



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OUKO & KIAGE, JJ.A)

CIVIL APPLICATION NO. NAI 135 OF 2012 (UR 101/2012)

BETWEEN

TOTAL KENYA LIMITED APPLICANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

(Being an application for an order of stay of execution and/or maintenance of status quo pending the hearing and determination of an intended appeal from the judgment and orders of the High Court of Kenya at Nairobi (S. Majanja) dated 8th May 2012

in

NAIROBI JR NO. 449 OF 2001)

RULING OF THE COURT

The applicant's motion for orders of *certiorari* and prohibition having been disallowed by the High Court and a subsequent temporary order of stay having lapsed, now brings the instant amended motion dated 17th May 2012 to this Court pursuant to **Rules 5 (2) (b), 42 and 47 (1) (2) and (3)** of the Court of Appeal Rules for orders that;-

“.....there be an order of stay of execution and/or order for maintenance of *status quo ante* stopping the respondent from demanding, collecting and/or enforcing payment of the duty the subject of this appeal or any part thereof or imposing any sanction in respect thereof on the applicant until the hearing and determination of the intended appeal herein.

The judicial review application that was dismissed had sought, first, to quash, by an order of *certiorari* the respondent's decision to recover Kshs. 23,407,724 from the applicant, being customs and excise duty amounting to Kshs. 3,353,181 plus penalties and interest, and secondly that the respondent be restrained by an order of prohibition from attaching, intervening or confiscating, disposing of or interfering with the management, control or conduct of the applicant's business, attachment of its property, or funds in the bank.

The instant motion is brought on the premise that the applicant being aggrieved by the dismissal of its

application for judicial review has filed a notice of appeal to this Court signifying its intention to challenge the decision of the High Court; that in the meantime, pursuant to an order of the High Court it has tendered a bank guarantee of Kshs. 11,500,000 and made payment to the respondent of a similar sum; that in view of the respondent's past conduct, the applicant is apprehensive that without an order of stay the respondent is likely to move with speed to enforce payment of the disputed duty, interest and penalties by suspending the applicant's trading account; that should this happen the applicant stands to suffer substantial and irreparable loss; that the intended appeal is arguable.

In opposing the application, the respondent, through James Walter Githinji, its Assistant Commissioner, has deposed in an affidavit dated 29th April 2013 that the application is misconceived as no orders of stay can issue where the High Court has not made any positive order capable of staying; that the intended appeal will not raise any arguable issues and; that the applicant having paid the principal taxes of Kshs. 23,407,724, the application has been overtaken by events.

This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if these interim orders were denied. See **Githunguri V. Jimba Credit Corporation Ltd** Civil Application No. 161 of 1988 and **J.K. Industries Ltd V. KCB** (1982 – 1988) KAR 1.

From the draft Memorandum of Appeal filed with the Notice of Appeal, the grounds upon which this application is brought and from the submissions of learned counsel for the applicant, the applicant intends to challenge the decision of the High Court on the following grounds; that;

- i. *the court erred in attributing the fraud and forgeries to the applicant instead of their clearing and forwarding agents, Veritas Agencies Limited, namely, whether a principal can be held liable for criminal actions of its agen.?*
- ii. *the respondents lacked statutory right to demand the duty in issue after the expiry to 5 years in terms of **Section 158 (1)** of the **Customs & Excise Act**.*
- iii. *the High Court failed to find that, by giving the applicant only 7 days to pay the disputed duty, the respondent was in violation of the rules of natural justice.*

The Court in a matter under **Rule 5 (2) (b)** of the Court of Appeal Rules exercises independent and discretionary jurisdiction, as we shall shortly explain. Being an interlocutory application before the main appeal is heard, the court's view in considering whether or not the twin principles have been satisfied are only on a *prima facie* basis bearing in mind that any concluded view expressed at this stage might embarrass the bench that will finally hear the appeal.

For that reason, we are satisfied that the legal arguments presented by learned counsel for the applicant that we have outlined in the preceding paragraph, appear to us *ex facie*, to have merit. Indeed it is settled that in inquiring whether the applicant has an arguable appeal, even a solitary arguable point is sufficient.

Turning to the second requirement, it is apparent from the annexures and arguments that the goods in question were imported by the applicant in 1995 and it contracted M/S Veritas Agencies Limited to clear them. It was not until the 8th February 2001, by a letter of even date that the respondent sought from the applicant to account for the goods which were neither delivered nor received at the Express (K) Limited Bonded Warehouse in Nairobi as they ought to have been. In that letter, the respondent demanded Kshs. 3,352,181 in duty and Kshs. 18,436,990 as compound interest of 3% to be paid within 14 days from the date of that letter. It is common ground that the sum of Kshs. 23,407,724 has fully been paid to the respondent. Likewise there is also no dispute that the respondent is demanding a further Kshs. 133,000,000 as interest and penalties accrued on the initial Kshs. 3,045,026 from the applicant, for which the latter has applied for a waiver from the Minister for Finance. That application for waiver by way of a letter was made to the respondent on 2nd August 2012 and to date, almost one year later, no response has been received.

It is settled and we appreciate, on numerous authorities from this Court, some of which we were referred to by learned counsel for the respondent, that where an applicant's suit has been dismissed, as is the case before us, the court cannot issue an order of stay of execution or proceedings as the dismissal is a negative order incapable of being stayed. The Court has also held that under **Rule 5 (2) (b)**, this Court can only make three orders, namely, an order staying proceedings, an order staying execution of the High Court's order and lastly an injunction. See **Stanbic Bank (K) Ltd V. Kenya Revenue Authority** Civil Application No. Nai 294/2007 **Western College of Arts and Applied Sciences V. Oranga & Others** (1976) KLR 63.

The divergent conclusions reached in various cases, including those cited by learned counsel for the respondent, on the application of **Rule 5 (2) (b)**, show that, by and large, it is the facts of each particular case that determine the result. This is especially so in view of the fact that under that rule, the Court does not only exercise independent jurisdiction but also has inherent, independent and unfettered power to grant a stay of execution pending an appeal of which a notice of appeal has already been filed in court. In a recent, separate but unanimous rulings of a five-judge bench of this Court, **Equity Bank Ltd. V. Weslink MBO Ltd** Civil Application Nai. 78/2011 it was held that the so-called original jurisdiction can only be exercised in the context of an appeal, defined in **Rule 2** to include an intended appeal. Applications under **Rule 5 (2) (b)** are not appeals from the High Court. The rule confers on this Court a discretion to apply its mind *de novo* on the suitability or otherwise of the relief sought. That clearly is the sense in which the expression "*independent, inherent and original jurisdiction*" is to be understood.

The inherent powers of this Court, like discretionary powers, are exercised as a means of enabling the court to take any such action and make such orders as to maintain its character as a court of justice; to prevent its process from being misused; to preserve the subject matter of a dispute in an appeal; and to protect a party from suffering injustice. Like the Court in **Reliance Bank Ltd V. Norlake Investments Ltd** [2002] IEA 231 and **Oraro and Rachier V. Cooperative Bank of Kenya**, Civil Application No. Nai 358 of 1999, we must bear in mind that the amount of Kshs. 133m demanded by the respondent from the applicant is certainly very large and if paid before the appeal is heard or the respondent's response on the applicant's letter on waiver is received, may occasion financial hardship to the latter. Fortified by **Article 159 (2) (d)** of the Constitution, **Sections 3A and 3B** of the Appellate Jurisdiction Act and **Rule 1 (2)** of the Court of Appeal Rules we think that, from the circumstances of this case the applicant deserves some measure of interim protection and preservation of *status quo*.

We have found that the original tax was only Kshs. 3,045,026 in 1995. Penalties and interest raised it to Kshs. 23,407,724 which has fully been paid over. It is this sum that the applicant will be challenging in the intended appeal. But even as that is being challenged, there are new demands of a whopping Kshs. 133m. This Court faced with situations not provided for under **Rule 5 (2) (b)** has always resorted to its inherent jurisdiction under various provisions of the law. The instant motion is expressed to be brought pursuant to the provisions of **Rules 5 (2), (b), 42 and 47 (1), (2) & (3)** of the Court's Rules and "*the inherent powers and jurisdiction*" of the court.

Indeed in **Stanbic Bank (K) Ltd** (supra) this Court alluded to the possibility of making an order for the maintenance of *status quo* if it was expressly sought by the applicant since an order of stay of execution was inapplicable. In the **Law Society of Kenya V. Commissioner of Lands, and 2 others**, Civil Application No. Nai 181 of 2002, after the High Court (**Ombija, J**) allowed a preliminary objection to the suit and declared that the Law Society of Kenya which had brought a suit to challenge the allocation to the 2nd respondent of the land on which the High Court at Eldoret stands had no *locus standi* to bring the action, the Law Society of Kenya moved to this Court for orders to stay Ombija J's dismissal. The Court ordered that:-

“Considering all the circumstances of the matter before us we order that the *status quo* now obtaining do remain in force pending the hearing and determination of the intended appeal.

This was so despite the society's application being made under **Rule 5 (2) (b)** for orders of stay. **Rule 5 (2) (b)** emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the court

must strive to prevent by preserving the *status quo* because any loss may render the appeal nugatory. So that, although under **Rule (2) (b)** only three orders are recognized, that does not preclude the Court, in specific circumstances, from making any other conservatory orders under its inherent jurisdiction. While there will be nothing to stay in respect of Kshs. 23,407,724, the demand of Kshs. 133m is a real threat to the applicant and its apprehension that the respondent may suspend its trading account are not without basis. If that were to happen, the hardship to the applicant would be out of proportion to any suffering the respondent might undergo while awaiting the hearing and determination of the appeal. After all, the respondent has already received the principal tax and over Kshs. 20m in addition as interest and penalties.

We have, for the above reasons, decided that this application be and is hereby allowed with costs to be in the appeal. We accordingly order that there will be maintenance of *status quo* as at the date of this ruling pending the filing, hearing and determination of the intended appeal.

Dated and delivered at Nairobi this 26th day of July 2013.

W. KARANJA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mgkm