwise the intended appeal would be rendered an academic exercise.

16. In response, and in opposition to the application, the 1st respondent filed an affidavit sworn by its Director, Biren Jasani who deposed that the application is an abuse of the Court process and was calculated to frustrate the 1st respondent by continuing to unjustly withhold the 1st respondent's rice; that the applicants and 5th respondent had filed similar applications for stay of execution in the High Court which they withdrew when they failed to obtain *ex parte* orders; that the 5th respondent's application was heard by the High Court and the ruling thereof is scheduled for delivery on 16th May 2019; and that the applicants have no *locus standi* to file the application on behalf of the 5th respondent.

17. Mr. Jasan deposed further that the applicants had not established that the intended appeal is arguable and that the same would be rendered nugatory to warrant the Court to exercise its discretion in its favour; that it is not in dispute that the rice consignment in issue is fit for human consumption; that taking into account the shelf life of the commodity, the same should be released to avoid total loss on the part of the 1st respondent; and that in any event, the applicants have not offered security for damages as required under the law.

18. The application was also opposed by the 6th respondent through a replying affidavit sworn by its warehouse Manager, Amos Kemboi Changwony. Mr. Changwony deposed that the cross petition was filed on account of the 6th respondent's go downs being sealed off which resulted in financial loss to the 6th respondent as it could not utilize the go downs to store additional consignments. He asserted that the rice consignment in issue occupied 30% of the total capacity of the go downs leaving 70% unutilized since 13th July, 2018.

19. Mr. Changwony deposed that the 6th respondent's rights should be protected as the applicants exercise their right of appeal, either by the applicants depositing security or a bank guarantee as to damages to the tune of Kshs.300,000,000.00. In the alternative, Mr. Changwony suggested that if the Court is inclined to grant the orders sought, the applicants should be directed to move the rice consignment at its own cost into two of the 6th respondent's go downs or in any other warehouse within its control pending the determination of the intended appeal.

Submissions by counsel

20. During the hearing of the application before us, the parties, with the exception of the 3rd and 4th respondents who did not appear, were represented by learned counsel. Mr. N. Wachira and Ms. Kiti appeared for the applicants; Mr. S. Khagram for the 1st respondent; Ms. J. Lavuna for the 2nd respondent; Ms. Kariuki for the 5th respondent and Mr. W. Mogaka appeared for the 6th respondent.

21. We observe that by the time the application came up for hearing before us on 6th May 2019, circumstances in the matter had materially changed. By a consent letter signed by counsel for all the parties dated and filed on 2nd April 2019, and adopted as an Order of the Court on the same date, the parties agreed that the intended appeal should be filed within 30 days and that the same should be heard on basis of priority. The consent letter further stipulated in part that:

“(3) The first respondent be and is hereby allowed to apply to downgrade the contentious rice under protest and without prejudice to its rights pending the determination of the intended appeal and such application be resolved within 14 days of the application being made.

(4) Each parties' rights are reserved pending determination of the appeal and shall abide by the outcome of the appeal.
[Emphasis added]

22. In a further affidavit sworn on 6th May 2019 by Charles Musee, the regional Manager of the Coast Region of the 5th respondent, it is deposed that pursuant to those consent orders, the 1st respondent did in accordance therewith apply to the 5th respondent for the downgrade of the contentious rice; that the 5th respondent acceded to a downgrade of the rice to grade three(3) and stipulated the manner in which the downgrade should take place including the requirement that the 1st respondent should pay to the 5th respondent the costs associated with the process and provide all necessary resources for the activity, including provision of labelling material and tools and labour.

23. Learned counsel for the 1st respondent **Mr. S. Khagram** confirmed from the bar that the 1st respondent had indeed submitted the application for downgrade and made payment to the 5th respondent for the “costs associated with this activity” as invoiced and that it was ready with all the necessary resources as demanded, but that the applicants and the 2nd to 5th respondents were frustrating the 1st respondent in failing to make themselves available to undertake the physical exercise to downgrade and release the rice.

24. Mr. Khagram stated that the 1st respondent is prepared to concede to the applicants' application provided the physical exercise of downgrading the rice commences immediately and in any event not later than within 14 days and continues on a day to day basis; and provided further that the 6th respondents' go downs are opened forthwith for normal operations and the 1st respondent allowed unconditional and unfettered access to the rice.

25. On his part, **Mr. W. Mogaka**, learned counsel for the 6th respondent reiterated that his client is the owner of the go downs and has wrongfully been locked out of the same and its the operations unduly and unfairly paralyzed; that the 6th respondent should be at liberty to

prosecute its cross petition before the High Court, the same having been severed from the petition by the 1st respondent; that if the court is inclined to allow the application it should be on terms that the 6th respondent should be at liberty to operate its go downs and that strict timelines should be fixed for the filing of the substantive appeal, and failing compliance the order of stay should lapse.

26. For the applicants, **Mr. Wachira** (who was supported by both Ms. Lavuna and Ms. Kariuki for the 2nd and 5th respondents respectively) reiterated the grounds in support of the application and emphasized that the reason for seeking an order for stay of the proceedings in the High Court was because of the 6th respondent's cross-petition which is pending before the High Court. He drew our attention to the draft memorandum of appeal and urged that the intended appeal is arguable and that the same will be rendered nugatory if stay is not granted because the contentious rice will have been released and the public misled as to its quality and into paying more money for the same than they ought to and irreversible damage will have been done.

27. **Ms. Kariuki** counsel for the 5th respondent added that unless stay is granted it will be compelled to pay the colossal sum of Kshs.15,000,000.00 awarded; that recovery of the same in the event that the intended appeal succeeds will drain public resources due to litigious process. Reference was made to the decision of this Court in **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd (2002) 1 EA 227.**

Analysis and determination

28. We have considered the application, the submissions and representations made by learned counsel. We are also cognizant as we have already indicated, of the developments that counsel say have taken place pursuant to consent order recorded on 2nd April 2019 and which are referred to in the 5th respondent's further affidavit filed on 6th May 2019.

29. That said, the prerequisites for the grant of the discretionary relief under Rule 5(2)(b) of the rules of the Court are settled. An applicant is required to demonstrate that the intended appeal is arguable and that if the order for stay is refused, the appeal, if successful will be rendered nugatory. (See **Patel vs. Transworld Safaris Ltd. [2004] eKLR** and **Githinji vs. Amrit & Another [2004] eKLR**). Based on the decision of the Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, SC. Application No. 5 of 2014 (2014) eKLR**, public interest is also a relevant consideration.

30. As to whether the intended appeal is arguable, we must be cautious not to predetermine matters that will be canvassed before the Court that will ultimately hear the appeal. However, we are unable to say, based on the draft memorandum of appeal, that the intended appeal is frivolous. There is for instance the question raised as to whether the learned Judge erred in directing the unconditional release of the rice in contention which the applicants and the 5th respondent assert did not comply with the prescribed standards of Grade 1 rice. There is also the question whether the learned Judge erred in finding that the variation of the percentage of broken rice kernels in the samples taken was negligible; and whether the learned Judge erred in awarding the damages that he did. These are in our view matters that merit consideration by the Court.

31. On the nugatory aspect, the applicants and the 5th respondent contend that if the contentious rice is released as it is, it will mislead the public as to its quality and violate consumer rights protected under Article 46 of the Constitution. On the other hand, the 1st respondent asserts that the withholding of the rice, which is fit for human consumption, is an infringement of its rights and is occasioning it to loss and that taking into account the shelf life of the rice, a stay of proceedings will result in total loss of the commodity. The 6th respondent also complained that the continued sealing of its go downs continues to expose it to untold financial loss.

32. Both sides make valid arguments. In **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR** this Court, while considering the question of whether an appeal would be rendered nugatory, stated:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

33. The main bone of contention between the parties relates to the quality and/or grade of the rice in contention. In our view, the release of the rice as grade one rice, before the appeal is heard and determined would defeat the object of the intended appeal in that should the said appeal be successful, the same cannot be reversed as the rice will have been sold to unsuspecting consumers. There is accordingly merit in the applicants' application.

34. We were urged, that should we be inclined to stay the proceedings in the High Court pending appeal, we should do so on the terms and conditions suggested by Mr. Khagram as captured earlier in this ruling. However, considering that the consent entered into by the parties allowing the 1st respondent to apply to downgrade the contentious rice was made “*under protest and without prejudice*”, and parties reserved their rights, and also considering the developments subsequent thereto are premised on that consent, we are unable to impose the conditions suggested by Mr. Khagram lest we prejudice any of the parties.

35. The orders that commend themselves and which we hereby make is to allow the applicant's application in terms of prayer 3 with the result that proceedings in Mombasa High Court Petition No. 205 of 2018 are hereby stayed pending the hearing and determination of the applicants' intended appeal on condition that the applicants shall file and serve the memorandum and record of appeal within 14 days from the date of delivery of this Ruling failing which the order for stay of proceedings granted herein shall lapse without further ado. Once filed, the applicants appeal shall be fixed for hearing on basis of priority to be heard during the month of June 2019.

36. The costs of the application shall abide by the outcome of the intended appeal.

Orders accordingly.

Dated and delivered at Malindi this 15th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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.

DEPUTY REGISTRAR