



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KARANJA & OUKO, J.J.A)**

**CIVIL APPLICATION NO. 294 OF 2014**

**BETWEEN**

**COMMISSIONER OF MINES & GEOLOGY ..... 1<sup>ST</sup> APPLICANT**

**CABINET SECRETARY, MINISTRY OF MINING ..... 2<sup>ND</sup> APPLICANT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> APPLICANT**

**AND**

**STEMA ALLOYS ENTERPRISE LTD. .... RESPONDENT**

***(An application for stay of execution in an intended appeal from the judgment of the High Court (Ogola, J.) delivered on 24<sup>th</sup> October, 2014 in***

***H.C.C. NO. 375 OF 2014)***

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**RULING OF THE COURT**

The respondent, Stema Alloys Enterprise Limited, a limited liability company, licensed to deal in minerals brought an action in the High Court against the applicants, challenging the decision of the Commissioner of Mines and Geology (1<sup>st</sup> applicant) to impound the former's export consignment comprising crushed malachite ore destined for South Korea on allegation that the export permit accompanying the consignment was a forgery and that the respondent had in some instances failed to comply with the Mining Act. In the suit, the respondent prayed that the respondents be directed by an order of mandatory injunction to unconditionally and forthwith release the consignment. They also sought an order for general damages.

The 1<sup>st</sup> appellant denied the allegations maintaining that the consignment was impounded by the Kenya Revenue Authority (and not the 1<sup>st</sup> appellant) after it became apparent that the respondent was in violation of the law.

After hearing evidence in the dispute, Ogola, J. delivered a judgment in which he held that:-

- i. The respondent is a licensed mineral dealer holding license No. 44 of 2014.

- ii. There was no evidence to prove the allegation of forgery of the export permit.

In contrast with the above finding, the learned Judge went ahead to hold that there was no evidence that the respondent had paid Kshs. 2,000, the processing fees for an export permit or the 8% royalty and that *"without these two requirements, Export Permit cannot be issued. I therefore do not know how the plaintiff acquired that alleged export permit."*

Stressing the need to promote trade as opposed to impounding goods that, in his view were lawful, the learned Judge in conclusion made the following orders:-

- "a. The defendant shall assess the fee payable for the Export Permit which the plaintiff shall pay within seven (7) days of the judgment.**
- b. The defendant shall assess the royalty payable by the plaintiff for the impounded goods, and the plaintiff shall pay the same within seven (7) days of this judgment.**
- c. Upon orders (a) and (b) above happening the plaintiff's consignment now impounded by the defendants shall forthwith be released to the plaintiff for shipment without any conditions.**
- d. As I have found that the plaintiff did not have an Export Permit, there will be no order for general damages or demurrage charges because the plaintiff could not purport to export goods without a valid Export Permit.**
- e. The costs of this suit, herewith assessed at 80% shall be for the plaintiff."**

The applicants have been aggrieved by the above orders and have filed a notice of appeal to challenge the decision in this Court. They have also filed a draft memorandum of appeal.

Mr. Njoroge learned counsel for the applicant explained that the appeal has not been filed because there have been an application by the respondent to enforce the orders as a result of which the certified proceedings, judgment and decree have not been availed despite their letter of 29<sup>th</sup> October, 2014 bespeaking them. We mention here in passing that the letter was not copied to the advocates for the respondent as required by **Rule 82 (2)** of the Court of Appeal Rules.

In the meantime, the applicants have applied for conservatory orders in the nature of a stay in terms of **Rules 5 (2) (b)** of the Rules, specifically that:-

**".....There be an order of stay of all execution proceedings and orders consequent upon the judgment and decree in Nairobi HCCC No. 375 of 2014 pending the lodging, hearing and determination of the intended appeal."**

It is the appellants' contention that for reasons listed in the draft memorandum of appeal, the intended appeal is arguable and further that unless the prayer for stay of execution is granted, the intended appeal will be rendered nugatory should it succeed, in that the respondent, in execution of the decree may proceed to prosecute their application seeking to commit the appellants for contempt of court and also that if execution of the decree was to proceed, there is imminent danger that the consignment, the subject of the intended appeal will be removed from the jurisdiction of court.

The respondent in the replying affidavit has maintained that the applicants are in disobedience of an order of the court; that a similar application was filed in the High Court by the applicants and is pending determination; that clearly the applicants are engaged in forum shopping; that the applicants' intended appeal is not arguable; that no prejudice will be suffered by the applicants by complying with the orders. With regard to the application for stay made in the High Court, the respondent, through its director, Stephen M. Gichuhi, has sworn and stated in the replying affidavit that that application was rejected by Ochieng, J. This was confirmed by learned counsel for the applicants.

Mr. Akide, learned Senior Counsel for the respondent, submitted that since the consignment was impounded on the instructions of the 1<sup>st</sup> appellant, there should be no difficulty for the 1<sup>st</sup> applicant to comply with the orders to release the consignment.

Mr. Njoroge for the applicants relied on eight authorities, all of which are decisions of this Court on its jurisdiction under **Rule 5 (2) (b)** to persuade us that the applicant has discharged the twin principles and is deserving of the orders sought herein.

Although these principles are everyday fare in this Court, it bears repeating that for an application under **Rule 5 (2) (b)** to succeed, the appeal or intended appeal must not be frivolous but arguable and secondly, it must be shown that the appeal or intended appeal, if successful, shall be rendered nugatory should the application be rejected. See **Stanley Kangethe Kinyanjui V. Tony Keter & 2 others** Civil Application No. 31 of 2012.

At this stage, we are not dealing with the intended appeal whose grounds are contained in the memorandum of appeal but we can only indicate that, in our view, on those grounds, the intended appeal is not frivolous. For instance, the arguments on appeal will be whether or not the learned Judge misdirected himself in finding that despite lack of export permit, the respondent was nonetheless entitled to judgment; whether the 1<sup>st</sup> applicant is in a position to release the impounded consignment; whether impounding of the consignment was justified and whether on the material before the learned Judge, a mandatory order of injunction could properly issue.

Since both limbs of the twin principles must be satisfied for an order under **Rule 5 (2) (b)** to issue, we turn to consider whether by rejecting the application, the intended appeal will be rendered nugatory. An appeal will be rendered nugatory if its outcome is worthless, futile or invalid. See **Reliance Bank Ltd. V. Norlake Investments Ltd** (2002) 1 EA 27; when it will not be possible for the successful appellant to be restored substantially to his former position in relation to the subject matter if the decree is executed before the appeal is determined.

At the heart of this dispute is the consignment of some minerals that has been impounded and held at the Port of Mombasa on allegation of breach of the law. The trial court has ordered the 1<sup>st</sup> applicant to facilitate the respondent to comply with the law by assessing the export permit fees and royalty payable and thereafter to release the consignment for export (to South Korea). The applicants have challenged this decision. In the meantime, however, the respondent has moved the Court by summons in chambers for orders that:-

- i. The impounded goods be released for export unconditionally.
- ii. Leave be issued to commence contempt proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as Collins Muturi Ngigi, the Senior Superintendent Inspector of Mines, (who has not been a party) for failing to comply with the orders of 24<sup>th</sup> October 2014.
- iii. That the three named contemnors be summoned by court to show cause why they should not be cited and committed to civil jail for their contempt of court.

It was confirmed before us that pursuant to this application the 2<sup>nd</sup> applicant has been summoned in terms of (iii) above a few times but failed to attend for various reasons. He has once more been summoned. For the reasons that upon execution of the decree the subject matter of this appeal will be removed from the court's jurisdiction and passed over to a third party in a foreign country, and more fundamentally, because the applicants now face imminent jail should they fail to comply with the decree, the very decree they will be challenging in the intended appeal, we are satisfied that these two events will render the appeal, if ultimately successful, nugatory.

Deprivation or threat to deprivation of personal liberty is a serious constitutional issue. Where personal liberty is threatened in a case where the applicant has challenged or intends to challenge on appeal the

very basis of such threats, the court will be inclined to grant an order of stay because liberty once lost, even for a second, cannot be reversed.

In the result, we are persuaded that the applicant has satisfied the two principles for the grant of an order of stay and is entitled to the orders sought. Accordingly, there will be an order of stay of all execution-related proceedings and orders consequent upon the decree until the intended appeal is lodged and determined.

In view of the nature, value and weight of the consignment as well as the accumulating charges, it is ordered that the applicant shall file the intended appeal within thirty (30) days from the date of this ruling failing which the order of stay shall stand vacated without further orders.

Costs will be in the intended appeal.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of February 2015.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**