



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: D. MUSINGA, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. NAI. 112 OF 2016

In the matter of an appeal

BRITISH AMERICAN TOBACCO KENYA LIMITEDAPPELLANT

AND

CABINET SECRETARY FOR THE MINISTRY OF HEALTH1ST RESPONDENT

TOBACCO CONTROL BOARD2ND RESPONDENT

ATTONEY GENERAL3RD RESPONDENT

AND

KENYA TOBACCO CONTROL ALLIANCE1ST INTERESTED PARTY

CONSUMER INFORMATION NETWORK.....2ND INTERESTED PARTY

(An application for stay of the coming into force of the Tobacco Control Regulations pending the lodging, hearing and determination of an appeal from the decision of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated the 24th March, 2016

in

H.C.C.C. No. 143 of 2015)

RULING

1. On 15th April, 2015 the applicant filed a constitutional petition challenging, inter alia, legality of the Tobacco Control Regulations 2014 (“*the Regulations*”) and **section 7(2)(f)** of the **Tobacco Control Act**. The regulations had been published by the first respondent on 5th December, 2014 and were scheduled to come into force on 5th June, 2015. Upon filing of the petition and an application for conservatory orders pending hearing and determination of the petition, the High Court stayed the coming into force of the regulations until the petition was heard and determined.

2. The petition was heard by **Mumbi Ngugi, J.** and a judgment delivered on 24th March, 2016. Although the petition was dismissed, the High Court directed that the regulations shall come into force six (6) months from the date of the judgment, which is on 25th September, 2016.
3. Being aggrieved by that judgment, the applicant filed a notice of appeal on 7th April, 2016. The applicant filed the record of appeal on 3rd June, 2016.
4. On 1st July, 2016 the applicant filed an application under certificate of urgency seeking stay of the coming into force, implementation and or operation of the regulations pending *inter partes* hearing and determination of the application as well as the appeal.
5. Pursuant to the provisions of **rule 47(2)** of the **Court of Appeal Rules**, on 4th July, 2016 the application together with the certificate of the supporting affidavit of **Kiragu Kimani**, learned counsel for the applicant, was placed before **Karanja, J.A.** for perusal, with a view to determining whether it is urgent or not. The learned judge declined to certify the matter as urgent. She pointed out that the six (6) months' moratorium granted by the High Court was due to expire in September, 2016 and directed that the application be fixed for hearing in the normal way.
6. On 8th July, 2016 the applicant's advocates wrote to this Court's Deputy Registrar requesting that the application be set down for hearing on the question of urgency. The request was made under **rule 47(5)** which states as follows:-

“The refusal by the judge to certify an application as urgent under this rule shall not be subject to a reference to the Court under rule 55, but the applicant may apply informally for the matter to be placed before a single judge for hearing inter partes.”
7. On 11th July, 2016 the Registrar of this court returned the application to Karanja J.A. for directions. The learned judge was about to commence her annual leave and was therefore unable to hear all the parties on the question of urgency. Consequently, the matter was placed before **Mwilu, J.A.** on 19th July, 2016. On that day, advocates for all the parties attended court. The respondents' advocates sought an adjournment to put in their responses regarding the question of urgency. The advocates for the interested parties also made a similar application. The court granted them a period of ten (10) days to do so.
8. Mr. Kimani and **Mr. Adow**, learned counsel for the applicant and respondents respectively, have filed skeleton submissions while the interested parties have filed an affidavit sworn by **Joel S. Gitahi**, the Chairman of Kenya Tobacco Control Alliance, **Mr. Gilbert Nyamweya** is on record for the interested parties.
9. In a nutshell, the affidavits sworn by Mr. Kimani and the applicant's Senior Manager, Government Affairs, **Constance Anjiri Anyika**, are to the effect that if the application for stay of implementation of the regulations is not certified as urgent and heard and determined before 25th September, 2016, the application and the entire appeal shall be rendered otiose and/or an academic exercise. Further, once the regulations came into effect on 25th September, 2016, the applicant will have to incur expenses running into billions of shillings in an effort to comply with the regulations that are the subject of the pending appeal. In the event that the appeal is successful, the applicant shall have suffered irreparable loses. The applicant may also be liable to suffer criminal sanctions for failing to comply with some of the regulations, counsel added.
10. According to the respondents and the interested parties, there is no compelling urgency in this matter and it should be listed for hearing

in the normal manner. These parties' objection to certification of the applicant's application as urgent is premised on reasons, inter alia, that the applicant took nearly three months to file the application, yet it was well aware that it had a grace period of only six months.

11. The respondent and the interested parties further argued that certification of urgency should be based on inherent public interest; constitutional values; proportionate magnitudes and priority levels attributable to relevant causes; and that in this matter public interest and proportionate magnitudes favour refusal of certification of urgency. They added that the coming into effect of the regulation as scheduled is in the interest of the public that completely outweighs the applicant's monetary concerns.

12. The respondents and the interested parties discounted the applicant's contention that the appeal will be rendered nugatory unless the applicant's application is heard expeditiously.

13. In a brief response, Mr. Kimani submitted that there was no undue delay in filing the appeal and the application. The appeal is quite voluminous, running into 4 volumes, and it took considerable time to obtain the proceedings and compile the record. HE further submitted that some of the issues raised by the respondents and the interested parties in objection to certification of urgency can only be raised during the hearing of the application seeking stay of the Regulations.

14. In an application brought under **rule 47(5)** of this **Court's Rules**, the single question for determination is whether the pending application ought to be certified as urgent and thus be heard on priority basis or not. In making that decision, a single judge exercises his discretion. The discretion has to be exercised judicially. It must therefore be exercised on sound reason and not on whim, caprice or sympathy. See **CMC HOLDINGS LIMITED versus NZIOKI [2004] 1 KLR 173**. In such an application, the judge is not reviewing the decision of the judge who had earlier declined to certify as urgent the pending application. Ideally, such an application ought to be placed before the same judge who first perused it in the absence of the parties or their representatives and refused to certify it as urgent, so that upon hearing all the parties the judge either changes his or her mind or maintains the original position. However, the wording of the rule makes it clear that the application can be placed before any judge to hear it *inter partes*.

15. I have carefully considered the affidavit and the skeleton submissions on record as well as counsel's submissions on the question of urgency. In **EQUIP AGENCIES LIMITED versus AKBER ABDULAHI KASSAM ESMAIL & 4 OTHERS [2013] eKLR**, Kiage, J.A. held:

“When an applicant whose application is not certified urgent moves the single judge at an inter partes hearing, it behoves him to demonstrate, to the single judge's satisfaction, that there is something about the application that is pressing by reason to risk or peril of harm or loss necessitating immediate and unhesitating action on and attention to the application by the court.”

16. I respectfully concur with those sentiments. There can be no dispute that the appeal that is before this Court relates to an issue that is of great public interest, that is, the health of all the people living in this country. The applicant has lawfully challenged some of the Tobacco Control Regulations that are scheduled to come into operation on 25th September, 2016. The application dated 30th June, 2016 is seeking to stay implementation of these Regulations before the appeal is heard and determined. There was no inordinate delay in filing both the appeal and the application.

17. It is in the interest of justice and in deed of all Kenyans that the court expeditiously pronounces itself on the legality of the Tobacco Control Regulations. At this juncture, it is not for me to consider the benefits or otherwise of the said Regulations. That has to be left to the full bench.

18. All I can state for now is that the applicant has a constitutional right of appeal that ought to be preserved as much as possible. The appeal shall be rendered nugatory unless the pending application, that has been in court since 1st July, 2016, is heard and determined expeditiously.

19. I am satisfied that the application dated 30th June, 2016 is indeed urgent and hereby certify it as such. Consequently, I direct that the application be placed before the President of this Court to constitute a bench to hear it as soon as possible.

DATED at NAIROBI this 16th day of September, 2016.

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR