



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 260 OF 2012

F & S SCIENTIFIC LIMITED..... APPLICANT

VERSUS

KENYA REVENUE AUTHORITY..... 1ST RESPONDENT

COMMISSIONER OF CUSTOMS SERVICES.....2ND RESPONDENT

(An application for stay of extinction of the Judgment and Decree of the High Court of Kenya at Nairobi (Githua, J.) dated 2nd October, 2012

in

HC J.R. Misc. Appl. No. 121 of 2011)

RULING OF THE COURT

The applicant instituted a judicial review application before the High Court in which it sought an order of *certiorari* to quash, *inter alia*, the decision of the Commissioner of Customs Services (the 2nd respondent) made on 11th May, 2011 in which it demanded from the applicant, payment of Kshs. 4,959,125/- being taxes due to the Government. The applicant also sought orders of prohibition against the respondents stopping the latter from classifying certain goods imported by the former under some tariffs and an order of mandamus compelling the respondents to correctly classify the goods in question.

The High Court (**Githua, J.**) found that none of the reliefs sought was available to the applicant and dismissed the application. That decision aggrieved the applicant and a notice of appeal to signify the applicant's intention to challenge that decision in this Court has been filed. In the meantime, the applicant has brought the present motion on notice dated 18th October, 2012 for orders that;

“a)....there be a stay of the implementation of the decision of the respondents to classify the applicant's goods under Tariff 4015.15.00 or 39.26.90.00 subject of the application for judicial review of distress, or distraint agency notices or other means until the applicant's intended appeal is lodged, heard and determined.”

It is the applicant's contention that the intended appeal is arguable and further, that it will be rendered nugatory in the event the order of stay sought herein is not granted.

The respondents through **William Odhiambo**, a Principal Revenue Officer have deposed that the relief sought in this application being injunctive in nature, cannot issue against the respondents for the reason that the original action was a judicial review application and secondly, under **section 3(2)(a)** of the **Kenya Revenue Authority Act**, as read with **section 16(1)** of the **Government Proceedings Act**, no order of injunction can issue against the respondents.

The respondents have also averred that the application is frivolous; that the applicant by continuing with ligation is engaged in self-destruction as the amount of tax originally demanded from it has risen due to penalties and interest from Kshs. 4,959,125.00 to Kshs. 6,446,862.50; that should the appeal succeed after the sums demanded have been paid, the same are refundable under **section 144** of the **East Africa Community Customs Management Act, 2004**. The respondents finally submit that should the Court be inclined to grant the relief sought and in order to avoid loss of revenue to the Government, the applicant ought to be ordered to deposit Kshs. 6,446,862.50 as security.

We have carefully considered these arguments together with the useful authorities cited by both counsel. The application is expressed to be brought under sections **3A and 3B** of the Appellate Jurisdiction Act and **Rule 5(2)(b)** of the Court of Appeal Rules. The orders sought read

in part;

“THAT there be a stay of the implementation of the decision of the respondents...”

Yet under **Rule 5(2)(b)** aforesaid only three orders can be issued. These are, order of stay of execution, injunction and order of stay of proceedings. In a case similar to the one before us, this Court emphasised the point in these words:

“We agree with Mr. Matuku that we can, under rule 5(2)(b), make only three orders, namely an order staying proceedings, an order staying execution of the superior court’s order and lastly, an injunction order. This is clearly spelt out in that rule. Our inherent powers revolve around these aspects only.”

See **Stanbic Bank (K) Limited v Kenya Revenue Authority**, Civil Application No. NAI 294 of 2007 (UR 200/2007).

In **Mombasa Seaport Duty Free Limited v. KPA**, Civil Application No. NAI 242 of 2006 once again this Court said:

“Moreover, the order of stay sought in prayer (b) of the notice of motion is neither an order of stay of execution or stay of proceedings or an order of injunction of the species envisaged by rule 5(2) (b). We believe we have no jurisdiction to grant such an order.

The orders sought do not relate to what the superior court decided and we are of the view that we have no jurisdiction to entertain the application.”

Secondly, the application seeks to “*stay the implementation*” of the decision of the respondents. We reiterate that the applicant sought in the High court the orders of certiorari, prohibition and mandamus. All the High Court did after hearing the arguments was to dismiss the motion with no orders as to costs.

Asking for “*stay of implementation*” of a decision by the respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law it is not possible to grant an order of stay of “execution” or “implementation” where the action has been dismissed. This is the view of this Court as expressed in many decisions. For instance in the case of **Republic v Kenya Wildlife Services & 2 Others**, Civil Application No. Nai. 12 of 2007 the Court said in part: “The superior court

has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay.”

In other words, the High Court did not order the applicant to pay to the respondents the taxes the latter was demanding. There is therefore no positive order it made that can be stayed even if we were minded to read the prayer of the application before us to mean “stay of execution”. That perhaps explains the curious manner in which the prayer in this application is framed. Even assuming from the grounds in support of the application and the draft memorandum of appeal, that its intended appeal is arguable and is not a frivolous one, the applicant in terms of **Rule 5(2)(b)** aforesaid was still obliged to convince us that the success of the intended appeal would be rendered nugatory if we reject this application.

Himanshu Shah, a director of the applicant company has deposed that without the orders sought in the application, the respondents are likely to issue agency notices, distraint orders, and proceed to attach, as a consequence of which the operations of the applicant may be paralysed and the appeal, if successful rendered nugatory.

We have already noted that the amount in question has grown from Kshs. 4,959,125 to Kshs. 6,446,862.50. Will the applicant's operations be paralysed if they paid to the respondent the amount demanded? With the dismissal of the applicant's judicial review application and without an order of stay the applicant will be made to pay the tax demanded. Should the appeal succeed, the respondents, under **section 144** of the East African Community Customs Management Act, are legally bound to make a refund.

Finally on this, it was not enough for the applicant to merely state that its operations will be paralysed. This Court has advised that a party making such a contention must prove by evidence the likelihood of this happening. In the case of **Coastal Bottlers Limited v The Commissioner of Domestic Taxes**, Civil Application No. Nai 91 of 2008 the Court said:

“In the circumstance, we do not see that the applicant's intended appeal will be rendered nugatory in any way. We may also add that no relevant evidence was placed before the Court, e.g. the balance sheet of the applicant, from which we could come to the conclusion that if the applicant was to be compelled to pay the outstanding balance, it might be forced out of business.”

We accordingly order that the applicants motion dated 18th October, 2012 be and is hereby dismissed. The costs shall be in the intended appeal.

DATED and DELIVERED at Nairobi this 8th day of March, 2013.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR