



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR JJ.A)

CIVIL APPLICATION NAI 169 OF 2017 (UR 134/2017)

ANTI-COUNTERFEIT AGENCYAPPLICANT

AND

BARLOWORLD LIMITED1ST RESPONDENT

MATCH MASTERS LIMITED2ND RESPONDENT

(An application for the stay of execution and further proceedings pending the hearing and determination of an intended appeal from the decree of the High Court of Kenya at Nairobi (Mativo J) dated 28th June, 2017

In

H.C. Petition 103 of 2017

RULING OF THE COURT

This is an application brought pursuant to Rule 5(2) (b) of the Court of appeal Rules, 2010 seeking two main orders: stay of the decree of Mativo J pending the hearing and determination of the intended appeal; and stay of further proceedings in High Court Petition No.103 of 2017 ('the petition') pending the hearing and determination of the intended appeal.

To set the stage for the application, the facts are as recounted hereunder. On 19th November, 2011 the Anti-Counterfeit Agency ('the applicant') seized a consignment of Brand Safety Matches from Barloworld Limited ('the 1st respondent') valued at over Kshs.6,000,000/= from its premises at Kijabe Street, Nairobi. The consignment had been imported from India for distribution and Sale in Kenya. The seizure was on the grounds that the consignment was made up of counterfeit goods.

The 1st respondent and his director, George Ngugi Wambui, were subsequently charged at the Chief Magistrate's Court at Nairobi on two counts: having in possession of trade, counterfeit goods contrary to Section 32(a) as read with S.35(1) (a) of the Anti-Counterfeit Act, 2008; and importing into Kenya, counterfeit goods contrary to S.32(f) as read with S.35 (1) (a) of the Anti-Counterfeit Act 2008.

Citing several violations of his constitutional rights, the 1st respondent filed the petition in response. It primarily asserted that not only was it not accorded a chance to defend itself against the seizure, but that

no reasons were provided for the seizure. Furthermore, that there was no justifiable or legitimate cause to institute criminal proceedings against it and its director. The applicant opposed the petition, defending its actions as being within its mandate and in accordance with the provisions of the Anti-Counterfeit Act ('The Act').

Mativo J in determining the petition found that the 1st respondent's prosecution was baseless and an abuse of the applicant's statutory mandate. Mativo J allowed the petition and granted *inter alia* orders prohibiting the applicant from further proceeding with the criminal case against the 1st respondent and its director. In complying with the High Court order, the Chief Magistrate (Andayi C.M) terminated the criminal proceedings against the 1st respondent and its director.

Aggrieved by the judgment, the applicant herein has filed a notice of appeal manifesting its intention to appeal against that decision. In the meantime, the applicant has filed this application on grounds contained in the body of the application and in the supporting and supplementary affidavit of Casper Oluoch the Chief Inspector with the applicant, which is to the effect that the applicant is apprehensive that the consignment will be lost and no criminal prosecution will lie against the 1st respondent. The applicant therefore seeks the preservation of the consignment.

The application was opposed by the 1st respondent in the replying affidavit of George Ngugi Wambui, its director. The gist of the 1st respondent's argument is that the applicant has failed to adduce evidence to justify seizure of its goods and the complaints against it.

Making submissions on behalf of the applicant, learned counsel Mr. J. O. Adera argued that Mativo J failed to appreciate the evidence presented before him and made a decision without affording the applicant an opportunity to be heard. Further that he applied wrong principles in coming to his determination. Counsel reiterated that should the consignment be released to the 1st respondent the substratum of the intended appeal will be destroyed or lost.

Learned counsel Mr. K. M Mwangi, representing the 2nd respondent, made an appearance before us in supporting the application despite not having filed any documents. Counsel urged the court to grant conservatory orders to stop the release of the consignment to the 1st respondent to avoid the risk of the counterfeit goods being released to the public. Counsel faulted Mativo J for shifting the burden of proof to the 2nd respondent.

Mr. Njuguna Karanja, learned counsel representing the 1st respondent, opposed the application. Counsel was adamant that the applicant had failed to follow the procedure set down for seizure of goods under the Act. Counsel reiterated that the present application as well as the intended appeal were an abuse of the court process.

The jurisdiction of this court as relates to applications brought under Rule 5(2) (b) follows a well beaten path. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay the success of that appeal will be rendered nugatory. See: **Ishmael Kagunyi Thande v HFCK Civil Application Nai No. 157 of 2006 (unreported)**.

On whether the appeal is arguable, we are alive to the fact that a single *bona fide* ground is sufficient. The applicant has propounded several grounds in his affidavit and raised even more grounds in his draft memorandum of appeal that Mativo J: usurped the power and jurisdiction of the trial court by delving into the merits of the issues pending before the trial court; applied the wrong principles of law in terminating the criminal proceedings before the trial court; and infringed on its constitutional right to be heard. From the foregoing we are unable to say that the grounds raised are frivolous and as such, they ought to have their day in court for determination.

Will the intended appeal be rendered nugatory? This court stated previously in **Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227** that factors which could render an appeal nugatory have to

be considered in the circumstances of each particular case. Additionally, where appropriate, the court may well consider whether or not granting an application for stay of execution would serve the public interest. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** declared public interest as a “*third condition...dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution*”.

The applicant has argued that it is in the interest of the public to have this matter prosecuted. The 2nd respondent added that the purpose of the seizure was to prevent the distribution of counterfeit goods in the Kenyan market. In our analysis, the issue of public interest mitigates against the release and disposal of the goods subject of this application. As was rightly pointed out, the objective and purpose of the applicant is to protect the Kenyan citizens against harm and injury resulting from adulterated goods and services. In the premises, our preemptive view is to enhance that legal responsibility, with the result that the appeal may well be rendered nugatory in the event the subject goods, which are the substratum of the intended appeal, are released.

For those reasons the application is allowed with costs.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. WAKI

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JUDGE OF APPEAL

M. WARSAME

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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