IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GITHINJI & OKWENGU, JJ.A.)

CIVIL APPLICATION NO. 288 OF 2019

BETWEEN

KENYA BUREAU OF STANDARDS.....APPLICANT

AND

LANDMARK FREIGHT SERVICES LIMITED.....1st RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENRAL.....3RD RESPONDENT

MINISTRY OF TRADE.....4TH RESPONDENT

DIRECTORATE OF CRIMINAL

INVESTIGATIONS.....5TH RESPONDENT

(Being an Application for stay of the Ruling and Order of the High Court at

Nairobi,(Weldon Korir, J.) dated 29th July, 2019 in Constitutional Petition No. 290 of 2018)

RULING OF THE COURT

Though this is a straightforward matter, at least at this stage, brought under **Rule 5(2)(b)** of the Court of Appeal Rules, the nature of the dispute is such that the following summarized background is essential.

The 1st respondent is a limited liability company incorporated in Kenya, one of whose objects is to import and trade in sugar within and outside Kenya. It has been its case that in a notice in the Kenya Gazette dated 12th May, 2017, the Cabinet Secretary for the National Treasury notified the general public that duty would not be payable for sugar imported by any person between 11th May, and 31st August, 2017; that through 18 entries, it imported 25580 metric tons being 511600 bags of 50kgs each of Brazilian brown sugar from a Dubai based company; and that all the 18 entries were inspected at the port of loading by the Kenya Bureau of Standards, the applicant; that the applicant approved the consignment as being compliant and thereafter issued the 1st respondent with a Certificate of Conformity, Certificate of Weight and Quantity and Certificate of Quality Analysis. When the sugar arrived in Kenya the applicant, after conducting a micro-biology test on samples also certified the sugar as compliant with the applicant's standards. Similarly, the Kenya Revenue Authority (KRA), the 2nd respondent gave its own approval after the requisite taxes were paid on all the 18 entries.

Having obtained stamp of approval from all these agencies, the 1st respondent moved the sugar to its hired godown. It was at this godown that a multi-agency team comprising the applicant, 2nd and 4th respondents descended and issued seizure notices, alleging that the sugar consignment had incorrect custom declaration; and that the bags containing the sugar were not labelled with the name and address of the 1st respondent. Subsequently, the godown was closed down. The totality of these grievances led the 1st respondent to believe that there was witch-hunt and proceeded to petition the High Court to:-

> *a) declare that the applicant and the other Government agencies had violated* ***Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 27, 35, 40, 47, 48*** *and* ***50*** *of the Constitution.*

b) declare the seizure notices unconstitutional.

c) issue a mandatory injunction compelling the applicant and the agencies concerned to lift the seizure notices and to allow the 1st respondent to access its go-down.

d) issue an order of permanent injunction to restrain the applicant and any of its agents or servants from seizing the sugar consignment.

e) issue an order of certiorari to quash the applicant's laboratory report dated 29th June 2018.

f) award compensation for losses suffered as a result of the indefinite seizure of the sugar consignment by the applicant.

The applicant denied that the seizure was illegal and maintained that it was justified since the certificates of conformity had expired in October, 2017; that concerned about the storage of the sugar, the applicant found it compelling to determine its suitability for human consumption; that the samples tested failed the set safety standard for brown sugar; and further, that inspection tests at the country of origin also had shown presence of yeast and mould.

The petition was canvassed before W. Korir, J, who, in his judgment found, on the substance, and relying on the decision of this Court in **Kenya Bureau of Standards V. Powerex Lubricants Limited** [2018] eKLR that the applicant acted in accordance with the Constitution and the law in conducting regular or impromptu checks and tests; that the court could not fault it for discharging its statutory mandate; and that it acted in the best interest of the public by safeguarding consumers' health and safety as required by **Article 46** of the Constitution.

The learned Judge was however unable to determine whether the sugar was good or bad for human consumption, and accordingly directed the applicant's main witness, Clarkson Ogembo Nyambok to provide to the court and the 1st respondent a report, within 3 days, on the fitness of the sugar for human consumption.

Based on the evidence before him, the Judge who obviously had the advantage of hearing and seeing the applicant's witness, Clarkson Ogembo Nyambok, made this observation;

> **"Although the expert witness made a conclusion that the sugar did not meet the standards, the truth of the matter is that the reports he produced, and which he appeared to admit during cross-examination not to be the maker of the same, showed that there was no clarity as to whether the sugar was good or bad. He admitted that his work was to just test the sugar and pass over the report for somebody else to make a decision. The decision maker was not availed in court and the court cannot tell how the decision that the sugar was unfit for human consumption was arrived at considering the evidence of the expert witness. Ordinarily, the contradictory evidence of the expert witness should be reconciled in favour of the Petitioner and the petition allowed as prayed. However, the court is alive to the fact that the commodity the Petitioner is asking the court to release is human food…...**
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> **Nevertheless, as matters now stand, this court cannot competently say whether the Petitioner's sugar is bad or good. The only entity with the expertise and statutory mandate to give a clear statement on the quality of the Petitioner's sugar is the Bureau. The Petitioner cannot therefore be granted the reliefs it seeks. On the other hand, the Bureau cannot be allowed to destroy the sugar. The court must provide a relief that takes care of the rights of the public to consume sugar of good quality but at the same time protect the Petitioner's business interests".**

On the suitable final order to make in the resolution of the petition, the learned Judge said;

> **"… I find that there is no evidence on record determining whether the Petitioner's sugar is good or bad. This is a technical matter that can only be decided by the experts. In the circumstances, I issue orders as follows:-**
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> **(a) Clarkson Ogembo Nyambok shall provide to the court the full test results in respect of the report dated 20th November, 2018 for purposes of clarifying his evidence as to whether the Petitioner's sugar meets the set standards. The written report should be clear and unambiguous as to whether the sugar is fit or not fit for human consumption; and**
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> **(b) The report to be shared with the Petitioner and filed in court within three (3) days from the date of this judgement in order to enable the court issue appropriate orders in regard to the disposal of the sugar".**

Ordinarily that would have marked the end of that matter, subject to a report by the expert witness as ordered. However, when the matter came up for mention before the learned Judge on 24th June, 2019 he directed the applicant's witness, Clarkson Ogembo Nyambok to appear before the court in person to produce the report. By its application of 26th June 2019 the applicant contested the recalling of the witness but the protest was dismissed so that when the matter came up in court on 27th June, 2019 the court went ahead to take the evidence of the witness as regards the report. From that evidence the Judge, in a detailed ruling running to 19 pages arrived at the conclusion that the sugar was safe for consumption and that there was no justification for holding it further. As consequence, he ordered that the seizure notices be lifted and sugar released to the 1st respondent.

Discontented by this ruling the applicant has evinced its intention of challenging it on appeal to this Court. In the meantime, it has taken out the motion to which this ruling relates under this Court's **Rule 5(2)(b)** praying that, pending hearing and determination of the intended appeal, the Court be pleased to stay the execution of the orders of 29th July, 2019.

The applicant has urged us to find that its intended appeal is arguable because, though the High Court styled the impugned decision of 29th July, 2019 as a ruling, it was infact a second judgment in the same matter; that the learned judge made an error in declaring the sugar fit for human consumption even after the applicant had found it, through laboratory analysis, unfit for human consumption; that he consequently erred in directing the release of the sugar which had expired; and that it was erroneous for the Judge to have taken evidence after delivering the judgment.

The applicant expressed fear that if we do not stay the orders complained of then the intended appeal shall be rendered nugatory as the sugar which has been found to have failed to meet the acceptable standards and which has, in the meantime, expired will be released into the market thereby exposing the public to grave health-related dangers; and that should the applicant fail to secure an orders of stay it stands the risk of being cited for contempt of court.

For the 1st respondent in opposition to the application, the fact that the applicant has not complied with the orders directing it to release the sugar is in itself sufficient reason to deny it a hearing or any equitable remedy.

In addition, it argued that the applicant has not met the conditions set out in **Rule 5(2)(b)** of the Court's Rules for the grant of an order of stay of execution besides the is incompetent for failure to file the notice of appeal within the time prescribed by the rules; that as a result the draft memorandum of appeal is equally incompetent as the notice of appeal upon which it is anchored is itself incompetent; that, as a matter of fact, it is the 1st respondent that will suffer immense prejudice if the applicant is granted orders of stay because there will be more delay as the appeal itself is yet to be filed and the application for leave to extend time to file a notice of appeal has not been heard.

With those submissions, it now remains for us to consider the two principles that a party applying for an order of stay of execution must satisfy that the appeal or intended appeal is arguable; and secondly, that if a stay of execution is not granted, the appeal, if successful, will be rendered nugatory. See **Stanley Kangethe Kinyanjui V. Tony Ketter & 5 Others** [2013] eKLR.

But before we consider those principles, the 1st respondent has raised a technical point which we think will be conveniently disposed of at this stage, that is, whether the application is incompetent for lack of a notice of appeal.

It is conceded that the notice of appeal filed on 30th August, 2019 was so filed 21 days after the 14 days' period provided for and that to regularize that situation the applicant took out Civil Application No. 298 of 2019 for the leave of Court to extend time. That application is still pending hearing before a single judge.

Is the omission to file a notice of appeal within the stipulated time fatal to the instant application?

The ready answer to this question was given by the Court in **Industrial Credit Bank Ltd V. Aquinas Francis Wasike & another** [2006] eKLR where the view was thus expressed;

> **"Mr. Ohagga, learned counsel for the respondents, Aquinas Francis Wasike (1st respondent) and Lantech Ltd. (2nd respondent) tried to argue before us that the notice of appeal filed by the applicant is invalid and that, therefore, the Court cannot grant the order of stay prayed for. We, however, take note of the fact that no application has been made by the respondents for the striking out of the notice of appeal and as the Court has repeatedly pointed out, Rule 5 (2) (b) does not provide that *"..... where a valid notice of appeal ....;"* the Rule simply provides that:-**
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> ***"In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74....."***
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> **Rule 74 itself does not talk about a valid notice of appeal. The validity or otherwise of a notice of appeal is to be determined in accordance with the provisions of Rule 80 under which a notice of appeal can be struck out. We do not see any reason for determining the validity or otherwise of a notice of appeal when an application under Rule 5 (2) (b) is being considered".**

All the Court is concerned with under **Rule 5 (2) (b),** as we have already said, is the arguability of the appeal or the intended appeal and the nugatory aspect of the appeal or intended appeal if the stay is not granted and the appeal or the intended appeal were to eventually succeed**.** There is a formal procedure under **Rule 84** of the Court Rules to deal with validity or invalidity of an appeal or a notice of appeal. In any case, we cannot see any prejudice that has been occasioned to the 1st respondent.

On the first limb, the applicant has listed nine grounds which it intends to argue in the intended appeal. For the purpose of this application, even a single arguable ground is enough. It is not idle to question the propriety of an order by the learned Judge to take the evidence of a witness after delivering the judgment. The ground that the learned Judge erred by directing the release of sugar to the 1st respondent in light of the report by the applicant to the effect that the sugar was unfit for consumption is equally arguable. We also think that the question whether the sugar had expired during litigation is not a frivolous point.

On the second limb, and in view of the contradictions on the state of the consignment of sugar, we are mindful that public good and interest is paramount. If the sugar is released before the intended appeal is filed, heard and determined, the appeal will serve only as an academic discourse and the risks to which the public will be exposed should it turn out that the sugar is not fit for human consumption will be too grave to contemplate.

Both limbs, having been satisfied, the application succeeds.

Accordingly, there will be and we hereby grant an order of stay of execution of the ruling and order of 29th July, 2019 pending the hearing and determination of the appeal.

So as to obviate any further loses to the 1st respondent, we order that the applicant's application in Civil Application No. 298 of 2019 be listed immediately before a single Judge and the main appeal be filed and served within thirty (30) days from the date of this ruling, if not already filed and served. Costs to be in the appeal.

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

W. OUKO, (P)

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR