



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJA)

CIVIL APPLICATION NO. 127 OF 2019

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

ANTI-COUNTERFEIT AUTHORITY.....APPLICANT

AND

FRANCIS JOHN WANYANGE.....1ST RESPONDENT

ROBERT PAUL GACHOKA WANYANGE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE OCS INDUSTRIAL AREA

POLICE STATION.....5TH RESPONDENT

(Application for stay of execution of the judgment of the High Court of Kenya

at Nairobi (Majanja, J.) dated 23rd November, 2018 in petition no. 320 of 2015)

RULING OF THE COURT

1. By its application presented to this Court on 18th April 2019 under Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Court of Appeal Rules, the applicant, Anti-Counterfeit Authority, has applied for an order of stay of execution of the judgment and decree of the High Court (Constitutional and Human Rights Division) delivered by Majanja, J on 23rd November 2018 pending the hearing and determination of its intended appeal to this Court.
2. In that judgment, the High Court allowed the 1st and 2nd respondents’ constitutional petition and declared that their right to property was violated by the arbitrary seizure and withholding of their motor vehicle, its log book, and 82 assorted gas cylinders. Accordingly, the court ordered the release of the logbook and the 82 assorted gas cylinders in addition to awarding the 1st and 2nd respondents general damages of Kshs. 500,000.00 for violation of their fundamental rights and freedoms.
3. Intending to challenge the whole judgment, the applicant filed a notice of appeal dated 27th November 2018 on which the present application is founded.
4. In urging us to order a stay of execution of the said judgment, Mr. J.O. Adera, learned counsel for the applicant, referred us to the affidavit in support of the application sworn by Naylor Mukofu, the Chief Legal Officer of the applicant, and submitted that the intended appeal is

arguable; that in allowing the petition and granting the reliefs that it did, the High Court failed to consider that the 1st and 2nd respondents did not demonstrate that they had the mandate, under the Energy (Liquified Petroleum Gas) Regulations, 2009 to deal in “controlled goods”, namely LPG gas cylinders; that the 1st and 2nd respondents did not demonstrate that they were either licence holders or had the permission of the brand owners to deal in the gas cylinders; that consequently, the 1st and 2nd respondents did not demonstrate they had an interest in the cylinders; neither did they demonstrate that they had a licence to transport the same.

5. It was submitted further that at the hearing of the appeal, the applicant will demonstrate that the Judge failed to appreciate that the petition before it was incompetent for lack of sufficient particulars.

6. Unless the judgment of the High Court is stayed, counsel submitted, the 82 assorted gas cylinders will be released to the 1st and 2nd respondents and will disappear and the appeal will thereby be rendered nugatory.

7. On his part, Mr. J. K. Njuguna, learned counsel for the 1st and 2nd respondents in opposing the application referred to the replying affidavit sworn by Robert Paul Gachoka Wanyange, the 2nd respondent, in which it was deposed that the basis of the petition in the High Court was that the applicant seized the respondents’ motor vehicle together with an assortment of 82 full gas cylinders; that the High Court ordered the release of the vehicle conditional upon surrender of the log book but the applicant retained the gas cylinders awaiting the outcome of an intended prosecution before the Magistrate’s court; that criminal charges that had been instituted by the Energy Regulatory Commission against the 2nd respondent were dismissed and the 2nd respondent acquitted by the Magistrates’ court on 1st September 2017; that despite the acquittal the applicant continued to detain the gas cylinders as well as the original log book in respect of the vehicle; and that as a result the 1st and 2nd respondents had incurred substantial business loss in addition to suffering mental torture.

8. Counsel submitted that the applicant’s intended appeal is not arguable; that despite being served with the petition, the applicant did not respond to it though its counsel was allowed to address the court on issues of law; that it was not demonstrated to the High Court that the vehicle or the gas cylinders are counterfeit; that as correctly noted by the Judge, under Section 28 of the Anti-Counterfeit Act, any goods seized should be returned within 3 months after the date of seizure, unless charges for an offence committed in relation to or in connection with such goods are brought under the Anti-Counterfeit Act; that there can be no basis for the continued detention of the cylinders as the respondents were acquitted by the Magistrate’s court due to lack of evidence; and that the applicant has not demonstrated that it will suffer if the cylinders are released. Counsel concluded that the applicant has not met the threshold for the grant of orders of stay of execution and urged us to dismiss the application with costs.

9. In his brief rejoinder, counsel for the applicant conceded that although no response to the petition was filed in the High Court, the applicant raised legal issues; that the respondents were under a duty to disclose their interest in the cylinders by producing a licence; and that notwithstanding that they were acquitted, the respondents were under a duty to demonstrate that they were indeed licensed to deal in the cylinders.

10. We have considered the application and the submissions by counsel. To succeed in its application, the applicant should demonstrate, firstly, that the intended appeal is arguable. Secondly, that if we do not grant the orders sought, the intended appeal, if successful, will be rendered nugatory. As stated by the Court in *Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006* :

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

11. Applying those principles to the matter at hand, the applicant asserts that the intended appeal is arguable; that during the hearing of the appeal, the applicant will demonstrate that under the Energy (Liquified Petroleum Gas) Regulations, 2009 (made under the Energy Act, No. 12 of 2006) the 1st and 2nd respondents are required to have a licence in order to conduct business of LPG cylinders; that they did not demonstrate before the High Court that they are so licensed; and that the Judge therefore erred in ordering the release of the cylinders.

12. We are not at this stage conclusively addressing the merits or otherwise of the intended appeal. We are however cognizant that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court or one that is deserving of the Court’s consideration. [See *Dennis Mogambi Mong’are vs. Attorney General & others [2012] eKLR; and Kenya Commercial Bank Ltd v Hon. Nicholas Ombija, Civil Application No. Nai. 153 of 2009*]. Bearing that in mind, we do not think the intended appeal is frivolous. The question whether the Judge failed to inquire or consider whether there was a license in existence authorizing the 1st and 2nd respondents to deal in the cylinders is in our view arguable.

13. As to whether the intended appeal, if successful, will be rendered nugatory unless we grant the orders sought, we agree with counsel for the applicant that if the full LPG cylinders at center of the dispute in the intended appeal are released before the appeal is heard and determined, the appeal will have been rendered academic as the cylinders will be out of reach of the applicant. As stated by the Court in *Stanley*

Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR:

“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.”

14. Githinji, JA. expressed it differently in *Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011* that the

object of Rule 5(2)(b) is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”***

15. We think the circumstances in this case warrant the preservation of the gas cylinders pending the hearing and determination of the intended appeal.

16. We accordingly allow the application in terms of prayer 3 thereof and hereby grant an order staying execution of the judgment and decree of the High Court dated 23rd November 2018 pending the hearing and determination of the intended appeal.

17. We further direct that the applicant shall file and serve its memorandum and record of appeal within 45 days from the date of delivery of this ruling, failing which the orders granted herein shall stand discharged. In that event, the applicant’s application dated 18th April 2019 shall also stand dismissed with costs to the 1st and 2nd respondents.

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

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL