



REPUBLIC OF KENYA



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 153 OF 2019

BETWEEN

UNITED MILLERS LIMITED.....APPLICANT

AND

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

THE DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE DIRECTOR, PUBLIC HEALTH.....4TH RESPONDENT

THE EXECUTIVE DIRECTOR,

ANTI-COUNTERFEIT AUTHORITY.....5TH RESPONDENT

THE DEPARTMENT OF HEALTH SERVICES,

NAKURU COUNTY.....6TH RESPONDENT

(Being an application for a conservatory order pending the hearing and determination of

an intended appeal against the Judgment and Decree of the High Court

at Nairobi (Mativo, J.) on 13th May 2019

In

Judicial Review No. 396 of 2018)

RULING OF THE COURT

The applicant moved to the High Court by a motion for judicial review orders of prohibition, certiorari and mandamus after the 1st respondent issued a seizure notice in respect of the sugar shipment for which it insisted the same 1st respondent had granted it a licence to import; that it had also been issued with an extended pre-shipment approval; that the 6th respondent had examined the sugar and found it suitable; and that the applicant had complied with all import procedures on the basis of which it proceeded to import the sugar in question.

In view of the foregoing the impugned letter of 7th September, 2018 by the 1st respondent directing the 2nd, 3rd, 4th and 5th respondents to

destroy the seized sugar must have come as a surprise to the applicant.

In the motion, the applicant contended that the decision was unreasonable, arbitrary and irrational because the sugar had been tested prior to shipment; that the 6th respondent had analyzed and found the sugar to be in conformity with the 1st respondent's standard.

For their part the respondents, save for the 2nd, 5th, and 6th, argued that the applicant's application was defective as the court lacked jurisdiction under **sections 11 and 14A(4)** of the Standards Act to entertain the suit; that instead of instituting judicial review application, the applicant ought to have appealed the decision of the 1st respondent to the Standards Tribunal pursuant to those sections aforesaid; that samples collected from the applicant's consignment of sugar were tested against the East African Standard Brown Sugar specifications EAS 749:2010 and found to have failed to comply with the set standards in relation to parameters of yeast and mould; that this result was communicated to the relevant authorities and the applicant as well; that following this outcome, the sugar was condemned for destruction; that due regard to the law was observed during the exercise; that the 1st respondent was a stranger to the tests conducted by the 6th respondent; and that even after the pre-shipment testing, the 1st respondent was bound to conduct further tests upon the sugar arriving in the country to ensure that the standards were met as shipping, handling and packaging might degrade the fitness of food products.

In its judgment rendered on 13th day of May 2019, the court below (Mativo, J) declined to declare that the 1st respondent had infringed the applicant's rights under **Article 47** of the Constitution and **section 4 (1)** of the Fair Administrative Action Act and to issue an order of *certiorari* to quash the 1st respondent's decision to detain 29,714 bags of sugar belonging to the applicant. The Judge also rejected a prayer to prohibit the 1st to 5th respondents from destroying the sugar and to direct the respondents by an order of *mandamus* to release it to the applicant.

Specifically, the learned Judge based his decision on two grounds. First, that the applicant had no justification to skip the jurisdiction of the Standards Tribunal in favour of the High Court; that it could only bypass the Tribunal with the leave of the court in terms of **section 9(4)** of the Fair Administrative Action Act and only after demonstrating the existence of exceptional circumstances. He said in conclusion on this ground that;

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36. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

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39. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the ex parte applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section 9 (2) of the FAA Act.[71] The ex parte applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the FAA Act.[72] In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail”.

On the second ground, the Judge was satisfied that the threshold for granting judicial review orders was not reached; that the applicant failed to demonstrate that the 1st respondent's decision was illogical or irrational, disproportionate or excessive. In conclusion on this ground the Judge stated that;

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78. In view of my analysis of the facts and the law herein above, and my findings on the issues discussed herein, the conclusion becomes irresistible that the ex parte applicant has not demonstrated that the impugned decision is tainted with illegality or any judicial review grounds to warrant an order of judicial review from this court. Accordingly, the ex parte applicant's application dated 8th October 2018 be and is hereby dismissed with no orders as to costs”

The applicant now intends to appeal that decision and has in the meantime taken out this motion under **Rule 5(2)(b)** in which it seeks, in a language rather alien to the nature of a **5(2)(b)** application that;

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1. That a conservatory order be issued restraining the respondents from acting on the 1st respondent's letter dated 7th September, 2018 (“the impugned decision”), addressed to the 2nd to 5th respondents (and copied to the applicant), in which the 1st respondent informed them that consignments of sugar the applicant had imported from Mauritius failed in yeast and mould when tested against the standard KS EAS 749: 2010 Brown Sugar Specification and “in line with the Multi-Agency Release Protocol should therefore not be released to the owner for sale in the market and should be condemned for destruction.”

2. That in the alternative the implementation of the 1st respondents' letter dated 7th September, 2018 (“the impugned decision”) addressed to the 2nd to the 5th respondents (and copied to the applicant), the 1st respondent informed them that consignments of sugar the applicant had imported from Mauritius failed in yeast and mould when tested against the standard KS EAS 749:2010 Brown Sugar – Specification and “In line with the Multi-Agency release Protocol should be condemned for destruction” be stayed pending the hearing and determination of the applicant's intended appeal against the judgment and Decree order of the High Court in Nairobi, Judicial Review Division (Mativo, J) made on 13th May, 2019”.

The application itself is headed “...an application for a conservatory order pending the hearing and determination of an intended appeal.....”

Before us Mr. Amoko, learned counsel representing the applicant tried to justify the approach adopted in framing the prayers saying that if the destruction of sugar pursuant to the 1st respondent's letter under reference is not stopped, the substratum of the intended appeal shall equally be destroyed and appeal rendered nugatory. He cited the case of Alfred N. Mutua V. Ethics and Anti-Corruption & 3 Others, Civil Application No. Nai. 31 of 2016 (UR 22/2016), to argue that irrespective of how the application is worded the Court's focus should be on the injury and prejudice the applicant stands suffer.

The 1st respondent, on the other hand through Mr. Moenga, learned counsel has complained that in their form the prayers above have the effect of requiring it (the 1st respondent) to release the seized consignment to the applicant even before the appeal is filed and heard. That may be so. However, for us, the concern is that under **Rule 5(2)(b)** the Court can only grant three specific orders, stay of execution, an injunction or stay of further proceedings.

It appears to us that, by framing the prayers as it did, the applicant is being cautious. The motion having been dismissed it would have been futile to apply for stay of execution of the decree and judgment. Though strangely framed, we believe the applicant is seeking injunctive orders pending the filing, hearing and determination of the intended appeal. This is confirmed even by the authorities cited, Alfred N. Mutua (supra) and Stanley Kangethe Kinyanjui V Tony Ketter & 5 others, Civil Application No. 31 of 2012. In any case stay of execution, stay of further proceedings and injunction are, generally speaking all conservatory orders.

Whether an application is for stay or injunction the consideration is the same. See Patrizia Bini V. Melina Investments Limited & 3 others Civil Application No. 27 of 2015 and also Oliver Collins Wanyama V. Engineers Board of Kenya, Civil Application No. 322 of 2018.

For an application brought under **Rule 5(2)(b)** to succeed it must satisfy the twin guiding principles, that the intended appeal is not frivolous and that unless a stay or an injunction is granted, the appeal or intended appeal, if successful, would be rendered nugatory. Those principles will, of course, be considered against the facts and circumstances of each case. See Panafrican News Agency V. Teleposta Pension Scheme & 2 others, Civil Application No. 47 of 2006.

In paragraph 13 of the affidavit supporting the motion the applicant has set out ten grounds that it considers to be arguable points in the intended appeal. Those grounds for our purpose include, failure by the Judge to find that the jurisdiction of the Standards Tribunal did not extend to decisions made pursuant to the Multi-Agency Protocol and also that the Judge in error failed to find that **section 11** of the Fair Administrative Act, 2015 vests in the High Court jurisdiction to grant the reliefs sought. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See Damji Pragji Mandavia V. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004. From the grounds contained in the aforesaid paragraph we are persuaded that the intended appeal is not frivolous.

In considering whether an appeal will be rendered nugatory if the relief sought is not granted, the court must bear in mind that each case must depend on its own facts and peculiar circumstances. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or stopped if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

In the Nigerian High Court decision in the case of Econet Wireless Limited V. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208] that has been cited with approval in several local decisions such as Republic V. National Assembly & another Ex-parte Coalition for Reform and Democracy (CORD), H.C. Misc. Appl. No. 647 of 2016 and in Dr Alfred Mutua (supra) it was stressed that;

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A consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the court a situation of complete hopelessness or render nugatory any order of the court or paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds in the appeal, there could be no return to the *status quo*, the Court ought to grant stay.”

This Court, in other words must guard against any action or inaction whose effect may render the appeal otiose.

If the sugar in question is destroyed and subsequent to that the appeal was to succeed, it would be futile. An applicant must satisfy the Court on both of the twin principles. See Stanley Kangethe Kinyanjui (supra).

The applicant has met the test for the grant of an injunction under **Rule 5(2)(b)** and the application accordingly succeeds. The order that commends itself to us, bearing in mind what we said at the beginning regarding the prayers, is that *status quo* obtaining at the time of hearing this application be maintained. In other words, the applicant’s consignment of sugar will not be released to it and the respondents, on the other hand will not destroy it pending the hearing and determination of the intended appeal.

Costs will be in the intended appeal.

Dated and delivered at Nairobi this 26th day of August, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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